

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Spartanburg County

R. Keith Kelly, Circuit Court Judge

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DEC 18 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ROBERT LEE MOORE,

APPELLANT

APPELLATE CASE NO. 2014-001669

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FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

1.

The court erred by refusing to suppress all evidence derived from the search of appellant's cell phone pursuant to Riley v. California, 134 S.Ct. 2473 (2014), since the cell phone was searched without a warrant after it was inadvertently left behind, and not abandoned. All of the evidence located during the search (warrantless and after the warrant) of appellant's cell phone was the fruit of the poisonous tree, and had to be suppressed.

2.

The court erred by refusing to suppress the evidence obtained as a result of the search warrant since the warrant was impermissibly granted based on a conclusory affidavit that did not establish probable cause for the issuance of the warrant.

### STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand Jury for the offense of attempted murder. R. 327. His case came on for trial on July 21, 2014, before the Honorable R. Keith Kelly, and a jury. Andrew Johnston represented appellant. Derrick Balsa was the deputy solicitor. R. 1.

On July 23, 2014, the jury found appellant guilty. R. 320, l. 25 – 321, l. 6. Judge Kelly sentenced appellant to thirty years' imprisonment. R. 322, ll. 5-6.

This appeal follows.

## ARGUMENT

1.

The court erred by refusing to suppress all evidence derived from the search of appellant's cell phone pursuant to *Riley v. California*, 134 S.Ct. 2473 (2014), since the cell phone was searched without a warrant after it was inadvertently left behind, and not abandoned. All of the evidence located during the search (warrantless and after the warrant) of appellant's cell phone was the fruit of the poisonous tree, and had to be suppressed.

### **Relevant facts**

Defense counsel Johnston moved to suppress all of the information derived from the search of appellant's cell phone, "an AT&T flip phone, which is attributed to the ownership of the defendant." Defense counsel told the judge the court would need to hear the testimony from the investigators who recovered it, and the other law enforcement personnel who were involved "in the forensic evaluation of the phone" before ruling. R. 2, ll. 7-19.

Assistant solicitor Balsa told the judge this case involved the shooting of the victim, thirty-four-year-old Travis Hall, on February 25, 2013 at a Taco Bell in Spartanburg. Three cell phones were found surrounding the injured victim in his car. Since money and drugs were also found in the vehicle, the police obviously suspected this case involved a drug deal gone badly, or a drug deal that was actually the result of a planned robbery that went awry. R. 3, l. 8 – 6, l. 11. Defense counsel cited *Riley v. California*, 134 S.Ct. 2473 (2014) in support of his motion to suppress the cell phone evidence. R. 6, l. 13 – 7, l. 15.

Balsa argued that the police discovered the cell phones, and thought they had a potential suspect. The police later got a search warrant after making "preliminary productive discoveries" from the warrantless search of the phone. However, Balsa

maintained a search warrant for the contents of the cell phone was never required because it had been “abandoned by the defendant.” R. 7, l. 16 -- 9, l. 6.

Defense counsel Johnston confirmed that appellant was claiming a privacy interest and an expectation of privacy in his cell phone. Johnston strongly disagreed that appellant had abandoned his cell phone. Johnston argued there was a major difference between forgetting one’s phone or negligently leaving it behind, and abandoning it. Even though the state had the burden of proof, as will be seen infra, the state was unable to state whether the cell phone had a secure password on it that law enforcement was able to get beyond, or whether the forensically “pulled” information was obtained in a less onerous manner. R. 8, l. 2 – 9, l. 14.

### **Suppression hearing**

Investigator Lindsey McGraw was the state’s first witness during the suppression hearing. McGraw testified that three cell phones were collected from the scene of the February 25, 2013 shooting at the Taco Bell in Spartanburg. “I was asked to perform a forensic examination of three cellular telephones that were found at the scene primarily to determine who owned the cell, the cell phones to determine ownership.” McGraw identified the phones as an Apple I-phone 3, an Apple I-phone 4, and a ZTE331 flip phone. R. 10, ll. 8-25.

The flip phone was the one at issue here. McGraw did a forensic examination of “the installed SIM card.” The card contained the call logs stored contacts “things of that nature.” R. 10, l. 22 – 11, l. 12. McGraw was able to recover the cell phone number assigned to the phone from his forensic investigation. He then asked other investigators to find out who the person matched up with the phone number. R. 12, l. 2 – 13, l. 3.

McGraw testified he was able to determine the cell phone number did not belong to the victim. Before he obtained a search warrant, McGraw said he found out the telephone number was 864-494-2573. He also recovered thirty-four contact entries, and he discovered three text messages on the cell phone. R. 12, l. 2 – 13, l. 3.

McGraw says the stored contact information allowed him to associate a name – appellant -- with a phone number. McGraw said after he obtained this information, the police got a search warrant and “I did a full forensic examination of the phone, processed it.” McGraw maintained he was unable to further recover contacts and images and pictures from the phone. R. 12, l. 2 – 15, l. 9.

On cross-examination, McGraw confirmed he got the phone number for the cell phone before the police obtained a search warrant. He confirmed the cell phone could send and receive text messages, and that typically the phone would have a contact name, phone number and “possibly their physical address and email address.” McGraw confirmed that the cell phone had a camera for photographs, and a record of all telephone calls made and received. R. 16, l. 1 – 17, l. 21.

McGraw testified that the search warrant was obtained the day after he initially searched the phone without a warrant. R. 17, l. 4 – 18, l. 20. The search warrant affidavit and return are all included in the record on appeal. R. 323. The detective on the search warrant was Tom Clark, and the warrant was dated February 26, 2013. Court’s Exhibit one. R. 323.

Detective Tom Clark was the state’s next witness at the suppression hearing. Clark testified he was originally contacted by Investigator Williams because multiple (three) cell

phones had been found in the vehicle, and Clark said the police determined that the victim himself had multiple cell phones. R. 19, l. 6 – 20, l. 16.

Clark confirmed that he was not the person who conducted the forensic examination on the telephone before a search warrant was obtained. He correctly said he assumed investigator Williams was the person who did the warrantless forensic examination. R. 20, l. 24 – 21, l. 18. Clark then read into the record his affidavit to obtain the search warrant.

Q. Tell me what you told Judge Willingham.

A. Told Judge Willingham that on February the 25<sup>th</sup> at approximately 14:30 hours deputy responded to the Spartanburg County – well, excuse me. With the Spartanburg County Sheriff's Office responded to 7680 Warren H. Abernathy Highway in reference to a shooting. Upon arrival they found the victim, Travis Hall, had been shot. Travis Hall was transported to Spartanburg Regional Medical Center.

Through further investigation and processing of the, processing of the vehicle, the victims AT&T ZTE model 7331 cell phone with serial number 322213371843 was found inside the vehicle. Through further investigation it was found that this phone number **assigned to this phone was 864-494-2573**. Through further investigation it was found that this phone *did not belong to the victim. Through further investigation it was found that this phone belonged to Robert Lee Moore*, that a search warrant is needed for the furtherance of this investigation to obtain information from the phone **that can either implicate or clear Robert Lee Moore from any involvement in this incident**.

R. 21, l. 19 – 22, l. 13. (emphasis added).

Judge Willingham did not have any other information to base his decision about the search warrant on other than that above. R. 22, ll. 14-19. Clark also confirmed that the police used the information from the warrantless search of the cell phone to obtain the search warrant. R. 23, ll. 3-19.

Clark agreed there was **not anything** in the search warrant affidavit which stated why the police thought appellant may or may not "have shot the victim." R.

23, l. 20 – 24, l. 4. Clark also said he was only told that the cell phone was found “in the vehicle under or near the victim and **that was all the information that I was given** other than the victim, according to the investigation, had several cell phones.” R. 24, ll. 10-17. (emphasis added).

On re-cross examination, Clark said he did not recall what he told the judge about **how the police knew** that cell phone was owned by appellant. He confirmed that the affidavit also did not provide even that most basic information to the magistrate. R. 25, l. 12 – 26, l. 3.

Investigator Lorine Williams was the lead investigator on this case. R. 26, ll. 6-19. Williams confirmed that several cell phones were found in the victim’s automobile. The wounded victim had been removed from the scene by the time he arrived at the Taco Bell and observed the two cell phones in the car. Williams said the third cell phone seized was not in plain view. Two of the cell phones “are in the driver compartment floorboard closer to the door.” R. 27, l. 3 – 28, l. 1.

Williams testified --and apparently found significance in the fact -- that no one at the scene was claiming ownership of any of the cell phones. Williams said that although he did not have any documentation, he seemed to remember that McGraw had told them that “he had gotten a phone number from the flip phone I believe it was. That number was run through our data system at the sheriff’s office. It was associated to Mr. Moore through that system as an “known phone number that he had used or given either in a previous incident or when he was booked in at the jail or something of that nature. It was associated to him. At that point we realized the phone did not belong to the victim. Therefore, the exam was stopped in

order to obtain a search warrant before any further forensic testing was done on the phone.” R. 28, l. 23 – 29, l. 14.

Williams said he could not testify whether or not the cell phone was “password protected,” and he added that Investigator McGraw’s report was no help on the password protected subject either. R. 29, l. 21 – 30, l. 1.

As for “abandonment,” Williams confirmed he had never seen appellant in possession of the cell phone nor had he seen appellant relinquish possession of the phone. Williams confirmed he had chased suspects who had discarded items during the chase. R. 30, ll. 2-17. Williams said he had never seen appellant throw the phone down or throw it away. “I never saw Mr. Moore at the scene.” Williams said he did not know why appellant left his cell phone but he opined it was apparent there had been a struggle at the Taco Bell scene, and he said **he was sure the cell phone was left behind by mistake.** R. 30, l. 1 – 32, l. 15. Another law enforcement officer, Forensic agent Robert Talanges, would take issue with the statement that it was apparent there had been a struggle inside the car. “I can’t say there was a struggle.” R. 101, ll. 9-17. Williams confirmed that he was aware of other situations where a person may have forgotten or misplaced their cell phone. R. 32, l. 18 – 33, l. 3.

### **Argument of counsel**

Defense counsel Johnston again argued pursuant to Riley v. California that the fruits of the search of the cell phone had to be suppressed. Johnston distinguished State v. DuPree, 319 S.C. 454, 462 S.E.2d 279 (1995) where the defendant had abandoned his property for Fourth Amendment purposes by throwing

the crack cocaine to the floor during the search of his mouth. Johnston reminded the judge that “Detective Williams summed it up very nicely when he said I have no doubt that he [appellant] *forgot it* and left it behind.” Johnston argued unintentionally forgetting or leaving behind a cell phone did not mean that it was abandoned. R. 33, l. 24 – 35, l. 9.

Johnston added there was a large amount of money and drugs were found in the victim’s car, and this was not a situation where a person would have voluntarily abandoned his cell phone. Johnston argued there was nothing in the search warrant to indicate appellant had anything to do with the shooting, and he said the warrant was conclusory, and did not provide probable cause for the issuance of a search warrant. Johnston noted the search warrant went so far as to state the search of the cell phone may actually “clear” appellant. This issue is discussed infra in issue two. R. 37, l. 4 – 38, l. 11.

Johnston argued Riley v. California was on point about the extraordinarily large amount of private information that was stored on an individual’s cell phone. The cell phones provided “potentially all of the person’s associates, their addresses, their telephone numbers, email addresses, anything else a person might decide to include with their contact information.” The cell phones also contained photographs and other personal data. R. 37, l. 4 – 38, l. 11.

Defense counsel repeated that the cell phone had not been abandoned, and that there was evidence of a clear intention to abandon the phone. Counsel argued that all the information obtained from the cell phone before and after the search warrant had to be suppressed. R. 38, ll. 12-25.

The solicitor said he had not anticipated the argument that the phone was mistakenly left behind rather than abandoned. The solicitor insisted the search was reasonable, and that the phone had been abandoned regardless. The solicitor also argued that the Riley v. California did not prevent the judge from ruling the telephone had simply been abandoned, and that appellant had no expectation of privacy in the cell phone once it “was left behind.” R. 39, l. 2 – 41, l. 3.

Defense counsel in his colloquy with the court said that the victim was apparently known to carry two cell phones but that three phones were found. Johnston also argued that even if the police thought the phone belonged to the victim they would still have needed to obtain a search warrant to obtain the victim’s information since it was known these cell phones contain private communications, and information that is inculpatory. For that reason, a search warrant was required for the personal information on the cell phone. R. 43, l. 4 – 44, l. 23. The judge deferred ruling. R. 44, ll. 22 -23.

### **Ruling**

Following jury selection, the judge denied appellant’s motion to suppress any and all of the information seized from appellant’s cell phone. R. 51, ll. 9-14. The judge ruled that appellant’s cell phone was “abandoned property.” The judge said he had read cases that property can “be abandoned even momentarily.” The judge reasoned the “property” had been abandoned. The judge ruled he would not suppress any information derived from the search of the cell phone, and accepted, as argued in issue two, that an alleged “benign” reason to search a cell phone was permissible. R. 51, l. 9 – 52, l. 24.

Defense counsel quickly tried to correct the judge about the prejudice of the information that law enforcement intended to use from the search of appellant's cell phone. Counsel correctly predicted the state was going to show a record of phone calls between appellant and the victim's phone that were in close proximity to the incident. He requested that the judge reconsider his ruling. The judge said he was not changing his ruling: "I have wrestled with that a little bit, Mr. Johnston." The judge and Johnston had a further discussion of Riley v. California, and Johnston argued that the holding in Riley v. California did not "hang on whether or not the person had been arrested." R. 53, l. – 54, l. 11. The judge refused to alter his ruling denying suppression.

#### **Trial evidence**

The state's first witness was the victim's mother, Deborah Hall. Her son, Travis Hall, was thirty-four years old when he was shot on February 25, 2013 at the Taco Bell. R. 58, l. 18 – 59, l. 23.

Ms. Hall testified her son came by her house for twenty to twenty-five minutes prior to the incident, and "he kept receiving several phone calls *from the same person.*" (emphasis added). Ms. Hall said she overheard her son talking about picking up his daughter near Highway 29. Highway 29, of course, was near the Taco Bell. Ms. Hall said the next thing she heard from her son was when "I got a phone call that he had got shot in the head from the sheriff's department." R. 59, l. 15 – 61, l. 24.

Ms. Hall testified her son spent a couple of months in the hospital after the shooting. R. 61, l. 7 – 63, l. 20. Ms. Hall then identified photographs showing the damage to her son's Impala. R. 64, l. 1 – 65, l. 21.

Deputy John Hudson, testified he went to the crime scene off Highway 29 at the Taco Bell. He remembered several people standing around the victim's automobile. R. 68, l. 2 – 70, l. 16.

Hudson recalled the victim had been shot, and he was leaning out of the vehicle "and the seatbelt was supporting his weight." Hudson opined the victim was attempting to get out of the front driver's seat, but the seatbelt was holding him inside. R. 73, l. 5 – 75, l. 16.

Tim Tullock worked for an air conditioning and refrigeration company. He was at the Taco Bell on the day of the shooting, February 25, 2013. R. 80, l. 22 – 82, l. 4.

Tullock was doing paperwork in his van when he heard "some popping sounds." He saw a man "hanging out of the car," and proceeded to walk across the parking lot "to see if he could help him out." Tullock remembered that a "white Chrysler 300 with some rather large rims" tore out of the parking lot "squealing its tires at the same time." R. 82, l. 23 – 84, l. 21.

Marilyn Arthur was a fingerprint identification expert. She testified that Tevin Thomas, a future state's witness, left behind ten fingerprints on the victim's automobile. R. 117, l. 17 – 119, l. 18. None of appellant's fingerprints were found on the victim's automobile. R. 127, ll. 9-14.

Tevin Thomas' fingerprints were also located on the white Chrysler that Tullock apparently identified as the car quickly leaving the Taco Bell parking lot. Appellant's fingerprints were found on the Chrysler as well. R. 129, l. 12 – 130, l. 11.

Thomas later testified as a state's witness that Reginald Sanders, Thomas, and appellant planned to rob the victim during a planned drug deal. Thomas claimed when Sanders did not show up that, he went with appellant to meet the victim at the Taco Bell without Sanders. Thomas said appellant parked his car "side by side" with the victim's car. Thomas maintained it was appellant who got out of his car, and got into the victim's car. Thomas claimed he saw appellant and the victim get into a struggle with the victim. Thomas said appellant and the victim were "on top of each other" when he heard a shot. R. 196, l. 4 – 207, l. 20. Thomas claimed appellant admitted he shot the victim as he fought with him inside the victim's car.<sup>1</sup> R. 207, l. 16 – 208, l. 11.

### **Eyewitness Barnes**

The defense called eyewitness Chris Barnes during appellant's trial. Barnes was going through the drive through at the time of the Taco Bell shooting. R. 242, l. 19 – 245, l. 22. Barnes testified he saw the victim's car "rocking back and forth. I was thinking like, what's going on in that car because it was swinging around, and then I heard a pop, and then I saw somebody slumped over and blood like squirting." Barnes saw a man get out of the passenger side of the victim's car, and jump into "another car." R. 245, l. 19 – 246, l. 8.

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<sup>1</sup> This Court can take judicial notice from the Department of Corrections Inmate Locator Information Service Website of the fact that Thomas was also serving sentences for burglary in the second degree, and he apparently received a ten year sentence for attempted armed robbery in this case. He is scheduled to be released in about six years on August 26, 2021.

The description Barnes gave of the man getting out of the victim's car after the shooting matched Thomas, and not appellant. That is true because Barnes described the black male quickly leaving the car as wearing a dark colored sweatshirt and a dark colored toboggan, and not red clothing. This was significant because Thomas was captured on a Hot Spot convenience store videotape shortly after the shooting wearing dark colored clothing, and a toboggan. Appellant, on that same videotape, was wearing red clothing. R. 172, l. 1 – 174, l. 17.

The solicitor was left to argue in closing that he did not think Barnes had a good view of the victim's car. The solicitor essentially argued that Barnes misidentified Thomas as the man in getting out of victim's car at the time of the shooting, and maintained Barnes saw Thomas get out of the other car consistent with what state's witness Thomas said. R. 301, ll. 6-19.

#### **Cell phone inculpatory evidence**

Robert Talanges was with the forensic department of the Spartanburg County Sheriff's Department. He opined, from the broken glass, that the shots were fired from inside the victim's car "out" that day. There was also a powder burn on the seat. The victim had "a fully loaded gun" inside his car -- with a full magazine with sixteen rounds in it. Talanges opined the victim did not shoot his gun. R. 94, l. 21 – 96, l. 10.

Talanges found three cell phones inside the victim's car. He acknowledged he could not tell from looking at them who owned these cell phones. R. 100, l. 11 – 103, l. 20. Finally, according to Talanges, the gun which fired the shot that hit the victim in the head, and injured him, was never found. R. 106, ll. 11-13.

### **Forensic cell phone evidence**

Forensic analyst Lindsey McGraw testified three cell phones were recovered from the victim's car, and he tried to identify the owners of the cell phones. R. 136, l. 11 – 137, l. 5. McGraw testified that his examination of the SIM card on the AT&T flip phone revealed the phone number was 864-494-2573. He identified the phone numbers from the other two cell phones as well. R. 137, l. 1 – 138, l. 13.

During his investigation, McGraw said he was able to “pull phone calls off of the cell phone log” and he “took pictures of them” with his digital camera. He testified five calls were made from appellant's phone to the victim's phone on the day of the shooting. R. 138, l. 24 – 142, l. 7.

### **Closing arguments**

In closing, defense counsel Johnston reminded the jury how many times Tevin Thomas had lied to the police to gain an advantage for himself. He told the jury as a strategic matter the prosecution decided to charge appellant as a participant in the shooting rather than as an accessory after the fact which appellant actually was. R. 273, l. 8 – 277, l. 22. Johnston reminded the jury that Barnes was a neutral witness, with nothing to gain or lose, and that he observed a man dressed exactly like Tevin Thomas and not like appellant get out of the victim's automobile immediately after the shooting. R. 280, l. 16 – 283, l. 16.

The solicitor argued to the jury that the forensic evidence traced the cell phone found in the victim's car to appellant. The forensic cell phone evidence showed appellant called the victim five times on the day of the incident. R. 288, l. 21 – 289, l. 14.

When the police went looking for appellant after removing the information from his cell phone, the solicitor told the jury appellant could not be found for eleven days before he

“conveniently turned himself in.” R. 287, l. 18 – 288, l. 20. The solicitor said Tevin Thomas conversely was found the day after the shooting. R. 288, ll. 15-20.

## **Discussion**

It was undisputed in this case that the forensics personnel searched appellant’s cell phone without a warrant. It is also undisputed that the information they obtained from this warrantless search allowed them to trace the telephone to appellant. The state then obtained an impermissible search warrant from a “conclusory affidavit” -- that provided no probable cause – for its issuance. The search warrant was also impermissibly obtained as the fruit of the information found during the illegal warrantless search.

It was acknowledged that the cell phone was inadvertently left behind in the victim’s automobile. That means it was not intentionally abandoned.

Law enforcement had no way of knowing when appellant’s cell phone was unintentionally left in the victim’s vehicle. For all the police knew, appellant may have ridden with the victim on other occasions, and there was an innocent explanation for the cell phone being forgotten and left behind.

The state used the evidence procured from the search warrant to trace calls from the appellant’s cell phone to the victim’s cell phone. The phone calls allegedly showed appellant and the victim were communicating at a critically inculpatory time on the day of the shooting. The solicitor argued that five calls were made to the victim by appellant that day, and Tevin Thomas was found the day after the shooting, and that appellant was not located for eleven days until “he conveniently turned himself in.”

Searches without a warrant are *pre se* unreasonable under the Fourth Amendment unless some exception applies. Katz v. United States, 389 U.S. 347, 357 (1967). It should

be apparent that the abandonment exception does not apply here given the testimony of the state's own witness in this case. The judge erred by finding the cell phone was abandoned. See State v. Dupree, *supra*. That erroneous legal ruling warrants reversal.

In Riley v. California, 134 S.Ct. 2473 (2014), the United States Supreme Court eloquently explained how a citizen's cell phone is a storage facility for nearly every aspect of his or her life – from the mundane to the intimate. Riley v. California, 134 S.Ct. at 2490. The “historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a specific building.” *Id.* at 2490 (*citing* United States v. Jones, 565 U.S. \_\_\_, 132 S.Ct. 945, 955 (2012) (Sotomayer, J., concurring)).

Defense counsel correctly argued that the fact the cell phone in Riley was seized incident to arrest was not a distinguishing factor from this case. In fact, it seems intuitive from the case law that a person has a much less expectation of privacy in what is removed from his person incident to arrest than he or she does in a mistakenly left behind cell phone.

Law enforcement knows very well that a search of cell phone may lead to suspicion or probable cause that the owner of the cell phone is, or has been, engaged in criminal activity, or other wrongdoing. Further, intimate information, details, and photographs contained on a citizen's cell phone also raise considerable privacy considerations.

Law enforcement in this case should have obtained a search warrant before it forensically searched appellant's cell phone. Defense counsel correctly argued appellant had an expectation of privacy in his cell phone. Although the state had the burden of justifying the search of appellant's cell phone, they *incredibly* maintained they did not even know if the cell phone was “password protected.”

It was undisputed that law enforcement used information obtained during the illegal warrantless search of appellant's cell phone to obtain the search warrant, even though, as argued infra, that warrant was illegally obtained from a "conclusory affidavit" that did not supply probable cause. Because illegally procured information from the warrantless search was used to obtain the search warrant the fruits of the search warrant also had to be suppressed. See, Wong Sun v. United States, 371 U.S. 471 (1963).

It was simply unreasonable for the police here not to obtain a search warrant for the contents of the cell phone once it was safely in their possession. See United States v. Chadwick, 433 U.S. 1 (1977).<sup>2</sup> See, also, State v. Brown, 400 S.C. 82, 91, 736 S.E.2d 263, 267 (2012). All of the evidence procured from the warrantless illegal search, and then from the search warrant in this case, should have been suppressed as the fruit of the poisonous tree. See, Wong Sun v. United States, 371 U.S. 471 (1963). The judge committed reversible error by ruling otherwise.

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<sup>2</sup> Overruled on other grounds. California v. Acevedo, 500 U.S. 565 (1991).

The court erred by refusing to suppress the evidence obtained as a result of the search warrant since the warrant was impermissibly granted based on a conclusory affidavit that did not establish probable cause for the issuance of the warrant.

### **Relevant facts**

After illegally searching appellant's cell phone without a warrant, the state, through Detective Tom Clark, sought a search warrant the following day. Search warrant. R. 323. The affidavit purportedly providing probable cause that appellant had committed a crime to justify the search warrant stated:

On 2/25/2013 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriff's Office responded to 7680 Warren H. Abernathy Hwy. In reference to a shooting. Upon arrival they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle **an AT&T ZTE model Z331 cell phone serial number #22213371843 was found inside the Victim's vehicle.** Through further investigation it was found this phone number assigned to the phone is **(864)494-2573.** Through further investigation it was found this phone did not belong to the Victim. *Through further investigation it was found this phone belonged to Robert Lee Moore.* This search warrant is needed for the furtherance of this investigation **to obtain information from the phone that can either implicate, or clear Robert Lee Moore** from any involvement in this incident.

The description of the property sought from appellant's cell phone was all stored data, which included but was not limited to "passwords, access codes, SIM passwords, files, programs, ringtones, picture files, video files, audio files, phonebooks, date books, call history, voice mail, e-mail, text messages, multimedia messages, instant messages,

internet chat content, calendar entries, task entries, note entries, internet browser history, internet bookmarks, geographical information, and databases.” Search Warrant. R. 323.

Defense counsel correctly argued that this affidavit was an impermissible “conclusory” affidavit, and it did not provide probable cause to warrant the issuing of the search warrant. He cited State v. Weston, 329 S.C. 287, 494 S.E.2d 801, and State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct.App. 2012)<sup>3</sup> in support of his motion. Tr. 44, l. 6 – 45, l. 12.

This was an incredible search warrant in its conclusory nature. It did not, as counsel argued, state that probable cause existed that appellant shot the victim, and it incredibly even stated in the affidavit that a search of appellant’s cell phone may “clear” him of further suspicion by the government. Conversely, it may lead to finding inculpatory evidence against him. This was the antithesis of probable cause. It was the epitome of a fishing expedition.

It is quite a gesture for the government ask to look into the most intimate aspects of a citizen’s life -- which the United States Supreme Court recognized in Riley v. California recognized are often contained in his or her cell phone -- because that search may “clear” him or her of further suspicion by the government. This conclusory affidavit simply failed to provide probable cause for its issuance.

It is elementary that a search warrant may only issue upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The duty of the reviewing Court is to ensure that the issuing magistrate had a substantial basis upon

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<sup>3</sup> The error was found harmless in State v. Jenkins, 2015 WL 4002381 (July 1, 2015), after the state did not challenge the finding of this Court that the search warrant for the DNA did not establish probable cause.

which to conclude that probable cause existed. State v. Adams, 291 S.C. 132, 352 S.E.2d 482, 483 (1987). The determination by the magistrate is governed by the “totality of the circumstances test.” State v. King, 349 S.C. 142, 148, 561 S.E.2d 640, 643 (Ct.App. 2002), *citing* State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000).

In this state, search warrants may only be issued “upon affidavits sworn to before the magistrate . . . establishing the grounds for the warrant.” S.C. Code § 17-13-140 (2003); State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. Franks v. Delaware, 438 U.S. 154 (1978).

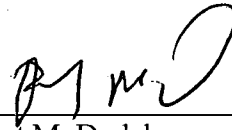
Conclusory statements and affidavits provide no basis to make a judgment that probable cause exists. *See*, State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990); State v. Baccus, 367 S.C. 41, 52, 625 S.E.2d 216, 222 (2006). Further, there must be sufficient nexus, described in the affidavit, between the items to be seized and the criminal behavior alleged. State v. McGuinn, 268 S.C. 112, 232 S.E.2d 229 (1977).

The judge erred by ruling nothing obtained from the search warrant “would lead to the arrest of the defendant himself. It led to his identity and certainly to a questioning as to why the cell phone may have been there. Don’t know that. But that’s all it does.” R. 52, ll. 12-24. Defense counsel quickly explained the prejudice of the search warrant to the judge but he refused to reconsider his ruling which approved the fishing expedition the state had gone into in this case vis-à-vis the search warrant. R. 53, l. 1 – 54, l. 11. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

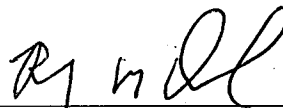
ATTORNEY FOR APPELLANT

This 18th day of Decemeber, 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."

December 18, 2015

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Spartanburg County  
R. Keith Kelly, Circuit Court Judge  
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RECEIVED  
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SC Court of Appeals

THE STATE,

RESPONDENT,

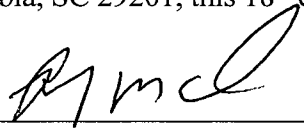
V.

ROBERT LEE MOORE,

APPELLANT

\_\_\_\_\_  
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 William M. Blich, Jr. Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18<sup>th</sup> day of December, 2015.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 18<sup>th</sup> day of December, 2015.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023.