ORIGINAL

3\STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JONATHAN D. RHODES,

APPELLANT

Appellate Case No. 2015-002605

SUPPLEMENTAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant, Jonathan Donnell Rhodes, in May of 2013 for burglary first degree, two counts of murder and possession of a weapon during the commission of a violent crime, and two counts of kidnapping and possession of a weapon during the commission of a violent crime. (R. pp. 598-600.) On November 30, 2015, Appellant's case was called to trial before the Honorable John C. Hayes. (R. p. 1.) Appellant was represented by Jake Erwin, Esquire and Stuart Sarratt, Esquire. (R. p. 1.) Solicitor W. Walter Wilkins and Assistant Solicitor Betty Strom represented the State. (R. p. 1.) At the conclusion of the five-day trial, the jury returned a verdict of guilty on all charges. (R. p. 1; pp. 583, line 15 – p. 584, line 12.) Judge Hayes sentenced Appellant to a concurrent two terms of life imprisonment for the two counts of murder, another concurrent term of life imprisonment for burglary, and four concurrent terms of five years' imprisonment for the weapons charges. Because Appellant received two life terms for murder, Judge Hayes did not sentence him on the kidnapping charges. (R. p. 585, line 16 – p. 586, line 1.) Thereafter, Appellant filed a timely notice of appeal.

On June 1, 2017, Appellant Defender John Strom filed his final brief of appellant in the South Carolina Court of Appeals. On June 5, 2017, Assistant Attorney General Susannah Cole filed the final brief of respondent on behalf of the State. The appeal was heard in oral arguments on March 4, 2018.

On June 22, 2018, the Supreme Court of the United States issued its opinion in *Carpenter v. United States*, 138 S. Ct. 2206, 201 L.E.2d 507 (2018). In an order received by Respondent on January 18, 2019, this Court ordered additional briefing on the issues in light of the Supreme Court's decision in *Carpenter*. This supplemental brief follows.

STATEMENT OF FACTS

Respondent incorporate by reference its statement of the facts from its final brief of June 5, 2017.

SUPPLEMENTAL ARGUMENT

Even in light of the United States Supreme Court's holding in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the trial court properly admitted the cell site location information ("CSLI") because the government was acting under an objectively reasonable good faith belief that obtaining CSLI pursuant to the Stored Communications Act was constitutional at the time. Further, Appellant had no expectation of privacy in the CSLI of a borrowed telephone, and he willingly relinquished the phone to law enforcement to aid in the investigation of the double murder.

This Court has asked for supplemental briefing in light of the recent opinion of the Supreme Court of the United States in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), in which the Supreme Court found that the Government's acquisition of historical cell site records revealing the location information of a defendant constituted a search under the Fourth Amendment. Respondent contends *Carpenter* does not undermine the trial court's refusal to suppress the cell site location information ("CSLI"), given the particular circumstances of this case.

Though investigators had consent to search the phone from the phone's owner, Eric Cade, the officers obtained the cell site location information from Sprint in accordance with the Stored Communications Act. *Carpenter*, decided while this case was in appellate review, held an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured though CSLI, and that the government's collection of CSLI requires a showing of probable cause under the Fourth Amendment. *Carpenter,* 138 S. Ct. at 2217, 201 L. Ed. 2d at 507. In this case, law enforcement was acting under an objectively reasonable good faith belief that obtaining CSLI pursuant to the Stored Communications Act was constitutional at

the time. Accordingly, the good faith exception applies when the government acted in compliance with prevailing law to obtain CSLI data without a warrant prior to *Carpenter*.

Next, the cell phone in question belonged to Appellant's roommate, Eric Cade. As the subscriber to the cell phone, Mr. Cade retained the privacy interest in the records compiled by the cellular provider with whom he contracted. Because Appellant acknowledged the phone did not belong to him, he had no subjective or reasonable expectation of privacy in the information. Further, during the early stages of the investigation, Mr. Cade and Appellant agreed to cooperate with the police and voluntarily turned over the cell phones to law enforcement. Because Mr. Cade, the owner of the phone, consented to the search of the phone, the investigators need not have sought a warrant to obtain the CSLI.

How the Issue Was Presented at Trial

Appellant argued the Fourth Amendment protected his right to privacy in his location, not in the phone records. (R. p. 273, lines 8-11.) The trial court found Appellant's argument he had a distinct privacy interest in his location on the public streets, over a period of four days, unpersuasive. As to the privacy interest in the customer records, the trial court found that interest belonged to Eric Cade, the owner of the cell phone. (R. p. 275, lines 10-25.) Because Appellant had shown no ownership interest in the cell phone, the trial court found them admissible. (R. p. 275, line 24 – p. 276, line 1.) The trial court did not make a finding on whether the collection of the records in compliance with the Stored Communications Act constituted a Fourth Amendment or South Carolina Constitutional violation.

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz*, 346

S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "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." *State v. Jennings*, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (citation omitted).

Analysis

As noted earlier, the trial court did not make a finding on whether the receipt of the records in accordance with the Stored Communications Act violated the federal or state Constitutional right to privacy and protection against unreasonable searches. Instead, the trial court found Appellant had no expectation of privacy in the CSLI because he was not the owner of the phone. That finding is a factual finding supported by the record and it is entitled to deference by the appellate courts. That finding also remains unaffected by the Supreme Court's holding in *Carpenter.*

In *Carpenter*, the Court held "that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search." *Carpenter,* 138 S. Ct. at 2217, 201 L. Ed. 2d at 507. It is now clear that under *Carpenter*, acquiring an account holder's CSLI is an unconstitutional search under the Fourth Amendment if the government does not obtain a warrant supported by probable cause. Unlike the instant case, *Carpenter* specifically addressed the search of records belonging to the defendant himself.

Notwithstanding the distinction between the instant case and *Carpenter*, evidence obtained in violation of a defendant's Fourth Amendment rights is not automatically suppressed. Evidence will be suppressed under the exclusionary rule when suppression would further the exclusionary rule's primary objective: to deter Fourth Amendment violations. *State v. Brown*,

401 S.C. 82, 736 S.E. 2d 263 (2012). One instance where suppressing evidence will not encourage deterrence is where the government acted upon an objectively reasonable good faith belief in the legality of its conduct when conducting a search. *See id,* 401 S.C. at 95, 736 S.E.2d at 270. ("The exclusionary rule would serve no deterrent purpose. Consequently, we find the exclusionary rule should not be applied in Brown's case because it would contravene the dictates of [prevailing law]")

Indeed, "applying the exclusionary rule would not 'yield appreciable deterrence' " when government actors have a reasonable belief that their conduct conforms with the law. *United States v. Vasquez-Algarin*, 821 F.3d 467, 482-83 (3d Cir. 2016) (quoting *Davis v. United States*, 564 U.S. 229, 237 (2011)) This is known as the good faith exception, and where it applies, the illegally-obtained evidence will not be suppressed under the exclusionary rule.

The Supreme Court has applied this exception across a number of cases where suppressing evidence would not have any deterrent value— one of which is most relevant here. In *Illinois v. Krull*, 480 U.S. 340 (1987), the Court held that the good faith exception applies when a search is executed pursuant to a statute that was valid at the time of the search but later declared unconstitutional. *Id.* at 349-50. Except in instances where a statute is obviously unconstitutional, suppressing evidence obtained by a law enforcement officer "acting in objectively reasonable reliance on a statute would have ... little deterrent effect on the [government's] actions." *Id.*

The good faith exception applies to the government's search in this case because the government acted upon an objectively reasonable, good faith belief that obtaining Eric Cade's CSLI under the Act was legal. At the time the search was executed, it was authorized under the Stored Communications Act. The government complied with all requirements of the Act and

obtained the records via a voluntary disclosure from Sprint based on the exigent circumstances of a double homicide committed by at least two persons still at large in the community. Thus, because the government relied on a then-valid statute, it had an objectively reasonable, good faith belief that its conduct was legal. Indeed, the conduct was legal at the time. Excluding evidence obtained through methods that complied with the law at the time of the search cannot serve any deterrent purpose. Under *Krull*, the good faith exception applies, and the trial court's denial of the motion to suppress should be affirmed.

Next, Appellant's argument he has a reasonable and subjective expectation of privacy in the CSLI is without merit for additional reasons. First, as the trial court properly found, Appellant lacked a subjective expectation of privacy in the location data of a cell phone because he was not the lawful subscriber to Sprint. This particular basis for argument was waived by Appellant during arguments at the hearing to suppress the records. Prior to the admission of the records, Appellant made no argument he sought to protect his privacy in the control and operation of the cell phone itself. For example, Appellant did not argue he paid the cell phone bill, he was the exclusive user of the phone, or he protected the phone with a passcode. There was no testimony concerning how long Appellant was entitled to use the phone or the nature of the limitations of its use from Eric Cade. Instead, Appellant claimed a privacy interest in his location, not in his ownership or control of the cell phone.

Contrary to Appellant's assertion the killer posed no threat to anyone other than Gary and Helen Wells, at the time law enforcement requested the records from Sprint, police suspected, but did not know, the extent of Shirley's Rogers' involvement in the gruesome murders of two elderly resident of Greenville County. From the sheer brutality of the scene, the disparate injuries to the two victims, and the locations of the bodies in different rooms of the house, law

enforcement reasonably determined more than one individual was likely responsible for the crimes. While Shirley Rogers may have had a particularized grudge against the victims, her accomplice certainly did not. Appellant's assertion the killer posed no threat to anyone else in the community downplays the scope of the senseless violence of the crime against the Wells.

In sum, a search warrant was not required for police to obtain the subscriber information for Eric Cade's cell phone; the numbers dialed and the origin of calls received on it; or the historical CSLI records because Appellant did not have either a subjective or a reasonable expectation of privacy in this information. Even if this Court were to find Appellant did have a reasonable expectation of privacy in Eric Cade's CSLI, the investigators complied with the Stored Communications Act when they requested the records from Sprint and were acting under an objectively reasonable good faith belief that obtaining CSLI in that manner was constitutional at the time. Even in light of *Carpenter*, Appellant has not presented this Court with any sound reason to find the trial court abused its discretion in finding the CSLI admissible under the facts of this case.

Harmless Error Analysis

Lastly, even if the Court were to find the CSLI inadmissible, the remaining evidence of Appellant's guilt conclusively proved Appellant acted in concert with his girlfriend Shirley Rogers when they confronted Gary and Helen Wells at their home and murdered them. Notwithstanding the testimony concerning the historical cell location information, the jury considered the following evidence presented at trial:

1) The nature of crime scene, giving rise to the inference of two killers, specifically
    a) the number of wounds and brutality of the crime (R. p. 597);
    b) the disparate wounds on the victims (R. pp 246-256);

c) the disparate locations of the victims when each was murdered (R. pp. 125-126);

2) The development of Shirley Rogers as culprit with motive and Rhodes as her only likely accomplice, proven by the following:

a) the victims' blood in mini cooper (R. pp. 434-472);

b) pictures of two of them in mini cooper (State's Ex 150)

c) the photographs, calls, and texts to each other surrounding the time of the murders, discovered by search warrant (State's Exhibit 103, State's Ex. 93);

d) the nature of their romantic relationship (State's Ex. 93);

3) The testimony of Eric Cade about Appellant's unavailability the night of the murder and his changing story about his whereabouts that night; and (R. pp. 294-312);

4) Most importantly, the testimony of jailhouse informant Curtis McLeod, who corroborated:

a) the vehicle driven to the scene of the murder (R. p. 503);

b) the words spoken by the victims to Rogers before she and Rhodes forced them back inside (R. pp. 503-504);

c) the separation of the victims into two bedrooms (R. pp. 504-505);

d) the wounds to the victims inflicted by knives and, specifically, a .32 caliber gun (R. pp. 504-506); and

e) the description of the items stolen, i.e., jewelry and bank cards. (R. p. 506, lines 11-17.)

When considering the totality of the evidence presented by the State, the admission of the CSLI, if the Court were to find error, could not have affected the outcome of the trial and was harmless beyond a reasonable doubt. The defense explained the presence of the phone near the

Wells home by suggesting Appellant left the phone in the car, which was then driven by Shirley Rogers when she murdered Gary and Helen Wells. This defense similarly explained the victims' blood in the Mini Cooper. The CSLI placed Appellant's **belongings** near the scene of the crime, and perhaps could have been a plausible explanation. However, the sheer brutality of the crime scene and the informant's testimony corroborating the evidence placed Appellant **physically** at the scene. Given the amount of circumstantial evidence linking Appellant to the murders, any testimony concerning the location of his cell phone is unnecessary to reach the same conclusion. *State v. Brockmeyer*, 406 S.C. 324, 356, 751 S.E.2d 645, 662 (2013) ("Because the improper admission of hearsay constitutes reversible error only when it results in prejudice, it is our view [defendant] has failed to show he was prejudiced, and thus, has failed to show reversible error.") As a result, any error in the admission of the CSLI proves harmless. Appellant's guilt is clear from the all the other State's evidence proving conclusively that Appellant aided his girlfriend in the murder Helen and Gary Wells.

CONCLUSION

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

Respectfully submitted,

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