

STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appeal from Charleston County
J.C. Buddy Nicholson, Jr., Circuit Court Judge

SC Court of Appeals

THE STATE, Respondent,
v.

DARRYL L. DRAYTON, Petitioner.

Appellate Case No. 2012-213295

Opinion No: 5294

RETURN TO PETITION FOR REHEARING

This Court issued a published opinion in this on February 4, 2015, affirming Petitioner's Charleston County murder conviction and sentence of life without the possibility of parole (LWOP), for murdering of Alexis Lukaitis. *State v. Darryl L. Drayton (Drayton)*, Opinion No. 5294, 2015 WL 446693 (S.C. Ct.App. filed Feb. 4, 2015). On February 19, 2015, Petitioner filed a petition for rehearing. This Court directed Respondent file a return to the petition in an Order filed 23, 2015. Pursuant to Rules 221 and 240, SCACR, and at the direction of the Court, Respondent now makes its return and submits that the petition for rehearing should be denied for the following reasons:

I.

In its Opinion, the Court rejected the three issues that Drayton had raised on appeal:

1. The trial court's refusal to charge the jury with an explanation concerning how to use circumstantial evidence violated Appellant's state and federal constitutional rights requiring the prosecution prove his guilt beyond a reasonable

doubt because the charge given confused the jury regarding how to evaluate circumstantial evidence?

II. In violation of Appellant's state constitutional right to privacy and statutory right to protection against defective search warrants, the trial judge erred in admitting the historical cell service location information obtained from Appellant's cellular service provider by a search warrant lacking probable cause where Appellant had standing to challenge the search warrant and the trial judge required only a showing of a reasonable grounds to obtain the records.

III. In violation of Appellant's right to present a complete defense and to due process of law, the trial judge erred in limiting Appellant's cross-examination of the pathologist concerning the toxicology report relating to the deceased, which demonstrated the deceased had high levels of drugs in her system at the time of her death.

Respondent submits that this Court's Opinion correctly rejected each of the issues presented. Also, Respondent incorporates by reference the arguments from the Final Brief of Respondent.

II.

Drayton first asks this Court to hold that the trial judge's failure to grant Drayton's request to charge the outdated "reasonable hypothesis" language from *State v. Edwards*, 298 S.C. 272, 275-76, 379 S.E.2d 888, 889 (1989), in the circumstantial evidence charge, was not harmless error. He further argues that "[t]he 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." Respondent submits that this Court correctly rejected Drayton's argument that there was reversible error. *Drayton*, 2015 WL 446693 at *5-*7.

First, this Court correctly applied *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013) to the facts of this case and found that there was no error. did not want an instruction such as that set forth in *Logan*. Rather, he wanted the trial judge to instruct jurors on the "reasonable

hypothesis” language of *Edwards*. Therefore, the requested charge was properly rejected because it did not and still does not accurately state the applicable law. As a result, this Court’s decision was correct.

This Court’s alternative decision that any error was harmless in light of the reasonable doubt instruction, *Drayton*, 2015 WL 446693 at *7, was a straight-forward and correct application of *Logan*, 405 S.C. at 94, 747 S.E.2d at 449, and this Court’s decision in *State v. Jenkins*, 408 S.C. 560, 573-74, 759 S.E.2d 759, 766 (Ct.App. 2014), *cert. denied*, Feb 4, 2015. (Thus, this Court’s Opinion in this case was filed on the same day that the South Carolina Supreme Court denied certiorari in *Jenkins*). Nor is there merit to Drayton’s claim that the more significant the amount of circumstantial evidence, the greater the need for a *Logan* charge. The suggestion that there is a greater need for a Logan charge here because of the amount of circumstantial evidence presented is inconsistent with *Logan*. *See Logan*, 405 S.C. at 99, 747 S.E.2d at 452 (proposed charge stating that “The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence”). It is likewise inconsistent with *State v. Cherry*, 361 S.C. 588, 601, 606 S.E.2d 475, 482 (2004) (“[T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not”).

Likewise, his suggestion that there could not be harmless error because there was more than one definition of the term “reasonable doubt,” ignores that the definition given was constitutional and is taken almost *verbatim* from that endorsed by the Federal Judicial Center, *see* Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (1987) (Instruction 21), and it has been approved by the South Carolina Supreme Court’s decision in *State v. Darby*, 324 S.C.

114, 115-16, 477 S.E.2d 710, 710-11 (1996), and in Justice Ginsberg's concurring opinion in *Victor v. Nebraska*, 511 U.S. 1, 26-27(1994) (Ginsburg, J., concurring in part and in judgment) ("This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly").

III.

Drayton further contends that this Court also erred in rejecting his claim that historical cell site location information was improperly admitted. Again, Respondent disagrees and submits that this Court's rejection of this allegation, *Drayton*, 2015 WL 446693 at *8-*10, is firmly supported both factually and legally. In particular, Respondent submits that Drayton did not have a *reasonable* expectation of privacy in the non-disclosure of those records under either the Fourth Amendment or the South Carolina Constitution. The records were not Drayton's private papers. Rather, cell site location records are business records that were generated by a "third party" - Drayton's cellular service provider - for the company's own purposes and without governmental requirement that the records be made. More importantly, he cannot assert either ownership or possession of those records, and he could not produce them in response to a subpoena.

As noted by the judge, the Order in this case also did not involve the disclosure of any "communications," *i.e.*, the substance of the actual calls. So, *Katz v. United States*, 389 U.S. 347, 351, 353, 361 (1967), and similar cases are distinguishable. Nor is the present case like the situation before the United States Supreme Court in *Riley v. California*, 134 S.Ct. 2473 (2014), where police conducted warrantless searches of the contents of the defendants' cell phones following arrest, as a search incident to arrest. *Riley* is distinguishable because the defendants in *Riley* indisputably had a reasonable expectation of privacy in the contents of their personal cell

phones, and the issue in *Riley* was whether the search incident to arrest exception overcame that privacy interest for the contents of an arrestee's cell phone.

Relying upon the United States Supreme Court's decisions in *Smith* and *United States v. Miller*, 425 U.S. 435, 443 (1976), the overwhelming majority of federal courts to consider the issue now before this Court have held that acquisition of historical cell-site records without a warrant does not violate the Fourth Amendment because there is no legitimate expectation of privacy in those records. *See, e.g., In re United States for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013) ("Cell site data are business records and should be analyzed under that line of Supreme Court precedent. Because the magistrate judge and district court treated the data as tracking information, they applied the wrong legal standard. Using the proper framework, the SCA's authorization of § 2703(d) orders for historical cell site information if an application meets the lesser 'specific and articulable facts' standard, rather than the Fourth Amendment probable cause standard, is not *per se* unconstitutional"); *United States v. Skinner*, 690 F.3d 772, 777-78 (6th Cir. 2012); *Graham*, 846 F.Supp.2d at 389-90, 397-99; *In re Applications of the United States for Orders Pursuant to Title 18, U.S. Code Section 2703(d)*, 509 F.Supp.2d 76, 81 (D.Mass. 2007) (no Fourth Amendment interest in prospective cell-site data). *See also United States v. Dye*, 2011 WL 1595255, *9 (N.D. Ohio April 27, 2011) (denying motion to suppress historical cell-site data); *United States v. Velasquez*, 2010 WL 4286276, *5 (N.D. Cal. Oct. 22, 2010) (same); *United States v. Benford*, 2010 WL 1266507, *3 (N.D. Ind. Mar. 26, 2010); *United States v. Suarez-Blanca*, 2008 WL 4200156, *8-*11 (N.D. Ga. Mar. 26, 2008) (same); *Mitchell v. State*, 25 So.3d 632, 635 (Fla. Dist. Ct. App. 2009) (same). *But see In re Application of United States*, 809 F. Supp. 2d 113, 2011 WL 3678934 *9-*11 (E.D.N.Y. Aug. 22, 2011) (holding a warrant is required to compel disclosure of historical cell-site records).

Respondent submits that Drayton has abandoned any reliance upon *United States v. Jones*, 132 S.Ct. 945 (2012), by not arguing *Jones* in his brief. See Rule 208(b)(1)(D), SCACR (each “particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority”); *Jinks v. Richland Cnty.*, 355 S.C. 341, 344, 585 S.E.2d 281, 283 (2003) (holding issues not argued in the brief are deemed abandoned and precluded from consideration on appeal); 4 *C.J.S. Appeal & Error* § 619 (2005) (“A point raised for the first time in the reply brief will not be considered by the appellate court”). However, *Jones* and cases like *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct.App. 2003), are readily distinguishable from this case because this case did not involve the commission of a trespass by police, or a month-long constant governmental surveillance, without judicial oversight.

Moreover, as opposed to GPS or other forms of electronic monitoring, the information revealed by historical cell site location data “exposes to the government only where a suspect *was* and not where he *is*.” *Graham*, 846 F.Supp.2d at 392. “The data gleaned from toll records or pen registers ... encompassed ‘location’ data with far more precision than the historical cell site location records at issue in the present case, and typically that location would be one in which the user had a Fourth Amendment privacy interest, such as a home or office.” *Id.* at 399.

“At best, the records in this case identify the closest cellular tower, whereas the pen register records at issue in *Smith* indicated the physical address of the defendant's telephone. The concept of a legitimate expectation of privacy in one's location or movement simply was not contemplated in those early telephone cases.” *Graham*, 846 F.Supp.2d at 399. Also, Drayton has not argued that these records revealed his movement in protected areas, such as his home, and he did not have any “subjective expectation of privacy that society is prepared to recognize as reasonable,” see *Katz*, 389 U.S. at 361 (Harlan, J., concurring), either while traveling along the

streets and highways or in committing his crime and the cover-up in an open area visible to the public.

Another reason this Court properly rejected his claim is that Drayton voluntarily used his phone, *In re U.S. for Historical Cell Site Data*, 724 F.3d at 613-14 & n. 13, and - unlike the GPS cases - Drayton could have defeated the cell-site location data by merely turning off his phone while engaging in criminal activity. At least one court has recognized that “cell phone users who fail to turn off their cell phones do not exhibit an expectation of privacy and such expectation would not be reasonable in any event.” *In re Smartphone Geolocation Data Application*, 2013 WL 5583711, *16 (E.D.N.Y., May 1, 2013).

Further, whatever qualms some members of the United States Supreme Court may have about whether they may need to rethink certain older Fourth Amendment jurisprudence based upon technological advances, none of those concerns are present here. The same is true of the concerns voiced by Justice Hearn, in her dissent in *State v. Dykes*, 403 S.C. 499, 511-522, 744 S.E.2d 505, 511-517 (2013) (Hearn, J. dissenting). To the contrary, the 5 day span of **records** (not recordings of conversations, as in *Katz*, or electronic monitoring of the defendant’s movements for a protracted period of time without any judicial oversight, as in the GPS cases) would satisfy Justice Alito’s concurrence in *United States v. Jones*, 132 S.Ct. 945, 957-64 (2012) (Alito, J., concurring), as would judicial review of the police action.

IV.

Additionally, even though article I, § 10 of the South Carolina Constitution extends greater protections than the Fourth Amendment because it specifically protects the people’s right to privacy, *State v. Forrester*, 343 S.C. 637, 643-45, 541 S.E.2d 837, 840-41 (2001), that provision does not require a different result. Art. I, § 10 was not infringed because - for the

reasons set forth above in this Court's decision and this Court's opinion – Drayton did not have any legitimate expectation of privacy in Verizon's cell site location records to be protected by this state constitutional protection of his right to privacy. In other words, to the extent Drayton may have had a subjective expectation of privacy while voluntarily using his cell phone in public places, in and around the time that he murdered the victim, "this expectation is not 'one that society is prepared to recognize as 'reasonable.' " *Smith v. Maryland*, 442 U.S. 735, 743 (1979) (citing *Katz*, 389 U.S., at 361), *superseded by statute*. See also *Florida v. Riley*, 488 U.S. 445, 696 (1989) (officer's observation, with his naked eye, of interior of partially covered greenhouse in residential backyard from vantage point of helicopter circling 400 feet above did not constitute a "search" for which a warrant was required, because " '[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.' "). There is simply no valid reason for extending the protections of the state constitutional right to privacy to protect the cell site location data, where the other state and federal cases rejecting Fourth Amendment challenges have all focused upon the right to privacy provided by the Fourth Amendment and the absence of a legitimate expectation of privacy, there are records of a third party that he could not produce in response to a subpoena and there is simply no right to privacy that society recognizes as reasonable.

Drayton did not argue in his brief that "[t]o understand just how much of an invasion occurs [by disclosing cell site location records], 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." He also has not heretofore relied upon the Massachusetts Supreme Court's decision in *Commonwealth v. Augustine*, 4 N.E.3d 846, 859-860 (2014). As a result these arguments are not properly before

this Court because they cannot be raised for the first time on rehearing. 4 *C.J.S. Appeal & Error* § 619 (2005) (“A point raised for the first time in the reply brief will not be considered by the appellate court”). Moreover, and contrary to *Augustine*, as well as the other procedurally barred points:

A cell service subscriber, like a telephone user, understands that his cell phone must send a signal to a nearby cell tower in order to wirelessly connect his call. See *United States v. Madison*, No. 11–60285–CR, 2012 WL 3095357, at *8 (S.D.Fla. July 30, 2012) (unpublished) (“[C]ell-phone users have knowledge that when they place or receive calls, they, through their cell phones, are transmitting signals to the nearest cell tower, and, thus, to their communications service providers.”). Cell phone users recognize that, if their phone cannot pick up a signal (or “has no bars”), they are out of the range of their service provider’s network of towers. And they realize that, if many customers in an area attempt to make calls at the same time, they may overload the network’s local towers, and the calls may not go through. Even if this cell phone-to-tower signal transmission was not “common knowledge,” *California v. Greenwood*, 486 U.S. 35, 40, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the Government also has presented evidence that cell service providers’ and subscribers’ contractual terms of service and providers’ privacy policies expressly state that a provider uses a subscriber’s location information to route his cell phone calls. In addition, these documents inform subscribers that the providers not only use the information, but collect it. See also *Madison*, 2012 WL 3095357, at *8 (“Moreover, the cell-phone-using public knows that communications companies make and maintain permanent records regarding cell-phone usage, as many different types of billing plans are available.... Some plans also impose additional charges when a cell phone is used outside its ‘home area’ (known commonly as ‘roaming’ charges). In order to bill in these different ways, communications companies must maintain the requisite data, including cell-tower information.”). Finally, they make clear that providers will turn over these records to government officials if served with a court order. Cell phone users, therefore, understand that their service providers record their location information when they use their phones at least to the same extent that the landline users in *Smith* understood that the phone company recorded the numbers they dialed.

In re U.S. for Historical Cell Site Data, 724 F.3d at 613. See also *Smith*, at 742-43; see also *Graham*, 846 F.Supp.2d at 401. Further, Drayton voluntarily used his phone, *In re U.S. for Historical Cell Site Data*, 724 F.3d at 613-14 & n. 13; *Skinner*, 690 F.3d at 777 (“There is no Fourth Amendment violation because *Skinner* did not have a reasonable expectation of privacy

in the data given off by his voluntarily procured pay-as-you-go cell phone”), and he voluntarily provided his cell site location information to Verizon. This is clear both from the reasoning of *Smith* and *Miller*, and from the provisions of his contractual agreement with Verizon. *In re U.S. for Historical Cell Site Data*, 724 F.3d at 613;¹ *see also Graham*, 846 F.Supp.2d at 399.

Therefore, neither the Fourth Amendment, nor art. I, § 10 of the S.C. Constitution, required a warrant and an order under the Stored Communications Act was sufficient.

V.

Equally unpersuasive is Drayton’s argument that probable cause was needed to obtain the records of a third party. Assuming without conceding standing, his argument lacks merit. Here, the record, including the redacted affidavit in support of the warrant (*see Court's Exhibit 2, R. p. 558; R. pp. 45-47*),² supports the trial judge’s finding that the State complied with the requirements of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712. Specifically, § 2703(c)(1) & (d). ‘The ‘specific and articulable facts’ standard of this Act is a lesser showing than the probable cause standard that is required by the Fourth Amendment to obtain a warrant.’” *In re U.S. for Historical Cell Site Data*, 724 F.3d at 606; *see also Graham*, 846 F.Supp.2d at 396. Respondent submits that this standard was satisfied. Further, a magistrate is a court of competent jurisdiction, and there is no merit to Drayton’s contention that police “obtained a search warrant, not a court order, and must be held accountable to the chosen method for pursuing the historical

¹ Verizon’s privacy policy states that “[w]e collect information about your use of our products, services and sites. Information such as call records, websites visited, wireless location, application and feature usage, network traffic data, product and device-specific information, service options you choose, mobile and device numbers, video streaming and video packages and usage, movie rental and purchase data, FiOS TV viewership, and other similar information may be used” *See* <http://www.verizon.com/about/privacy/policy/>.

² The redacted language in the warrant states that Mr. Bartley, the fiancé of the victim, last spoke to the victim on August 8, 2010. She informed him that she was traveling to Charleston, South Carolina, with Drayton, also known as "D". Bartley also provided the Verizon cellular telephone number of Drayton. Further, the affidavit stated that “it is believed that the call or and information contained in here will provide information as pertinent to the death investigation. All evidence being sought will be compared with evidence already obtained in this investigation.”

cell site location information.” His argument ignores that the trial judge did not find that the warrant lacked probable cause. Rather, he found that it was unnecessary to obtain a warrant because Drayton did not have a legitimate expectation of privacy in the Verizon records, and he found that the magistrate’s issuance of the warrant satisfied the order requirement of the SCA. Drayton’s argument in this regard ignores that the warrant issued was an “order.”

CONCLUSION

Based on the forgoing, Respondent submits Petitioner has failed to show that rehearing is warranted. The petition should be denied.

Respectfully submitted,

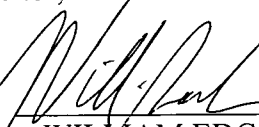
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PETITIONER.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for the Respondent, certify that I have served the within Return to Petition for Rehearing on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Susan Hackett, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 4th day of March, 2015.



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