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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM ANTHONY WALLACE,

APPELLANT

APPELLATE CASE NO. 2014-001786

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Did the trial judge err in finding that the exigent circumstances exception to the search warrant requirement applied in refusing to suppress cell phone records, including real time GPS locations as well as historical cell service location information obtained by law enforcement from a cell phone company without a search warrant or court order?

Appellant became a suspect hours after the crimes took place on June 28, 2012. That same day Special Agent Diego A. Nova with the South Carolina Law Enforcement State Surveillance and Intelligence Unit requested information from Appellant's cell phone provider T-Mobile. (R. 1198, State's Exhibit #86). Special Agent Nova did not seek a search warrant or court order or even a subpoena for the cell phone records. Instead, Special Agent Nova obtained the records by use of an "exigency request" which stated, "Suspect is armed and dangerous, has shot/killed one victim and struck female victim on the head with handgun. Escaped and is threatening the life of surviving victim and family[1]." (R. 1198, State's Exhibit #86). The request specifically states, "Please provide 48 hour subscriber, cell site, historical information and GPS Locator every 15 min for target number 803-404-8062 to dnova@sled.sc.gov." (R. 1198, State's Exhibit #86).

Appellant moved to suppress the records obtained from T-mobile pursuant to the "exigency request." (R. 191, lines 12-20; R. 199, lines 9-12; R. 204, line 25, - R. 205, lines 1-18). Appellant argued that the circumstances in the present case did not meet the exigent

[1] The record does not support the assertion of threats in the "exigency request." During pre-trial hearings Captain McDonald testified that when he took the search warrant to the apartment on Garner's Ferry Road, he had no information that any suspects had contacted Weston's family. (R. 118, lines 3-15). Evidence of threats being made toward Weston came from co-defendant Diggs who was arrested days after the exigency form was sent to T-Mobile. (R. 737-738). Additionally, as Appellant had not yet been arrested, he certainly had not escaped as alleged in the "exigency request."

circumstances exception to the requirement for a search warrant. (R. 212-213). The judge denied the motion to suppress. The judge **did not** rule, nor did the State argue that a search warrant was not needed because Appellant did not hold a legitimate expectation of privacy in the cell phone records. Instead, the judge ruled:

> As to the exigency request, I don't believe there is enough evidence in the record to determine that the exigency request was not appropriate. The testimony of a witness who says that some deputy told her what was going on doesn't fully encompass the exigency circumstances based upon the information contained in the exigency request and the lack of any evidence to the contrary as to what was in Agent Nova's mind at the time. The motion to suppress the exigency request is denied, and the motion to suppress the cell phone is denied.

(R. 231, lines 12-23).

The trial judge erred in finding that the exigent circumstances exception to the warrant requirement applied in refusing to suppress cell phone records, including real time GPS locations as well as historical cell service location information obtained by law enforcement from a cell phone company without a search warrant or court order. "In criminal cases, this Court only reviews errors of law." State v. Gamble, 405 S.C. 409, 415, 747 S.E.2d 784, 787 (2013) (citing State v. Jacobs, 393 S.C. 584, 586, 713 S.E.2d 621, 622 (2011)). "On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (citing State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459 (2002)). However, this Court reviews questions of law de novo. State v. Whitner, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) (citations omitted). The trial judge's refusal to suppress the cell records in

violation of Appellant's Fourth Amendment rights under both the State and Federal Constitutions is an error of law requiring reversal.

Respondent argues that the exigent circumstances exception to the warrant requirement applies because, ". . . Appellant remained at- large at the time the exigent request was made and by all indications was armed, a threat to law enforcement, and a threat to the community at large." (Initial Brief of Respondent p. 13). The circumstances in the present case do not constitute exigent circumstances justifying the warrantless search of the real time GPS locations or the historical cell site service locations. While there may be circumstances where the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment in regard to GPS location information, See Riley v. California, -- U.S.--, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), such circumstances are not present in Appellant's case. As to historical cell site service location information, however, it is difficult to imagine any circumstance that would justify a warrantless search based on the exigent circumstances exception.

Real Time GPS Location Information

The real time GPS location information obtained by law enforcement, without a warrant, was the functional equivalent of a GPS tracking device. In United States v. Jones, --U.S.--,132 S. Ct. 945, 949, 181 L. Ed. 2d 911 (2012) the Court wrote, "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" (footnote omitted). Respondent's reliance on State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct.App. 2015) reh'g denied (Mar. 19, 2015), in regard to the real time GPS location information is

misplaced because Drayton involved only historical cell service location information rather than GPS information. The historical cell service location information obtained in the present case is discussed below. The present case is also distinguished from Drayton by the fact that law enforcement in Drayton obtained search warrants for the historical cell service location information. The records in the present case were obtained by a faxed "exigent request."

If law enforcement had requested a search warrant for the GPS location information in order to locate and arrest Appellant, without any showing that Appellant was evading arrest or fleeing, the request should have been denied. As the Maryland District Court noted in In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel., 849 F. Supp. 2d 526, 585 (D. Md. 2011):

> There is no precedent for what the government seeks: the right to obtain location data without any demonstration of the subject's knowledge of, and attempt to avoid, an arrest warrant. While courts routinely authorize location data where there is a demonstration under Rule 41(c)(1) that a defendant is fleeing to avoid prosecution and a few courts have authorized other types of surveillance in aid of an arrest warrant under All Writs Act where diligent law enforcement techniques have failed or been frustrated, no court under any rubric has approved a warrant or order for location data on the simple showing of an outstanding arrest warrant and the possession of a cell phone by the subject of the arrest warrant. See, e.g., In the Matter of the Application of United States for an order: (1) Authorizing Use of a Pen Register and Trap and Trace Device, (2) Authorizing Release of Subscriber and Other Information, (3) Authorizing Disclosure of Location-Based Services, 727 F.Supp.2d 571, n. 22 (W.D.Tex.2010) (stating that, in a case in which the government seeks location data to track a person so that an arrest warrant may be executed, the warrant affidavit must demonstrate the existence of the arrest warrant and probable cause to believe that the phone is in the possession of the *fugitive*) (emphasis added); In the Matter of Application for an Order Authorizing the Installation and Use of a Pen Register, 439 F.Supp.2d 456 (denying government's application for an order authorizing access to prospective cell site information where the government failed to submit an affidavit

attesting to the facts in the application, including the defendant's fugitive status).

In the present case law enforcement conducted a warrantless search to obtain the GPS location information. Exigent circumstances did not exist in the present case to justify the warrantless search. The exigent circumstances doctrine provides an exception to the Fourth Amendments 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. Brown, 289 S.C. 581, 587, 347 S.E.2d 882, 886 (1986) (quoting Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)) (emphasis added). In discussing exigent circumstances in the context of a warrantless arrest inside a home the Court in Welsh v. Wisconsin, 466 U.S. 740, 749-50, 104 S. Ct. 2091, 2097-98, 80 L. Ed. 2d 732 (1984), wrote:

> Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," United States v. United States District Court, supra, 407 U.S., at 318, 92 S.Ct., at 2137, and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.

Included in the "few in number and carefully delineated" exceptions where the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment are: 1.) hot pursuit of a fleeing felon, United States v. Santana, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 2409-2410, 49 L.Ed.2d 300 (1976); 2.) destruction of evidence, Schmerber v. California, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 1835-1836, 16 L.Ed.2d 908(1966); and 3.) danger to police or to others inside or

outside a dwelling, Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1694, 109 L.Ed.2d 85 (1990).

First, there is no evidence that law enforcement did not have time to seek a search warrant for the cell phone records. The police were able to promptly secure a search warrant for the apartment on Garner's Ferry Road where two victims were located[2]. (R. 1040, lines 12-17). Respondent argues that, "The circumstances of Appellant's identification and apprehension undeniably satisfy the exigency requirement." (Brief of Respondent p. 12). Respondent then argues that, ". . . Appellant remained at- large at the time the exigent request was made and by all indications was armed, a threat to law enforcement, and a threat to the community at large." (Initial Brief of Respondent p. 13).

While Appellant was "at-large" while the police were attempting to locate and arrest him, they were not in hot pursuit. As discussed above, law enforcement had no information that Appellant was about to flee or was trying to evade arrest. Appellant was arrested, without incident, after leaving the Burlington Coat Factory on Bush River Road. (R. 1041, lines 7-16). There was no evidence that the warrantless search was needed to prevent the destruction of evidence.

While Appellant was suspected of being involved in a violent crime and police had an arrest warrant for Appellant, there was no evidence that he was a threat to law enforcement or the community. There was no evidence that Appellant remained armed. When Corporal Hayhurst was asked if, at the time of arrest, he knew whether the

[2] Arguably, the exigent circumstances exception to the warrant requirement would have applied to the search of the Garner's Ferry Road apartment because law enforcement reasonably believed persons within the apartment were in need of immediate aid. Mincy v. Arizona, 437 U.S. 385, 392, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978).

Appellant was armed or not, the Corporal answered, "No, Ma'am." (R. 355, lines 21-23). The warrantless search of Appellant's cell phone records constituted a violation of the Fourth Amendment. The State failed to meet its burden to justify the warrantless search pursuant to the exigent circumstances exception.

Historical Cell Service Location Information

In addition to the GPS location information, law enforcement also obtained historical cell service location information without a warrant. The historical cell service location information placed appellant near the scene of the crime. Respondent argues, relying on State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct.App. 2015), reh'g denied (Mar. 19, 2015), that Appellant had no expectation of privacy in the historical cell site location data obtained without a warrant from his cell phone. (Brief of Respondent p. 16). In Drayton the Court of Appeals wrote:

> Under our analysis of the cases interpreting the United States Fourth Amendment, we find Drayton did not have a legitimate expectation of privacy in his historical cell site location records. First, the Stored Communication Act requires only a showing of "specific and articulable facts" is necessary for the issuance of a search warrant. *See* 18 U.S.C. § 2703(d) (Supp.2014); see generally Elizabeth Elliott, United States v. Jones: The (Hopefully Temporary) Derailment of Cell–Site Location Information Protection, 15 Loy. J. Pub. Int. L. 1, 3 (2013) ("Currently under the Stored Communications Act., criminal investigators can obtain cell-site location data with only a showing of 'specific and articulable facts'." (quoting § 2703(d))).
>
> Second, the federal courts have found no expectation of privacy in historical data records. See United States v. Graham, 846 F.Supp.2d 384, 389–90 (D.Md.2012)(stating "[a] majority of courts ... have concluded that the acquisition of historical cell site location data pursuant to the Stored Communications Act's specific and articulable facts standard does not implicate the Fourth Amendment"). But see Tracey v. State, 152 So.3d 504, 515 (Fla.Sup.Ct.filed Oct. 16, 2014) (noting "as to 'historical' cell site location information, the federal

> courts are in some disagreement as to whether probable cause or simply specific and articulable facts are required for authorization to access such information").

411 S.C. at 547-48, 769 S.E.2d at 262. The finding by the Maryland District Court cited in Drayton, United States v. Graham, 846 F.Supp.2d 384, 389–90 (D.Md.2012), was reviewed by the Fourth Circuit Court of Appeals in United States v. Graham, No. 12-4659, 2015 WL 4637931, at *8 (4th Cir. Aug. 5, 2015). The Fourth Circuit wrote:

> We hold that the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical CSLI [cell site location information] for an extended period of time. Examination of a person's historical CSLI can enable the government to trace the movements of the cell phone and its user across public and private spaces and thereby discover the private activities and personal habits of the user. Cell phone users have an objectively reasonable expectation of privacy in this information. Its inspection by the government, therefore, requires a warrant, unless an established exception to the warrant requirement applies.

The Fourth Circuit found the privacy concerns with historical cell site location information were even greater than the privacy concerns addressed in Jones with regard to GPS monitoring writing, "The privacy interests affected by long-term GPS monitoring, as identified in Maynard and the Jones concurrences, apply with equal or greater force to historical CSLI for an extended time period. See Commonwealth v. Augustine, 4 N.E.3d 846, 861 (Mass.2014) ("CSLI implicates the same nature of privacy concerns as a GPS tracking device.")." United States v. Graham, No. 12-4659, 2015 WL 4637931, at *11 (4th Cir. Aug. 5, 2015). The Court noted that the cell phone was carried on the person rather than the GPS device in Jones that was attached to the automobile.

Other courts have come to similar conclusions. State v. Earls, 214 N.J. 564, 70 A.3d 630, 642 (N.J.2013) (reasonable expectation of privacy in location of cell phones);

Tracey v. State, 152 So.3d 504, 526 (Fla.2014) (objectively reasonable expectation of privacy in "location as signaled by one's cell phone"); In re Application of U.S. for an Order Authorizing Disclosure of Location Info. of a Specified Wireless Tel., 849 F.Supp.2d 526, 539 (D.Md.2011) ("reasonable expectation of privacy both in [subject's] location as revealed by real-time [CSLI] and in his movement where his location is subject to continuous tracking over an extended period of time, here thirty days"); In re Application of U.S. for an Order Authorizing the Release of Historical Cell–Site Info. (In re Application *(E.D.N.Y.)),* 809 F.Supp.2d 113, 120 (E.D.N.Y.2011) ("reasonable expectation of privacy in long-term cell-site-location records").

The Eleventh Circuit found a distinction between the GPS monitoring information and historical cell site location information finding, as the South Carolina Court of Appeals found in Drayton, no expectation of privacy in the later. See United States v. (Quartavious) Davis, 785 F.3d 498 (11th Cir.2015). The Fifth and Sixth Circuits reached a similar conclusion. See In re Application of U.S. for Historical Cell Site Data , 724 F.3d 600 (5th Cir.2013); United States v. Skinner, 690 F.3d 772 (6th cir. 2012). The present case is distinguished from the federal cases because in each of those cases the records were obtained pursuant to a court order. The orders in Davis and In re Application of U.S. for Historical Cell Site Data were issued pursuant to 18 U.S.C. § 2703(c) requiring a showing of specific and articulable facts showing that there are reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation. There was no court order in the present case. The records in Drayton were obtained by a search warrant. There was no search warrant in the present case. Based on the Fourth Circuit's ruling in Graham, this Court should find

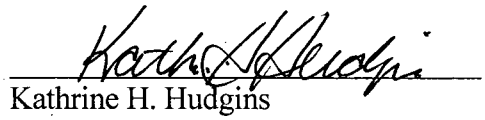
that a person has a reasonable expectation of privacy in historical cell site location information and require law enforcement to seek a search warrant in order to obtain these records.

In the present case Special Agent Nova circumvented the search warrant process, the court order process and even the subpoena process to obtain Appellant's cell phone records. The exigent circumstances exception to the warrant requirement does not apply to the historical cell site service locations. As to the real time GPS location information, there is no evidence that police did not have time to seek a search warrant and no evidence that Appellant was about to flee or was trying to evade arrest. The unlawfully seized records should have been suppressed at trial. The failure to suppress requires a new trial.

CONCLUSION

Based on the above argument and the argument contained in the inital brief, Appellant's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

This 7th day of October, 2015.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Caroline M. Scrantom, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of October, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 7th day of October, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022 .