STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Fairfield County

Honorable Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LEVOND TAYANO KEITT,

APPELLANT

APPELLATE CASE NO 2020-000130

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it ruled that Appellant did not have a reasonable expectation of privacy in his GPS data, taken as a condition of bond for an unrelated charge, where Appellant consented to be GPS monitored solely for the limited purpose of enforcing the bond conditions on the unrelated charge?

STATEMENT OF THE CASE

During the December 2018 term, the Fairfield County Grand Jury indicted Appellant for criminal sexual conduct in the first degree and assault and battery in the first degree. R.*.

Appellant proceeded to trial on January 20 – 23, 2020 before the Honorable Thomas A. Russo, and a jury. Tr. 1. William Frick represented Appellant. Id. Julie Hall represented the state. Id.

Appellant was found guilty of assault and battery in the first degree. Tr. 438, l. 25 – 439, l. 12. Appellant was sentenced to ten years' imprisonment. Tr. 445, ll. 8 – 19.

This appeal follows.

STANDARD OF REVIEW

In Fourth Amendment search and seizure cases, the standard of review is limited to the following:

> The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling. The appellate court will reverse only when there is clear error.

State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) (citations and internal quotation marks omitted). This deference does not bar appellate courts from conducting their 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

The trial court erred when it ruled that Appellant did not have a reasonable expectation of privacy in his GPS data, taken as a condition of bond for an unrelated charge, where Appellant consented to be GPS monitored solely for the limited purpose of enforcing the bond conditions on the unrelated charge.

During Appellant's trial, Chattiqua Richardson, the complaining witness, testified that in the early morning hours of March 17, 2018, Appellant allegedly picked her up at "Faces" a night club in Fairfield county. Tr. 135, l. 5 – 140, l. 14. She stated she planned on "hanging out" with Appellant, Richardson had sex with Appellant in the past, and got into his car willingly. Id. She stated that she performed oral sex on Appellant, but did not intend to have sex with him because she was "on her period." Tr. 141, l. 16 – 142, l. 3. She then alleged that Appellant stopped the car "by the woods" off of I-77 and they got out to check the passenger side tire. Tr. 142, l. 4 – 143, l. 9. Appellant then allegedly attacked Richardson and raped her. Tr. 143, l. 16 – 145, l. 2.

Richardson fled to a nearby road where a "white guy" picked her up and drove Richardson to her sister's house where her sister already called an ambulance to bring her to the hospital. Tr. 149, l. 25 – 151, l. 12.

Officer Bill Dove testified at Appellant's trial as well. Tr. 264, l. 16. He visited Richardson at the hospital and took her statement. Tr. 265, ll. 5 – 17. Richardson claimed a man she knew named "Von" was the person who attacked her, but she could not provide his phone number because she lost her phone during the incident. Tr. 146, l. 10 – 147, l. 1. Dove testified he made Appellant a suspect in this case because the phone number for "Von" in Richardson's contacts on her google account was Appellant's phone number. Tr. 336, l. 24 – 339, l. 9.

Dove also testified to a call that came from Karneisha Dixon, Appellant's wife, that alleged their car was stolen by a woman Appellant knew as "Sis" and several men[1]. Tr. 343, l. 17 – 346, l. 24. Dove arrived at Dixon's home to interview Appellant about the stolen car, then "at some point" Dove read Appellant his Miranda rights and questioned him about the sexual assault allegation by Richardson. Tr. 346, l. 25 – 348, l. 2. Appellant denied knowing Richardson, stated he was in Savannah and that he was wearing an ankle monitor at the time. Tr. 348, l. 19 – 349, l. 2.

Dove stated he drove with Richardson out to where she alleged the incident happened. Tr. 366, l. 24 – 367, l. 3. Dove admitted that Richardson could not determine exactly where off of I-77 the alleged incident happened. Tr. 366, l. 14 – 367, l. 3. Dove explained that Richardson could only say that she believed a side road off of I-77, Mount Hope road, "looked familiar." Id.

Dove telephoned Illery Bail Bonds, the company that collected Appellant's Global-Positioning-System (GPS) ankle monitor data, and received a report of Appellant's whereabouts on the night of the incident. Tr. 351, l. 13 – 357, l. 4. Dove testified that Appellant's ankle monitor showed that he was driving on I-77 and stopped eventually on Mount Hope road. Id. Dove explained that the GPS report was the basis for obtaining a warrant for Appellant's arrest. Tr. 361, ll. 19 – 23.

In a pretrial motion, trial counsel moved to exclude the GPS tracking reports under S.C. Code 17-30-140 and the Fourth Amendment to the U.S. Constitution. Tr. 8, l. 19 – 13, l. 9; S.C. Code Ann. 17-30-140. Trial counsel explained that when Appellant became a suspect in this case, the police went to the GPS monitoring company, without a warrant, for March 16 and 17, 2018 the period when the alleged incident occurred. Id. Trial counsel stated that Appellant was

[1] The car was registered to Dixon but Appellant was allegedly driving it on the night of the incident.

on GPS monitoring for charges from Orangeburg County. Id. The conditions of the GPS monitoring were that Appellant not travel to Orangeburg, Dorchester, and Berkeley counties. Id.

Trial counsel argued that Appellant did not "give up any privacy [right] to anyone other than those related to that bond because it is not an adjudicated matter and not related to any other issues he may have had." Id. He explained that if police want to place a GPS monitor on someone they have to follow SC Code Ann. 17-30-140.[2] Id.

Trial counsel cited State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014) where our Supreme Court held the investigating officers violated Adams' Fourth Amendment protection against unreasonable search and seizure when they attached a GPS monitor to Adams' car without first getting a court order. Adams, at 653 – 54, 764 S.E.2d at 348. Trial counsel argued that in this case the officers "converted" the GPS monitor, used for the unrelated bond condition, to use in this case, and that unauthorized use was the officers "essentially attach[ing] the GPS tracking device" to Appellant without getting the required court order. Tr. 8, l. 19 – 13, l. 9.

Trial counsel also cited U.S. v. Jones, 132 S.Ct. 945 (2012) for the principle that police need to get a warrant to attach a GPS tracking device to a suspect. Id. He further explained that under U.S. v. Carpenter, 138 S.Ct. 2206 (2018) a third party holding a defendant's data does not relinquish the defendant's expectation of privacy in that data. Id. Trial counsel concluded that here, law enforcement, "didn't go through any process other than requesting [the GPS data]… [and] doing such does invade the privacy of [Appellant]." Id.

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[2] The statute requires the state make an application to a judge to attach a "mobile tracking device" on a suspect certifying probable cause exists, and the judge must, upon a finding that probable cause existed, issue an ex parte order authorizing the installation and use of a mobile tracking device. Also under the statute, a mobile tracking device means an electronic or mechanical device which permits the tracking of the movement of a person or object. S.C. Code Ann. § 17-30-140.

The solicitor replied that the GPS monitor on Appellant's leg was not similar to cell-site location information (CSLI) in regards to Appellant's expectation of privacy. Tr. 13, l. 11 – 14, l. 17. The solicitor further argued that in this case Appellant mentioned he was on an ankle monitor when he was being interviewed by Dove, which meant Appellant did not have an expectation of privacy in the GPS data. Id.

The court ruled that the GPS data was admissible because tracking was a condition of Appellant's bond and "there was no expectation of privacy." Tr. 15, l. 4 – 16, l. 11.

During Appellant's trial, Officer Dove testified that the GPS report he requested from Illery Bail Bonding showed Appellant was in the vicinity of the scene around the time that Richardson alleged he attacked her. Tr. 351, l. 8 – 357, l. 4. The GPS report was the only evidence, aside from Richardson's allegation, that connected Appellant to the alleged incident and strongly corroborated Richardson's testimony. Accordingly, the wrongful admission of the GPS report unfairly prejudiced Appellant and as a result he was found guilty of assault and battery in the first degree. Tr. 438, l. 25 – 439, l. 11.

Discussion

In the present case, Appellant gave limited consent to be GPS monitored to officials in Orangeburg county, pursuant to his bond agreement on an unrelated charge, for the sole purpose of ensuring that Appellant did not travel into Orangeburg, Berkeley, and Dorchester counties. Tr. 9, l. 1 – 13, l. 9. Accordingly, the Fairfield county officers violated Appellant's Fourth Amendment right against unreasonable search and seizure when they viewed his GPS data without a warrant because they exceeded the scope of consent that Appellant gave for his whereabouts to be monitored.

GPS monitoring of a suspect is a search within the meaning of the Fourth Amendment. U.S. v. Jones, 132 S.Ct. 945, 949 (2012). Accordingly, barring an exception to the warrant requirement, police officers must obtain a warrant before using GPS to monitor a suspect. Id.

In this case the trial court ruled that Appellant had no expectation of privacy in the GPS data used by Orangeburg county, to enforce the conditions of Appellant's bond on an unrelated charge, such that the warrantless taking of that data was per se constitutional. Tr. 15, l. 4 – 16, l. 11. While the trial court did not expressly state the justification for Appellant not having an expectation of privacy in the GPS data, the ruling can be interpreted as: when Appellant gave consent to be tracked by GPS as a condition for bond on his Orangeburg charge he relinquished his expectation of privacy in the GPS data entirely.

The trial court erred in its ruling that Appellant had no expectation of privacy in his GPS data because Appellant's consent to be tracked was limited to the sole purpose of complying with the conditions of his bond to not travel to Orangeburg, Dorchester, and Berkeley counties. Tr. 15, l. 4 – 16, l. 1. Dove's warrantless search of the GPS data violated Appellant's right to privacy because Appellant's consent to be monitored was based on the reasonable belief that the GPS data would only be accessed to determine if he was violating the terms of his bond.

"We have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 111 S.Ct. 1801, 1803 – 04 (1991). Accordingly, warrantless searches that exceed the scope of consent are unreasonable. Camara v. Mun. Court of City & Cty. of San Francisco, 87 S.Ct. 1727, 1730 – 31 (1967).

In Walter v. U.S., 100 S.Ct. 2396 (1980), Walter was arrested for interstate transportation of obscene material through the mail. Id. at 2399. In Walter, the obscene materials were mistakenly sent to the wrong address and the recipients, who read the labels but did not watch the videos, called the police. Id. The recipients gave the films to law enforcement who viewed them without getting a warrant. Id.

The Supreme Court determined that the fact that the packages had been opened by a private party, the recipients who were sent the package mistakenly, did not excuse the officers' failure to obtain a search warrant. Id. at 2401. Moreover, the Court held that, "whether an official search is properly authorized – whether by consent or by the issuance of a valid warrant – *the scope of the search is limited by the terms of its authorization*." Id. (emphasis added) Accordingly, the officers in Walter could not exceed the scope of the search by the wrongful recipients and because the wrongful recipients had not watched the films, it was unconstitutional for the officers to view the films without first obtaining a warrant. Id. at 2402 – 03.

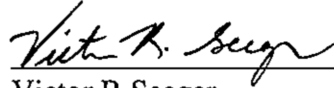
In this case, since Appellant reasonably believed that his data would only be viewed for the purpose of ensuring that he complied with the conditions of his bond for his Orangeburg charges, Dove's search into Appellant's GPS records exceeded the scope of Appellant's consent to be GPS monitored. As a result, Appellant's reasonable expectation of privacy was violated when Dove accessed his private GPS data without a warrant. Id. See Walter v. U.S., 100 S.Ct. at 2401 – 02 ("Consent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers.")

Accordingly, the lower court erred when it ruled that the warrantless taking of Appellant's GPS tracking report did not infringe on his Fourth Amendment rights against

unreasonable search and seizure, and since the GPS report was the impetus for Dove obtaining the arrest warrant for Appellant, its admission at his trial unfairly prejudiced him.

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate his conviction and remand his case to the Fairfield County Court of General Sessions for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of October, 2020.

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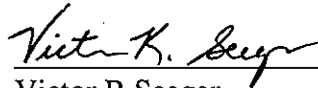
CERTIFICATE OF SERVICE

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 Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Levond Tayano Keitt, #299982, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 12th day of October, 2020.



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