STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN NEIL WHITE,

APPELLANT

APPELLATE CASE NO. 2019-001971

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Violating the Fourth Amendment to the United States Constitution, did the trial judge err by admitting a phone call made by Appellant while he was awaiting trial in the detention center where the state failed to present any evidence that the phone call was intercepted pursuant to the law enforcement exception or consent exception to the federal law prohibiting interception of communications?

STATEMENT OF THE CASE

On June 19, 2019, a Richland County grand jury indicted Appellant for murder (2019-GS-40-3681). R. 956-957. The state, represented by April W. Sampson, Samuel C. McGlothin, and Harrison M. Pratt, called the case for trial before the Honorable DeAndrea Gist Benjamin and a jury on November 18-22, 2019. R. 1. Megan A. Eigenbrot, Tracy E. Pinnock, and Richard E. Marsh represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 923, ll. 19-25. Judge Benjamin sentenced Appellant to thirty-eight years imprisonment for murder. R. 935, ll. 2-4; R. 958.

Appellant served his notice of appeal on November 26, 2019. This brief follows.

STATEMENT OF FACTS

Crystal Posey and James Scott Turner were romantically involved for almost eight years. R. 204, ll. 4-3; R. 795, ll. 11-13. Posey and Turner lived in a home along with Posey's adult daughter, Shena Nicole Bryant. R. 202, ll. 23-24; R. 203, ll. 8-16; R. 262, ll. 5-8. Appellant also lived in Posey's home when he was romantically involved with her daughter. R. 203, ll. 8-10; R. 262, ll. 5-8; R. 792, ll. 10-17; R. 792, ll. 19-24. Appellant moved out during the summer of 2016 when he and Bryant broke up. R. 235, ll. 19-23; R. 263, ll. 7-22. Nevertheless, Bryant and Appellant remained close friends. R. 263, ll. 23-25; R. 792, ll. 16-18.

In December 2016, Posey worked at Hardee's on Garners Ferry Road in Columbia. R. 203, ll. 3-7. On December 7, 2016, Posey worked until 11 p.m. R. 205, ll. 4-19. Although she had no driver's license, she had recently purchased a car with Turner. R. 205, l. 22 – R. 206, l. 2. Turner had taken her to work that day and was supposed to pick her up. R. 206, ll. 1-9. Throughout her shift, Posey exchanged phone calls and text messages with Turner. R. 239, l. 15 – R. 240, l. 16. At some point during the evening, Posey sent a text message to Turner, confronting him about his drug use, because she could tell he was intoxicated during one of the earlier telephone calls. R. 240, ll. 9-19. Turner contacted Bryant because of Posey's suspicions and her aggressive behavior toward him. R. 289, l. 25 – R. 290, l. 8. Bryant indicated that Turner always called her when he and Posey argued; he always tried to pull her "into the middle of it." R. 290, ll. 9-20

When Turner did not arrive at Hardee's, Posey sent Bryant numerous text messages and called her many times. R. 242, ll. 15-19; R. 793, ll. 18-24 (testimony showing Posey called Appellant as well). However, Bryant was with Appellant and his friends at the Marriott. R. 265, ll. 4-7; R. 266, ll. 4-14; R. 791, ll. 8-9; R. 792, ll. 4-9. Initially, Bryant did not respond to

Posey's messages and calls. R. 242, ll. 20-22. When Bryant and Posey finally spoke by phone, Posey was "irate." R. 268, ll. 11-18. Hearing how upset Posey was, Bryant insisted Appellant take her home right away. R. 268, ll. 12-22; R. 795, l. 24 – R. 796, l. 1. Bryant was "mad" and "started freaking out" and "yelling." R. 434, ll. 10-14.

Eventually, Posey got a ride home from a coworker. R. 206, ll. 10-13. Posey believed Turner was high on crack cocaine because Turner had been battling his drug addiction over the last year. R. 206, ll. 17-23; R. 287, ll. 2-11. It was not unusual for Turner to "go missing" in light of his proclivity for drugs. R. 207, ll. 4-7; R. 262, ll. 11-22.

Posey had no key to her home as the house key was on the same ring as the car keys. R. 207, ll. 14-19. As a result, she had to break into her home after her coworker gave her a ride home. R. 207, ll. 14-19. She immediately saw that her television was gone, and she suspected Turner of selling it for drugs. R. 208, ll. 2-11.

Shortly thereafter, Bryant arrived home. R. 208, ll. 17-20; R. 269, ll. 2-3. Bryant was accompanied by Appellant and two of his friends. R. 208, ll. 21-23; R. 269, ll. 4-7; R. 796, ll. 2-4. Posey told them what had happened with Turner, and they offered her comforting words in return. R. 209, ll. 1-5; R. 269, ll. 8-13; R. 796, ll. 15-18. Posey was "in hysterics." R. 436, ll. 16-19; R. 796, ll. 19-22. Bryant was even more upset than Posey. R. 436, ll. 24-25. In general, Posey and Bryant were "being very dramatic about the situation." R. 451, ll. 12-13. "They were angry." R. 451, l. 13; R. 796, ll. 19-25.

Eventually, Appellant and his friends left. R. 209, ll. 5-6; R. 269, ll. 21-23; R. 438, ll. 14-15; R. 798, ll. 20-24. Bryant held and reassured an upset Posey until the two went to bed. R. 209, ll. 9-10; R. 246, ll. 14-15; R. 269, ll. 24-25. During this time, Bryant sent a text message to Turner in which she warned that he would not continue hurting Posey. R. 284, ll. 5-15. When

confronted with her statement to police, Bryant asserted that she called Appellant after he left to talk about what had happened because he was her best friend. R. 297, l. 24 – R. 300, l. 19. Bryant claimed Appellant told her not to worry about it because he would take care of it. R. 270 ll. 8-13; see also R. 438, ll. 7-10.

According to Appellant, Bryant worried Turner had a gun and would be violent when he returned to the residence. R. 800, ll. 1-8. Bryant asked Appellant to return to her house with a gun in the event Turner arrived. R. 800, ll. 1-8. Based upon Bryant's request, Appellant went to the home of his friend, Jerry Rabon, with whom he had been living. R. 382, ll. 6-13; R. 386, ll. 4-12; R. 800, ll. 21-25. Appellant indicated he was going coyote hunting with someone and asked to borrow Rabon's rifle. R. 386, ll. 15-20; R. 803, ll. 1-6. Rabon offered to loan his pistol – a Smith and Wesson 9-millimeter – to Appellant because he had no ammunition for his rifle. R. 387, ll. 2-5; R. 803, ll. 1-5.

Although Posey would deny it at trial, her phone records showed she sent a text message to Bryant at 5:21 a.m., stating, "This m.f. just came in." R. 249, l. 1 – R. 250, l. 25. Further, Bryant denied taking photographs, receiving or making calls, and receiving or sending text messages around 5 a.m. despite clear evidence on her phone records to the contrary. R. 302, l. 16 – R. 305, l. 13.

After Appellant borrowed the gun from Rabon, he parked his car down the road from Bryant's home. R. 804, ll. 19-22. He did so at Bryant's specific instruction. R. 804, l. 23 – R. 805, l. 1. He then walked to Bryant's home. R. 805, ll. 2-7. As he approached the house, he saw Bryant outside. R. 805, l. 15 – R. 806, l. 11. Bryant asked if Appellant had the gun, and Appellant responded by showing her the gun. R. 806, ll. 16-19. Bryant immediately grabbed the gun, turned toward the door, and started shooting. R. 806, ll. 20-21. After shooting, Bryant

shoved the gun at Appellant and told him to get rid of it. R. 807, ll. 1-5. Bryant then went back inside. R. 807, ll. 4-5. Appellant panicked and ran. R. 807, ll. 6-7.

Later, Posey awoke to the sound of gunshots. R. 210, ll. 8-9. Posey yelled for Bryant, and the two met at the front door. R. 210, ll. 23-25; R. 273, ll. 9-20. Posey and Bryant saw no one outside. R. 211, ll. 3-5; R. 275, ll. 6-8. Bryant walked to the van and opened the door. R. 211, ll. 9-12. Posey called for help. R. 211, ll. 12-14. Bryant took some towels from Posey, got into the van, and placed the towels on Turner's head. R. 212, l. 2-3; R. 274, ll. 3-24.

Appellant ran into a neighbor, Randell Wilson, while he was leaving.[1] He stopped briefly to discuss the gunshots with him. R. 195, ll. 14-20; R. 195, l. 23 – R. 196, l. 4; R. 199, l. 1-7; R. 809, ll. 10-17. Additionally, Appellant flagged down a police officer who was on the way to Patricia Drive. R. 104, ll. 18-24; R. 809, ll. 21-24. Appellant informed that he officer that he was near the scene at the time of the shooting. R. 104, ll. 23-24; R. 105, ll. 12-13; R. 810, ll. 2-5.

Richland County Sheriff's deputies and emergency medical personnel responded to a call regarding a shooting on Patricia Drive. R. 102, ll. 17-21; R. 114, ll. 9-16; R. 133, ll. 8-15. The police found a man, later identified as Turner, sitting inside a van parked outside of a residence. R. 103, ll. 2-5; R. 108, ll. 5-12. Turner was pulseless and apneic. R. 109, ll. 2-3. Turner had what appeared to be gunshot wounds to the left side of his head. R. 109, ll. 7-10. Law

[1] Samuel Knowles lived near Patricia Drive. R. 125, ll. 23-25. As he was leaving his house, he heard five or six gunshots. R. 126, ll. 3-8. He looked around, but he did not see anyone running. R. 126, ll. 9-11. He circled the block and returned home to check on his children. R. 126, ll. 12-15. As he pulled in the driveway, he saw two people standing across the street from his home: one was a black gentleman, and the other was a white gentleman. R. 127, ll. 2-5. Knowles asked the men if they heard any gunshots, and both responded affirmatively. R. 127, ll. 6-8. The white man informed Knowles that he had just run from the trailer park where bullets were flying past his head. R. 127, ll. 8-11.

enforcement found a projectile in the passenger door skin on the exterior of the van and eight 9-millimeter fired cartridge cases on the ground. R. 134, ll. 12-24.

Eventually, Appellant made it back to his car. R. 810, l. 19. He then went back to Rabon's home around 7:45 a.m. when Rabon was leaving for work. R. 391, ll. 6-12; R. 810, ll. 20-24. Appellant returned the gun[2] to Rabon. R. 391, ll. 20-23; R. 811, l. 24. Meanwhile, Bryant called Appellant, asking for a ride to the hospital because Turner had been shot. R. 812, ll. 3-4. Appellant, Posey, and Bryant went to the hospital where they learned Turner had died.[3] R. 812, ll. 9-14. Appellant then took Posey and Bryant back to their home. R. 813, ll. 1-2.

Bryant claimed Appellant sent her a text message after the shooting stating, "I took care of that." R. 281, ll. 2-5. Later in the evening, Appellant arrived at Bryant's house, where he was arrested. R. 213, ll. 16-25; R. 214, ll. 5-7; R. 499, ll. 14-16; R. 814, ll. 22-23; R. 815, ll. 1-3. According to the lead investigator, Appellant claimed he shot Turner. R. 507, l. 1 – R. 510, l. 15; R. 650, l. 3 – R. 653, l. 7.

At trial, Appellant emphatically denied shooting Turner. R. 790, ll. 23-24; R. 821, ll. 13-15. Further, Appellant denied confessing to police, and explained he did not read the typed statement prepared by law enforcement before signing it. R. 817, ll. 2-4; R. 819, ll. 5-7.

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[2] When Rabon learned that Appellant was charged with murder, he contacted the police about the firearm. R. 397, ll. 16-24. Forensic testing showed the handgun fired two projectiles and several fired cartridge cases found at the shooting scene. R. 360, l. 9 – R. 362, l. 2; R. 363, l. 20 – R. 366, l. 3. The projectiles recovered during the autopsy were fired by the same firearm. R. 167, ll. 14-23; R. 366, l. 4 – R. 368, l. 7.

[3] Turner died as a result of multiple gunshot wounds. R. 582, ll. 1-3. Testing of Turner's blood revealed cocaine, a metabolite for cocaine, tetrahydrocannabinol (THC), and a metabolite of marijuana. R. 422, ll. 11-23.

Appellant did not tell the police what Bryant had done because he still cared about her and did not want anything to happen to her. R. 817, ll. 7-17.

The lead investigator admitted that although he considered Posey and Bryant to be "victims," he was suspicious of their involvement almost immediately. R. 630, ll. 12-18; R. 632, ll. 6-15; R. 633, ll. 12-25. He noted that when he asked to look at the contents of her cell phone she was "very hesitant" and told him that "something crazy happened to her cell phone" on the night Turner was shot and killed. R. 634, ll. 1-24. The lead investigator "never deemed [Bryant] to be a suspect as far as a shooter," but he "always suspected them of being involved." R. 637, ll. 20-23; R. 718, ll. 10-12; R. 721, ll. 9-16. He "always felt that they put [Appellant] up to it or -- or he did it for them. … [He] always suspected them of being involved." R. 636, l. 24 – R. 638, l. 5. The lead investigator "fe[lt] like this [was] all coordinated between all of them." R. 721, ll. 9-16. He elaborated that he "felt like [Posey] might've had knowledge of it, especially after it, but wasn't going to throw her daughter under the bus, so to speak. [He] never felt [Posey] really was in the plannings of it. [Bryant]? [He] felt she had knowledge of what was going to happen." R. 724, ll. 1-6.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only. Therefore, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The 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). Appellate review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500-501 (Ct. App. 2003).

ARGUMENT

Violating the Fourth Amendment to the United States Constitution, the trial judge erred by admitting a phone call made by Appellant while he was awaiting trial in the detention center where the state failed to present any evidence that the phone call was intercepted pursuant to the law enforcement exception or consent exception to the federal law prohibiting interception of communications.

Relevant facts

During a pre-trial hearing, the defense moved to exclude recorded telephone calls made by Appellant while he was in pre-trial detention. R. 19, ll. 6-7; R. 941. Defense counsel explained the local jail used AmTel to provide telephone services to the detainees. R. 19, ll. 16-20; R. 941. After recording the calls, AmTel provided the recordings to the solicitor's office and law enforcement "almost in real time." R. 19, ll. 21-24; R. 941. The defense argued the recording of the phone calls and the use of the recordings of those phone calls violated Appellant's Fourth Amendment rights. R. 21, ll. 8-14; R. 941.

Defense counsel argued the warrantless recording of phone calls by detainees violated the detainee's right to be free from unreasonable searches and seizures. R. 26, ll. 16-18; R. 941. Counsel argued detainees had a reasonable expectation of privacy in their phone calls. R. 26, l. 18 – R. 27, l. 2; R. 941. Defense counsel recognized prior cases in which courts approved of jails recording phone calls for safety and security purposes. R. 22, ll. 1-11; R. 941. However, such a purpose was not accomplished by providing access to the recordings to the solicitor's office and law enforcement. R. 22, ll. 11-15; R. 941. Counsel argued there was "no nexus between the solicitor's office having direct access to these phone calls [and] to the state's administration of the detention center." R. 23, ll. 9-11; R. 941. Further, counsel argued that the

alternative means of communicating with family and friends were not equivalent substitutes due to the length of time involved in a letter reaching a loved one. R. 23, ll. 15-25; R. 941. Of course, letters and emails sent and received by the detainees were subject to warrantless searches and seizures as well. R. 24, ll. 1-5; R. 941. Counsel distinguished in-person visits from telephone calls. R. 24, ll. 6-25; R. 941.

Further, defense counsel explained that the public defender office refused to accept phone calls from the detention center because *all* calls were recorded. R. 36, ll. 19-24. Neither the phone service nor the detention center provided a mechanism for not recording phone calls between attorneys and clients. R. 36, ll. 19-24. The detention center allowed immediate access to the solicitor of all recorded detainee phone calls without regard to attorney-client privilege or confidentiality. R. 36, ll. 19-24.

The state argued the rights of the detainees were not violated because they were not prohibited from making phone calls. R. 30, ll. 19-21; R. 952. Detainees were permitted to make phone calls, but the calls were recorded. R. 30, ll. 22-25; R. 31, ll. 12-13; R. 952. The state admitted to having access to the jail calls in real time. R. 31, ll. 14-20; R. 44, ll. 5-13. The detention center provided a password to the solicitor's office to use to log on to the phone system, which allowed the solicitor's office to access phone calls made by detainees. R. 42, ll. 3-8. The state claimed the defense had equal access to the calls as long as the defense requested such access through a subpoena. R. 32, ll. 1-9. Additionally, the solicitor admitted the detention center recorded all phone calls placed by detainees, even those made to attorneys. R. 38, ll. 12-18. The solicitors engaged in some self-policing through "a rule in place" that if "the P.D.'s number pops up, nobody listens to it." R. 38, ll. 12-18. As for lawyers outside the public defender office, the solicitor does not listen to those calls either as long as the solicitor knows the

number being called is to a lawyer. R. 38, ll. 19-24. In the past, the solicitor's office had listened to a call between a detainee and a lawyer when the detainee called the lawyer's cell phone, a number with which the solicitor was unfamiliar. R. 38, ll. 19-21. "The minute" the solicitor "realized that it was an attorney," the solicitor turned over the phone call and informed the attorney that the solicitor had stopped listening. R. 38, ll. 21-24.

Regarding the phone calls sought to be admitted, the solicitor claimed the calls were found by the sheriff's department, who listened to Appellant's phone calls. R. 42, ll. 9-11; R. 952. The investigator who listened to the calls, made a recording for the police file, which was then turned over to the solicitor for prosecution. R. 43, ll. 3-6; R. 952. In short, the investigator listened to Appellant's phone calls to further his investigation by finding incriminating evidence against Appellant. R. 45, ll. 7-14; R. 952. The calls were not made to ensure security or safety at the detention center. R. 45, ll. 7-14; R. 952.

Investigator Cris Truluck with the Richland County Sheriff's Department obtained two phone calls made by Appellant while he was in the detention center. R. 76, ll. 8-16. Truluck explained how he got the calls:

> [W]hen a defendant gets arrested, he is booked into jail and he's given a ID number. AmTel, which is their phone service, they record all calls. All calls that - - the telephones that are at the jail are marked that the calls are recorded. And prior to the call even beginning, it - - it is a specific line that it's automated that tells you again these calls are recorded.
>
> So - - and we also had that police at the sheriff's department too. If you use our phones, they're all marked as recorded.
>
> However, normally what you do, you get their ID number that they are given. And you can go to the AmTel website and put in that PIN number or that ID number. And you can set a date - - a - - a time range on it.
>
> Now, as was brought up before, there is a section where you can listen live. But that's a crap shoot. You might get - - click on it and see their name that they are making a live call.

> But that's very rare that you can do that. However, that's a possibility. Me personally, I've never done that. I've never been able to do that.
>
> This process you put down and it - - it lists all the cases and the times that are made. All's you ever have to do is you click on it and you can listen to the call.

R. 76, l. 20 – R. 77, l. 19.

Truluck followed this process when listening to Appellant's phone calls. R. 77, ll. 20-21. He provided two calls to the solicitor. R. 77, ll. 22-24. These calls were part of his investigative file. R. 77, l. 25 – R. 78, l. 2. Listening to calls made by pre-trial detainees was "pretty much standard" practice for the sheriff's department. R. 78, ll. 7-11.

Truluck was *not* employed by the detention center. R. 79, ll. 108. Thus, he was not in charge of any security at the detention center. R. 79, ll. 1-8. His examination of the jail calls was strictly for investigative purposes. R. 79, ll. 11-13; R. 79, ll. 20-21; R. 81, ll. 10-15. He has never obtained a search warrant in order to listen to jail calls. R. 79, ll. 16-19. Truluck explained that he was listening to Appellant's phone calls "to see if there's investigative leads" revealed in the call. R. 80, ll. 1-3.

Truluck explained there was a "section" showing the person being called by the detainee. R. 80, ll. 21-24. He provided that he had never clicked on the button and learned that the number belonged to an attorney. R. 80, l. 24 – R. 81, l. 3. He was unsure "whether those calls are already screened." R. 81, ll. 4-6. However, he assured the court that he engaged in self-policing, like the solicitor, because he knew "that if [it] does go to the attorney, not to listen to it." R. 81, ll. 8-9.

The warning provided to the participants on the phone call was simply that the call was being monitored and recorded. R. 83, ll. 8-20. The recording did not indicate by whom. R. 179, ll. 11-14.

Citing 18 U.S.C. § 2512, the state argued that a federal statute permitted law enforcement to record "any phone calls." R. 177, ll. 3-15; R. 952. According to the solicitor, "[t]he courts ha[d] looked at this when it – in terms of when it talks about jail calls and specifically said it's not an unreasonable search and seizure, more specifically because it tells you that that's what they're doing." R. 177, ll. 16-20; R. 952. Further, the state argued that any concerns the judge may have regarding the solicitor's ability to listen to the calls were misplaced because "in this case," the solicitor did not listen to the calls; rather, the lead investigator did. R. 178, ll. 14-16. Finally, the state argued the "third party doctrine." R. 179, ll. 4-14. Specifically, the state claimed that when a third party is involved, a person loses "some" of the right to privacy. R. 179, ll. 6-8. Here, according to the state, the third party was AmTel, the telephone service provider. R. 179, ll. 8-9. The state claimed AmTel recorded all telephone calls and "could provide it to whomever they want to." R. 179, ll. 9-10.

The solicitor argued that it is not necessary for the recording, monitoring, or reviewing of the calls to be done for purposes of security. R. 180, ll. 5-10. The law only requires that it "simply be done by law enforcement, period." R. 180, ll. 7-10.

Defense counsel clarified that in accordance with case law, the detention center may record phone calls made by detainees for purposes of safety and security at the detention center. R. 182, ll. 9-14. However, defense counsel explained that the ability of the detention center to record the calls for security purposes did not mean the recordings of the calls should be reviewable by law enforcement for investigative purposes. R. 182, ll. 15-22.

In ruling on the motion, the trial judge reviewed the Omnibus Crime Control and Safe Streets Act to address defense counsel's argument on the Fourth Amendment. R. 189, l. 22 – R. 190, l. 3. The judge noted there were two exceptions to the prohibition of the interception of

communications in the absence of a court order. R. 190, ll. 4-5. One exception was for "law enforcement to record conversations and review recorded conversations kept in an ordinary course of business that were – were monitored as a - - and here, it says a safety measure." R. 190, ll. 4-11. "The second exception was consent." R. 190, l. 12. In light of appellant being placed on notice that the calls were being recorded and monitored, which the judge determined amounted to consent, and the law enforcement exception, the judge found the calls were admissible. R. 191, ll. 7-8; R. 191, ll. 15-19.

Robert Waters, who worked in the professional standards division at the Alvin S. Glenn Detention Center, indicated that he was the "custodian of the calls" made by detainees. R. 493, ll. 18-21; R. 494, ll. 10-11. He identified State's Exhibit #92 as a CD containing "a jail call" from the detention center. R. 494, l. 15 – R. 495, l. 3. Waters was clear that he "couldn't tell anybody who was on that call." R. 495, ll. 20-22. The trial judge admitted State's Exhibit #92 over defense counsel's objection. R. 495, ll. 8-19; R. 703, ll. 17-21. Truluck informed the jurors that he listened to jail calls made by Appellant. R. 702, ll. 5-7. He explained that law enforcement has access to a website where the phone company stores the calls made by pre-trial detainees. R. 702, l. 8 – R. 703, l. 2. Truluck told the jurors that the recording was of appellant "saying the only person around when James Turner was shot was him and James Turner." R. 704, ll. 14-17.

Discussion

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." Wilson v. Arkansas, 514 U.S. 927, 931 (1995). "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (citing Horton v. California, 496 U.S. 128, 133 (1990)). The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government. Terry v. Ohio, 392 U.S. 1, 9 (1968). Pre-trial detainees maintain protections afforded under the Fourth Amendment, including a diminished expectation of privacy. Bell v. Wolfish, 441 U.S. 520, 557 (1979).

The United States Congress passed legislation to protect individuals from the unauthorized interception of telephone calls. See 18 U.S.C. § 2511. The law "protects an individual from all forms of wiretapping except when the statute specifically provides otherwise." Abraham v. County of Greenville, 237 F.3d 386, 389 (4th Cir. 2001). Those protections apply to prisoners and pre-trial detainees, like Appellant. See United States v. Faulkner, 439 F.3d 1221, 1222 (10th Cir. 2006) (explaining the protections afforded under Title III apply to prisoners and pretrial detainees); United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002) (same). According to the law, when information is obtained in violation of the statute, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial." 18 U.S.C. § 2515.

Specifically, it is unlawful to "intentionally intercept[] … or procure[] any other person to intercept … any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). Additionally, it is unlawful to "intentionally disclose[] … to any other person the contents of any wire, oral, or

electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c). Likewise, it is unlawful to use such ill-gotten communications. 18 U.S.C. § 2511(1)(d). The statute exempts devices used to intercept communications "being used … by an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a). "'Investigative or law enforcement officer' means any officer … of a State or political subdivision thereof, who is empowered to conduct investigations of or to make arrest for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7). See also United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002). Finally, the statute provides that "[i]t shall not be unlawful … for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(d); see also 18 U.S.C. § 2515.

The Fourth Circuit analyzed (1) whether the Bureau of Prisons (BOP) recording of an inmate's phone call with a friend violated the statute, and (2) if the BOP's recording was lawful, whether the FBI's seizure of the recording through a subpoena, rather than court order, violated the statute. United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002). The court first held the BOP's recording of the phone call fell within the "law enforcement" and "consent" exceptions of the statute. Id. Next, the court turned to whether "the FBI's acquisition of the BOP's tapes through subpoena itself constituted an independent 'interception' subject to Title III's requirements." Id. at 192-193. The court concluded that once the recordings were obtained lawfully pursuant to Title III by the BOP, then the BOP was free to do with them as it saw fit. Id. at 193. In other words, "the FBI was free to use the intercepted conversations once they were excepted under either §

2510(5)(a)(1) or § 2511(2)(c)." Id. The court explained that the statute applied only to the initial capture of the communication, and the FBI's conduct was not in using a device to acquire the communication. Id.

The state failed to establish the call at issue was intercepted by law enforcement for investigative purposes. Rather, the call was intercepted by AmTel, a telephone service provider, in connection with the Alvin S. Glenn Detention Center. There was no evidence presented that Alvin S. Glenn Detention Center was an institution run by law enforcement. In fact, Investigator Truluck, who was employed by the Richland County Sheriff's Department, disavowed any role whatsoever in the managing and operating of the detention center. According to publicly available information, the detention center is administered by Richland County independent of the sheriff's department. http://www.richlandcountysc.gov/Government/Departments/Public-Safety/Detention-Center.

Neither Truluck nor anyone connected with the Richland County Sheriff's Office intercepted the calls as that term is understood under the federal law. Thus, it was incumbent upon the state to show that the person or entity that actually intercepted the call fell within an exception under the law. The state simply failed to do so. See United States v. Lanoue, 71 F.3d 966, 981 (1st Cir. 1995) overruled on other grounds by United States v. Watts, 519 U.S. 148 (1997) (expressing concerns over whether the government could show the phone call was intercepted pursuant to the law enforcement where the phone call was intercepted from a pre-trial detainee at the Wyatt Detention Center, which was owned and operated by Cornell Cox Management, a private corporation). Truluck obtained access to the calls only by grace from the detention center, not pursuant to the law enforcement exception under the Act.

Additionally, the state failed to show Appellant consented to the recording of his call. "'Consent' is a broad term and is defined as 'agreement, approval, or permission as to some act or

purpose.'" State v. Whitner, 399 S.C. 547, 554, 732 S.E.2d 861, 865 (2012) (quoting Black's Law Dictionary 346 (9th Ed. 2009). "Whether a consent to search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." State v. Mattison, 352 S.C. 577, 584, 575 S.E.2d 852, 856 (2003). "The state bears the burden of establishing the voluntariness of the consent." Id.

Here, per the actual recording, he was told "all phone calls are subject to monitoring and recording." State's Exhibit #92. Such notice was a far cry from the notice deemed to be sufficient to infer consent by the Fourth Circuit in Hammond, supra. There, the Fourth Circuit explained that inmates "receive two handbooks that state that all calls other than those to their attorneys are monitored. They sign a consent form acknowledging that their calls may be monitored and recorded and that use of the telephones constitutes consent of monitoring." Hammond, 286 F.3d at 191. Further, "[t]hey also receive an orientation lesson plan stating that calls are monitored and are told that such is the case orally during an orientation lesson. Finally, the BOP reminds the inmates that their calls may be monitored by placing notices of monitoring on or near the actual telephones." Id.

Quite simply, the state presented evidence that the only notice Appellant received was that his call was "subject to monitoring and recording" at the beginning of the telephone call that he placed. The minimal warning could hardly satisfy the strictures of consent to waiving one's constitutional right to be free from warrantless searches and seizures. See Lanoue, 71 F.3d at 981 ("Deficient notice will almost always defeat a claim of implied consent.").

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

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ATTORNEY FOR APPELLANT

This 8th day of February, 2021.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 8, 2021

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