STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

LAMAR SEQUAN BROWN,

APPELLANT

APPELLATE CASE NO. 2013-000725

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The United States Supreme Court's decision in Riley v. California, 134 S.Ct. 2473 (2014) controls the result in this case. Riley struck an important blow for Americans' privacy rights. The Court recognized that cell phones "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." Riley at 2489. The storage capacity differentiates cell phones from other items. Id. "The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions. . . ." Id. The Court noted that "it is no exaggeration to say that 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." Id. at 2490.

The State seeks to limit Riley to when the State acquires a cell phone through a search incident to arrest. The Supreme Court did not announce its holding in such limited terms. The Court stated: "Our holding, of course, 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. The Court's own language in stating its holding creates a rule that the police must obtain a warrant before searching a phone. The Court could have limited its holding to the search incident to arrest situation, but explicitly chose not to do so. Reading such a limitation into Riley would ignore Chief Justice Roberts' long discussion of the categorical difference of cell phones and the greater privacy concerns regarding their treatment by the police.

The State claims the theory of abandonment absolves the police of the necessity of obtaining a warrant. Nothing in Riley or the facts of this case support that opinion. As noted in Riley, the information on the phone is what is important, not the physical object itself. Even if the physical object is abandoned, it cannot be argued that the "intimate" and "mundane" details of appellant's life were abandoned for all the world to know. The fact that appellant maintained a lock on his phone demonstrates that he did not want anyone to access his phone. Most citizens whose phone was lost would prefer that their phone be destroyed or irrevocably locked instead of allowing a stranger to access their entire life through their phone. Abandonment theory may be relevant when the object itself is what is abandoned. But when the item is more than a physical object—which is the entire thrust of the Riley opinion—abandonment theory does not apply, especially when a citizen has a lock code on his phone. Furthermore, the express right of privacy in the South Carolina Constitution supports the idea that a citizen's personal data is still protected even if the physical phone is lost. S.C. Const. art. I, § 10.

Nor should the analysis change because the lock code on appellant's phone was easy to crack. Such a rule would lack any logical force or clear line. It would beg the question of how easy must the code be to break. Would a birthday be too easy? Would an address be too easy? The Court should not seriously consider making Fourth Amendment rights contingent on a citizen's ability to invent a difficult code for their phone.

The State's independent source argument is not supported by the record. The police could not have obtained the warrant without first searching the phone. The police officer's testimony on this point was clear:

Q. So when you pulled [the phone] from evidence you activated it and went through it and you unlocked it to get into it. There was a lock on there. And you would not have been able to figure out the owner of the cell phone without getting into that phone; without getting into that contact list.

A. At the time, no.

R. 39, ll. 17 – 23.

Q. So all this information that you listed in the warrant—not the—the serial number of the phone, the phone number, the model number you got those from the phone itself when you went into it, correct?

A. Yes, ma'am, they are located on the phone.

R. 41, ll. 14 – 22.

Q. But you were never would have been able to talk to him or have anybody to talk to if you hadn't gone into that phone in the first place.

A. At that time.

Q. And that's the information that you used in this warrant here?

A. Yes, ma'am.

R. 42, ll. 4 – 10. The subsequent warrant was based on the initial illegal search. The Court should disregard the State's attempt to save this search on a ground that is not supported by the record.

Finally, the State attempts to assert the inevitable discovery doctrine to save this illegal search. After Riley, it seems clear that a warrantless inventory search is not allowed. Furthermore, the State neither argued nor presented evidence of any kind of standardized procedure for obtaining warrants to search abandoned cell phones. See Nix v. Williams, 467 U.S. 431, 442-43 (1984). Williams is instructive as to the specificity of the evidence required to satisfy the prosecution's burden. 467 U.S. at 448-49. In Williams, the defendant

kidnapped and murdered a child on Christmas Eve. Police were engaged in a massive, systematic search for the child's body. While the search was ongoing, Williams led the police to the child's body. The search was halted. The evidence surrounding Williams' statements and helping police to find the body were suppressed because of violations of his Sixth Amendment right to counsel.

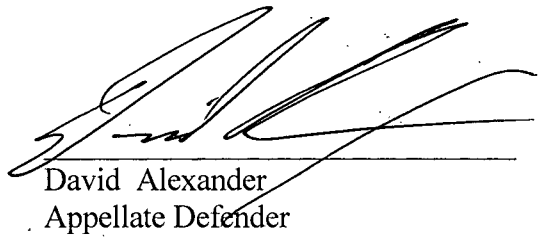
However, the Supreme Court held that the state met its burden of showing that the police would have discovered the child's body. See id. at 448-49. The prosecution presented the testimony of the agent in charge of the search. The agent testified that he had marked off two entire counties in grids and instructed the search teams to check all roads, ditches, culverts, abandoned farm buildings or any other places where a child's body would be found. Teams of four to six persons were assigned specific parts of the grid. The child's body was ultimately found in a culvert—exactly where the searchers had been instructed to look. The agent testified that the child's body would have been found within several hours of the time it was actually found had the search not been halted. See id.

No such specific evidence was presented in this case. The State had ample opportunity to present such evidence. But no such evidence appears in the record and indeed, the State's argument concerning inevitable discovery in its brief fails to cite to the record. The Court should ignore this attempt to save the illegal search.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's conviction.

Respectfully submitted,



David Alexander
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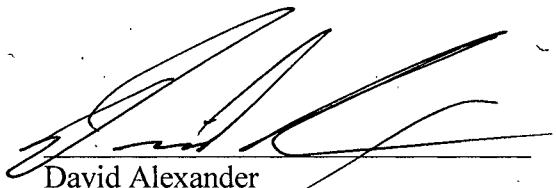
ATTORNEY FOR APPELLANT

This 2nd day of December, 2014.

CERTIFICATE OF COUNSEL

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

December 2nd, 2014



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