RECEIVED
Apr 22 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JUSTIN JAMAL WARNER,

APPELLANT

APPELLATE CASE NO 2017-001313

Appeal from Anderson County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 5717

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner seeks rehearing because this Court may have overlooked the fact that law enforcement obtaining an illegal search warrant from a local Anderson County magistrate for records housed in New Jersey should not be found to be a "good faith" exception to the exclusionary rule since obtaining a search warrant in this fashion was never legal, the solicitor knew that, and law enforcement was therefore not relying on that procedure being good pursuant to existing case law at the time. This Court noted that the trial judge found the warrant was invalid, and that "the State does not challenge this ruling." State v. Justin Jamal Warner, Op. No. 5717, Shearouse's Adv. Sh. #14 a p. 46.

However, this Court then reasoned that "although the officers exceeded the Fourth Amendment when they obtained Warner's cell phone records without a *valid warrant*, in light of Miller's validity at the time of the search, their conduct was not a *deliberate or reckless transgression*." State v. Justin Jamal Warner, Op. No. 5717, Shearouse's Adv. Sh. #14 a p. 47. Respectfully, it was a deliberate or reckless transgression. The police were not relying on United States v. Miller, 425 U.S. 435, 443 (1976) on petitioner not having an expectation of privacy in his cell phone records or United States v. Graham, 82 F.3d 421, 437-38 (4th Cir. 2016) on the *warrantless* collection of cell phone records when they deliberately and recklessly procured the illegal search warrant from a local Anderson Magistrate. That fact, and not the retroactive application of Carpenter v. United States, 138 S.Ct. 2206, 22117 (2018), was the operative fact. The exclusionary rule was meant to deter deliberate and reckless police conduct that violated petitioner's Fourth Amendment rights, and this Court should reconsider its holding that "[n]o deterrent value accrues from suppressing the evidence under these circumstances." State v. Justin Jamal Warner, Op. No. 5717, Shearouse's Adv. Sh. #14 a p. 47.

This Court should respectfully grant rehearing and hold that the trial court erred by refusing to suppress the cell phone evidence obtained as a result of the police deliberately or recklessly procuring an illegal search warrant from a local magistrate. The cavalier disregard of a citizen's Fourth Amendment rights, between the local police and the cell phone company through the systematic use this farcical local magistrate search warrant should be condemned – "*We do this all the time . . . as long as we say you don't have to come, that [then] it doesn't matter*" -- was what the exclusionary rule meant to deter. R. 43, l. 2 – 47, l. 6. (emphasis added). Using the court system to knowingly obtain an invalid warrant that you think will nonetheless be honored does a dishonor to the entire judicial system. Rehearing should be granted.

The cell phone evidence being deemed reliable.

This Court noted that FBI special Agent David Church was qualified at trial as an expert in historical cell site and cell phone record analysis. Church claimed the evidence was reliable.

"The trial court pointedly asked Church, `You said to [the solicitor], yes it's reliable." "Besides a boilerplate response, how do you determine that it's, in fact, reliable?" Church responded, "There are sixty-two of us now that are doing it, and we regularly find people that are looking for, or help look for, by analyzing those records . . . so to me, I mean, *the practical application is the best study.*" R. 92, l. 13 – 93, l. 9. (emphasis added).

As this Court also wrote, Church mentioned "using common sense and investigative knowledge and your expertise knowing how a network operates, determine where to go look for a phone. As we successfully do that, you know, every week, our unit does. So to me . . . the practical application is the best study." State v. Justin Jamal Warner, Op. No. 5717, Shearouse's Adv. Sh. #14 at p. 39.

This Court stated that "CSLI evidence is more technical in nature than scientific. It still falls within Rule 702, SCRE, and must be screened for reliability. State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) . . ." State v. Justin Jamal Warner, Op. No. 5717, Shearouse's Adv. Sh. #14 a p. 39. This Court correctly stated that Church's answer on reliability above "may appear to resemble the "*ipse dixit* of the expert," but it nonetheless held that the trial court did not abuse its discretion in admitting Church's CSLI testimony as reliable expert opinion." State v. Justin Jamal Warner, Op. No. 5717, Shearouse's Adv. Sh. #14 a p. 42. Cf. Watson v. Ford Motor Company, 398 S.C. 434, 699 S.E.2d 169 (2010) (the Supreme Court held that an electrical engineering witness was not qualified and his testimony was not sufficiently reliable to be admitted on the issue of alternative design for a cruise control system). The Court found that to

allow expert testimony, the court must first find the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009). The trial court must also find the proper witness is qualified, *and that the evidence is reliable*. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

As this Court will recall, Defense counsel Harvey argued that he did not think that this cell phone tracing evidence even qualified as a science (This Court held it was more technical then scientific). Counsel Harvey argued, "My position, Judge, is that this does not require an FBI agent to say, 'Hey, we get the longitude and latitude from the phone company. We can plug it in with our software, and we can identify where a cell tower is.' I can do that. I promise you I can do that." R. 96, ll. 8-22. Counsel argued there was not a need for expert testimony. R. 96, l. 11 – 98, l. 18.

Having the aura of an expert, Church's testimony was much more likely to be credited by the jury as being "infallible, and here Church's CSLI testimony was devastating to petitioner. State v. White, 372 S.C. 364. 376, 374, 642 S.E.2d 607, 613 (Ct.App.2007), *aff'd in result,* State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). Church told the jury that, in his opinion, the cell phone evidence showed the phone travelled from metropolitan Atlanta up to the Greenville/Anderson County area, and "the phone traveled within Anderson and Greenville County up towards the Pellham Road area back dow*n to the area of the crime scene* and utilized the two sectors shown in slide 11, I believe." R. 438, l. 10 – 439, l. 1. (emphasis added).

Demonstrative exhibits only if admitted

Over appellant's prior objections, records, maps, arrows, and other information from Church's report were introduced into evidence as State's Exhibit 23-A through 23-E. They jury

therefore had the documents in the jury room during deliberations. R. 439, l. 21 – 440, l. 5. The following occurred on cross-examination of Church:

> Q: Okay. So we have a number of factors to be taken into consideration in these particular instances, but we can't and we don't have the data to determine what kind of phone, the generation of the phone, the wattage of the phone, the actual coverage area, or the data to determine the actual coverage area, correct?
>
> A: From the records that I analyzed, no.

R. 453, ll. 16-22.

Defense had argued that if cell phone evidence was going to be allowed – it should only be for demonstrative purposes as "a summary exhibit." The solicitor told the judge that she would use the cell phone documents as demonstrative exhibits, but she wanted some of them introduced into evidence. The solicitor wanted the "arrow indicates direction of travel" documents (pages 8-12 of State's Exhibit 23 A-E) before the jury as evidence. The judge overruled the defense objections, and defense counsel reminded the judge he was objecting "to his testimony in whole" based on his prior motion. R. 391, l. 23 – 399, 11.

This Court should reconsider its holding that Church was properly qualified as an expert in this case, and that his documents were properly admitted into evidence rather than just as demonstrative exhibits once defense counsel lost the battle on Church being rendered an expert. State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 698 (2009). In State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982) our Supreme Court held that the trial judge abused his discretion in allowing the jury to take a transcript into the jury room because it unduly emphasized that evidence. Here, while defense counsel objected to all of Church's cell phone analysis evidence because it was not a science, and that it was speculative, and not admissible; his backup position

was such evidence should only be used for demonstrative purposes -- if admitted – and it should not go to the jury.

As seen, although the judge seemed troubled by Church's "boilerplate assertions" that this evidence was reliable, he nonetheless admitted it, rejecting all of the defense challenges to it. Respectfully, the state failed to prove that the cell phone tower tracking evidence was reliable, and not speculative. This Court should respectfully reconsider its holdings in this regard. This evidence was extraordinarily prejudicial to petitioner because Church alleged the evidence showed that petitioner's phone went from Atlanta to very near the crime scene, to Greenville, and back to Atlanta. It was the center piece of the solicitor's closing argument as well. This Court should respectfully grant rehearing on this issue, and on the demonstrative exhibit only if admitted issue, as well. Watson v. Ford Motor Company, 398 S.C. 434, 699 S.E.2d 169 (2010); State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009); State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999); State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982).

Refusal to grant a Neil v. Biggers hearing

Defense counsel requested a Neil v. Biggers, 409 U.S. 188 (1972) hearing. On its face, the identification here looked unduly suggestive because, as defense counsel told the judge, petitioner's probation agent was provided with a film clip of the surveillance tape. The man in the tape was a black male wearing a hat and glasses. Appellant's probation agent in Georgia, Nathan Goolsby, later testified before the jury that he saw petitioner once a month. R. 223, l. 17 – 224, l. 19.

Goolsby admitted that with the hat and sunglasses "it was hard to see the face" but he maintained he identified petitioner because of "the way *that he walked, the way he carried himself*, and he exhibited the same signs." R. 226, l. 23 – 227, l. 9. (emphasis added). In short,

Goolsby said that he was able to identify petitioner from his walk, and "how he carried himself" – the specifics of which were never provided in this case despite the enormous prejudice of this identification testimony. R. 228, l. 11 – 229, l. 8; R. 58, l. 19 – 61, l. 10.

The solicitor said that a Neil v. Biggers hearing was not necessary because Goolsby was not an eyewitness and because he knew appellant. The trial judge found this reasoning persuasive and ruled that a Neil v. Biggers hearing or analysis was not even involved in this case. R. 58, l. 15 – 62, l. 19. This Court agreed with this ruling, and it noted that in both this case and in State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012) the identifying witness knew the suspect. However, this Court found it critical that in Liverman, the identifying witness was an eyewitness, and the probation agent in this case was not. State v. Justin Jamal Warner, Op. No. 5717, Shearouse's Adv. Sh. #14 a p. 45.

This Court held, "Even if sending the video to Goolsby was unnecessarily suggestive, we are confident Goolsby's identification was reliable." "Without disclosing he was Warner's probation officer, Goolsby told the jury he had spent time with Warner every month over the past nine of so months, usually for fifteen to thirty minutes each time. He testified he was sure of his identification because he was familiar with Warner's gait, the way he carried himself, and the way he held his hands and shoulders, and Warner had the same height and build as the person on the video." State v. Justin Jamal Warner, Op. No. 5717, Shearouse's Adv. Sh. #14 a p. 45-46.

State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012) respectfully does not support the Court's holding in this case. The Court noted that a criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification. See State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004). That is this case.

In Liverman, the trial court also relied heavily on the fact the witness knew the defendant. Our Supreme Court held that the reliance on State v. McLeod, 260 S.C.445, 196 S.E.2d 645 (1973) could not stand after the Supreme Court issued its opinion in Perry v. New Hampshire, 565 U.S. 228 (2012), in which the Supreme Court made clear that due process requires a trial court to conduct a preliminary assessment of the reliability of an eyewitness identification made *under suggestive circumstances arranged by law enforcement*. Again, and respectfully, that is what happened in this case when Anderson law enforcement asked Agent Goolsby if petitioner was the robber and murderer in the film clip, even though Goolsby essentially admitted he could not even see the robber's face. Petitioner respectfully requests that this Court reconsider its holding that Goolsby identification under the facts of this case was reliable. "'[R]eliability is the linchpin' of the due process inquiry." Manson v. Brathwaite, 432 U.S. 98, 114 (1977)." State v. Justin Jamal Warner, Op. No. 5717, Shearouse's Adv. Sh. #14 a p. 45.

Again, Agent Goolsby was shown a film clip of a black man wearing sunglasses with a hat on and asked by another branch of law enforcement whether this man was "Justin Warner." Goolsby confirmed to the Anderson police that the man in this surveillance tape they suspected was Petitioner Justin Warner was indeed Petitioner Justin Warner. On its face, that was a very unduly suggestive identification.

In State v. Liverman, our Supreme Court rejected the state's invitation to hold that the denial of the Neil v. Biggers pretrial hearing fully comported with due process requirements, nonetheless. Here, the fact that Agent Goolsby was not an eyewitness to the crime, but served the same function by identifying petitioner from the BP surveillance film clip should not have been the deciding factor. In the final analysis, this Court should grant rehearing, reconsider its holding that Goolsby's identification of petitioner was reliable as a matter of law, and hold that

petitioner was entitled to a Neil v. Biggers, 409 U.S. 188 (1972) hearing on the admissibility of the identification in this highly unusual case pursuant to Perry v. New Hampshire, 565 U.S. 228 (2012) and State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012).

Respectfully Submitted,

__s/ *Robert M. Dudek*__
ROBERT M. DUDEK
Chief Appellate Defender

.

This 22nd day of April, 2020

RECEIVED
Apr 22 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JUSTIN JAMAL WARNER,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon William Edgar Salter, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 22nd day of April, 2020; and Justin Jamal Warner, #372737, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 22nd day of April, 2020.

__s/ *Robert M. Dudek* ___________
Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

April 22, 2020