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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

The State, Respondent,

vs.

Robert Lee Moore, Appellant.

PETITION FOR REHEARING

On August 30, 2017, this Court affirmed the trial court's decision allowing into evidence the identity of the individual whose phone was found abandoned in the victim's vehicle. While a majority of the Court affirmed the decision of the trial court, the members of the panel arrived at the decision in different ways. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find in accordance with Judge McDonald's opinion that there was no violation of the Fourth Amendment, and affirm Appellant's conviction and sentence.[1] In the event, this Court denies the Petition for Rehearing, the State asks this Court to de-publish the opinions because the three vastly different opinions are likely to cause confusion and not clarity on the issues involved.

The majority of the Court found the officer obtained identification information from the phone in violation of the Fourth Amendment. However, as Judge McDonald

[1] While the State was the prevailing party, it believes out of an abundance of caution it needs to address the issues that follow in order to best raise them in the event a Petition for Writ of Certiorari is filed.

explained, the limited search to identify the owner of the phone was entirely reasonable, and so no violation of the Fourth Amendment occurred. Further, the majority of the panel overlooked or misapprehended the relevant law and facts demonstrating the phone was clearly abandoned and so an exception to the warrant requirement existed. Additionally, members of the panel either misapprehended or overlooked relevant law and facts indicating the identity would have inevitably been discovered and so suppression would not have been necessary.

First, the search to determine ownership of the phone was entirely reasonable and so it is not a violation of the Fourth Amendment. "The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV (emphasis added. This guarantee protects against unreasonable searches and seizures. "The touchstone of the Fourth Amendment is **reasonableness**." Florida v. Jimeno, 500 U.S. 248, 250 (1991) (emphasis added).

Investigator McGraw did not initially examine the contents of the phone such as text messages and call logs. Instead, he examined the SIM card which provided him merely a phone number for the phone. (T.19-20; R. 11-12). The phone number was then run through the Sheriff's Department's database and was connected to Appellant. (T.20; 37; R. 12-19). This process would have been required in order to verify whether the phone belonged to the victim. A process which was entirely reasonable given the phone was found in the victim's car. The mere obtaining of the cell phone number from the SIM card in order to verify whether the phone belonged to the owner of the vehicle in which it

was found did not implicate the Fourth Amendment because it was not an unreasonable search.

"When containers have been turned over to the police, an officer 'may validly search lost property to the extent necessary for identification purposes.'" United States v. Wilson, 984 F. Supp. 2d 676, 683 (E.D. Ky. 2013) (quoting State v. Ching, 678 P.2d 1088, 1093 (Haw. 1984). In Wilson, officers searched a suitcase containing the personal effects and electronics of the defendant in order to identify ownership. Id. at 681. The district court found officers acted reasonably in searching a suitcase for identification of the owner when the suitcase was found in the woods and turned over to them. Id. at 683.

Very recently, the Ohio Supreme Court considered the reasonableness of searching unattended book bags on a school bus. The Court found even if someone retained an expectation of privacy in a lost item, that expectation was "diminished to the extent that the finder may examine the contents of that item as necessary to determine the rightful owner." State v. Polk, 78 N.E.3d 834, 843 (Ohio 2017) (citing State v. Hamilton, 2003 MT 71, 314 Mont. 507, 67 P.3d 871; accord Ching at 110, 678 P.2d 1088; State v. Kealey, 80 Wash. App. 162, 173, 907 P.2d 319 (1995)); see also, U.S. v. Sumlin, 909 F.2d 1218, 1220 (8th Cir.1990) (holding officer's search of defendant's stolen property for the purpose of identifying ownership was a "legitimate governmental interest" that outweighed defendant's reasonable expectation of privacy in that property); Chrispen v. Sec'y, Florida Dep't of Corr., 246 F. App'x 599, 602 (11th Cir. 2007) (finding either briefcase left on trunk of third-party's automobile was abandoned or the search by officers of the briefcase "constituted a reasonable inventory-like administrative search conducted for the purpose of identifying the seemingly abandoned briefcase's owner");

Wayne R. LaFave, 3 Search & Seizure § 5.5(d) (5th ed.) (2016 Supp.) ("Similarly, there is authority that police may inventory effects which they find apparently abandoned or which are turned over to them by persons who found them or who by mistake took or received possession of them. Even if such full inventory authority is not granted, courts recognize a police obligation to undertake to find the owner of property they find or which a finder turns over to them, and on this basis an examination of contents is permissible but only to the extent needed to discover the owner's identification.") (footnotes omitted).

Investigator McGraw solely obtained the SIM card from the phone for the purpose of identifying the phone's owner. The only information presented at trial was the phone number obtained from that SIM card. No contents or other information was presented to the jury. As a result, Judge McDonald correctly determined the actions of the officers in searching the phone solely for identification purposes was entirely reasonable and not in violation of the Fourth Amendment.

Additionally, the phone in the instant case was abandoned and so Appellant did not retain any expectation of privacy in the phone. As this Court very recently observed: "Our supreme court has recognized the doctrine of abandonment as one such exception to the Fourth Amendment warrant requirement." State v. Brown, Op. No. 5355 (S.C. Ct. App. Filed September 23, 2015) (Shearouse Adv. Sh. No. 37 at 25) (citing State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995)). "Abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment." State v. Dupree, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995) (citing California v. Greenwood, 486 U.S. 35 (1988)). The South Carolina Supreme Court thoroughly

explained the determination of abandoned property, indicating a very clear distinction between abandoned property in a property-law sense and abandoned property in a Fourth Amendment sense:

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

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

This distinction is critical in this case where Appellant's sole argument regarding whether he abandoned the cell phone is that he "forgot it" or "inadvertently" left it behind—as he fled a crime scene. His argument, if believed in full, could be fruitful in the "property-law sense" because he did not voluntarily abandon his interest in the property, such that the police who found it could claim a greater possessory interest.

However, similar to this Court's conclusion in Brown, Appellant did abandon his expectation of privacy interest in the cell phone by leaving it at a crime scene and not seeking to reclaim the phone. See Id. at 27-29. He did nothing to further protect his expectation of privacy by claiming the phone at the scene, or calling the phone to determine if it had been discovered.

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

Finally, members of the panel overlooked the fact the identity of the person owning the phone would have inevitably been discovered. The only evidence admitted from the search of Appellant's phone was its connection to the victim through the phone calls made directly before the shooting occurred. The officers had the victim's phone in their possession. They had every right to search the victim's phone as part of the investigation, and even if they did not, Appellant could not assert any violation of the right because he did not have a possessory interest in the victim's phones. See State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (stating defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate his "own rights" have been violated by showing he has a legitimate expectation of privacy in connection with the searched premises in order to challenge the search). As a result of the search of the

victim's phone, the officers would have found the number that called five times immediately before the shooting. It would have taken nothing more than running the number through the same database that they ran the number from the SIM card through to determine it belonged to Appellant. A simple call to the number would have verified it was the phone in their possession and would have placed Appellant at the scene of the crime. As a result, any evidence obtained from the search of Appellant's phone would have inevitably been discovered through an independent source, the victim's phone. See Nix v. Williams, 467 U.S. 431, 443-444 (1984) (finding the inevitable discovery doctrine has been adopted as an exception to the exclusionary rule and "[t]he independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.").

The dissent posits: "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." This overlooks the exact rationale behind the inevitable discovery doctrine, as well as the cost to society for exclusion of evidence which otherwise should be admitted.

In Nix, officers violated the defendant's Sixth Amendment right to counsel by speaking with him after agreeing with his lawyer not to communicate with the defendant. As a result of the communications, the defendant led the officers to the location of a missing child's body. The United States Supreme Court acknowledged the violation of the Sixth Amendment, but found because individuals were already canvassing the area,

the body would have been inevitably discovered. The Court explained its reasons for not excluding the evidence based on the constitutional violation saying:

> Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. . . . Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

Nix, 467 U.S. at 446. The Court continued that exclusion was not necessary to cure an ill or to insure fairness, finding:

> Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, 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. In that situation, the State has gained no advantage at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a worse position than it would have occupied without any police misconduct. Williams' argument that inevitable discovery constitutes impermissible balancing of values is without merit.

Id. at 447. The Fourth Circuit, in United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir. 1970), recognized the inevitable discovery doctrine in a case similar to the one at hand. Officers stopped a vehicle driven by the defendant. After obtaining his wallet and realizing he presented an expired license, the officer continued to search through the wallet for further proof of identification. He found papers with the defendant's real name listed. The trial court suppressed the papers from the wallet, but allowed testimony and evidence that resulted after the individuals were detained. The Fourth Circuit found that

the defendant's identity would have been discovered from his co-defendant because they were both wanted as fugitives and the co-defendant had given his actual name. The Fourth Circuit explained:

> [T]he district judge found that the police would have learned of the Baltimore warrants through Rutkowski and that they would have arrested Seohnlein even if they had not discovered the papers in his wallet. Although the knowledge gained from examining the wallet may have accelerated a lawful arrest on the Baltimore warrant, it did not taint the evidence that was subsequently obtained.

Seohnlein, 423 F.2d at 1053.

Similar to Nix and Seohnlein, the information of Appellant's identity would have been discovered by the officers even if they had never pulled the SIM card from his phone. The officers would have matched his name to the phone number that called the victim using the same database they used once they had the phone number off the SIM card. There is no reason to suppress the evidence that otherwise would have been admissibly because it did not taint the investigation.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find the investigation into the identity of the owner of the cell phone was not an unreasonable search and seizure so the prohibitions of the Fourth Amendment do not apply, and affirm Appellant's conviction and sentence. If the Court finds the Fourth Amendment applies because the search would have been unreasonable, the State asks the panel to conclude the phone was abandoned, and therefore, Appellant no longer had an expectation of privacy in the phone. In the alternative, the panel should find the

information would have been inevitably discovered and affirm the refusal of the trial court to suppress the information. Finally, if this panel denies the Petition for Rehearing or does not alter its opinions, the State asks the panel to de-publish the opinions because they are more likely to cause confusion and not assist the trier of fact in reaching a conclusion on similar issues.

Respectfully submitted,

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September 14, 2017

STATE OF SOUTH CAROLINA

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 14th day of September, 2017.

Anne Mueller

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ALAN WILSON
ATTORNEY GENERAL

September 14, 2017

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Robert Lee Moore,
Appellate Case No. 2014-001669

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Assistant Attorney General
S.C. Bar No. 15608

Enclosures
cc: Robert M. Dudek, Esquire (2 copies enclosed)
Victim's Services (enclosure)