STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Robert E. Hood, Circuit Court Judge

Opinion No. 2016-UP-344 (S.C. Ct. App. Filed June 29, 2016)

2013-GS-40-4547- 4554

THE STATE,

RESPONDENT,

V.

WILLIAM ANTHONY WALLACE,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

William Anthony Wallace, Appellant.

Appellate Case No. 2014-001786

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Unpublished Opinion No. 2016-UP-344
Heard April 12, 2016 – Filed June 29, 2016

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald Zelenka, and Assistant Attorney General Caroline M. Scrantom, all of Columbia; and Solicitor Daniel E. Johnson, of Columbia, for Respondent.

PER CURIAM: Appellant William Anthony Wallace appeals his convictions for murder, kidnapping, attempted murder, and armed robbery. Wallace argues the trial court erred by admitting evidence, which the police obtained from his cellular telephone provider without a warrant, showing the approximate location of his telephone during the relevant time period.

We find the error, if any, was harmless because it could not reasonably have affected the result of the trial. *See State v. Covert*, 368 S.C. 188, 196, 628 S.E.2d 482, 487 (Ct. App. 2006) ("Error is harmless where it could not reasonably have affected the result of the trial. Generally, appellate courts will not set aside convictions due to insubstantial error not affecting the result." (citation and internal quotation marks omitted)); *State v. Herring*, 387 S.C. 201, 215-16, 692 S.E.2d 490, 497 (2009) (finding that even if a search violated the Fourth Amendment the error was harmless given the overwhelming evidence of guilt).

We find there was overwhelming evidence of Appellant's guilt even without considering the location data provided by his cellular telephone provider. The surviving victim identified Appellant immediately after the incident as the perpetrator. Her identification carried significant weight because she saw and spent time with Appellant on a regular basis prior to this incident. Appellant's accomplice, Deandre Diggs, testified he and Appellant committed the crimes. Diggs testified in detail regarding the events and admitted substantial personal liability. The State also presented significant circumstantial evidence linking Appellant to the vehicle and firearm used to perpetrate this incident. Additionally, the State introduced a recording of a telephone call between Appellant and an associate, which was made while Appellant was in the detention center awaiting trial. In the recording, Appellant instructed his associate the surviving victim "need[ed] to be taken care of ASAP."

We find this evidence constituted overwhelming evidence of Appellant's guilt, and thus, the error, if any, of admitting the location data could not reasonably have affected the result of the trial. Accordingly, even if the trial court erred, the error was harmless, and we affirm Appellant's convictions.

Furthermore, we note that although our supreme court has not directly addressed the issue of whether the warrantless procurement of cell-site location data violates the Fourth Amendment, the federal appellate courts, including a recent en banc decision from the United States Court of Appeals for the Fourth Circuit, have uniformly found such police action does not violate the Fourth Amendment. *See*

United State v. Graham, Op. No. 12-4659, 4-5 (4th Cir. filed May 31, 2016) (*en banc*) ("We now hold that the Government's [warrantless] acquisition of historical [cell-site location information] from Defendants' cell phone provider did not violate the Fourth Amendment."); *id.* at 5-6 ("All of our sister circuits to have considered the question have held, as we do today, that the government does not violate the Fourth Amendment when it obtains historical [cell-site location information] from a service provider without a warrant.").

AFFIRMED.

SHORT and THOMAS, JJ., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

WILLIAM ANTHONY WALLACE,

APPELLANT

APPELLATE CASE NO. 2014-001786

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

Opinion No. 2016-UP-344

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for William Anthony Wallace petitions the Court for rehearing. First, counsel respectfully submits that in finding harmless any error in the admission of 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, this Court overlooked the importance of the records in placing Petitioner near the scene of the crime. Second, counsel respectfully submits that this Court overlooked the fact that while the United States Court of Appeals for the Fourth Circuit recently held in United

States v. Graham, No. 12-4659, 2016 WL 3068018, at *2 (4th Cir. May 31, 2016), that the Government's warrantless acquisition of historical cell-site location information from Defendant's cell phone provider did not violate the Fourth Amendment under the U.S. Constitution based on the "third-party doctrine," the trial judge in the present case found no Fourth Amendment violation based on the exigent circumstances exception to the warrant requirement. A search warrant or court order was required but exigent circumstances did not exist to justify the warrantless search.

The holding in Graham, based on the U.S. Constitution, is not dispositive. Respectfully, this Court overlooked the fact that the South Carolina Constitution, with an express protection of the right of privacy, offers a higher level of privacy protection than the Fourth Amendment provision of the U.S. Constitution. See S.C. Const. art. 1§10; State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001).

Additionally, counsel respectfully submits that this Court overlooked the fact that the present case is distinguished from Graham by the fact that law enforcement in the present case obtained both historical cell-site location information as well as real time GPS locations from the cell phone company without a search warrant or court order. In Graham the Government obtained only historical cell-site location information and obtained that information after obtaining an order from the federal court pursuant to The Stored Communications Act, 18 U.S.C. §2703(c), (d) (2012). According to the Act, in order to obtain a court order the Government must show "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C.. §2703(d). Law enforcement in the present case did not seek a court order. Instead, claiming exigent

circumstances, law enforcement obtained both the historical cell-site location information as well as real time GPS locations from Petitioner's cell phone provider by simply faxing an exigency request. The obtaining of both kinds of information from the cell phone provider constitutes an illegal search requiring suppression of all of the cell phone records.

In affirming Petitioner's conviction this Court wrote:

> We find there was overwhelming evidence of Appellant's guilt even without considering the location data provided by his cellular telephone provider. The surviving victim identified Appellant immediately after the incident as the perpetrator. Her identification carried significant weight because she saw and spent time with Appellant on a regular basis prior to this incident. Appellant's accomplice, Deandre Diggs, testified he and Appellant committed the crimes. Diggs testified in detail regarding the events and admitted substantial personal liability. The State also presented significant circumstantial evidence linking Appellant to the vehicle and firearm used to perpetrate this incident. Additionally, the State introduced a recording of a telephone call between Appellant and an associate, which was made while Appellant was in the detention center awaiting trial. In the recording, Appellant instructed his associate the surviving victim "need[ed] to be taken care of ASAP."

State v. Wallace, No. 2016-UP-344 (S.C.Ct.App. Filed June 29, 2016). While the evidence discussed above was important, the cell phone information served to corroborate witness testimony and credibility of the witnesses was an important issue, especially in light of the fact that the deceased was a drug dealer. The error in admitting the illegally obtained cell phone records was not harmless.

Addressing the Graham case this Court wrote:

> Furthermore, we note that although our supreme court has not directly addressed the issue of whether the warrantless procurement of cell-site location data violates the Fourth Amendment, the federal appellate courts, including a recent en banc decision from the United States Court of Appeals for the Fourth Circuit, have uniformly found such police action does not violate the Fourth Amendment. See United State v. Graham, Op. No. 12-4659, 4-5 (4th Cir. filed May 31, 2016) (en banc) ("We now hold that the

> Government's [warrantless] acquisition of historical [cell-site location information] from Defendants' cell phone provider did not violate the Fourth Amendment."); id. at 5-6 ("All of our sister circuits to have considered the question have held, as we do today, that the government does not violate the Fourth Amendment when it obtains historical [cell-site location information] from a service provider without a warrant.").

State v. Wallace, No. 2016-UP-344 (S.C.Ct.App. Filed June 29, 2016). In State v. Drayton, 415 S.C. 43, 780 S.E.2d 902 (2015), the South Carolina Supreme Court declined to reach the issue of whether an individual has an expectation of privacy in historic cell site location data because, in view of the totality of the circumstances, the affidavits in support of the search warrants established probable cause for the search. No search warrant or court order was sought in the present case.

Other courts have, contrary to the finding in Graham, found an expectation of privacy in historic cell site location information. 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."); 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").

During the motion to suppress counsel for Petitioner argued, "I would also argue that South Carolina's right to privacy is higher than that which is granted by the State, excuse me, the U.S. Constitution. I think that you have a heightened privacy interest in your cell phone simply because, again, the incriminatory nature of the device itself is not readily available." (R. p. 179, lines 8-14). Although counsel did not specifically cite to the S.C. Const. art. 1§10 or State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001), the motion to suppress was based on both the State and Federal Constitutions. In the reply brief Petitioner specifically argued that the trial judge's refusal to suppress the cell phone records obtained in violation of Petitioner's Fourth Amendment rights under both the State and Federal Constitutions was an error of law requiring reversal. (Reply Brief pp. 4-5). Respectfully, this Court's reliance on Graham is misplaced given the heightened level of privacy protection provided by the South Carolina Constitution.

Graham also involved only historical cell-site location information. In contrast, the present case involves both historical cell-site location information as well as real time GPS locations. The majority of federal courts that have considered the issue have concluded that real time GPS information may only be obtained pursuant to a warrant supported by probable cause. In re App. of U.S. for an Order Authorizing Disclosure of Location Information, 849 F. Supp. 2d 526, 539-42 (D. Md. 2011); see also United States v. Espudo, 954 F. Supp. 2d 1029, 1035 (S.D. Cal. 2013) (collecting cases); but see In re Application of the United States for an Order for Prospective Cell Site Location Information on a Certain Cellular Telephone, 460 F. Supp. 2d 448 (S.D.N.Y. 2006) (warrant not required); In re Application of the United States for an Order (1) Authorizing the Installation and Use of a Pen Register and Trap and Trace Device, and (2) Authorizing Release of Subscriber and Other Information, 433 F. Supp. 2d 804 (S.D. Tex. 2006) (same).

The real time GPS location information obtained by law enforcement, without a warrant or court order, 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). In State v. Adams, 409 S.C. 641, 652, 763 S.E.2d 341, 347-48 (2014) (footnote omitted), decided in September of 2014, after the July 2014, pre-trial hearing and August 2014, trial in the present case, the South Carolina Supreme Court wrote:

> Prior to Jones, no South Carolina appellate decision addressed the constitutionality of the warrantless installation and monitoring of a GPS device. There is, however, a state statute that squarely addresses law enforcement's use of electronic tracking devices. In 2002, as a part of the South Carolina Homeland Security Act, the legislature enacted a statute that provides that "[t]he Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State." S.C.Code Ann. § 17–30–140(A). This statutory requirement "provide[s] law enforcement ... with the proper means and tools to enable them to protect and defend South Carolina and her citizens while preserving individual constitutional rights and liberties." Act No. 339, 2002 S.C. Acts 3625.

Law enforcement's monitoring of Petitioner's movements, through the use of the cell phone GPS and the cell phone provider was the functional equivalent of placing a GPS tracking device on Petitioner's car. The real time GPS location information from the cellphone company provided even more information than if law enforcement had placed a GPS tracking device on Petitioner's car because the information came from the cell phone which is ordinarily carried on the person and was not limited to the car. Pursuant to Jones and S.C. Code §17-30-140, a search warrant or court order was required to obtain the real time GPS location information.

The trial judge found that 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. 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.

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 Amendment 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).

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[1]. (Tr. p. 996, 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 Petitioner 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. Petitioner was arrested, without incident, after leaving the Burlington Coat Factory on Bush River Road. (Tr. p. 997, lines 7-16). There was no evidence that the warrantless search was needed to prevent the destruction of evidence.

While Petitioner was suspected of being involved in a violent crime and police had an arrest warrant for Petitioner, there was no evidence that he was a threat to law enforcement or the community. There was no evidence that Petitioner remained armed. When Corporal Hayhurst was asked if, at the time of arrest, he knew whether the Appellant was armed or not, the Corporal answered, "No, Ma'am." (Tr. p. 311, lines 21-23). The warrantless search of

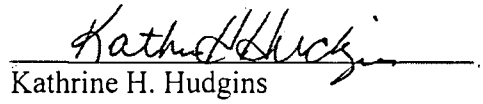
[1] Arguably, the exigent circumstances exception to the warrant requirement would have applied to the search of the Garner's Ferry Road apartment because law enforcement reasonably believed persons within the apartment were in need of immediate aid. MIncy v. Arizona, 437 U.S. 385, 392, 98 S.Ct. 2408,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

Appellant's cell phone records constituted a violation of the Fourth Amendment under both the State and Federal Constitutions. The State failed to meet its burden to justify the warrantless search pursuant to the exigent circumstances exception.

Finally, an important distinguishing factor in the present case is the complete lack of any court order or search warrant. In Graham the Government obtained an order from the federal court pursuant to the Stored Communications Act, 18 U.S.C. §2703(c), (d) (2012). Pursuant to the Act, the Government demonstrated to the federal court specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. No such order was sought in the present case. In Drayton law enforcement obtained search warrants in order to obtain historic cell site location data. No search warrant was sought in the present case.

Petitioner respectfully seeks rehearing based on the above arguments. Petitioner asks this Court to reverse the conviction based on the unlawful search and remand the case for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

This 14th day of July, 2016.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM ANTHONY WALLACE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Caroline M. Scrantom, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and William Anthony Wallace, #320396, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 14th day of July, 2016.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this
14th day of July, 2016.

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

The South Carolina Court of Appeals

The State, Respondent,

v.

William Anthony Wallace, Appellant.

Appellate Case No. 2014-001786

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Kathrine Haggard Hudgins, Esquire
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Caroline M. Scrantom, Esquire
John W. McIntosh, Esquire

FILED

August 18, 2016