STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

Opinion No. 2019-UP-146 (S.C. Ct. App. Filed 4/17/2019)
2015-GS-32-01307; 2015-GS-32-01308; 2015-GS-32-01309; 2015-GS-32-01310

THE STATE,

RESPONDENT,

V.

JUSTIN ANTONIO BUTLER,

PETITIONER

APPENDIX

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ATTORNEYS FOR RESPONDENT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Justin Antonio Butler, Appellant.

Appellate Case No. 2016-001269

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Unpublished Opinion No. 2019-UP-146
Submitted February 11, 2019 – Filed April 17, 2019

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Sherrie Butterbaugh, all of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

PER CURIAM: Justin Antonio Butler appeals his convictions for murder, attempted murder, first-degree burglary, and possession of a weapon during the commission of a violent crime. On appeal, he argues the trial court erred in (1) denying his motion to suppress cell phone records obtained with search warrants signed by a South Carolina magistrate and sent to out-of-state phone companies and (2) qualifying a police officer as an expert in "street culture and language" and allowing him to testify about his experience with gangs. We affirm.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, this court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

SEARCH WARRANTS

Butler argues the trial court erred in refusing to suppress cell phone records the State obtained by issuing search warrants signed by a South Carolina magistrate to out-of-state phone companies. We disagree.

Before trial, Butler moved to suppress cell phone records the State obtained with search warrants signed by a South Carolina magistrate and sent to out-of-state phone companies. Butler argued the search warrants were invalid because the magistrate did not have jurisdiction outside South Carolina. Butler noted the phone companies could voluntarily comply with the request for records, arguing "[t]he Sheriff's Department can accomplish the exact same thing . . . by just issuing simply a letter saying . . . this is an official investigation . . . please send us th[ese] items, but they chose not to do that and instead to use the search warrant form and procedures." Butler argued there was no "limiting . . . language . . . that would put the recipient on notice that the[] search warrants ha[d] no force or applicability of the law and compliance [wa]s strictly voluntary." Thus, Butler contended the phone companies could have turned over the information voluntarily if the State had sent a letter, but the information should be excluded because the State chose to

send invalid search warrants. The State responded by arguing Butler did not have an expectation of privacy in the phone records because the information was owned by the phone company. The trial court denied Butler's suppression motion, relying on an unpublished Michigan case[1] and finding there was no expectation of privacy in the "records held by a third-party out-of-state custodian."

Section 17-13-140 of the South Carolina Code (2014) states "any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize" property. In *State v. McKnight*, an officer obtained a search warrant to search a mobile home. 291 S.C. 110, 112, 352 S.E.2d 471, 472 (1987). The officer told the magistrate he believed drugs and stolen goods would be found inside the mobile home. *Id.* Subsequently, the magistrate filled out the search warrant form and the officer signed it. *Id.* The officer did not complete an affidavit; instead, the magistrate placed the officer under oath and the officer "orally recited the facts upon which the warrant was based." *Id.* Evidence found during the search of the mobile home was later used against the defendants at trial, and the trial court granted the defendants' motion to suppress despite the State's argument that they did not have standing to challenge the search warrant because they did not have a legitimate expectation of privacy in the searched premises. *Id.* "A search warrant that would survive constitutional scrutiny may still be defective under" section 17-13-140. *Id.* at 113, 352 S.E.2d at 472. The court stated, "[O]ne contesting the legality of a search because of a defect under [s]ection 17-13-140 need only show that the State is attempting to introduce the evidence against him." *Id.* at 115, 352 S.E.2d at 474. Our supreme court affirmed and held the defendants had standing to attack the search warrant because the constitutional question of whether they had an expectation of privacy in the place searched and the statutory question of the validity of the search warrant were two separate questions. *Id.*

We disagree with Butler that *McKnight* is controlling in this case. Butler conceded at trial that the State did not need to send a search warrant in order to obtain the cell phone records. At trial, Butler stated records held by a third-party cell phone company did not belong to him and the company could choose to turn those records over to police. Butler conceded the State could have merely sent a letter

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[1] In an unpublished opinion, the Court of Appeals of Michigan held that an attorney was not ineffective for failing to move to suppress search warrants sent to out-of-state telephone companies because the warrants sought "only records of electronic communications that occurred in Michigan." *People v. Wilson*, 2013 WL 2360239, at *10 (Mich. Ct. App. 2013).

requesting the records to the cell phone companies. However, Butler argues on appeal the records should have been excluded because the State chose to send an invalid search warrant. Although *McKnight* does state the question of statutory compliance of a search warrant is different than the Fourth Amendment privacy considerations, we find there still has to be some legitimate expectation of privacy in the premises searched for a defendant to raise the statutory question. *See id.* In *McKnight*, the officer needed to first obtain a search warrant to search the mobile home because a search of a home implicates someone's privacy rights under the Fourth Amendment—whether it was the defendants' privacy rights or someone else's privacy rights. *See id.* However, in the instant case, Butler noted the owners of the cell phone records voluntarily turned the information over to the third party. Because Butler did not argue the State was required to send search warrants to obtain the cell phone records, Butler's argument regarding the validity of the search warrants has no merit. Therefore, we affirm the trial court's denial of Butler's motion to suppress and find the trial court did not abuse its discretion. *See Black*, 400 S.C. at 16, 732 S.E.2d at 884 ("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." (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001))).

EXPERT WITNESS

Butler argues the trial court erred in qualifying Brian Zwolak as an expert in "street culture and language" and allowing him to testify about his gang-related training and experience. We disagree.

At trial, Zwolak testified he worked as a gang instructor at the South Carolina Criminal Justice Academy (the Academy). He began his career as a patrol officer with the City of Columbia Police Department and moved into the gang unit in 2011. As an investigator in the gang unit, Zwolak "worked violent crime cases[,] gathered intel [on] gang members," and assisted other police officers "when it came to organized crime and street gang[s]." Zwolak then accepted a position with the Academy to teach classes on street gangs. He attended the Criminal Gang Overview for Law Enforcement and Law Enforcement Response to Gangs in the Community and Graffiti Recognition classes at the Academy. He also took the Basic Gang School and Investigation and Criminal Gang Investigations courses in Mississippi. He attended the World Gangs of the Low Country Training Conference in South Carolina and took a Gang Investigations and Prosecution Techniques course taught by the federal government. He was a member of the South Carolina Gang Investigator's Association. His total amount of "gang related,

street culture related training" was 225 hours. He taught the following classes at the Academy and around South Carolina: Gang Specialist, Criminal Street Gang Investigation, Criminal Gang Overview, Criminal Gang Overview for School Resource Officers, and Gang Documentation. He testified he participated in numerous interviews and reviewed social media and music videos to "keep up with current trends and slang." The trial court qualified Zwolak as an expert in street culture and language over Butler's objection. During his testimony, Zwolak went line by line and interpreted the language used by Butler and others in text messages.

As a general rule, "all relevant evidence is admissible." Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

> Rule 702, SCRE, provides that a witness qualified as an expert may testify when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. However, even if an expert's testimony is admissible under the rules, the trial court may exclude the testimony if its probative value is outweighed by the danger of . . . unfair prejudice, confusion of the issues, or misleading the jury.

Wilson v. Rivers, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004). "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013) (quoting *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998)).

We find the trial court did not err in allowing Zwolak to testify as an expert witness. The State presented no evidence that Butler, Terry McClure, or the crime itself was associated with a gang. The mention of gangs was only in relation to Zwolak's experience and training as a necessity to qualifying him as an expert witness. The only time Zwolak mentioned gangs outside of outlining his training and experience was when he indicated the term "blood" usually referred to a gang member. However, he clarified it did not mean the person who wrote the text was associated with a gang and later explained "blood" could also refer to a friend or family member. Furthermore, because of the danger of unfair prejudice associated with the word gang, the trial court gave three limiting instructions regarding Zwolak's testimony—after it qualified Zwolak as an expert witness, at the end of

Zwolak's testimony, and during the jury instructions. Thus, any prejudice that may have arose because of the extensive use of the word gang in Zwolak's testimony regarding his qualifications would have been cured by the limiting instruction. *See State v. Young*, 420 S.C. 608, 624, 803 S.E.2d 888, 896 (Ct. App. 2017) ("Limiting instructions are deemed to cure error unless 'it is probable that, notwithstanding the instruction, the accused was prejudiced.'" (quoting *State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986))); *id.* at 623, 803 S.E.2d at 896 ("We start by presuming the cure worked, for we also presume juries follow their instructions.").

Butler does not point to any specific part of Zwolak's testimony that prejudiced him, other than the fact Zwolak said the word "gang" many times while explaining his qualifications. Because the trial court repeatedly instructed the jury that there was no association between Butler or McClure and any gang, and the State did not attempt to connect Butler with a gang, we find the prejudicial effect of Zwolak's testimony was small. The State presented Zwolak's testimony to counter Butler's assertion that he was not involved in McClure's plan to rob the victims and to show a scheme between Butler and McClure. We find Zwolak's testimony had probative value and was not substantially outweighed by the mention of gangs during his testimony about his qualifications. Thus, the trial court did not abuse its discretion in allowing Zwolak to testify. *See Black*, 400 S.C. at 16, 732 S.E.2d at 884 ("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." (quoting *Saltz*, 346 S.C. at 121, 551 S.E.2d at 244)).

Accordingly, Butler's convictions are

AFFIRMED.[2]

HUFF, THOMAS, and KONDUROS, JJ., concur.

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[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JUSTIN ANTONIO BUTLER,

APPELLANT.

APPELLATE CASE NO. 2016-001269

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

Opinion No. 2019-UP-146

PETITION FOR REHEARING

On April 17, 2019, this Court affirmed Appellant's convictions and sentence in an unpublished opinion. State v. Butler, 2019-UP-146 (S.C. Ct. App. filed April 17, 2019). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in arriving at its conclusions.

On appeal, Appellant argued the trial judge erred by (1) denying his motion to suppress cell phone records obtained with defective search warrants signed by a South Carolina magistrate

and served on out of state phone companies and (2) qualifying a police officer as an expert in "street culture and language" and allowing him to testify about his extensive experience with gangs.

Search Warrants

Appellant moved pretrial to suppress all evidence obtained through the use of search warrants issued by a local South Carolina magistrate who did not have jurisdiction over the area where the property sought was located as required by S.C. Code Ann. § 17-13-140. R. 4, l. 6 – 5, l. 4. These search warrants, fourteen in all, were for telephone records for Appellant, Terry McClure, VonKeith Toland, Tycus Toland, and other unidentified individuals whose telephone records were relevant to the investigation. See Court's Exhibit No. 1. These warrants were marked together as Court's Exhibit No. 1. The warrants were faxed by investigators with the Lexington County Sheriff's Department to the relevant subpoena compliance and records centers for Sprint in Overland Park, Kansas, Verizon Wireless in San Angelo, Texas, Verizon Wireless in Bedminster, New Jersey, T-Mobile in Parsippany, New Jersey, Cingular in West Palm Beach, Florida, AT&T in West Palm Beach, Florida, and MetroPCS Wireless in Richardson, Texas. See Court's Exhibit No. 1.

Counsel for Appellant argued that the search warrants included in Court's Exhibit No. 1 were invalid because they "were issued by a judge [who] does not have jurisdiction over the area [where] these documents and records and other materials were [located]. The warrants all indicate on the[ir] face that they were being sent out of state, outside of the jurisdiction of the magistrate or of this court and there is no exception in the enabling statute or any other provision of South Carolina Law providing for . . . the validity of an out of state - - of a search warrant issued out of state." R. 4, l. 20 – 5, l. 4. Because the search warrants, which were issued by a

local magistrate, sought to obtain records stored out of state from out of state entities, counsel asserted the warrants were invalid "on their face." R. 5, ll. 5-13.

The assistant solicitor claimed in response that Appellant had no expectation of privacy in any of the telephone records in order to challenge the various searches. His argument was based solely on the Fourth Amendment. In support of his argument that Appellant had no expectation of privacy in the records from two telephone numbers associated with Appellant, the solicitor cited Smith v. Maryland, 442 U.S. 735 (1979), which "states that an individual enjoys no Fourth Amendment protection of information he voluntarily turns over to a third party." He further argued Appellant had no expectation of privacy in telephone records associated with other individuals. R. 7, l. 4 – 10, l. 12.

After the solicitor's argument, counsel for Appellant made clear that he was not arguing under the Fourth Amendment or pursuant to any right to privacy, instead his argument was that the search warrants had "no legal validity" because they were issued by a local magistrate who did not have jurisdiction over the area were the property sought was located as required by § 17-13-140. R. 10, l. 24 – 11, l. 8.

Finding no precedent in South Carolina, the trial judge denied Appellant's motion to suppress based on an unpublished opinion from the Michigan Court of Appeals: People v. Wilson, 2013 WL 2360239 (Mich. Ct. App. 2013). In Wilson, the defendant argued his attorney was ineffective for not moving to suppress telephone records which were obtained pursuant to two search warrants issued by a Michigan magistrate but served on a telephone provider in Texas. Id. The defendant argued the records should have been suppressed *under the Fourth Amendment* because the magistrate who issued the two search warrants lacked jurisdiction to issue warrants pertaining to an out of state party. Id. The Michigan Court of Appeals found the

warrants were valid because even though they were served out of state, they solely concerned electronic communications that occurred within Michigan, not Texas. Id.

After summarizing Wilson, the trial judge denied the motion to suppress based on its holding. He also ruled Appellant had no expectation of privacy to challenge the searches. R. 16, ll. 11-17.

The Fourth Amendment of the United States Constitution and Article I, Section 10 of the South Carolina Constitution require warrants be issued only "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV; S.C. Const. Art. 1, § 10. "This is a minimum standard, and state legislatures are free to enact stricter requirements for the issuance of search warrants." State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987) (citing State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967)).

S.C. Code Ann. § 17-13-140 is the "general search warrant statute" in South Carolina. State v. Covert, 382 S.C. 205, 209, 675 S.E.2d 70, 743 (2009). This statute contains requirements different from those mandated by the Fourth Amendment and Article I, Section 10 of the South Carolina Constitution, and is in some ways stricter than the federal and state constitutions. Covert, 382 S.C. at 209, 675 S.E.2d at 743 (citing McKnight, 291 S.C. 110, 352 S.E.2d 471). Consequently, a search warrant that would survive constitutional scrutiny may still be defective under § 17-13-140. McKnight, 291 S.C. 110, 352 S.E.2d 471.

The South Carolina General Assembly enacted a requirement that search warrants may only be issued by a magistrate "having jurisdiction over the area where the property sought is located." S.C. Code Ann. § 17-13-140. The statute states in relevant part:

> Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State **having jurisdiction over the area where the property sought is located**, may issue a search warrant . . .

S.C. Code Ann. § 17-13-140 (emphasis added).

As argued below, the magistrate who issued the various search warrants in this case for telephone records associated with Appellant, Terry McClure, VonKeith Toland, Tycus Toland, and other unnamed individuals did not have jurisdiction over the area where the telephone records were located and stored. Consequently, the search warrants were defective because they failed to comply with § 17-13-140. This defect was apparent from the face of the warrants. The evidence obtained as a result of these invalid warrants should have been suppressed by the trial judge.

Our Supreme Court has previously held search warrants were defective for failing to comply with this statute and suppressed the evidence obtained as a result of the invalid warrants. In McKnight, police officers appeared before a magistrate to obtain a warrant, but did not complete an affidavit in support thereof. Our Supreme Court held the warrant was defective because the officers failed to comply with the affidavit requirement of § 17-13-140. McKnight, 291 S.C. at 113, 352 S.E.2d at 473; See S.C. Code Ann. § 17-13-140 (requiring search warrants be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant."). Even though the officers were sworn and gave oral testimony to the magistrate, the Court held a search warrant affidavit which is itself insufficient to establish probable cause may be supplemented before the magistrate by sworn oral testimony, but sworn oral testimony alone does not satisfy the statute. McKnight, 291 S.C. at 113, 352 S.E.2d at 473. The Court found the mandatory requirement of an affidavit lacking, thereby requiring suppression. Id. at 113-114, 352 S.E.2d at 473.

In Covert, law enforcement officers obtained and served a search warrant on September 26, 2002. The warrant was signed by the magistrate and dated September 28, 2002. However, the accompanying two page affidavit was signed by the magistrate on both pages and both signatures were dated September 26, 2002. Covert, 382 S.C. at 207, 675 S.E.2d at 741. Our Supreme Court held the warrant was invalid due to the absence of the magistrate's signature at the time the warrant was served. Id. at 208, 675 S.E.2d at 742. The Court concluded that under South Carolina law an unsigned warrant is not a warrant, and is not capable of being issued within the meaning of § 17-13-140. Id. at 210, 675 S.E.2d at 743.

In Herring, a SLED agent faxed a search warrant to a magistrate and the magistrate swore the agent over the telephone. State v. Herring, 387 S.C. 201, 692 S.E.2d 490 (2009). Based on the language of § 17-13-140 that commands a warrant "be issued only upon affidavit sworn to before the magistrate," Herring argued the warrant was invalid because the statute requires the affiant appear before the magistrate *in person*. Our Supreme Court disagreed. The Court held the language does not state an affidavit must be sworn in person. It only requires the affidavit be sworn. Emphasizing that the agent who prepared the warrant was sworn over the telephone by the magistrate, the Court held this procedure complied with the literal terms of the statute and there was no defect in the warrant. Id.

Like in McKnight and Covert, this Court should hold the search warrants in this case marked together as Court's Exhibit No. 1 were invalid because the South Carolina magistrate who issued the warrants did not have jurisdiction over the area were the property sought was located as required by § 17-13-140. Again, the police sought telephone records stored out of state by out of state entities. The warrants were faxed to these out of state entities by investigators with the Lexington County Sheriff's Department. The South Carolina magistrate

did not have jurisdiction in Texas, Florida, New Jersey, and Kansas where these various records were located. Consequently, the warrants were defective for failing to comply with the jurisdictional requirement of § 17-13-140 and the evidence obtained should have been suppressed. See McKnight, 291 S.C. at 113, 352 S.E.2d at 473 (When . . . the State is unable to demonstrate a good faith attempt to comply with the statute [§ 17-13-140], exclusion is the proper remedy.").

Expectation of Privacy

The trial judge's finding that Appellant did not have an expectation of privacy in the telephone records or standing to challenge the search warrants marked as Court's Exhibit No. 1 was error.

"The Fourth Amendment to the United States Constitution guarantees to individuals the right to be free from unreasonable searches and seizures. One who seeks to have evidence suppressed on this basis must establish that his *own* Fourth Amendment rights were violated." McKnight, 291 S.C. at 114, 352 S.E.2d at 473 (citing United States v. Salvucci, 448 U.S. 83 (1980)) (emphasis in original). "The defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate a legitimate expectation of privacy in connection with the searched premises in order to have standing to challenge the search." Id. (citing United States v. Salvucci, 448 U.S. 83 (1980), Rawlings v. Kentucky, 448 U.S. 98 (1980, and Combs v. United States, 408 U.S. 224 (1972)).

"On the other hand, the rights afforded by Section 17-13-140 *are not dependent upon a showing of an expectation of privacy in the searched premises.*" Id. at 115, 352 S.E.2d at 474 (emphasis added). "Therefore, one contesting the legality of a search because of a defect under

Section 17-13-140 *need only show that the State is attempting to introduce the evidence against him.*" Id. (emphasis added).

If Appellant had argued the various search warrants marked as Court's Exhibit No. 1 were invalid on constitutional grounds, he would have had to show he had an expectation of privacy in the records sought. However, Appellant argued the search warrants were invalid based on the stricter statutory requirements found in § 17-13-140. Therefore, Appellant unquestionably had standing to object to the validity of the search warrants because the state attempted to, and later successfully, introduced the evidence against him at trial. The judge erred by ruling Appellant had no expectation of privacy or standing to challenge the searches.

In its opinion, this Court held, "Although McKnight does state the question of statutory compliance of a search warrant is different than the Fourth Amendment privacy considerations, we find there still has to be some legitimate expectation of privacy in the premises searched for a defendant to raise the statutory question." This holding directly conflicts with our Supreme Court's opinion in McKnight. In McKnight, which is still good law, our Supreme Court asserted "one contesting the legality of a search because of a defect under Section 17-13-140 *need only show that the State is attempting to introduce the evidence against him.*" 291 S.C. at 115, 352 S.E.2d at 474 (emphasis added). Consequently, Appellant respectfully request this Court grant rehearing and hold Appellant did not need to show any expectation of privacy.

Good Faith Exception

In McKnight, our Supreme Court emphasized that the good faith exception to the exclusionary rule adopted by the United States Supreme Court in United States v. Leon, 468 U.S. 897 (1984) only applies when a search warrant is defective on Fourth Amendment grounds, not on the basis of a statutory violation. McKnight, 291 S.C. at 114, 352 S.E.2d at 473. However,

the Court did not decide whether evidence seized pursuant to a search warrant that is defective under § 17-13-140 may be admitted when the officers who execute the search act with objectively reasonable reliance on a warrant ultimately found to be invalid. Id. The Court noted that even if it were to adopt a good faith exception akin to Leon for violations of § 17-13-140, the exception would not have applied in McKnight because the officers were aware of the defective in the warrant (the lack of a sworn affidavit) when they executed the search, negating any argument of good faith. Id.

Over two decades later, our Supreme Court recognized that there is a good faith exception to § 17-13-140's requirements where the officers make a good faith attempt to comply with the statute's *affidavit procedures*." Herring, 387 S.C. at 215, 692 S.E.2d at 497 (quoting Covert, 382 S.C. 205, 675 S.E.2d 740) (emphasis added). In Herring, the Supreme Court held the officers made a good faith attempt to comply with the affidavit procedures due to the surrounding circumstances: "It was 4:00 in the morning, and SLED agents were attempting to obtain a warrant to investigate a shooting by Richland County Sheriff's deputies of a prominent Columbia attorney." Id. at 216, 692 S.E.2d at 497.

Assuming the Supreme Court would extend this good faith exception to the statutory requirement that the issuing magistrate have "jurisdiction over the area where the property sought is located," it would not apply in this case. Here, the officers were clearly aware that the records sought were located out of state and held by out of state entities, and that a local South Carolina magistrate did not have jurisdiction to issue the warrants. This is evidenced by the fact that investigators with the Lexington County Sheriff's Department worked with officers from the Florence Police Department in Alabama to obtain a search warrant from an Alabama magistrate to search Appellant's residence in Alabama. See Court's Exhibit No. 2. Based on these actions,

it is obvious that the Lexington County investigators were aware that a South Carolina magistrate could not issue a search warrant for a residence or property located out of state. Therefore, the good faith exception, if held to extend to the jurisdiction requirement of § 17-13-140, would not apply in this case.

The trial judge erred in denying Appellant's motion to suppress. Respectfully, this Court should grant rehearing, hold the search warrants marked as Court's Exhibit No. 1 were invalid, and suppress the evidence obtained as a result.

Expert Witness

The state's last witness was Brian Zwolak. Before Zwolak testified, the assistant solicitor informed the judge that the state sought to have Zwolak qualified as an expert in "street culture and language" to give his opinion concerning language used by Appellant and others in text messages that were admitted into evidence. The solicitor explained that Zwolak's "experience comes from working intelligence with gangs and interviewing gang members and looking at social media for gang members and people related to gangs." He continued, "I'm concerned about during the voir dire of qualifying him as an expert, if . . . the defense is going to claim that's prejudicial." R. 381, ll. 9-21; R. 382, ll. 16-20.

Defense counsel objected to the qualification of Brian Zwolak as an expert in "street culture and language" and any use of the word gang. Counsel argued that any reference to a gang or "street language" would be unfairly prejudicial. He suggested use of the term "slang" would be generic enough to remove any unfair prejudice to Appellant. R. 382, ll. 4-14.

Emphasizing that the state must lay a foundation to qualify its expert, the trial judge ruled the state could elicit the witness' "qualifications full and complete." However, subject to

Appellant's objection, the judge stated he would give the jury a limiting instruction concerning how it could consider the evidence. R. 382, l. 21 – 384, l. 23.

Zwolak ultimately testified that he was "a gang instructor" at the Criminal Justice Academy. His law enforcement career started in 2007 when he was hired by the City of Columbia Police Department. He was hired as a patrol officer and "worked a lot of street crime cases." After two years "on the street," he was moved to investigations were he "interviewed multiple individuals both involved in gangs and not involved in gangs." In 2011, he was promoted to the "Gang Unit." As an investigator with the "Gang Unit," Zwolak "did intel on street gangs," "worked violent crime cases and gathered intel on documented gang members," and "assisted patrol in all the other aspects of the Columbia Police Department when it came to organized crime and street gangs." R. 386, l. 22 – 388, l. 9.

Before he left the Columbia Police Department in June 2015, Zwolak helped establish the "Midlands Gang Task Force in Richland County." In June 2015, he began working for the Criminal Justice Academy "when a position opened up to teach on street gang." He has taught classes called Criminal Street Gang Investigations, Criminal Gang Overview for Law Enforcement, and Gang Documentation, among other related courses. R. 389, l. 24 – 390, l. 19.

Additionally, Zwolak testified he has extensive formal training in "gang or street culture and language." For example, he attended the Criminal Gang Overview for Law Enforcement at the Criminal Justice Academy before he became employed there, as well as Law Enforcement Response to Gangs in the Community and Graffiti Recognition. He completed the "Basic Gang School" and later the "Advanced Criminal Gang Investigations and Interview" class in Meridian, Mississippi. He has also attended the World Gangs of the Low Country Training Conference in South Carolina and "taken the Gang Investigations and Prosecution Techniques that was put on

by the Federal Government." R. 388, l. 20 – 389, l. 9. Lastly, Zwolak is a member of the South Carolina Gang Investigator's Association. R. 389, ll. 13-14.

During the course of *voir dire* concerning Zwolak's qualifications, the word gang or gangs was mentioned *at least thirty five times*. When the state moved to qualify Zwolak as an expert in "street culture and language," defense counsel renewed his objection. Subject to Appellant's objection, the judge qualified Zwolak as an expert and gave a limiting instruction, which stated in part:

> Additionally, ladies and gentlemen, I'm going to give you what is known as the limited instruction concerning this testimony. As you heard, the officer's background and history and training, you heard the word gang many, many, many times and, of course, that word can be a buzz word in and of itself. There is no association, no association whatsoever between this defendant, Mr. Butler, and membership in or association with any gang whatsoever. The issue about whether or not Mr. Butler is a member of, or associated with any member of a gang is not relevant to the trial of this case, and that particular issue is not an issue.
>
> And the area of gangs should not even be discussed, Mr. Foreman, by you or any of the ladies and gentlemen in the jury room at the time of your deliberations.
>
> I'm allowing this evidence solely for the purpose of interpreting street culture and language and as you all know, being American Citizens of Lexington County, South Carolina, people are tried based on the evidence, not whatever their status may be. They're not tried because of a label whatsoever. Even if they were, Mr. Butler does not have that label whatsoever.

R. 392, l. 11 – 393, l. 12.

Zwolak ultimately testified regarding his interpretation of language used by Appellant, McClure, and others in text messages that were admitted into evidence as State's Exhibit No. 66 over Appellant's objection. For example, Zwolak opined that the word "hammy" or "hamma" allegedly used by Appellant referred to a firearm. R. 399, ll. 2-18; R. 403, l. 16 – 405, l. 8. He maintained that the word "nickel" allegedly used by Appellant could refer to a firearm or a quantity of drugs. R. 397, ll. 9-12. He also claimed the term "a blood" allegedly used by

Appellant in a conversation with McClure "normally . . . would refer to a gang member." R. 398, l. 21 – 399, l. 1.

The trial judge erred by qualifying Zwolak as an expert in "street culture and language" and allowing him to testify, without any limitation whatsoever, concerning his extensive experience and training related to gangs and his interpretation of language allegedly used by Appellant because this evidence was unfairly prejudicial to Appellant in violation of Rule 403, SCRE. The evidence elicited during *voir dire* before Zwolak was qualified as an expert, particularly the repeated use of the word gang, along with Zwolak's testimony interpreting language allegedly used by Appellant, suggested to the jury that Appellant was affiliated with or involved in a gang and likely led the jury to convict Appellant on an improper basis.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013) (quoting State v. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct.App.1998)) (alternation in original) (internal quotation marks omitted).

There was no evidence besides Zwolak's testimony that Appellant or McClure were affiliated with a gang. Consequently, Zwolak's testimony was highly prejudicial to Appellant, particularly where Appellant was convicted under the hand of one is the hand of all theory of accomplice liability and testified in his own defense. Appellant's credibility before the jury was crucial because he testified that he was merely present at VonKeith's house when the burglary and shooting occurred. Zwolak's testimony concerning gangs, which the jury could only have interpreted as meaning Appellant was likely affiliated with a gang, undermined his character and credibility. This prejudicial testimony likely led the jury to convict Appellant on an improper

basis. Because any probative value of Zwolak's testimony was substantially outweighed by the danger of unfair prejudice to Appellant, the trial judge should have excluded or severely limited his testimony.

Based on the foregoing, Appellant respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming Appellant's convictions and sentence.

Respectfully Submitted,

Lara M. Caudy

LARA M. CAUDY
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of May, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN ANTONIO BUTLER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above captioned case has been served upon Sherrie Butterbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Justin Antonio Butler, #368538, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 2nd day of May, 2019.

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE ME this 2nd day of May, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.

The South Carolina Court of Appeals

The State, Respondent,

v.

Justin Antonio Butler, Appellant.

Appellate Case No. 2016-001269

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied, but that unpublished opinion number 2019-UP-146, filed April 17, 2019, be withdrawn and that the attached opinion be substituted therefor.

Thomas E. Cuff J.

Paula H. Thomas J.

A. Kline J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Lara Mary Caudy, Esquire

FILED
June 5, 2019

Donald J. Zelenka, Esquire
Sherrie Butterbaugh, Esquire
Melody Jane Brown, Esquire
Samuel R. Hubbard, III, Esquire
The Honorable R. Knox McMahon

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Justin Antonio Butler, Appellant.

Appellate Case No. 2016-001269

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Unpublished Opinion No. 2019-UP-146
Submitted February 11, 2019 – Filed April 17, 2019
Withdrawn, Substituted, and Refiled on June 5, 2019

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Sherrie Butterbaugh, all of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

PER CURIAM: Justin Antonio Butler appeals his convictions for murder, attempted murder, first-degree burglary, and possession of a weapon during the commission of a violent crime. On appeal, he argues the trial court erred in (1) denying his motion to suppress cell phone records obtained with search warrants signed by a South Carolina magistrate and sent to out-of-state phone companies and (2) qualifying a police officer as an expert in "street culture and language" and allowing him to testify about his experience with gangs. We affirm.

STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless those findings are clearly erroneous. *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). Thus, on review, this court is limited to determining whether the trial court abused its discretion. *Id.* An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). The appellate court "does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Edwards*, 384 S.C. at 508, 682 S.E.2d at 822.

SEARCH WARRANTS

Butler argues the trial court erred in refusing to suppress cell phone records the State obtained by issuing search warrants signed by a South Carolina magistrate to out-of-state phone companies. We disagree.

Before trial, Butler moved to suppress cell phone records the State obtained with search warrants signed by a South Carolina magistrate and sent to out-of-state phone companies. Butler argued the search warrants were invalid because the magistrate did not have jurisdiction outside South Carolina. Butler noted the phone companies could voluntarily comply with the request for records, arguing "[t]he Sheriff's Department can accomplish the exact same thing . . . by just issuing simply a letter saying . . . this is an official investigation . . . please send us th[ese] items, but they chose not to do that and instead to use the search warrant form and procedures." Butler argued there was no "limiting . . . language . . . that would put the recipient on notice that the[] search warrants ha[d] no force or applicability of the law and compliance [wa]s strictly voluntary." Thus, Butler contended the phone companies could have turned over the information voluntarily if the State had sent a letter, but the information should be excluded because the State chose to

send invalid search warrants. The State responded by arguing Butler did not have an expectation of privacy in the phone records because the information was owned by the phone company. The trial court denied Butler's suppression motion, relying on an unpublished Michigan case[1] and finding there was no expectation of privacy in the "records held by a third-party out-of-state custodian."

Section 17-13-140 of the South Carolina Code (2014) states "any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize" property. In *State v. McKnight*, an officer obtained a search warrant to search a mobile home. 291 S.C. 110, 112, 352 S.E.2d 471, 472 (1987). The officer told the magistrate he believed drugs and stolen goods would be found inside the mobile home. *Id.* Subsequently, the magistrate filled out the search warrant form and the officer signed it. *Id.* The officer did not complete an affidavit; instead, the magistrate placed the officer under oath and the officer "orally recited the facts upon which the warrant was based." *Id.* Evidence found during the search of the mobile home was later used against the defendants at trial, and the trial court granted the defendants' motion to suppress despite the State's argument that they did not have standing to challenge the search warrant because they did not have a legitimate expectation of privacy in the searched premises. *Id.* "A search warrant that would survive constitutional scrutiny may still be defective under" section 17-13-140. *Id.* at 113, 352 S.E.2d at 472. The court stated, "[O]ne contesting the legality of a search because of a defect under [s]ection 17-13-140 need only show that the State is attempting to introduce the evidence against him." *Id.* at 115, 352 S.E.2d at 474. Our supreme court affirmed and held the defendants had standing to attack the search warrant because the constitutional question of whether they had an expectation of privacy in the place searched and the statutory question of the validity of the search warrant were two separate questions. *Id.*

We disagree with Butler that *McKnight* is controlling in this case. Butler conceded at trial that the State did not need to send a search warrant in order to obtain the cell phone records. At trial, Butler stated records held by a third-party cell phone company did not belong to him and the company could choose to turn those records over to police. Butler conceded the State could have merely sent a letter

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[1] In an unpublished opinion, the Court of Appeals of Michigan held that an attorney was not ineffective for failing to move to suppress search warrants sent to out-of-state telephone companies because the warrants sought "only records of electronic communications that occurred in Michigan." *People v. Wilson*, 2013 WL 2360239, at *10 (Mich. Ct. App. 2013).

requesting the records to the cell phone companies. However, Butler argues on appeal the records should have been excluded because the State chose to send an invalid search warrant. *McKnight* states the question of statutory compliance of a search warrant is different than the Fourth Amendment privacy considerations. *See id.* In *McKnight*, the officer needed to first obtain a search warrant to search the mobile home because a search of a home implicates someone's privacy rights under the Fourth Amendment—whether it was the defendants' privacy rights or someone else's privacy rights. *See id.* However, in the instant case, Butler noted the owners of the cell phone records voluntarily turned the information over to the third party. Because Butler did not argue the State was required to send search warrants to obtain the cell phone records, Butler's argument regarding the validity of the search warrants has no merit. Therefore, we affirm the trial court's denial of Butler's motion to suppress and find the trial court did not abuse its discretion. *See Black*, 400 S.C. at 16, 732 S.E.2d at 884 ("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." (quoting *State v. Saltz*, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001))).

EXPERT WITNESS

Butler argues the trial court erred in qualifying Brian Zwolak as an expert in "street culture and language" and allowing him to testify about his gang-related training and experience. We disagree.

At trial, Zwolak testified he worked as a gang instructor at the South Carolina Criminal Justice Academy (the Academy). He began his career as a patrol officer with the City of Columbia Police Department and moved into the gang unit in 2011. As an investigator in the gang unit, Zwolak "worked violent crime cases[,] gathered intel [on] gang members," and assisted other police officers "when it came to organized crime and street gang[s]." Zwolak then accepted a position with the Academy to teach classes on street gangs. He attended the Criminal Gang Overview for Law Enforcement and Law Enforcement Response to Gangs in the Community and Graffiti Recognition classes at the Academy. He also took the Basic Gang School and Investigation and Criminal Gang Investigations courses in Mississippi. He attended the World Gangs of the Low Country Training Conference in South Carolina and took a Gang Investigations and Prosecution Techniques course taught by the federal government. He was a member of the South Carolina Gang Investigator's Association. His total amount of "gang related, street culture related training" was 225 hours. He taught the following classes at the Academy and around South Carolina: Gang Specialist, Criminal Street Gang

Investigation, Criminal Gang Overview, Criminal Gang Overview for School Resource Officers, and Gang Documentation. He testified he participated in numerous interviews and reviewed social media and music videos to "keep up with current trends and slang." The trial court qualified Zwolak as an expert in street culture and language over Butler's objection. During his testimony, Zwolak went line by line and interpreted the language used by Butler and others in text messages.

As a general rule, "all relevant evidence is admissible." Rule 402, SCRE. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

> Rule 702, SCRE, provides that a witness qualified as an expert may testify when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. However, even if an expert's testimony is admissible under the rules, the trial court may exclude the testimony if its probative value is outweighed by the danger of . . . unfair prejudice, confusion of the issues, or misleading the jury.

Wilson v. Rivers, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004). "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013) (quoting *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998)).

We find the trial court did not err in allowing Zwolak to testify as an expert witness. The State presented no evidence that Butler, Terry McClure, or the crime itself was associated with a gang. The mention of gangs was only in relation to Zwolak's experience and training as a necessity to qualifying him as an expert witness. The only time Zwolak mentioned gangs outside of outlining his training and experience was when he indicated the term "blood" usually referred to a gang member. However, he clarified it did not mean the person who wrote the text was associated with a gang and later explained "blood" could also refer to a friend or family member. Furthermore, because of the danger of unfair prejudice associated with the word gang, the trial court gave three limiting instructions regarding Zwolak's testimony—after it qualified Zwolak as an expert witness, at the end of Zwolak's testimony, and during the jury instructions. Thus, any prejudice that may have arose because of the extensive use of the word gang in Zwolak's testimony

regarding his qualifications would have been cured by the limiting instruction. *See State v. Young*, 420 S.C. 608, 624, 803 S.E.2d 888, 896 (Ct. App. 2017) ("Limiting instructions are deemed to cure error unless 'it is probable that, notwithstanding the instruction, the accused was prejudiced.'" (quoting *State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986))); *id.* at 623, 803 S.E.2d at 896 ("We start by presuming the cure worked, for we also presume juries follow their instructions.").

Butler does not point to any specific part of Zwolak's testimony that prejudiced him, other than the fact Zwolak said the word "gang" many times while explaining his qualifications. Because the trial court repeatedly instructed the jury that there was no association between Butler or McClure and any gang, and the State did not attempt to connect Butler with a gang, we find the prejudicial effect of Zwolak's testimony was small. The State presented Zwolak's testimony to counter Butler's assertion that he was not involved in McClure's plan to rob the victims and to show a scheme between Butler and McClure. We find Zwolak's testimony had probative value and was not substantially outweighed by the mention of gangs during his testimony about his qualifications. Thus, the trial court did not abuse its discretion in allowing Zwolak to testify. *See Black*, 400 S.C. at 16, 732 S.E.2d at 884 ("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." (quoting *Saltz*, 346 S.C. at 121, 551 S.E.2d at 244)).

Accordingly, Butler's convictions are

AFFIRMED.[2]

HUFF, THOMAS, and KONDUROS, JJ., concur.

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[2] We decide this case without oral argument pursuant to Rule 215, SCACR.