STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN DONELL RHODES,

APPELLANT

APPELLATE CASE NO. 2015-002605

INITIAL BRIEF OF APPELLANT

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2.

Did the court abuse its discretion by admitting expert testimony concerning per call measurement data (PCMD), which is an estimate of the distance a cellular telephone is from a cell tower, to show Appellant's telephone was allegedly at or near the location where the murders occurred, when there was insufficient evidence of the reliability of this data?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicated Appellant on May 21, 2013 for two counts of murder, two counts of kidnapping, first degree burglary, and four counts of possession of a weapon during the commission of a violent crime. R. *. His case was called to trial on November 30, 2015 before the Honorable John C. Hayes, III, and a jury. Tr. 1. Solicitor W. Walter Wilkins and Deputy Solicitor Betty Strom represented the state, and John Kenneth Erwin and Stuart Sarratt represented Appellant. Tr. 1.

On December 3, 2015, the jury found Appellant guilty. Tr. 675, l. 15 – 676, l. 14. Judge Hayes sentenced him to life without parole for murder and first degree burglary, and five years' imprisonment for each count of the weapons offense. No sentence was imposed for kidnapping pursuant to S.C. Code Ann. § 16-3-910. The judge ordered all sentences be served concurrently. Tr. 683, l. 16 – 684, l. 11.

This appeal follows.

STATEMENT OF THE FACTS

Helen and Gary Wells were brutally murdered in their home on the night of October 1, 2012. Their housekeeper, Shirley Rogers, discovered the bodies on the morning of October 3, 2012. Tr. 182, l. 6 – 190, l. 6. Rogers was immediately a suspect in the murders after law enforcement discovered there was an ongoing investigation concerning Rogers' fraudulent use of Helen Wells' debit card. Rogers had been fired by the Wellses approximately two weeks before the murders. The police began a "background investigation" on Rogers, which included obtaining her cellular telephone records. Through this investigation, the police learned that Appellant was a "known associate" of Rogers. Tr. 258, l. 2 – 259, l. 17. More specifically, law enforcement discovered there had been telephone contact between Rogers and Appellant between September 30, 2012 and October 3, 2012. Tr. 260, ll. 4-18. Consequently, the Greenville County Sheriff's Office requested Appellant's telephone records from Sprint.[1]

After obtaining Appellant's telephone records, law enforcement used the historical call detail information to track Appellant's whereabouts on the night of the murder. The state called Richard Fennern, who was qualified as an expert in historical call detail analysis, to testify at trial concerning this evidence. Tr. 450, l. 23 – 451, l. 5. Fennern claimed that based on these records at 10:45 pm and 11:02 pm on October 1, 2012, the location of Appellant's telephone was consistent with him being at or near the Welles' residence. He further claimed that the location of Appellant's telephone at 11:45 pm on October 1, 2012 was consistent with him being at or near Shirley Rogers' house. Tr. 483, l. 8 – 488, l. 8.

[1] The actual subscriber of this telephone was Richard Eric Cade, who was Appellant's "roommate." However, it was undisputed that Appellant was the exclusive user of this telephone. Tr. 284, ll. 7-8.

Neither Appellant's DNA nor fingerprints were found in the Wellses' house. Tr. 281, l. 20 – 282, l. 24. However, blood belonging to both Helen Wells and Gary Wells was found in Eric Cade's car that was frequently used by Appellant. Tr. 542, l. 2 – 550, l. 21.

Based on this circumstantial evidence, the jury ultimately convicted Appellant of murder, kidnapping, and first degree burglary. Tr. 675, l. 15 – 676, l. 14.

ARGUMENT

1.

The court erred by denying Appellant's motion to suppress his cellular telephone records obtained by law enforcement from Sprint in violation of his rights under the Fourth Amendment of the United States Constitution and his right to privacy under Article 1, Section 10 of the South Carolina Constitution where law enforcement obtained the records without a warrant and without properly complying with the federal Stored Communications Act.

Motion and Arguments by Counsel

Appellant moved to suppress his cellular telephone records obtained from Sprint and any testimony related to the records under the Fourth Amendment of the United States Constitution and under Article I, Section 10 of the South Carolina Constitution. Tr. 336, l. 25 – 337, l. 4.

Defense counsel explained that law enforcement obtained Appellant's telephone records from Sprint through 18 U.S.C. § 2702, which allows a provider to voluntarily disclose a subscriber's records to law enforcement if law enforcement has "a good faith belief that there is some exigent circumstance that risks danger, imminent danger to somebody's life and safety." Counsel stated that "law enforcement did provide an affidavit which indicated that was the case, and in turn they were provided the records [by Sprint]. The telephone company did choose to voluntarily disclose those." Tr. 161, l. 14 – 162, l. 2. The exigent circumstance listed by the Greenville County Sheriff's Office to obtain Appellant's records was "[i]nvestigation of a double homicide." Tr. 339, ll. 13-16; See R. * (Court's Exhibit No. 5).

Counsel argued there were no exigent circumstances that permitted a voluntary disclosure under 18 U.S.C. § 2702. Before requesting Appellant's records from Sprint, the South Carolina Law Enforcement Division (SLED) conducted a criminal profile and determined that "this was a

personal attack against the Wellses, that there was no broader danger to anyone else, that this was sort of a personalized thing." See Tr. 282, l. 25 – 283, l. 6. Consequently, counsel maintained there was no "emergency involving danger of death or serious physical injury to any person" that required voluntary disclose of Appellant's records under § 2702. He maintained that the "investigation of a double homicide" was not enough.

Counsel argued law enforcement was required to obtain a court order for the records under 18 U.S.C. § 2703, "which governs compelled disclosures of subscriber information," including "call detail records." Tr. 338, l. 1 – 340, l. 2. He asserted, "[T]he government manipulated the cell phone companies in providing this information voluntarily by misrepresenting and exaggerating the exigency that did not exist. Therefore, the cell phone company was manipulated into acting at the government's behest. And that manipulation makes the cell phone company an agent of law enforcement, thereby triggering the Fourth Amendment." Tr. 340, ll. 3-11.

The state argued Appellant had no "standing" under the Fourth Amendment to challenge law enforcement's acquirement and use of his telephone records because the he had "no contractual relationship with the phone company" since Eric Cade was the actual subscriber. Tr. 341, l. 23 – 342, l. 4.

Counsel argued the right that Appellant "is seeking to have protected is his right to privacy in his location . . . therefore, it would not matter if the phone was in his name. The phone essentially acts as a tracking device. And as long as it tracks his movements, then he does have the right to privacy. It's not a right to privacy necessarily in the phone itself, but it's the signals that are sent off of the towers and bounce back and track his location. That's what he has a right to privacy in." Tr. 342, ll. 8-17. Law enforcement requested four days of records,

October 1, 2012 through October 4, 2012. Counsel asserted, "So it would have been four days of essentially surveillance of his location." Tr. 342, ll. 18-20.

Lastly, defense counsel argued that even if the court finds Appellant's rights under the Fourth Amendment were not violated, it could still find Appellant's right to privacy under Article I, Section 10 of the South Carolina Constitution was violated. Citing State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), counsel maintained that the South Carolina Constitution "enumerates a specific privacy right that is more limited than the Federal Constitution" and that "[s]tates are free to . . . enhance" their citizens' rights, and South Carolina has specifically [done so] in its State Constitution." He concluded that Appellant's right to privacy under our state constitution was violated by law enforcement's action in this case. Tr. 343, l. 22 – 344, l. 9.

Court's Ruling

The court ultimately ruled Appellant had no "standing." It stated that "if anyone had any right to privacy in the divulging of those records, it would be Mr. Cade [the actual subscriber]. And of course, he [Eric Cade] has not raised that. He's not a party. So I'm going to allow the introduction of the records." Tr. 344, l. 10 – 345, l. 1. Because the court found Appellant had no expectation of privacy in the records, it made no further ruling on Appellant's arguments.

Discussion

The trial court erred by denying Appellant's motion to suppress his cellular telephone records obtained by law enforcement from Sprint in violation of Appellant's rights under the Fourth Amendment and his right to privacy under Article 1, Section 10 of the South Carolina

Constitution. Law enforcement obtained the records without a warrant and without properly complying with the federal Stored Communications Act found in 18 U.SC. §§ 2702-2712.[2]

A. Expectation of Privacy Under the Fourth Amendment

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). Protection under the Fourth Amendment is afforded to those who have a legitimate expectation of privacy in the place searched. Rakas v. Illinois, 439 U.S. 128, 143 (1978). To demonstrate an expectation of privacy, the defendant must show he had a subjective expectation of not being discovered and the expectation was one that society recognized as reasonable. Katz v. United States, 389 U.S. 347, 351, (1967); Oliver v. United States, 466 U.S. 170, 177 (1984). The Fourth Amendment is a personal right and an individual must invoke its protections. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

> [I]n 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.'

Id. (quoting Rakas, 439 U.S. at 143-144, and n.12).

The United States Supreme Court created the exclusionary rule to safeguard Fourth Amendment rights. United States v. Calandra, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. See Wong Sun v. United States, 371 U.S. 471,

[2] The Stored Communications Act was enacted as Title II of the Electronic Communications Privacy Act (ECPA).

484 (1963); See also State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999) (finding evidence is not admissible under the "fruit of the poisonous tree" doctrine when the police exploit an unlawful search to seize evidence that would not have otherwise come to light). The Fourteenth Amendment of the United States Constitution incorporates the rule excluding evidence obtained through an illegal search or seizure and makes it applicable to the states. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

In State v. Drayton, 411 S.C. 533, 769 S.E.2d 245 (2015), this Court held an individual does not have an expectation of privacy pursuant to the Fourth Amendment in his historical cell site location records. However, our Supreme Court held this Court "erred in reaching the novel issue of whether [Drayton] had an expectation of privacy in his HCSLD [historical cell site location data] because . . . the affidavits in support of the warrants [obtain by law enforcement in the case] established probable cause for the search." State v. Drayton, 415 S.C. 43, 45, 780 S.E.2d 902, 903 (2015). Consequently, our Supreme Court vacated that part of this Court's opinion in Drayton. Id.

A careful examination of recent United States Supreme Court precedent indicates that an individual has an expectation of privacy in his cellular telephone records, including the call detail records and the historical cell site location records.

The Supreme Court's recent decision in Riley v. California, 134 S.Ct. 2473 (2014) supports Appellant's argument that individuals have an expectation of privacy in cellular telephone records. The Supreme Court held that that a search warrant is required to search a cell phone, even when the phone is seized incident to arrest. Id. at 2493. The Court rested its opinion upon the "quantitative and qualitative" difference between cell phones and other items of personal property. Id. at 2489. "One of the most notable and distinguishing features of modern cell phones is their immense storage capacity." Id. "Cell phones couple that capacity with the ability to store many different

types of information." Id. One of the Court's many concerns with cell phones was the ability of the cell phone to allow the reconstruction of the sum of an individual's private life, including the person's whereabouts on particular dates. Id. The Court explained "[h]istoric 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 particular building." Id. at 2490 (citing United States v. Jones, 565 U.S. 400, 132 S.Ct. 945, 955 (2012) (Sotomayor, J., concurring)).

In City of Ontario, Cal. v. Quon, 560 U.S. 746, 756 (2010), the United States Supreme Court assumed the city employee had a reasonable expectation of privacy in the text messages he sent on his employer-issued pager. However, numerous courts have held that individuals have expectations of privacy in their text messages stored on their cell phones. United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008); United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007); United States v. Davis, 787 F.Supp.2d 1165, 1170 (D. Or. 2011); United States v. Quintana, 594 F.Supp.2d 1291, 1299 (M.D. Fla. 2009); State v. Boyd, 992 A.2d 1071, 1081 (Conn. 2010). Further, courts have found a privacy expectation in text messages stored by the service provider. State v. Clampitt, 364 S.W.3d 605, 611 (Mo. Ct. App. 2012).

In Katz, the United States Supreme Court held the government's conduct of electronically listening to and recording Katz's words while he was using a public telephone booth violated his privacy. Katz, 389 U.S. at 353. In other words, individuals have a reasonable expectation of privacy in the content of their telephone conversations, even those taking place on public telephones. Likewise, senders of letters through the mail service have an expectation of privacy in those letters. In Ex Parte Jackson, 96 U.S. 727 (1877), the Court held that "[l]etters, and sealed packages are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." In fact,

"[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be." Id. The Court reaffirmed this holding in United States v. Van Leeuwen, 397 U.S. 249 (1970).

Appellant had a reasonable expectation of privacy pursuant to the Fourth Amendment in his cellular telephone records, including the call detail records, the historical cell site location information, and the per call measurement data (PCMD). Certainly, if law enforcement must obtain a search warrant to search a physical cell phone – even when conducting a search incident to arrest – due to the expectation of privacy an individual has in his phone, then law enforcement may not circumvent this warrant requirement by simply going to the cellular service provider seeking the same information. In other words, if an individual has an expectation of privacy in the information contained on his cellular telephone itself, then an individual has an expectation of privacy in the information stored by the cellular service provider.

B. Expectation of Privacy Under Article I, Section 10 of the South Carolina Constitution

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. U.S. Cont. amend. IV. "In parallel with the protection of the Fourth Amendment, the South Carolina Constitution also provides a safeguard against unlawful searches and seizures." State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing S.C. Cont. art. I, § 10). "In addition to language which mirrors the Fourth Amendment, S.C. Cont. art. 1, § 10 contains an express right to privacy: The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated." Id. at 644, 541 S.E.2d at 840-841 (emphasis in original).

"The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.'" Id. at 643, 541 S.E.2d at 840 (quoting State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997)). "Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights." Id. "This relationship is often described as a recognition that the federal Constitution sets the floor for individual rights while the state constitution established the ceiling." Id.

In State v. Forrester, our Supreme Court concluded, "The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. at 645, 541 S.E.2d at 841. "By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution." State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007) (citing Forrester, 343 S.C. at 644-645, 541 S.E.2d at 841).

Several cases in South Carolina discuss the right to privacy contained in Article I, § 10 of our state constitution. The most comprehensive discussions of the right to privacy are contained in State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001), State v. Weaver, 374 S.C. 313, 649 S.E.2d 479, (2007), and State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015). See Counts, 413 S.C. at 167, 776 S.E.2d at 67.

In Forrester, the defendant was approached by law enforcement for questioning after an officer observed her exhibiting suspicious behavior at a local train station. According to the officer, he identified himself to Forrester who agreed to let him search her luggage. Because

Forrester was clutching her purse tightly, the officer asked to search the purse. Without surrendering possession, Forrester opened the purse to allow the officer to look inside. The officer took the purse and tore open the lining at which time he found crack cocaine. Forrester, 343 S.C. at 640-641, 541 S.E.2d at 839. On appeal, Forrester argued she had not given the officer consent to search her purse, and thus, the crack cocaine was discovered in violation of the right to privacy provision found in Article I, § 10 of our state constitution. She also argued that the officer's failure to inform her of her right to refuse consent to a search of her purse invalidated the search. Id. at 641, 541 S.E.2d at 839.

Our Supreme Court reversed Forrester's conviction after finding the officer "exceeded the scope of Forrester's consent when he proceeded beyond visual inspection of the purse granted by Forrester to an intense physical examination of the purse." Id. at 648, 541 S.E.2d at 843. The Court emphasized that "[u]nder our state constitution, suspects are free to limit the scope of the searches to which they consent." Id. However, the Court found the state right to privacy does not require informed consent prior to government searches. Forrester, 343 S.C. at 647-648, 541 S.E.2d at 842-843. Specifically, the Court stated, "[W]hile our state constitution may provide a higher level of protection in the search and seizure context, it does not go so far as to require informed consent prior to government searches." Id.

Six years later, in State v. Weaver, our Supreme Court again acknowledged the higher level of privacy protection afforded by our state constitution. Weaver was convicted of murder following a shooting at a nightclub. Weaver, 374 S.C. at 317, 649 S.E.2d at 480. The investigation led law enforcement to the home of Weaver's cousin where they discovered the vehicle that had been driven by Weaver parked in the backyard. Id. at 317, 649 S.E.2d at 481. According to Weaver's cousin, Weaver had recently been at the home and asked for a change of

clothes, some bleach, and a garbage bag. Weaver then left the home. Id. Upon finding the vehicle driven by Weaver, the investigating officer opened the door and discovered the inside of the vehicle was wet and smelled of bleach. Id. at 317-318, 649 S.E.2d at 481. Based on this evidence, the officers impounded the vehicle and processed it. They found blood in the vehicle that matched that of the shooting victim. Id. at 318, 649 S.E.2d at 481. On appeal, Weaver argued the evidence found in the vehicle should have been suppressed as it was the product of an impermissible warrantless search. Id.

The Court rejected Weaver's argument, holding the warrantless search met the automobile exception to the Fourth Amendment. Id. at 319-321, 649 S.E.2d at 482. However, the Court also analyzed whether the search and seizure violated Weaver's right to privacy pursuant to the South Carolina Constitution. Id. at 321, 649 S.E.2d at 483. Citing Forrester, the Court noted the South Carolina Constitution affords a higher level of privacy protection than the Fourth Amendment. Id. Nevertheless, the Court held the privacy provision did not require a warrant before the search and seizure of a vehicle located in the backyard of a private residence. Id. at 322, 649 S.E.2d at 483. In so holding, the Court explained that "[t]he focus of the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy in the vehicle to be searched. Once the officers have probable cause to search a vehicle, the state constitution's requirement that the invasion of one's privacy be reasonable will be met." Id.

However, as later highlighted by our Supreme Court in State v. Counts, former Chief Justice Pleicones, in a concurring opinion in Weaver, emphasized that "[o]ur state constitution's provision protecting unreasonable invasions of privacy necessarily requires some analysis of the privacy interests involved when a warrantless seizure is made on private property." Weaver, 374

S.C. at 326, 649 S.E.2d at 485; See Counts, 413 S.C. at 170, 776 S.E.2d at 68-69. Under the facts in Weaver, Justice Pleicones found no state constitutional violation because Weaver was not the owner of the vehicle that was seized and the vehicle was not parked at Weaver's residence. Counts, 413 S.C. at 170, 776 S.E.2d at 69 (citing Weaver, 374 S.C. at 326, 649 S.E.2d at 485).

Most recently, in State v. Counts, our Supreme Court again reaffirmed the higher level of privacy protection afforded by our state constitution. In Counts, the police "received two separate anonymous tips from citizens who alleged that Counts was selling drugs. These tips also identified vehicles driven by Counts, his phone number, and his use of multiple identities." 413 S.C. at 173, 776 S.E.2d at 70. The police also "confirmed that Counts had two false identification cards on record and had prior drug convictions." Id. Based on this information, officers conducted a "knock and talk" at Count's residence. When Counts opened the door, the officers "immediately smelled 'the strong odor of marijuana'" and noticed "a 'rolled blunt' on the coffee table in the living room." Id. at 158, 776 S.E.2d at 62. One of the officers then observed a silver automatic gun in Counts' hand. The officers drew their guns and approached Counts who dropped his gun and was immediately detained. Id. Law enforcement then conducted a protective sweep of the residence during which they found a bag of marijuana and a scale in plain view. Id. A search warrant was later obtained. The search revealed approximately 800 grams of marijuana, a large sum of cash, and other incriminating evidence. Id. at 158-159.

Counts moved to suppress the evidence arguing law enforcement's search of his home violated the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution. Id. at 157, 776 S.E.2d at 61. Counts further asserted that, pursuant to the right to privacy provision in our state constitution, law enforcement must have reasonable

suspicion before they conduct a "knock and talk" at a person's residence. Id. at 161-162, 776 S.E.2d at 64. Our Supreme Court agreed. Recognizing that "the privacy interests in one's home are the most sacrosanct," the Court held "that law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." Id. at 172, 776 S.E.2d at 69-70. The Court noted, "Otherwise, we foresee the potential for abuse if law enforcement targets a neighborhood and indiscriminately knocks on doors with hope of discovering contraband without a search warrant." Id.

Applying this rule to the facts presented in Counts, the Supreme Court held law enforcement had reasonable suspicion of illegal activity prior to conducting the "knock and talk" at Counts' residence. Id. at 173, 776 S.E.2d at 70. The Court held the specificity of the anonymous tips and the corroboration by law enforcement of the tips indicated "the officers were not randomly knocking on Counts' door but had reasonable suspicion to support their decision to approach Counts' residence and conduct the 'knock and talk.'" Id.

As demonstrated by our Supreme Court's opinions in Forrester, Weaver, and Counts, the Court has sought to guard the broader state constitutional right to privacy, but still give credence to the government's interest in conducting legitimate searches.

Significantly, in Forrester, our Supreme Court explained, "[T]he drafters of our state constitution's right to privacy provision were principally concerns with the emergence of new electronic technologies that increased the government's ability to conduct searches." Forrester, 343 S.C. at 647, 541 S.E.2d at 842.[3] Without question, South Carolinians consider cellular

[3] In her dissent in State v. Dykes, Justice Hearn provided an eloquent analysis and assessment of the growing threat of technological advances to individual liberty. She explained that "the very concept of what we as citizens view as private is called into question by technology which facilitates unprecedented oversight of our lives." State v. Dykes, 403 S.C. 499, 511-522, 744 S.E.2d 505, 511-517 (2013) (Hearn, J. dissenting).

telephone records, including call detail records, historical cell site location information, and PCMD, maintained by cellular service providers to be private information. Obtaining such information without a warrant is an invasion of that privacy.

To understand just how much of an invasion occurs when considering historical cell site location information and PCMD, it is necessary to understand how cellular telephones work and how this information can be used to track individuals. "When a cell phone is turned on, it identifies its location to nearby cell towers, every seven seconds, on a continuous basis." Eric Lode, Validity of Use of Cellular Telephone or Tower to Track Prospective, Real Time, or Historical Position of Possessor of Phone Under State Law, 94 A.L.R.6th 579 (2014). This sort of tracking "may identify a cell phone's location to within about 200 feet." Id. Using information received by multiple cell towers, the location can be determined even more precisely. Id. If a phone has GPS capabilities, and more than 90% do, a telephone may be tracked to within fifty feet. Id.

Recognizing how cell phones work and the increasing view that cell phones are necessary to social interactions and business, the Massachusetts Supreme Court held that "[c]learly, tracking a person's movements implicates privacy concerns." Commonwealth v. Augustine, 4 N.E.3d 846, 859-860 (2014). The Massachusetts court held the third-party doctrine was not applicable to historical cell site location information under the state constitution's protection against unreasonable searches and seizures. The court distinguished the historical cell site location information from the record of telephone numbers dialed as maintained by the telephone company. As explained by the court, the user knowingly provided the telephone numbers dialed to the telephone company. "No cellular telephone user, however, voluntarily conveys [cell site location information] to his or her cellular service provider" because such information "is purely

a function and product of cellular telephone technology." Id. at 862. The court noted the police were "not seeking to obtain information provided to the cellular service provider by the defendant," but were looking "only for the location-identifying by-product of the cellular telephone technology – a serendipitous (but welcome) gift to law enforcement investigations." Id. at 863.

The Supreme Court of New Jersey held "individuals have a reasonable expectation of privacy in the location of their cell phones under the State Constitution." State v. Earls, 70 A.3d 630, 632 (N.J. 2013). It was settled law that the state constitution of New Jersey afforded greater protection than the Fourth Amendment and that individuals did not lose their privacy rights simply because they gave information to a third-party provider. Id. The court recognized that disclosure of cell phone location information was required by users in order to receive service and that such information "can reveal a great deal of personal information about an individual," including "not only where individuals are located at a point in time but also which shops, doctors, religious services, and political events they go to, and with whom they choose to associate." Id. The court further recognized that "people do not buy cell phones to serve as tracking devices or reasonably expect them to be used by the government in that way." Id.

Using its state constitution, the Washington Supreme Court held a police officer's reading of text messages on a cell phone seized from an arrestee invaded the arrestee's right to privacy. State v. Hinton, 319 P.3d 9, 12-13 (Wash. 2014). The Washington court explained that its constitution provided greater protections than the federal constitution. Id. at 13. To determine that text messages were "private affairs" protected by the state constitution, the Washington court explained that "[t]ext messages can encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically

been strongly protected." Id. According to the court, "text messages often contain sensitive personal information about an individual's associations, activities, and movements." Id.

The ability of law enforcement to obtain cellular telephone records, including call detail history, historical cell site location information, and PCMD falls squarely within our state constitution's prohibition against unreasonable invasions of privacy and the concerns of the drafters regarding new technologies used by the government to conduct searches of its citizens. Therefore, Appellant had an expectation of privacy in the records based upon this state's protection of individuals against governmental invasions of privacy.

C. Appellant's rights under the Fourth Amendment and the South Carolina Constitution were violated when law enforcement obtained his cellular telephone records from Sprint without a warrant and without properly complying with the Stored Communications Act under 18 U.S.C. § 2702 and 18 U.S.C. § 2703.

"Generally, a warrantless search is *per se* unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures." Weaver, 374 S.C. at 319, 649 S.E.2d at 482. The United States Constitution and the South Carolina Constitution provide that a search warrant may not issue except upon probable cause. U.S. Const. amend IV; S.C. Const. art. I, §10. South Carolina's search warrant statute permits a search warrant to search for and seize "property constituting evidence of crime or tending to show that a particular person committed a criminal offense." S.C. Code Ann. § 17-13-140.

Here, law enforcement failed to obtain a search warrant for Appellant's cellular telephone records in violation of Appellant's Fourth Amendment rights and privacy rights under our state constitution. Instead, law enforcement relied on the federal Stored Communications Act, specifically 18 U.S.C. § 2702, to obtain the records from Sprint. Section 2702 allows a cellular telephone provider to voluntarily disclose subscriber information and records "to a governmental entity," including law enforcement, "if the provider, in good faith, believes that an emergency

involving **the danger of death or serious physical injury** to any person requires disclosure without delay of communications relating to the emergency." 18 U.S.C. § 2702(b)(8) (emphasis added).

In this case, Investigator Jonathan Howard with the Greenville County Sheriff's Office submitted a "Mandatory Information for Exigent Circumstance Requests" form alleging the exigent circumstance permitting Sprint to voluntarily disclose Appellant's cellular telephone records pursuant to this statute was an "[i]nvestigation of a double homicide [that] occurred on 10/2/12 w[ith] [an] active suspect." R. * (Court's Exhibit No. 5). However, this was not a sufficient exigent circumstance under § 2702(b)(8), which requires the provider believe "that an emergency involving danger of death or serious physical injury to any person requires disclosure [of the records] without delay."

At the time of the request, the Greenville County Sheriff's Office, through its investigation, knew "that this was a personal attack against the Welles" and that "there was no broader danger to anyone else." Consequently, as defense counsel argued below, the sheriff's office manipulated Sprint into disclosing Appellant's telephone records "voluntarily by misrepresenting and exaggerating the exigency that did not exist." Tr. 340, ll. 3-11; See Tr. 282, l. 25 – 283, l. 6.

Rather than acting under § 2702, law enforcement should have obtained a search warrant or, in the alternative, a court order pursuant to 18 U.S.C. § 2703 for Appellant's telephone records. Section 2703(d) permits a provider to disclose a subscriber's cellular telephone records to a governmental entity if the governmental entity obtains a court order after offering "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

materials to an ongoing criminal investigation." In order to properly comply with the federal Stored Communications Act, the police in this case were required to obtain a court order under § 2703.

It is obvious that the police in this case attempted to circumvent the warrant requirement by manipulating Appellant's telephone provider to voluntarily disclose Appellant's records. Not only did the police fail to obtain a search warrant, it also failed properly comply with the Stored Communications Act by obtaining a court order. This conduct violated Appellant's rights under the Fourth Amendment and his state constitutional right to privacy. Consequently, the trial court erred by failing to suppress Appellant's telephone records and the related testimony. Respectfully, this court should reverse Appellant's convictions and sentence and remand for a new trial.

2.

The court abused its discretion by admitting expert testimony concerning per call measurement data (PCMD), which is an estimate of the distance a cellular telephone is from a cell tower, to show Appellant's telephone was allegedly at or near the location where the murders occurred, when there was insufficient evidence of the reliability of this data.

Relevant Facts

Appellant moved pretrial to exclude expert testimony from Special Agent Richard Fennern of the Federal Bureau of Investigations (FBI) concerning evidence of the estimated location of Appellant's cellular telephone at various points in time surrounding the murders. R. * (Court's Exhibit No. 4 – Motion in Limine for a Hearing on the Admissibility of Expert Testimony). Specifically, Appellant objected to Fennern's testimony about the per call measurement data (PCMD), which is an estimate of the distance a cellular telephone is from a cell tower, as unreliable. Tr. 149, l. 25 – 150, l. 4. The court held a pretrial hearing on Appellant's motion.

The court qualified Fennern, who is a member of the FBI's Cellular Analysis Survey Team (CAST), as an expert in historical call detail analysis. Appellant did not object to his qualifications. Tr. 71, ll. 10-22; Tr. 148, ll. 24-25.

PCMD "is additional information Sprint began providing law enforcement a few years back regarding distance measurements from how far the phone is away from the tower when the transmission happens." Tr. 85, ll. 10-15. Fennern explained that PCMD is used by engineers at Sprint to help the company understand "their network capacity" and where cellular telephones are being used within their network "for planning decisions." Tr. 85, ll. 18-21.

PCMD is based on the amount of time in nanoseconds it takes the radio frequency, which travels at the speed of light, to travel from the cell tower to the cellular telephone and back. This figure is then used to calculate a distance in miles of where the telephone is located from the tower. Tr. 87, ll. 8-14. Fennern admitted the PCMD has an error rate of approximately two hundred and forty-three meters. Tr. 87, ll. 15-19. Fennern further admitted that there are variables that can affect the accuracy of the PCMD. For example, if the telephone is "buried in a building" there will be "a slight variation in how long it takes that signal [radio frequency]" to reach the telephone and travel back to the tower "because there's obstacles in the way." Tr. 88, ll. 6-22.

In addition to estimates of the distance of a cellular telephone from a tower, Sprint also provides latitude and longitude coordinates, which are "an estimate provided by Sprint of where they believe that phone *could* be located." Tr. 90, ll. 17-20 (emphasis added). Fennern explained that the latitude and longitude data "is kind of a point of contention with Sprint" and that "Sprint for a while didn't want to provide [this data] to law enforcement." Sprint refused to provide law enforcement with the latitude and longitude coordinates because the company cannot explain what goes into the calculation used to determine those figures. Tr. 90, l. 17 – 91, l. 1. Fennern said he cannot testify to the latitude and longitude coordinates and did not use that information in his report. He only utilized the PCMD provided by Sprint concerning the distance in miles of the location of the cellular telephone from the tower. Tr. 91, ll. 18-22.

The Greenville County Solicitor's Office provided Fennern with cellular telephone records for Appellant, including the subscriber information, the call detail records, and the PCMD. The Solicitor's Office also informed Fennern of the dates and locations relevant to the investigation. Specifically, Fennern was provided with the following addresses: 10 Terramont

Drive, which is the location of the murders; 14 South Vance Street, which was Shirley Rogers' residence; 8205 Glen Forest Drive, which was where Appellant was living at the time, and 101 Verdae Boulevard, which is the location of a BI-LO grocery store.

Fennern ultimately testified about the location of Appellant's telephone at certain times on the night of October 1, 2012 and during the early morning hours of October 2, 2012, and the alleged distance of Appellant's telephone from the tower based on the PCMD provided by Sprint. Most significantly, Fennern claimed that at 10:45 pm and 11:02 pm, Appellant's telephone communicated with towers consistent with the telephone being at or near 10 Terramont Drive, which is the Welles' residence where the murders occurred. Tr. 102, l. 20 – 103, l. 2. At 10:45 pm, Appellant's telephone was allegedly 1.97 miles from the cell tower. At 11:02 pm, Appellant's telephone was allegedly 1.88 miles and 1.89 miles from the cell tower. Tr. 103, ll. 11-24.

Fennern's testimony before the jury was similar to his pretrial *in camera* testimony. However, his testimony before jury was much more detailed. See Tr. 444-500.

On cross-examination, Fennern admitted that call detail records are not designed to be used by law enforcement. They are created by telecoms in the regular course of business for billing and network performance purposes. Tr. 113, ll. 1-13. Fennern does not create any new data. He merely relies on data and information provided by the cellular telephone provider to map out the location of a telephone based on the location of the towers utilized by the telephone. Fennern admitted that the tower utilized by a telephone is not always the closest tower to the telephone. Instead, the telephone utilizes the tower with the "strongest and clearest signal." Tr. 113, l. 20 – 114, l. 8.

Moreover, Fennern acknowledged that PCMD reports provided by Sprint contain a disclaimer which states, "Sprint Nextel will not guarantee the accuracy of the location information." Tr. 125, ll. 17-20. The disclaimer indicates that many variables affect the accuracy of the measurements contained in the PCMD. Tr. 125, ll. 4-16. Fennern further acknowledged that the manager of subpoena compliance along with other record custodians at Sprint "advised that they cannot testify to the accuracy of the PCMD data as it is only a rough estimate." Tr. 127, l. 6 – 128, l. 2.

Appellant called Thomas Slovenski in support of his motion. Slovenski was qualified as an expert in historical cell phone analysis. Tr. 135, ll. 8-20. He was employed by various law enforcement agencies for over fifteen years before he became a private investigator. He owns and operates Cellular Forensics, LLC in Greenville and is certified in mobile forensics and historical call analysis. Tr. 130, l. 11 – 131, l. 20. He received extensive training at Purdue University and has over seventeen thousand hours of training. Tr. 134, ll. 17-18.

Slovenski testified that PCMD is "very inaccurate" and that it should not be relied upon. He explained, "Sprint actually says that their records are inaccurate in the PCMD realm. They won't testify to them." Tr. 138, ll. 13-24. Slovenski reached out to Sprint a few months before Appellant's trial and a senior technical analyst told him Sprint "do[es] not guarantee the accuracy of the distance or latitude, longitude at all." This Sprint analyst admitted a representative of Sprint would testify that "those records are inaccurate." Tr. 138, l. 25 – 139, l. 14.

Arguments and Ruling

Defense counsel moved to exclude Fennern's expert testimony concerning PCMD. He argued that under State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), this scientific evidence is unreliable and inadmissible. He asserted that there are no peer reviewed studies analyzing the

accuracy of PCMD and that such studies are impossible. There is no way for experts to determine the accuracy of PCMD because the way in which it is calculated and determined is unknown. PCMD is a "closely guarded trade secret by the telecom companies," including Sprint.

Counsel maintained that Sprint admits these records are inaccurate and, therefore, they are not reliable. Moreover, he argued, "Just because every member of CAST comes in and says that there is a two hundred and twenty meter variance does not necessarily make it true." He continued, "[I]t would take some outside source to come in and test that. And that's the whole purpose of Council and these cases[4] is to make sure that the data is itself trustworthy to some degree and does not simply go to the weight of the evidence, it goes to the admissibility." Tr. 147, l. 22 – 151, l. 5.

In addition to his arguments on the record, counsel also relied on Appellant's Motion in Limine for a Hearing on the Admissibility of Expert Testimony marked as Court's Exhibit No. 4. R. *.

After considering the factors outlined in Council, the court found the testimony concerning PCMD to be reliable and admissible. Tr. 153, l. 20 – 156, l. 20. The court later clarified its ruling. Tr. 165, l. 10 – 169, l. 3.

Discussion

The trial court erred by admitting Fennern's expert testimony concerning the PCMD, specifically the alleged distance of Appellant's telephone to the cell tower, to show Appellant's telephone was allegedly at or near 10 Terramont Drive when the murders occurred, and at or near other relevant locations at specific times because there was insufficient evidence of the

[4] Counsel is referring to cases cited in Appellant's Motion in Limine for a Hearing on the Admissibility of Expert Testimony marked as Court's Exhibit No. 4. See R. *.

reliability of the data. This evidence should have been excluded under Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

The admission of expert testimony is governed by Rule 702, SCRE, which provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010), our Supreme Court held, "Expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." The Court emphasized that "expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony.

> First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, **the trial court must evaluate the substance of the testimony and determine whether it is reliable.**

Id. at 446, 699 S.E.2d 169, 175 (internal citations omitted) (emphasis added).

The Court concluded that "only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate." Id. at 447-447, 699 S.E.2d at 175.

In Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 735 S.E.2d 650 (2012), our Supreme Court exclaimed, "It is this final requirement of reliability which is the central feature of the inquiry. Graves, at 74, 735 S.E.2d at 655 (citing State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009)).

"If the proffered testimony is scientific in nature, then the circuit court must determine its reliability per the factors set forth in [State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)]." Id. at 74, 735 S.E.2d at 655 (citing Watson, 389 S.C. at 449-450, 699 S.E.2d at 177). "Under Council, the court must consider the following: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." Id. (citing Council, 335 S.C. at 19, 515 S.E.2d at 517).

Fennern's testimony concerning the PCMD is not reliable under the Council factors and should have been excluded by the trial court. An analysis of the Council factors makes it clear that the evidence is unreliable. First, there are no publications or peer review of the technique. As defense counsel argued at trial, it is impossible to analyze the accuracy of PCMD because Sprint and other providers will not disclose how it is calculated or determined. Fennern merely relied on PCMD provided by Sprint. He did not conduct any of his own calculations to determine if the figures provided were accurate. For this same reason, it is impossible to determine the quality control procedures used by Sprint to ensure the reliability of PCMD or the consistency of the method with recognized scientific laws and procedures, which are the third and fourth factors under Council. Lastly, as to the second factors, it is likely this method has been applied in prior cases, but this does not make it reliable.

Because there is no way to determine the accuracy or reliability of PCMD, Fennern's testimony concerning this data should have been excluded. Sprint, who provides the information to law enforcement, admits PCMD is inaccurate and should not be relied upon. Representatives of Sprint, such as records custodians, are not even permitted to testify about PCMD and will attest under oath that the data is inaccurate.

Respectfully, this Court should hold the trial court erred by failing to exclude Fennern's testimony about PCMD, reverse Appellant's convictions and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Lara M. Caudy

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Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 30th day of January, 2017.

RECEIVED
JAN 30 2017
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN DONELL RHODES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter has been served upon Jonathan Donell Rhodes, #343817, at Lieber Correctional Institution, P.O. Box 205, Ridgeville, SC 29472, this 30th day of January, 2017.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of January, 2017.

Brittany W [illegible] (L.S)
Notary Public for South Carolina
My Commission Expires: November 3, 2026.