The Supreme Court of South Carolina

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June 29, 2018

The Honorable Julie J. Armstrong
100 Broad St. Ste. 106
Charleston, SC 29401-2210

REMITTITUR

Re: The State v. Lamar Sequan Brown
Lower Court Case No. 2012-GS-10-07545
Appellate Case No. 2015-002360

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: David Alexander, Esquire
Alan McCrory Wilson, Esquire
Scarlett Anne Wilson, Esquire
William M. Blitch, Jr., Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Lamar Sequan Brown, Petitioner.

Appellate Case No. 2015-002360

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Nicholson Jr., Circuit Court Judge

Opinion No. 27814
Heard March 28, 2018 – Filed June 13, 2018

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Assistant Attorney General William M. Blitch Jr., both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston; all for Respondent.

JUSTICE FEW: In this appeal we address whether the digital information stored on a cell phone may be abandoned such that its privacy is no longer protected by the Fourth Amendment. The trial court determined the information on the cell

phone in this case had been abandoned, and admitted it into evidence. A divided panel of the court of appeals affirmed. *State v. Brown*, 414 S.C. 14, 776 S.E.2d 917 (Ct. App. 2015). We affirm the court of appeals.

I. Facts and Procedural History

On December 22, 2011, one of the victims and his girlfriend returned from dinner to his condominium on James Island in the city of Charleston. The victim testified they went straight to the living room because "I had arranged all of her Christmas presents . . . on the center coffee table." While she was opening the presents, he heard a phone ringing down the hall toward the bedrooms. Initially, he assumed the phone belonged to his roommate or her boyfriend. After the phone rang a few times, he saw a light and feared it might be someone with a flashlight. He testified, "I got a little nervous so I got up and told my girlfriend to stay in the living room and I walked down the hall and [saw] the ringing phone . . . on my bedroom floor." When he turned on his bedroom light, he realized his home had been burglarized. His "window had been broken out" and there was "glass everywhere." The burglar stole his television, his laptop computer, two of his roommate's laptops, and some of her jewelry.

The victim called the police. The first officer on the scene took the cell phone to the police station and secured it in a locker in the evidence room. Six days later, Detective Jordan Lester retrieved the cell phone and was able to observe "a background picture of a black male with dreadlocks." Considering the phone to be "abandoned property," he guessed the code to unlock the screen—1-2-3-4—and opened the phone without a warrant. Detective Lester looked through the "contacts" stored on the phone and found a person listed as "Grandma." He entered "Grandma's" phone number into a database called Accurint and identified a list of her relatives, which included a man matching the age of the person pictured on the background screen of the cell phone—Lamar Brown. Detective Lester then entered Brown's name into the South Carolina Department of Motor Vehicles database and looked at Brown's driver's license photograph. After comparing the photographs, Detective Lester determined Brown was the man pictured on the screen of the cell phone.

Detective Lester sent other officers to Brown's home to question him. The officers showed Brown the cell phone and informed him it was found at the scene of a burglary. Brown admitted the phone belonged to him, but claimed he lost it on December 23rd—one day after the burglary occurred. Brown also admitted that no

one else could have had his cell phone on December 22nd. After questioning Brown, the police charged him with burglary in the first degree.

At trial, Brown's counsel moved to suppress all evidence obtained from the cell phone on the ground Detective Lester conducted an unreasonable search of the phone in violation of Brown's Fourth Amendment rights. The trial court found Brown had no reasonable expectation of privacy in the information stored on the phone because he abandoned it. The jury convicted Brown of first-degree burglary, and the trial court sentenced him to eighteen years in prison. We granted Brown's petition for a writ of certiorari to review the court of appeals' opinion affirming his conviction.

II. Analysis

The Fourth Amendment guarantees us the right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV; *see also* S.C. CONST. art. I, § 10. "Abandoned property," however, "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, 40-41, 108 S. Ct. 1625, 1628-29, 100 L. Ed. 2d 30, 36-37 (1988)). Under a standard abandonment analysis, "the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy." *Dupree*, 319 S.C. at 457, 462 S.E.2d at 281 (quoting *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 371 (Minn. 1975)). As the Fourth Circuit has described it, "When a person voluntarily abandons his privacy interest in property, his subjective expectation of privacy becomes unreasonable . . . ." *United States v. Stevenson*, 396 F.3d 538, 546 (4th Cir. 2005); *see also id.* ("'[T]he proper test for abandonment is . . . whether the complaining party retains a reasonable expectation of privacy in the [property] alleged to be abandoned.'" (quoting *United States v. Haynie*, 637 F.2d 227, 237 (4th Cir. 1980))). In any Fourth Amendment challenge, "defendants must show that they have a legitimate expectation of privacy in the place searched." *State v. Missouri*, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (citing *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 430, 58 L. Ed. 2d 387, 401 (1978)). When the reasonable expectation of privacy is relinquished through abandonment, the property is no longer protected by the Fourth Amendment. *Dupree*, 319 S.C. at 457, 462 S.E.2d at 281.

Brown contends, however, the reasoning of the Supreme Court of the United States in *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), fundamentally alters the abandonment analysis when the property in question is the

digital information stored on a cell phone. In *Riley*, the Supreme Court described in extensive detail the manner in which "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." 573 U.S. at ___, 134 S. Ct. at 2489, 189 L. Ed. 2d at 446. Among the many observations the Court made to explain these differences, the Court stated, "many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate," 573 U.S. at ___, 134 S. Ct. at 2490, 189 L. Ed. 2d at 447, "Data on a cell phone can also reveal where a person has been[,] . . . and can reconstruct someone's specific movements down to the minute, . . . within a particular building," 573 U.S. at ___, 134 S. Ct. at 2490, 189 L. Ed. 2d at 448, and "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house," 573 U.S. at ___, 134 S. Ct. at 2491, 189 L. Ed. 2d at 448. The Court concluded, "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" 573 U.S. at ___, 134 S. Ct. at 2494-95, 189 L. Ed. 2d at 452 (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746, 751 (1886)).

We certainly agree with Brown that the reasoning of *Riley* is important to the Fourth Amendment analysis any time the police conduct a warrantless search of the digital information on a cell phone. We find, however, that *Riley* does not alter the standard abandonment analysis.[1] Rather, the unique character of cell phones described in *Riley* is one factor a trial court should consider when determining whether the owner has relinquished his expectation of privacy.

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[1] Other courts have considered whether the digital information stored on a cell phone may be abandoned for purposes of the Fourth Amendment and found that it had been abandoned. *See United States v. Crumble*, 878 F.3d 656, 659-60 (8th Cir. 2018) (holding the warrantless search of a cell phone did not violate the Fourth Amendment because the defendant abandoned it); *United States v. Sparks*, 806 F.3d 1323, 1347 (11th Cir. 2015) (same); *State v. Samalia*, 375 P.3d 1082, 1089 (Wash. 2016) (same); *but see State v. K.C.*, 207 So. 3d 951, 956 (Fla. Dist. Ct. App. 2016) (holding that "a categorical rule permitting warrantless searches of abandoned cell phones, the contents of which are password protected, is . . . unconstitutional" (relying on *Brown*, 414 S.C. at 32, 776 S.E.2d at 927 (Konduros, J., dissenting))).

Turning to the abandonment analysis the trial court conducted in this case, we review the trial court's decision for clear error. *State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016). This means we "must affirm if there is any evidence to support the trial court's [factual] ruling," 415 S.C. at 251, 781 S.E.2d at 900, but we "review[] questions of law de novo," *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014).

We begin our review of the trial court's finding that Brown abandoned his phone with the factual premise of *Riley*, that cell phones hold "the privacies of life." 573 U.S. at ___, 134 S. Ct. at 2494-95, 189 L. Ed. 2d at 452. Brown's expectation that this privacy would be honored—at least initially—is supported by the fact he put a lock on the screen of the phone. As the court of appeals in this case stated, "the act of locking the container . . . demonstrates to a law enforcement officer that the owner of the container *started out* with an expectation of privacy in the container's contents." 414 S.C. at 27, 776 S.E.2d at 924. At least until the time of the burglary, therefore, Brown enjoyed Fourth Amendment protection for the digital information stored on his phone.

Additionally, we can presume Brown did not intentionally leave his cell phone at the scene of the crime, for he must have known that doing so would lead to the discovery that he was the burglar. Thus, it is unlikely a police officer would believe the mere act of leaving the phone at the scene of the crime was an intentional relinquishment of his privacy. For at least a short period of time after the crime, therefore, the phone might not yet have been abandoned. However, when a person loses something of value—whether valuable because it is worth money or because it holds privacies—the person who lost it will normally begin to look for the item. In this case, the phone sat in the evidence locker at the police station for six days. The record contains no evidence Brown did anything during this time to try to recover his phone. While Brown might have taken action to protect his privacy before he left it at the victim's condominium, there is no evidence he did anything after that to retain the privacy he previously had in the phone's digital contents. There is no evidence he tried to call the phone to see if someone would answer. There is no evidence he attempted to text the phone in hopes the text would show on the screen, perhaps with an alternate number where Brown could be reached, or perhaps even with a message that he did not relinquish his privacy in the contents of the phone.[2] There is no evidence he attempted to

[2] Brown's phone received numerous calls and texts after Brown left it at the scene of the burglary. However, there is no evidence Brown made or initiated any of those calls or texts.

contact the service provider for information on the whereabouts of the phone. Instead, he contacted his service provider and canceled his cellular service to the phone. And there is certainly no evidence he went back to the scene of the crime to look for it, or that he attempted to call the police to see if they had it.

We would expect that a person who lost a cell phone that has value because of the privacies it holds would look for the phone in one or more of the ways described above. On the other hand, the reason a burglar would not look too hard to find a phone he lost during a burglary is obvious. Brown put himself in the difficult position of having to balance the risk that finding the phone would incriminate him against the benefit of retrieving the private digital information stored in it. Looking at these facts objectively, any police officer would assume after six days of no efforts by the owner to recover this phone—especially under the circumstance that the owner left the phone at the scene of a burglary—that the owner had decided it was too risky to try to recover it. Brown's decision not to attempt to recover the phone equates to the abandonment of the phone.

"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." *Missouri*, 361 S.C. at 112, 603 S.E.2d at 596 (citing *Oliver v. United States*, 466 U.S. 170, 177, 104 S. Ct. 1735, 1741, 80 L. Ed. 2d 214, 223 (1984)). As to the first point, Brown's decision to forego looking for his phone demonstrates he did not expect to maintain his privacy in the information stored on his phone. In addition—although it is not clear Detective Lester knew this when he opened the phone—Brown told the officer who first interviewed him that he canceled cellular service to the phone when he realized "someone has [my] phone."[3] Considering these facts, Brown clearly had no "subjective expectation" that his privacy in the digital information on the phone would be preserved.

Brown even more clearly fails on the second point. Here, we pause to consider the reasoning of Judge Konduros—the dissenting judge at the court of appeals. Judge Konduros correctly points out that *Riley* "recognized the unique nature of modern cell phones, their capacity for storage of vast amounts of personal information on devices easily carried, and the resulting privacy concerns triggered," and "the

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[3] Brown's statement is inconsistent with the records of his cell phone provider, which indicate the service was not officially canceled until later.

decision provides guidance on the protection of privacy interests under the Fourth Amendment given substantial advancements in technology." 414 S.C. at 30, 776 S.E.2d at 926 (Konduros, J., dissenting). With this reasoning, Judge Konduros properly brings our focus back to the factual premise of *Riley*—cell phones hold "the privacies of life." 573 U.S. at ___, 134 S. Ct. at 2494-95, 189 L. Ed. 2d at 452. From this premise, Judge Konduros correctly concludes "the Court's language indicates law enforcement must obtain warrants to search cell phones, even in cases when a person's expectation of privacy is diminished." 414 S.C. at 32, 776 S.E.2d at 927 (Konduros, J., dissenting).

In our abandonment analysis, however, the question is not whether Brown's expectation of privacy was "diminished." Rather, the question before us is whether Brown could reasonably expect to maintain any privacy interest in his phone after he chose to cancel cellular service and stop looking for it. More specifically, the question on this second point from *Missouri* is whether society will recognize as reasonable that a burglar who leaves his cell phone in a home he just robbed, and thereafter cancels service to the phone and makes no effort to recover it, nevertheless maintains a privacy interest under the Fourth Amendment in the digital information stored on the phone. Viewing the question in this posture, even considering the valid reasoning of Judge Konduros, the answer to the question is clearly, "No." The idea that a burglar may leave his cell phone at the scene of his crime, do nothing to recover the phone for six days, cancel cellular service to the phone, and then expect that law enforcement officers will not attempt to access the contents of the phone to determine who committed the burglary is not an idea that society will accept as reasonable.

To summarize, we turn to the majority opinion from the court of appeals, which we believe correctly concludes the abandonment analysis,

> When Detective Lester made the decision to unlock the phone several days later, he was aware of these circumstances, all of which, when considered together, provided sufficient objective facts to support his belief that any expectation of privacy in the phone and its data had been abandoned.

414 S.C. at 26, 776 S.E.2d at 924.

III. Conclusion

Modern cell phones are not just another item of property, and the extent to which they "differ in both a quantitative and a qualitative sense from other objects" is an important factor to be considered in any abandonment analysis. Nevertheless, the standard abandonment analysis applies to cell phones. There is evidence in the record to support the trial court's finding that Brown abandoned his cell phone. The decision of the court of appeals is **AFFIRMED**.

KITTREDGE, HEARN and JAMES, JJ., concur. BEATTY, C.J., dissenting in a separate opinion.

CHIEF JUSTICE BEATTY: I respectfully dissent. I would reverse the decision of the Court of Appeals and find, as did Judge Konduros in her well-reasoned dissent, Brown did not abandon his expectation of privacy in the contents of his cell phone. Accordingly, I would conclude that law enforcement's warrantless search of Brown's cell phone violated the Fourth Amendment.

The Fourth Amendment to the United States Constitution protects a person's right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *State v. Brown*, 401 S.C. 82, 89, 736 S.E.2d 263, 266 (2012) (citation omitted). The State bears the burden of establishing "the existence of circumstances constituting an exception to the general prohibition against warrantless searches and seizures." *State v. Gamble*, 405 S.C. 409, 416, 747 S.E.2d 784, 787 (2013).

We have recognized the doctrine of abandonment as an exception to the Fourth Amendment warrant requirement. *State v. Dupree*, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995). In determining whether the defendant abandoned property for Fourth Amendment search and seizure purposes,

> 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.

Id. (citation omitted). To answer this question, a court "must determine from an objective viewpoint whether property has been abandoned." 79 C.J.S. *Searches* § 43, at 70 (2017). "[A]bandonment is a question of intent and exists only if property has been voluntarily discarded under circumstances indicating no future expectation of privacy with regard to it." 68 Am. Jur. 2d *Searches and Seizures* § 23, at 135 (2010). Intent in this context is "inferred from words, acts, and other objective facts." 79 C.J.S. *Searches* § 43, at 70 (2017).

In my view, this case presents the Court with an opportunity to consider the continued validity of the doctrine of abandonment with respect to passcode-protected digital information in a post-*Riley* era. In *Riley*, the Supreme Court of the United States consolidated two cases to determine "whether the police may,

without a warrant, search digital information on a cell phone seized from an individual who has been arrested." *Riley v. California*, 134 S. Ct. 2473, 2480 (2014). In a unanimous decision authored by Chief Justice Roberts, the Court answered this question in the negative. *Id.* at 2485. More specifically, the Court concluded "[o]ur answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—*get a warrant.*" *Id.* at 2495 (emphasis added).

In reaching this conclusion, the Court prefaced its analysis by stating:

> Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999).

Id. at 2484. Using this analytical framework, the Court reasoned that:

> while *Robinson*'s[4] categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*[5]—harm to officers and destruction of evidence—are present

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[4] *United States v. Robinson*, 414 U.S. 218 (1973) (concluding that, following a custodial arrest, the warrantless search of defendant's person, the inspection of a crumpled cigarette package found on defendant's person, and the seizure of heroin capsules found in the package were permissible under the Fourth Amendment).

[5] *Chimel v. California*, 395 U.S. 752, 763 (1969) (holding that a search incident to an arrest may only include "the arrestee's person and the area 'within his immediate control'–construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence"), *abrogated by Arizona v. Gant*, 556 U.S. 332 (2009) (concluding search of defendant's vehicle, while defendant was handcuffed and locked in the back of a patrol car following an arrest for driving with a suspended license, did not fall within the search incident to arrest exception to the Fourth Amendment's warrant requirement as the safety and

> in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.
>
> We therefore decline to extend *Robinson* to searches of data on cell phones, and *hold instead that officers must generally secure a warrant before conducting such a search.*

Id. at 2484–85 (emphasis added).

Although the Court issued this categorical rule, it noted that "other case-specific exceptions," primarily the exigent circumstances exception, "may still justify a warrantless search of a particular phone." *Id.* at 2494. The Court explained, "[t]he critical point is that, unlike the search incident to arrest exception, the exigent circumstances exception requires a court to examine whether an emergency justified a warrantless search in each particular case." *Id.*

In my view, the majority fails to appreciate the full import of the *Riley* decision. While the majority discusses *Riley*, it concludes that "*Riley* does not alter the standard abandonment analysis." By narrowly construing the holding, the majority finds "the unique character of cell phones described in *Riley* is one factor a trial court should consider when determining whether the owner has relinquished his expectation of privacy."

In contrast to the majority, I believe *Riley* creates a categorical rule that, absent exigent circumstances, law enforcement must procure a search warrant before searching the data contents of a cell phone. Even though the decision in *Riley* arose out of a search incident to an arrest, I discern no reason why the Supreme Court's rationale is not equally applicable with respect to the abandonment exception to the Fourth Amendment. I believe the defendant's expectation of privacy in the digital contents of a cell phone remains the same in either context.

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evidentiary justifications underlying *Chimel*'s reaching-distance rule were not present).

As one legal scholar explained:

> the logic behind the Supreme Court's need to protect cell phones during arrests applies just as convincingly to cell phones left behind by their users. Categorically, the Supreme Court clearly identified that cell phones "implicate privacy concerns far beyond those implicated by the search" of any other nondigital physical item or container because of cell phones' immense storage capacity and variety of detailed information. The same invasion of privacy occurs during a warrantless search of a cell phone, regardless of whether that phone is found during an arrest or left behind by its owner. In light of the modern developments of personal technological devices and the Court's analysis in *Riley*, courts should develop a carve-out for cell phones from the abandonment exception to the Fourth Amendment and require police officers to obtain a search warrant before searching cell phones left behind by their owners.

Abigail Hoverman, Note, *Riley and Abandonment: Expanding Fourth Amendment Protection of Cell Phones*, 111 Nw. U. L. Rev. 517, 543 (2017) (footnote omitted).

I agree with this assessment and believe that any interpretation limiting the holding in *Riley* effectively negates its precedential value. *See State v. K.C.*, 207 So. 3d 951, 956 (Fla. Dist. Ct. App. 2016) (analyzing *Riley* and holding that "a categorical rule permitting warrantless searches of abandoned cell phones, the contents of which are password protected, is . . . unconstitutional (relying on *Brown*, 414 S.C. at 32, 776 S.E.2d at 927 (Konduros, J., dissenting) and *State v. Samalia*, 375 P.3d 1082, 1091-96 (Wash. 2016) (*en banc*) (Yu, J., dissenting))).

However, even accepting the majority's narrow interpretation of *Riley*, I would find the State failed to establish the abandonment exception to the Fourth Amendment warrant requirement.

As the majority recognizes, Brown did not voluntarily discard his cell phone. Brown also placed a passcode on his cell phone to protect his personal information from unauthorized access. *See K.C.*, 207 So. 3d at 955 (concluding that contents of defendant's cell phone, which was left in a stolen vehicle, were still protected by a password given "the password protection that most cell phone users place on their devices is designed specifically to prevent unauthorized access to the vast store of

personal information which a cell phone can hold when the phone is out of the owner's possession"). Brown never relinquished this passcode.

Further, unlike the majority, I believe there is evidence that Brown attempted to locate his phone. Notably, the victim was drawn to the bedroom by the sound of the ringing cell phone. During his testimony, the victim stated that the phone rang "over and over and over." The cell phone records reflect that these calls and text messages were initiated by individuals known to Brown as they were identified in the contact list stored on his cell phone. The cell phone records also reflect that the phone received calls and text messages from the evening of December 22, 2011, until at least January 3, 2012. Without evidence to the contrary, one can only infer that Brown initiated these contacts in order to find his cell phone. Additionally, on January 22, 2012, Brown contacted the cell phone service provider to discontinue service on the cell phone. By discontinuing cell phone service, Brown deactivated the lost cell phone to prevent the use of and access to the phone. Also, when questioned by law enforcement, Brown never disclaimed ownership of the cell phone.

In my view, these objective facts demonstrate Brown's intent to retain his expectation of privacy in the contents of his cell phone. *See* 79 C.J.S. *Searches* § 43, at 70 (2017) (noting that a court, when determining whether property has been abandoned in the context of search and seizure analysis, must look at the "totality of the circumstances, paying particular attention to explicit denials of ownership and to any physical relinquishment of the property"). Because there were no exigent circumstances presented, I would find law enforcement was required to obtain a warrant prior to the search of Brown's cell phone.

This decision in no way limits the ability of law enforcement to access the data contents of a cell phone that is unintentionally discarded near or at the scene of a crime. Rather, as explained by Chief Justice Roberts in *Riley*, it "is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Riley*, 134 S. Ct. at 2493.

Finally, I believe my conclusion effectuates the intent of *Riley*, but, even more importantly, ensures the heightened level of protection afforded by the express right to privacy found in the South Carolina Constitution. *See* S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ."); *State v. Weaver*, 374 S.C. 313, 322, 649

S.E.2d 479, 483 (2007) ("By articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution. Accordingly, the South Carolina Constitution favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." (citation omitted)).

Based on the foregoing, I would find the trial court erred in denying Brown's motion to suppress as law enforcement's warrantless search violated the Fourth Amendment. Accordingly, I would reverse the decision of the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lamar Sequan Brown, Appellant.

Appellate Case No. 2013-000725

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5355
Heard May 5, 2015 – Filed September 23, 2015

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Salley W. Elliott, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

THOMAS, J.: Lamar Sequan Brown appeals his conviction for first-degree burglary, arguing the trial court erred in admitting evidence obtained from a warrantless search of the contents of his code-locked cell phone. We affirm.

FACTS AND PROCEDURAL HISTORY

The two victims shared a first-floor condominium in Charleston County. Neither was home during the evening of Thursday, December 22, 2011. Sometime after 10:30 p.m. that night, one of the victims heard a phone ring after he returned to the residence. When he went to investigate, he saw an unfamiliar cell phone on the floor and noticed a window had been broken, his television was gone, and his bedroom had been ransacked. The victim claimed he "immediately knew that [the cell phone] was none of ours."

When the police arrived, the victim who discovered the burglary gave Officer Matthew Randall the unfamiliar cell phone. Officer Randall took the phone to the police station and placed it inside a secure box by the evidence desk. Fingerprints could not be obtained from the phone because the victim had handled it. Attempts to take fingerprint evidence from the crime scene were also unsuccessful.

Jordan Lester, the lead detective assigned to the case, began his investigation on December 28, 2011, and learned nobody had claimed the phone found at the crime scene. Considering the phone abandoned, Detective Lester opened the phone and noticed the background picture portrayed a black male with dreadlocks.[1] Detective Lester then searched the contacts list to look for a possible relative. He found an entry for "Grandma," took the corresponding number, entered it into a comprehensive database maintained by the Charleston Police Department, and obtained a list of relatives and their age ranges. Using this information, Detective Lester accessed records of the South Carolina Department of Motor Vehicles (DMV), found a driver's license photograph that matched the image on the phone, and obtained a name and address for the individual in question. The individual was identified as Lamar S. Brown.

Later the same day, Officer Dustin Thompson visited Brown at the address Detective Lester obtained from the DMV records. After Officer Thompson informed Brown he was investigating a burglary, Brown agreed to speak with him privately. The two went into Officer Thompson's vehicle to discuss the matter. Although Brown was given *Miranda*[2] warnings, he was not handcuffed or placed under arrest.

While questioning Brown, Officer Thompson did not initially disclose that the burglary he was investigating had taken place on December 22, 2011. Brown told

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[1] The phone was protected by a passcode, but Detective Lester unlocked the phone by entering "1-2-3-4," which he described as a "lucky guess."

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Officer Thompson he lost his phone on Friday, December 23, 2011. Brown claimed he had the phone with him when he drove to the store but could not find it when he returned to his vehicle. Brown stated he disconnected service to the phone when he learned from a friend that someone else had it. When Officer Thompson asked Brown whether he left his home between 6:00 p.m. and midnight on December 22, 2011, Brown answered he did not. Brown also told Officer Thompson no one else had possession of his phone during that time. When Officer Thompson showed Brown the phone found at the victims' residence on the night of the burglary, he acknowledged the phone belonged to him.

During the meeting, Brown signed a form with printed language indicating he had been advised of his *Miranda* rights but chose to waive them and answer questions concerning a possible burglary charge. The form also included a handwritten "witness statement" on which Officer Thompson's questions and Brown's answers were recorded. Some of the responses were written by Brown himself.

Subsequently, police obtained consent to search Brown's residence but did not recover any of the stolen items. A warrant for Brown's arrest was issued on December 29, 2011, and he was arrested a few weeks later.

On November 5, 2012, Detective Lester obtained a search warrant for records from T-Mobile, the service provider for Brown's phone. The warrant directed T-Mobile to provide its records from December 9, 2011, to January 3, 2012, for the number assigned to the phone. The information T-Mobile provided revealed the phone was deactivated on January 22, 2012, apparently later than when Brown indicated he cancelled his service.[3] T-Mobile's records also showed activity on the phone during the interval the victims were away from the residence.

On November 13, 2012, a grand jury indicted Brown for first-degree burglary, and he proceeded to trial on March 6, 2013. During a pretrial hearing, Brown moved to suppress all evidence obtained from his cell phone, arguing his Fourth Amendment rights were violated because the police did not obtain a search warrant before unlocking the phone. In the jury's absence, the trial court heard testimony from Detective Lester and Officer Thompson on the motion.[4]

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[3] A T-Mobile representative testified the phone would not have been automatically deactivated; an individual would have to call T-Mobile to deactivate the phone.

[4] The trial court also heard a motion in limine from Brown regarding the admission of testimony from the clerk of court that Brown had two prior burglary convictions. The State advised that Brown actually had six prior convictions but it

The trial court initially found Brown had a Fourth Amendment expectation of privacy in the phone because it was passcode-protected. However, the court denied Brown's motion to suppress, concluding that regardless of whether the phone was inadvertently dropped or deliberately discarded at the victims' residence, this expectation of privacy had been abandoned. During the State's case-in-chief, Brown made several unsuccessful motions based on his pretrial objection to suppress evidence obtained directly or indirectly from the warrantless search of his cell phone.

After the State rested, Brown declined to testify and did not call any witnesses. The jury found Brown guilty as charged, and Brown moved for a new trial based on his previous Fourth Amendment objections. The trial court denied the motion and sentenced Brown to eighteen years' imprisonment. This appeal followed.

ISSUE ON APPEAL

Did the trial court's admission of evidence obtained from the warrantless search of Brown's code-locked cell phone violate Brown's Fourth Amendment rights?

STANDARD OF REVIEW

When reviewing a trial court's ruling on the admissibility of evidence in a Fourth Amendment search and seizure case, the appellate court "will review the trial court's ruling like any other factual finding and reverse if there is clear error." *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). The appellate court "will affirm if there is any evidence to support the ruling." *Id.*; *see also Robinson v. State*, 407 S.C. 169, 180-81, 754 S.E.2d 862, 868 (2014) ("On appeal from a motion to suppress on Fourth Amendment grounds, [appellate courts] appl[y] a deferential standard of review and will reverse only if there is clear error.").

LAW/ANALYSIS

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would limit the evidence to two convictions pursuant to *State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000), to satisfy a required element of burglary in the first degree. The court allowed the State to present evidence of the convictions but prohibited evidence on the underlying facts. Brown has not appealed this ruling.

Brown argues the police needed a warrant to search his phone and no exception to the warrant requirement applied to the facts of this case. He disputes the trial court's finding that he abandoned his expectation of privacy in his phone, asserting he maintained this expectation by locking the phone with a passcode. The purpose of the passcode, Brown claims, was to protect sensitive personal information contained within the phone rather than to protect the phone itself.

The State argues the trial court properly found the police could search the phone without a warrant because it was abandoned property left at the scene of a crime. We agree with the State.

The Fourth Amendment to the United States Constitution recognizes "[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. Our state constitution also recognizes this right. *See* S.C. Const. art. I, § 10 (containing language nearly identical to that in the Fourth Amendment). "[T]he ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Id.* at 653.

In *Riley v. California*, 134 S. Ct. 2473 (2014), a decision issued after Brown's trial, the Supreme Court of the United States addressed the constitutionality of a warrantless search of a cell phone seized incident to a lawful arrest. Although the present case does not involve such a search, we are mindful of the Court's recognition that the immense storage capacity of modern cell phones presents privacy concerns that have not arisen in searches of other physical items:

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information . . . that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. . . . Third, the data on a phone can date back to the purchase of the phone, or even earlier. . . .
>
> Finally, there is an element of pervasiveness that

> characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. . . .
>
> Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different.

Id. at 2489-90.[5]

Based on these considerations, the Court refused to extend its holding in *United States v. Robinson*, 414 U.S. 218, 224 (1973), that despite the absence of any concern about loss of evidence or weapons within the defendant's reach, the arresting officer's actions in (1) removing a crumpled cigarette package from the defendant's person during the arrest, (2) opening it, and (3) discovering capsules of white powder that later proved to be heroin "did not offend the limits imposed by the Fourth Amendment." The Court in *Riley* expressly "decline[d] to extend *Robinson* to searches of data on cell phones." *Riley*, 134 S. Ct. at 2485. Rather, the Court stated:

> Modern cell phones are not just another technological convenience. With all they contain and all they may

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[5] The Court actually considered two cases that were consolidated for appeal, both of which raised the question of whether the police had the right to perform a warrantless search of digital information on a cell phone seized from an arrestee. *Riley*, 134 S. Ct. at 2480. One case involved a "smart phone," which had "a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity." *Id.* The cell phone at issue in the companion appeal was a "flip phone," which the Court described as "a kind of phone that is flipped open for use and that generally has a smaller range of features than a smart phone." *Id.* at 2481. Although the Court's analysis appears to focus on privacy concerns arising from the more contemporary smart phones, the Court expressed similar concerns regarding basic, older model phones such as the phone at issue in the present appeal. *See id.* at 2489 ("Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on.").

> reveal, they hold for many Americans "the privacies of life[.]" The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Id. at 2494-95 (citation omitted).

Despite the decisive tone in these statements, the Court did not require law enforcement officers to obtain a warrant to search every cell phone that falls into their possession. *See id.* at 2494 ("[E]ven though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone."). Although "a warrantless search is per se unreasonable and violative of the Fourth Amendment," there are "several well-recognized exceptions to the warrant requirement." *State v. Morris*, 411 S.C. 571, 580, 769 S.E.2d 854, 859 (2015). Our supreme court has recognized the doctrine of abandonment as one such exception to the Fourth Amendment warrant requirement. *State v. Dupree*, 319 S.C. 454, 457, 462 S.E.2d 279, 281 (1995). Under this doctrine, "[a]bandoned property has no protection from either the search or seizure provisions of the Fourth Amendment." *Id.*; *see also United States v. Tugwell*, 125 F.3d 600, 602 (8th Cir. 1997) ("A warrantless search of abandoned property does not implicate the Fourth Amendment, for any expectation of privacy in the item searched is forfeited upon its abandonment.").

"[T]he Fourth Amendment is not triggered unless a person has an actual and reasonable expectation of privacy or unless the government commits a common-law trespass for the purpose of obtaining information." *State v. Robinson*, 410 S.C. 519, 527, 765 S.E.2d 564, 568 (2014) (citation omitted). 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." *Tugwell*, 125 F.3d at 602; *see also State v. Taylor*, 401 S.C. 104, 119, 736 S.E.2d 663, 670-71 (2013) ("Whether a Fourth Amendment violation has occurred turns on an objective assessment of [an officer's] actions in light of the facts and circumstances confronting him at the time . . . ." (alteration by court) (internal quotation marks omitted)). Moreover, in determining whether property has been abandoned in the Fourth Amendment context, the inquiry is not whether the owner of the property has relinquished his or her interest in it such that

another, having acquired possession, may successfully assert a superior interest. *Dupree*, 319 S.C. at 457, 462 S.E.2d at 281. Rather, "'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.'" *Id.* (quoting *City of St. Paul v. Vaughn*, 237 N.W.2d 365, 371 (Minn. 1975)).

Here, during the suppression hearing, the State advised the trial court of case law supporting the proposition that Brown's apparent lack of effort to locate his phone after it was discovered at the crime scene was objective evidence establishing he abandoned any reasonable expectation of privacy in the phone and its data. Among the cases the State cited to the trial court was *United States v. Oswald*, 783 F.2d 663 (6th Cir. 1986), which concerned the denial of a motion to suppress drugs found during a warrantless search of a locked metal briefcase taken by the police from the locked trunk of a burned-out automobile the defendant left on the berm of an interstate highway. The trial court found the defendant had already abandoned both the car and the items left inside before responding law enforcement officers found and searched the briefcase inside the car trunk. *Id.* at 664-65. In affirming the finding of abandonment, the United States Court of Appeals for the Sixth Circuit stated:

> [A] guilty conscience cannot create an expectation of privacy that would not otherwise exist. Where an ordinary person could fairly be said to have abandoned his privacy interests by failing to come forward, a reasonable expectation of privacy cannot be thought to have been retained solely by virtue of the fact that the person happens to be guilty of a crime.

Id. at 667. Although the court expressly noted Oswald locked both the briefcase and car trunk, these precautions were not mentioned as possible reasons to support a finding that he continued to maintain an expectation of privacy after fleeing from the burning automobile. *Id.* On the contrary, the court determined Oswald's flight "provided objective abandonment evidence." *Id.* at 669.

The State also cited *People v. Daggs*, 34 Cal. Rptr. 3d 649 (Cal. Ct. App. 2005), during the suppression hearing. *Daggs* involved the warrantless search of the defendant's cell phone, which was found shortly after a robbery at a drug store. *Id.* at 650. After no one came forward to claim the phone during the twenty to thirty

minutes the officers remained at the store, the phone was booked into evidence at the police station, where it remained unclaimed for one week. *Id.* A passcode had been installed on the phone, but a detective discovered the phone's electronic serial number and other numbers by removing the battery. *Id.* at 650-51. Using these numbers, the detective procured a search warrant to release the subscriber's name, telephone number, and telephone records; however, the detective did not obtain a search warrant before removing the battery. *Id.* at 651. The subscriber was the defendant's brother, who told the police he had given the phone to the defendant. *Id.*

After the trial court denied the defendant's motion to suppress this evidence, the defendant entered a plea of no contest to one count of robbery. *Id.* at 650. The California Court of Appeal affirmed the trial court's finding the defendant abandoned his phone at the scene of the robbery. *Id.* The court held no unlawful search took place when the police removed the battery to view the numbers identifying the phone and gave the following explanation for its decision:

> Defendant contends . . . that since it was undisputed that he *accidentally* dropped the phone at Walgreen's, the court could not find that he intentionally or voluntarily discarded it. Defendant's testimony, assuming it were credited, would support an inference that at the moment he first dropped the phone he did not subjectively intend to discard it. Nonetheless, his own testimony also unequivocally established that as soon as he realized he had left the phone behind, he made a conscious and deliberate decision not to reclaim his phone, and never did. He therefore voluntarily abandoned it.
>
> In any event, the intent to abandon is determined by objective factors, not the defendant's subjective intent. Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other *objective* facts. Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search. [The victim] informed the officers who found the phone at the scene that he had not seen the cell phone in that area prior to his confrontation

> with the robber. No one else at the scene claimed the phone, nor did anyone assert a claim to it in the week after the robbery. Therefore, when the police seized the phone, and certainly by the time [police] finally performed the challenged search, these circumstances were all objective indications that defendant had discarded the phone, and would not reclaim it.

Id. at 651-52 (citations and internal quotation marks omitted).

Oswald and *Daggs* establish that an individual can abandon an expectation of privacy in the contents of a locked container, including a cell phone, when objective facts support law enforcement's belief the owner of the container has forgone his intent to protect the container or its contents. *See also Wilson v. State*, 966 N.E.2d 1259, 1264 (Ind. Ct. App. 2012) (rejecting a defendant's argument that he did not abandon a car when he locked the car before fleeing from police and holding "the fact that the vehicle was locked does not necessarily negate a reasonable inference that [the defendant] abandoned it"); *State v. Smith*, 681 So. 2d 980, 989 (La. Ct. App. 1996) (same); *State v. List*, 636 A.2d 1097, 1100-01 (N.J. Super. Ct. Law Div. 1990) *aff'd*, 636 A.2d 1054 (N.J. Super. Ct. App. Div. 1993) (holding the defendant abandoned any expectation of privacy in a locked desk and file cabinets inside his house when law enforcement were aware of the following objective facts before searching the desk and cabinets: defendant's neighbors had not seen or heard from the defendant or his family in weeks, light bulbs in the defendant's house were burning out and not being replaced, and the defendant left an envelope on the desk containing the keys to the desk and file cabinets and a note instructing the finder of the note to "contact the proper authorities").

In the case *sub judice*, the trial court admitted evidence obtained from Brown's cell phone, finding any expectation of privacy Brown had in the phone had been abandoned by the time the police searched it. All the evidence presented during the suppression hearing supports the trial court's conclusion. The State's witnesses testified the phone had been in police custody for at least five days. Brown did not dispute that the phone was found in a private residence shortly after the residence was burglarized. The phone did not belong to anyone who lived at or frequented the residence, and no evidence of any attempts to reclaim the phone after it was confiscated by the police was presented. When Detective Lester made the decision to unlock the phone several days later, he was aware of these circumstances, all of which, when considered together, provided sufficient objective facts to support his belief that any expectation of privacy in the phone and its data had been

abandoned. *See Tugwell*, 125 F.3d at 602 (explaining whether one has abandoned an expectation of privacy "is determined on the basis of the *objective facts available to the investigating officers, not on the basis of the owner's subjective intent*" (emphasis added)); *Daggs*, 34 Cal. Rep. at 652 ("[T]he intent to abandon is determined by objective factors, not the defendant's subjective intent. Abandonment is primarily a question of intent, and intent may be inferred from words, acts, and other *objective* facts." (internal quotation marks omitted)).

The dissent distinguishes *Oswald* on the basis that a cell phone contains much more information than a locked briefcase is capable of containing. However, this misses the point because it is not the volume of a locked container's contents that determines whether or not the container and its contents have been abandoned under the Fourth Amendment. *See Riley*, 134 S. Ct. at 2494 (discussing the massive storage capabilities of modern cell phones but acknowledging "case-specific exceptions may still justify a warrantless search of a" cell phone). Rather, it is the objective indicia of the owner's intent, viewed from the perspective of law enforcement, to forgo protecting the container or its contents that determines whether the owner has abandoned them. *See Tugwell*, 125 F.3d at 602 (explaining whether one has abandoned an expectation of privacy "is determined on the basis of the *objective facts available to the investigating officers, not on the basis of the owner's subjective intent*" (emphasis added)); *Taylor*, 401 S.C. at 119, 736 S.E.2d at 670-71 (stating "[w]hether a Fourth Amendment violation has occurred turns on an *objective assessment* of [an officer's] actions in light of the facts and circumstances confronting him at the time" (second alteration by court) (emphasis added) (internal quotation marks omitted)). Locking a container does not erase these objective indicia because the act of locking the container merely demonstrates to a law enforcement officer that the owner of the container *started out* with an expectation of privacy in the container's contents. One may start out with a desire to protect the container's contents only to later abandon the container and its contents upon experiencing a superior desire to avoid being arrested for a crime. *See Oswald*, 783 F.2d at 667 ("[A] guilty conscience cannot create an expectation of privacy that would not otherwise exist."). This is precisely what the circuit court held when it ruled that Brown had a reasonable expectation of privacy in the phone but later abandoned that expectation by discarding the phone.

Whether a container is locked or unlocked, once a reasonable amount of time in which to claim the container and its contents has passed, an objective assessment of the circumstances leads a law enforcement officer to the inescapable conclusion that the owner of the container has abandoned the container and its contents. *See United States v. Basinski*, 226 F.3d 829, 836 (7th Cir. 2000) ("Because this is an

objective test, it does not matter whether the defendant harbors a desire to later reclaim an item; we look solely to the external manifestations of his intent as judged by a reasonable person possessing the same knowledge available to the government agents."); *Oswald*, 783 F.2d at 667 ("Where an ordinary person could fairly be said to have abandoned his privacy interests by failing to come forward, a reasonable expectation of privacy cannot be thought to have been retained solely by virtue of the fact that the person happens to be guilty of a crime."). More specifically, in the case of a smartphone, the mere use of a passcode does not always lead law enforcement to conclude the owner of the phone retained an expectation of privacy in the phone and its contents when other objective facts to the contrary are available.

Accordingly, consistent with our standard of review, we hold the trial court properly admitted evidence obtained from Brown's cell phone because all the evidence offered at the suppression hearing established that at the time Detective Lester searched Brown's cell phone, objective facts supported his belief that Brown had abandoned any expectation of privacy in the phone and its data, and therefore, Detective Lester was not required to obtain a warrant before searching the phone. *See Brockman*, 339 S.C. at 66, 528 S.E.2d at 666 (explaining a trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence); *Dupree*, 319 S.C. at 457, 462 S.E.2d at 281 (explaining "[a]bandoned property has no protection *from either the search or seizure provisions* of the Fourth Amendment" (emphasis added)). As a result, we affirm the trial court's denial of Brown's motion to suppress evidence obtained from the warrantless search of his cell phone based on the abandonment exception to the warrant requirement.

CONCLUSION

We hold, based on our standard of review, the State presented evidence at the suppression hearing that supported the trial court's finding of abandonment. Thus, we affirm the trial court's decision to admit evidence obtained from the warrantless search of Brown's cell phone.[6]

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[6] The State also argues the evidence obtained from Brown's cell phone was admissible pursuant to the independent source doctrine. Because we conclude the evidence was admissible under the abandonment exception to the warrant requirement, we need not address the State's independent source argument. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d

AFFIRMED.

GEATHERS, J., concurs.

KONDUROS, J.: I respectfully dissent. I would find Brown did not abandon his expectation of privacy in the contents of his cell phone and therefore, law enforcement's warrantless search violated the Fourth Amendment.

The Fourth Amendment to the United States Constitution 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. Generally, "a warrantless search is per se unreasonable and violative of the Fourth Amendment," unless an exception applies. *State v. Morris*, 411 S.C. 571, 580, 769 S.E.2d 854, 859 (2015).

The doctrine of abandonment, which our supreme court has recognized as an exception to the warrant requirement, provides "[a]bandoned 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). In determining whether property has been abandoned in the Fourth Amendment search and seizure context,

> 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.

Id. (internal quotation marks omitted).

The United States Supreme Court recently held law enforcement must generally obtain a warrant before searching the contents of a cell phone seized pursuant to a search incident to arrest. *Riley v. California*, 134 S. Ct. 2473, 2493-95 (2014). The Court's "answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant." *Id.* at 2495. In distinguishing other physical objects obtained during searches incident to

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591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive).

arrest, the Court recognized the unique nature of modern cell phones, their capacity for storage of vast amounts of personal information on devices easily carried, and the resulting privacy concerns triggered. *Id.* at 2488-91. Although *Riley* focused on how the search incident to arrest doctrine applies to modern cell phones, the decision provides guidance on the protection of privacy interests under the Fourth Amendment given substantial advancements in technology. *Id.* (noting modern cell phones may store an immense range of sensitive personal information and a search of a cell phone "would typically expose to the government far *more* than the most exhaustive search of a house").

In my opinion, Brown did not relinquish his reasonable expectation of privacy in the *contents* of the phone merely by its discovery at the scene of a crime, especially in light of the presence of a passcode on the phone. In addition, the lack of any exigency justifying a warrantless search and the ease with which law enforcement could have obtained a warrant demonstrates further the need to comply with the warrant requirement.

I disagree with the majority's reliance on *United States v. Oswald*, 783 F.2d 663 (6th Cir. 1986), and on *People v. Daggs*, 34 Cal. Rptr. 3d 649 (Cal. Ct. App. 2005), in affirming the trial court's conclusion. The events in *Oswald* do not involve a cell phone and occurred decades before the technology on which modern cell phones are based was fully conceivable. 783 F.2d at 663-65; *see also Riley*, 134 S. Ct. at 2484 ("Both phones [at issue in the case] are based on technology nearly inconceivable just a few decades ago."). What the defendant in *Oswald* abandoned—a locked briefcase inside the trunk of a burned-out automobile left next to the interstate—is substantially different from a cell phone discovered at the scene of a crime. 783 F.2d at 663-64. While tangible items similar to those digitally contained on a cell phone, such as photographs, contact information, and correspondence, may be stored in a briefcase, it is significantly limited compared to what may be stored on a cell phone. *Riley*, 134 S. Ct. at 2489-90.

In addition, the law enforcement officers in *Daggs* did not access the data contained on the cell phone discovered at the scene of a crime but instead procured the phone's electronic serial number by removing the battery. 34 Cal. Rptr. 3d at 650-51. Unlike opening a passcode-locked phone without first obtaining a warrant, removing the battery to the cell phone to discover a serial number does not intrude upon a person's extensive private information that may be stored therein. *Id.* Moreover, the officers in *Daggs* used the serial number to obtain a warrant for the subscriber's name, telephone number, and telephone records, which led to the identification of the defendant. *Id.* at 651.

By contrast, the officers in the present case possessed the phone for nearly a week before unlocking it by a "lucky guess," yet did not seek a warrant, which likely would have been granted given that the cell phone was discovered at the scene of a burglary and did not belong to any of the residents. The officers' delay in accessing the cell phone belies the presence of any exigent circumstances justifying the warrantless intrusion. *See Riley*, 134 S. Ct. at 2494 (stating exigent circumstances may justify a warrantless search of a cell phone). As the majority notes, after unlocking the phone six days after the burglary, the lead detective searched through the contacts list until he found a relative, "Grandma," from whose number he then obtained a list of relatives and age ranges from a comprehensive database. The detective then compared photographs for driver's licenses in the records of the DMV to the background picture on the cell phone until he discovered a match. This match directly identified and led the officers to Brown. The evidence leading the officers to Brown was found entirely through the warrantless search of the phone and is the only evidence connecting Brown to the burglary. Law enforcement did not find Brown's fingerprints on the cell phone or at the crime scene, nor did a search of Brown's residence uncover any of the stolen items.

The Court in *Riley* made clear its holding "is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, *even* when a cell phone is seized incident to arrest." *Id.* at 2493 (emphasis added). In my opinion, the Court's language indicates law enforcement must obtain warrants to search cell phones, even in cases when a person's expectation of privacy is diminished, absent the applicability of an exception. *See id.* at 2488 ("[W]hen privacy-related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." (internal quotation marks omitted)). The existence of the passcode also displays an expectation of privacy in the contents of the phone, and the simplicity of Brown's passcode of "1-2-3-4" does not negate law enforcement's need to obtain a warrant. While under these circumstances I would not find a reasonable expectation of privacy existed in the physical object of the phone, I believe a person preserves their reasonable expectation of privacy in its *contents*, which is precisely what provides a phone its significance.

For the foregoing reasons, I believe Brown did not abandon his reasonable expectation of privacy in the contents of the phone and law enforcement's warrantless search violated the Fourth Amendment. The trial court therefore erred

in failing to exclude the evidence obtained from the warrantless search, and I would reverse and remand for a new trial.