THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT

V.

DARRYL L. DRAYTON,

APPELLANT

APPELLATE CASE NO. 2012-213295

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 2015-UP-5294

PETITION FOR REHEARING

On February 4, 2015, this Court affirmed Appellant's conviction and sentence in a published opinion. State v. Drayton, Op. No. 5294 (S.C. Ct. App. filed Feb. 4, 2015). Pursuant to Rule 221(a), Appellant respectfully requests this Court rehear the matter based upon the following points overlooked and/or misapprehended in the opinion.

Concerning the first issue regarding the circumstantial evidence jury instruction, Appellant asks this Court to hold the error in failing to give clarifying instructions regarding how the jury should consider circumstantial evidence was not harmless error. This Court based its harmless error analysis on (1) the trial judge having instructed the jury on reasonable doubt immediately before

charging the law on circumstantial evidence and (2) the reasonable doubt instruction being a correct statement of the law. Thus, this Court held "the instructions, as a whole, properly conveyed the applicable law."

In arriving at this conclusion, this Court failed to consider that the entire case against Appellant was circumstantial. The state presented no direct evidence that Appellant committed the charged offense of murder; the only evidence connecting Appellant to the crime was circumstantial. Thus, this jury's understanding of how to analyze circumstantial evidence to arrive at a just verdict was critical.

Further, the reasonable doubt instruction charged to the jury included both "a reasonable doubt is the kind of doubt that would cause a person or a reasonable person to hesitate to act" and that "[p]roof beyond a reasonable doubt is doubt (sic) that leaves you firmly convinced of the defendant's guilt." The judge further instructed:

> There are very few things in this world that we know with absolute certainty and in criminal cases the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence, you're firmly convinced the defendant is guilty of the crime charged, you must find the defendant guilty. On the other hand, if you think there's a real possibility the defendant is not guilty, you must give the defendant the benefit of the doubt and find the defendant not guilty.

R. 515, line 14 – R. 516, line 9. In light of the multiple definitions of reasonable doubt given and the use of the "real possibility" language, the circumstantial evidence charge following the reasonable doubt instruction was confusing to the jury without the clarifying instruction mandated in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). Although the trial judge defined circumstantial evidence for the jury, the trial judge failed to inform the jury of how to use the circumstantial evidence presented to arrive at a verdict. The Logan instruction explains to jurors that when the state relies on circumstantial evidence, all of the circumstances must be consistent with each other and point conclusively to the guilty of the accused beyond a reasonable doubt. This

language was critical to the jury's understanding of how to evaluate circumstantial evidence in order to determine whether the evidence caused a juror to "hesitate to act," left a juror "firmly convinced" of Appellant's guilt, or left a juror with "a real possibility" that Appellant was not guilty.

Appellant also asks this Court to rehear the second issue regarding the admissibility of historical cell site location information. This Court held Appellant did not have a "legitimate expectation of privacy" in his historical cell site location information; therefore, no violation of Appellant's Fourth Amendment rights occurred. Additionally, this Court held there was no violation of the South Carolina Constitution, relying upon federal precedent to find Appellant "did not have a reasonable expectation of privacy in his historical cell site location data because he voluntarily contracted with the cellular provider, thereby conveying his cell site location data to the provider who created the records in the ordinary course of business." Appellant asks this Court to rehear this matter concerning both aspects of his claim – the Fourth Amendment and the South Carolina Constitution. Additionally, Appellant asks this Court to address his argument that there was no probable cause to issue the warrant.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Oliver v. United States, 466 U.S. 170,

177 (1984). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

> [I]n order to claim the protection of the Fourth amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'

Id. (quoting Rakas, 439 U.S. at 143-144, and n.12). The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); see also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding that evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light).[1]

This is an open question federally since Circuits disagree regarding whether an individual has a reasonable expectation of privacy under the Fourth Amendment in his historical cell site location information. However, the United States Supreme Court's recent decision in Riley v. California, 134 S.Ct. 2473 (2014) supports Appellant's contention, which is shared by a growing number of federal courts, that individuals have an expectation of privacy in these records. The Supreme Court held that that a search warrant is required to search a cell phone, even when the phone is seized incident to arrest. Id. at 2493. The Court rested its opinion upon the "quantitative and qualitative" difference between cell phones and other items of personal property. Id. at 2489.

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[1] The Fourteenth Amendment incorporates the rule of excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

"One of the most notable and distinguishing features of modern cell phones is their immense storage capacity." Id. "Cell phones couple that capacity with the ability to store many different types of information." Id. One of the Court's many concerns with cell phones was the ability of the cell phone to allow the reconstruction of the sum of an individual's private life, including the person's whereabouts on particular dates. Id. The Court explained "[h]istoric location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." Id. at 2490 (citing United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 955 (2012)(Sotomayor, J., concurring)).

Certainly, if the police must obtain a search warrant to search a cell phone – even when conducting a search incident to arrest – due to the expectation of privacy an individual has in his phone, then a fortiori, the police may not circumvent this warrant requirement by going to the cellular service provider seeking the same information. In other words, if an individual has an expectation of privacy in the information contained on the phone itself, then an individual has an expectation of privacy in the information stored by the cellular service provider. The phone is useless without the cellular service provider.

This Court attempts to distinguish the acquisition of historical cell site location information from cellular providers, as in this case, from the line of United States Supreme Cases finding violations of the Fourth Amendment based on acquisition of location information using electronic surveillance. According to this Court, the fact that the records sought were business records of Verizon, the law governing electronic surveillance was inapplicable. However, Justice Alito has explained that technology can change what is considered a reasonable expectation of privacy: "[d]ramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes." United States v. Jones, 132 S.Ct.

945, 962 (2012)(Alito, J. concurring). Continuing, Justice Alito recognized that cell phones and other wireless devices permit wireless carriers to track and record the location of users, shaping the average person's expectations about privacy. Id. at 963.

This Court's reliance upon the Stored Communication Act (SCA) for the proposition that an individual does not have an expectation of privacy in historical cell site location information stored by the cellular provider is misplaced. Fearful that the "third party doctrine" used by courts when interpreting the Fourth Amendment would not protect stored internet communications, Congress enacted the SCA. Orin S. Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending it, 72 GEO. WASH. L. REV. 1208, 1209-1210 (Aug. 2004). Thus, the entire purpose of the SCA is to recognize the privacy interests of information, including historical cell site location information, stored by third parties.

Appellant requests this Court rehear his Fourth Amendment argument relative to the historical cell site location information in light of the recent United States Supreme Court opinion in Riley, supra, and the growing trend among courts to find an expectation of privacy in this data.

Next, Appellant seeks rehearing of this Court's determination that the South Carolina Constitution does not protect the historical cell site location information at issue here. Specifically, this Court analyzed the issue under a "reasonable expectation of privacy" test and the "third party doctrine." The reasonable expectation of privacy test and the third party doctrine are creatures of the Fourth Amendment, not South Carolina's Constitution. To the extent the reasonable expectation of privacy plays a role in understanding South Carolina's Constitution, it serves only to establish the floor of the protection, not the ceiling.

South Carolina's Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable

invasions of privacy shall not be violated." S.C. Const. Art. I, Section 10. "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). "[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." Id. at 647, 541 S.E.2d at 842. Our Supreme Court explained, "the drafters of our state constitution's right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches." Id. at 647, 541 S.E.2d at 842.[2] According to the South Carolina Supreme Court, "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy" in the place searched. State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007).

Without question, South Carolinians consider historical cell site location information maintained by cellular service provides to be private information and obtaining of such information without a warrant is an invasion of that privacy. To understand just how much of an invasion occurs, it is necessary to understand how cell phones work and how the information can be used to track individuals. Of obvious note is the fact that consumers contract with cell phone providers for the provision of certain services. These contracts include provisions for privacy protection of information. "When a cell phone is turned on, it identifies its location to nearby cell towers, every seven seconds, on a continuous basis." Eric Lode, Validity of Use of Cellular

[2] In her dissent in State v. Dykes, Justice Hearn provided an eloquent analysis and assessment of the growing threat of technological advances to individual liberty. She explained that "the very concept of what we as citizens view as private is called into question by technology which facilitates unprecedented oversight of our lives." State v. Dykes, 403 S.C. 499, 511-522, 744 S.E.2d 505, 511-517 (2013)(Hearn, J. dissenting).

Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under State Law, 94 A.L.R.6th 579 (2014). This sort of tracking "may identify a cell phone's location to within about 200 feet." Id. Using information received by multiple cell towers, the location can be determined even more precisely. Id. If a phone has GPS capabilities, and more than 90% do, a phone may be tracked to within fifty feet. Id.

Recognizing how cell phones work and the increasing view that cell phones are necessary to social interactions and business, the Massachusetts Supreme Court held that "[c]learly, tracking a person's movements implicates privacy concerns." Commonwealth v. Augustine, 4 N.E.3d 846, 859-860 (2014). The Massachusetts court held the third-party doctrine was not applicable to historical cell site location information under the state constitution's protection against unreasonable searches and seizures. The court distinguished the historical cell site location information from the record of telephone numbers dialed as maintained by the telephone company. As explained by the court, the user knowingly provided the telephone numbers dialed to the telephone company. "No cellular telephone user, however, voluntarily conveys [cell site location information] to his or her cellular service provider" because such information "is purely a function and product of cellular telephone technology. Id. at 862. The court noted the police were "not seeking to obtain information provided to the cellular service provider by the defendant" but were looking "only for the location-identifying by-product of the cellular telephone technology – a serendipitous (but welcome) gift to law enforcement investigations." Id. at 863.

The ability of law enforcement to obtain historical cell site location information falls squarely within our state constitution's prohibition against unreasonable invasions of privacy and the concerns of the drafters regarding new technologies used by the government to conduct

searches of its citizens. Therefore, Appellant had an expectation of privacy in the records based upon this state's protection of individuals against governmental invasions of privacy.

Finally, Appellant respectfully requests this Court reach his argument regarding the lack of probable cause contained within the warrant. The South Carolina Code mandates that a search warrant "shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record." S.C. Code Ann. § 17-13-140 (1985); State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). "The affidavit must contain sufficient underlying facts and information upon which the magistrate may make a determination of probable cause." State v. Dupree, 354 S.C. 676, 684, 583 S.E.2d 437, 441 (Ct. App. 2003) (citing State v. Philpot, 317 S.C. 458, 454 S.E.2d 905 (Ct. App. 1995)).

The magistrate should determine probable cause based on all of the information available to the magistrate at the time the warrant was issued." Dupree, 354 S.C. at 684, 583 S.E.2d at 441 (citations omitted). In terms of a court's review of the magistrate's decision, "[t]he duty of the reviewing court is to ensure the issuing magistrate had a substantial basis upon which to conclude that probable cause existed." State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). In determining whether a substantial basis exists, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched. Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n. 6 (1978).

> This determination requires the magistrate to make a practical, common-sense decision of whether, given the totality of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. King, 349 S.C. 142, 150, 561 S.E.2d 640, 644 (Ct. App. 2002).

As explained, supra, a search warrant issues only upon probable cause. South Carolina's

search warrant statute permits a search warrant to search for and seize "property constituting evidence of crime or tending to show that a particular person committed a criminal offense." S.C. Code Ann. § 17-13-140. Appellant assumes the prosecution proceeded under the theory that Appellant's historical cell-site location information was evidence tending to show that Appellant committed a criminal offense. However, the affidavit supporting the search warrant was devoid of any facts to support the theory.

An affidavit that is submitted in support of the issuance of a search warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. Baccus, 367 S.C. at 52, 625 S.E.2d at 222; Dupree, 354 S.C. at 684, 583 S.E.2d at 441; State v. Philpot, 317 S.C. 458, 461, 454 S.E.2d 905, 907 (Ct. App. 1995).

In State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990), the South Carolina Supreme Court held a search warrant affidavit was defective where the affidavit set forth no facts as to why the police believed the defendant robbed the motel. The affidavit provided a conclusory statement that the defendant had robbed the motel and the police sought to search his room at another motel for a knife used in the robbery. Id. at 372, 392 S.E.2d at 183. The Court found "[m]ere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient." Id. at 373, 392 S.E.2d at 183.

In Baccus, the Court found the affidavit in support of the search warrant failed to set forth any facts as to why police believed the defendant had committed the crime. The search warrant sought clothing and forensic evidence possibly connected to the homicide of the victim. The basis for the search warrant was that at the time of the defendant's arrest, a pile of what appeared to be clothing was lying on the ground beside the residence smoldering and the defendant's bloodstained

vehicle was located a quarter mile from his residence. Baccus, 367 S.C. at 51-52, 625 S.E.2d at 221-222. The Court found the affidavit failed to set forth any facts as to why police believed the defendant committed the crime. The Court explained that "[t]he language in the affidavit lack[ed] specificity and contain[ed] conclusory statements." Id. at 52, 625 S.E.2d at 222. Thus, the Court held the magistrate did not have a substantial basis to find probable cause for a search of the defendant's residence. Id.

Similarly, the South Carolina Supreme Court found a search warrant defective where the affidavit "failed to set forth any facts as to why police believed [the defendant] committed the Crumlin crime." State v. Weston, 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997). The affidavit provided that Crumlin was the victim of an armed robbery at a certain date, time, and location. It further provided that the defendant was a suspect and the registered owner of the vehicle to be searched. A witness stated that the defendant was driving the vehicle at the time of the incident. Id. at 289, 494 S.E.2d at 802. The Court found the first three sentences to be "mere conclusory statements." Although the forth sentence linked the defendant to his car at the time of the incident, it failed to link the defendant or his car to the crime itself. Id. at 291-292, 494 S.E.2d at 803.

Furthermore, it is necessary to examine the reliability and credibility of an informant for determining the existence of probable cause. Illinois v. Gates, 462 U.S. 213, 230-235 (1983). In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. Instead, probable cause arises from the totality of the circumstances, and "[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." Id.

As previously noted by our Supreme Court,

> [t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03 (quoting Illinois v. Gates, 462 U.S. 213, (1983)).

The affidavit used to obtain the search warrant for Appellant's historical cell site location information failed to set forth any facts to establish probable cause that Appellant's historical cell site location information constituted evidence of the deceased's death or tended to show that Appellant was responsible for the deceased's death. Inexplicably, the affidavit stated that a body was found on July 9, 2010, which was identified as that of the deceased.[3] Then, a month later, the deceased was reported missing. The only non-conclusory statement in the affidavit was that Bartley stated that he last spoke with the deceased on August 8, 2010 and "she informed him that she was traveling to Charleston SC with [Appellant]." R. 545. In a conclusory statement, the affiant stated "[i]t is believed that the call log and information contained therein will provide information that is pertinent to the death investigation." The affiant provided absolutely no basis for this statement. There was no indication that the deceased and Appellant had communicated using Appellant's cell phone prior to the deceased's death, that the phone had been used in the commission of a crime, or that the phone contained evidence of a crime. The affidavit provided no reason to believe Appellant's historical cell site location information was related at all to the deceased's death or disappearance.

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[3] At first blush, it appears this was merely a typographical error; however, it was repeated in each of the search warrant affidavits signed by the magistrate on August 10, 2010. The prosecution presented no evidence to indicate this error was corrected by the affiant to the magistrate. See R. 560; 562; 564; 566.

The affidavit failed to establish that the hearsay information provided by Bartley was reliable. Although the affidavit identified Bartley, and therefore, he was not a confidential informant, Bartley was an informant nonetheless. It was necessary to establish his reliability relative to the information he was providing and on which law enforcement was relying. The affidavit provided no reason to believe Bartley – no indication that law enforcement checked Bartley's phone records to corroborate his story that he had spoken to the deceased at a certain time or attempted to corroborated his story with other witnesses or records.

Appellant requests rehearing of this matter based upon the points misapprehended and/or overlooked concerning the circumstantial evidence jury instruction and Appellant's privacy rights to his historical cell site location information.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

This 19th day of February, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

FEB 19 2015

SC Court of Appeals

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

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V.

DARRYL L. DRAYTON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Darryl L. Drayton #238403, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 19th day of February, 2015.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 19th day
of February, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.