

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

THE STATE,

RESPONDENT,

V.

ROBERT LEE MOORE,

APPELLANT

APPELLATE CASE NO. 2014-001669

Appeal from Spartanburg County

Honorable R. Keith Kelly, Circuit Court Judge

Opinion No. 5512

PETITION FOR REHEARING

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Appellant seeks rehearing pursuant to Rule 221 (a), SCACR, because the majority of this Court, for different reasons, overlooked the scope of Officer McCraw's warrantless search of Appellant Moore's cell phone as Judge Konduros explained in her dissent:

I conclude Officer McGraw's warrantless examination of the SIM card constituted a search that violated Moore's Fourth Amendment rights. As Officer McGraw explained in his testimony, the contents one can find on a SIM card *include the stored phone number, call logs, a contact list, and "things of that nature."* In this case, *Officer McGraw testified he recovered the cell phone number, thirty-four contact entries, and three text messages.* The minute Officer McGraw removed the SIM card, **he had access to digital information in which our courts have recognized an expectation of privacy.** See Riley v. California, — U.S. —, 134 S.Ct. 2473,

189 L.Ed.2d 430 (2014) (explaining society is willing to recognize an expectation of privacy in the digital contents of one's cell phone as reasonable). Therefore, I would conclude the warrantless search of Moore's cell phone violated his Fourth Amendment rights and no exception to the warrant requirement applies to the facts of this case. (Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (indicating searches without a warrant are per se unreasonable under the Fourth Amendment unless some exception applies).

State v. Moore, Op. No. 5512, Shearouse's Adv. Sh. #33 at 59.

The dissent also explained the distinction between the present case and a Georgia and Fourth Circuit case relied upon in the lead opinion:

The lead opinion cites to two cases—one from the Georgia Court of Appeals and one from the Fourth Circuit Court of Appeals—both of which are distinguishable from the facts in this case. In State v. Hill, the police used a locked cell phone to call 911 and obtain the owner's phone number, name, and date of birth. 338 Ga.App. 57, 789 S.E.2d 317, 318 (2016). **Such limited identifying information is not all Officer McGraw had access to in Moore's SIM card.** The 911 dispatcher in Georgia did not provide the police with the owner's contact list, text messages, or call logs. The Fourth Circuit's opinion in United States v. Graham, 824 F.3d 421, 427 (4th Cir. 2016) (en banc), addressed an individual's expectation of privacy *in historical cell-site location information. Again, this is distinguishable from the information available on a SIM card.*

State v. Moore, Op. No. 5512, Shearouse's Adv. Sh. #33 at 59.

As to inevitable discovery, Judge Konduros harkened back to her dissent in State v. Brown, 414 S.C. 14, 32, 776 S.E.2d 917, 927 (Ct. App. 2015) *cert. granted* (S.C. Sup. Ct. Order dated August 8, 2017):

The holding in Riley "is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." 134 S.Ct. at 2493 (emphasis added). . . . I believe this language from Riley indicates an officer must obtain a warrant prior to searching a cell phone absent an applicable exception, even when one's expectation of privacy is diminished. Allowing officers to

search the digital content of a cell phone prior to obtaining a warrant, yet cure such an invasion **by arguing they could have inevitably obtained the information, circumvents the spirit of the warrant requirement.**

State v. Moore, Op. No. 5512, Shearouse's Adv. Sh. #33 at 60.

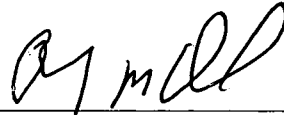
In concurring and dissenting, Chief Judge Lockemy agreed that appellant did not abandon his reasonable expectation of privacy in the data contained on his cell phone. State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995), involved discarding and abandoning illegal drugs, not the data and information on a citizen's cell phone. State v. Moore, Op. No. 5512, Shearouse's Adv. Sh. #33 at 56-57.

While finding the State violated the Fourth Amendment in this case by performing a search of appellant's cell phone information, the concurring and dissenting opinion nonetheless joined in the lead opinion because "[I] believe the State would have inevitably discovered the same information using the valid warrant it later secured to continue its search of the phone. See Nix v. Williams, 467 U.S. 431, 447, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) ('If the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings.'). State v. Moore, Op. No. 5512, Shearouse's Adv. Sh. #33 at 57.

Respectfully, the State conducted an illegal warrantless search of appellant's cell phone as the concurring and dissenting opinion found. In doing so it obtained information and data that violated appellant's reasonable expectation of privacy. The State's belated covering of its tracks to obtain a mulligan for its constitutional violation of appellant's reasonable expectation of privacy from the majority of the Court does, most respectfully, circumvent the integrity of the warrant requirement. See Riley v. California, — U.S. —, 134 S.Ct. 2473 (2014).

Appellant respectfully urges the majority of the Court to reconsider, and grant rehearing in this significant constitutional case.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written in a cursive style.

ROBERT M. DUDEK
Chief Appellate Defender

This 14th day of September, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

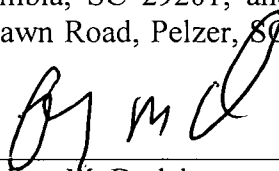
V.

ROBERT LEE MOORE,

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 William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Robert Lee Moore, #320303, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 14th day of September, 2017.


Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 14th day of September, 2017.

Courtney Powers (L.S.)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.

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