STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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OCT 15 2014

SC Court of Appeals

Appeal from Charleston County
Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2013-000725

THE STATE,

Respondent,

vs.

LAMAR SEQUAN BROWN,

Appellant.

AMENDED INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Did the trial court properly decline to suppress evidence obtained from a warrantless search of Appellant's abandoned cell phone when a search warrant was not required because the Fourth Amendment does not apply to abandoned property found at the scene of the burglary; nevertheless, the information was obtained from an independent source pursuant to a lawful search warrant?

STATEMENT OF THE CASE

On November 13, 2012, Appellant was indicted for First-Degree Burglary (2012-GS-10-7545). He was tried before a jury on March 6-8, 2013, with the Honorable J.C. Nicholson, Jr., presiding. [Tr. 1.] On March 8, the jury returned a verdict of guilty, and Appellant was sentenced to 18 years in prison. [Tr. 426, 441.] On March 14, 2013, Appellant filed a motion for a new trial, which was denied without a hearing on March 22, 2013. [Motion for new trial; Order denying motion for new trial].

Appellant filed and served Notice of Appeal. Thereafter, Appellant's brief was filed and served. This brief of respondent follows.

STATEMENT OF FACTS

On December 22, 2011, Richard Poole returned to the condominium he shared with two other roommates to open Christmas presents with his girlfriend. [Tr. 163-165]. When he came home, he heard a strange phone ringing in his bedroom. [Tr. 165; 176]. After it rang several times, Poole got up and investigated the bedroom. He discovered that his window had been smashed, his television was gone, all of the drawers had been pulled out and searched, and three laptops were missing. [Tr. 166; 168; 217]. Poole also found an older red T-Mobile phone lying on the bedroom floor. [Tr. 167]. No one knew who the phone belonged to. [Tr. 166]

When the police arrived fifteen minutes later, Poole showed them the phone.[1] [Tr. 167; 185]. No other evidence was found at the scene of the crime. [Tr. 100; 205-209;220-21; 229]. The phone was taken to the police department, where it was held until December 28, 2011, when Detective Jordan Lester opened the cell phone without a warrant. [Tr. 96; 185-187, 289-291]. The phone was password protected, but unlocked when Lester typed in "1234." [Tr. 96; 343; 361] After guessing the password, Lester noted that the background picture on the phone was of a black male with dreadlocks. [Id.; 343] He accessed the contacts list and identified a number that belonged to the owner's grandmother. [Tr. 96; 292]. After collecting these two pieces of information, Lester closed the phone and entered Grandma's number into the Accurint[2] system. After locating her driver's license, he then started comparing pictures of her relatives in the Accurint system until he located a match to the background photo on the cell phone. [Tr. 96-98; 292-293]. Lester determined that the phone belonged to Appellant. [Tr. 96-

[1] No fingerprints were taken from the phone because it had been contaminated by Poole and his girlfriend's initial investigation. [Tr. 191; 228]

[2] Accurint is a powerful database containing public records of most individuals, including their driver's licenses. http://www.lexisnexis.com/risk/solutions/accurint.aspx (last visited April 11, 2014).

103;293.] Appellant was located less than a half mile from Poole's condominium. [Tr. 295].

On the same day, another police officer contacted Appellant and took his statement. [State's Exhibit 2]. When questioned, Appellant admitted the cell phone belonged to him but claimed that he was going to the store in a car, and that the cell phone must have fallen out somewhere because when he returned to the car it was missing. [Tr. 243, State's Exhibit 2].[3] Appellant also claimed that he had turned off the phone on December before talking to the police. [Tr. 244, State's Exhibit 2]. Appellant claimed this incident occurred on December 23, one day after the burglary. [Tr. 244.]

However, the cell phone was found at the scene of the burglary one day before Appellant claimed to have lost it, and Appellant did not turn his phone off until January 22, 2012. [Tr. 261] Detective Lester applied for and received a search warrant for the phone records from T-Mobile on November 5, 2012. [State's Exhibit 1 p. 1].

Trial

During a pretrial suppression hearing, the trial court heard argument on the issue whether Appellant's Fourth Amendment expectation of privacy in his cell phone had been violated. [Tr. 71-112, 136-152]. Both parties fully litigated the issue, and the trial court ultimately concluded that, while Appellant had a reasonable expectation of privacy in the cell phone based upon the password, he lost that right by **discarding** the phone at the scene of the burglary and making no efforts to retrieve the phone. [Tr, 151-152]. Appellant renewed his objections when later data obtained from the cell phone or cell phone records were introduced. [Tr. 186, 260, 280; Motion for New Trial].

[3] Appellant's statement is difficult to read, so the above is based partially on his statements and partially on the testimony of the police officer taking his statements.

The State introduced testimony from Poole, Detective Lester, as well as the crime scene technician and a T-Mobile employee, who testified about the phone records. The State also presented Van Horn, a forensic analyst who testified about the phone records. At the conclusion of trial, Appellant chose not to testify, and did not put on a defense. He was convicted and sentenced to 18 years in prison. Afterwards, Appellant made a motion for a new trial in which he renewed the Fourth Amendment objections he had made at trial. [Motion for New Trial.]

ARGUMENT

The trial court properly declined to suppress evidence obtained from a warrantless search of Appellant's abandoned cell phone when a search warrant was not required because the Fourth Amendment does not apply to abandoned property found at the scene of the burglary; nevertheless, the information was obtained from an independent source pursuant to a lawful search warrant.

Appellant claims the trial court erred in refusing to suppress the warrantless search of Appellant's password-locked cell phone. Respondent submits that Appellant lost the expectation of privacy in his cell phone by discarding it in the house he burglarized, and, even if the search did violate the Fourth Amendment, evidence of Appellant's identity would not be excluded because the State obtained the same evidence through an independent warrant based off of the cell phone's serial number.

"In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous." State v Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." Id. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. "When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial court's ruling if there is any evidence to support it; the appellate court may reverse only for clear error." Id. at 82, 736 S.E.2d at 265-266.

I: Appellant lost whatever reasonable expectation of privacy he may have had in his phone by discarding it in the house he burglarized and making no effort to retrieve it.

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV. "The Fourth Amendment protects people, not places." Katz v. U.S., 389 U.S. 347, 361 (1967)(Justice Harlan, concurring). The touchstone of the Fourth Amendment is "reasonableness" subjecting the warrant requirement to exceptions. Kentucky v. King, 131 S.Ct. 1849 (2011); Riley v. California, ___U.S. ___, 134 S.Ct. 2475, 2483 (2014), citing Brigham City v. Stuart, 547 U.S. 398 (2006). Consistent with Katz, the Supreme Court has uniformly held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a reasonable expectation of privacy that has been invaded by government action. U.S. v. Knotts, 460 U.S. 276 (1983), citing Smith v. Maryland, 442 U.S. 735 (1979).

The reasonable expectation of privacy inquiry involves two discrete questions: First, whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy." Knotts at 281 (citations omitted). Second, whether the individual's expectation, viewed objectively, is one society is prepared to recognize as reasonable under the circumstances. Id. The United States Supreme Court has opined that when a search is conducted by law enforcement officers to discover evidence of criminal wrongdoing, "reasonableness generally requires the obtaining of a judicial warrant." Id., citing Veronia School Dist. 47J v. Acton, 515 U.S. 646 (1995). What is

deemed reasonable depends upon the surrounding circumstances and the nature of the search and seizure. United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

However, if a warrant is not obtained, a search will withstand constitutional scrutiny if it falls within one of several well recognized exceptions to the warrant requirement. See Kentucky v. King, 563 U.S. ___, 131 S.Ct. 1849 (2011); State v. Gamble, 405 S.C. 409, 747 S.E.2d 784 (2013); State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012). The exceptions to the warrant requirement include: (1) search incident to lawful arrest; (2) hot pursuit; (3) stop and frisk; (4) automobile; (5) plain view; (6) consent; and (7) abandonment. State v. Brown, 401 S.C. at 89, 736 S.E.2d at 266; State v. Moore, 377 S.C. 299, 659 S.E.2d 256 (Ct. App. 2008); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (Ct. App. 1995); Fernandez v. State, 306 S.C. 264, 411 S.E.2d 426 (1991).

A. **Detective Lester's inspection of Appellant's phone did not violate the Fourth Amendment because Appellant had abandoned his phone, relinquishing all expectations of privacy.**

Appellant contends the State did not argue that a warrantless exception applied to the search by Detective Lester of his cell phone. Brief of Appellant 6. Appellant also argues that "[b]y placing a password on his phone, Appellant maintained his expectation of privacy, even if it were lost, abandoned or stolen." Brief of Appellant 7. Both of these arguments are incorrect: abandonment is an exception to the warrant requirement and was argued to and ruled upon by the trial court, and even if Appellant put a password on his cell phone, what matters is whether he maintained that expectation of privacy after discarding the phone. The record clearly shows that he did not.

The trial court paid significant attention to this issue, and over fifty pages of the record are devoted exclusively to the Fourth Amendment analysis. [Tr. 71-112, 136-

152.] The trial court determined that whether the phone was abandoned or lost was irrelevant. [Tr. 151-152.] Instead, the trial court held that the question was whether the reasonable expectation of privacy in the phone had been extinguished when Appellant discarded the phone. Id. Further, the trial court found that, while Appellant did have a reasonable expectation of privacy in the phone **before** the phone was discarded, he lost that expectation by discarding the phone, whatever his subjective intent. [Tr. 136; 151-152]

Our Supreme Court has long held that warrantless searches are *per se* unreasonable unless an exception to the warrant requirement is present. State v. Dupree, 319 S.C. 454, 456, 462 S.E.2d 279, 281 (1995). The Court has specifically recognized several exceptions, including abandoned property, which has no protection from search and seizure under the Fourth Amendment. Id., 319 S.C. at 457. (citing California v. Greenwood, 486 U.S. 35 (1988)).

Appellant's phone was left in a burglarized apartment by someone who had no right to be in that apartment. Appellant argued at trial that the intent to abandon the property is less clear here, and that, according to property law, the property had not been "abandoned," merely "lost." [Tr. 109-111]

In State v. Dupree, our Supreme Court rejected this formulation of the abandonment doctrine, instead holding that abandonment has two different meanings: one rooted in property law and another rooted in the Fourth Amendment. 319 S.C. at 457, 462 S.E.2d at 281 (citing California v. Greenwood, 486 U.S. 35 (1988)). In property law, the question is whether the owner has voluntarily, intentionally and unconditionally relinquished his interest in the property, so that another, having acquired possession, may assert a superior interest. Id. But in a search and seizure context, the question is whether,

in discarding the property, the person has relinquished their reasonable expectation of privacy in the property so that its seizure and search is reasonable under the Fourth Amendment. Id. Our Supreme Court noted that the property is not necessarily abandoned but the defendant's reasonable expectation of privacy in the property is abandoned.

In Dupree, our Supreme Court held: "Where the presence of the police is lawful and the discard occurs in a public place where the defendant cannot have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for the purpose of search and seizure." Id. (quoting City of St. Paul v. Vaughn, 306 Minn. 337, 237 N.W.2d 365, 370-371 (1975).

The only way this case varies from the Dupree test is that the phone was not found in a public place. If anything, this strengthens the argument that the property was abandoned: Appellant had no right to be in the victim's home in the first place. The police presence was lawful and Appellant's cell phone was discarded in another person's private residence. There is no indication on the record that Appellant knew the victim, or that Appellant had been a guest at the time. Instead, the cell phone was discarded by Appellant during the commission of the crime.

As the trial court found, this case squarely fits within the definition of abandonment of a reasonable expectation of privacy as provided by Dupree. [Tr. 151.]

Appellant also argues that searching personal containers requires a warrant. Brief of Appellant 7-8. Respondent acknowledges that Appellant's cell phone had a password of "1234." However, several courts have found that abandoned, locked containers do not retain a reasonable expectation of privacy. See, e.g., United States v. Busic, 592 F.2d 13, 22-23 (2d. Cir. 1978) (no reasonable expectation of privacy when defendant left her locked suitcase, an item in which citizens have a high expectation of privacy, in an

airplane which she and her associates had illegally hijacked); United States v. Oswald, 783 F.2d 663, 666-667 (6th Cir. 1986), citing U.S. v. Tolbert, 692 F.2d 1041 (6th Cir. 1982) and Able v. U.S., 362 U.S. 217 (1960) (holding that police action in breaking into a locked suitcase full of cocaine found in a burning car did not violate defendant's Fourth Amendment rights because Appellant had abandoned the property.).

Nonetheless, Appellant argues that "[b]y placing a password on his phone, [Appellant] maintained his expectation of privacy, even if it were . . . abandoned." Brief of Appellant 6-7 (citations omitted). This argument cannot be squared with what Appellant argued to the court below.

At the suppression hearing, Appellant's counsel stated: "But what [the State]did was go into the contacts and get information on different people that were identified as family members. And we argue that is the information that is entitled to privacy. **Not the number of the phone; that would be minimally intrusive.**" Tr. 76 (emphasis added). Therefore, Appellant waived the issue of password protection, since he admitted that the State could retrieve his number from his cell phone.

To the extent this issue is not waived, the actions Appellant took before he discarded the phone are irrelevant under Dupree. What matters is what Appellant **did** to maintain his expectation of privacy after he discarded the phone, since these actions most clearly manifest whether he intended to maintain his reasonable expectation of privacy or not. See People v. Daggs, 133 Cal.App.4th 31 (Calif. 2005)(stating there is no reasonable expectation of privacy in cell phone where defendant left it unattended at the crime scene, fled, and made no effort to reclaim and that defendant's testimony that he did not intend to abandon the phone is immaterial where the objective circumstances reveal he left the phone unattended); U.S. v. Duran, 884 F.Supp. 548 (D.D.C. 1995)(stating that defendant

abandoned any reasonable expectation of privacy he may have had in personal belongings kept at former workplace, permitting warrantless search of workplace were defendant was automatically discharged through failure to report to work); U. S. v. Rem, 984 F.2d 806 (7th Cir. 1993)(stating defendant's later claims of subjective intent are not dispositive; rather, the objective manifestations of intent must control and indicate defendant's abandonment of suitcase on train); U.S. v. Morris, 738 F.Supp. 20 (D.D.C. 1990)(stating defendant surrendered any reasonable expectation of privacy when he abandoned vials by stuffing into crevice between bus seats and left the seat); U.S. v. Brown, 473 F.2d 952 (5th Cir. 1973)(stating that leaving suitcase buried in chicken coop in open field was abandonment and officers were justified in opening without a warrant);

On December 22, 2011, Appellant left his cell phone in the victim's condominium – the scene of the crime. Appellant took no further action between the 22nd and the 27th to recover the phone.[4] On December 28, Sgt. Thompson contacted Appellant and obtained a statement from Appellant about the phone. [State's Exhibit 2, page 1] Appellant took no further action between December 28, 2011, and January 22, 2012. [Tr. 261]

Appellant's lack of action demonstrates he had no desire to maintain an expectation of privacy. Appellant could have, at any time, asked for his phone back. He could have reported the phone stolen to the police department. He could have deactivated the phone immediately after he discovered it was lost. Yet Appellant did none of these things.

[4] For example, Appellant could have knocked on the victim's door and ask for his cell phone back. He also could have contacted police to report his lost cell phone. It is unclear whether Appellant called the phone to locate it during this time.

B. This Court need not address Appellant's expectation of privacy in his cell phone, as the trial court found that he had one, but had abandoned it.

Appellant expresses concern over the privacy issues at stake in a cell phone. Brief of Appellant 9-11. Privacy expectations in a cell phone are not dispositive. The trial court found that Appellant had a reasonable expectation of privacy in his phone, but then abandoned that expectation by discarding the phone. [Tr. 151-152]. Moreover, the password proves nothing about whether Appellant attempted to secure his expectation of privacy in his cell phone. The password on the cell phone is one commonly known and used and was more likely in place through default. The common password fails to signify Appellant's intent to protect the information contained in the cell phone. See California v. Greenwood, 486 U.S. 35 (1988)(stating it is **common knowledge** that plastic garbage bags left on or at the site of a street are readily accessible to snoops, scavengers, and members of the public thereby defeating any claim to Fourth Amendment protection).

Further, Detective Lester did no more here than what a reasonably responsible citizen would do, presented with similar alternatives and resources. The actions Appellant claims were a search are nothing more than opening up a phone, guessing a common password, looking at phone's main screen, and then locating a number within the contact log to determine the identity of the owner. It is difficult to imagine how police would obtain information from an unidentified cell phone in a less intrusive way than what occurred here. Most phones do not have their numbers emblazoned across the startup screen. Some investigation was necessary to determine the identity of the owner.

C. The authority relied upon by Appellant is factually and legally distinguishable.

Respondent submits that the decisions relied upon by Appellant in advancing his argument to this Court are factually and legally distinguishable and provide no guidance on appeal. The decisions offered by Appellant all pertain to cell phones seized at arrest and not abandoned at the scene of the crime. The analysis and rationale for search incident to arrest simply does not apply here. To the extent Appellant may now rely on Riley v. California, ___U.S. ___, 134 S.Ct. 2475, 2483 (2014), to support his argument the trial court erred in this case in finding an exception to the warrant requirement, Respondent submits the decision provides no guidance as it is also factually and legally distinguishable. Riley was determined based upon an analysis of the search incident to arrest exception and not abandonment. A different analysis applies here. The United States Supreme Court specifically recognized that "other case-specific exceptions may still justify a warrantless search of a particular phone." Riley v. California, at 2493. The cell phone in this case was abandoned at the crime scene. Clearly no expectation of privacy exists that society is prepared to recognize as reasonable.

II. Even if this search were to be held illegal, Appellant's identity and phone number should not be excluded because the State also introduced the T-Mobile phone records of Appellant's phone, an independent source obtained under a lawful search warrant.

On November 5, 2012, Detective Lester obtained a search warrant for the T-Mobile phone records.[5] In the warrant, Detective Lester swore "[t]hat the victim, Richard

[5]Appellant sought to preempt the State's warrant arguments by stating that the search warrant is invalid for purposes of searching Appellant's phone for the data. Brief of Appellant p. 10-11. The warrant is directed towards T-Mobile for the recovery of information relating to Appellant's account, including subscriber information, account comments, billing record, outbound and inbound calls, call origination, address of cell sites, and all stored communications, such as voicemail, email, texts, buddy lists, images

Poole, located a red in color Samsung T-Mobile (**Serial # RQ3Z182459W, Model #SGH-T239**, number (843)345-8868) cell phone on his bedroom floor that was left behind." State's exhibit 1, page 4 (emphasis added). The serial number is unique to that specific phone. Even without the provided phone number, T-Mobile could have provided Appellant's account information to Detective Lester, including his name and phone number based solely on the serial number. This information was provided to the State by T-Mobile, and the State introduced it at trial. [State's Exhibits 12-14; Tr. 260, 280.]

The "fruit of the poisonous tree" doctrine, cited by Appellant provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality. State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996). However, the challenged evidence is admissible if it was obtained from a lawful source independent of the illegal conduct. Id. On reply, Appellant might point out that we could not have obtained the evidence "but for" the initial, warrantless search. This would misstate the fruit of the poisonous tree doctrine and the facts of this case. The independent source doctrine is an **exception** to the general fruits doctrine, not a separate, related concept. Murray v. United States, 487 U.S. 533, 542 n.3 (1988) ("one must ask whether [the warrant] would have been sought even if what actually happened....had not occurred."). The cell phone's serial number was obtained wholly independently of the warrantless search and would have been obtained regardless of the complained of search.

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and call details. (State's Exhibit 1, Page 4). The warrant is valid for information obtained from T-Mobile.

Appellant's identity and phone number in this case were lawfully obtained from T-Mobile, an independent source. As Appellant conceded at trial, issuing a warrant for the records of this phone under these circumstances was proper. Tr. 78. \

Additionally, the evidence inevitably would have been discovered through the request for a search warrant to search the information on the cell phone. State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012). Therefore, this Court should not apply the exclusionary rule, and the trial court's ruling should be affirmed.

CONCLUSION

Based on the foregoing, the State submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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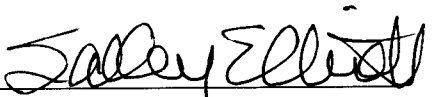
BY: 
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October 15, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable J.C. Nicholson, Jr., Circuit Court Judge
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THE STATE,

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vs.

LAMAR SEQUAN BROWN,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Amended Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been ser
This 15th day of October, 2014.

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October 15, 2014

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RE: State v. Lamar Sequan Brown
Appellate Case No. 2013-000725

Dear Mr. Alexander:

I am enclosing two (2) copies of the Amended Initial Brief of Respondent and Designation of Matter, along with proof of service, in the above-referenced case.

Sincerely,

Salley W. Elliot
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: The Honorable Jenny A. Kitchings
Victim Services