STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2017-001846

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SC Court of Appeals

THE STATE,

Appellant,

vs.

JAVON D. GIBBS,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in suppressing historical cell site location information (CSLI) by finding it was afforded protection by the Fourth Amendment and by finding the search warrant affidavit lacked sufficient probable cause.

STATEMENT OF THE CASE

In February of 2014, the Horry County Grand Jury indicted Respondent Javon D. Gibbs for murder and kidnapping. (Indictments). Prior to trial, Gibbs filed, among others, a motion entitled "Motion to Suppress Phone Records." On August 30, 2017, a hearing was conducted on Gibbs's motions in the Horry County Court of General Sessions before the Honorable Larry B. Hyman, Jr. At the conclusion of the hearing, Judge Hyman granted Gibbs's motion and suppressed the cell site location information. The State then filed a timely notice of appeal. On November 17, 2017, the State then moved this Court to hold this appeal in abeyance pending the United States Supreme Court's decision in Carpenter v. United States, 819 F.3d 880 (6th Cir. 2016) cert. granted, 137 S Ct. 2211, 198 L. Ed. 2d 657 (2017) (No. 16-402). This Court denied that motion by order filed January 8, 2018. This brief follows.

STATEMENT OF FACTS

Gibbs's murder and kidnapping trial was scheduled to be heard the week of September 3, 2017. A number of pre-trial motions were filed by Gibbs. Relevant to this matter, Gibbs's "Motion to Suppress Phone Records" was filed on August 22, 2017. (Def. Motion, pp. 1-4). In the motion Gibbs argues that his phone records, including cell site location information (CSLI), should be suppressed because it was obtained in violation of the Fourth Amendment. (Def. Motion, pp. 1-4). Gibbs noted that the State obtained the records from Verizon Wireless and was planning to use the CSLI to show that Gibbs was in the proximate location of where the victim, Zachary Malinowski, was abducted and then murdered. (Def. Motion, pp. 1-4). Gibbs argued in the motion that he had a subjective expectation of privacy in the CSLI. (Def. Motion, pp. 1-4)

The trial court scheduled the numerous motions to be heard on Wednesday, August 30, 2017. (Tr. p. 1). At the hearing, Gibbs argued that "courts have already said in numerous cases that there is a guaranteed expectation of privacy by the Fourth Amendment and cell phone records." (Tr. p. 7). He also argued that the investigator's affidavit supporting the magistrate's probable cause finding was not sufficient. (Tr. p. 7-8). Investigator Jonathan Martin was called to the stand to discuss the affidavit. He testified that he learned there was an ongoing dispute between Gibbs, the victim, and codefendant Chris Brown. (Tr. p. 13). He explained that Gibbs and Brown took the victim's share of profits from a drug deal. (Tr. p. 13). The victim also had difficulties with Brown because of an incident at a local park where Brown was charged with being in possession of a stolen handgun. (Tr. p. 15-18). Brown believed the victim "snitched on him," and that he was arrested because of the victim's statement to the responding authorities. (Tr. p. 17). Investigator Martin also learned about the drug deal gone bad from Shakeem Fore, one of the victim's best friends. (Tr. p. 18). Brown actually got into a fight with Marcus Smith, another good friend of the victim. (Tr. p. 17; 22-23). Smith took up for the victim and did not

believe he was treated fairly and stepped in the victim's place to fight with Gibbs and Brown. (Tr. p. 17).

Investigator Martin procured Brown's phone records first. (Tr. p. 25; 30). In those records, it showed Gibbs was communicating with Brown at the same time the victim went missing and was last seen. (Tr. p. 25). According to the CSLI, Brown's phone was placed proximate to the victim's house at the time investigators believed he went missing. (Tr. p. 25). In addition, communications on Facebook corroborated the drug deal gone bad. (Tr. p. 26). While testifying, Investigator Martin noted that the magistrate who signed the search warrant was familiar with the investigation and the fact that there was bad blood between the victim, Gibbs, and, Brown because he had signed other search warrants in the case and had been provided that information previously. (Tr. p. 26-27). At the conclusion of the hearing, the trial court granted Gibbs's motion to suppress the cell phone records, including the cell site location information. (Tr. p. 79).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "In appeals of pretrial rulings, [the appellate court] is 'bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law.' " Reed v. Becka, 333 S.C. 676, 684, 511 S.E.2d 396, 400 (Ct. App. 1999) (quoting State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). Importantly, a trial judge's ruling on a matter "will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law." State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial judge's conclusions lack evidentiary support or are controlled by an error of law. State v. Elders, 386 S.C. 474, 480, 688 S.E.2d 857, 861 (Ct. App. 2010).

ARGUMENT

The trial court erred in suppressing historical cell site location information (CSLI) by finding it was afforded protection by the Fourth Amendment and by finding the search warrant affidavit lacked sufficient probable cause.

Prior to trial, the trial court committed a reversible error of law by finding that cell site location information (CSLI) is afforded protection by the Fourth Amendment. The records sought in this case were created and stored by Verizon Wireless preventing Gibbs from having a reasonable expectation of privacy in records he had no access to. Thus, the third-party doctrine applies. In addition, the Fourth Circuit Court of Appeals' decision in United States v. Graham, 824 F.3d 421 (4th 2016) (en banc)[1], holding that individuals could not have a reasonable expectation privacy in CSLI is persuasive and controlling in this case. Second, the trial court abused its discretion in finding the search warrant affidavit and the supporting testimony

[1] The State notes that a petition for writ of certiorari has been filed asking the United States Supreme Court to review this decision. Graham, petition for cert. filed, (U.S. Sept. 26, 2016) (No. 16-6308).

presented at the pre-trial hearing did not establish sufficient probable cause for investigators to search and seize CSLI. Even if a warrant was required for investigators to obtain the CSLI from Gibbs's phone, the search warrant at issue was valid. Finally, the trial court also erred in finding the good faith doctrine did not apply in this case. Accordingly, the trial court's ruling should be reversed, and Gibbs's case should be remanded for trial.[2]

A. The trial court erred as a matter of law in finding cell site location information is protected by the Fourth Amendment.

Gibbs had no reasonable expectation of privacy in his cell site location information. "A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable." State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004).

The societal expectation of privacy in location information transmitted to a cell phone carrier is a novel issue in South Carolina with no cases directly on point.[3] In State v. Drayton, 411 S.C. 533, 769 S.E.2d 245 (Ct. App. 2015), this Court held the defendant did not have a reasonable expectation of privacy in his historical CSLI, citing prevailing federal law and the Stored Communications Act's requirement that investigators need only make a showing of "specific and articulable facts" necessary for the issuance of a court order authorizing disclosure

[2] The trial court's suppression of the CSLI significantly impairs the State's prosecution of this case, affects a substantial right, and prevents a judgment form which an appeal might be taken because this evidence is critical to the State's presentation of evidence. See S.C. Code Ann. § 14-3-330.

[3] The United States Supreme Court is currently considering a nearly identical issue raised here in Carpenter v. United States, 819 F.3d 880 (6th Cir. 2016) cert. granted, 137 S Ct. 2211, 198 L. Ed. 2d 657 (2017) (No. 16-402). The issue as framed by the government is: "Whether the government's acquisition, pursuant to a court order issued under 18 U.S.C. 2703(d), of historical cell-site records created and maintained by a cell-service provider violates the Fourth Amendment rights of the individual customer to whom the records pertain." Brief for the United States at (I) Carpenter v. United States, 137 S Ct. 2211 (2017), No. 16-402. Oral argument in Carpenter was held on November 29, 2017.

of CSLI. Drayton, 411 S.C. at 547-548, 769 S.E.2d at 262. The court reasoned Drayton had no reasonable expectation of privacy in the CSLI because he voluntarily contracted with the cellular provider, thereby conveying his location data to the provider who created the records in the ordinary course of its business. Id. at 549, 769 S.E.2d at 263. In 2015, the South Carolina Supreme Court vacated the portion of this Court's holding discussing the privacy interest in historical CSLI. State v. Drayton, 415 S.C. 43, 45, 780 S.E.2d 902, 903 (2015). The supreme court found this Court reached the issue in error because the supporting affidavits established probable cause for the search and that it was not necessary to engage in any further analysis.

In the Fourth Circuit Court of Appeals, the Maryland case of U.S. v. Graham has undergone its own evolution. The district court found the defendants did not have a legitimate expectation of privacy in historical CSLI after police obtained the records by court order pursuant to the Stored Communications Act. United States v. Graham, 846 F. Supp. 2d 384, 386 (D. Md. 2012). In its application to the court, the government stated the records sought would aid in an ongoing criminal investigation of recent robberies of two fast food restaurants. Id. The government sought to link the defendants with the prior robberies by identifying the location of cellular towers accessed by the defendants' phones during the relevant time periods. Id. Following its first oral argument, the Fourth Circuit affirmed the convictions but overruled the district court, finding the government's inspection of CSLI was a search for Fourth Amendment purposes. United States v. Graham, 796 F.3d 332 (4th Cir. 2015). The United States then petitioned the court for rehearing *en banc*, which was granted, and the *en banc* Court affirmed the decision of the district court, finding the non-content information obtained by a third party was distinct from protected contents of communications information, stating:

> The landscape would be different "if our Fourth Amendment jurisprudence cease[d] to treat secrecy as a prerequisite for privacy." Id. But unless and until the Supreme Court so holds, we are bound by the contours of the

> third-party doctrine as articulated by the Court. See, e.g., Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (reversing the Second Circuit but noting that it had correctly applied then-governing law, explaining that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls" (internal quotation marks, alteration, and citation omitted)). Applying the third-party doctrine, consistent with controlling precedent, we can only conclude that the Fourth Amendment did not protect Sprint/Nextel's records of Defendants' CSLI.

United States v. Graham, 824 F.3d 421, 433, 437–38 (4th Cir. 2016).

The Graham holding and this Court's decision in State v. Drayton[4] are consistent with the overwhelming majority of cases to consider the issue. The Fourth Amendment simply does not prohibit the government from obtaining business records that reveal sensitive information. Bank records, credit card records, and telephone records can reveal sensitive information *about* a suspect, but obtaining them from a third party is not a search *of* that suspect. The United States Supreme Court "has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." United States v. Miller, 425 U.S. 435, 443 (1976) (holding that individuals do not have a reasonable expectation of privacy in their bank records).

The majority of federal courts to consider the issue now before this Court have held that acquisition of historical CSLI without a warrant does not violate the Fourth Amendment because there is no legitimate expectation of privacy in those records. See, e.g., In re United States for Historical Cell Site Data, 724 F.3d 600, 615 (5th Cir. 2013) ("Cell site data are business records and should be analyzed under that line of Supreme Court precedent. Because the magistrate judge and district court treated the data as tracking information, they applied the wrong legal

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[4] State v. Drayton, 411 S.C. 533, 547-50, 769 S.E.2d 254, 262-63 (Ct. App. 2015)

standard. Using the proper framework, the SCA's authorization of § 2703(d) orders for historical cell site information if an application meets the lesser 'specific and articulable facts' standard, rather than the Fourth Amendment probable cause standard, is not *per se* unconstitutional"); United States v. Skinner, 690 F.3d 772, 777-78 (6th Cir. 2012); Graham, 846 F.Supp.2d at 389-90, 397-99; United States v. Davis, 785 F.3d 498, 513 (11th Cir. 2015) (en banc) (holding that the government obtaining a court order under the Stored Communications Act for CSLI was not a search); In re Applications of the United States for Orders Pursuant to Title 18, U.S. Code Section 2703(d), 509 F.Supp.2d 76, 81 (D.Mass. 2007) (no Fourth Amendment interest in prospective cell-site data).[5]

The holding in Graham is controlling over this case. Accordingly, the State urges this Court to correct the trial court's errors and to hold, consistent with the Fourth Circuit Court of Appeals, that the acquisition of CSLI by investigators does not implicate the Fourth Amendment.[6] The warrantless acquisition of historical cell-site records without a warrant does *not* violate the Fourth Amendment because there is no legitimate expectation of privacy in those records.

This Court "must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their contents." Miller, 425 U.S. at 442. See also Smith v. Maryland, 442 U.S. 735, 741 (1979). Here,

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[5] See also United States v. Dye, 2011 WL 1595255, *9 (N.D. Ohio April 27, 2011) (denying motion to suppress historical cell-site data); United States v. Velasquez, 2010 WL 4286276, *5 (N.D. Cal. Oct. 22, 2010) (same); United States v. Benford, 2010 WL 1266507, *3 (N.D. Ind. Mar. 26, 2010) (same); United States v. Suarez-Blanca, 2008 WL 4200156, *8-*11 (N.D. Ga. Mar. 26, 2008) (same); Mitchell v. State, 25 So.3d 632, 635 (Fla. Dist. Ct. App. 2009) (same). Contra In re Application of United States, 809 F. Supp. 2d 113, 2011 WL 3678934 *9-*11 (E.D.N.Y. Aug. 22, 2011) (holding a warrant is required to compel disclosure of historical cell-site records).

[6] Respondent did not argue that his rights were violated under the South Carolina Constitution, so the analysis is guided by Graham and its interpretation of the U.S. Constitution.

the State did not seek content or conversations, unlike in the situation before the Supreme Court in Katz, but CSLI. That is a key distinction as content is provided much stronger protections. Like the pen register numbers in Smith and the bank records in Miller, the State did not obtain Gibbs's "private papers" without a warrant. Instead, it obtained the business records of a third party, Verizon Wireless, and only for a very limited period of time, six days. A historical cell-site record is a phone company's own record of the cell tower and sector it used to handle a customer's call, in a transaction to which it is a party. It is generated and stored by a cell phone company at its own discretion because federal law does not require phone companies to create or keep such records.[7] Graham, 846 F.Supp.2d at 398 & n. 11; In re U.S. for Historical Cell Site Data, 724 F.3d at 611-12.

Additionally, Gibbs has no privacy interest in the historical CSLI because society does not recognize this interest as reasonable. The Fourth Amendment regulates the government's ability to obtain evidence *from* a person. It does not restrict the government from obtaining evidence *about* a person. See Katz v. United States, 389 U.S. 347, 350 (1967) ("[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"). Thus, it was unnecessary for the State to obtain a search warrant in order to acquire either the personal subscriber information related to the defendant's phone or the cell site location records from the phone company because the CSLI was not stored in a place in which the defendant a reasonable expectation of privacy.[8] A customer has no reasonable expectation of privacy in a business's records of services it provided. See United States v. Miller, 425 U.S. 435, 440 (1976) ("[T]he

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[7] 47 C.F.R. § 42.6 requires providers to maintain for 18 months "the name, address, and telephone number of the caller, telephone number called, date, time and length of the call." This requirement does not extend to cell-site information.

[8] In this case, investigators did obtain a search warrant but were *not* required by law to do so. The facts presented to the magistrate easily satisfied the "specific and articulable facts" standard for a court order pursuant to § 2703(d). Regardless, as discussed below, the search warrant was valid and investigators acted in good faith when obtaining the search warrant.

documents subpoenaed here are not respondent's 'private papers.'. . .[R]espondent can assert neither ownership nor possession . . . [of the] business records of the banks."). As Justice Marshall wrote for the Court in S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 743 (1984):

> It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.

The CSLI is no more than a record Verizon creates and maintains in its ordinary course of business for its own purpose. Accordingly, when the government seeks information from a business that has acquired transactional information from a customer, the fact that the information pertains to a customer does not permit the customer to object to its production.

Because these records are created solely by the cellular providers, "individual customers do not generally have access to those records, and could not be expected to produce them in response to a subpoena." Graham, 846 F.Supp.2d at 398. Moreover,

> A cell service subscriber, like a telephone user, understands that his cell phone must send a signal to a nearby cell tower in order to wirelessly connect his call. See United States v. Madison, No. 11–60285–CR, 2012 WL 3095357, at *8 (S.D.Fla. July 30, 2012) (unpublished) ("[C]ell-phone users have knowledge that when they place or receive calls, they, through their cell phones, are transmitting signals to the nearest cell tower, and, thus, to their communications service providers."). Cell phone users recognize that, if their phone cannot pick up a signal (or "has no bars"), they are out of the range of their service provider's network of towers. And they realize that, if many customers in an area attempt to make calls at the same time, they may overload the network's local towers, and the calls may not go through. Even if this cell phone-to-tower signal transmission was not "common knowledge," California v. Greenwood, 486 U.S. 35, 40, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the Government also has presented evidence that cell service providers' and subscribers' contractual terms of service and providers' privacy policies expressly state that a provider uses a subscriber's location information to route his cell phone calls. In addition, these documents inform subscribers that the providers not only use the information, but collect it. See also Madison, 2012 WL 3095357, at *8 ("Moreover, the cell-phone-using public knows that communications companies make and maintain permanent records regarding cell-phone usage, as many different types of billing plans are available . . . Some plans also impose additional charges when a cell phone is used outside its 'home area' (known commonly as 'roaming' charges). In order to

> bill in these different ways, communications companies must maintain the requisite data, including cell-tower information."). Finally, they make clear that providers will turn over these records to government officials if served with a court order. Cell phone users, therefore, understand that their service providers record their location information when they use their phones at least to the same extent that the landline users in Smith understood that the phone company recorded the numbers they dialed.

In re U.S. for Historical Cell Site Data, 724 F.3d at 613. See also Smith, at 742-43; see also Graham, 846 F.Supp.2d at 401.

Further, Gibbs voluntarily used his phone and voluntarily provided his CSLI to Verizon. In re U.S. for Historical Cell Site Data, 724 F.3d at 613-14 & n. 13; Skinner, 690 F.3d at 777 ("There is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone"). This is clear both from the reasoning of Smith and Miller, and from the provisions of his contractual agreement with Verizon. In re U.S. for Historical Cell Site Data, 724 F.3d at 613;[9] see also Graham, 846 F.Supp.2d at 399.

Gibbs attempted to equate CSLI with GPS tracking in his arguments to the trial court. (Tr. p. 46). The two are easily distinguishable and subject to very different standard. As opposed to GPS or other forms of electronic monitoring, the information revealed by historical CSLI "exposes to the government only where a suspect *was* and not where he *is*." Graham, 846 F.Supp.2d at 392. "The data gleaned from toll records or pen registers . . . encompassed 'location' data with far more precision than the historical cell site location records at issue in the

[9] Verizon's privacy policy states that "[w]e collect information about your use of our products, services and sites. Information such as call records, websites visited, wireless location, application and feature usage, network traffic data, product and device-specific information, service options you choose, mobile and device numbers, video streaming and video packages and usage, movie rental and purchase data, FiOS TV viewership, and other similar information may be used … ." See http://www.verizon.com/about/privacy/policy/.

present case, and typically that location would be one in which the user had a Fourth Amendment privacy interest, such as a home or office." Id. at 399.

"At best, the records in this case identify the closest cellular tower, whereas the pen register records at issue in Smith indicated the physical address of the defendant's telephone. The concept of a legitimate expectation of privacy in one's location or movement simply was not contemplated in those early telephone cases." Graham, 846 F.Supp.2d at 399. Also, Gibbs has not argued that these records revealed his movement in protected areas, such as his home, and he did not have any "subjective expectation of privacy that society is prepared to recognize as reasonable," see Katz, 389 U.S. at 361 (Harlan, J., concurring), either while traveling along the streets and highways or in committing his crime and the cover-up in an open area visible to the public.

> Unlike [United States v. Karo, 468 U.S. 705, 715 (1984)], where the electronic beeper concealed in the drum of ether disclosed not only the location of defendant's home, but also the fact that criminal activity was afoot (which featured prominently in the search warrant affidavit), there is nothing presumptively illegal about the possession of a cellular phone. The most that the "tracked" cell phone might reveal is that its owner might presently be found in the home (assuming that the phone had not been loaned to someone else). There is nothing, however, about that disclosure that is any more incriminating or revealing than what could be gleaned from the activation of a pen register or from physical surveillance. Moreover, outside of the home it is doubtful that the tracking of a cell phone has any Fourth Amendment implication whatsoever. See Karo, 468 U.S. at 713-72.

In re Applications of the United States for Orders Pursuant to Title 18, U.S. Code Section 2703(d), 509 F.Supp.2d at 81. See also United States v. Knotts, 460 U.S. 276, 281 (1983); Skinner, 690 F.3d at 777-78 (defendant had no legitimate expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone and, since he was on public road before stopping at public restroom, police could have obtained same information by visual surveillance).

Finally, and again unlike the GPS monitor surreptitiously installed in Jones, Gibbs could have simply turned off his cell phone or not used it while committing the crimes. At least one court has recognized that "cell phone users who fail to turn off their cell phones do not exhibit an expectation of privacy and such expectation would not be reasonable in any event." In re Smartphone Geolocation Data Application, 2013 WL 5583711, *16 (E.D.N.Y., May 1, 2013). Therefore, Gibbs did not have a reasonable expectation of the CSLI and the Fourth Amendment warrant requirement did not apply.

For the foregoing reasons, the trial court abused his discretion and committed a clear error of law by suppressing the CSLI in Gibbs's case. See Sheldon, 344 S.C. at 342, 543 S.E.2d at 585-586 (instructing a trial judge's ruling should only be reversed if it is legally erroneous or constitutes an abuse of discretion); see also State ex rel. Davis v. State Bd. of Canvassers, 86 S.C. 451, 455, 68 S.E. 676, 678 (1910) (explaining an appellate court "will correct errors of law" committed by a lower court). The State urges this Court to correct these errors and to find, consistent with the Fourth Circuit Court of Appeals, that the acquisition of CSLI by investigators does not implicate the Fourth Amendment. As a result, the trial court's ruling should be reversed, and Gibbs's case should be remanded for trial.

B. The trial court abused its discretion in finding the supporting warrant affidavit lacked probable cause.

The warrant affidavit combined with the supplementary testimony provided at the pretrial hearing constituted sufficient probable cause for the issuance of a warrant. The Fourth Amendment protects "[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. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237

S.E.2d 589, 591 (1977). Generally, in order for a search to be reasonable under the Fourth Amendment, a law enforcement officer must obtain a search warrant prior to conducting the search. Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014). In South Carolina, an officer seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348-349 (1999); see S.C. Code Ann. § 17-13-140 ("A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant.").

In deciding whether to issue a search warrant, the issuing judge must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). The court should base its determination on the totality of circumstances and afford great deference to the issuing judge's probable cause determination. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). "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) (quoting United States v. Leon, 468 U.S. 897, 923 (1984)).

An affidavit supporting a warrant must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of probable cause. State v. Baccus, 367 S.C. 41, 50, 625 S.E.2d 216, 221 (2006). The duty of a reviewing court is to ensure that the issuing magistrate had a substantial basis upon

which to conclude that probable cause existed under the "totality-of-the-circumstances" set forth in Illinois v. Gates, 462 U.S. 213, 238 (1983); Baccus, 367 S.C. at 50, 625 S.E.2d at 221.

Here, the affidavit set out the relevant facts and circumstances of the investigation up to that point. (Search Warrant). The affidavit reads as follow:

> On 8/27/13 the mother of Zachary Malinowski reported him missing from 2918 Hwy 905 in the Conway section of Horry County. Family and friends were interviewed including a close girlfriend and the most record contact they had with him was 8/25/13 by phone. This is not normal for him and it is believed something happened to him. A subsequent search of the victim's phone showed activity up to 0424 where the phone completely shut off in the Aynor area. His vehicle was located several days later completely burned and other property was located on the side of different roadways. As of 11/15/13 the victim or his body have not been located. The phone number to be searched belongs to Javon Gibbs who has been identified by many as being involved with his disappearance based on drug related incidents before his disappearance. The male denied the allegations and identified that he did not want to provide a DNA sample or take a polygraph to exclude him. It is my belief that searching the records of Javon Gibbs will provide information regarding any contact with the victim and his whereabouts during the date and time the victim went missing.

(Search Warrant). The affidavit sets forth sufficient information to support a probable cause finding. Notably, the investigator had information from multiple witnesses of prior altercations between the victim and the defendant stemming from a drug deal gone bad and from an incident where the defendant was arrested on weapons charges. (Tr. p. 12; 18; 26). First, the affidavit explains that the victim has been missing since August 26, 2013, which is two months before the search warrant was sought. (Search Warrant). After interviewing friends and family, the investigator concluded that it is not normal for the victim to disappear and be out of touch by cellular phone. (Search Warrant). The victim's phone was searched, and it was revealed that the phone was completely shut off and all activity stopped at 4:24am on August 26, 2013. (Search Warrant). The investigation began to show that foul play was involved in the victim's disappearance. As the affidavit explains, the victim's vehicle was located several days completely burned. (Search Warrant). Other property belonging to the victim was located on the

side of the road. (Search Warrant). This gave investigators reason to believe that the victim was kidnapped and was possibly murdered after he could not be located. Finally, the affidavit reveals that Gibbs has been "identified by many as being involved with [the victim's] disappearance based on drug related incidents before his disappearance." (Search Warrant). At the pre-trial hearing, Investigator Martin was able to supplement the record to explain how the investigation progressed and zeroed in on Gibbs and Brown. Brown's phone records, including the CSLI, were obtained first. (Tr. p. 30). Brown was in communication with Gibbs leading up to the time the victim was last seen and when his cell phone was shut off in the early morning hours. (Tr. p. 25-26; 30).

This evidence, particularly the timeline of events, provides ample information to support the probable cause finding made by the magistrate judge. The probable cause was based on evidence obtained from interviews showing that Gibbs and the victim had prior altercations and that Gibbs had a possible motive to kidnap and murder the victim. It was shown that Brown's cell phone was in the vicinity of the victim's house and then in the proximate location where the victim's vehicle was burned. (Tr. p. 25-26; Search Warrant). Brown's communications with Gibbs further supported that there was probable cause. In addition, the magistrate was familiar with the investigation because he had issued other warrants in the case. (Tr. p. 27). In short, there was a reasonable basis to believe that the defendant's phone records would produce evidence showing that a crime may have been committed. Viewing the affidavit and the supplemental testimony under the totality of the circumstances, there is sufficient information set forth to support the magistrate's finding of probable cause. See Kaley v. United States, __ U.S. __, 134 S. Ct. 1090, 1103 (2014) (recognizing probable cause "is not a high bar").The trial court erred in finding otherwise.

C. The trial court erred in finding the good faith exception did not apply.

Even if this Court finds that a warrant was required and that there was not sufficient probable cause, then the trial court further erred by finding that the good faith exception to the warrant requirement did not apply. There is no evidence to support this finding. Although the State submits that there was probable cause to issue a search warrant based upon the supporting affidavit, suppression of the records was not required even if probable cause was lacking because law enforcement acted in objectively good faith reliance upon the order that was issued. Due to the heavy costs exacted by the exclusion of evidence on both the judicial system and society as a whole, application of the exclusionary rule is only appropriate where the deterrent benefits of the rule outweigh the heavy costs its application would exact. State v. Brown, 401 S.C. 82, 88, 736 S.E.2d 262, 266 (2012). As a result, judicially-created exceptions to the exclusionary rule have been established, including the good faith exception first recognized by the United States Supreme Court in its decision in United States v. Leon, 468 U.S. 897 (1984). Brown, 401 S.C. at 88-89, 736 S.E.2d at 266; see also State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987) ("Exclusion of evidence is not the only means available to insure that warrants are properly issued."). "Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in "objective good faith." [Leon, 468 U.S. at 922–923]." Messerschmidt v. Millender, 132 S.Ct. 1235, 1245 (2012).

The Supreme Court determined the exclusionary rule should only "rarely" be applied to cases where officers reasonably relied upon subsequently-invalidated search warrants. Leon, 468 U.S., at 926. Specifically, the Supreme Court concluded suppression of the evidence based on a subsequently-invalidated search warrant was only appropriate in four limited situations: (1)

where the affiant misled the issuing judge by including false or misleading information in the search warrant affidavit; (2) where the issuing judge wholly abandoned his neutral and detached judicial role; (3) where the search warrant affidavit was " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;]' " and (4) when a search warrant was so facially deficient in some technical respect the officer executing that warrant could not reasonably have presumed it to be valid. Id. at 923 (citation omitted).

Gibbs presented a detailed search warrant affidavit that was not "bare bones." Gibbs failed to show how the investigator acted in "deliberate," "reckless," or "grossly negligent" disregard for Gibbs's Fourth Amendment rights." Id. at 909. Investigator Martin objectively acted in good faith in providing the information he had at the time to the magistrate showing that he had a reasonable basis in believing a search of Gibbs's phone would produce evidence that the victim was kidnapped. See United States v. Martin, 833 F.2d 752, 756 (8th Cir. 1987) ("When judges can look at the same affidavit and come to differing conclusions, a police officer's reliance on that affidavit must, therefore, be reasonable."). The trial court failed to support this finding with any facts or applicable law. Thus, the trial court abused its discretion in finding the good faith doctrine did not apply.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the ruling of the trial court should be reversed, and the case should be remanded for trial.

Respectfully submitted,

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Assistant Attorney General

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May 9, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2017-001846

RECEIVED
MAY 09 2018
SC Court of Appeals

THE STATE,

Appellant,

vs.

JAVON D. GIBBS,

RECEIVED
MAY 09 2018
SC Court of Appeals

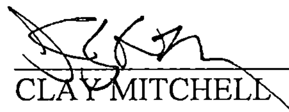
Respondent.

CERTIFICATE OF SERVICE

I, Clay Mitchell, counsel for the Appellant, certify that I have served the within Initial Brief of Appellant and Designation of Matter on Respondent by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record: Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 9th day of May, 2018.



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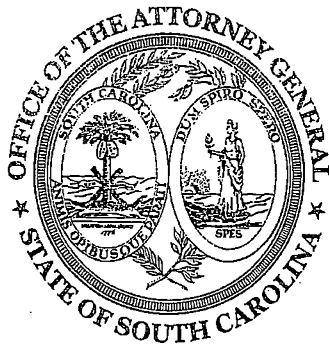

ALAN WILSON
ATTORNEY GENERAL

May 9, 2018

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

Re: *The State vs. Javon D. Gibbs*
Appeal from Horry County
Appellate Case No. 2017-001846

Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Brief of Appellant and Designation of Matter, together with Certificate of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

Clay Mitchell
Assistant Attorney General

CM/dmd
Enclosures
cc: Robert M. Dudek, Esq. (w/two copies of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)

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