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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHESNEE LABRI MATTRESS,

APPELLANT.

APPELLATE CASE NO. 2020-000183

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT

ARGUMENT I

In violation of the state and federal constitutional protections against unreasonable invasions of privacy, the trial judge erred in failing to suppress evidence seized pursuant to a search warrant because the prosecution failed to establish probable cause to search Appellant's residence where the affidavit in support of the warrant failed to disclose the identities of key witnesses, failed to provide evidentiary support for mere conclusory statements, and used information obtained from an illegal search – pinging a cell phone without a search warrant – to establish a relationship between Appellant and the residence searched. 3

Standard of Review 3
Relevant Facts 3
Discussion 6

ARGUMENT II

The trial court erred by allowing the state to introduce items seized from Appellant's home, including ammunition, firearms boxes, and holsters, that were irrelevant to the issues presented, and if relevant, the danger of unfair prejudice substantially outweighed the low probative value offered by the evidence. 16

Standard of Review 16
Relevant Facts 16
Discussion 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967) 6

Carpenter v. United States, 138 S. Ct. 2206 (2018)... 6, 7, 8, 9

Commonwealth v. Almonor, 120 N.E.3d 1183 (Mass. 2019) 12, 13

Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999)............ 6

Illinois v. Gates, 462 U.S. 213 (1983) 14

In the Matter of an Application of the United States of America for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone, 849 F.Supp.2d 526 (D. Md. 2011).. 8

Jones v. City of Columbia, 301 S.C. 62, 389 S.E.2d 662 (1990) 6

Katz v. United States, 389 U.S. 347 (1967).. 6

Kyllo v. United States, 533 U.S. 27 (2001) 7

Mapp v. Ohio, 367 U.S. 643 (1961) 6

State v. Muhammad, 451 P.3d 1060 (Wash. 2019) 8, 11, 12

Murray v. United States, 487 U.S. 533 (1988) 14

Old Chief v. United States, 519 U.S. 172 (1997) 19

Riley v. California, 573 U.S. 373(2014).. 7, 9

State v. Andrews, 134 A.3d 324 (Md. Ct. Spec. App. 2016).. 8

State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014).. 19

State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015) 10, 11

State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988).. 6

State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013).. 19

State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003).. 3

State v. Earls, 70 A.3d 630 (N.J. 2013) 13

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001)... 6, 10

State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).. 6

State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998)... 18

State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014).. 18

State v. Lee, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012)... 18

State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008).. 19

State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005) 16, 18

State v. Sachs, 264, S.C. 541, 216 S.E.2d 501 (1975) 6

State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004)... 18

State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) 10, 11

State v. Weston, 329 S.C. 287, 494 S.E.2d 801 (1997) 15

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).. 18

Tracey v. Florida, 152 So.3d 504 (Fla. 2014)... 8, 9

United States v. Bonds, 12 F.3d 540 (6th Cir. 1993).. 18

United States v. Calandra, 414 U.S. 338 (1974).. 14

United States v. Ellis, 270 F.Supp.3d 1134 (N.D. Cal. 2017) 8

United States v. Gillenwaters, 890 F.2d 679 (4th Cir. 1989)... 14

United States v. Jones, 565 U.S. 400 (2012) 6, 7

United States v. Lambis, 197 F.Supp.3d 606 (S.D.N.Y. 2016) 8

United States v. Mohr, 318 F.3d 613 (4th Cir. 2003) 19

Weeks v. United States, 232 U.S. 383 (1914) 6

Wolf v. Colorado, 338 U.S. 25 (1949).. 6

Wong Sun v. United States, 371 U.S. 471 (1963) 14

Wortman v. City of Spartanburg, 310 S.C. 1, 425 S.E.2d 18 (1992) 6

Constitutional Provisions

S.C. Const. art. 1, § 10 .... 3, 10

Rules

Rule 401, SCRE 17, 18

Rule 402, SCRE 17

Rule 403, SCRE 17, 18, 19

STATEMENT OF ISSUES ON APPEAL

I. In violation of the state and federal constitutional protections against unreasonable invasions of privacy, did the trial judge err in failing to suppress evidence seized pursuant to a search warrant because the prosecution failed to establish probable cause to search Appellant's residence where the affidavit in support of the warrant failed to disclose the identities of key witnesses, failed to provide evidentiary support for mere conclusory statements, and used information obtained from an illegal search – pinging a cell phone without a search warrant – to establish a relationship between Appellant and the residence searched?

II. Did the trial court err by allowing the state to introduce items seized from Appellant's home, including ammunition, firearms boxes, and holsters, that were irrelevant to the issues presented, and if relevant, the danger of unfair prejudice substantially outweighed the low probative value offered by the evidence?

STATEMENT OF THE CASE

On April 9, 2018, a Lexington County jury indicted Appellant for murder (2018-GS-32-0920) and possession of a weapon during the commission of a violent crime (2018-GS-32-0921). R. 504 – 505; R. 507 – 508. The state, represented by Rhonda Patterson and Bradley Pogue, called the case for trial before the Honorable Walton J. McLeod, IV, and a jury on January 13-16, 2020. R. 1. Ola Johnson represented Appellant. R. 1. The jury found Appellant guilty as charged. R. 436, ll. 13-22. Judge McLeod sentenced Appellant to thirty-five years imprisonment for murder and five years imprisonment for the weapon. R. 437, ll. 12-16; R. 506; R. 509. Appellant filed a motion to reconsider her sentence on January 16, 2020. Judge McLeod denied the motion on January 27, 2020.

Appellant served her notice of appeal on February 3, 2020. This brief follows.

ARGUMENT

I. In violation of the state and federal constitutional protections against unreasonable invasions of privacy, the trial judge erred in failing to suppress evidence seized pursuant to a search warrant because the prosecution failed to establish probable cause to search Appellant's residence where the affidavit in support of the warrant failed to disclose the identities of key witnesses, failed to provide evidentiary support for mere conclusory statements, and used information obtained from an illegal search – pinging a cell phone without a search warrant – to establish a relationship between Appellant and the residence searched.

Standard of review

"An appellate court reviewing the decision to issue a search warrant should decide whether the magistrate had a substantial basis for concluding probable cause existed." State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). "This review, like the determination by the magistrate, is governed by the 'totality of the circumstances' test." Id.

Relevant facts

Prior to trial, defense counsel moved to suppress all evidence regarding items that were seized in Appellant's home pursuant to a search warrant. R. 14, l. 13 – R. 50, l. 7. Counsel argued the search was in violation of article 1, section 10 of the South Carolina Constitution and the Fourth Amendment to the United States Constitution. R. 16, ll. 10-14; R. 497. Counsel argued the affidavit in support of the search warrant contained insufficient information to support probable cause. R. 497. The affidavit provided the following:

> On October 11, 2017, at 00:41 AM the Lexington County Sheriff's Department received a 911 call in reference to a shooting at the location of XXX State Pond Rd. in Gaston area of Lexington County, SC. The caller advised that a female known as Annette Riley had been shot in the face by Chesnee Mattress. Upon arrival, deputies were advised by multiple witnesses on scene that Chesnee Mattress came to the residence with other individuals after being challenged to a

> fight by Jasmine Riley. The dispute between Chesnee Mattress and Jasmine Riley has been an ongoing dispute between the two females. During the altercation, Annette Riley, mother of Jasmine Riley intervened to break up the altercation and was subsequently shot in the face by Chesnee Mattress when Annette Riley was disengaging from the altercation. Through further investigation of the shooting incident which took place at XXX State Pond Rd. in the Gaston, area of Lexington County SC. Detectives located information on a known address for suspect Chesnee Mattress who was positively identified by witnesses as the shooter of Annette Riley. Deputies pinged Chesnee Mattress cell number 803.403.5514 which was located at XXXX Village Court in the West Columbia area of Lexington County, SC shortly after the shooting. Detective[s] are seeking this search warrant [to] further investigate this homicide and gather and collect any and all related evidence to further assist law enforcement with this investigation.

R. 502.

Defense counsel noted the 911 caller was not identified in the affidavit; therefore, the credibility and reliability of the information provided by the caller was unknown to the magistrate. R. 18, ll. 13-20. Further, the affidavit failed to identify the witnesses who claimed Appellant was the shooter. R. 18, ll. 21-25. Further, the affidavit failed to indicate the identity of the deputies who "pinged" Appellant's phone, the identity of the deputies who "located information on a known address" for Appellant, or how the deputies located the address. R. 19, l. 17 – R. 20, l. 5.

Counsel noted the unlikelihood that the police were told by the phone company that Appellant was in a specific residence if the police merely obtained real time cell site location information, but the affidavit indicated the ping showed Appellant's cell phone was at a specific residence. R. 20, l. 6 – R. 21, l. 2. Importantly, the affidavit failed to explain why the police believed the phone number listed was connected to Appellant. R. 22, ll. 1-3. Further, the affidavit failed to connect Appellant to the residence, but for the pinging of the phone. R. 22, ll. 4-10.

Sergeant Traci Barr prepared the search warrant affidavit. R. 29, l. 20 – R. 30, l. 2. Barr met with Magistrate Whittle at his home around 3:30 a.m. R. 30, ll. 18-21. She advised Judge Whittle of the shooting death of Annette Riley at the home of Melissa Riley, who was Annette's sister. R. 30, ll. 22-25. She further advised Judge Whittle that "deputies on scene had pinged a cell phone number that they knew to be Chesnee Mattress' cell phone number that was obtained by Deputy Woloc." R. 31, l. 25 – R. 32, l. 3. She claimed there were "several deputies on scene who worked that area and were familiar with Chesnee Mattress." R. 32, ll. 4-6.

Barr admitted she did not know the name of the 911 caller. R. 34, ll. 6-10; R. 40, l. 24 – R. 41, l. 2. Further, she admitted she did not know the names of witnesses who allegedly identified Appellant as the shooter. R. 35, ll. 2-7; R. 40, ll. 11-22.

Barr claimed "deputies on scene were very familiar with Ms. Mattress, so they were able to provide a cell phone number for her as a last-known cell phone number." R. 36, ll. 3-6; R. 44, ll. 1-14. Barr claimed the police "had that address as a residence for her before the phone was even pinged." R. 36, ll. 6-9. Detective Hart told Barr that "deputies on scene or a deputy dispatcher, someone with law enforcement, that evening, … had pinged that cell phone number, which indicated that that cell phone was in the area or at the residence of XXXX Village Court." R. 36, ll. 10-19; R. 41, ll. 18-22. Based upon the pinging of the cell phone, the police "had reason to believe" the phone was inside the home. R. 46, ll. 21-23. Barr claimed "this phone had been pinged to XXXX Village Court." R. 48, ll. 4-12.

Judge McLeod found the magistrate, who determined there was probable cause, was "entitled to some level of deference." R. 49, ll. 20-22. Thereafter, Judge McLeod denied the motion to suppress. R. 50, ll. 3-7.

Discussion

"The Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated.'" United States v. Jones, 565 U.S. 400, 404 (2012). "The 'basic purpose of this Amendment,' [the Court's] cases have recognized, 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018) (quoting Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 528 (1967)).

A search warrant must be based upon probable cause. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests on such grounds as would induce an ordinarily prudent and cautious person, under the circumstances to believe likewise." Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); see also State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996); Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990); Gist v. Berkeley County Sheriff's Dep't, 336 S.C. 611, 615, 521 S.E.2d 163, 165 (Ct. App. 1999). If the warrant affidavit is insufficient to establish probable cause, it may be supplemented by sworn oral testimony before the magistrate. State v. Crane, 296 S.C. 336, 338, 372 S.E.2d 587, 588 (1988); State v. Sachs, 264, S.C. 541, 216 S.E.2d 501 (1975). Evidence obtained in violation of the Fourth Amendment is inadmissible in both state and federal court. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (citing Weeks v. United States, 232 U.S. 383 (1914), Mapp v. Ohio, 367 U.S. 643 (1961), Wolf v. Colorado, 338 U.S. 25 (1949)).

According to the United States Supreme Court "the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967). "When an individual seeks to

preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable," the Court has "held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." Carpenter, 138 S. Ct. at 2213. The Court has "recognized some basic guideposts" for determining the contours of the Fourth Amendment. Id. at 2214. "First, that the Amendment seeks to secure the privacies of life against arbitrary power." Id. "Second, and relatedly, that the central aim of the Framers was to place obstacles in the way of a too permeating police surveillance." Id.

"As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes," the Court "has sought to assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." Carpenter, 138 S. Ct. at 2214. The Court has held that the government may not capitalize on new technology absent a warrant. Kyllo v. United States, 533 U.S. 27, 34 (2001).

Thereafter, the Court held that the use of a thermal imager to detect heat radiating from the side of the defendant's home was a search, which required a warrant. Kyllo, 533 U.S. at 34. Additionally, the Supreme Court held the police must obtain a warrant before searching the contents of a cell phone. Riley v. California, 573 U.S. 373, 393-394 (2014). The United States Supreme Court held "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" Jones, 565 U.S. at 404. Recently, the Court held "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell site location information]." Carpenter, 138 S. Ct. at 2217. However, the Court specifically reserved deciding whether an individual has a reasonable expectation of privacy in real time cell site location information. Id. at 2220.

According to the Washington Supreme Court, the reasoning of Carpenter applies to real-time CSLI. State v. Muhammad, 451 P.3d 1060, 1071 (Wash. 2019). After cataloguing the Carpenter Court's concerns with historical CSLI, the Washington Court explained that each concern applied equally to real time CSLI. Id. at 1072. "Accordingly," the Court held "a cell phone user has a reasonable expectation of privacy in real-time CSLI, and the collection of location data implicates the Fourth Amendment." Id. Other courts examining this issue have determined individuals have a constitutional privacy right to their cell phone location data. See e.g., United States v. Ellis, 270 F.Supp.3d 1134, 1145-1146 (N.D. Cal. 2017); United States v. Lambis, 197 F.Supp.3d 606, 611 (S.D.N.Y. 2016); In the Matter of an Application of the United States of America for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone, 849 F.Supp.2d 526 (D. Md. 2011); Tracey v. Florida, 152 So.3d 504, 525 (Fla. 2014); State v. Andrews, 134 A.3d 324 (Md. Ct. Spec. App. 2016).

The Florida Supreme Court analyzed whether an individual has a reasonable expectation of privacy in "real time cell site location information of the subject cell phone that is produce when the cell phone is in use." Tracey, 152 So.3d at 516. Put another way, the question presented was "whether accessing real time cell site location information by the government in order to track a person using his cell phone is a Fourth Amendment search for which a warrant based on probable cause is required." Id. at 517. The Florida Court recognized the sanctity of one's home as a central tenet of the Fourth Amendment. Id. at 518-519. Further, the Florida Court recognized the incongruity of allowing the government to access an individual's real time cell site location information, but subjecting such information to suppression if the information revealed the user's location in his home or similar location withdrawn from public view. Id.

Such a holding would analyze the constitutionality of the search only after the fact and void the privacy protections afforded under the Fourth Amendment. Id.

Rejecting the "mosaic" theory, the Florida Supreme Court held "that basing the determination as to whether warrantless real time cell site location tracking violates the Fourth Amendment on the length of the time the cell phone is monitored is not a workable analysis." Id. at 520. Such a theory risks arbitrary and inequitable enforcement. Id. at 521.

The court recognized that "a cell phone user can prevent locational signals from being used for tracking purposes by turning off the cell phone, thus concealing the signals and the location of the user." Id. at 523. Nevertheless, the court held that "[r]equiring a cell phone user to turn off the cell phone just to assure privacy from governmental intrusion that can reveal a detailed and intimate picture of the user's life places an unreasonable burden on the user to forego necessary use of his cell phone, a device now considered essential by much of the populace." Id. The Court refused to "overlook the inexorable and significant fact that, because cell phones are indispensable to so many people and are normally carried on one's person, cell phone tracking can easily invade the right to privacy in one's home or other private areas, … which, when it occurs, is clearly a Fourth Amendment violation." Id. at 524. The court concluded that "a subjective expectation of privacy of location as signaled by one's cell phone – even on public roads – is an expectation of privacy that society is now prepared to recognize as objectively reasonable." Id. at 526.

Based upon the guidance from the Supreme Court regarding the Fourth Amendment's protections of information contained on cell phones – Riley – and historical cell site location information – Carpenter, Appellant respectfully requests this Court hold individuals have a reasonable expectation of privacy in their cell phone location data, including the location data

obtained from pinging a phone or real time location information, that is protected by the Fourth Amendment, requiring law enforcement to obtain a search warrant in order to obtain.

Even if this Court were to determine that the United States Constitution affords no privacy interest in real time location information on cell phones, this Court should hold the South Carolina Constitution does. The South Carolina Constitution provides "[t]he 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" and for "no warrants [to] issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained." S.C. Const. Art. 1, § 10.

"The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001). "[T]he federal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." Id. at 647, 541 S.E.2d at 842. According to the Supreme Court, "[t]he focus in the state constitution is on whether the invasion of privacy is reasonable, regardless of the person's expectation of privacy" in the place searched. State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). "By 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." Id. (citing Forrester, 343 S.C. at 644-45, 541 S.E.2d at 841).

The South Carolina Supreme Court recently decided State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015). The Court noted "'[o]ur state constitution's provision protecting unreasonable

invasions of privacy *necessarily requires* some analysis of the privacy interests involved when a warrantless seizure is made on private property.'" Id. at 172, 776 S.E.2d at 69 (quoting State v. Weaver, 374 S.C. 313, 326, 649 S.E.2d 479, 485 (Pleicones, J., concurring)). Explaining that "the privacy interests in one's home are the most sacrosanct," the Court required "some threshold evidentiary basis for law enforcement to approach a private residence." Id. Thus, the Court required that "law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." Id. at 172, 776 S.E.2d at 70.

The Washington Supreme Court examined an issue similar to the one *sub judice* using its state constitution. "Article I, section 7" of the Washington State Constitution provides that "'[n]o person shall be disturbed in his [or her] private affairs, or his [or her] home invaded, without authority of law.'" Muhammad, 451 P.3d at 1069. According to the Washington Supreme Court, this provision is "qualitatively different from the Fourth Amendment and provides greater protections." Id. The Washington Supreme Court held cell site location information is a "private affair." Id. at 1069. The Court explained that "[w]hen law enforcement loses sight of a suspected individual, officers need merely ask a cellular service carrier to ping that individual's phone and almost instantaneously police acquire data on the suspect's past and present location." Id. "This location tracking technique does substantially more than binoculars or flashlights; it enables officers to see farther than even the walls of a home – it pierces through space and time to pinpoint a cell phone's location and, with it, the phone's owner." Id. at 1069-1070. The Court explained that "real-time CSLI" "reveal an intensely intimate picture into our personal lives. Our cell phones accompany us on trips taken to places we would rather keep

private." Id. at 1070. "This type of information, revealed by our public movements, can expose personal details about family, politics, religion, and sexual associations." Id.

The Court explained that "[t]he limited nature of the information provided by a one-time ping is not dispositive of whether cell phone location data is a private affair." Id. "This one-time ping reveals only limited information, but the nature of the information has changed – exposing a cell phone user's attendance at a location a person would reasonably expect to be private." Id.

The Massachusetts Supreme Judicial Court was convinced similarly of the protections afforded its citizens through its state constitution. "The intrusive nature of police action that causes an individual's cell phone to transmit its real-time location raises distinct privacy concerns." Commonwealth v. Almonor, 120 N.E.3d 1183, 1193 (Mass. 2019). "When the police ping a cell phone … they compel it to emit a signal, and create a transmission identifying its real-time location information." Id. "This action and transmission is initiated and effectively controlled by the police, and is done without any express or implied authorization or other involvement by the individual cell phone user." Id. "Without police direction, such data would also not otherwise be collected and retained by the service provider." Id. The Massachusetts Supreme Judicial Court concluded that such police action implicates reasonable expectations of privacy. Id. "Indeed, society reasonably expects that the police will not be able to secretly manipulate our personal cell phones for any purpose, let alone for the purpose of transmitting our personal location data. Id. at 1193-1194. "In today's digital age, the real-time location of an individual's cell phone is a proxy for the real-time location of the individual." Id. at 1194. "The fact that cell phones are now 'almost a feature of human anatomy' effectively means that individuals are constantly, and often unknowingly, carrying a hidden tracking device that can be activated by law enforcement at any moment, subject only to the constraints of whether law

enforcement knows the phone number and whether the cell phone is turned on." Id. "Allowing law enforcement to immediately locate an individual whose whereabouts were previously unknown by compelling that individual's cell phone to reveal its location contravenes" society's expectation that the police will not be able to locate individuals instantly. Id. at 1195. The Massachusetts Supreme Judicial Court held the police intruded on a defendant's reasonable expectation of privacy in the real-time location of his cell phone, which constituted a search under the state's constitution. Id. at 1196.

The Supreme Court of New Jersey interpreted its constitution to hold that when people make disclosures to phone companies and other providers to use their services, they can reasonably expect that their personal information will remain private. State v. Earls, 70 A.3d 630, 641 (N.J. 2013). The court explained that using a cell phone is "akin to using a tracking device and can function as a substitute for 24/7 surveillance without police having to confront the limits of their resources." Id. at 642. "It also involves a degree of intrusion that a reasonable person would not anticipate." Id. The court focused "on the obvious: cell phones are not meant to serve as tracking devices to locate their owners wherever they may be." Id. "[N]o one buys a cell phone to share detailed information about their whereabouts with the police." Id. Thus, the court concluded the New Jersey Constitution "protects an individual's privacy interest in the location of his or her cell phone" and "police must obtain a warrant based on a showing of probable cause, or qualify for an exception to the warrant requirement, to obtain tracking information through the use of a cell phone." Id. at 644.

Likewise, Appellant respectfully requests this Court hold the South Carolina Constitution protects against unreasonable invasions of privacy by the police pinging an individual's cell

phone in order to learn the individual's location – particularly, to learn where the individual lives.

Appellant had a reasonable expectation of privacy in her real time location information derived from her cell phone either through the Fourth Amendment or the South Carolina Constitution. The police violated Appellant's right to privacy by failing to obtain a search warrant in order to learn Appellant's address by pinging her cell phone. Therefore, the use of this illegally obtained information to support the search warrant must not stand. Wong Sun v. United States, 371 U.S. 471, 484-485 (1963); United States v. Calandra, 414 U.S. 338, 347 (1974). When a search is made based on a warrant that contains illegally obtained information, the court must consider whether the warrant affidavit, with the challenged information excluded, still established probable cause to issue the warrant. Murray v. United States, 487 U.S. 533 (1988); United States v. Gillenwaters, 890 F.2d 679, 682 (4th Cir. 1989).

In addition to removing the tainted information, the totality of the circumstances presented in the untainted portion of the affidavit failed to support probable cause. As defense counsel noted, the affidavit failed to identify the 911 caller. This made the magistrate's task of determining the reliability and credibility of the caller impossible. See Illinois v. Gates, 462 U.S. 213, 233-234 (1983). Neither the affidavit nor the oral testimony provided other indicia of reliability of the 911 caller. See id. Similarly, and more importantly, the affidavit failed to identify the witnesses who "positively identified" Appellant as the shooter. Again, the magistrate was unable to evaluate the reliability and credibility of the alleged witnesses. See id. Even the identity of the deputy who pinged Appellant's phone, and how that was accomplished was not identified, which inhibited the magistrate's ability to evaluate the reliability of the witness and the science used. See id.

Particularly important for the issue presented is the state's failure to provide evidence to support its conclusory statement that the particular cell phone that was pinged belonged to Appellant. The affidavit was completely devoid of any information explaining a connection between Appellant and the cell phone number. Barr's testimony during the pre-trial hearing was unclear regarding whether she supplemented the affidavit with information about Appellant's cell phone. Nonetheless, Barr's testimony, which may have been presented to the magistrate as an oral supplement, did little to shore up the affidavit. According to Barr, an unknown deputy pinged a cell phone number "that they knew to be [Appellant]'s cell phone number that was obtained by Deputy Woloc." See State v. Weston, 329 S.C. 287, 291, 494 S.E.2d 801, 803 (1997). Likewise, the affidavit contained no information explaining how the address was connected to Appellant. Barr's pre-trial testimony was ambiguous as to whether she orally supplemented the affidavit regarding the address. Barr testified that the police database has incident reports and that local police officers are familiar with individuals in the community; however, she never indicated how this information assisted in determining Appellant's address or cell phone number. Even if this information had been provided to the magistrate, the affidavit still lacked probable cause as the testimony was conclusory and without any evidentiary support.

The trial judge erred by failing to suppress the evidence seized during a search of Appellant's home where the affidavit and supplemental oral testimony failed to establish probable cause to search the home. Removing the tainted information from the illegal search – pinging Appellant's cell phone – results in an affidavit of anonymous informants, mere conclusory statements, and a lack of connection between Appellant and the residence searched. Based upon the lack of probable cause in the affidavit or in the supplemental oral testimony, the evidence obtained pursuant to the search warrant should have been suppressed.

II. The trial court erred by allowing the state to introduce items seized from Appellant's home, including ammunition, firearms boxes, and holsters, that were irrelevant to the issues presented, and if relevant, the danger of unfair prejudice substantially outweighed the low probative value offered by the evidence.

Standard of review

"In criminal cases, the appellate court sits to review errors of law only." State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005). The appellate court "is bound by the trial court's factual findings unless they are clearly erroneous." Id. The appellate court examines whether the trial court abused his discretion. Id. "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant." Id. at 472-473, 613 S.E.2d at 384. "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id. at 473, 613 S.E.2d at 384-385.

Relevant facts

Defense counsel moved to suppress all items seized from Appellant's home because the items were not relevant and the danger of unfair prejudice from the items substantially outweighed the probative value. R. 14, l. 13 – R. 50, l. 7. Counsel noted the police seized ammunition, a holster, and clips that were not related to the murder, and therefore, were irrelevant. R. 14, ll. 20-25. Specifically, defense counsel explained that state seized a .40-caliber pistol, which the state claimed was linked to the murder. R. 15, ll. 4-6. Defense counsel argued that if the state could connect the pistol to the murder, then it was relevant, but none of the other items seized were relevant. R. 15, ll. 3-25. Counsel noted the police seized "ammunition and things that could lead a jury to believe [Appellant] was guilty of another crime, whether that be

possession of an unlawful firearm, possession of another firearm, due to the other ammunition that was there." R. 15, ll. 17-25.

Judge McLeod denied the motion to suppress. R. 50, ll. 3-7. Thus, an officer informed the jurors of the evidence seized during the search of Appellant's home. The jurors learned the police "nine-millimeter Luger" ammunition in a drawer in Appellant's home. R. 173, ll. 1-9. The police found another box of nine-millimeter Federal ammunition in another drawer. R. 173, ll. 14-19. Additionally, the police seized a holster for a handgun and a magazine. R. 173, l. 20 – R. 174, l. 6. A single bullet in a box was found as well. R. 174, ll. 7-14. In addition to the nine-millimeter ammunition, the police found an ammunition box for .40-caliber Smith and Wesson. R. 174, ll. 15-18. Loose bullets were found. R. 174, ll. 22-24. A gun case with Hornaday Critical Defense nine-millimeter rounds were seized. R. 175, ll. 1-7. Finally, the police found a firearm with five founds in the magazine. R. 177, l. 17 – R. 178, l. 21. The officer who searched Appellant's home made clear that the handgun box that was recovered could not have been the box for the firearm that was seized. R. 182, ll. 1-23.

Discussion

Pursuant to the South Carolina Rules of Evidence, all relevant evidence is generally admissible. Rule 402, SCRE. "Evidence which is not relevant is not admissible." Id. Even relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. A determination on the admissibility of relevant evidence requires consideration of the evidence's probative value, the danger of unfair prejudice posed by the evidence, and the balancing of those two.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it

would be without the evidence." Rule 401, SCRE. "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Preslar, 364 S.C. 466, 476, 613 S.E.2d 381, 386 (Ct. App. 2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-127, 606 S.E.2d 508, 513 (Ct. App. 2004).

When looking at Rule 403, SCRE, the starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). "'Probative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. While relevant evidence and probative evidence are not synonymous, the two share many similarities as demonstrated through their definitions. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567

(6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003).

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case. State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 27-28 (2014) (citing State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

Appellant concedes the firearm identified by Appellant to police as the one used in the shooting was relevant. However, the remaining items recovered from Appellant's home and introduced into evidence in the form of testimony, photographs, and tangible evidence, was not relevant to the charged offenses. The state failed to show how any of the items seized – bullets, ammunition boxes, magazines, firearm boxes, and gun holsters – had any tendency to make the existence of any fact of consequence more or less probable. Nothing connected any of the items seized to the crime. The trial judge erred by failing to exclude the fruits of the search warrant, save the firearm to which Appellant admitted shooting, as irrelevant to Appellant's trial.

Even if this Court were to determine the state satisfied the low hurdle of relevance, the trial judge erred by failing to exclude the seized items because the danger of unfair prejudice substantially outweighed any probative value. As mentioned, the seized items had very little probative value. The state could draw no connection between the items and the shooting. However, the danger of unfair prejudice was unacceptably high. The police found multiple firearm boxes, at least one holster, and countless bullets to fit different weapons. The seized items made it appear that Appellant was a dangerous person with multiple firearms and unlimited ammunition. In short, it appeared Appellant had an arsenal. Balancing the low probative value of the items seized in Appellant's home that had no connection to the shooting against the danger of unfair prejudice often inherent in the possession of multiple firearms and ammunition required exclusion of the seized items. The trial judge erred in ruling otherwise.

CONCLUSION

Appellant respectfully requests this Court reverse her convictions and remand for a new trial.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of April, 2021.

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Apr 15 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHESNEE LABRI MATTRESS,

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 Final Brief of Appellant in the above referenced case has been served upon W. Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is jmaye@scag.gov, this 15th day of April, 2021.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

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Apr 15 2021
SC Court of Appeals

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."

April 15, 2021

s/*Susan B. Hackett*
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