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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

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

Opinion No. 5294 (S.C. Ct. App. filed Feb. 4, 2015)

Indictment No.: 2010-GS-10-8551

THE STATE,

RESPONDENT,

V.

DARRYL L. DRAYTON,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on March 19, 2015. App. 41.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding that Petitioner had no reasonable expectation of privacy in his historical cell service location information obtained from Petitioner's cellular service provider by a search warrant lacking probable cause in violation of Petitioner's right to be free from unreasonable searches and seizures pursuant to the Fourth Amendment to the United States Constitution?

II. Did the Court of Appeals err in requiring Petitioner to show a reasonable expectation of privacy in his historical cell service information obtained from his cellular provider by a search warrant lacking probable cause in order to invoke the privacy protections afforded by South Carolina's Constitution?

III. Did the Court of Appeals err in finding the trial court's error in refusing to charge the jury with an explanation concerning how to use circumstantial evidence harmless?

STATEMENT OF THE CASE

Procedural History

In December 2010, a Charleston County grand jury indicted Petitioner for murder (2010-GS-10-8551). R. 572. The state, represented by Jennifer Shealy and Timothy Finch, called the case to trial before the Honorable J.C. Nicholson, Jr. and a jury on October 1, 2012. Ashley Pennington and Michael Cooper represented Petitioner. R. 1-2. The jury found Petitioner guilty as charged. R. 530, lines 19 – 23. Pursuant to S.C. Code Ann. § 17-25-45, Judge Nicholson sentenced Petitioner to life imprisonment without the possibility of parole. R. 535, lines 8-11; R. 574. On October 10, 2012, Petitioner filed a motion for a new trial. R. 569. On October 17, 2012, Judge Nicholson denied the motion. R. 571. Petitioner filed a timely notice of appeal.

On February 4, 2015, a three-judge panel of the Court of Appeals, Judges Short, Huff, and Konduros, published an opinion affirming Petitioner's convictions and sentences. State v. Drayton, Op. No. 5294 (S.C. Ct. App. Feb. 4, 2015); App. 1-15. On February 19, 2015, Petitioner filed a petition for rehearing. App. 16-30. On March 19, 2015, the Court of Appeals denied the petition. App. 41. Petitioner now files this petition for writ of certiorari.

Trial facts

On August 9, 2010, Michael Bartley reported his fiancée, Alexis, missing to the police in Beaufort County. R. 76, lines 10-11. Bartley admitted that Alexis took prescription medications that had not been prescribed for her. R. 68, lines 1-3. Bartley explained that while he and his children were visiting with his parents on August 8, 2010, Alexis stayed at home. R. 70, lines 4-25. Later, Alexis called Bartley to say she planned to take "D" to Charleston to get prescription pills, a portion of which she would get in exchange for driving. R. 72, lines 20-25. Alexis and Bartley last

spoke at 8:19 p.m. R. 73, lines 1-16. However, the following day, Alexis had not returned home. R. 76, lines 4-11.

On August 9, 2010, Jackie Seward found a body along a dirt road in Charleston County. Seward reported his findings to the police. R. 116, line 21 – R. 118, lines 13. An examination of the body found in Charleston County revealed it was Alexis [hereinafter referred to as "the deceased"]. An autopsy revealed the deceased died as a result of incisions to her neck which transected her carotid artery. R. 447, lines 12-14. On August 10, 2010, the Bluffton Police Department located a car and later learned the car belonged to the deceased. R. 192, lines 15-24.

On August 10, 2010, Petitioner went to see his cousin, Steven Edwards. R. 126, lines 3-11; R. 127, lines 8-22. Edwards took Petitioner, who injured his finger, to the hospital R. 127, line 24 – R. 128, line 1; R. 130, lines 1-6; R. 130, lines 18-22. After Petitioner received treatment for his injured finger, Edwards took him to a jewelry store. R. 132, lines 12-18.[1] Edwards and Petitioner spent the next two nights in a hotel in Hardeeville. R. 133, lines 17-25; R. 135, lines 14-21. When Edwards returned home, he found trash that did not belong to him. He called the police who responded and collected the items. R. 138, line 1- R. 154, line 25.

Although numerous items were collected from the car and trash was recovered from Edwards' home, very few were tested forensically. Of the swabs taken from the car, two contained DNA consistent with Petitioner's DNA profile and one contained a mixture of at least two profiles and Petitioner could not be excluded as a minor contributor. R. 361, line 8 – R. 362, line 5; R. 364, lines 1-9; R. 364, line 17 – R. 365, line 3; R. 365, lines 20-23. Of the trash recovered from

[1] Christopher Golis, an employee of the Golis Family Jewelers, testified that on August 9, 2010, he purchased a ring from Petitioner. R. 181, lines 14-18; R. 183, lines 11-19; R. 186, lines 20-23. This ring was identified by Bartley as belonging to the deceased. R. 66, lines 2-12.

Edwards' residence, a swab from a CVS plastic bag contained a mixture of at least two people's DNA. The state's analyst determined the major contributor of the DNA was Petitioner, but the remaining profiles were insufficient for reliable interpretation. R. 370, line 21 – R. 371, line 4. Additionally, a DNA profile developed from a swab taken from the left shoe recovered from the deceased's body was consistent with Petitioner's DNA profile. R. 370, lines 7-14.

Kenneth Aycock, an employee for the Army National Guard counter-drug task force, was assigned to the FBI safe streets task force, which required him to conduct cell phone tracking and analysis. R. 398, line 18 – R.399, line 13. His review of the deceased's cell phone records indicated her phone was in the Bluffton area until then evening on August 8, 2010. R. 405, lines 2-12; R. 408, lines 1-9. Calls made between 8:19 p.m. and 9:49 p.m. used cell tower 310 located in Ravenel. R. 408, line 23.

The records indicated Petitioner's phone used towers in the Bluffton area between 9:08 a.m. and 6:36 p.m. on August 8, 2010. R. 410, line 20 – R. 411, line 4. Then, the phone used towers along Highway 17 between Bluffton and Charleston. R. 412, lines 15-23; R. 413, lines 11-13. Thereafter, the phone used towers in Charleston until 11:38 p.m. R. 414, lines 4-10. At 6:48 a.m., the next morning, the phone used a tower in Bluffton again. R. 415, line 24 – R. 416, line 2.

In summary, the prosecution presented evidence that the deceased told another of her intent to go to Charleston with Petitioner, that Petitioner's DNA was found on items belonging to the deceased, that Petitioner was in possession of the deceased's ring shortly after her death, and that his cell phone was in the area of where the deceased's body was found during the evening of August 8, 2010.

ARGUMENT

I. In violation of Petitioner's right to be free from unreasonable searches and seizures pursuant to the Fourth Amendment to the United States Constitution, the Court of Appeals erred in holding that Petitioner had no reasonable expectation of privacy in his historical cell service location information obtained from Petitioner's cellular service provider by a search warrant lacking probable cause.

Reasons for granting certiorari

This case presents a novel question of law. In fact, the opinion notes that the no South Carolina appellate court has addressed this issue. Additionally, the substantial issues of federal constitutional law are involved and the Court of Appeals' opinion conflicts with the recent opinions of the United States Supreme Court. Therefore, pursuant to Rule 242 (b), SCACR, this Court should grant certiorari.

Relevant facts

On the evening of August 10, 2010, the police obtained a search warrant for Petitioner's cell phone records. The warrant sought:

> Any and all information in reference to the Verizon cellular telephone number 843-368-9422 to include, but not limited to, subscriber information, account comments, billing records, outbound and inbound calls to include blocked call information from August 6, 2010 to August 10, 2010. Subscriber information on other numbers listed in the report, call origination location, physical address of cell sites and coverage map, all stored communications, or files including voice mail, email, digital images, text messages, buddy lists, and any other files associated with the cellular target number 843-368-9422.

The search warrant was based upon the following information contained within an affidavit:

> That on July 9, 2010, Charleston County Sheriff's Office responded to Old Jacksonboro Rd near Hwy. 174 in reference to a deceased person. Upon arrival deputies discovered the body of a female victim on the side of Jacksonboro Rd. On August 9, 2010, Alexis J. Lukaitis was reported missing to the Beaufort

> County Sheriff's Office. The body of the deceased was later positively identified as being Alexis J. Lukaitis. Mike Bartley the fiancée of the victim stated that he last spoke to the victim on August 8, 2010 and she informed him that she was traveling to Charleston SC with Darryl Drayton AKA "D".
>
> A separate witness came forward and provided information about a conversation between Darryl Drayton and a friend and neighbor of the victim named Shannon in which they discussed the murder of the victim.
>
> Bartley provided the Verizon cellular telephone number 843-368-9422 as a contact number for Darryl Drayton. It is believed that the call log and information contained therein will provide information that is pertinent to the death investigation. All evidence being sought will be compared with evidence already obtained in the investigation.

R. 8, line 13 – R. 9, line 6; R. 545.[2]

Concerning Petitioner's claims under the federal and state constitutions, the trial judge found Petitioner had no expectation of privacy in the records. R. 45, lines 9-22. The trial judge found the federal cases interpreting the Stored Communications Act (SCA)[3] to be persuasive authority for how South Carolina would address the issue. He announced that he was "not talking about probable cause in this search warrant, [he was] talking about reasonable grounds to believe that the records and other information sought [were] relevant and material to an ongoing and criminal investigation." Based upon the persuasive authority, the judge said that because no statute or case explained whether law enforcement must obtain a warrant or court order to obtain

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[2] The trial court rightly discounted the statement contained in the affidavit regarding a separate witness. The parties agreed that a neighbor and friend of the deceased had spoken to Petitioner regarding the deceased's death, but there was no "separate witness." Further, the parties agreed that the substance of the conversation was a denial by Petitioner of any involvement in the deceased's disappearance and death. R. 42; R. 543. Clearly, law enforcement used false information – "a separate witness" – in an attempt to shore up its very weak case of probable cause. See generally, Franks v. Delaware, 438 U.S. 154 (1978); United States v. Colkley, 299 F.2d 297 (4th Cir. 1990); State v. Missouri, 337 S.C. 548, 524 S.E.2d 394 (1999).

[3] The Stored Communications Act (SCA) was enacted as Title II of the Electronic Communications Privacy Act and may be found at 18 U.S.C. §§ 2701 – 2712.

the records, the judge would treat the "warrant as obtaining an order from the magistrate to obtain the records." The judge concluded that the order obtained from the magistrate was sufficient to obtain the records and reasonable grounds were proven under the warrant. He ultimately concluded that probable cause was not necessary. R. 45, line 9 – R. 47, line 24; R. 48, lines 6-7.

The Court of Appeals found Petitioner had no expectation of privacy in his historical cell site location records, and therefore, Petitioner's claim under the Fourth Amendment failed. In light of the Court of Appeals' ruling that Petitioner did not have an expectation of privacy in the records, the Court of Appeals refused to address Petitioner's claim that the trial court erred in construing the search warrant as a court order.

Discussion

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).[4]

This is an open question federally because 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 Petitioner'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. "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

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[4] 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).

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.

The Court of Appeals distinguished 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 the 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.

The court's reliance upon the 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.

Following the line of recent cases from the United States Supreme Court regarding the Fourth Amendment, it is clear that Appellant had a reasonable expectation of privacy in his cell site location information. Thus, the state was required to obtain a search warrant for those records, and that warrant was required to supply probable cause for those records.

Lack of probable cause

The trial judge construed the search warrant as a court order and found it contained "reasonable grounds" for the order to issue. In short, the judge applied the requirements of the SCA, which he determined to be persuasive authority, to determine the search warrant – construed as a court order – was sufficient to obtain Petitioner's historical cell site location information. The SCA permits the government to acquire certain information from cellular service providers through a court order where the government "offers specific and articulable facts showing that there are reasonable grounds to believe that … the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(c)(1)(B); 18 U.S.C. § 2703(d). The trial judge erred by (1) construing the search warrant as a court order; and (2) applying the standard of "reasonable grounds."

The officers obtained a search warrant, not a court order, and must be held accountable to the chosen method for pursuing the historical cell site location information. Additionally, the officers did not follow the requirements of the SCA; therefore, the state should not benefit from the lower threshold afforded under the Act.

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).

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. 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). Petitioner assumes the prosecution proceeded under the theory that Petitioner's historical cell site location information was evidence tending to show that Petitioner committed a criminal offense. However, the affidavit supporting the search warrant was devoid of any facts to support the theory.

In State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990), this 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. This 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, this 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. This Court found the affidavit failed to set forth any facts as to why police believed the defendant committed the crime. This 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, this Court held the magistrate did not have a substantial basis to find probable cause for a search of the defendant's residence. Id.

Similarly, this 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. This 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 this 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 Petitioner's historical cell site location information failed to set forth any facts to establish probable cause that Petitioner's historical cell site location information constituted evidence of the deceased's death or tended to show that Petitioner 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.[5] 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 [Petitioner]." 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 Petitioner had communicated using Petitioner'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 Petitioner's historical cell site location information was related at all to the deceased's death or disappearance.

[5] 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 - 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.

The trial judge erred in construing the search warrant as a court order and allowing the acquisition of Petitioner's historical cell site location information to stand based upon a showing of a reasonable basis where the police obtained a search warrant and were required to follow the statutory requirements and the affidavit failed to provide probable cause that Petitioner's historical cell site location information contained evidence of a crime associated with the deceased's death.

II. In violation of Petitioner's state constitutional right to privacy, the Court of Appeals erred in requiring Petitioner to show a reasonable expectation of privacy in his historical cell service information obtained from his cellular provider by a search warrant lacking probable cause in order to invoke the privacy protections afforded by South Carolina's Constitution.

Reasons for granting certiorari

As mentioned previously, this case presents a novel question of law. In fact, the Court of Appeals' opinion notes that the no South Carolina appellate court has addressed this issue. This case concerns the state constitutional right to privacy, and very few cases in this Court's jurisprudence address the parameters of that right. Therefore, pursuant to Rule 242 (b), SCACR, this Court should grant certiorari.

Relevant facts

Petitioner incorporates by reference the relevant facts discussed in Issue I, supra. Recognizing the that South Carolina appellate courts had not addressed historical cell site location data under the South Carolina Constitution, the Court of Appeals relied on federal precedent to resolve the issue. The Court of Appeals held Petitioner had no reasonable expectation of privacy in his historical cell site location information because he voluntarily contracted with the cellular provider, conveying his cell site location data to the provider who created the records in the ordinary course of business. In light of the Court of Appeals' ruling that Petitioner did not have an expectation of privacy in the records and could not invoke the privacy protections of the state constitution, the Court of Appeals refused to address Petitioner's claim that the trial court erred in construing the search warrant as a court order.

Discussion

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. This 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.[6] According to this 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

[6] 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).

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 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, Petitioner had an expectation of privacy in the records based upon this state's protection of individuals against governmental invasions of privacy.

The Court of Appeals 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.

Lack of Probable Cause

Petitioner incorporates by reference his argument presented in Issue I, supra, regarding the lack of probable cause contained within the search warrant used to obtain his historical cell site location information.

III. The Court of Appeals erred in finding the trial court's error in refusing to charge the jury with an explanation concerning how to use circumstantial evidence harmless.

Reasons for granting certiorari

The Court of Appeals' decision in this case conflicts with this Court's opinion in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013). Further, this case involves a substantial constitutional issue – the requirement that the state prove the elements of criminal offenses beyond a reasonable doubt. Therefore, pursuant to Rule 242 (b), SCACR, this Court should grant certiorari.

Relevant facts

Without question, the state's case against Petitioner was purely circumstantial. At the conclusion of the trial, Judge Nicholson instructed the jury as follows concerning circumstantial evidence:

> There are two types of evidence which are generally presented during trial. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes a fact to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find the defendant not guilty.

R. 516, line 10 – R. 517, line 3.

Petitioner objected to the trial judge's instruction regarding circumstantial evidence. Petitioner explained, "it is incumbent on the jury to sift the circumstances to see if the circumstances are proven beyond a reasonable doubt and are they consistent with each other, taken together, and pointing conclusively to the guilt of the accused to the exclusion of every other reasonable

hypothesis." Additionally, Petitioner provided a proposed jury instruction. Specifically, Petitioner requested the court to instruct the jury as follows:

> Every circumstance relied upon by the state [must] be proven beyond a reasonable doubt; and ... all of the circumstances so proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every reasonable hypothesis. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

R. 526, line 1 – R. 529, line 15; R. 568. The judge denied Petitioner's request. R. 529, line 16.

Discussion

On August 14, 2013, this Court addressed the circumstantial evidence charge as given in criminal cases in South Carolina.[7] In State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), this Court "revisited [its] past discussions regarding the circumstantial evidence charge, and articulate[d] for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the state's burden and the jury's responsibility." As this Court explained, the purpose of a clear jury instruction concerning analyzing circumstantial evidence is paramount. Id. Although direct and circumstantial evidence may carry the same weight, "a jury cannot accurately analyze these two types of evidence using identical approaches." Id.

Specifically, circumstantial evidence, unlike direct evidence, "requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded." Id. Thus, "[a]nalysis of circumstantial evidence is plainly a more intellectual process." Id. In light of the differing analysis required when examining direct versus circumstantial

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[7] Trial counsel foresaw this Court's ruling in Logan when he argued to the trial court that "[t]he Supreme Court, therefore is poised to overrule [State v.] Cherry[, 361 S.C. 588, 606 S.E.2d 475 (2004)] when presented with the appropriate case." R. 568.

evidence, this Court provided a proper jury instruction for trial courts to use. Important for Petitioner's case, the instruction directs jurors that "to the extent the state relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt." The instruction also provided that "[i]f these circumstances merely portray the defendant's behavior as suspicious, the proof has failed." Id.

Although this Court held that a trial judge may instruct the jury as to circumstantial evidence as provided in State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997) and State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2005), this Court held that a trial judge may not rely exclusively on that charge over a defendant's objection. Id.

The Court of Appeals held that Petitioner benefits from the Logan ruling as his case was pending on direct review and the issue was preserved for review. See State v. Belcher, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final), Harris v. State, 543 S.E.2d 716, 717-718 (Ga. 2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline' – i.e., cases which are pending in direct review or not yet final")). Petitioner does not challenge this holding.

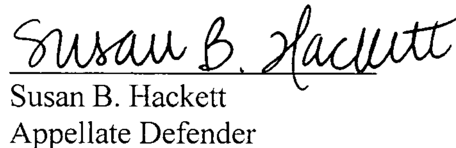
However, Petitioner challenges the court's holding that he suffered no harm from the trial court's failure to provide clarifying instructions to the jury regarding how to consider circumstantial evidence. Clear, cogent, and concise instructions directing the jury on how to analyze the circumstantial evidence before it were necessary in Petitioner's case due to the nature of the

evidence presented by the prosecution. Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, which is not required for evaluating direct evidence. The trial judge's refusal to charge the jury with an explanation concerning how to use circumstantial evidence violated Petitioner's right to require the prosecution to prove his guilt beyond a reasonable doubt.

CONCLUSION

Petitioner respectfully requests this Court reverse his conviction and sentence and remand the matter for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 20th day of April, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

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

Opinion No. 5294 (S.C. Ct. App. filed Feb. 4, 2015)
Indictment No.: 2010-GS-10-8551

THE STATE,

RESPONDENT,

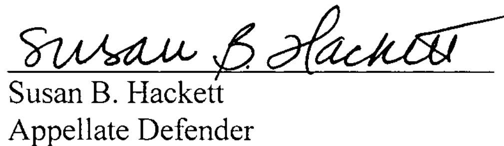
V.

DARRYL L. DRAYTON,

PETITIONER

CERTIFICATE OF SERVICE

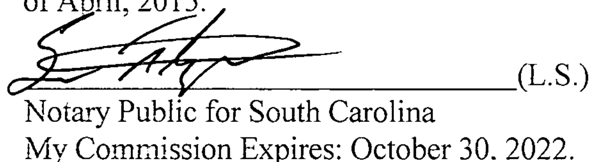
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Mr. Darryl L. Drayton #238403, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, and the S.C. Court of Appeals this 20th day of April, 2015.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of April, 2015.



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