

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Roger M. Young, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

v.

DANTE SAMAR BROWN,

APPELLANT

APPELLATE CASE NO. 2014-001082

Opinion No. 2016-UP-447

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant Dante Samar Brown respectfully petitions the Court for a rehearing of its Opinion No. 2016-UP-447 filed on November 2, 2016 based upon the following points overlooked or misapprehended by the Court:

In affirming Appellant's conviction for three counts of armed robbery, five counts of kidnapping, attempted murder, criminal conspiracy, possession of a weapon during a violent crime, and burglary, second degree, this Court held that the GPS records from an electronic monitoring device attached to his co-defendant as a term of his probation constitute admissible hearsay under the business records exception found in Rule 803(6), SCRE.

This Court correctly explained that Rule 803(6), SCRE provides that, under the business records exception to the hearsay rule, “evidence is admissible if it is ‘[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnosis made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, **all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.**” (*emphasis added*).

Despite this Court’s recitation of the applicable rules of evidence, this Court determined that the GPS records, as presented by the State at trial, qualified as business records. Thus, it appears this Court misapplied or overlooked the authenticity requirements of Rule 803(6) and Rule 901, SCRE. At trial, the State did not offer the GPS records through the testimony of the records custodian or a qualified witness with knowledge regarding the mode of preparation for the records and the incoherent format of the records indicated a fundamental lack of trustworthiness.

The State failed to present testimony from a custodian or other qualified witness prior to entering the GPS records into evidence.

The business records exception to the rule against hearsay provides that memoranda, reports, records, or data compilation, in any form, of acts, events, conditions, or diagnoses can be admissible at trial if they are (1) made at or near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) made and kept in the course of a regularly-conducted business activity; (4) identified by the custodian or qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. Rule 803(6), SCRE.

This exception to the hearsay rule does not, however, “absolve the offering party from the usual requirements of authentication.” *State v. Rich*, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987). *See also Stevens v. Allen*, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999) (“Even under Rule 803(6), SCRE, a proper foundation must be laid for admittance of the evidence.”). The proponent of evidence that falls within the business records exception must still meet the authentication requirement of Rule 901, SCRE. *State v. Anderson*, 386 S.C. 120, 128-29, 687 S.E.2d 35, 39 (2009).

Under Rule 901, SCRE, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Authentication of a process or system requires evidence that the process or system in question produces a result and that the result produced is accurate. Rule 901(b)(9), SCRE.

Here, the GPS records for Appellant’s co-defendant, Christopher Wilson, should not have been admitted as a business record. The State offered Agent Steward Powell as the custodian of the records. However, he did not explain how the GPS data is stored or how the GPS data is converted from GPS coordinates to addresses. Powell did not testify whether the electronic monitoring device was working properly or whether there had ever been problems with the device. Powell did not offer his experience or training working with electronic monitoring devices, nor did he explain how the device works.

In fact, Powell stated that GPS data is “recorded by a third party vendor, that (sic) supplied the software, hardware, [and] the actual ankle monitor, for the system.” R. 468, l. 24 – R. 469, l. 1. The only testimony he offered was that he and other agents had access to the third party’s server, Omni Link, and regularly printed records.

Moreover, Agent Powell testified that another probation agent, Agent Gross, actually accessed the computer program to create the GPS records. R. 471, l. 2 - 474, l. 23. Powell testimony revealed that he had almost no knowledge of how the GPS software functioned, “I testified to the numbers that we submitted. Those numbers, I do not know. I'm a field agent, not a statistician or a person of science.” R. 474, ll. 7-16.

Critically, Agent Gross was unable to explain in any detail how the spreadsheets of GPS records were created, “[y]ou know, I don't see a column on there. **I don't really know what those numbers mean without a column. It could be anything, and I don't want to speculate without knowing for sure, but there's no columns on that sheet.** . . . I do not know. Like I said, I'm only trained to interpret the paperwork I'm sent, the address and the location.” R. 475, ll. 4-11 (*emphasis added*). He was limited to mechanically repeating that he regularly used GPS records and that “[w]e stand by what our department's agents do.” R. 474, l. 7 - 476, l. 11.

Investigator Nicholas Powell, who interpreted the data, did not testify as to his experience or training in interpreting GPS data. There was no testimony as to Investigator Powell's knowledge of electronic monitoring devices and how they work nor testify to his familiarity with Wilson's device. He merely read from the report.

Other jurisdictions that have addressed the foundational requirements for authenticating GPS monitoring records as a business record have admitted such records only after a sufficient foundation was established by a witness - or more frequently witnesses - with a thorough understanding of how the GPS technology functioned.

In *Ruise v. State*, 43 So.3d 885 (Fla. Dist. Ct. App. 2010), the Florida District Court of Appeal reviewed Ruise's revocation of his probation and resulting sentence based on GPS data from his electronic monitoring device. In May 2008, Ruise was placed on sex offender probation and

was required to wear an electronic monitoring device as a condition of his supervision. *Ruise*, 43 So.3d at 886. The state filed an affidavit of violation alleging that on June 28, 2009, Ruise was “away from his approved residence,” in violation of the condition that he remain confined to his home. *Id.* The only evidence that the state presented was the GPS data from the monitoring device. *Id.*

Ruise argued that the GPS data was inadmissible hearsay and should not have been admitted as evidence. *Id.* The state argued the data was admissible under the business records exception the rule against hearsay. *Id.* The District Court of Appeal explained that “[t]he state had the burden to lay the requisite foundation for admission of the GPS data under this hearsay exception.” *Id.* at 887. *See also Jackson v. State*, 877 So.2d 816, 816-17 (Fla. Dist. Ct. App. 2004) (“[C]omputer printouts, like business records, are admissible if the custodian or other qualified witness is available to testify as to the manner of preparation, reliability, and trustworthiness.”).

In *Ruise*, the state “presented testimony of an employee of the monitoring company who explained how the electronic monitoring system worked and how the GPS data from the offender’s monitoring device is compiled into a computer database that the probation officer can access to track the offender’s location within an 18-foot radius.” *Id.* In addition to testimony from the employee of the monitoring company, Ruise’s probation agent explained how he accessed the database and printed the reports. *Id.* The agent also testified how he had taken Ruise to various locations to ensure that the data from the monitoring device was accurate. *Id.*

The District Court of Appeal found that the state had laid the foundation necessary for having the GPS data admitted as a business record. *Id.* at 888.

North Carolina, our sister state, has also addressed laying the proper foundation to verify authenticity and trustworthiness of GPS tracking data. In *State v. Jackson*, 748 S.E.2d 50 (N.C. Ct.

App. 2013), the North Carolina Court of Appeals considered whether the state properly authenticated GPS tracking evidence.

In that case, Jackson was indicted for simple assault, sexual battery, larceny, and second-degree sexual offense. *Jackson*, 748 S.E.2d at 52. After the victim informed the police of the sexual assault and gave a description of the suspect, the police received a tip that directed them to Jackson's residence. *Id.* at 53. Police arrived at Jackson's residence and observed that he wore an electronic monitoring device. *Id.* After the victim identified Jackson as her assailant, Jackson was arrested. *Id.*

At trial, the state introduced evidence from Jackson's electronic monitoring device to place him at the scene of the assault. *Id.* Sgt. Dave Scheppgrell testified on behalf of the state concerning Jackson's monitoring device and the data produced by the device. *Id.* at 54. Sgt. Scheppgrell testified that "he is the supervisor of the electronic monitoring unit of the Charlotte-Mecklenburg Police Department," and "he received training from the vendors of the electronic monitoring devices used" by the police department. *Id.*

Sgt. Scheppgrell also "described the different components of the device," "testified about how the device operates using a combination of GPS signals and cell phone triangulations to track the location of the device," and explained how the "tracking data is then uploaded from the device to a secure server where it is stored." *Id.* Finally, Sgt. Scheppgrell explained how "he can view the data stored on the secured server via a web service and produce reports based on the data and routinely does so in the normal course of business." *Id.*

On appeal, Jackson argued that the GPS tracking data was not properly authenticated. The Court disagreed and found that Sgt. Scheppgrell's testimony "established a sufficient foundation of trustworthiness for the tracking evidence to be admitted as a business record." *Id.* at 56. *See also*

State v. Taylor, 632 S.E.2d 218 (N.C. Ct. App. 2006) (Finding that printouts of text messages sent to and from a cell phone number assigned to victim's company-issued cell phone were properly authenticated where the strategic care specialist for the cell phone company testified as to the company's procedures for keeping records of text messages to and from customers and the manager of the cell phone business that issued phone to victim and retrieved the messages testified how he retrieved them.).

Jurisdictions beyond the southeast have considered the foundation requirements for introducing data derived from electronic monitoring devices. *See State v. Kandutsch*, 336 Wis.2d 478, 799 N.W.2d 865 (2011) (holding that the State authenticated and laid a proper foundation for a report from defendant's home electronic monitoring unit by providing testimony describing the electronic monitoring system, how the system works, the process by which the summary reports are generated, and that the process produces an accurate result); *State v. Polanco*, 69 Conn. App. 169, 184, 797 A.2d 523, 533 (Conn. App. Ct. 2002) (Although the evidence at issue involved a map generated using data from a GPS system that was maintained on a computer, the appeals court explained that "a court is not permitted to admit a computer generated exhibit into evidence unless the proffering party also (1) presents a witness whose knowledge of computers is sufficient to enable a direct and cross-examination concerning the process used to generate the exhibit and (2) lays a foundation, through that witness, sufficient to support a finding that the process and equipment involved in generating the exhibit were adequate for that purpose.").

Here, the GPS records should not have been admitted as a business record at the State failed to introduce the GPS records through a custodian or a witness with knowledge about the record's mode of preparation.

The method and circumstances surrounding the preparation of the GPS records indicated a lack of trustworthiness and the State failed to adequately authenticate the records.

Appellate courts in South Carolina require a proper foundation of authenticity for such evidence as fingerprints. Accordingly, a proper foundation as to the accuracy and trustworthiness of data from electronic monitoring devices should be required as well. *See Anderson*, 386 S.C.120, 687 S.E.2d 35; *Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987).

The nine pages of spread sheets that constitute the State's GPS records are inconsistent and show clear signs of having been manipulated or edited so as to isolate and emphasize the date and times helpful to the State's case. For these reasons, the GPS records, as presented at trial, could not be in the form that they are normally kept in during the course of probation's normal activity and are not sufficiently trustworthy so as to be admissible. *S.C. Nat'l Bank v. Jones*, 302 S.C. 154, 155, 394 S.E.2d 323, 324 (1990) (holding that summary statements of two accounts were not admissible as business records without inserting, attaching or otherwise introducing the monthly account statements on which they were based).

The first row on pages one and two of the GPS records are numbered one through fifty on the first page and one hundred to one hundred and fifty on the second page. R. 724 - 725. GPS entries numbered fifty-one to ninety-nine are missing from the GPS records. The last entry on page one is recorded as "12/23/2011 10:58:49 PM". R. 724. The first entry on the second page is "12/23/2011 11:29:29 PM" resulting in a half-hour gap in the records. R. 725. Moreover, the individual GPS entries on pages one through three are incomplete as they have no location information.

Page three of GPS records consists of four isolated, numbered entries. R. 726. The two previous pages each contained fifty entries. As with the entries on the first two pages, these entries are also missing location information. These four entries, removed from the timeline

presumably by Agent Gross, represented the GPS data entries that the State claimed showed Appellant in the vicinity of the robbery. *Id.*; R. 507 – 514. The location information related to these four entries appears to be on a separate page located four pages later in the GPS records. R. 730.

Pages four through seven appear to show the location information missing from pages one through three. R. 727 - 730. Curiously, there are no GPS coordinates on these pages and there was no testimony on how the GPS tracking software accurately extrapolates addresses from the GPS coordinates or whether the addresses are determined manually by the officer that generates the report. Moreover, page six has nine rows of data entries containing location information, none of which corresponds with data entries found on other pages. R. 729.

Attempts to understand the GPS records are further complicated by the fact that pages one and two lack any headings indicating what the data in their columns mean. R. 724 - 725. Likewise, pages five and six lack not only column headings, but also the row numbering system found in pages one through three. R. 728 - 729.

Conversely, pages three, four, and seven have column headings, but only page three has row numbers. R. 726; R. 727; R. 730. The inconsistent - seemingly random - use of column headings and row numbers was never explained by Agent Powell. In fact, his testimony strongly suggested that he did not understand how the spreadsheets were generated or what the column headings and row numbers meant. R. 471, l. 2 - 476, l. 11.

More problematically, even though pages four through seven appear to be the missing half of the GPS records found on pages one through three; the entries on these seemingly complementary pages do not match. For instance, the first line on page four records a “Max

Time” of “12/23/2011 10:00:14 PM.” R. 727. On the second line, the “Max Time” is 12/23/2011 10:00:50 PM.” *Id.*

By contrast, the first row on page one lists a date and time of “12/23/2011 10:29:30 PM” and “12/23/2011 10:30:06 PM” in its first two entries. R. 724. Thus page one and page four are not two halves of the same GPS data entries. This same incompatibility occurs throughout the GPS records. In fact, the only two pages with matching halves are pages three and seven. R. 726; R. 730. These pages contain the four out of sequence, isolated GPS records that the State relied on to place Appellant at the crime scene. *Id.*; R. 507 – 514.

The final two pages of the GPS records are totally anomalous. R. 731 - 732. Page eight has no column headings, but appears to record data similar to that found on pages one through four. R. 731. Except, rather than having numbered rows, page eight’s rows begin with “##”. *Id.* Moreover, the first date listed on page eight is “12/28/2011 02:32:19 PM”. *Id.* This is four days after the last data entry found on any other page. There is no other page in the GPS records that overlaps with the dates listed on page eight.

Page nine is equally irregular. Unlike the preceding eight pages that have either five or three columns, page nine only has two columns. R. 732. There are no headings describing the data the two columns contain. The first column lists dates and times. The second column lists various locations. The descriptions of these locations varies significantly; ranging from specific addresses (“2015 Ashley Phosphate Rd.” and 2103 Northwood Blvd.”) to general streets and locations (“I-26”, “St. James Ave.”, and “ramp”). *Id.* Like most of the other pages in the GPS records, the dates and times listed in the first column do not match dates and times listed in any other page of the GPS records.

The GPS records the State introduced at trial are incomplete and incoherent. This simply cannot be how these records are kept in the normal course of business. *State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (holding that a business record without evidence on the manner in which it is prepared or the source of its information does not meet the requirements of the Uniform Business Record as Evidence Act or business records exception to hearsay rule.). Since the individual that compiled the records did not testify, the defense did not have a chance to cross-examine a knowledgeable witness on the inconsistencies in the GPS records.

Curiously, the only complete GPS records are those that the State alleged showed Appellant in the area of the robbery. Found on pages four and seven, these four GPS data entries were clearly excised from where they would normally be found in the data set. Given that the GPS records contain no other coherent data entries, these four entries - in addition to being removed from the timeline - must have also been further manipulated by Agent Gross when creating the spreadsheet.

In sum, there was no preliminary showing that the GPS data introduced against Appellant was accurate and trustworthy. There was no evidence describing the process by which the data was stored and transmitted. Even if the GPS records qualify as a business record, they were not properly authenticated, and therefore, should not have been admitted. Rule 803(6), SCRE; Rule 901, SCRE. The introduction of the GPS records could not have been harmless error because the State presented the GPS records as objective, technological proof that Appellant was with his co-defendant at the time of the robbery.

Conclusion

Appellant respectfully requests this Court rehear this matter for the points overlooked and/or misapprehended in rendering its *per curiam* unpublished opinion on November 2, 2016.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line.

John H. Strom
Appellate Defender

This 17th day of November, 2016.

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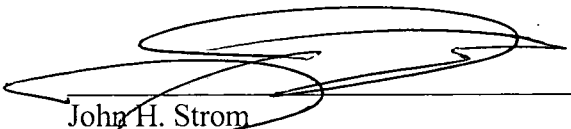
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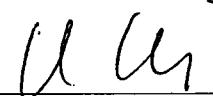
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of November, 2016, and on Mr. Donte Samar Brown, #314818 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472.


John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of November, 2016.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.