ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN BROWN,

APPELLANT

APPELLATE CASE NO. 2014-001554

ANDERS BRIEF OF APPELLANT

LARA M. CAUDY
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by denying Appellant's motion to suppress the photographs and videos found on his cellular telephone where law enforcement seized the telephone from his residence without a warrant and without consent in violation of the Fourth Amendment?

STATEMENT OF THE CASE

A Dorchester County Grand Jury indicted Appellant at the May 5, 2014 term of General Sessions for two counts of first degree criminal sexual conduct with a minor, and at the July 7, 2014 term for an additional count of first degree criminal sexual conduct with a minor. R. 453-458. Pretrial matters were heard before the Honorable Maité Murphy on June 3-4, 2014. R. 1. Appellant's case was ultimately called to trial on July 14, 2014 before Judge Murphy and a jury. R. 109. Assistant Solicitors Glenn Justis and Kyle Ward represented the state, and John Loy represented Appellant. R. 1.

On July 16, 2014, the jury found Appellant guilty of all three counts of first degree criminal sexual conduct with a minor. R. 440, ll. 3-16. Judge Murphy sentenced him to life imprisonment. R. 450, l. 16 – 451, l. 7.

This appeal follows.

ARGUMENT

The court erred by denying Appellant's motion to suppress the photographs and videos found on his cellular telephone where law enforcement seized the telephone from his residence without a warrant and without consent in violation of the Fourth Amendment.

Relevant Facts

Appellant moved during the pretrial hearing on June 4, 2014 to suppress photographs and videos allegedly found on his cell phone since his phone was unlawfully seized without a warrant in violation of the Fourth Amendment. R. 66, l. 16 – 67, l. 4. Because law enforcement later obtained a warrant to search Appellant's cell phone, he only challenged the initial unlawful seizure of the phone from his home during his arrest.

Appellant testified during the suppression hearing that he was arrested and taken into custody by law enforcement sometime around 1:00 pm on the afternoon of July 28, 2013. R. 68, ll. 8-13. When the officers arrived at his residence, he was the only person home. R. 68, ll. 14-18. Appellant explained that he was sitting at the computer, which was to the immediate left of the front door, when he heard noises coming from the front porch. He "got up and opened the door and saw officers standing by the door." R. 69, ll. 2-5. Appellant said he recalled there were either five and six officers on the porch. However, when he opened the door he "didn't fully recognize them as police officers at first" because only one was wearing a uniform. Appellant closed the door for a few seconds and then reopened it and walked out onto the porch. R. 69, l. 19 – 70, l. 20. He "kind of winged [the door] so it would shut" behind him but it did not fully close. R. 70, ll. 21-24.

Once out on the porch, the officers identified themselves as Summerville Police and told Appellant he was under arrest. Appellant testified that he asked the officers "if we

could move into the house, just not to cause a scene for the neighbors." The officers complied and they moved into the house. R. 71, ll. 2-25. Appellant said he took three to four steps into the house and then the officers placed him under arrest with his hands handcuffed behind his back. R. 72, ll. 1-14.

After he was placed under arrest and read his Miranda rights, an officer asked Appellant where his cell phone was located. Appellant "motioned over to the back of the fish tank, where [his] phone was, about three or four feet away . . . and he [the officer] stepped over and grabbed it, and Detective Mosher identified or indicated at that point that that was the phone that . . . the alleged victim described or whatever." R. 73, l. 20 – 74, l. 13.

Appellant testified that none of the officers asked him for consent to search his home nor did they ask for permission to take custody of any of his property. However, he explained that one of the officers asked him if he could take his cell phone, but before Appellant could object Detective Mosher interrupted and said, "Well, that's the phone that's in question. We're taking it." R. 75, ll. 1-11.

After Appellant was arrested, he was taken to the Summerville Police Department and later booked at the local detention center. R. 74, ll. 21-25.

The testimony of the two law enforcement officers who testified during the suppression hearing differed from Appellant's testimony. Detective Jason Mosher of the Summerville Police Department testified that he went to Appellant's residence to attempt to serve arrest warrants on him. According to Mosher, there were three other officers who responded to the home to assist: Detective Gebhardt, Sergeant Jones, and PFC Terranova. Mosher claimed he and Sergeant Jones, who was in uniform, approached the front door

while Detective Gebhardt and PFC Terrnova went around to the sides of the home in case Appellant decided to flee. Mosher said he knocked on the front door and when Appellant answered, he identified himself as law enforcement and asked Appellant to step outside. However, Appellant asked if they would come inside instead "because he didn't want to air his business outside." After the officers stepped inside, Mosher placed Appellant under arrest and read him his Miranda rights.

Mosher claimed that Appellant had his cell phone in his hand when the officers arrived and that when Mosher told Appellant he was under arrest, Appellant placed his phone down on the computer stand that was right next to the front door. Mosher testified, "[P]rior to leaving I wanted to make sure that the residence was secured and that he [Appellant] had his property he wanted to take to the jail with him, so I did ask him if he wanted to take his cell phone and keys with him. At that point he said yes. He had his wallet on him, so we collected the cell phone and keys off the computer stand and took it at his request." R. 80, l. 1 – 81, l. 13. PFC Terranova then transported Appellant to the police department in his patrol vehicle.

On cross-examination, Mosher explained that Appellant was arrested the day after his niece claimed the alleged sexual assault occurred and within hours of her being interviewed and examined at the hospital. Mosher said he interviewed Appellant's niece and daughter who both gave statements that provided him with probable cause to seek arrest warrants for Appellant. Both children told Mosher that Appellant had used a telephone to take pictures and videos during the alleged sexual assault. R. 82, l. 8 – 83, l. 13. Mosher admitted he believed Appellant's cell phone might contain "some pretty strong evidence" that would help the investigation. R. 83, ll. 14-19. Despite this information, when Mosher

went back to the police department to obtain arrest warrants for Appellant after speaking with the children, he did not prepare a search warrant for Appellant's residence. R. 83, l. 20 – 86, l. 22.

Mosher further explained that once Appellant arrived at the police department, they seized his cell phone and gave him a property receipt. The phone was secured by Detective Gebhardt until a search warrant was obtained and executed. R. 89, ll. 19-25; R. 93, ll. 8-19. Mosher admitted the officers did not follow the usual protocol in that they seized Appellant's telephone while he was being interviewed at the police department instead of later during the booking process where they usually take an arrestee's property and store it at the detention center until the individual is released. R. 90, l. 1 – 92, l. 22.

Detective Richard Gebhardt testified that he assisted Detective Mosher, Sergeant Jones, and PFC Terranova with serving Appellant with arrest warrants. He claimed Mosher and Jones went to the front door while he and PFC Terranova went around to the back of the residence to ensure Appellant did not escape. R. 95, l. 17 – 96, l. 5. Gebhardt maintained that he never went inside Appellant's residence. He was notified by radio that Appellant was in custody and when he came around to the front of the house, Appellant was being escorted out. He said Appellant asked them to "hurry up and get him out of there because he didn't want a scene." R. 96, ll. 6-12.

According to Gebhardt, Terranova drove Appellant to the police department where Gebhardt and Mosher attempted to interview him. Gebhardt claimed that after the interview, he seized Appellant's cell phone and gave him a property receipt. He said he secured the telephone in a locked desk drawer in his office until the following day when he obtained and executed a search warrant for the phone. R. 96, l. 13 – 98, l. 2.

After the testimony, defense counsel argued it was undisputed there was a warrantless seizure of Appellant's cell phone. He argued:

> Mr. Brown's [Appellant's] contention - - and a reasonable contention it appears to be - - is that he was in his home. That his phone was nearby on a fish tank . . . And that law enforcement, who have indicated they knew of this phone, **they knew of its potential importance in their investigation, they knew that it was alleged to contain photographic evidence which could either make their case, or at least go a long way toward making their case for them, saw the phone there on the table and said, 'That's it. Get it.'** And it makes all the sense in the world that it would have transpired that way, and that's his representation as far as what happened in the house that day.
>
> At that point **it is a warrantless seizure of private property** within the confines of his home, certainly where he's got the most protection. Constitution protects his privacy, his rights to privacy, his property, his personal effects probably to a greater extent than anywhere. I think a . . . warrantless seizure of his property in his home is invalid on its face.
>
> The State's story [is] that we knew about this phone. We knew it was central to our investigation. We knew we were having a serious crime that we were looking at. We've got Mr. Brown [Appellant] handcuffed. **There the phone is, dangling under our nose. The idea that we're going to walk away and leave it there appears to have just been more than they could stomach, they could do. Certainly they could have, if they had probable cause, they could have showed up with a search warrant**; and there's not any testimony that that would have been some huge impediment, that it would have been days or weeks or a long time, hours even, to obtain the search warrant . . . He could have come with a warrant, which would have been reasonable. He could have obtained an arrest warrant and sent these other folks over there to execute the arrest warrant, and even then I think he might have been allowed to have someone else stay at the house, make sure folks don't come and go, to preserve the evidence while he waits to see whether or not . . . a judge would sign a warrant giving him the right to go in and search and grab the property, etc. **But they just jumped the gun**.
>
> I mean, they went in the house. They arrested Mr. Brown. They looked around. They saw some evidence. It's not a bag of cocaine or a joint or anything like that. **It's not anything inherently criminal in and of itself.** It's just a cell phone. **Cell phones contain, for a lot of people, intensely personal information, private information**, whether its photographs or passwords or their banking records, etc., etc., and they are accorded some degree of protection. And certainly within his home, to have

> law enforcement in his home pick it up and leave with it I think is an illegal search or an illegal seizure.
>
> When they get to the police department, and then they take it out of the ordinary course of affairs . . . We haven't gone to a judge still, but we're going to on our own decide sua sponte to seize your property, take it outside the chain that property goes when folks are arrested in the ordinary course of affairs, and put it over here separate and apart from that, while we then go see if we can get a warrant, I think is singularly inappropriate. There are reasons why they have the protocol in place and why things are done the same way time after time.
>
> And, again, in this case **they got excited, they saw the phone, and they grabbed it. Whatever happened subsequent to that is a result of the original seizure. I think the original seizure is illegal**, and so I'd ask you to suppress the result of the search that Detective Gebhardt indicated was done later.

R. 100, l. 23 – 104, l. 4 (emphasis added).

The Court found the state "met its burden in proving that there was proper consent." R. 106, ll. 14-16. The judge noted that the officers testified Appellant "consented to bringing the telephone with him to the police department" and that the "Fourth Amendment does not require police officers to tell him that he can refuse to consent to take his phone." She also found it was reasonable for the officers to seize the telephone once they were at the police department and secure it until a search warrant was obtained. Therefore, the court denied Appellant's motion to suppress. R. 106, l. 12 – 107, l. 9.

During Appellant's trial, the state entered into evidence and published before the jury four photographs and four videos recovered from Appellant's cell phone. The videos allegedly showed Appellant sexually assaulting his then five-year-old daughter, Minor 1, and the photographs were allegedly of the vaginal and anal area of his then eight-year-old niece, Minor 2. R. 373, l. 19 – 376, l. 20.

Discussion

The court erred by denying Appellant's motion to suppress the photographs and videos found on his cell phone when law enforcement seized the phone from his residence without a warrant and without his consent in violation of his Fourth Amendment rights.

"Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" Riley v. California, 573 U.S. ____, ____, 134 S.Ct. 2473, 2494-95 (2014) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). "The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." Riley, 573 U.S. at ____, 134 S. Ct. at 2489. Modern cell phones have an "immense storage capacity" and can hold "millions of pages of text, thousands of pictures, or hundreds of videos." Id.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Cont. amend. IV. "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting Horton v. California, 496 U.S. 128, 133 (1990)) (internal quotation marks omitted). "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." Wright, 391 S.C. at 442, 706 S.E.2d at 327 (citing Mincey v. Arizona, 437 U.S. 385, 390 (1978)). "The burden is on the State to justify the warrantless search." State v. Bailey, 276 S.C. 32, 35, 274 S.E.2d 913, 915 (1981) (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971)).

Recognized exceptions to the warrant requirement include plain view, exigent circumstances, and consent. Wright, 391 S.C. at 442, 706 S.E.2d at 327 (citing State v. Beckham, 334 S.C. 302, 317, 513 S.E.2d 606, 613 (1999) and State v. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986)); Bailey, 276 S.C. at 35-36, 274 S.E.2d at 915 (citing State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978)).

"Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." Wright, 391 S.C. at 443, 706 S.E.2d at 327 (citing Beckham, 334 S.C. at 317, 513 S.E.2d at 613) (internal quotation marks omitted). "[T]he two elements needed to satisfy the plan view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities." Wright, 391 S.C. at 443, 706 S.E.2d at 327.

Here, the first element was clearly met since it was undisputed that Appellant invited the officers into his home to avoid drawing attention from his neighbors. However, the state failed to establish that the incriminating nature of the phone was immediately apparent. There is nothing unlawful about owning and possessing a cell phone. Therefore, the officers were not permitted to seize Appellant's phone without a warrant pursuant to this exception.

"The exigent circumstances doctrine provides an exception to the Fourth Amendment's protection against warrantless searches, but only where, from an objective standard, a compelling need for official action and no time to secure a warrant exist." State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004) (citing Brown, 289 S.C. at 587, 347 S.E.2d at 886). Here, Detective Mosher admitted he did have not have

an immediate need to seize Appellant's cell phone because no one else was present at the residence who could destroy the phone and Appellant was in custody so obviously he could not destroy it. R. 86, l. 23 – 87, l. 13. There was also evidence that Mosher could have obtained a search warrant for Appellant's residence at the same time he obtained the arrest warrants, but for whatever reason chose not to do so. Therefore, the state failed to prove the officers were permitted to seizure Appellant's phone without a warrant pursuant to this exception.

Moreover, Appellant maintained that he did not consent to the officers seizing his cell phone. He testified that the officers asked him where his cell phone was located and, when he pointed over to the fish tank, the officers seized it without his permission. This was clearly an unlawful warrantless seizure of Appellant's cell phone. Therefore the evidence found on the phone should have been suppressed. See Wong Sun v. United States, 371 U.S. 471, 484 (1963) (The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine.).

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
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THE STATE,

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V.

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APPELLATE CASE NO. 2014-001554

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jonathan Brown states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge Maite Murphy, which was held on July 14-16, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Jonathan Brown.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of May, 2015.

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APPELLATE CASE NO. 2014-001554

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed Indictments;
(2) Entire June 3-4, 2014 Transcript;
(3) Entire July 14, 2014 Transcript;
(4) Entire July 15-16, 2014 Transcript;
(5) State's Exhibit No. 17 (photograph);
(6) State's Exhibit No. 19 (photograph);
(7) State's Exhibit No. 20 (photograph).

I certify that this designation contains no matter which is irrelevant to this appeal.

May 19th, 2015

Lara M. Caudy

Lara M. Caudy
Appellate Defender

South Carolina Commission on Indigent Defense
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

May 19, 2015

Lara M. Caudy

Lara M. Caudy
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Jonathan Brown, #360660 at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 19th day of May, 2015.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of May, 2015.

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