

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Honorable Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2017-001846

RECEIVED

Dec 23 2020

S.C. SUPREME COURT

THE STATE,

Respondent,

v.

JAVON DION GIBBS,

Appellant.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner submits this reply to point out several errors in Respondent's reasoning that clearly demonstrate the trial judge's error in suppressing the CSLI:

I.

Assuming *arguendo* that a search warrant is required for law enforcement to acquire five days of historical cell site location information (CSLI) from a defendant's phone after the Supreme Court's decision in *Carpenter v. United States*, the Court of Appeals committed clear error by affirming suppression of the CSLI for Gibbs' cell phone where the search warrant affidavit, as supplemented by the information provided to the magistrate, clearly supports the magistrate's finding of probable cause to issue the warrant.

Respondent correctly states that the State did not rely "on binding appellate precedent" in seeking to obtain Respondent's CSLI. Yet, this proves nothing and ignores both that the warrant in this case was supported by probable cause and that Inv. Martin acted in reasonable acted with an objectively reasonable good faith belief his conduct was lawful based on the search warrant that he obtained. *See* Argument III. Respondent is derisive of the adequacy of the search warrant affidavit, referring to it as "extremely deficient, reckless and wanton." Yet, he has not addressed that the trial judge's and the Court of Appeals' findings the affidavit was defective for not providing information for the magistrate to assess the reliability of known informants, *See State v. Javon D. Gibbs*, 2020-UP-244 (S.C. Ct.App., Aug. 19, 2020), at 9-10, contradicts the Court of Appeals' own published decision in *State v. Driggers*, 322 S.C. 506, 511, 473 S.E.2d 57, 60 (Ct. App. 1996), where the Court stated that "a non-confidential informant should be given higher level of credibility because he exposes himself to public view and to possible criminal and civil liability should the information he supplied prove to be false." This finding is likewise contrary to the overwhelming majority of courts outside of this jurisdiction that have considered this question, as the cases cited on pp. 12-14 of Petition unerringly demonstrate.

Respondent also ignores, as did the lower courts, that *Illinois v. Gates*, 462 U.S. 213 (1983), does not require an affidavit to include the specific crime alleged to have been committed. Rather,

“only a probability of criminal conduct need be shown.” *United States v. Koonce*, 485 F.2d 374, 380 (8th Cir. 1973) (quoting *McCreary v. Sigler*, 406 F.2d 1264, 1268 (8th Cir. 1969)); *Gates*, 462 U.S. at 235 (“[I]t is clear that ‘only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause’”). Therefore, the contrary findings by the trial judge and the Court of Appeals are clearly erroneous. *Id.* See also *District of Columbia v. Wesby*, 138 S.Ct. 577, 586 (2018).

II.

The Court of Appeals clearly erred by finding that Gibbs had a legitimate expectation of privacy in the State's collection of only five days of CSLI, such that acquiring his CSLI was a search under *Carpenter* that required a warrant.

Respondent contends that no sound reason exists to grant certiorari to review the Court of Appeals’ conclusion that Gibbs had a legitimate expectation of privacy in the State's collection of only five days of CSLI, so that acquiring his CSLI was a search under *Carpenter* that required a warrant. Yet, he necessarily ignores that in *Carpenter v. United States*, 138 S.Ct. 2206, 2217 n. 3 (2018), a sharply-divided United States Supreme Court held for the very first time that individuals have a reasonable expectation of privacy in the record of their physical movements captured by historical CSLI and that acquisition of more than seven days of CSLI constitutes a “search” under the Fourth Amendment.

One of the Justices in the *Carpenter* majority was Justice Ginsburg, who is now deceased. It is not settled that her successor, Justice Barrett, would agree with the *Carpenter* decision, should a challenge arise in the proper case. Further, and as discussed in the Petition at 15, this reasoning is not supported by any opinion of any Justice in *Carpenter*, including the majority opinion. Also, Respondent has not cited and the undersigned has been unable to find *any published or unpublished decision* in the United States that has reached a similar conclusion. Respondent’s

failure to address these points is conspicuous and telling of the clear error committed by the trial judge and Court of Appeals.

III.

The lower courts committed clear error in finding that Inv. Martin did not act in good faith reliance on the search warrant that was issued because a search warrant was not required to obtain the CSLI at the time the State obtained this evidence and the magistrate's order satisfied the requirements of the Stored Communications Act.

The most egregious error committed by both the trial judge and the Court of Appeals was the rejection of the State's argument Inv. Martin acted with an objectively reasonable good faith belief his conduct was lawful based on the search warrant that he obtained under *United States v. Leon*, 468 U.S. 897, 922-23 (1984), and, thus, suppression of the CSLI was not required. *See Gibbs*, at 11-12; **R. 102**. For the reasons argued in the Petition (Petition, pp. 17-25), the reasoning of the trial judge, as well as that of the Court of Appeals that there was no good faith reliance on the warrant because the warrant lacked probable cause, even considering the supplemental testimony, *see Gibbs*, at 12, is clearly circular reasoning that proves nothing and clearly flies in the face of the controlling precedent of *Leon* because at the time the State obtained the CSLI and even at the time of the hearing on Gibbs' motion to suppress, a search warrant was not required to obtain these records in this jurisdiction. *See also United States v. Thomas*, 908 F.3d 68, 72 (4th Cir. 2018) (Under the good faith exception to the exclusionary rule, “evidence obtained by an officer who acts in objectively reasonable reliance on a search warrant will not be suppressed, even if the warrant is later deemed invalid” (citing *Leon*, 468 U.S. at 922). Also, the warrant obtained by Inv. Martin was sufficient under the SCA, which only required a showing by the government of “reasonable grounds” for believing that the records were “relevant and material to an ongoing investigation.” 18 U.S.C. § 2703(d). This is a standard lower than probable cause.

Additionally, Respondent does not address “the elephant in the room,” *i.e.*, that the finding that there was no good faith is inconsistent with the result reached by a panel of the Court of Appeals in *State v. Warner*, 430 S.C. 76, 93-94, 842 S.E.2d 361, 369-70 (2020), where the Court concluded there was good faith reliance on a warrant even though the trial judge found the warrant was void *ab initio* because the magistrate lacked jurisdiction to issue it. Further, whether or not there was probable cause to issue a search warrant, it cannot be seriously contended that the State’s showing was sufficient under § 2703(d) of SCA, which was all that was required at the time the warrant was obtained. The Court of Appeals rejected this argument because the State attempted to obtain a search warrant. *Gibbs*, at 12-13. Again, the reasoning is circular and ignores *Leon*, as well as the settled law at the time the warrant was obtained. For these reasons and those in the Petition, the State submits that it was clearly erroneous to find that Inv. Martin did not act in good faith under *Leon* and its progeny.

CONCLUSION

Based upon the foregoing, Petitioner (the State) would ask the Court to grant certiorari, reverse the trial judge's order and judgment, and remand the case for a jury trial.

Respectfully submitted,

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