STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

V.

JONATHAN DONELL RHODES,

APPELLANT

APPELLATE CASE NO 2015-002605

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

Opinion No. 2019-UP-361

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Jonathan Donell Rhodes petitions this Court for rehearing and respectfully submits that this Court misapprehended the United States Supreme Court's holding in Carpenter v. U.S., 138 S.Ct. 2206 (2018) when it wrongfully determined that "emergency" under the Stored Communications Act was a lesser standard than "exigency" as understood under the Fourth Amendment to the U.S Constitution and under Section 1, Article 10 of the South Carolina Constitution.

This Court erred when it determined that in Appellant's case the police who wrongfully gathered Appellant's cell-site location information (CSLI) and per call measurement data (PCMD) had a good faith belief that their warrantless taking was permissible under the emergency exception to the Stored Communications Act because they were investigating a double homicide where the state had no evidence Appellant was a danger to the public at large or that any future crime was imminent. 18 U.S.C.A. § 2702; Carpenter v. U.S., 138 S.Ct. 2206 (2018); State v. Rhodes, Opinion No. 2019-UP-361 (2019), p. 5.

In Carpenter, the United States Supreme Court held that obtaining location information from Carpenter's wireless carrier was a search and that an individual maintains a legitimate expectation of privacy over his movements captured through his cell phone. Carpenter, at 2217. The Court explained that under the Stored Communications Act 18 U.S.C.A., § 2702, "emergency" meant exigency as understood under the United States Constitution's Fourth Amendment. Id. at 2223.

The Carpenter Court categorized the emergency exception that permitted warrantless collection of cell phone data under the Stored Communications Act in classic Fourth Amendment terms in that, "[s]uch exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." Id. The Court explained that the types of threats that were "emergencies" or "exigencies" that allowed the warrantless collection of cell phone data under the Stored Communications Act were "bomb threats, active shootings, and child abductions." Id. In those cases the warrantless collection of otherwise private data was permissible because it was to "respond to an ongoing emergency." Id. In the present case there was no such "ongoing emergency."

In its opinion, this Court cited to U.S. v. Takai, 943 F.Supp.2d 1315 (2013) to hold that the police officers in Appellant's case had a good faith belief that their taking of Appellant's CSLI and PCMD was in an attempt to stop an ongoing emergency. State v. Rhodes, Opinion No. 2019-UP-361 (2019). In Takai, the United States District Court in Utah held that the warrantless taking of Takai's cellphone data to track his whereabouts was permissible because there was an ongoing emergency in that Takai was likely to commit further crimes. Takai, at 1321.

This Court overlooked that important difference between Appellant's case and Takai. In Takai, the officers' warrantless taking of Takai's cell phone location information was lawful because there were clear and articulable facts that showed the defendant was armed and dangerous and that he would commit another armed robbery imminently. Id. at 1322 – 23. The officer in Takai believed, "based on reliable information from gang unit detectives, [Takai] was armed and dangerous," and that, "another [armed robbery] might be imminently forthcoming." Id. Moreover, in that case, prior to collecting warrantless location data from Takai, the investigators confirmed that Takai was the suspect seen on surveillance footage from one of the prior armed robberies. Id.

In Appellant's case there was no evidence that Appellant was armed and dangerous, nor was there any evidence another crime was "imminently forthcoming." Id. Moreover, there was no evidence offered that the crime in this case presented an "ongoing emergency." Carpenter, at 2223.

Conversely, there was evidence presented that at the time of the request for Appellant's CSLI and PCMD from his service provider, the Greenville County Sheriff's Office knew the crime was not likely to be an "ongoing emergency." R. 213, l. 25 – 214, l. 6. Investigator Hammett used criminal profiler Barton from SLED, and Barton concluded the crime here was "personal in nature" and that the killer knew the decedents. Id.

Defense counsel argued the conclusions Barton told Hammett meant that law enforcement knew the double homicide it was investigating posed "no broader danger to anyone else." R. 271, ll. 20 – 25. Defense counsel pointed out that Barton gave his profile of the suspect to Hammett before the police requested Appellant's cell phone records. R. 270, l. 20 – 272, l. 5. Therefore, since the officers in this case knew the crime was "personal in nature" and that the killer knew the decedents before they requested Appellant's cell phone data, they *could not* have had an "objectively reasonable good-faith belief" that the warrantless taking of Appellant's CSLI and PCMD was lawful because they knew at the time of the request that the crime they were investigating did not present an "ongoing emergency." Id.; United States v. Chavez, 894 F.3d 593, 608 (4th Cir. 2018). Respectfully, this Court's ruling was in error and should be reconsidered.

Appellant also requests rehearing on the grounds that this Court erred when it held the lower court's error in allowing expert testimony on the inherently unreliable PCMD was harmless. State v. Rhodes, Opinion No. 2019-UP-361 (2019) p. 6 – 7.

As this Court stated in its opinion, "[T]he trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific." Id. at 6; State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009). The testimony from the "expert" at trial was that the PCMD from Appellant's cell phone allegedly placed Appellant at the scene of the incident. R. 377, l. 23 – 378, l. 5. As this Court held, that testimony was inherently unreliable and should not have been admitted. State v. Rhodes, Opinion No. 2019-UP-361 (2019) p. 6 – 7. However, this Court erred when it found the state's use of expert testimony for the inherently unreliable PCMD was harmless. Id.

The state's "expert" Fennern testified that the PCMD showed Appellant's exact whereabouts at the time of the incident. R. 44, l. 20 – 45, l. 24. Fennern claimed that Appellant was exactly 1.97 miles from the nearest cell tower at 10:45 pm and then 1.88 – 1.89 miles from the cell tower at 11:02 pm on the night of the incident. Id. Fennern testified that based on these records, the location of Appellant's cell phone was consistent with him being at or near the decedents' home on the night of the murders. R. 410, l. 8 – 415, l. 8. Fennern's testimony was the only evidence the state presented that purported to place Appellant at the scene of the crime.

The remainder of the evidence against Appellant certainly did not amount to overwhelming evidence of guilt. There was DNA of the decedents in a car belonging to Eric Cade that Appellant was allowed to drive. R. 469, l. 2 – 477, l. 21. Therefore, as defense counsel argued, Appellant's DNA "would be on every surface" of the car from his regular use and, consequently, the DNA match to Appellant, "doesn't mean anything." R. 558, ll. 1 – 11.

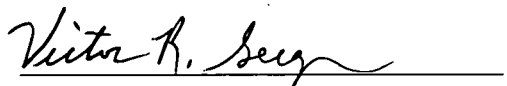
The jailhouse snitch McLeod was the only direct evidence of guilt in this case. However, McLeod's allegation that he heard Appellant make inculpatory remarks regarding his involvement in the incident while they were cellmates, hardly provided overwhelming evidence of guilt either. R. 507, ll. 4 – 6.

McLeod was a career criminal who had an interest in testifying against Appellant in an effort to procure a more lenient sentence when his charges were adjudicated. R. 497, l. 7 – 498, l. 12; R. 510, l. 6 – 512, l. 7. Moreover, McLeod's testimony at trial differed from what he first told police. McLeod initially told police that a third individual, Amber McDaniel, went with Rogers and Appellant to the Wells' home, but at trial McLeod testified only Rogers and Appellant were involved. App. 515, ll. 13 – 23. Accordingly, McLeod's testimony was unreliable and did not provide overwhelming evidence of Appellant's guilt.

Therefore, the error by the lower court in admitting the inherently unreliable expert testimony on PCMD to place Appellant at the scene of the crime was not harmless; and this Court's ruling to the contrary should be reconsidered.

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's affirmation of Appellant's convictions. Appellant respectfully requests (that) this Court hold that the warrantless taking of Appellant's CSLI was an unlawful violation of his Fourth Amendment rights and his right to privacy under Article I, Section 10 of the South Carolina Constitution, and that the lower court's error in admitting the inherently unreliable expert testimony about PCMD could not be harmless.

Respectfully Submitted,



VICTOR R SEEGER
Appellate Defender

This 21st day of November, 2019.

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Jonathan Donell Rhodes, #343817, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 21st day of November, 2019.

Victor R. Seeger

Victor R Seeger
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 21st day of November, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029