STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE COMMON PLEAS COURT
The Honorable Thomas W. Cooper

Appellate Case No.: 2018-001916

MELEKE D. STEWART,

Appellant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

Final Brief of Appellant

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2. **Did the Trial Court erred in denying Appellant's Motion to Suppress the Defendant's statement based on the unavailability of Detective Kitelinger?**

STATEMENT OF THE CASE

The Appellant, Meleke Stewart, is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. The Appellant was indicted in 2014 for Murder (2014-GS-26-3682), Possession of a Firearm during commission of a violent crime 2014-GS-26-03681), and Attempted Armed Robbery (2018-GS-26-2255). The Appellant's indictments were true billed by the Grand Jury.

On October 16, 2018, through October 18, 2018, Appellant proceeded to trial before the Honorable Thomas W. Cooper, Jr., in Conway, SC. The State of South Carolina was represented by Jonathan Mills, Assistant Solicitor, and George Debusk, Jr., Senior Assistant Solicitor. The Appellant was represented by J. Eric Fox, Esq., Assistant Public Defendant and Jonathan Hiller, Esq., Assistant Public Defender for Horry County. The Appellant was found guilty by jury. Judge Cooper sentenced Appellant to confinement for thirty (30) years for murder, five (5) years for Possession of a firearm during the commission of a violent crime, and twenty (20) years for Attempted Armed Robbery. All sentences were to run concurrently with seventy seven (77) days credit for jail time and one thousand five hundred and seven (1507) hours credit for detention by electronic monitoring. A timely Notice of intent to Appeal was filed on October 24, 2018. This appeal follows:

STATEMENT OF THE FACTS

At approximately 9:00 a.m. on June 16, 2014, Law Enforcement in Myrtle Beach was notified that there was a vehicle reported at 9th South and Youpon Drive and the occupant appeared to be deceased. Upon arrival at the scene, it was determined that the

driver was in fact deceased. The victim was sitting partially in the driver's seat with one foot on the ground and was lying back against the center console. The door to the vehicle was open. There was a small amount of blood under the left armpit of the victim. A fired cartridge case was found on the lower dashboard area of the vehicle. Case and what appeared to be the victim's cell phone where located in the driver's door. Once the victim was removed, another cartridge casing was discovered under the body lying in the driver's seat. A search of the vehicle revealed two cell phones. It was determined that the blackberry devise had not been used since May and was of no evidential value. The second cell phone was determined to be the victims phone and the data from this phone was downloaded and placed into evidence.

Through the use of cell phone data, the police were able to identify a potential suspect in the case. This person of interest was Meleke Deshawn Stewart, the Appellant. Through the use of cell phone data, the Police obtained the Appellant's address in Chester, SC. Arrangements were made to travel to Chester to interview the Appellant. Law enforcement arrived in Chester, SC around 10:00 a.m. on June 18, 2018. They met with officers of the Chester County Sheriff's Office and Chester City Police Department. It was determined that the Appellant would be taken into custody. A search warrant for his residence was to be executed.

Investigator Kitlinger, from the Myrtle Beach Police Department, was the lead investigator in this case and conducted a recorded post Maranda interview with the Appellant. Chester County Officer Wade Young, who was familiar with the suspect, was also present at the interview. The Appellant gave a lengthy statement implicating himself in the crime.

Based upon the information provided by the Appellant, a severely damaged cell phone was found at a convenient store in Rock Hill, SC. This was taken into evidence and the Appellant was transported to the Myrtle Beach Detention Center. Upon arrival at the Myrtle Beach Detention Center, the Appellant showed the Police the dumpster that the gun had allegedly been deposited into. This being behind the Sea Mist Motel. The dumpster was searched, but no gun was located.

The Appellant, Meleke Stewart, was arrested and charged with Murder, Attempted Armed Robbery and Possession of a Weapon during the Commission of a Violent Crime. Due to mental health concerns, the Appellant was evaluated by Dr. Sharetha Christopher, for competency to stand trial. Dr. Christopher concluded that the Appellant had adequate actual understanding, and adequate rational understanding. However, Dr. Christopher also noted certain mental health concerns. The Appellant was diagnosis with reading and understanding difficulties (ROA p. 13, lines 5-13), major depression disorder and mild anxious distress. (ROA p. 14, lines 1-7) However, she found the Appellant competent to stand trial. (ROA p. 14, lines 18-19)

This issue becomes important in Pre-trial argument about his ability to understand and comprehend during his interrogation and statement given at the Chester Police Department.

The Court finds that the Appellant is competent to stand trial.

The second Pre-Trial Motion addressed the post Miranda statement and confession at the Chester Police Department. A Jackson v. Denno hearing was held.

At this hearing testimony was presented by Hugh Jones, Sargent with the Myrtle Beach Police Department. Sgt. Jones indicated that while he responded to the incident

scene on Detective Kitelinger was the officer in charge of the investigation. Sgt. Jones testified that the use of communication through the victim's cell phone produced a number that he communicated with right before the murder. With that information they had developed a person of interest who lived in Chester, South Carolina. (ROA p. 38, lines 4-9) Sargent Jones travelled with Detective Kitelinger and witnessed the Appellant given his Miranda rights. While Sgt. Jones was present at the interview, he was not in the interview room. He was in a room adjacent to the interview room and observed through a glass window.

Officer Wade Young, Jr. was also present at the interrogation. He is a Detective with the Chester County Sheriff's Office. He knew the Appellant when he was a school resource officer. He testified that he was asked to sit in on the interview, hoping that the Appellant would be more comfortable with his presence. (ROA p. 47, lines 5-8) It appears that Officer Kitelinger had separately recorded the interview with a hand held devise. (ROA p. 50, lines 1-25; p. 51, lines 1-24).

Objection was made regarding the unavailability of Detective Kitelinger. Defense Counsel argued his unavailability, that it did not allow the Defense to cross examine the Detective and in essence allowed his testimony through the Publication of his interview. Defense counsel argues that there is a Crawford issue in terms of Detective Kitelinger. He is the witness who conducted the interview. That the video is going to be played in front of the Jury. The Defense is not going to be able to confront Detective Kitelinger in cross examination. (ROA p. 53, lines 13-21).

The Court, however, finds that the State has satisfied the requirements of Rule 901 (B)(1) for authentication and denied Defense Counsel's objection.

At this point the issue of the Appellant's competence to stand trial and forensic interview come back into play. Objection was made as to the voluntariness of the confession based upon the fact that he had limited understanding that that there was a great discrepancy between the officer's obvious education and experience verses that of the Appellant. (ROA p. 64, lines 4) The Court finds that the Appellant had voluntarily waived his rights and made a voluntary statement. (ROA p. 65, lines 7-17). The Defense furthers their objection indication that their suppression Motion also encompasses the problems with the fact that Detective Kitelinger is not present (ROA p. 66, 1-25)

The Defense then moves to Suppress the statement and all other evidence that would come in based upon a warrantless search of the Appellant's phone records. Defense Counsel points out that the Police obtained a search warrant for the deceased vehicle. This search of the vehicle led to the discovery of two cell phones. The Police then applied for search warrant on these phones. Counsel points out that one thing the State did not do was request a search warrant to search the Appellant's phone. (ROA p. 76, lines 14-19) Counsel argues that the State circumvented the warrant requirement by going straight to Verizon under an emergency situation disclosure form. (ROA p. 76, lines 2-24) Through this warrantless search they were able to acquire account holder information which led them to know where the Appellant lived and also to place him in Myrtle Beach. This led them to Chester, South Carolina, which then produced the interrogation and confession. Detective Kitelinger aggressively used the information about the Appellant's presence in Myrtle Beach to produce the confession. Defense Counsel moved for the exclusion of this evidence due to a violation of Article 1, Section 10, South Carolina Constitution and in violation of his Fourth Amendment rights.

STANDARD OF REVIEW

"In criminal cases, the Appellate Court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted).

Review is limited to determining whether any evidence supports the trial court's finding. State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Upon such review, an appellate court may reverse only when the trial court's decision is clear error. State v. Pichardo, 367 S.C. 84, 95, 623 S.E. 2d 840, 846 (Ct. App. 2005). Under the "clear error" standard, the appellate court will not reverse a trial court's finding of fact simply because it may have decided the case differently. Id. at 96, 623 S.E.2d at 846. [T]his deference does not bar this Court from conducting its 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

1. **That the Trial Court erred in not granting the Appellant's Motion to exclude all evidence to include the Appellant's statement, due to a warrantless search of his cell phone.**

An extensive Pre-Trial Brief was prepared by Defense Counsel and portions of that brief are included in this argument.

On June 16, 2014 the Myrtle Beach Police Department searched the Defendant's cell phone records without a warrant. The search was not justified by any exception to the

Fourth Amendment warrant requirement. Even though it is a drastic remedy, all evidence acquired from the warrantless search of the Defendant's cell phone records must be suppressed. The search violated Defendant's rights under both the Fourth Amendment of the United States Constitution and the right to privacy granted him by Article I, Section Ten of the Constitution of the State of South Carolina.

Relevant Facts

On the morning of June 16, 2014, at approximately 9:00 a.m., the victim was found deceased inside his vehicle inside the city limits of Myrtle Beach, SC. During the course of the homicide investigation, detectives secured a search warrant for the vehicle. During the search of the vehicle, they located two cell phones and then secured a search warrant for each phone.

The searches revealed that both phones had belonged to the victim. Only one of the phones, an LG, was of evidentiary value. The text messages found on the LG showed that – beginning around 7:49 p.m. on June 15, 2014 – the victim had been soliciting an unknown person to perform a sex act on him in exchange for money.

Law enforcement properly searched the victim's cell phone because a search warrant had been requested and received before the search took place. From this search, detectives learned that the victim called 803-899-2076 around 7:30 p.m. on June 15, 2014. The call did not connect. Thereafter, the victim started a text message conversation with 803-899-2076.

Text conversation lasted the majority of the evening. The victim sent the first text message at 7:49 p.m. on June 15, 2014. He sent the final text at 12:45 a.m. on June 16,

2014. The final phone call made by the victim was also to 803-899-2076. That call connected at 1:02 a.m. and lasted over four minutes.

After the search of the victim's phone, the focus of the investigation turned to the user of 803-899-2076, as it was the last number to have been in contact with the victim's phone. Using the Number Portability Administration Center, Verizon Wireless was identified as the service provider for 803-899-2076.

No search warrant was obtained for the phone records of 803-899-2076. Rather a detective filled out an "EMERGENCY SITUATION DISCLOSURE" form he received from Verizon Wireless. He used that form to request: subscriber information, location information, incoming and outgoing call information and SMS (text message) details. To justify the request for the phone records without a search warrant, the detective filled out the form as follows.

> A murder occurred in Myrtle Beach and information from the victim's phone indicates he was supposed to meet the person w/ 803-899-2076. At this time we don't know if they are another victim, in need of assistance, or if they are the perpetrator.

It appears that Verizon Wireless informed Law Enforcement that 803-899-2076 was a TracFone. Verizon Wireless therefore referred them to the law enforcement line maintained by TracFone to acquire the subscriber information that they had requested. Without a warrant, TracFone then identified the subscriber of 803-899-2076 as Meleke Stewart of 129 Jester Street in Chester, SC 29706. TracFone also provided the Defendant's date of birth, email address and an alternate phone number listed on the account. Without a search warrant, Verizon Wireless provided the remaining requested

information: phone log records, SMS (text message) records, and cell site location information (CSLI).

The next day, June 17, 2014, Law Enforcement reviewed 803-899-2076's phone log and the text messages sent and received from that account. They also reviewed the historical CSLI data received. This data allowed them to track the phone's movement. The report indicates that the CSLI records put the Defendant's cell phone on the cell tower that would cover the crime scene when the Defendant's phone connected for the 1:02 a.m. phone call the victim made.

803-899-2076's phone log revealed a call made at 1:26 a.m. on June 16, 2014 to a previously unknown phone number. Detectives also read text messages sent between 803-899-2076 and the previously unknown phone number. The detective then requested a search warrant for the cell phone records of the previously unknown phone number. The information provided in response to the search warrant identified Broderick Roscoe – the Defendant's co-defendant – as the registered owner of the previously unknown phone number.

On June 18, 2014, Myrtle Beach Police Department detectives travelled to Chester, SC to arrest the Defendant and interview him and his co-defendant. Detectives arrived in Chester, SC at approximately 10:00 a.m. per the investigative reports. According to the lead detective's report of his interview with the Defendant, "after being confronted with the evidence, especially the text messages, he admitted to being in the victim's car and eventually shooting him." At 4:16 p.m. on July 18, 2014 – after the Defendant was already interrogated and in custody – a search warrant for 803-899-2076 was finally obtained and sent to Verizon Wireless via facsimile.

Appellant's Fourth Amendment Challenge

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects . . . ." U.S. Const. amend. IV. "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." Kyllo v. United States, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). When a defendant asserts a Fourth Amendment challenge and claims a search is unreasonable, "the burden is on the defendant to prove not only that the search was illegal, but also that he had a legitimate expectation of privacy in the item searched." State v. Moore, 421 S.C. 167, 174, 805 S.E.2d 585, 589 (S.C. 2017) (citing Rawlings v. Kentucky, 448 U.S. 98, 104–05, 100 S.Ct. 2556 (1980) (holding petitioner did not make a sufficient showing that his legitimate or reasonable expectations of privacy were violated by a search of his female companion's purse)).

In the Appellant's case, the Myrtle Beach Police Department – without a warrant – requested and received: (1) subscriber information, (2) location information (CSLI), (3) a call log of incoming and outgoing calls, and (4) a detail of SMS (text messages) sent and received from the Appellant's cell phone. The first issue to determine is: **whether the Appellant held a reasonable expectation of privacy in any of the information seized from him without a search warrant** by the Myrtle Beach Police Department. If the Appellant is found to have a reasonable expectation of privacy in any or all of the information seized from him without a warrant, the second issue to resolve is **whether an exception to the Fourth Amendment search warrant requirement exists** that would alleviate the need to acquire a search warrant under fact-specific circumstances.

Subscriber Information

South Carolina recently addressed whether a citizen has a reasonable expectation of privacy in cell phone subscription information, such as phone number, name, date of birth and related information. In Moore, law enforcement found several cell phones at the scene of an attempted murder. Id. at 171, 805 S.E.2d at 587. The police then conducted "limited forensic examinations to determine who owned each of the phones . . . [and] ran [each number] through a database." Id., 805 S.E.2d at 587. During the initial search, the police determined that one of the phones belonged to Moore, the defendant.

After acquiring this subscriber information, which was obtained without securing a search warrant, law enforcement then took no further action until they requested a search warrant. Upon receipt, they seized the call logs and text messages that were stored on the phone. Id., 805 S.E.2d at 587. The South Carolina Supreme Court found no Fourth Amendment violation. The Court determined:

> [The defendant's] phone was found at a crime scene and was examined by police before they obtained a warrant solely to obtain the telephone number and ownership identification . . . . [L]aw enforcement's limited search of the SIM card to obtain the phone number did not constitute an unreasonable search under the Fourth Amendment because [the defendant] had no reasonable expectation of privacy in the number itself. **Of significance here is the fact that police obtained a warrant before performing further analysis to examine the phone's contents.**

Id. at 175-76, 805 S.E.2d at 590 (emphasis added).

Location Information (Cell Site Location Information / CSLI)

Defendant's Fourth Amendment rights were violated when the Myrtle Beach Police Department acquired location information for the cell phone that was registered to him without first obtaining a search warrant. Carpenter v. United States is a recent United States Supreme Court case that holds the Fourth Amendment – in most circumstances – protects location information data in the possession of a cell phone provider. 585 U.S. ___, 138 S.Ct. 2206 (2018). In Carpenter, the Court determined that "[g]iven the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. . . . **[A]n individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.** Id., at ___, 138 S.Ct. at 2217 (emphasis added).

In the 5-4 opinion authored by Chief Justice Roberts, the Court ultimately held that:

> The Government must generally obtain a warrant supported by probable cause before acquiring [cell phone location] records. Although the "ultimate measure of the constitutionality of a governmental search is 'reasonableness,'" our cases establish that warrantless searches are typically unreasonable where "a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing."

Id., at ___, 138 S.Ct. at 2221 (internal citations omitted).

Unless an exception to the Fourth Amendment warrant requirement applies, since the police did not obtain a search warrant before conducting a search of the Defendant's cell phone, the Myrtle Beach Police Department violated the Fourth Amendment when it acquired cell site location information directly from Verizon Wireless.

The Exigent Circumstances Exception to the Warrant Requirement

In Appellant's case, the detective who searched Appellant's cell phone records without a search warrant relied on exigent circumstances to square his actions with the Appellant's Fourth Amendment rights. As noted above, to get Appellant's cell phone records from Verizon Wireless, the detective filled out an "EMERGENCY SITUATION DISCLOSURE" form. This form was provided to him by Verizon Wireless via facsimile at 3:26 p.m. This was nearly 6 hours and 30 minutes into the homicide investigation that began just before 9:00 a.m. that morning. Again, the detective's verbatim justification for warrantless access to the cell phone records is as follows.

> A murder occurred in Myrtle Beach and information from the victim's phone indicates he was supposed to meet the person w/ 803-899-2076. At this time we don't know if they are another victim, in need of assistance, or if they are the perpetrator.

If the above recitation is sufficient to establish exigent circumstances, then exigent circumstances exist in almost every single police investigation. The crime scene was carefully investigated by skilled crime scene investigators who found no evidence that another victim could be in need of assistance. No blood drops belonging to a person other than the victim were found. The crime scene gave no hint at all that another person was in distress. In short, the detective had no facts to support his assertion that the person associated with 803-899-2076 may be in need of assistance.

While Carpenter v. United States acknowledges that cell site location information can be acquired without a warrant under exigent circumstances, it is also equally clear

that the exigent circumstances exception is to be applied to circumstances where a threat is continuing to unfold.

> [C]ase-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. "One well-recognized exception applies when 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.

Id., at ___, 138 S.Ct. at 2222-23 (internal citations omitted).

While a homicide investigation is certainly one of the most serious investigations law enforcement undertakes, not every homicide investigation is an "ongoing emergency" that would justify circumventing the Fourth Amendment. In the Appellant's case, no facts exist to support the claim that "exigent circumstances" left law enforcement with no choice but to acquire the Appellant's cell phone records without a search warrant. The Appellant's cell phone records were requested well into a homicide investigation the

police were actively trying to solve.

Cell Phone Call Log and SMS (Text Message) Log

Previously discussed in the context of subscriber information, State v. Moore also discusses what is required for law enforcement to search and seize phone call log records and SMS (text) message records. In the case of State v. Moore:

> [The appellant's] phone was found at a crime scene and was examined by police before they obtained a warrant solely to obtain the telephone number and ownership identification . . . . [L]aw enforcement's limited search of the SIM card to obtain the phone number did not constitute an unreasonable search under the Fourth Amendment because [the appellant] had no reasonable expectation of privacy in the number itself.

Moore, at 175-76, 805 S.E.2d at 590. The Moore Court further supported this conclusion by noting that "[o]f significance here is the fact that police obtained a warrant before performing further analysis to examine the phone's contents." Id., at 176, 805 S.E.2d at 590.

Moore addresses the search of a physical phone, not phone records maintained by the service provider. However, the call logs and text message logs that were stored "in the cloud" by Verizon Wireless in Defendant's case are a mirror image of the call and text history stored on the Defendant's physical cell phone. Carpenter, in the context of CSLI, is clear that "the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. . . . **[A]n individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.** Carpenter, 585 at ___, 138 S.Ct. at 2217

(emphasis added).

Additional case law provides support for the Appellant's claim that he had a reasonable expectation of privacy in his cell phone call log history and SMS (text message) log history. As Moore recognized, quoting from another seminal United States Supreme Court case:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life[.]" The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

Moore, 421 S.C. at 177, 805 S.E.2d at 590 (quoting Riley v. California, 571 U.S. 1161, 134 S.Ct. 2473, 2494-95 (2014).

When considering phone call logs and SMS (text message) logs, the information stored on physical phones is no different than the version of the same information that is stored "on the cloud" by the cell phone service provider. Thus, the Appellant had a reasonable expectation of privacy in his phone call and SMS (text message) records stored by his service provider, Verizon Wireless. When the police searched the Appellant's personal cell phone records stored "on the cloud," his Fourth Amendment rights were violated. No exception to the warrant requirement is applicable; thus the search was illegal.

The Right to Privacy Under Article I, Section Ten of the South Carolina Constitution

"In addition to language which mirrors the Fourth Amendment, [Art. 1 Section 10 of the South Carolina Constitution] contains an express protection of the right to privacy: 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures **and unreasonable invasions of privacy** shall not be violated . . .'" (emphasis in original). State v. Forrester, 343 S.C. 637, 644, 541 S.E.2d 837, 840-41 (S.C. 2001).

". . . [B]y articulating a specific prohibition against 'unreasonable invasions of privacy,' the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence." Id., 541 S.E.2d at 841.

The Appellant asserts that, as a citizen of the State of South Carolina, he possessed a privacy right in: (1) his subscriber information in the possession of TracFone, (2) his cell site location information in the possession of Verizon Wireless, (3) his phone call log information in the possession of Verizon Wireless, and (4) his SMS (text message) log information in the possession of Verizon Wireless. When his records were searched without a warrant, his right to privacy was violated.

2. That the Court erred in not granting the Defendant's Motion to Suppress the Defendant's statement based on the unavailability of Detective Kitelinger.

Pretrial, Defense Counsel argues for the Suppression of the Appellant's statement and confession based upon lead investigator Kitelinger's absence. That the State was unable to meet its burden to show that he was properly advised of his Miranda Rights, that he gave his statement freely and voluntarily and the publication of the recorded interview allowed Detective Kitelinger to testify in absentia.

The Court indicated its concern about Detective Kitlinger not being present and that he would instruct the Jury that Detective Kitelinger's statements made in the interrogation are not to be considered as evidence. Defense Counsel acknowledges that Detective Kitelinger medical situation is serious and concedes that he would fit the definition of Rule 803. However, he argues that under Crawford v. Washington that the interrogation is testimonial in nature. That the back and forth with Appellant does amount to a testimony and as such is at least subject to Cross Examination.

The Defense Counsel's argument is two-fold.

"I think—well, it is a suppression motion but based on what we've learned with Detective Kitelinger, who conducted the interrogation. We would argue even if the statement is freely and voluntarily and knowingly made that we have an issue. I would argue anything that Detective Kitelinger says on that, he's, basically, getting a chance to testify and present his version of – Detective Kitelinger's version of the facts without the opportunity to cross-examine him." (App. p. 66, lines 6-14)

Defense Counsel also argues that Detective Kitelinger's comments are hearsay.

Defense Counsel argues that Crawford specifically addresses two issues: One, that the witness is unavailable and concedes that Detective Kitelinger is unavailable. But, secondly, is a prior opportunity to cross examine the witness. Counsel states that this opportunity was never made available and for these reasons, that the Appellant's statement should be excluded. The Court notes that circumstances exist that bring the confrontation clause to bear. (ROA. p.174, lines 5-13) But, the court notes that he does not believe that Crawford is designed to address or to protect against these issues.

The lack of the presence of Detective Kitelinger created problems of not being able to verify the voluntariness of the Appellant's statement. The Miranda rights were read to him by Detective Kitelinger. The form presented to him to sign saying these rights had been explained to him and that he understood these rights was presented to him by Detective Kitelinger.

The Appellant would argue that the absence of Detective Kitelinger seriously prejudiced the Appellant and as a result, his statement should have been excluded.

CONCLUSION

1. Under clear Fourth Amendment case law, the Defendant had a legitimate and reasonable expectation of privacy in (1) the cell site location information stored by Verizon Wireless, (2) the call log information stored by Verizon Wireless, and (3) the SMS (text message) information stored by Verizon Wireless. When the Myrtle Beach Police Department searched the Defendant's phone records without a search warrant, it violated the Defendant's Fourth Amendment right against unreasonable search and seizure and the right to privacy granted by the South Carolina Constitution.

Defendant further asserts that his right to privacy embedded the South Carolina Constitution granted him a legitimate and reasonable expectation of privacy in the cell phone subscriber information stored by TracFone. The warrantless search of his TracFone subscriber information violated his right to privacy grated to him by Article I, Section 10 of the South Carolina Constitution.

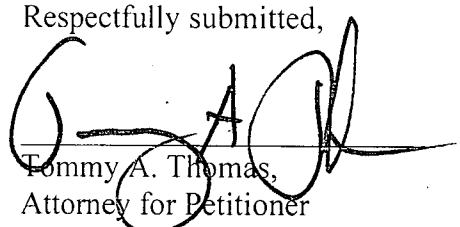
Problematically for the government, the information revealed by the warrantless searches solved the homicide investigation. The victim's phone found at the crime scene gave up the Defendant's phone number. The warrantless searches of the phone records

associated with the Defendant's phone provided the detectives with all the information needed to identify the co-defendant and interrogate both him and the Defendant. The entire case against the Defendant fell into place because of the warrantless searches of his phone records. Neither search was supported by any exception to the Fourth Amendment. As such, the evidence acquired by the Myrtle Beach Police Department in violation of the Fourth Amendment must be suppressed and excluded from presentation at trial.

2) That the unavailability of lead investigator Kitelinger made it impossible for the defense to address a number of important issues. The Appellant's understanding the waiver of his Miranda rights, the voluntariness of his waiver of these rights and the giving of his statement. Also allowing the investigator to testify in his absence without being subject to cross examination. As a result, the Court erred in not suppressing the Appellant's statement.

For the reasons stated above, Appellant respectfully requests that this Court reverse his convictions.

Respectfully submitted,

By: 

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