

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Roger M. Young, Circuit Court Judge

RECEIVED

AUG 10 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DONTE SAMAR BROWN,

APPELLANT

APPELLATE CASE NO. 2014-001082

FINAL BRIEF OF APPELLANT

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The trial judge erred by admitting evidence recovered from 318 Swamp Fox Lane, pursuant to a defective search warrant, where the original search warrant did not have a return attached, one copy of the search warrant had an unsigned return attached, and another copy of the search warrant had a signed return attached, but no time of execution written on the return. 16

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial judge erred by admitting the GPS search records for co-defendant Christopher Wilson's electronic monitoring device, under the business records exception, to coordinate calls made by Appellant from Wilson's cell phone at the time of the robbery, where there was no foundation as to the accuracy of the electronic monitoring device, the process by which the GPS data from the device is stored, and the trustworthiness of the GPS records.

II. Whether the trial judge erred by admitting evidence recovered from 318 Swamp Fox Lane, pursuant to a defective search warrant, where the original search warrant did not have a return attached, one copy of the search warrant had an unsigned return attached, and another copy of the search warrant had a signed return attached, but no time of execution written on the return.

STATEMENT OF THE CASE

On July 18, 2012, a Berkeley County Grand Jury indicted Appellant for three counts of armed robbery, five counts of kidnapping, attempted murder, criminal conspiracy, possession of a weapon during a violent crime, and burglary, second degree. R. 739-762. All twelve indictments are from a single incident. R. 739-762. The matter proceeded to a jury trial before the Honorable Roger M. Young, Sr. on May 5, 2014. R. 1. Debra Littlejohn and David Schwacke represented Appellant. Colleen Taylor and Mason West represented the State. R. 1.

On May 8, 2014, the jury found Appellant guilty of each count of armed robbery and kidnapping. R. 713. Appellant was also found guilty of burglary and criminal conspiracy. R. 713. He was found not guilty of attempted murder and possession of a weapon during a violent crime. R. 713.

Judge Young sentenced Appellant to sixty years imprisonment. R. 722. Appellant appealed his convictions and sentence. This brief follows.

ARGUMENT

I. The trial judge erred by admitting the GPS search records for co-defendant Christopher Wilson's electronic monitoring device, under the business records exception, to coordinate calls made by Appellant from Wilson's cell phone at the time of the robbery, where there was no foundation as to the accuracy of the electronic monitoring device, the process by which the GPS data from the device is stored, and the trustworthiness of the GPS records.

Introduction

This case involved an armed robbery of the Zaxby's in Goose Creek, Berkeley County on December 23, 2011. One individual told police that Appellant had called her from Christopher Wilson's phone on the night of the robbery. Another individual told police that she picked up Appellant and Wilson across the street from the Zaxby's the night that it was robbed. Appellant and Wilson were soon developed as suspects. Police requested the GPS search records and cell phone records for Wilson from the night of the robbery. At trial, the State introduced the records to show that Wilson was at the Zaxby's during the time of the robbery and Appellant was with him and made calls from Wilson's phone.

Motion to Suppress Christopher Wilson's GPS Records

Prior to trial, defense counsel moved to suppress the GPS records for Christopher Wilson, Appellant's co-defendant. R. 85. The solicitor sought to introduce the records to show that Appellant was with Wilson and making calls from Wilson's cellphone during the time of the robbery. R. 86, lines 13 – 25. Counsel argued that GPS data can be obstructed

by “various things” and there must be testimony of the accuracy of the GPS technology. R. 88, line 18 – R. 89, line 1.

The solicitor argued that the GPS records were kept by the South Carolina Department of Probation, Pardon, and Parole as part of their normal business documents. The department’s agents had access to the server run by Omni Link, the company that runs the GPS. According to the solicitor, the department’s agents regularly go to Omni Link’s website to print records. R. 89, lines 6 – 13. The solicitor also claimed that Agent Steward Powell, Wilson’s probation agent and witness for the State, is trained in how to read a GPS report printout. R. 89, lines 17 – 24.

Defense counsel responded that “simply reading a report doesn’t qualify someone to testify as to the accuracy of it, which then would be . . . very prejudicial to [Appellant].” R. 90, line 24 – R. 91, lines 1 – 8. Counsel explained that the GPS is run by Omni Link, which created the GPS records, stored them on their server, and produced the software that allowed the company to perform those functions. R. 92, lines 11 – 13.

Over counsel’s objection, Judge Young admitted the GPS records into evidence under the business records exception to the rule against hearsay, Rule 803(6), SCRE. The judge stated that “GPS data pulled off the server is business records exception . . . and that the person who comes and testified that they’re someone who regularly has access to those records can come in and testify as to . . . what that data was that got pulled off.” R. 369, lines 4 – 10.

Facts at Trial

The State's case consisted of highly circumstantial evidence.

On the night of December 23, 2011, Jeffrey Taylor had just ended his evening shift at the Zaxby's in Goose Creek, Berkeley County. R. 221, line 17 – R. 222, line 11. His shift ended around 11:00 pm and he walked to his car to make some phone calls. R. 222, lines 10 – 15.

While sitting in his car, Taylor saw a light flashing and heard someone say “turn around.” R. 222, lines 16 – 19. He turned around to see three people walking towards the Zaxby's. R. 222, lines 20 – 23. He recognized one person as his co-worker, Ronnie, but could only see that the other two people had on black clothing. R. 222, line 24 - R. 223, line 6. One of them had a gun “poked” into Ronnie's side and was “pulling him back towards the restaurant.” R. 223, lines 7 – 20.

Taylor called 9-1-1 and stayed on the phone until the police responded to the scene. R. 223, lines 8 – 16. When officers arrived, he pointed out to police that the two men ran away into the woods behind the restaurant. R. 223, lines 8 – 16. Taylor also gave a statement stating that two men went into the restaurant and later ran out the back door into the woods. R. 227, lines 14 – 18. He could not identify the two men.

Gerlinda Williams was the assistant manager working at the Zaxby's on the night of December 23, 2011. R. 278, line 21 – R. 279, line 6. She was inside the manager's office completing her paperwork when a man with a knife walked into the office and told her to lie down on the floor. R. 286, lines 6 – 10. Then, a man with a gun walked into the office and told the man with the knife to go in the back of the restaurant. R. 286, lines 11 – 13.

While Williams was on the floor near the office, the man with the gun searched her pockets and shot her in the leg. R. 280, lines 20 – 21. She stated that the two men were wearing all black clothing and ski masks. R. 280, lines 3 – 5. The men took about \$3,800.00 during the robbery. R. 281, lines 19 – 21. Williams could not identify the men.

Sgt. Scott Clark with the Berkeley County Sheriff's Office K-9 Unit got a call from the Goose Creek police to assist with the investigation. R. 314, lines 9 – 11. The officers informed Sgt. Clark that two people were seen running across the highway into the Foxborough subdivision across from the Zaxby's. R. 314, lines 12 – 14. He started his dog at the entrance of Foxborough, which led him into the area of 318 Swamp Fox Lane. R. 314, line 9 – R. 319, line 23. He found money on the ground. R. 314, lines 2 – 23. However, neither Appellant's nor Wilson's DNA was found on the money.

Sgt. Clark returned to the restaurant with his dog and tracked a scent at the back of the building near the dumpsters where the two men were seen running away into the woods. R. 322, line 21 – R. 323, line 3. The dog picked up a black ski mask that was sitting on a tree and more money on the ground. R. 323, lines 3 – 11. Wilson's DNA was later found on the mask. R. 491, lines 1 – 14.

Wendy Myers, a crime scene investigator with the Goose Creek police department, recovered a .22 caliber shell casing inside of the Zaxby's near the "employees only" area. R. 339, line 20 – R. 340, line 6. Myers also located a projectile in the back of the restaurant near the office. R. 341, line 1 – R. 342, line 9. The shell casing was sent to SLED for ballistics testing. R. 344, line 22- R. 345, line 2. The casing matched the .22 caliber pistol that was later recovered from Wilson's residence. R. 480, lines 12 – 23.

Appellant's girlfriend, Marteeka Hamilton, stated that Appellant called her from Christopher Wilson's phone around midnight on December 23, 2011. R. 378, lines 4 – 12. Appellant told her that he needed her to pick him and Wilson up from the entrance of the Foxborough subdivision. R. 379, lines 10 – 20.

Cynthia Garrett told police that she had seen Appellant cleaning a gun in her house. R. 416, lines 22 – 23. She claimed that Appellant called her from Wilson's cell phone on December 23, 2011 around midnight. R. 420, lines 11 – 20. He asked Garrett to pick him up, but she refused. R. 420, line 21 – R. 421, line 21. Garrett also claimed that Appellant confessed to her about robbing the Zaxby's with Wilson. R. 423, lines 11 – 24. She said that Appellant had new clothes, shoes, and a cell phone. R. 424, lines 9 – 18. After her encounter with Appellant, Garrett went to the police. R. 426, lines 1 – 3.

Based on Garrett's information and Wilson's DNA on the mask, officers executed a search warrant for 318 Swamp Fox Lane in the Foxborough subdivision, Wilson's home. R. 491, lines 15 – 19. Appellant was located inside the home and was detained. R. 479, line 18 – R. 480, line 11.

Officers recovered a Ruger Mark II semi-automatic .22 caliber pistol inside of a suitcase, which was found outside near the garage. R. 480, lines 12 – 23. The pistol matched the shell casing recovered from the restaurant. R. 574, line 1 – R. 575, line 5. Appellant's DNA was not a conclusive match to the DNA found on the pistol. R. 608, line 16 – R. 611, line 10.

Over defense counsel's objection, Investigator Powell used the GPS records from Wilson's electronic monitoring device to coordinate his location with the phone calls that Appellant allegedly made from Wilson's phone to Marteeka Hamilton and Cynthia Garrett.

shortly after the robbery. R. 507 – 514. According to Powell, Wilson was at the Zaxby’s address and in the wooded area next to the restaurant during the time period of the robbery, 12:04 pm. R. 507 – 514.

Appellant chose to put the State to its burden of proof and did not offer a defense. Christopher Wilson pled guilty prior to trial and did not testify against Appellant.

Discussion

The trial judge erred by admitting the GPS records for Christopher Wilson’s electronic monitoring device under the business records exception to the rule against hearsay. There was no foundation laid as to the accuracy of the electronic monitoring device, the process by which the GPS data from the device is stored, and the trustworthiness of the GPS records.

The business records exception to the rule against hearsay provides that memoranda, reports, records, or data compilation, in any form, of acts, events, conditions, or diagnoses can be admissible at trial if they are (1) made at or near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) made and kept in the course of a regularly-conducted business activity; (4) identified by the custodian or qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Rule 803(6), SCRE.

This exception to the hearsay rule does not, however, “absolve the offering party from the usual requirements of authentication.” State v. Rich, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987). See also Stevens v. Allen, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999) (“Even under Rule 803(6), SCRE, a proper foundation must be laid for admittance of the evidence.”). The proponent of evidence that falls within the business records exception

must still meet the authentication requirement of Rule 901, SCRE. State v. Anderson, 386 S.C. 120, 128-29, 687 S.E.2d 35, 39 (2009).

Under Rule 901, SCRE, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Authentication of a process or system requires evidence that the process or system in question produces a result and that the result produced is accurate. Rule 901(b)(9), SCRE.

While Appellant knows of no South Carolina cases that directly address the foundational requirements for authenticating electronic monitoring records for admission as a business record, neighboring jurisdictions have addressed the issue.

In Ruise v. State, 43 So.3d 885 (Fla. Dist. Ct. App. 2010), the Florida District Court of Appeal reviewed Ruise’s revocation of his probation and resulting sentence based on GPS data from his electronic monitoring device. In May 2008, Ruise was placed on sex offender probation and was required to wear an electronic monitoring device as a condition of his supervision. Ruise, 43 So.3d at 886. The state filed an affidavit of violation alleging that on June 28, 2009, Ruise was “away from his approved residence,” in violation of the condition that he remain confined to his home. Id. The only evidence that the state presented was the GPS data from the monitoring device. Id.

Ruise argued that the GPS data was inadmissible hearsay and should not have been admitted as evidence. Id. The state argued the data was admissible under the business records exception the rule against hearsay. Id. The District Court of Appeal explained that “[t]he state had the burden to lay the requisite foundation for admission of the GPS data under this hearsay exception.” Id. at 887. See also Jackson v. State, 877 So.2d 816, 816-17

(Fla. Dist. Ct. App. 2004) (“[C]omputer printouts, like business records, are admissible if the custodian or other qualified witness is available to testify as to the manner of preparation, reliability, and trustworthiness.”).

In Ruise, the state “presented testimony of an employee of the monitoring company who explained how the electronic monitoring system worked and how the GPS data from the offender’s monitoring device is compiled into a computer database that the probation officer can access to track the offender’s location within an 18-foot radius.” Id. In addition to testimony from the employee of the monitoring company, Ruise’s probation agent explained how he accessed the database and printed the reports. Id. The agent also testified how he had taken Ruise to various locations to ensure that the data from the monitoring device was accurate. Id.

The District Court of Appeal found that the state had laid the foundation necessary for having the GPS data admitted as a business record. Id. at 888.

North Carolina, our sister state, has also addressed laying the proper foundation to verify authenticity and trustworthiness of GPS tracking data. In State v. Jackson, 748 S.E.2d 50 (N.C. Ct. App. 2013), the North Carolina Court of Appeals considered whether the state properly authenticated GPS tracking evidence.

In that case, Jackson was indicted for simple assault, sexual battery, larceny, and second-degree sexual offense. Jackson, 748 S.E.2d at 52. After the victim informed the police of the sexual assault and gave a description of the suspect, the police received a tip that directed them to Jackson’s residence. Id. at 53. Police arrived at Jackson’s residence and observed that he wore an electronic monitoring device. Id. After the victim identified Jackson as her assailant, Jackson was arrested. Id.

At trial, the state introduced evidence from Jackson's electronic monitoring device to place him at the scene of the assault. Id. Sgt. Dave Schepperegell testified on behalf of the state concerning Jackson's monitoring device and the data produced by the device. Id. at 54. Sgt. Schepperegell testified that "he is the supervisor of the electronic monitoring unit of the Charlotte-Mecklenburg Police Department," and "he received training from the vendors of the electronic monitoring devices used" by the police department. Id.

Sgt. Schepperegell also "described the different components of the device," "testified about how the device operates using a combination of GPS signals and cell phone triangulations to track the location of the device," and explained how the "tracking data is then uploaded from the device to a secure server where it is stored." Id. Finally, Sgt. Schepperegell explained how "he can view the data stored on the secured server via a web service and produce reports based on the data and routinely does so in the normal course of business." Id.

On appeal, Jackson argued that the GPS tracking data was not properly authenticated. The Court disagreed and found that Sgt. Schepperegell's testimony "established a sufficient foundation of trustworthiness for the tracking evidence to be admitted as a business record." Id. at 56. See also State v. Taylor, 632 S.E.2d 218 (N.C. Ct. App. 2006) (Finding that printouts of text messages sent to and from a cell phone number assigned to victim's company-issued cell phone were properly authenticated where the strategic care specialist for the cell phone company testified as to the company's procedures for keeping records of text messages to and from customers and the manager of the cell phone business that issued phone to victim and retrieved the messages testified how he retrieved them.).

Jurisdictions beyond the southeast have considered the foundation requirements for introducing data derived from electronic monitoring devices. See State v. Kandutsch, 336 Wis.2d 478, 799 N.W.2d 865 (2011) (holding that the State authenticated and laid a proper foundation for a report from defendant's home electronic monitoring unit by providing testimony describing the electronic monitoring system, how the system works, the process by which the summary reports are generated, and that the process produces an accurate result); State v. Polanco, 69 Conn. App. 169, 184, 797 A.2d 523, 533 (Conn. App. Ct. 2002) (Although the evidence at issue involved a map generated using data from a GPS system that was maintained on a computer, the appeals court explained that "a court is not permitted to admit a computer generated exhibit into evidence unless the proffering party also (1) presents a witness whose knowledge of computers is sufficient to enable a direct and cross-examination concerning the process used to generate the exhibit and (2) lays a foundation, through that witness, sufficient to support a finding that the process and equipment involved in generating the exhibit were adequate for that purpose.").

Upon a review of the case law, appellate courts from other states that have considered and addressed the proper foundation to verify the authenticity of electronic monitoring device data approve testimony from witnesses with knowledge of how the device works, how data is derived from the device to be stored, and whether the data is accurate.

Because appellate courts in South Carolina require a proper foundation of authenticity for such evidence as fingerprints, a proper foundation as to the accuracy and trustworthiness of data from electronic monitoring devices should be required as well. See

State v. Anderson, 386 S.C.120, 687 S.E.2d 35 (2009); State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987).

Here, the GPS records for Christopher Wilson should not have been admitted as a business record. The State offered Agent Steward Powell as the custodian of the records. However, he did not explain how the GPS data is stored. Powell did not testify whether the electronic monitoring device was working properly or whether there had ever been problems with the device. Powell did not offer his experience or training working with electronic monitoring devices, nor did he explain how the device works.

In fact, Powell stated that GPS data is “recorded by a third party vendor, that (sic) supplied the software, hardware, [and] the actual ankle monitor, for the system.” R. 468, line 24 – R. 469, line 1. The only testimony he offered was that he and other agents had access to the third party’s server, Omni Link, and regularly printed records.

Investigator Nicholas Powell, who interpreted the data, did not testify as to his experience or training in interpreting GPS data. There was no testimony as to his knowledge of electronic monitoring devices and how they work no was there testimony about his familiarity with Wilson’s device. He merely read from the report.

There was no preliminary showing that the GPS data introduced against Appellant was accurate and trustworthy. There was no evidence describing the process by which the data was stored and transmitted. Even if the GPS records qualify as a business record, they were not properly authenticated, and therefore, should not have been admitted. Rule 901, SCRE.

II. The trial judge erred by admitting evidence recovered from 318 Swamp Fox Lane, pursuant to a search warrant, where the original search warrant did not have a return attached, one copy of the search warrant had an unsigned return attached, and another copy of the search warrant had a signed return, but no time of execution written on the return.

Motion to Suppress the Search Warrant for 318 Swamp Fox Lane

Prior to trial, defense counsel moved to suppress evidence recovered from Christopher Wilson's residence of 318 Swamp Fox Lane. Counsel argued that the form of the search warrant was defective under S.C. Code Ann. §17-13-140 (1976). The solicitor presented the original search warrant signed by the magistrate, however, there was no return attached to the original. R. 358, lines 3 – 13; R. 246. Court's Ex. 9. The solicitor also presented a copy of the search warrant with a signed return attached, but no time of execution on the return. R. 358, lines 3 – 13; R. 235. Court's Ex. 2. Finally, the solicitor presented a third copy of the search warrant with a return attached which contained a time of execution, but no signature. R. 358, lines 3 – 13; R.235. Court's Ex. 3.

Defense counsel argued that the best evidence rule required the original of each part of the search warrant, including the return. R. 358, lines 18 – 24. Because the original warrant had no return attached, it did not comply with the statute and, therefore, should be excluded along with any evidence recovered pursuant to the search warrant. R. 359, lines 11 – 16. Counsel argued that Appellant was prejudiced because, without having all parts of the original search warrant, he did not know whether it had been executed within ten days as proscribed by section 17-13-140. R. 364, lines 11 – 16. Counsel further explained that "we really don't know what's written on that original search warrant... [g]iven that No. 2 and 3

are different, and not just by an omission of a signature, because that time on No. 3 is darkened in, like, it looks like it's written hard." R. 362, lines 8 – 15.

Judge Young did not agree with counsel that Appellant was prejudiced by not having the original return attached to the original warrant and found that the State had complied with section 17-13-140 by providing copies of a return.

Discussion

The trial judge erred in admitting evidence recovered from 318 Swamp Fox Lane, pursuant to a search warrant. The original search warrant did not have a return attached, one copy of the search warrant had an unsigned return attached, and another copy of the search warrant had a signed return, but no time of execution written on the return.

Under S.C. Code Ann. §17-13-140, a valid search warrant must have the person or place to be searched, a description of the property to be recovered, and sworn affidavit establishing the grounds for the warrant, a magistrate's signature, a signed return attached, and must be executed within ten days after the warrant is dated. The State's failure to comply with the execution and return requirements of the statute are grounds for having the warrant excluded. State v. Weaver, 361 S.C. 73, 79-80, 602 S.E.2d 786, 789 (Ct. App. 2004).

A defendant must show prejudice from the State's non-compliance. State v. Mollison, 319 S.C. 41, 47, 459 S.E.2d 88, 92 (Ct. App. 1995). Further, if a search warrant is defective under the statute, each defendant against whom seized evidence is offered has standing to object to the warrant's validity. State v. McKnight, 291 S.C. 110, 114-15, 352 S.E.2d 471, 473-74 (1987).

This Court has excluded evidence discovered pursuant to a search warrant deemed defective under the statute. In State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995), the State failed to produce the original warrant and a signed, sworn return. This Court found that Freeman was prejudiced because “he was unable to review the return and match the items listed with the items that were analyzed and admitted into evidence.” Id. at 116-19, 459 S.E.2d at 871-72. This Court further explained that it “is certainly insufficient to elevate a copy of a search warrant with an unsworn, unsigned copy of the return to the status of an original warrant.” Id. at 118, 459 S.E.2d at 872.

Here, the case is no different. While the State presented the original search warrant, there was no original return. Each copy of the purported return that the State presented had an omission. Court’s exhibit two has a copy of a return with the signature of the executing officer; however, there is no date of execution. R. 235. Taking this copy alone, we have no idea on which date the residence of 318 Swamp Fox Lane was searched. While court’s exhibit three does have a return with a date of execution, there is no signature. R. 235. Taking this copy alone, we do not know who was the officer executing the warrant.

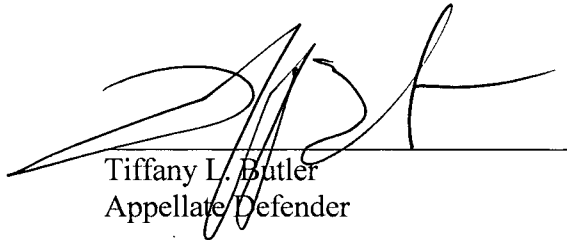
The State presented two defective, copies of the purported return and sought to elevate them “to the status of an original” return. See Freeman, 319 S.C. at 118, 459 S.E.2d at 872. To prove the content of the return, the State was required to present an original. Rule 1002, SCRE. Although the State attempted to present a duplicate return, there was **no** true duplicate. Each copy had a defect. Rule 1003, SCRE. Two defective copies call the contents of the original return into question. Appellant had no knowledge of what was in the originally return nor did he know whether the search warrant was executed within the ten days as required by section 17-13-140.

It was unfair for the trial judge to admit two defective copies as representing an original return, which prejudiced Appellant. Rule 1003, SCRE. The solicitor took full advantage of the improperly seized gun in closing argument, arguing that Appellant “was not being excluded on the DNA on the gun,” which was evidence of his guilt. R. 669.

CONCLUSION

For the reasons argued, Appellant Donte Brown respectfully requests this Court to reverse his convictions and sentence and remand this case to the lower court for a new trial.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

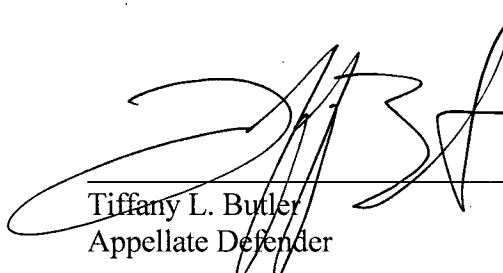
ATTORNEY FOR APPELLANT

This 10th day of August, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 10, 2015


Tiffany L. Butler
Appellate Defender

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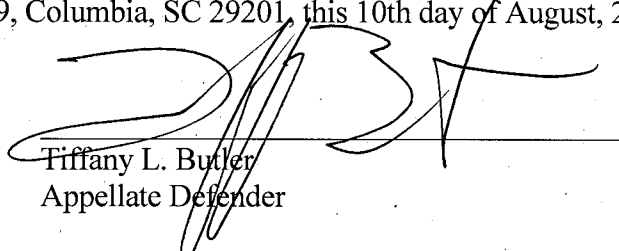
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APPELLANT

APPELLATE CASE NO. 2014-001082

CERTIFICATE OF SERVICE

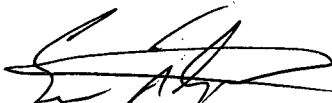
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of August, 2015.



Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of August, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.