STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Fairfield County
Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case Tracking No. 2020-000130

The State, Respondent,

vs.

Levond Tayano Keitt, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in admitting GPS data obtained from Appellant's bond company because he did not have a reasonable expectation of privacy in the data he voluntarily turned over to the bond company.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

The victim and Appellant were acquaintances that had hung out only a couple of times. Prior to going out with friends on March 17, 2018, the victim and Appellant chatted through Snapchat about what the victim was doing that night. (T.136-137; R.136-137). The victim went out with friends to a bar called Faces. (T.135; R.135). While out, the victim called Appellant and they agreed to meet. (T.139; R.139).

Appellant picked the victim up at Faces to hang out. The victim indicated she thought they may drive to a hotel room, but that she didn't agree to anything sexual at that point. (T.140-141; R.140-141). During the ride, the victim performed oral sex on Appellant but since she was menstruating, she did not intend to have sex with Appellant. (T.141; R.141).

Appellant drove into the woods, stopped the car, and got out to look at the tire. After the victim also got out of the car, Appellant came up behind her. He tried to twist her neck, but she struggled out. She ended up on the ground, and Appellant took a log and smashed her in the head and side of the face. (T.143; R.143). Appellant choked the victim, pulled her pants down, and vaginally and anally raped her against the side of the car. (T.144-145; R.144-145).

The victim got back into the vehicle with Appellant and he drove a short ways. Ultimately, the victim got out of the car without her purse or cell phone. Appellant attempted to run her over, but went into a ditch. The victim ran off through some woods towards the interstate. (T.148-149; R.148-149). She was picked up by a gentleman who took her to her sister's house after calling for an ambulance and an officer. When they arrived, the victim got in the ambulance and headed to the hospital. (T.150-152; R. 150-152).

Investigator Bill Dove met the victim at the hospital. She identified her attacker as a man she knew as Von. After putting her google account on her sister's phone, the victim was able to

give Investigator Dove the phone number for the man she knew as Von. (T.156; R.156). Investigator Dove used the phone number the victim gave him, searched for it on Facebook, and located Appellant's Facebook profile. When he showed the Facebook picture to the victim, she indicated he was the person who attacked her. (T.339; R.339). Investigator Dove also took the victim in his car to try and determine the location of the attack. She was able to give him a general idea of the location, but could not identify an exact location. (T.157; 366-367; R.157; 366-367).

Investigator Dove went to meet with Appellant. After discussing other matters, Investigator Dove showed Appellant the victim's photograph. Appellant claimed he did not know the woman in the photo. (T.346; R.346). When he was told she accused him of sexual assault, he again claimed not to know her and asked when it allegedly occurred. (T.348; R.348). When given the date of March 17th, Appellant responded: "It couldn't have been me, I was in Savannah." He then followed that up by saying he was "on an ankle monitor and that [Investigator Dove] could check his GPS ankle monitor to show where he was." (T.348-349; R.348-349).

STANDARD OF REVIEW

"On review of a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling and will reverse only when there is clear error." State v. Bruce, 412 S.C. 504, 509, 772 S.E.2d 753, 755 (2015) (citing State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011)); see also, State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004) (same). "'On appeals from a motion to suppress based on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse if there is clear error.'" State v. Adams, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (quoting State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010)). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (quoting State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)). "[A]ppellate courts must affirm if there is any evidence to support the trial court's ruling." Id.

ARGUMENT

I. The trial court did not err in admitting GPS data obtained from Appellant's bond company because he did not have a reasonable expectation of privacy in the data he voluntarily turned over to the bond company.

Appellant contends the trial court erred in admitting GPS data obtained from Appellant's bond company as recorded by the ankle monitor he was wearing related to a different case. Appellant consented to the data's collection and it was voluntarily turned over to a third party who disclosed it to the government. Further, Appellant did not have a reasonable expectation of privacy in the data collected by the monitoring company of his ankle monitor which he was wearing in exchange for his freedom on another charge at the time he committed this offense. As a result, the trial court properly admitted the data.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV. This guarantee protects against unreasonable searches and seizures. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991).

When moving to suppress evidence on the basis of an alleged unreasonable search, the defendant has the burden of showing a legitimate expectation of privacy in the area searched. See United States v. Rusher, 966 F.2d 868 (4th Cir. 1992); see also Rawlings v. Kentucky, 448 U.S. 98 (1980) (declaring a legitimate expectation of privacy is necessary to trigger Fourth Amendment protections); State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987) (stating defendant who seeks to suppress evidence on Fourth Amendment grounds must demonstrate his "own rights" have been violated by showing he has a legitimate expectation of privacy in connection with the searched

premises in order to challenge the search). "Since Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" Oliver v. United States, 466 U.S. 170, 177 (1984) (quoting Katz, 389 U.S. at 360 (Harlan, J., concurring)).

Thus,

> in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143–44 n. 12 (1978)).

A legitimate expectation of privacy is both subjective and objective in nature: the defendant must show (1) he had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable. Oliver, 466 U.S. at 177 (citing Katz, 389 U.S. at 361 (Harlan, J., concurring)).

Appellant did not maintain a reasonable expectation of privacy in the GPS tracking information voluntarily turned over to the third-party ankle monitoring company. In Katz v. United States, the United States Supreme Court explained: "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351. This was further announced in United States v. Miller, 425 U.S. 435 (1976), when the Supreme Court found no protection for information turned over by a depositor at a bank. The court explained:

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information

> is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id. at 443.

In Smith v. Maryland, 442 U.S. 735 (1979), the Supreme Court used the above analysis to hold that petitioner had no legitimate expectation of privacy when he used his phone to voluntarily convey the telephone number he was dialing to the telephone company and "'exposed' that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed." Smith, 442 U.S. at 743.

As the Sixth Circuit Court of Appeals has noted: "if a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery. This is true even though the sender may have instructed the recipient to keep the letters private." United States v. King, 55 F.3d 1193, 1196 (6th Cir. 1995). The United States Supreme Court has provided similar commentary:

> It is well-settled that when an individual reveals private information to another, he **assumes the risk** that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information: "This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, **even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed.**"

United States v. Jacobsen, 466 U.S. 109, 117, 104 S. Ct. 1652, 1658, 80 L. Ed. 2d 85 (1984) (quoting Miller, 425 U.S. at 443) (emphasis added).

In the instant case, Appellant voluntarily disclosed his movements to the ankle monitoring company in exchange for his freedom from detention on the Orangeburg charges. The fact he personally believed the information would not be turned over to law enforcement outside the

counties he was prohibited by court order from entering is entirely irrelevant to whether he still maintained an expectation of privacy in the information. As the Supreme Court noted in Miller, once the information is turned over—even with an expectation of limited use—the party receiving that information may disclose it to authorities and the authorities may use the information without running afoul of the Fourth Amendment.

Additionally, this case is very different from the considerations of the United States Supreme Court in either United States v. Jones, 565 U.S. 400 (2012) or Carpenter v. United States, ___ U.S. ___, 138 S.Ct. 2206 (2018). Neither case is controlling in this case, nor were the convictions reversed for reasons similar to the one espoused by Appellant.

In Jones, the Court found a search warrant was necessary in order to physically attach a GPS monitoring device to an automobile. The South Carolina Supreme Court recognized the limited nature of the holding: "While the Supreme Court's holding of a Fourth Amendment violation was unanimous, the majority's rationale was based on a theory of trespass, characterizing the government's conduct as the physical occupation of private property for the purpose of obtaining incriminating evidence." State v. Adams, 409 S.C. 641, 646, 763 S.E.2d 341, 344 (2014). In the instant case, the government did not surreptitiously place a tracker on Appellant, he agreed to the GPS monitor as a condition of being released from detention while awaiting trial on unrelated criminal charges.

In Carpenter, the United States Supreme Court considered whether the government was required to have a search warrant in order to obtain 127 days of cell-site location information from Carpenter's wireless phone provider. The Court found that a cell phone is such an integral part of everyday life that an individual maintains an expectation of privacy in some record of his movements. The Court refused to extend the holdings of Miller and other cases based on the

"novel circumstances." Carpenter, 138 S. Ct. at 2217. Additionally, the Court specifically found a warrant was required to obtain seven days of records, and did not address the need for a warrant for a shorter time frame. Id. at 2217 n.3. Here, Appellant was not tracked using his cell phone or cell-site location information. He was tracked, for much less than seven days, using a GPS monitor he voluntarily wore and knew was actively tracking him. The holding of Carpenter is inapposite to the case at hand.

Other courts have considered the warrantless obtaining of GPS monitor data. For example, in People v. Campbell, 425 P.3d 1163 (Colo. 2018), Campbell, a suspect in a burglary, was wearing a GPS ankle monitor at the request of a private bail bondsman when he was arrested. Officers requested data from the monitoring company without requesting a warrant. Id. at 1168. The company provided more than a month of tracking records. The Court found Campbell did not have an expectation of privacy in the data obtained from the ankle GPS monitor. Campbell argued he believed the information would only be used by the private bondsman that required the monitor and did not anticipate that the data would be used "to facilitate criminal investigations." Id. at 1170. The Court found, even if he maintained a subjective expectation of privacy, it was not an expectation of privacy that society was willing to recognize. Id. ("Thus, even if we assume he subjectively believed his GPS data would remain private, that expectation was not one society would be prepared to call reasonable.").

Even if a reasonable expectation of privacy could be found, Appellant consented to the acquisition of his movements through the GPS tracking as part of his release on bond. He knew the information would be obtained and kept by the ankle monitor tracking company. He also knew it would be available to law enforcement to enforce his bond conditions. He voluntarily agreed to wear the monitor and have his movements actively tracked in exchange for his release from

custody while awaiting charges. See Georgia v. Randolph, 547 U.S. 103, 109 (2006) (recognizing consent as one of the "jealously and carefully drawn" exceptions to the warrant requirement).

Further, Appellant's consent can be gleamed from his comments to Investigator Dove. When questioned about the sexual assault, Appellant indicated he was in Savannah for the weekend. He told Investigator Dove "he had an ankle monitor on and that [Investigator Dove] could check that." (T.69; 348-349; R.69; 348-349). As a result, he knew he was being actively monitored, he knew the information could be used by law enforcement not connected with the Orangeburg charges, and he gave consent to Investigator Dove to obtain the tracking information. As a result, a warrant was not necessary to obtain the information from Appellant's GPS ankle monitoring. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (finding it "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

Finally, even if it was error to admit the GPS ankle monitoring information, it was entirely harmless. The tracking information was admitted to demonstrate Appellant was present at the location where the victim indicated she was raped and to refute any possible alibi he tried to establish, such as his claim when questioned by Investigator Dove that he was in Savannah. The DNA evidence taken from the victim, most notably the swab of the inside of her mouth the day she was raped and attacked by Appellant, places Appellant with the victim just as well, if not better, than the GPS monitoring. The oral swab indicated the presence of semen and when DNA analysis was conducted, the analyst indicated "The DNA profile is approximately 1.8 octillion times more likely if [the victim] and Levond Keitt contributed to the mixture than it is [the victim] and an unidentified unrelated individual contributed to the mixture." (T.315; R.315). This testimony clearly established Appellant's presence with the victim and so, even if the GPS ankle

monitoring testimony should have been excluded, its inclusion was entirely harmless. See State v. Byers, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011) ("Error is harmless when it could not reasonably have affected the result of the trial."); State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); State v. Price, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006) (noting any error in admission of improper evidence is harmless when such is cumulative to other unobjected-to evidence admitted at trial); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial); State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947) ("It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him.").

Accordingly, Appellant did not maintain a reasonable expectation of privacy in the GPS ankle monitoring data, because even if he had a subjective expectation of privacy it was not one society should be willing to recognize. Further, Appellant voluntarily consented to the search of the data when he offered it as a means for Investigator Dove to verify his alibi at the time of the sexual assault. As a result, the trial court properly denied Appellant's motion to suppress the data obtained from the GPS ankle monitoring company.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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May 7, 2021

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STATE OF SOUTH CAROLINA

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed May 7, 2021, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 7th day of May, 2021.

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