STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge
Appellate Case Tracking No. 2014-001669

The State, Respondent,

vs.

Robert Lee Moore, Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in refusing to suppress evidence found during the search of a cell phone Appellant abandoned at the scene of the crime. (Appellant's Issues I and II).

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in refusing to suppress evidence found during the search of a cell phone Appellant abandoned at the scene of the crime. (Appellant's Issues I and II).

Appellant contends the trial court erred in refusing to suppress evidence obtained from his cell phone recovered from the scene of the crime. Appellant abandoned the cell phone, and, as a result, Appellant no longer had a reasonable expectation of privacy in a phone he left at a crime scene and made no attempt to collect. As a result, there is no violation of the Fourth Amendment and the results of the search were properly admitted into evidence. Further, any evidence obtained through the search of Appellant's cell phone would have inevitable been discovered through the search of the victim's phone also collected at the crime scene. Finally, the search warrant obtained was unnecessary, but, even if necessary, was obtained in good faith and suppression is not warranted.

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see also, State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses,

papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991).

When moving to suppress evidence on the basis of an alleged unreasonable search, the defendant has the burden of showing a legitimate expectation of privacy in the area searched. See United States v. Rusher, 966 F.2d 868 (4th Cir. 1992); see also Rawlings v. Kentucky, 448 U.S. 98 (1980) (declaring a legitimate expectation of privacy is necessary to trigger Fourth Amendment protections); State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (stating defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate his "own rights" have been violated by showing he has a legitimate expectation of privacy in connection with the searched premises in order to challenge the search). "Since Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" Oliver v. United States, 466 U.S. 170, 177 (1984) (quoting Katz, 389 U.S. at 360 (Harlan, J., concurring)).

Thus,

> in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143–44 n. 12 (1978)).

As this Court very recently observed: "Our supreme court has recognized the doctrine of abandonment as one such exception to the Fourth Amendment warrant requirement." State v. Brown, Op. No. 5355 (S.C. Ct. App. Filed September 23, 2015) (Shearouse Adv. Sh. No. 37 at 25) (citing State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995)). "Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment." State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing California v. Greenwood, 486 U.S. 35 (1988)). The South Carolina Supreme Court thoroughly explained the determination of abandoned property, indicating a very clear distinction between abandoned property in a property-law sense and abandoned property in a Fourth Amendment sense:

> The distinction between abandonment in the property-law sense and abandonment in the constitutional sense is critical to a proper analysis of the issue. In the law of property, the question . . . is whether owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest.... In the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein.
>
> Where the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for the purpose of search and seizure.

Dupree, 319 S.C. at 457, 462 S.E.2d at 281 (quoting City of St. Paul v. Vaughn, 237 N.W.2d 365, 370–71 (1975)). This Court explained: "Whether such an expectation of privacy has been abandoned is determined on the basis of the objective facts available to the investigating officers, not on the basis of the owner's subjective intent." Brown, Ad. Sh. No. 37 at 26.

This distinction is critical in this case where Appellant's sole argument regarding whether he abandoned the cell phone is that he "forgot it" or "inadvertently" left it behind—as he fled a crime scene. His argument, if believed in full, could be fruitful in the "property-law sense" because he did not voluntarily abandon his interest in the property, such that the police who found it could claim a greater possessory interest. However, similar to this Court's conclusion in Brown, Appellant did abandon his expectation of privacy interest in the cell phone by leaving it at a crime scene and not seeking to reclaim the phone. See Id. at 27-29.

During the suppression hearing and at trial, officers explained three cell phones were located in the victim's vehicle. No one came forward to claim any of the cell phones. (T.36; R. 28). The cell phone ultimately connected to Appellant was not password protected. (T.37-38; R. 29-30).[1] Appellant presented no evidence he intended to come forward and claim the cell phone as his prior to the suppression hearing. As a result, the officers objectively believed the cell phone to be abandoned, and the Fourth Amendment did not require a warrant to conduct a search of the phone.

[1] Appellant contends the testimony by Investigator Williams indicates Investigator McGraw's report was "of no help" in determining whether the phone was password protected. On the contrary, the testimony regarding the report indicates the phone was no password protected. Counsel asked: "in his report, does he say it was password protected?" (T. 37; R. 29). The answer was not I don't see anything in the report it was instead: "I don't see that it was." (T.38; R. 30). The clear implication is if the phone had been password protected the report would have indicated the fact, but instead the report indicated the phone was not password protected.

Further, Investigator McGraw did not initially examine the contents of the phone such as text messages and call logs. Instead, he examined the SIM card which provided him merely a phone number for the phone. (T.19-20; R. 11-12). The phone number was then run through the Sheriff's Department's database and was connected to Appellant. (T.20; 37; R. 12-19). This process would have been required in order to verify whether the phone belonged to the victim. A process which was entirely reasonable given the phone was found in the victim's car. The mere obtaining of the cell phone number from the SIM card in order to verify whether the phone belonged to the owner of the vehicle in which it was found did not implicate the Fourth Amendment because it was not an unreasonable search. See U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated. . . .") (emphasis added). As a result, the obtaining of the phone number connected to the phone for purposes of determining ownership would not implicate Fourth Amendment protections.

Additionally, the only evidence admitted from the search of Appellant's phone was its connection to the victim through the phone calls made directly before the shooting occurred. The officers had the victim's phone in their possession. They had every right to search the victim's phone as part of the investigation, and even if they did not, Appellant could not assert any violation of the right because he did not have a possessory interest in the victim's phones. As a result of the search of the victim's phone, the officers would have found the number that called five times immediately before the shooting. It would have taken nothing more than running the number through the same database that they ran the number from the SIM card through to determine it belonged to

Appellant. A simple call to the number would have verified it was the phone in their possession and would have placed Appellant at the scene of the crime. As a result, any evidence obtained from the search of Appellant's phone would have inevitably been discovered through an independent source, the victim's phone. See Nix v. Williams, 467 U.S. 431, 443-444 (1984) (finding the inevitable discovery doctrine has been adopted as an exception to the exclusionary rule and "[t]he independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.").

Even though the search warrant obtained on Appellant's phone was entirely unnecessary in light of the fact he abandoned any expectation of privacy in the phone, the warrant was obtained in good faith and provided no basis to suppress the evidence. The United States Supreme Court in U.S. v. Leon, 468 U.S. 897 (1984), holds a court should not suppress the fruits of a search conducted under the authority of a warrant, even a "subsequently invalidated" warrant, unless "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922 n. 23. The Supreme Court explained the limited circumstances in which an officer could not be found to have acted with "objective reasonableness," thereby excluding application of this good faith exception:

> (1) "the magistrate ... was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth";

> (2) the magistrate acted as a rubber stamp for the officers and so "wholly abandoned" his detached and neutral "judicial role";
> (3) "an affidavit [is] so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or
> (4) "a warrant [is] so facially deficient- i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid."

U.S. v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002) (citing Leon, 468 U.S. at 923) (internal quotation marks omitted).

The Fourth Circuit Court of Appeals explained:

> "Substantial basis" provides the measure for determination of whether probable cause exists in the first instance. If a lack of a substantial basis also prevented application of the Leon objective good faith exception, the exception would be devoid of substance. In fact, Leon states that the third circumstance prevents a finding of objective good faith only when an officer's affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." This is a less demanding showing than the "substantial basis" threshold required to prove the existence of probable cause in the first place.

Bynum, 293 F.3d at 195 (internal citations omitted) (emphasis added).

The South Carolina Supreme Court explained the application of the Leon good faith exception: "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (emphasis added) (quoting Leon, 468 U.S. at 923). "[W]hen an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause." Id. at 292, 494 S.E.2d at 803-804.

In this case, even if the affidavit does not provide a substantial basis for determining the existence of probable cause, it is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." The affidavit cannot be described as so bare-boned that the magistrate's issuance of the warrant could be viewed as a mere rubber-stamping of the warrant application, nor is the affidavit so lacking in indicia of probable cause that it was unreasonable for the officers or the magistrate to conclude that probable cause existed. Accordingly, even if the affidavit is insufficient in some manner, this Court should affirm the admission of the evidence under the additional sustaining ground of the Leon good faith exception.

Appellant abandoned his cell phone and any reasonable expectation of privacy he had in it. As a result, the trial court properly refused to suppress the results of any search of the phone because Appellant no longer had the requisite expectation of privacy to challenge the search and any search was reasonable under the Fourth Amendment to the United States Constitution. Further, the information would have been discovered through a search of the victim's phone indicating he received the five phone calls from Appellant's phone number immediately before being shot at the Taco Bell. Finally, the search warrant was unnecessary, but even if found conclusory, it was obtained in good faith and did not provide a basis to suppress the evidence presented at trial. Accordingly, Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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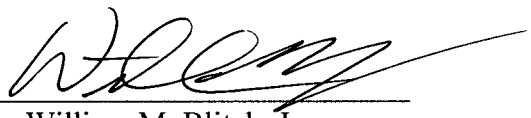
BY: 
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December 17, 2015

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 17th day of December, 2015.

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