STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

APPELLANT,

V.

JAVON DION GIBBS,

RESPONDENT

APPELLATE CASE NO. 2017-001846

INITIAL BRIEF OF RESPONDENT

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ISSUE PRESENTED

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?

COUNTER STATEMENT OF ISSUE PRESENTED

Whether the court correctly ruled respondent had an expectation of privacy in his cell phone records and the CSLI, that there was not probable cause for the issuance of the search warrant, particularly where the vague allegations did not even state what, if any, crime respondent allegedly committed, and it did not assert any belief in the reliability of the "sources"?

STATEMENT OF THE CASE

On August 30, 2017, a pre-trial hearing was held before the Honorable Larry B. Hyman pertaining to respondent's motions to suppress "all evidence, substances, tangible items, and/or testimony regarding any and all cell records and/or cell site location information regarding phone number 843-877-1553." R. p. (order). Ralph Wilson, Jr., represented respondent. Assistant attorney generals Jason Anders and James Clayton Mitchell represented the state. Tr. 1. (Order granting defendant's motion to suppress phone records; Motion to suppress phone records; Motion in limine to exclude cell site location information; and, motion in limine regarding testimony of cell location conclusions.). R. p. *.

At the conclusion of the hearing, the judge granted the motion to suppress, ruling, "I find that the information provided for the magistrate and the affidavits are woefully wanting and it was improperly issued and I'll suppress . . ." Tr. 79, ll. 2-11. A written order granting these suppression motions was filed on September 5, 2017. R. p. * (Order granting defendant's motion to suppress).

The state filed a notice of intent to appeal, and then moved that this Court hold the 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 (2017). This Court denied that motion by order filed January 8, 2018.

Subsequently, in Carpenter v. United States, 138 S.Ct. 2206 (2018), the United States Supreme Court reversed the Sixth Circuit and held an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through the cell site location information (CSLI).

This brief of respondent follows.

STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, the standard of review is limited to the following:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). This deference does not bar appellate courts from conducting their own review of the record to determine whether the trial judge's decision is supported by the evidence. State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

ARGUMENT

The court correctly ruled respondent had an expectation of privacy in his cell phone records and the CSLI, that there was not probable cause for the issuance of the search warrant, particularly where the vague allegations did not even state what, if any, crime respondent allegedly committed, and it did not assert any belief in the reliability of the "sources".

Relevant Facts

At the beginning of the hearing, the state confirmed, "this is a no body case." Tr. 5, ll. 10-25. The judge observed that he had read the respondent's motion to suppress, and he stated: "I am concerned about the sufficiency of this search warrant." Tr. 7, ll. 10-17.

Defense counsel Wilson asserted respondent had an expectation of privacy guaranteed by the Fourth Amendment in the cell phone records, and the CSLI. Defense counsel Wilson then read the affidavit to the search warrant for the court:

> MR. WILSON: On 8/27/13, the mother of Zachary Malinowski **reported him missing** from 2918 Highway 905 in the Conway section of Horry County. **Family and friends were interviewed, including a close girlfriend and the most recent 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 4:24 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 11/5/13, the victim or his body have not been located. The phone number that he searched belongs to Javon Gibbs, who had 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 late, excuse me, during the date and time the victim went missing.**

Tr. 8, ll. 6-25 (emphasis added).

The judge observed that respondent's exercise of his constitutional rights to remain silent, and not to submit to a polygraph or give a DNA sample could not be considered as evidence of guilt. Tr. 9, ll. 14-21.

The state then called investigator Jonathan Martin as a witness regarding the search warrant. Tr. 10, l. 9 – 11, l. 10. Martin told the judge he did not have a copy of his investigative report but he asserted that he had numerous statements "from people that Javon Gibbs and Christopher Brown had been involved in a drug transaction" with the missing person [Zach]. Tr. 11, l. 10 – 12, l. 6. Martin offered that respondent's girlfriend told him that, "Zach had an ongoing issue with Christopher Brown and Javon Gibbs . . . over drug dealing." Tr. 13, ll. 1-11. Allegedly, the drug deal was for $1400, and "they had taken his half and refused to give it up." Tr. 13, ll. 12-16.

Martin said that Christopher Brown had been arrested for having a stolen gun and "Zach was being blamed for the arrest and there had been some animosity over that." Tr. 15, ll. 9-14. Martin talked about another incident involving "Marcus Smith, Chris Brown, and Zach Malinowski at a park, and there was a shots fired call that the police responded to." Tr. 16, ll. 1-5. Allegedly, Christopher Brown and Marcus Smith were arrested in this incident. Tr. 16, ll. 21-23.

Martin also offered that respondent had denied ever being at "Zach's house, you know, pretty much accounting that he wasn't with Zach the night of the incident." Tr. 17, ll. 6-21.

On the issue of reliability, the following occurred with Jonathan Martin:

> Q: Okay. Well, let me ask you this. In the warrant that you actually wrote to the court, **did you actually talk about the reliability of these particular witnesses** that were saying these things about him?

A: **No, I did not.**

Q: Okay. Did you discuss with the magistrate at all in your conversation with him about the fact that you knew that these people were reliable, that y'all had done with business with them before, that they were confidential informants or whatever?

A: None of them were confidential informants; they were all witnesses to the acquaintance of Zach or ---

Q: Well, let me ask you this, did you give the actual Magistrate the actual police report that you had?

A: For right there?

Q: Yes.

A: No.

Tr. 24, ll. 2-18. (emphasis added).

When asked whether Martin talked about the reliability of the hearsay witnesses, Martin responded, "I probably did not go through reliability. **I did nothing to gauge each person's reliability** . . ." Tr. 30, ll. 8-15. (emphasis added). Martin also said that the search warrant stated that it only hoped respondent could provide information "regarding any contact with the victim and his whereabouts during the date and time that the victim went missing." Martin added, "That's all I can go off of is my beliefs." Tr. 33, ll. 13-23.

Martin admitted he did not put in the affidavit that he believed respondent committed a crime. He also did not allege respondent did anything illegal or wrong. Tr. 33, l. 24 – 34, l. 4.

Defense counsel Wilson then noted that there was no assertion as to the reliability of the informants or the hearsay witnesses, nor any statement of why the police believed "a person committed any particular crime." Tr. 35, l. 16 – 36, l. 24.

The judge observed that "this sworn affidavit didn't even say a crime has been committed." Defense counsel agreed, and he added that the warrant and affidavit were so

deficient in this case that there could not be any assertion that good faith could save them. Counsel Wilson also argued that the affidavit was so irresponsibly put together in this case that an inquiry "into the knowing or reckless falsity of the affidavit" was not out of the realm of a responsible inquiry. Tr. 37, l. 7 – 38, l. 17. See Franks v. Delaware, 438 U.S. 154 (1978).

As to probable cause, the judge asked, "Probable cause for what?" and defense counsel responded: "Exactly." Counsel said it was apparent that the state was merely going on a fishing expedition in this case, and that there were "a number of different theories out here that they had regarding to what happened to this young kid." Tr. 38, ll. 2-25. Wilson added, "Some people were saying, look, we saw him here, some people said he was kicked in the head, some people said he was hanged from a tree. They were getting psychics calling in giving them information . . ." Tr. 38, l. 18 – 39, l. 21. Counsel added:

> And the report is very detailed, but nowhere in the report -- when you look through the first, I think it was 31 pages or 60 pages before he issued the warrant for Javon Gibbs, there was almost no mention of Javon. Now there was a lot of talk about Chris Brown, but there's no mention of Javon Gibbs being this big drug dealer. There weren't incidents. There was one accusation that, you know, Zach said that, again, this man may have taken $600 from him. There was one person that said that. Otherwise, this other stuff was not true. Jamal Fleming never said it, Marcus Smith never said it, no one said this was happening. So, again, the falsity of the affidavit concerns me, but also the fact that that it does not give me conclusions as to what they're looking at this for **other than to say, okay, we're looking at it for his whereabouts. Well, if that's the case then, we don't need to use it against him in a murder trial.**

Tr. 39, ll. 3-18. (emphasis added).

The judge then stated:

> THE COURT: Let me ask you, counsel, why in the world in a case of this magnitude would you submit an affidavit for a search warrant that does not describe a crime and the only thing it says that the Defendant has been identified by many as being involved with his disappearance, not murder, not kidnapping, disappearance

> based on drug related incidents before his disappearance and not describe it, not put any information as to who the many are, which we've now determined not to be many, maybe one, or put in anything concerning the reliability and the officer says he had no information concerning their reliability, nothing to show any corroboration. **Who in the world goes before a Magistrate with that kind of affidavit in a possible murder case? Please, please, I've only been doing this 40 years.** You know, I'm new to it, I learn every day, but tell me about that.

Tr. 44, l. 17 – 45, l. 6 (emphasis added).

Defense counsel Wilson repeated that respondent had an expectation of privacy that was a reasonable expectation, and that the state needed a valid search warrant based upon probable cause that respondent had committed a crime, and which alleged the reliability of the hearsay sources. Tr. 46, l. 8 – 49, l. 2. The state argued that a warrant was not required for "business records" which it, at the time, claimed the CSLI was. Tr. 49, l. 3 – 50, l. 13. As stated, the judge granted the motion to suppress, and later issued a written order. R. p. *.

Discussion

In Carpenter v. United States, 138 S.Ct. 2206 (2018), the Supreme Court held that an individual maintains a legitimate expectation of privacy in the records of his physical movements as captured through CSLI. In this case, there was no exigency involved, and under Carpenter, there was no exception to the government not needing a search warrant supported by a probable cause before it acquired the CSLI and phone records from his wireless carrier.[1]

Cell site records hold for many Americans "the privacies of life." Riley v. California, 573 U.S. ___, ____, 134 S.Ct. 2473, 2494-2495 (2014). That was one major reason the Supreme

[1] The state writes in its brief, written prior to Carpenter, that United States v. Graham, 824 F.3d 421 (4th Cir. 2016) (en banc), holding that individuals do not have a reasonable expectation of privacy in CSLI was persuasive and controlling. Brief of Petitioner at 5. However, the Fourth Circuit in United States vs. Chavez, 894 F.3d 593, 608 (4th Cir. 2018), later recognized that United States v. Graham was abrogated by Carpenter.

Court in Carpenter rejected the government's position that CSLI records should be treated under the "third-party doctrine" stemming from the notion that where an individual knowingly shares information with another that he or she has a reduced expectation of privacy. See United States v. Miller, 425 U.S. 435 (1976) (financial records held by a bank); Smith v. Maryland, 442 U.S. 734 (1979). The same cannot be said of CSLI records as is said of bank records because that would be tantamount to holding that because an individual has his or her cell phone turned on that they have knowingly shared all of the details of their present and past whereabouts with with law enforcement.

Thus, the issue of a "legitimate expectation of privacy" in respondent's cell phone records and the CSLI documents are now settled in respondent's favor for Fourth Amendment purposes. The issue remains whether Judge Hyman correctly ruled that the affidavit and search warrant process here did not provide probable cause for the magistrate to determine there was a fair probability that respondent committed a crime based on information given by individuals the government deemed reliable, and that evidence tending to assist in proving respondent's guilt would be discovered following the issuance of the search warrant.

As seen, the affidavit did not allege respondent committed **any crime**. It only stated that it was the "belief" that searching the records of respondent would "provide information regarding any contact with the victim and his whereabouts during the date and time the victim went missing." Tr. 8, ll. 6-25. In other words, the police were literally going on a fishing expedition hoping that respondent's cell phone records and CSLI information would "provide information regarding any contact with the missing victim. Tr. 8, ll. 22-25.

Therefore, there can be no assertion that this search warrant affidavit stated there was a fair probability that evidence of a crime would be found in a particular place if the search

warrant was issued, since what crime respondent allegedly committed was not even asserted in the affidavit or warrant. Further, there was also nothing set forth in the affidavit about the veracity or reliability of the persons supplying hearsay information. See Illinois v. Gates, 462 U.S. 213 (1983); State v. Johnson, 302 S.C. 243, 247, 395 S.E.2d 167, 169 (1990).

The state's brief at 16-17 claims there was "ample information to support the probable cause finding made by the magistrate judge." However, the affidavit itself, as seen above, only stated it was the belief of the affiant that respondent's CSLI records could provide information regarding any contact with the missing alleged victim. This was truly a fishing expedition, and the judge here correctly ruled that the affidavit did not establish probable cause nor set forth any assertion about the reliability of the "sources."

Finally, defense counsel correctly argued any assertion of a good faith exception pursuant to Leon[2] in this case was specious.[3] The trial judge correctly observed he did not understand "how in the world" anyone in this case could assert that this affidavit provided probable cause for the issuance of the search warrant. Again, it did not assert what, if any, crime respondent may have committed, and it made no assertion of the reliability of the "sources" of its information.[4] Counsel correctly noted the sloppiness of the state's affidavit raised a Franks v. Delaware[5] issue of the deliberate falsehood or reckless disregard for the truth in obtaining the

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2 United States v. Leon, 468 U.S. 897 (1984).

3 Further, though United States v. Leon has been cited and discussed by our Supreme Court, a good faith exception has never been specifically adopted by that Court.

4 As defense counsel again correctly argued the state's investigation seemed to reveal if there was any probable cause for a warrant it might more accurately have been for Chris Brown or Marcus Smith.

5 Franks v. Delaware, 438 U.S. 154 (1978).

search warrant in this case. The well-reasoned ruling by the trial court in this case, as subsequently vindicated by our United States Supreme Court in Carpenter v. United States should be affirmed.

CONCLUSION

The ruling of the lower court should be affirmed.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 29th day of November, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Respondent and Designation of Matter in the above referenced case has been served upon J. Clayton Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Respondent and Designation of Matter have been served on Javon Dion Gibbs, at 477 Beau Street, Conway, SC 29527, this 29th day of November, 2018.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 29th day of November, 2018.

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