STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE MOORE,

APPELLANT

APPELLATE CASE NO. 2014-001669

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

The court erred by refusing to suppress all evidence derived from the search of appellant's cell phone pursuant to Riley v. California, 134 S.Ct. 2473 (2014), since the cell phone was searched without a warrant after it was inadvertently left behind, and not abandoned. All of the evidence located during the search (warrantless and after the warrant) of appellant's cell phone was the fruit of the poisonous tree, and had to be suppressed.

2.

The court erred by refusing to suppress the evidence obtained as a result of the search warrant since the warrant was impermissibly granted based on a conclusory affidavit that did not establish probable cause for the issuance of the warrant.

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand Jury for the offense of attempted murder. R. 327. His case came on for trial on July 21, 2014, before the Honorable R. Keith Kelly, and a jury. Andrew Johnston represented appellant. Derrick Bulsa was the deputy solicitor. R. 1.

On July 23, 2014, the jury found appellant guilty. R. 320, l. 25 – 321, l. 6. Judge Kelly sentenced appellant to thirty years' imprisonment. R. 322, ll. 5-6.

This appeal follows.

ARGUMENT

1.

The court erred by refusing to suppress all evidence derived from the search of appellant's cell phone pursuant to *Riley v. California*, 134 S.Ct. 2473 (2014), since the cell phone was searched without a warrant after it was inadvertently left behind, and not abandoned. All of the evidence located during the search (warrantless and after the warrant) of appellant's cell phone was the fruit of the poisonous tree, and had to be suppressed.

Relevant facts

Defense counsel Johnston moved to suppress all of the information derived from the search of appellant's cell phone, "an AT&T flip phone, which is attributed to the ownership of the defendant." Defense counsel told the judge the court would need to hear the testimony from the investigators who recovered it, and the other law enforcement personnel who were involved "in the forensic evaluation of the phone" before ruling. R. 2, ll. 7-19.

Assistant solicitor Bulsa told the judge this case involved the shooting of the victim, thirty-four-year-old Travis Hall, on February 25, 2013 at a Taco Bell in Spartanburg. Three cell phones were found surrounding the injured victim in his car. Since money and drugs were also found in the vehicle, the police obviously suspected this case involved a drug deal gone badly, or a drug deal that was actually the result of a planned robbery that went awry. R. 3, l. 8 – 6, l. 11. Defense counsel cited Riley v. California, 134 S.Ct. 2473 (2014) in support of his motion to suppress the cell phone evidence. R. 6, l. 13 – 7, l. 15.

Bulsa argued that the police discovered the cell phones, and thought they had a potential suspect. The police later got a search warrant after making "preliminary productive discoveries" from the warrantless search of the phone. However, Bulsa

maintained a search warrant for the contents of the cell phone was never required because it had been "abandoned by the defendant." R. 7, l. 16 – 9, l. 6.

Defense counsel Johnston confirmed that appellant was claiming a privacy interest and an expectation of privacy in his cell phone. Johnston strongly disagreed that appellant had abandoned his cell phone. Johnston argued there was a major difference between forgetting one's phone or negligently leaving it behind, and abandoning it, Even though the state had the burden of proof, as will be seen infra, the state was unable to state whether the cell phone had a secure password on it that law enforcement was able to get beyond, or whether the forensically "pulled" information was obtained in a less onerous manner. R. 8, l. 2 – 9, l. 14.

Suppression hearing

Investigator Lindsey McGraw was the state's first witness during the suppression hearing. McGraw testified that three cell phones were collected from the scene of the February 25, 2013 shooting at the Taco Bell in Spartanburg. "I was asked to perform a forensic examination of three cellular telephones that were found at the scene primarily to determine who owned the cell, the cell phones to determine ownership." McGraw identified the phones as an Apple I-phone 3, an Apple I-phone 4, and a ZTE331 flip phone. R. 10, ll. 8-25.

The flip phone was the one at issue here. McGraw did a forensic examination of "the installed SIM card." The card contained the call logs stored contacts "things of that nature." R. 10, l. 22 – 11, l. 12. McGraw was able to recover the cell phone number assigned to the phone from his forensic investigation. He then asked other investigators to find out who the person matched up with the phone number. R. 12, l. 2 – 13, l. 3.

McGraw testified he was able to determine the cell phone number did not belong to the victim. Before he obtained a search warrant, McGraw said he found out the telephone number was 864-494-2573. He also recovered thirty-four contact entries, and he discovered three text messages on the cell phone. R. 12, l. 2 – 13, l. 3.

McGraw says the stored contract information allowed him to associate a name – appellant -- with a phone number. McGraw said after he obtained this information, the police got a search warrant and "I did a full forensic examination of the phone, processed it." McGraw maintained he was unable to further recover contacts and images and pictures from the phone. R. 12, l. 2 – 15, l. 9.

On cross-examination, McGraw confirmed he got the phone number for the cell phone before the police obtained a search warrant. He confirmed the cell phone could send and receive text messages, and that typically the phone would have a contact name, phone number and "possibly their physical address and email address." McGraw confirmed that the cell phone had a camera for photographs, and a record of all telephone calls made and received. R. 16, l. 1 – 17, l. 21.

McGraw testified that the search warrant was obtained the day after he initially searched the phone without a warrant. R. 17, l. 4 – 18, l. 20. The search warrant affidavit and return are all included in the record on appeal. R. 323. The detective on the search warrant was Tom Clark, and the warrant was dated February 26, 2013. Court's Exhibit one. R. 323.

Detective Tom Clark was the state's next witness at the suppression hearing. Clark testified he was originally contacted by Investigator Williams because multiple (three) cell

phones had been found in the vehicle, and Clark said the police determined that the victim himself had multiple cell phones. R. 19, l. 6 – 20, l. 16.

Clark confirmed that he was not the person who conducted the forensic examination on the telephone before a search warrant was obtained. He correctly said he assumed investigator Williams was the person who did the warrantless forensic examination. R. 20, l. 24 – 21, l. 18. Clark then read into the record his affidavit to obtain the search warrant.

> Q. Tell me what you told Judge Willingham.
>
> A. Told Judge Willingham that on February the 25th at approximately 14:30 hours deputy responded to the Spartanburg County – well, excuse me. With the Spartanburg County Sheriff's Office responded to 7680 Warren H. Abernathy Highway in reference to a shooting. Upon arrival they found the victim, Travis Hall, had been shot. Travis Hall was transported to Spartanburg Regional Medical Center.
>
> Through further investigation and processing of the, processing of the vehicle, the victims AT&T ZTE model 7331 cell phone with serial number 322213371843 was found inside the vehicle. Through further investigation it was found that this phone number **assigned to this phone was 864-494-2573**. Through further investigation it was found that this phone *did not belong to the victim. Through further investigation it was found that this phone belonged to Robert Lee Moore*, that a search warrant is needed for the furtherance of this investigation to obtain information from the phone **that can either implicate or clear Robert Lee Moore from any involvement in this incident.**

R. 21, l. 19 – 22, l. 13. (emphasis added).

Judge Willingham did not have any other information to base his decision about the search warrant on other than that above. R. 22, ll. 14-19. Clark also confirmed that the police used the information from the warrantless search of the cell phone to obtain the search warrant. R. 23, ll. 3-19.

Clark agreed there was **not anything** in the search warrant affidavit which stated why the police thought appellant may or may not "have shot the victim." R.

23, l. 20 – 24, l. 4. Clark also said he was only told that the cell phone was found "in the vehicle under or near the victim and **that was all the information that I was given** other than the victim, according to the investigation, had several cell phones." R. 24, ll. 10-17. (emphasis added).

On re-cross examination, Clark said he did not recall what he told the judge about **how the police knew** that cell phone was owned by appellant. He confirmed that the affidavit also did not provide even that most basic information to the magistrate. R. 25, l. 12 – 26, l. 3.

Investigator Lorine Williams was the lead investigator on this case. R. 26, ll. 6-19. Williams confirmed that several cell phones were found in the victim's automobile. The wounded victim had been removed from the scene by the time he arrived at the Taco Bell and observed the two cell phones in the car. Williams said the third cell phone seized was not in plain view. Two of the cell phones "are in the driver compartment floorboard closer to the door." R. 27, l. 3 – 28, l. 1.

Williams testified --and apparently found significance in the fact -- that no one at the scene was claiming ownership of any of the cell phones. Williams said that although he did not have any documentation, he seemed to remember that McGraw had told them that "he had gotten a phone number from the flip phone I believe it was. That number was run through our data system at the sheriff's office. It was associated to Mr. Moore through that system as an "known phone number that he had used or given either in a previous incident or when he was booked in at the jail or something of that nature. It was associated to him. At that point we realized the phone did not belong to the victim. Therefore, the exam was stopped in

order to obtain a search warrant before any further forensic testing was done on the phone." R. 28, l. 23 – 29, l. 14.

Williams said he could not testify whether or not the cell phone was "password protected," and he added that Investigator McGraw's report was no help on the password protected subject either. R. 29, l. 21 – 30, l. 1.

As for "abandonment, "Williams confirmed he had never seen appellant in possession of the cell phone nor had he seen appellant relinquish possession of the phone. Williams confirmed he had chased suspects who had discarded items during the chase. R. 30, ll. 2-17. Williams said he had never seen appellant throw the phone down or throw it away. "I never saw Mr. Moore at the scene." Williams said he did not know why appellant left his cell phone but he opined it was apparent there had been a struggle at the Taco Bell scene, and he said **he was sure the cell phone was left behind by mistake**. R. 30, l. 1 – 32, l. 15. Another law enforcement officer, Forensic agent Robert Talanges, would take issue with the statement that it was apparent there had been a struggle inside the car. "I can't say there was a struggle." R. 101, ll. 9-17. Williams confirmed that he was aware of other situations where a person may have forgotten or misplaced their cell phone. R. 32, l. 18 – 33, l. 3.

Argument of counsel

Defense counsel Johnston again argued pursuant to Riley v. California that the fruits of the search of the cell phone had to be suppressed. Johnston distinguished State v. DuPree, 319 S.C. 454, 462 S.E.2d 279 (1995) where the defendant had abandoned his property for Fourth Amendment purposes by throwing

the crack cocaine to the floor during the search of his mouth. Johnston reminded the judge that "Detective Williams summed it up very nicely when he said I have no doubt that he [appellant] *'forgot it* and left it behind.'" Johnston argued unintentionally forgetting or leaving behind a cell phone did not mean that it was abandoned. R. 33, l. 24 – 35, l. 9.

Johnston added there was a large amount of money and drugs were found in the victim's car, and this was not a situation where a person would have voluntarily abandoned his cell phone. Johnston argued there was nothing in the search warrant to indicate appellant had anything to do with the shooting, and he said the warrant was conclusory, and did not provide probable cause for the issuance of a search warrant. Johnston noted the search warrant went so far as to state the search of the cell phone may actually "clear" appellant. This issue is discussed infra. in issue two. R. 37, l. 4 – 38, l. 11.

Johnston argued Riley v. California was on point about the extraordinarily large amount of private information that was stored on an individual's cell phone. The cell phones provided "potentially all of the person's associates, their addresses, their telephone numbers, email addresses, anything else a person might decide to include with their contact information." The cell phones also contained photographs and other personal data. R. 37, l. 4 – 38, l. 11.

Defense counsel repeated that the cell phone had not been abandoned, and that there was evidence of a clear intention to abandon the phone. Counsel argued that all the information obtained from the cell phone before and after the search warrant had to be suppressed. R. 38, ll. 12-25.

The solicitor said he had not anticipated the argument that the phone was mistakenly left behind rather than abandoned. The solicitor insisted the search was reasonable, and that the phone had been abandoned regardless, The solicitor also argued that the Riley v. California did not prevent the judge from ruling the telephone had simply been abandoned, and that appellant had no expectation of privacy in the cell phone once it "was left behind." R. 39, l. 2 – 41, l. 3.

Defense counsel in his colloquy with the court said that the victim was apparently known to carry two cell phones but that three phones were found. Johnston also argued that even if the police thought the phone belonged to the victim they would still have needed to obtain a search warrant to obtain the victim's information since it was known these cell phones contain private communications, and information that is inculpatory. For that reason, a search warrant was required for the personal information on the cell phone. R. 43, l. 4 – 44, l. 23. The judge deferred ruling. R. 44, ll. 22 -23.

Ruling

Following jury selection, the judge denied appellant's motion to suppress any and all of the information seized from appellant's cell phone. R. 51, ll. 9-14. The judge ruled that appellant's cell phone was "abandoned property." The judge said he had read cases that property can "be abandoned even momentarily." The judge reasoned the "property" had been abandoned. The judge ruled he would not suppress any information derived from the search of the cell phone, and accepted, as argued in issue two, that an alleged "benign" reason to search a cell phone was permissible. R. 51, l. 9 – 52, l. 24.

Defense counsel quickly tried to correct the judge about the prejudice of the information that law enforcement intended to use from the search of appellant's cell phone. Counsel correctly predicted the state was going to show a record of phone calls between appellant and the victim's phone that were in close proximity to the incident. He requested that the judge reconsider his ruling. The judge said he was not changing his ruling: "I have wrestled with that a little bit, Mr. Johnston." The judge and Johnston had a further discussion of Riley v. California, and Johnston argued that the holding in Riley v. California did not "hang on whether or not the person had been arrested." R. 53, l. – 54, l. 11. The judge refused to alter his ruling denying suppression.

Trial evidence

The state's first witness was the victim's mother, Deborah Hall. Her son, Travis Hall, was thirty-four years old when he was shot on February 25, 2013 at the Taco Bell. R. 58, l. 18 – 59, l. 23.

Ms. Hall testified her son came by her house for twenty to twenty-five minutes prior to the incident, and "he kept receiving several phone calls *from the same person.*" (emphasis added). Ms. Hall said she overheard her son talking about picking up his daughter near Highway 29. Highway 29, of course, was near the Taco Bell. Ms. Hall said the next thing she heard from her son was when "I got a phone call that he had got shot in the head from the sheriff's department." R. 59, l. 15 – 61, l. 24.

Ms. Hall testified her son spent a couple of months in the hospital after the shooting. R. 61, l. 7 – 63, l. 20. Ms. Hall then identified photographs showing the damage to her son's Impala. R. 64, l. 1 – 65, l. 21.

Deputy John Hudson, testified he went to the crime scene off Highway 29 at the Taco Bell. He remembered several people standing around the victim's automobile. R. 68, l. 2 – 70, l. 16.

Hudson recalled the victim had been shot, and he was leaning out of the vehicle "and the seatbelt was supporting his weight." Hudson opined the victim was attempting to get out of the front driver's seat, but the seatbelt was holding him inside. R. 73, l. 5 – 75, l. 16.

Tim Tullock worked for an air conditioning and refrigeration company. He was at the Taco Bell on the day of the shooting, February 25, 2013. R. 80, l. 22 – 82, l. 4.

Tullock was doing paperwork in his van when he heard "some popping sounds." He saw a man "hanging out of the car," and proceeded to walk across the parking lot "to see if he could help him out." Tullock remembered that a "white Chrysler 300 with some rather large rims" tore out of the parking lot "squealing its tires at the same time." R. 82, l. 23 – 84, l. 21.

Marilyn Arthur was a fingerprint identification expert. She testified that Tevin Thomas, a future state's witness, left behind ten fingerprints on the victim's automobile. R. 117, l. 17 – 119, l. 18. None of appellant's fingerprints were found on the victim's automobile. R. 127, ll. 9-14.

Tevin Thomas' fingerprints were also located on the white Chrysler that Tullock apparently identified as the car quickly leaving the Taco Bell parking lot. Appellant's fingerprints were found on the Chrysler as well. R. 129, l. 12 – 130, l. 11.

Thomas later testified as a state's witness that Reginald Sanders, Thomas, and appellant planned to rob the victim during a planned drug deal. Thomas claimed when Sanders did not show up that, he went with appellant to meet the victim at the Taco Bell without Sanders. Thomas said appellant parked his car "side by side" with the victim's car. Thomas maintained it was appellant who got out of his car, and got into the victim's car. Thomas claimed he saw appellant and the victim get into a struggle with the victim. Thomas said appellant and the victim were "on top of each other" when he heard a shot. R. 196, l. 4 – 207, l. 20. Thomas claimed appellant admitted he shot the victim as he fought with him inside the victim's car.[1] R. 207, l. 16 – 208, l. 11.

Eyewitness Barnes

The defense called eyewitness Chris Barnes during appellant's trial. Barnes was going through the drive through at the time of the Taco Bell shooting. R. 242, l. 19 – 245, l. 22. Barnes testified he saw the victim's car "rocking back and forth. I was thinking like, what's going on in that car because it was swinging around, and then I heard a pop, and then I saw somebody slumped over and blood like squirting." Barnes saw a man get out of the passenger side of the victim's car, and jump into "another car." R. 245, l. 19 – 246, l. 8.

[1] This Court can take judicial notice from the Department of Corrections Inmate Locator Information Service Website of the fact that Thomas was also serving sentences for burglary in the second degree, and he apparently received a ten year sentence for attempted armed robbery in this case. He is scheduled to be released in about six years on August 26, 2021.

The description Barnes gave of the man getting out of the victim's car after the shooting matched Thomas, and not appellant. That is true because Barnes described the black male quickly leaving the car as wearing a dark colored sweatshirt and a dark colored toboggan, and not red clothing. This was significant because Thomas was captured on a Hot Spot convenience store videotape shortly after the shooting wearing dark colored clothing ,and a toboggan. Appellant, on that same videotape, was wearing red clothing. R. 172, l. 1 – 174, l. 17.

The solicitor was left to argue in closing that he did not think Barnes had a good view of the victim's car. The solicitor essentially argued that Barnes misidentified Thomas as the man in getting out of victim's car at the time of the shooting, and maintained Barnes saw Thomas get out of the other car consistent with what state's witness Thomas said. R. 301, ll. 6-19.

Cell phone inculpatory evidence

Robert Talanges was with the forensic department of the Spartanburg County Sheriff's Department. He opined, from the broken glass, that the shots were fired from inside the victim's car "out" that day. There was also a powder burn on the seat. The victim had "a fully loaded gun" inside his car -- with a full magazine with sixteen rounds in it. Talanges opined the victim did not shoot his gun. R. 94, l. 21 – 96, l. 10.

Talanges found three cell phones inside the victim's car. He acknowledged he could not tell from looking at them who owned these cell phones. R. 100, l. 11 – 103, l. 20. Finally, according to Talanges, the gun which fired the shot that hit the victim in the head, and injured him, was never found. R. 106, ll. 11-13.

Forensic cell phone evidence

Forensic analyst Lindsey McGraw testified three cell phones were recovered from the victim's car, and he tried to identify the owners of the cell phones. R. 136, l. 11 – 137, l. 5. McGraw testified that his examination of the SIM card on the AT&T flip phone revealed the phone number was 864-494-2573. He identified the phone numbers from the other two cell phones as well. R. 137, l. 1 – 138, l. 13.

During his investigation, McGraw said he was able to "pull phone calls off of the cell phone log" and he "took pictures of them" with his digital camera. He testified five calls were made from appellant's phone to the victim's phone on the day of the shooting. R. 138, l. 24 – 142, l. 7.

Closing arguments

In closing, defense counsel Johnston reminded the jury how many times Tevin Thomas had lied to the police to gain an advantage for himself. He told the jury as a strategic matter the prosecution decided to charge appellant as a participant in the shooting rather than as an accessory after the fact which appellant actually was. R. 273, l. 8 – 277, l. 22. Johnston reminded the jury that Barnes was a neutral witness, with nothing to gain or lose, and that he observed a man dressed exactly like Tevin Thomas and not like appellant get out of the victim's automobile immediately after the shooting. R. 280, l. 16 – 283, l. 16.

The solicitor argued to the jury that the forensic evidence traced the cell phone found in the victim's car to appellant. The forensic cell phone evidence showed appellant called the victim five times on the day of the incident. R. 288, l. 21 – 289, l. 14.

When the police went looking for appellant after removing the information from his cell phone, the solicitor told the jury appellant could not be found for eleven days before he

"conveniently turned himself in." R. 287, l. 18 – 288, l. 20. The solicitor said Tevin Thomas conversely was found the day after the shooting. R. 288, ll. 15-20.

Discussion

It was undisputed in this case that the forensics personnel searched appellant's cell phone without a warrant. It is also undisputed that the information they obtained from this warrantless search allowed them to trace the telephone to appellant. The state then obtained an impermissible search warrant from a "conclusory affidavit" -- that provided no probable cause – for its issuance. The search warrant was also impermissibly obtained as the fruit of the information found during the illegal warrantless search.

It was acknowledged that the cell phone was inadvertently left behind in the victim's automobile. That means it was not intentionally abandoned.

Law enforcement had no way of knowing when appellant's cell phone was unintentionally left in the victim's vehicle. For all the police knew, appellant may have ridden with the victim on other occasions, and there was an innocent explanation for the cell phone being forgotten and left behind.

The state used the evidence procured from the search warrant to trace calls from the appellant's cell phone to the victim's cell phone. The phone calls allegedly showed appellant and the victim were communicating at a critically inculpatory time on the day of the shooting. The solicitor argued that five calls were made to the victim by appellant that day, and Tevin Thomas was found the day after the shooting, and that appellant was not located for eleven days until "he conveniently turned himself in."

Searches without a warrant are *pre se* unreasonable under the Fourth Amendment unless some exception applies. Katz v. United States, 389 U.S. 347, 357 (1967). It should

be apparent that the abandonment exception does not apply here given the testimony of the state's own witness in this case. The judge erred by finding the cell phone was abandoned. See State v. Dupree, supra. That erroneous legal ruling warrants reversal.

In Riley v. California, 134 S.Ct. 2473 (2014), the United States Supreme Court eloquently explained how a citizen's cell phone is a storage facility for nearly every aspect of his or her life – from the mundane to the intimate. Riley v. California, 134 S.Ct at 2490. The "historic 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 specific building." Id. at 2490 (*citing* United States v. Jones, 565 U.S. ___, 132 S.Ct. 945, 955 (2012) (Sotomayer, J., concurring).

Defense counsel correctly argued that the fact the cell phone in Riley was seized incident to arrest was not a distinguishing factor from this case. In fact, it seems intuitive from the case law that a person has a much less expectation of privacy in what is removed from his person incident to arrest than he or she does in a mistakenly left behind cell phone.

Law enforcement knows very well that a search of cell phone may lead to suspicion or probable cause that the owner of the cell phone is, or has been, engaged in criminal activity, or other wrongdoing. Further, intimate information, details, and photographs contained on a citizen's cell phone also raise considerable privacy considerations.

Law enforcement in this case should have obtained a search warrant before it forensically searched appellant's cell phone. Defense counsel correctly argued appellant had an expectation of privacy in his cell phone. Although the state had the burden of justifying the search of appellant's cell phone, they *incredibly* maintained they did not even know if the cell phone was "password protected."

It was undisputed that law enforcement used information obtained during the illegal warrantless search of appellant's cell phone to obtain the search warrant, even though, as argued infra, that warrant was illegally obtained from a "conclusory affidavit" that did not supply probable cause. Because illegally procured information from the warrantless search was used to obtain the search warrant the fruits of the search warrant also had to be suppressed. See, Wong Sun v. United States, 371 U.S. 471 (1963).

It was simply unreasonable for the police here not to obtain a search warrant for the contents of the cell phone once it was safely in their possession. See United States v. Chadwick, 433 U.S. 1 (1977).[2] See, also, State v. Brown, 400 S.C. 82, 91, 736 S.E.2d 263, 267 (2012). All of the evidence procured from the warrantless illegal search, and then from the search warrant in this case, should have been suppressed as the fruit of the poisonous tree. See, Wong Sun v. United States, 371 U.S. 471 (1963). The judge committed reversible error by ruling otherwise.

[2] Overruled on other grounds. California v. Acevedo, 500 U.S. 565 (1991).

2.

The court erred by refusing to suppress the evidence obtained as a result of the search warrant since the warrant was impermissibly granted based on a conclusory affidavit that did not establish probable cause for the issuance of the warrant.

Relevant facts

After illegally searching appellant's cell phone without a warrant, the state, through Detective Tom Clark, sought a search warrant the following day. Search warrant. R. 323. The affidavit purportedly providing probable cause that appellant had committed a crime to justify the search warrant stated:

> On 2/25/2013 at approx. 14:13 Hrs. Deputies with the Spartanburg County Sheriff's Office responded to 7680 Warren H. Abernathy Hwy. In reference to a shooting. Upon arrival they found the Victim, Travis Hall had been shot. Hall was transported to SRMC. Through further investigation and the processing of the Victim's vehicle **an AT&T ZTE model Z331 cell phone serial number #22213371843 was found inside the Victim's vehicle**. Through further investigation is was found this phone number assigned to the phone is **(864)494-2573**. Through further investigation it was found this phone did not belong to the Victim. Through *further investigation it was found this phone belonged to Robert Lee Moore*. This search warrant is needed for the furtherance of this investigation **to obtain information from the phone that can either implicate, or clear Robert Lee Moore** from any involvement in this incident.

The description of the property sought from appellant's cell phone was all stored data, which included but was not limited to "passwords, access codes, SIM passwords, files, programs, ringtones, picture files, video files, audio files, phonebooks, date books, call history, voice mail, e-mail, text messages, multimedia messages, instant messages,

internet chat content, calendar entries, task entries, note entries, internet browser history, internet bookmarks, geographical information, and databases." Search Warrant. R. 323.

Defense counsel correctly argued that this affidavit was an impermissible "conclusory" affidavit, and it did not provide probable cause to warrant the issuing of the search warrant. He cited State v. Weston, 329 S.C. 287, 494 S.E.2d 801, and State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct.App. 2012)[3] in support of his motion. Tr. 44, l. 6 – 45, l. 12.

This was an incredible search warrant in its conclusory nature. It did not, as counsel argued, state that probable cause existed that appellant shot the victim, and it incredibly even stated in the affidavit that a search of appellant's cell phone may "clear" him of further suspicion by the government. Conversely, it may lead to finding inculpatory evidence against him. This was the antithesis of probable cause. It was the epitome of a fishing expedition.

It is quite a gesture for the government ask to look into the most intimate aspects of a citizen's life -- which the United States Supreme Court recognized in Riley v. California recognized are often contained in his or her cell phone -- because that search may "clear" him or her of further suspicion by the government. This conclusory affidavit simply failed to provide probable cause for its issuance.

It is elementary that a search warrant may only issue upon a finding of probable cause. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The duty of the reviewing Court is to ensure that the issuing magistrate had a substantial basis upon

[3] The error was found harmless in State v. Jenkins, 2015 WL 4002381 (July 1, 2015), after the state did not challenge the finding of this Court that the search warrant for the DNA did not establish probable cause.

which to conclude that probable cause existed. State v. Adams, 291 S.C. 132, 352 S.E.2d 482, 483 (1987). The determination by the magistrate is governed by the "totality of the circumstances test." State v. King, 349 S.C. 142, 148, 561 S.E.2d 640, 643 (Ct.App. 2002), *citing* State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000).

In this state, search warrants may only be issued "upon affidavits sworn to before the magistrate . . . establishing the grounds for the warrant." S.C. Code § 17-13-140 (2003); State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter. Franks v. Delaware, 438 U.S. 154 (1978).

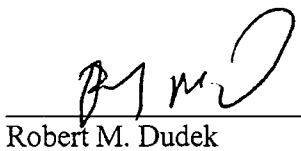
Conclusory statements and affidavits provide no basis to make a judgment that probable cause exists. See, State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990); State v. Baccus, 367 S.C. 41, 52, 625 S.E.2d 216, 222 (2006). Further, there must be sufficient nexus, described in the affidavit, between the items to be seized and the criminal behavior alleged. State v. McGuinn, 268 S.C. 112, 232 S.E.2d 229 (1977).

The judge erred by ruling nothing obtained from the search warrant "would lead to the arrest of the defendant himself. It led to his identity and certainly to a questioning as to why the cell phone may have been there. Don't know that. But that's all it does." R. 52, ll. 12-24. Defense counsel quickly explained the prejudice of the search warrant to the judge but he refused to reconsider his ruling which approved the fishing expedition the state had gone into in this case vis-à-vis the search warrant. R. 53, l. 1 – 54, l. 11. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of Decemeber, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 18, 2015

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
R. Keith Kelly, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LEE MOORE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr. Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of December, 2015.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of December, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in refusing to suppress evidence found during the search of a cell phone Appellant abandoned at the scene of the crime. (Appellant's Issues I and II).

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in refusing to suppress evidence found during the search of a cell phone Appellant abandoned at the scene of the crime. (Appellant's Issues I and II).

Appellant contends the trial court erred in refusing to suppress evidence obtained from his cell phone recovered from the scene of the crime. Appellant abandoned the cell phone, and, as a result, Appellant no longer had a reasonable expectation of privacy in a phone he left at a crime scene and made no attempt to collect. As a result, there is no violation of the Fourth Amendment and the results of the search were properly admitted into evidence. Further, any evidence obtained through the search of Appellant's cell phone would have inevitable been discovered through the search of the victim's phone also collected at the crime scene. Finally, the search warrant obtained was unnecessary, but, even if necessary, was obtained in good faith and suppression is not warranted.

In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is any evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); see also, State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004) ("On appeal from a suppression hearing, this court is bound by the circuit court's factual findings if any evidence supports the findings."). The appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "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. 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).

When moving to suppress evidence on the basis of an alleged unreasonable search, the defendant has the burden of showing a legitimate expectation of privacy in the area searched. See United States v. Rusher, 966 F.2d 868 (4th Cir. 1992); see also Rawlings v. Kentucky, 448 U.S. 98 (1980) (declaring a legitimate expectation of privacy is necessary to trigger Fourth Amendment protections); 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). "Since Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" Oliver v. United States, 466 U.S. 170, 177 (1984) (quoting Katz, 389 U.S. at 360 (Harlan, J., concurring)).

Thus,

> in 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."

Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143–44 n. 12 (1978)).

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.

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).[1] 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.

[1] Appellant contends the testimony by Investigator Williams indicates Investigator McGraw's report was "of no help" in determining whether the phone was password protected. On the contrary, the testimony regarding the report indicates the phone was no password protected. Counsel asked: "in his report, does he say it was password protected?" (T. 37; R. 29). The answer was not I don't see anything in the report it was instead: "I don't see that it was." (T.38; R. 30). The clear implication is if the phone had been password protected the report would have indicated the fact, but instead the report indicated the phone was not password protected.

Further, 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. See U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated. . . .") (emphasis added). As a result, the obtaining of the phone number connected to the phone for purposes of determining ownership would not implicate Fourth Amendment protections.

Additionally, 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. 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.").

Even though the search warrant obtained on Appellant's phone was entirely unnecessary in light of the fact he abandoned any expectation of privacy in the phone, the warrant was obtained in good faith and provided no basis to suppress the evidence. The United States Supreme Court in U.S. v. Leon, 468 U.S. 897 (1984), holds a court should not suppress the fruits of a search conducted under the authority of a warrant, even a "subsequently invalidated" warrant, unless "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922 n. 23. The Supreme Court explained the limited circumstances in which an officer could not be found to have acted with "objective reasonableness," thereby excluding application of this good faith exception:

> (1) "the magistrate ... was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth";

> (2) the magistrate acted as a rubber stamp for the officers and so "wholly abandoned" his detached and neutral "judicial role";
> (3) "an affidavit [is] so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or
> (4) "a warrant [is] so facially deficient- i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid."

U.S. v. Bynum, 293 F.3d 192, 195 (4th Cir. 2002) (citing Leon, 468 U.S. at 923) (internal quotation marks omitted).

The Fourth Circuit Court of Appeals explained:

> "Substantial basis" provides the measure for determination of whether probable cause exists in the first instance. If a lack of a substantial basis also prevented application of the Leon objective good faith exception, the exception would be devoid of substance. In fact, Leon states that the third circumstance prevents a finding of objective good faith only when an officer's affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." This is a less demanding showing than the "substantial basis" threshold required to prove the existence of probable cause in the first place.

Bynum, 293 F.3d at 195 (internal citations omitted) (emphasis added).

The South Carolina Supreme Court explained the application of the Leon good faith exception: "Suppression is appropriate in only a few situations, including when an affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (emphasis added) (quoting Leon, 468 U.S. at 923). "[W]hen an officer acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, a reviewing court should not order a suppression of the evidence based on a lack of probable cause." Id. at 292, 494 S.E.2d at 803-804.

In this case, even if the affidavit does not provide a substantial basis for determining the existence of probable cause, it is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." The affidavit cannot be described as so bare-boned that the magistrate's issuance of the warrant could be viewed as a mere rubber-stamping of the warrant application, nor is the affidavit so lacking in indicia of probable cause that it was unreasonable for the officers or the magistrate to conclude that probable cause existed. Accordingly, even if the affidavit is insufficient in some manner, this Court should affirm the admission of the evidence under the additional sustaining ground of the Leon good faith exception.

Appellant abandoned his cell phone and any reasonable expectation of privacy he had in it. As a result, the trial court properly refused to suppress the results of any search of the phone because Appellant no longer had the requisite expectation of privacy to challenge the search and any search was reasonable under the Fourth Amendment to the United States Constitution. Further, the information would have been discovered through a search of the victim's phone indicating he received the five phone calls from Appellant's phone number immediately before being shot at the Taco Bell. Finally, the search warrant was unnecessary, but even if found conclusory, it was obtained in good faith and did not provide a basis to suppress the evidence presented at trial. Accordingly, Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
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WILLIAM M. BLITCH, JR.
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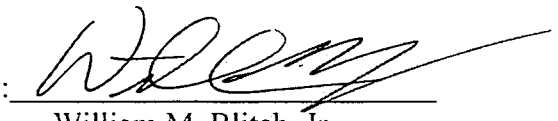
BY: 
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December 17, 2015

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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December 17, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable R. Keith Kelly, Circuit Court Judge
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The State, Respondent,

vs.

Robert Lee Moore, Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 17th day of December, 2015.

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