STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5313 (S.C. Ct. App. filed April 22, 2015)
11-GS-10-01793, 01795

THE STATE,

RESPONDENT,

V.

RAHEEM D. KING,

PETITIONER

APPELLATE CASE NO. 2015-001278

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 June 5, 2015.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by holding that the jury instruction that malice may be inferred from the use of a deadly weapon was not erroneous pursuant to State v. Belcher where there was evidence in this case reducing or mitigating petitioner's conduct, particularly since the trial court charged lesser-included offenses?

2.

Whether the Court of Appeals erred by holding it was it was not an abuse of discretion to admit phone records, which led to a photographic identification, when the search warrant for these records was the fruit of a previous illegal warrantless search for the same information requested in the search warrant?

3.

Whether the Court of Appeals erred by holding it was not an abuse of discretion to allow the State to publish detention center phone calls petitioner allegedly made, when the danger of unfair prejudice substantially outweighed any probative value?

STATEMENT OF FACTS

Procedural history

On December 4, 2010, the State arrested Petitioner Rakeem King on the charges of attempted murder in violation of S.C. Code Ann. § 16-3-29, armed robbery in violation of S.C. Code Ann. § 16-11-330(A), and possession of a firearm during the commission of a violent crime in violation of S.C. Code Ann. § 16-23-490. Petitioner was tried on November 5, 2012 through November 7, 2012 before the Honorable J.C. Nicholson, Jr. and a jury.

Petitioner was convicted of all three crimes and sentenced to thirty years imprisonment for armed robbery, five years consecutive on the possession of a firearm during the commission of a violent crime count, and ten years concurrent on the attempted murder charge.

The Court of Appeals affirmed petitioner's armed robbery and possession of firearm during a violent crime convictions, and reversed his attempted murder convictions. App. 1-14. Both parties filed petitions for rehearing. App. 15-35. The Court denied both rehearing petitions. App. 36-37.

This petition for a writ of certiorari follows.

Relevant trial facts

Dario Brown, a driver for the Yellow Cab Company, responded to a dispatch call to 1808 [redacted] Street during the early morning hours of November 26, 2010. R. p. 53, lines 2-17. It took him between one and two minutes to arrive to that address.
R. p. 58, lines 1-12.

When Brown arrived, the fare came from the yard of the residence across the street, which is 1809 [redacted] Street. R. p. 60, lines 8-11. Brown was familiar with the street, as he used to live on the street for several years and an aunt also had lived on the street. R. p. 53, lines

18-24. After the fare got into the back seat and because of Brown's familiarity with the street, he inquired of the fare why he was coming out of the yard of an abandoned residence. R. p. 60, lines 14-24; R. p. 61, lines 13-17. The fare responded that it was his yard. R. p. 61, lines 6-7.

Because the street was a dead-end, Brown made a U-turn. R. p. 62, lines 16-18; R. p. 63, lines 8-11. At this time, he heard a pistol cocking, turned around and saw a gun raised, and heard the fare demand money. R. p. 62, lines 18-21. Brown gave the fare "give away money", which he described as a stack of ones that are carried by cab drivers just in case they are robbed. R. p. 64, lines 4-10. Brown estimated that there were between fifteen and twenty ones. R. p. 97, line 10. He had already made eighty-three dollars in fares during this shift. R. p. 89, lines 17-19.

When the fare demanded more money, Brown tried to move the gun away from the back of his head with his elbow and forearm, telling the fare "he doesn't have to rob me." R. p. 64, lines 23-25; R. p. 65, lines 2-4. Brown testified that he tried to move the gun three different times and that his hands were up. R. p. 96, lines 14-15 and 19-20. The gun went off and Brown was struck in the elbow, while his arm was back. R. p. 67, lines 15-19. Brown described the gun as a .25 caliber automatic, with a clip, that ejects shells upon firing. R. p. 95, line 20-p. 96, line 5.

Brown then got out of the cab and ran towards the dead-end. He jumped over a three or four foot chain-link fence, landing on his back, causing a fractured vertebra. R. p. 69, line 15-p. 70, line 5; R. p. 78, lines 22-23; R. p. 102, lines 1-2. Brown testified that while he was running towards the dead-end, the fare was about two steps behind him and fired another shot. R. p. 68, lines 24-25; R. p. 101, lines 20-22. After Brown hopped the fence and while Brown as lying on his back, the fare fired another round. R. p. 70, lines 10-14. Brown then claimed that he was able to crawl behind a van in the yard, at which point the fare fired six or seven rounds. R. p. 70,

lines 16-19. Brown estimated the van to be about five to ten feet away from the fence. R. p. 104, lines 3-4.

As he was behind the van, the fare said that "he is not going to shoot me anymore if I just give him the money." R. p. 73, lines 9-13. Although the fare knew he went behind the van, but he was still able to use his cell phone to call law enforcement. R. p. 73, line 23- 74, line 19. It took only sixty seconds for law enforcement to arrive. R. p. 104, lines 18-19. Brown had only been shot once, which was the shot to the arm he received while inside the cab. R. p. 79, lines 1-3.

The Yellow Cab Company's telephone operator testified that the call came in requesting a cab at 4:06:06 a.m. and that the cab driver was dispatched at 4:11:46 a.m. R. p. 44, line 5- p. 45, line 12. The number on Yellow's caller I.D. was XXX-4849. R. p. 45, 24-p. 46, line 3.

Jennifer Butler, a patrolman with the North Charleston Police Department, was the first responding officer. R. p. 114, lines 10-12; R. p. 120, lines 3-4. Butler was dispatched to the scene at approximately 4:20 a.m. and arrived at approximately 4:21 a.m. R. p. 110, lines 12-17. She did not see the shooter on scene, did not see anyone running away, and did not see anybody picking up shell casings off the ground. R. p. 113, lines 1-7; R. p. 119, lines 11-18. However, a shell casing was found inside the cab. R. p. 115, line 25-p. 116, line 7.

Kelly Murphy, the crime scene technician, was called to the scene at approximately 4:30 a.m. A shell casing, which was "just kind of laying [sic] there on the rear seat" was retrieved from the cab. R. p. 127, lines 16-19; R. p. 137, lines 14-15. She and her supervisor were able to follow a blood trail through a yard at the end of [redacted] Street. Despite a thorough search, which took a little over two hours, Officer Murphy and three to four other officers were unable to find

any other shell casings. R. p. 130, lines 6-9; R. p. 132, lines 1-2; R. p. 139, lines 7-13; R. p. 140, lines 4-23.

On November 29, 2010 Brown was presented with a photo lineup, but was unable to identify any of the photos presented as the fare. R. p. 169, lines 14-16; R. p. 173, lines 20-21.

Because no identification was made in the first photo lineup, North Charleston Police Department focused its attention on investigating the phone number that called the Yellow Cab Company to request a dispatch to [redacted] Street on the November 26, 2010. R. p. 193, lines 1-21. Detectives used internet sources to determine the number belonged to the Cricket Wireless cell phone company. R. p. 193, lines 12-16. The detectives then were able to find out the name of the subscriber was Kevin King, that the subscriber's date of birth was X/X/91, and that the address of the subscriber was listed as 3440 Elliott Street. R. p. 193, line 19-p. 194, line 3. The State, during the petitioner's pretrial search warrant suppression hearing, explained to the trial court that detectives found out the above information when they went to Cricket Wireless store and asked for the information, which was provided without a search warrant. R. p. 10, lines 8-p.11, line 5.

The detectives were not able to find a Kevin King living at 3440 Elliott Street, but researched the name King with the date of birth provided by the cell phone company. They came up with the name Rakeem King, date of birth X/X/91. R. p. 194, line 23-p. 195, line 5. Detectives then looked up Rakeem King's driver's license and discovered that his listed address was 3440 Osceola Street. R. p. 195, lines 10-12. Based on this information, detectives compiled a photo line-up and presented it to cab driver Brown on December 3, 2010. R. p. 195, lines 23-24; R. p. 13, lines 11-14. Brown selected Rakeem King as the person who robbed and shot him.

R. p. 196, lines 21-23. That photo-lineup identification completed the investigation and warrants were taken out on Rakeem King the next day. R. p. 197, line 25-p. 198, line 2.

It was undisputed that the only evidence presented placing petitioner at the scene was Brown's photo identification. Although fingerprints and DNA were found at the scene, they did not belong to petitioner. R. p. 133, line 11-p. 135, line 21.

On February 10, 2012, North Charleston Police Department obtained a search warrant directed to the Custodian of Record for Cricket Communications, Inc. regarding telephone number XXX-XXX-4849 for the subscriber's name and mailing/billing address, call details, and other information. R. pp. 297-311. The Affidavit accompanying the search warrant stated the following: "During the course of the investigation[,] the aforementioned phone number was determined to be a Cricket Wireless number which belonged to [petitioner]." R. p. 300.

ARGUMENT

1.

The Court of Appeals erred by holding that the jury instruction that malice may be inferred from the use of a deadly weapon was not erroneous pursuant to State v. Belcher where there was evidence in this case reducing or mitigating petitioner's conduct particularly since the trial court charged lesser-included offenses.

Introduction

During its closing, the State argued to the jury the following: "The Judge will tell you[,] you do not have to intent to kill in order to be guilty of this offense [of attempted murder]. You must have the requisite [m]alice. The Judge will tell you that; don't just take it from me." R. p. 238, lines 19-22. At this point, the defense objected based on the charge conference, and the objection was overruled. R. p. 238, line 25-p. 239, line 5.

The trial court instructed the jury that attempted murder occurs when "a person with the intent to kill attempts to kill another person with [m]alice [a]forethought[,] whether expressed or implied[,] commits the crime of Attempted Murder. R. p. 259, lines 3-6. The trial court went on to instruct the jury that "[a] specific intent to kill is not an element of Attempted Murder but it must be a general intent to commit serious bodily harm." R. p. 260, lines 22-24. The trial court went even further in instructing that "[i]ntent may also be inferred when it is demonstrated the petitioner voluntarily and willfully commits and act in a natural tendency which is to destroy another's life." R. p. 261, lines 8-11. The defense took exception to the charge on attempted murder, stating that it was a specific intent crime. R. p. 268, lines 10-13 and 18-25. The trial court ruled that attempted murder is a general attempt crime requiring only a showing of malice. R. p. 270, lines 9-21.

During deliberations, the jury came back with a question stating: "We'd like further clarification of the difference between attempted murder and assault and battery of a high and aggravated nature." R. p. 312. The hypotheticals presented by the jury in Court's Exhibit 2 clearly demonstrate that the jury struggled with general intent (malice) versus specific intent (intent to kill): "If someone points a gun at a person's head, but does not fire, does that fulfill the definition of attempted murder?"

The Court explained to the jury that "[t]he basic difference between attempted murder and assault and battery of a high and aggravated nature is assault and battery of a high and aggravated nature does not require malice. Malice is a hatred, ill will or hostility towards another person and is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict injury or under circumstances that the law would infer as evil intent." R. p. 273, lines 10-17. The trial court had previously instructed the jury that "[a] person commits

the offense of Assault and Battery of a High and Aggravated Nature if the person unlawfully injures another and great bodily injury to another person results when the act is accomplishe[d] by means likely to produce death or great bodily injury." R. p. 261, lines 13-18. The defense objected to the trial court's answer to the jury and was again overruled. R. p. 274, line 14-p. 275, line 4. The charge book was in the possession of the jury during the entire length of deliberations. R. p. 275, lines 5-7.

The Court of Appeals reversed petitioner's attempted murder conviction holding that a specific intent to kill was an element of attempted murder, and that the trial court erred by charging that "a specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm." App. 4-7. The State has challenged that holding on certiorari.

The jury instruction also violated the holding of *Belcher*

Attempted murder is defined by statute as: "A person who, *with intent to kill*, attempts to kill another person **with malice aforethought, either expressed or implied**, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (emphasis added). This statute became effective on June 2, 2010 and replaced assault and battery with intent to kill, formerly S.C. Code Ann. §16-3-620 (see legislative history of S.C. Code Ann. § 16-3-29).

The trial court explained to the jury that "[m]alice is a hatred, ill will, or hostility towards another person [and] is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury [or] under circumstances that the law will infer as evil intent." R. p. 259, lines 6-10. The trial court, in answering the jury's question R. p. 312, put in the words it originally left out in its jury instruction on malice: "[m]alice is a hatred, ill will or hostility towards another person *and* is the intentional doing of a wrongful act without just cause or

excuse and with the intent to inflict injury *or* under circumstances that the law would infer as evil." R. p. 273, lines 13-17 (emphasis added). The trial court, in its original jury instruction, told the jury that "[i]nferred malice may also arise when the deed is done with a deadly weapon." R. p. 260, lines 4-5. The defense objected to the "use of a deadly weapon" implied malice instruction and cited State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

According to State v. Belcher, the Court held that such an 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)." Belcher, 385 S.C. at 610, 685 S.E.2d at 809 (emphasis added). In reversing Belcher's conviction, the Court went on to state that such a charge cannot be considered harmless and that "[i]t is entirely conceivable that the only evidence of malice was [the petitioner's] use of a handgun." 385 S.C. at 612, 685 S.E.2d at 810.

Here, Brown testified that he tried to move the gun away from the back of his head by moving the gun with his elbow and forearm three different times and that Brown's hands were up. R. p. 64, lines 23-25; R. p. 96, lines 14-15 and 19-20. The gun went off and Brown was struck in the elbow, while his arm was back. R. p. 67, lines 15-19. The defense, in its closing argument, made a very probable argument -- that the fare was merely using the gun as a scare tactic to successfully receive money from Brown, that the fare never intended the gun to fire, and that the gun only fired when Mr. Brown was trying to move the gun with his elbow and forearm. R. 246, lines 10-24. If the gun was accidently fired, this certainly reduces or mitigates Brown being shot in the arm.

The argument that the error in the instruction was harmless because malice could have been inferred from multiple gun shots holds no weight. The jury could quite possibly have not

believed Brown when he testified there were additional shots fired after he left the cab. Other than Brown's testimony, there was no admissible evidence that the fare fired more than the one time inside the cab, and the Court of Appeals properly held it was error to admit the hearsay testimony as to the number of shots a non-testifying witnesses allegedly heard. App. 7-11. In fact, it may be inferred from the jury's hypotheticals in its questions to the trial court regarding the difference between attempted murder and assault and battery of a high and aggravated nature that at least one member of the jury did not believe any other shot was fired other than in the cab: "If someone points a gun at a person's head, but does not fire, does that fulfill the definition of attempted murder?" R. p. 312. There was evidence presented that gun was only fired once. Only one shell casing was discovered, despite a thorough search for more (two hour search with four to five trained officers searching). R. p. 127, lines 16-19; R. p. 140, lines 4-23. The State tried to justify the absence of any shell casings by pointing out that it was dark outside during the search and the shell casings were small. R. p. 139, lines 7-13; R. p. 140, lines 4-23. However, Officer Murphy was able to locate a blood trail under the same conditions. R. p. 130, lines 6-9.

The speculative argument may be attempted that the fare was able to pick up the additional seven to eight shell casings before law enforcement responded, but no evidence supports this conceit. The phone operator testified that the cab driver was not dispatched until 4:11:46 a.m., Brown testified that it took him between one and two minutes to drive to the location, the first responding officer, Butler, was dispatched at approximately 4:20 a.m. and arrived at approximately 4:21 a.m. R. p. 44, line 25-p. 45, line 12; R. p. 58, lines 1-12; R. p. 110, lines 12-17. Butler testified that when she arrived, she did not see the shooter, did not see anyone running away, and did not see anyone picking up shell casings. R. 113, lines 1-7; R. p. 119, lines 11-18. The entire incident, from the time Brown arrived on scene to the time the first

responding officer was dispatched, took only seven minutes. It would be unreasonable to believe that the fare was able to locate seven to eight shell casings in the dark within mere minutes. If the fare was going to attempt to hide the shell casings, he would have gone to the cab first, where the casing was "just kind of laying [sic] there on the rear seat." R. p. 137, line 14. Therefore, there was evidence presented that Brown was shot at once, and that that single shot when Brown pushed at the pistol.

The trial court gave lesser included charges for assault and battery of a high and aggravated nature and assault and battery 1st degree. R. p. 261, lines 12-15; R. p. 262, lines 1-14. When the defense requested that the trial court also charge on assault and battery 2nd degree, the trial court refused, 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 petitioner 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 1st degree, otherwise the lesser included offenses would not have been charged. Therefore, the trial court must have found evidence that could reduce, mitigate, excuse, or justify the crime of attempted murder in the jurors' minds. The petitioner in Belcher argued that 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." Belcher, 385 S.C. at 602, 685 S.E.2d at 804. The Court, in agreeing with Belcher's argument, stated that the "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 petitioner has committed murder (or assault and battery with intent to kill)." Belcher, 385 S.C. at

612, 685 S.E.2d at 810. Because lesser included charges were given, the permissive inference malice charge should not have been given, as it was a charge on the facts. For these reasons, this issue provides this Court with an additional sustaining grounds for the Court of Appeals reversing petitioner's attempted murder conviction.

2.

The Court of Appeals erred by holding it was it was not an abuse of discretion to admit phone records, which led to a photographic identification, when the search warrant for these records was the fruit of a previous illegal warrantless search for the same information requested in the search warrant.

Relevant facts

Detectives with the North Charleston Police Department went to a Cricket Wireless store, without a search warrant, and asked for subscriber information, including the subscriber's name, date of birth, and address. R. p. 10, line 22-p. 11, line 2; R. p. 193, line 19-p. 194, line 3. Detectives used this information to put together a photo lineup, in which Brown identified the petitioner on December 3, 2010 as his assailant. R. p. 13, lines 11-14; R. p. 14, lines 11-24; R. p. 195, lines 23-24; R. p. 196, lines 21-23. The search warrant for the subscriber's information was obtained on February 10, 2012. R. p. 299.

Court of Appeals holding

The Court of Appeals in a one paragraph parenthetical held that petitioner did not have a legitimate expectation of privacy in information he conveyed to a third party. The Court also held that the Fourth Amendment did not prohibit "the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed

on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." App. 13.

Rehearing

On rehearing petitioner argued:

> 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 Petitioner'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 Petitioner'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.

App. 20-21.

Discussion

In State v. Dupree, 319 S.C. 454, 456-57, 462 S.E.2d 279, 281 (1994), this Court stated the following: "'We have long held [w]arrantless searches are *per se* unreasonable unless an exception to the warrant requirement is present. The burden is upon the State to justify the warrantless search. We have specifically recognized several exceptions to the warrant requirement. These include (1) search incident to a lawful arrest, (2) 'hot pursuit', (3) stop and frisk, (4) automobile exceptions, (5) the "plain view" doctrine, and (6) consent. *State v. Bailey,* 276 S.C. 32, 35–36, 274 S.E.2d 913, 915 (1981) (internal citations omitted); *see also State v. Peters,* 271 S.C. 498, 248 S.E.2d 475 (1978)." At trial, the State did not cite an exception to the warrant requirement or attempt to justify the warrantless search.

This Court in State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594 (2004), a drug trafficking case, provided an outline for the appropriate circumstances when one may claim a search was conducted in violation of the U.S. Constitution: "The Fourth Amendment guarantees individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; S.C. Const. art. I, § 10. To claim protection under the Fourth Amendment of the United States Constitution, petitioners must show that they have a legitimate expectation of privacy in the place searched." Rakas v. Illinois, 429 U.S. 128 (1978). A legitimate expectation of privacy is both subjective and objective in nature: the petitioner must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as

reasonable. Oliver v. United States, 466 U.S. 170, 177 (1984). (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring))."

In Katz, the United States Supreme Court, in deciding that "the Fourth Amendment protects people, not places" explained that "[t]o read the Constitution more narrowly is to ignore the vital role the public telephone has come to play in private communication." Katz, 389 U.S. 347, 351-352 (1967). In 1967, the 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." Id.

It is evident citizens have a legitimate expectation of his cell phone records not being discoverable. Riley, supra. The expectation of privacy in a person's cell phone records is certainly one that society recognizes as reasonable. 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 obtained 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). This is a classic articulation and judicial admission that the records were fruit of the poisoned tree. See Wong Sun v. United States, 371 U.S. 471 (1963).

Merely because the State went back and got a search warrant for records it had already attained more than a year previous, does not cure the illegal search and the photo line-up that was developed based solely on that illegal search. The affidavit accompanying the search warrant stated the following: "[d]uring the course of the investigation[,] the aforementioned phone

number was determined to be a Cricket Wireless number which belonged to the petitioner." (R. p. 300). Therefore, the probable cause stated in the affidavit to obtain a search warrant is also based on an unconstitutional search and, therefore, the search warrant itself is invalid and the phone subscriber information should not have been entered into evidence.

Finally, as argued above, the holding of the Court of Appeals that petitioner had no expectation of privacy is based on outdated notions of land-line telephones. The United States Supreme Court in Riley v. California had to consider 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.

For these reasons, the Court should reverse and remand the entire case for a new trial and order that the cell phone records and photo lineup set up through those records be suppressed.

3.

The Court of Appeals erred by holding it was not an abuse of discretion to allow the State to publish detention center phone calls petitioner allegedly made, when the danger of unfair prejudice substantially outweighed any probative value.

Relevant facts

The State introduced into evidence a compact disc containing several phone calls that allegedly the petitioner made to an unknown third party from December 4, 2010 through January 4, 2011. The entire compact disc was entered into evidence, over the petitioner's objection. R. p. 216, line 4-p. 217, line 3; State's Exhibit 33- C.C. of Jail Calls. The State told the trial court that it wanted to play two phone calls to the jury, each lasting fifteen minutes. R. p. 211, lines

20-21. However, based on the transcript, the only portion of the compact disc that was ever published to the jury was one phone call from the detention center to XXX-XXX-4849 on December 5, 2010 at 8:28 a.m. This call lasted approximately fifteen minutes. R. p. 209, line 16; R. p. 223, lines 9-12. (This is the same number that called the cab company on November 26, 2010.) R. p. 45, line 24-p. 46, line 3. However, this phone call is not reflected on State's Exhibit 34, R. pp. 314-317, the detention center's phone logs for calls placed with the petitioner's inmate identification number. Neither the State nor the defense transcribed the compact disc prior to trial. At trial, as is the practice, the court reporter did not transcribe the compact disc, as it was played for the jury.

Petitioner objected to the introduction of the compact disc based on relevancy and unfair prejudice. R. p. 209, lines 17-20; R. p. 216, lines 22-25. Both the petitioner and the State admitted that portions of the compact disc were difficult to understand. R. p. 209, line 25-p. 210, line 1; R. p. 214, lines 16-18; R. p. 216, lines 24-25.

The State cited the following reasons the compact disc was relevant: (1) to connect the petitioner to the XXX-XXX-4849 telephone number; (2) that the petitioner gave the unknown third party the passcode for the phone and claimed the phone was his; (3) that the petitioner spoke about explaining away his involvement; (4) that the petitioner stated he did not know why he was picked out of a photo lineup; (5) the unknown third party stated that the petitioner could have left a hair; (6) that the unknown third party stated that the petitioner could say that the petitioner took a cab from the petitioner's house to the third party's house; (7) that the petitioner and the third party were trying to get the petitioner's story straight; (8) the petitioner spoke about the circumstances of the crime; and (9) that the petitioner spoke about his cousin getting Mr. Brown to take back his photo identification. R. p. 211, lines 1-16; R. p. 215, line 23-p. 216, line

2. The State told the trial court that the most important reason to admit the compact disc was to connect the petitioner with the telephone number. R. p. 211, lines 16-18. Yet, when the trial court asked the State if it would accept the petitioner *stipulating that the detention center calls were made to the XXX-XXX-4849 rather than admitting the compact disc, the State refused.* R. p. 215, line 19-p. 216, line 3.

The trial court **refused to listen to the compact disc before the State published it to the jury.** R. p. 216, lines 4-13. Before publishing the phone call for the jury, the State introduced the detention center's phone logs for telephone calls made from the petitioner's inmate number. R. pp. 314-317. Sergeant Kevia Heyward, in charge of detention center phone calls, testified that petitioner called XXX-XXX-4849 sixty-three times during the time period from December 4, 2010 through January 4, 2011. R. p. 223, lines 9-13.

As to relevance, it must be stated that at the time these arguments were made, the State told the trial court that it intended to publish two phone calls to the jury. However, only one phone call was actually published to the jury. Lead counsel in the Court of Appeals argued in her final brief that: "It is also important to note that the phone call that was published to the jury was, for the most part, impossible to understand, despite repeatedly listening to the compact disc and playing it a slower pace. For the sake of addressing the State's argument as to relevancy only, the Petitioner will not contest that that the Petitioner was the person making the phone call from the detention center." Final brief at p. *.

The State's main objective in introducing the calls was to connect the petitioner to the phone number XXX-XXX-4849. R. p. 211, lines 16-18. However, this was accomplished with the phone log R. pp. 314-317 and Sergeant Heyward's testimony.

At the very beginning of the phone call, the petitioner states that his phone has been turned on, but the other party is not even picking up. State's Exhibit 33- C.D. of Jail Calls, time :16. When the third party was attempting to place a call to the petitioner's mother, the third party said he could not get the petitioner's phone to work and the petitioner gave the third party a code. State's Exhibit 33-C.D. of Jail Calls, time 2:07. Counsel in the Court of Appeals wrote that she was not able to hear anything on the tape "giving credence to State's argument that the petitioner attempted to explain away his involvement. Throughout the phone call, the petitioner adamantly denied his involvement." Final brief at 24. Petitioner stated that he did not know why he was picked out of a photo lineup. State's Exhibit 33- C.D. of Jail Calls, time 3:23. The State's argument claiming that the third party stated that the petitioner could have left a hair is misleading. What was actually said was: "[inaudible] find a piece of hair or shit like that [inaudible] on seat that's all it takes some boy come up with some shit like that [inaudible] that's why I take cab from my house to your house. Just like that." State's Exhibit 33- C.D. of Jail Calls, time 4:03. The State was incorrect in stating that the third party told the petitioner that the petitioner could say that the petitioner took a cab from the petitioner's house to the third party's house. Counsel in the Court of Appeals wrote that she did not hear "anything in this phone call on which the State could surmise that the petitioner and the third party were trying to get the petitioner's story straight or that the petitioner spoke about his cousin getting Mr. Brown to take back the photo identification." Final brief at 24. Perhaps this was in the second phone call that the State never published. "The only portions of the telephone call that could be interpreted as the petitioner speaking about the circumstances of the crime is when the petitioner says `they ain't even have no gun or nothing.' (State's Exhibit 33- C.D. of Jails Calls, time 6:58) and when the third party says `You gotta get to the bottom of this. You gotta see how the fuck you got cut

off.' (State's Exhibit 33- C.D. of Jail Calls, time 7:14). The petitioner replied, 'I know, that's why I'm waiting for my preliminary hearing.' (State's Exhibit 33- C.D. of Jail Calls, time 7:15). The phone call conversation mostly involved the petitioner's bond, preliminary hearing, getting the petitioner in contact with his mother, and getting the petitioner money for his detention center account." Final brief at 25.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. Also, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." Rule 404(a), SCRE. Also, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rules 404(b), SCRE.

Court of Appeals: The Court of Appeals in a one paragraph parenthetical held that "a trial court has wide discretion in ruling on Rule 403 objections," and refused to hold an abuse of discretion occurred here. App. 13.

Rehearing

On rehearing petitioner argued the Court of Appeals 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." App. 18.

> **The only relevancy the detention center phone call had was to connect the Petitioner 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 Petitioner 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 Petitioner made during his time in detention and the number Petitioner called. R. pp. 314-317.

Without a doubt, the jail phone call has an undue tendency to suggest a decision as to Petitioner's guilt on an improper basis. Petitioner and the unknown party **used profanity, racial slurs, and street vernacular throughout the phone call. Petitioner 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 petitioner replied in the affirmative (State's Exhibit 33- C.D. of jail calls, time 13:57). **The phone call paints Petitioner 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,'" *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.

App. 18-20. (emphasis added). Rehearing was denied. App. 36-37.

As stated, there are several portions of the telephone call that are unfairly prejudicial and present inadmissible evidence of the petitioner's character to the jury. As counsel argued in the Court of Appeals: "These portions are, for the most part, clear and easily audible. At the very beginning of the published phone call, the petitioner stated: `My nigger, my nigger, my dog, my mother fucking nigger, my dog.' The petitioner also asked the third party: `Do you know what song popped up in my head?' The petitioner proceeds to sing the following words to the third party: `And I've been here before. And I told myself I wasn't gonna come back here no more.' When talking about the petitioner getting a bond on his current charges, the third party stated: `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 petitioner replied in the affirmative and the third party responded: `[Inaudible] good ass lawyer.' (State's Exhibit 33- C.D. of jail calls, time 13:57). Final brief at 26.

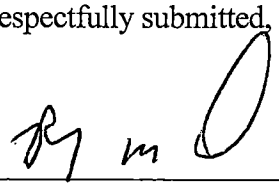
The danger that the jury would consider the petitioner being in jail before, having just come off bond, having similar charges "back-to-back", and the use of racial slurs and curse words, substantially outweighs the little probative value of the information coming from the actual *content* of the phone call that was published for the jury. The probative value of the phone call is to link the petitioner with the telephone number XXX-XXX-4849, which the State more than accomplished through Sgt. Heyward's testimony and the calls logs documented in State's Exhibit 34. R. pp. 314-317. The court's refusal to exercise discretion was an abuse thereof, and

the Court of Appeals' deference was not justified in this scenario. State v. Smith, 276 S.C. 494, 498, 280 S.E2d 200, 202 (1981)

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 27th day of July, 2015

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5313 (S.C. Ct. App. filed April 22, 2015)
11-GS-10-01793, 01795

THE STATE,

RESPONDENT,

V.

RAHEEM D. KING,

PETITIONER

APPELLATE CASE NO. 2015-001278

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 Deborah R.J. Shupe., Esquire, and the S.C. Court of Appeals this 27th day of July, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of July, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022