STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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SC Court of Appeals

Certiorari to Charleston County

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

Opinion No. 5355 (S.C. Ct. App. filed Sept. 23, 2015)

12-GS-10-07545

THE STATE, RESPONDENT,

V.

LAMAR SEQUAN BROWN, PETITIONER

APPELLATE CASE NO. 2013-000725

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

INDEX 1

CERTIFICATE OF COUNSEL 2

QUESTION PRESENTED 3

STATEMENT OF THE CASE 4

ARGUMENT 5

CONCLUSION 11

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 19, 2015.

QUESTION PRESENTED

Whether the Court of Appeals erred in affirming petitioner's conviction where the circuit court admitted evidence gleaned from a warrantless search of the contents of petitioner's code-locked cell phone which violated the Fourth Amendment and the South Carolina Constitution?

STATEMENT OF THE CASE

On November 13, 2012, a Charleston County grand jury indicted petitioner Lamar Sequan Brown for first degree burglary. R 395. On March 6, 2013, petitioner was tried before the Honorable J.C. Nicholson, Jr. and a jury. R. 1. Kelly Ann Flynn and Chad Simpson of the Ninth Circuit Solicitor's Office represented the State. R 2. Victoria Anderson and Lori Proctor represented petitioner. R. 2. The jury convicted petitioner. R. 372, ll. 14 – 18. Judge Nicholson sentenced petitioner to eighteen years' imprisonment. R. 387, ll. 17 – 20. On March 14, 2013, petitioner filed a motion for a new trial. R. 390. On March 22, 2013, Judge Nicholson denied the motion without a hearing. R. 393.

A panel of the Court of Appeals consisting of Judges Thomas, Konduros, and Geathers heard oral argument on petitioner's appeal on May 5, 2015. App. 1. On September 23, 2015, the Court of Appeals issued a published opinion affirming petitioner's conviction. App. 1. State v. Brown, 414 S.C. 14, 776 S.E.2d 917 (Ct. App. 2015). Judge Thomas authored the majority opinion. App. 1. Judge Konduros dissented. App. 13. On October 19, 2015, the court denied the petition for rehearing. App. 22. This petition for certiorari now follows.

ARGUMENT

The Court of Appeals erred in affirming petitioner's conviction where the circuit court admitted evidence gleaned from a warrantless search of the contents of petitioner's code-locked cell phone which violated the Fourth Amendment and the South Carolina Constitution.

Reasons for Granting Certiorari

Nearly every consideration governing review of decisions by the Court of Appeals exists in this case. Rule 242(b), SCACR. Petitioner's case includes a substantial federal and state constitutional issue—the right to privacy in a cell phone. Rule 242(b)(4), SCACR. The opinion below contains a dissent. Rule 242(b)(2), SCACR. As recognized by the dissent, the majority's opinion is in direct conflict with the United States Supreme Court's decision in Riley v. California, 134 S.C. 2473 (2014). Rule 242(b)(5), SCACR. See App. 15 (Konduros, J., dissenting) ("The Court in Riley made clear its holding 'is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, *even* when a cell phone is seized incident to arrest.'"). Furthermore, this case contains a novel question of law because this Court has yet to interpret the Fourth Amendment under Riley or the South Carolina Constitution as it would be applied to the contents of a citizen's cell phone. Rule 242(b), SCACR. This Court should grant certiorari to correct the error below and align South Carolina's jurisprudence on cell phones with that of the United States Supreme Court.

Factual Background

The facts of this case are simple. On December 22, 2011, the resident of a condominium returned from an evening on the town to find his apartment burglarized. R. 102, l. 24 – 106, l. 18. His bedroom window was broken. R. 104, ll. 18 – 20. On the floor of his bedroom he found an unfamiliar cell phone. R. 104, l. 11 – 105, l. 11. When the police arrived, he gave the cell phone to

them. R. 105, ll. 18 – 19. The police did not find fingerprints or any other physical evidence at the scene. R. 143, l. 22 – 146, l. 18. The police admitted the cell phone was "the only connection to whoever may or may not have been in that apartment." R. 39, ll. 1 – 3.

Detective Jordan Lester was assigned the case. R. 33, l. 24 – 34, l. 1. Five days after the burglary, Detective Lester opened the phone and guessed the code (1-2-3-4) to unlock its contents. R. 38, ll. 19 – 21. R. 34, ll. 13 – 18. Detective Lester did not get a search warrant before examining the data contained in the cell phone. R. 35, ll. 14 – 16.

Using the information in the phone, Detective Lester developed petitioner Lamar Sequan Brown ("Brown") as a suspect. R. 34, l. 13 – 35, l. 19. R. 37, l. 23 – 38, l. 4. Detective Lester candidly admitted that without searching the phone's data, he would not have been able to determine its owner. R. 39, ll. 17 – 23. Another officer interviewed Brown who admitted the phone was his. R. 189, ll. 18 – 22. Brown told the police he lost the phone the day after the burglary. R. 182, ll. 18 – 25. He denied committing the robbery. R. 183, ll. 9 – 25.

When Brown moved to suppress any evidence gleaned from the warrantless search of Brown's phone, the State only argued that Brown lost any expectation of privacy in the phone because it was abandoned. R. 23, l. 15 – 30, l. 6. Judge Nicholson held that Brown had an expectation of privacy in the phone because of his privacy code. R. 89, ll. 17 – 21. However, the trial judge ultimately held that Brown lost his any constitutional protections in the phone because it "was either lost or abandoned."[1] R. 89, l. 17 – 90, l. 5.

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[1] Brown renewed his pretrial suppression motion when the phone was entered into evidence, when Detective Lester testified about his search of the phone's data, and again in his motion for a new trial. R. 124, ll. 6 – 21. R. 237, l. 10 – 238, l. 3. R. 390.

The Court of Appeals' Decision

The majority decision of the Court of Appeals agreed with the trial judge that Brown abandoned his expectation of privacy in the phone. App. 12. The majority stated that Riley recognized that searches of modern cell phones are categorically different than searches of other items. App. 5. Citing Riley, the majority stated that "the immense storage capacity of modern cell phones presents privacy concerns that have not arisen in searches of other physical items." App. 5-6. Despite this recognition, the majority then treated Brown's cell phone as just another physical container. The cases cited by the majority involved a cigarette package (United States v. Robinson, 414 U.S. 218 (1973)), a briefcase (United States v. Oswald, 783 F.2d 663 (6th Cir. 1986)), a car (Wilson v. State, 966 N.E.2d 1259 (Ind. Ct. App. 2012)), and a desk and file cabinets (State v. Smith, 636 A.2d 1097 (N.J. Super. Ct. Law Div. 1990)). The principal case relied upon by the majority involved a cell phone, but did not involve a cell phone's data. App. 9, *citing* People v. Daggs, 34 Cal. Rptr.3d 649 (Cal. Ct. App. 2005).

The dissent believed that these cases concerning locked physical containers were inapplicable after Riley. App. 13-15. Hewing close to Riley, the dissent stated, "While under these circumstances I would not find a reasonable expectation of privacy existed in the physical object of the phone, I believe a person preserves their reasonable expectation of privacy in its *contents*, which is precisely what provides a phone its significance." App. 16. Because the dissent correctly recognized the distinction between a physical phone and its contents, Judge Konduros concluded that reversal of Brown's conviction was required.

Discussion

This case turns on the critical distinction between a physical device and its data. Riley compels courts to focus on the data of a phone when conducting a Fourth Amendment analysis. Brown had a code lock on his cell phone and never relinquished his expectation of privacy in the data contained on the phone or that could be accessed from the phone. As Chief Justice Roberts wrote in Riley, cell phones "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." Riley at 2489. The storage capacity differentiates cell phones from other items. Id. "The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions. . . ." Id. The Court noted that "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." Id. at 2490.

Nothing in Riley justifies the court's limitation of its holding to searches incident to arrest or, in this case, an allegedly abandoned physical phone. The Court stated: "Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." Id. at 2493. The Court's own language in stating its holding creates a rule that the police must obtain a warrant before searching a phone. The Court could have limited its holding to the search incident to arrest situation, but explicitly chose not to do so. Reading such a limitation into Riley ignores Chief Justice Roberts' long discussion of the categorical difference of cell phones and the greater privacy concerns regarding their treatment by the police.

Whether the physical phone was abandoned did not absolve the police of the necessity of obtaining a warrant. Nothing in Riley or the facts of this case support that opinion. As noted in

Riley, the information on the phone is what is important, not the physical object itself. Even if the physical object is abandoned, it cannot be argued that the "intimate" and "mundane" details of Brown's life were abandoned for all the world to know.

The fact that Brown maintained a lock on his phone demonstrates that he did not want anyone to access his phone. Abandonment theory may be relevant when the object itself is what is abandoned. But when the item is more than a physical object—which is the entire thrust of the Riley opinion—abandonment theory does not apply, especially when a citizen has a lock code on his phone. See People v. Schutter, 249 P.3d 1123, 1125-26 (Colo. 2011) (holding that owner of phone left behind at gas station maintained an expectation of privacy and upholding suppression of warrantless search of phone's contents).

Furthermore, the express right of privacy in the South Carolina Constitution supports the idea that a citizen's personal data is still protected even if the physical phone is lost. S.C. Const. art. I, § 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).

The Fourth Circuit recently recognized the broad applicability of Riley when it held that citizens have an expectation of privacy in their historical cell site location information even though such information was given to and maintained by third parties. United States v. Graham, 796 F.3d 332 (4th Cir. 2015), rehearing *en banc* granted October 28, 2015. The court recognized the primacy of the data—not its physical location. If a person maintains an expectation of privacy in data knowingly held by third parties, then appellant certainly maintained an expectation of privacy in his data accessible by and contained in his code-locked cell phone.

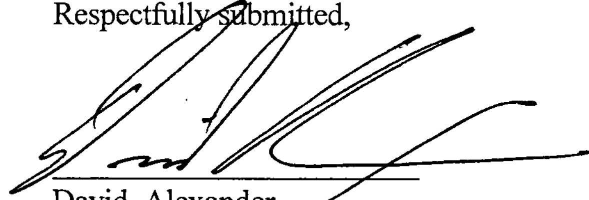
Simply put, the police needed a warrant to search Brown's phone. By placing a password on his phone, Brown maintained his expectation of privacy, even if it were lost, abandoned, or stolen. One of the primary reasons for placing a password on a phone is to prevent anyone but the owner from accessing its contents. A person with a password-protected phone would likely hope that any unauthorized person coming into possession of the phone would be unable to learn anything about its owner. Many reasonable people who have their phones lost or stolen would prefer to never recover the phone rather than have unknown persons access a device that contains a wealth of sensitive personal information. Hoping for the phone's destruction is more likely in this day when the contents are increasingly backed up to a computer elsewhere, such as a cloud. State v. Granville, 423 S.W.3d 399 (Tex. Crim. App. 2014).

It is not the device itself that a person wants to keep private—it is the data on the phone. The device is merely a key to unlock the content, which is sensitive and personal and protected by the state and federal constitutions. The Court of Appeals erred in its application of Riley. This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse petitioner's conviction.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER.

This 30th day of November, 2015

STATE OF SOUTH CAROLINA

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THE STATE, RESPONDENT,

V.

LAMAR SEQUAN BROWN, PETITIONER

APPELLATE CASE NO. 2013-000725

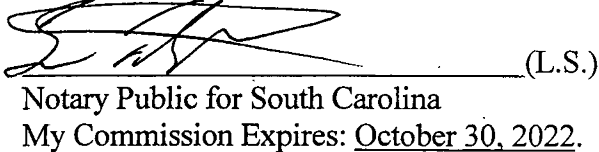
CERTIFICATE OF SERVICE

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 Salley W. Elliott, Esquire, Lamar Brown, #328957, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, and the S.C. Court of Appeals this 30th day of November, 2015.

David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of November, 2015.



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

SCCID

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November 30, 2015

Salley W. Elliott, Esquire
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

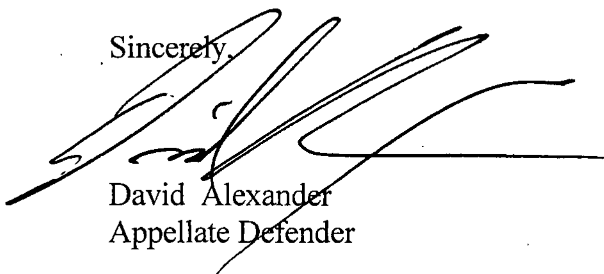
Re: The State v. Lamar Sequan Brown

Dear Salley:

Enclosed are two copies of the petition for writ of certiorari and the appendix in the above case that I filed with the S.C. Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,



David Alexander
Appellate Defender

DAA/lmv

Enclosures

cc: Court of Appeals