

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**  
MAY 06 2015  
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of General Sessions

The Honorable J.C. Nicholson, Jr.

Appellate Case No. 2012-213405

Opinion No. 5313  
Filed April 22, 2015

State of South Carolina.....Respondent,

vs.

Rakeem D. King.....Appellant.

PETITION FOR REHEARING

On April 22, 2015, in a published opinion, this Court reversed and remanded Appellant's conviction for attempted murder and affirmed Appellant's convictions for armed robbery and possession of a firearm during the commission of a violent crime. *State v. King*, Opinion No. 5313 (S.C. Ct. App. filed April 22, 2015). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon the following points overlooked and/or misapprehended in the opinion.

Appellant asks this Court to rehear the issue regarding whether it was improper for the trial court to instruct the jury that malice may be inferred from the use of a deadly weapon. Respectfully, this Court misunderstood the holding in *State v. Belcher*, which held that "the 'use of a deadly weapon' inferred malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)." 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) (emphasis added). This Court held that it found "no basis for reducing, mitigating, excusing, or justifying *King's conduct*." *State v. King*, Opinion No. 5313, Shearouse's Advance Sheet at p. 49 (emphasis added). The issue is not whether there was a basis for reducing, mitigating, excusing, or justifying the Appellant's conduct, rather, the issue is whether there was evidence presented that would reduce, mitigate, excuse, or justify the actual offense. Surely an unintentional shooting versus an intentional shooting would accomplish at least one of the following: reduce, mitigate, excuse or justify the offense of shooting Dario Brown in the elbow. (R. p. 67, lines 15-19).

Further, this Court cited *State v. Belcher* in that "[t]he permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed [attempted] murder . . . ." 485 S.C. at 612, 685 S.E.2d at 810; *State v. King*, Opinion No. 5313, Shearouse's Advance Sheet at p. 49. This Court overlooked the fact that attempted murder was not the only issue presented to the jury, as the trial court also gave the jury the option of finding Appellant guilty of the lesser-included charges of assault and battery of a high and aggravated nature and assault and battery 1<sup>st</sup> degree. (R. p. 261, lines 12-15; R. p. 262, lines 1-14). The trial court refused to charge the jury on assault and battery in the 2<sup>nd</sup> degree, reasoning that a gunshot wound is not moderate

bodily injury. (R. p. 269. Lines 5-10; R. p. 270, lines 9-12). “A trial judge must charge a lesser included offense if there is any evidence from which it can be inferred that the appellant committed the lesser included of the crime charged.” *State v. Heyward*, 350 S.C. 153, 157, 564 S.E.2d 379, 381 (Ct. App. 2002). The trial court must have found evidence of the lesser included crimes of assault and battery of a high and aggravated nature and assault and battery 1<sup>st</sup> degree, otherwise the lesser included offenses would not have been charged. As the Appellant in *Belcher* argued and as the Court in *Belcher* agreed, when “a jury is asked to consider a lesser included offense . . . the permissive inference charge violates our common law . . . against charging juries on the facts.” 385 S.C. at 602, 685 S.E.2d at 804. The Court in *Belcher*, which held that the deadly weapon inferred malice charge was improper, stated: “We elect to decide this appeal solely under the common law. Relying on *Belcher*’s common law challenge, we conclude that our modern day usage of this jury charge has strayed from this Court’s original jurisprudence.” *Id.* Because lesser included charges were given, the deadly weapon inferred malice charge should not have been given, as it was a charge on the facts.

This Court went on to cite *State v. Smith*, for the holding that “[b]ecause [the defendant] was acting unlawfully, he was not entitled to an accident charge.” *State v. King*, Opinion No. 5313, Shearouse’s Advance Sheet at p. 49 (citing *State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011)). Respectfully, this Court misapprehend the application of *State v. Smith* to the case at hand. The issue is not whether Appellant was entitled to an accident charge, but rather there was any evidence that would reduce, mitigate, excuse or justify the offense of shooting Dario Brown.

Additionally, Appellant asks this Court to rehear the issue regarding whether it was improper for the trial court to allow the State to publish Appellant’s detention center phone call,

which was made on December 5, 2010 at 8:28:26 and lasted approximately fifteen minutes, based on a Rule 403, SCRE, analysis. In deciding that the admission of the detention center phone call was not in error pursuant to a Rule 403 analysis, this Court cited case law stating that: “[u]nfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [sic] decision on an improper basis”; that “[t]he admission of evidence is within the [trial] court's discretion and will not be reversed on appeal absent an abuse of that discretion”; and that “[a] trial court has particularly wide discretion in ruling on Rule 403 objections.” *State v. King*, Opinion No. 5313, Shearouse’s Advance Sheet at p. 49-50; (citations omitted).

This Court, in its Rule 403 analysis, overlooked the incredibly unfairly prejudicial nature of the detention center phone call, especially when compared to its marginal probative value. The only relevancy the detention center phone call had was to connect the Appellant to the cell phone number that called the cab company’s dispatch, which was already established through previously admitted testimony and evidence. Before the call was published to the jury, Sergeant Kevia Heyward testified that the Appellant called the number in question from the detention center sixty-three times in a one-month time span. (R. p. 223, lines 9-13). The State also introduced into evidence the detention center’s phone logs showing every call the Appellant made during his time in detention and the number Appellant called. (R. pp. 314-317).

Without a doubt, the jail phone call has an undue tendency to suggest a decision as to Appellant’s guilt on an improper basis. Appellant and the unknown party used profanity, racial slurs, and street vernacular throughout the phone call. Appellant spoke about being in the detention center before (State’s Exhibit 33- C.D. of jail calls, time 12:50). Also, the unknown third party states: “You just come clean off of [inaudible] and you know when you get charges

like that back to back them boys be trying to charge a motherfucker with menace to society and all that bullshit and the solicitor be bringing up the shit what you do in the streets and this and that. You know?" The appellant replied in the affirmative (State's Exhibit 33- C.D. of jail calls, time 13:57). The phone call paints Appellant in a light that would suggest that he is disreputable, has been incarcerated in the past, commits bad acts while outside of incarceration, and has "come off" similar charges just recently. It is extremely improper and, thus, unfairly prejudicial for a jury to base its decision on such a basis, which it is likely to do. See Rule 404(a) and 404(b), SCRE.

While "[t]he admission of evidence is within the [trial] court's discretion and will not be reversed on appeal absent an abuse of that discretion," this Court overlooked the fact that the trial court failed to exercise its discretion at all. *State v. King*, Opinion No. 5313, Shearouse's Advance Sheet at p. 49-50; (citations omitted). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (citing *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012)). "A failure to exercise discretion amounts to an abuse of that discretion." *Id.* (citing *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997)). The trial court refused to listen to the phone call before the State published it to the jury. The trial court stated: "The problem I have is it hadn't [sic] been transcribed and I'm not going to sit here and listen to 30 minutes of it." (R. p. 216, lines 7-9). "I'm going to have to hear it one time in the courtroom with the jury. I don't want to listen to it twice." (R. p. 216, lines 11-13). Because the trial court did not know what it was it was admitting into evidence, it failed to exercise its discretion in admitting it. Surely, the trial court

would not have admitted the call if it had known the extremely unfairly prejudicial nature of the phone call.

Thirdly, Appellant asks this Court to rehear the issue regarding whether Appellant's cell phone records are protected by the Fourth Amendment. This Court cited *State v. Robinson*, for the proposition that "the Fourth Amendment is not triggered unless a person has an actual and reasonable expectation of privacy." 410 S.C. 519, 527, 765 S.E.2d 564, 568 (2014). This Court did not rule as to whether Appellant had a subjective (actual) expectation of privacy and focused its ruling on whether Appellant had an objective (reasonable) expectation of privacy. Appellant maintains that Appellant had a subjective expectation of privacy in his cell phone records. See Appellant's Brief at 20-21.

This Court reasoned that a person has no legitimate expectation of privacy in information conveyed to third parties. *State v. King*, Opinion No. 5313, Shearouse's Advance Sheet at p. 50 (citing *Smith v. Maryland*, 442 U.S. 735, 743-33, 99 S. Ct. 2577, 2582, 61 L.Ed. 2d 220, 229 (1979) and *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 1624, 48 L. Ed. 2d 71, 79 (1976)). In 1967, the U.S. Supreme Court recognized that the Constitution must keep up with modern times and recognize the "vital role" new technology "has come to play in private communication." *Katz v. U.S.*, 389 U.S. 347, 351-352, 88 S.Ct. 507, 511-512 (1967).

This Court overlooked how the Appellant's case is distinguishable from *Smith v. Maryland* and *United States v. Miller*, as those cases were decided several decades before the existence of cell phones. This Court failed to consider the importance of the recent United States Supreme Court's decision in *Riley v. California* (see Appellant's Supplemental Citation), which held that a search warrant is required to search a cell phone, and that the normal search incident to a lawful arrest exception to the search warrant requirement does not apply to cell phones. 134

S.Ct. 2473, 2493 (2014). The Court reasoned that modern cell phones “have an immense storage capacity”, have “several interrelated privacy consequences”, have a capacity which “allows even just one type of information to convey far more than previously possible”, and “data on the phone can date back years.” *Id.* at 2478-2479. The Court further reasoned that “[a] decade ago officers might have occasionally stumbled across a highly personal item such as a diary, but today many of the more than 90% of America adults who own cell phones keep on their person a digital record of nearly every aspect of their lives.” *Id.* at 2479. Finally, the Court reasoned that “[t]he scope of the privacy interests at stake is further complicated by the fact that the data viewed on many modern cell phones may in fact be stored on a remote server.” *Id.* Surely the Court in *Riley v. California* considered the fact that a server is controlled by a third party and the information on the server is information that was voluntarily turned over to a third party. Despite that fact that cell phone companies have voluntarily been given access to the very private information contained on cell phones, the Court ruled that such information is protected by the Fourth Amendment.

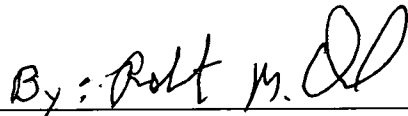
While home telephone numbers, with subscriber names and addresses, are often listed in phone books, cell phone numbers are not listed in phone books. There is no public way for someone, to look up a cell phone number and attach it to a subscriber’s name, address, and date of birth. In fact, the State, in explaining why it got a search warrant for information it already had in its possession over a year before, told the trial court the information “would not have been admissible in court, unless we got the search warrant so we went back and got the search warrant. So that’s why we are here.” (R. p. 11, lines 2-5).

If law enforcement must obtain a search warrant to search a cell phone, even when conducting a search incident to arrest, it logically follows that law enforcement may not sidestep the

search warrant requirement by going to the cell phone company seeking the same information. If a person has an expectation of privacy in the information contained on a cell phone, it is a necessary conclusion that the person also has an expectation of privacy in the information stored by the cell phone company. The cell phone is useless without the cell phone company.

Appellant respectfully requests a rehearing on the following issues based on the above points that this Court overlooked and/or misapprehended: whether the deadly weapon inferred malice charge was improper, whether Appellant's detention center phone call should have been excluded based on a Rule 403 analysis, and whether Appellant's cell phone records are protected by the Fourth Amendment.

Respectfully submitted,

By:   
\_\_\_\_\_  
Jenny L. Barwick  
Jenny L. Barwick, Attorney at Law, P.A.

Robert M. Dudek  
Chief Appellate Defender

Attorneys for Appellant

This 6<sup>th</sup> day of May, 2015.

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**  
MAY 06 2015  
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of General Sessions

The Honorable J.C. Nicholson, Jr.

Appellate Case No. 2012-213405

Opinion No. 5313  
Filed April 22, 2015

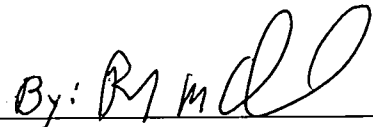
State of South Carolina.....Respondent,

vs.

Rakeem D. King.....Appellant.

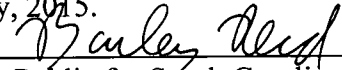
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, this 6<sup>th</sup> day of May, 2015.

By:   
Robert M. Dudek  
Chief Appellate Defender

Attorney for Appellant

SWORN to and Subscribed  
Before me this 6<sup>th</sup> day  
of May, 2015.

  
Notary Public for South Carolina  
My Commission expires: October 24, 2021