RECEIVED

Jan 05 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Beaufort County
Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRONE ANTHONY WALLACE, JR.,

PETITIONER.

APPELLATE CASE NO. 2021-000332

REPLY BRIEF OF PETITIONER

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT IN REPLY

The Court of Appeals erred in holding a member of the solicitor's office was qualified as an expert in historical cell site analysis where the solicitor's employee lacked the knowledge, skill, experience, training, or education necessary in order to render an opinion in the area.

First, some factual recitations in the state's brief must be addressed. According to the state, "Investigator George Erdel testified that the 911 call for shots fired at [Steve]'s address came through at 8:34pm on October 25, 2015." BOR at 3. For this proposition, the state cites to record page 294. However, that page in the record contains no indication that the call for shots fired at 8:34 p.m. concerned Steve's address. Instead, Erdel confirmed there were police officers on the street at 7:31 by examining a CAD report. R. 294, ll. 2-6. Not in response to any question, Erdel added, "And then, later on they were out for a shots-fired call." R. 294, ll. 6-7. When asked the time for the shots-fired call, Erdel was unable to give the correct time until presented with the CAD report. R. 294, ll. 8-16. Nonetheless, Erdel *never* indicated the call was related to shots fired at Steve's address. Similarly, the state wrote, "[Steve]'s Greene Street residence was determined to be the location of the shooting." BOR at 3. Tellingly, the state offered no record citation for this factual assertion despite the claim in the previous sentence that "Erdel testified" to this "fact." BOR at 3. As shown, Erdel did not testify as claimed by the state.

The state next noted that the police collected a single bullet from the wall of the residence, which suggested that the call regarding shots-fired at 8:34 p.m. was related to this bullet. BOR at 3. However, the testimony at trial was that the bullet recovered by the police from the wall was the result of Twiz shooting at Steve earlier in the evening – prior to Frazier's arrival at the home. R. 355, ll. 8-23. Thus, if Frazier's kidnapping was interrupted by the police

call at 7:31 p.m. as the state posited in its brief, then the call regarding shots-fired at 8:34 p.m. could not have been a call related to the bullet found in the home by the police if the bullet recovered related to shooting at Twiz prior to Frazier's arrival as Erdel testified. See BOR at 2 n.1.

Now, turning to the facts relevant to the issue presented, the state continued to "beef up" Hightower's resume in its brief. For example, the state continued to insist that Hightower was "required to take an online training course once per year in order to stay updated on the frequent changes in technology with cellular devices." BOR at 9. Hightower actually testified that because cell phone technology is ever-changing, "you have to take, you know, online training, any type of updates that the providers may offer." R. 15, ll. 20-23. Hightower *never* indicated he was *required* to take the classes. When asked how often he took a course or class related to this sort of information, he responded, "Generally, about once a year for the last seven years." R. 15, ll. 8-11. Furthermore, he did not indicate that he *received* those "update" courses from the National Domestic Communications Assistance Center. Cf. BOR at 9. Instead, he said that organization *offered* those types of training online. R. 15, ll. 23-25.

Similarly, the state claimed Hightower "had received 72 hours of training courses in the field of historical cell site analysis." BOR at 9. However, Judge Mullen asked how many hours of training Hightower had in *cellular telephone technology*, and Hightower responded "[a]ctual training courses, it would be 72 hours." R. 24, ll. 13-24. Thus, Hightower received 72 hours of training in general *cellular telephone technology*. These hours were not in the specific "field of historical cell site analysis" as the state alleged.

During the trial and on appeal, the state made much of Hightower's "certifications" suggesting that these certifications were indications that Hightower had been certified by some

organization to perform certain tasks or possess certain knowledge. However, the record belies the assertion. All but one of the certifications were attendance or completion certificates. For example. Hightower received a certificate showing he completed the SLED four-week training course. R. 589. This certificate did not certify that he was capable of doing anything or possessed any specific knowledge. On December 15, 2011, Hightower received a certificate for completing the Call Analysis Training School's Pen-Link Call Analysis Training School. R. 588. Again, this certificate did not certify that he was capable of doing anything as a result of completing the course. The certificate regarding the "Fundamentals of Call Detail Records (CDR) Analysis" provided no explanation whatsoever as to its purpose. R. 583. It simply stated that it was "to certify that Dylan J. Hightower" and then it listed the course. R. 583. Presumably, the certificate meant he completed the course, but the certificate was unclear as to its actual purpose. Finally, the FBI CAST certificate was merely for completion of the course and cautioned that it did not provide the requisite knowledge or experience to qualify students as experts in historical call detail record analysis. R. 578-579. All of the certifications on which the state relied were merely certifications of attendance or completion; not one certified Hightower's skill, knowledge, training, or education in anything, much less historical cell site location information analysis.

The state's inaccurate claims regarding the record evidence are made worse by the state's accusation that "[c]ertain factual arguments set forth by Petitioner are without support in the record." BOR at 22. To support this contention, the state pointed to three sentences from Petitioner's brief. BOR at 22-23. First, the state claimed Petitioner asserted that Hightower demonstrated no knowledge, skill, experience, training, or education in the area for which he was qualified as an expert. BOR at 23 (incorrectly citing BOP at 6). Context reveals the misleading

nature of the state's claims here. In providing this Court with a statement of the case, Petitioner explained that on appeal, he challenged the trial court's qualification of an employee of the solicitor's office as an expert in historical cell site analysis due to the employee's lack of knowledge, skill, experience, training, and education. BOP at 7. Thereafter, "Petitioner noted the witness had never been qualified as an expert previously and he demonstrated no knowledge, skill, experience, training or education in this area." BOP at 7. Petitioner's summary of the argument presented at the Court of Appeals is clear when context is provided – as it must – that the solicitor's employee demonstrated no knowledge, skill, experience, training or education in this area sufficient to qualify him as an expert.

The second inaccuracy alleged by the state to have been committed by Petitioner is the claim that the state relied primarily upon the FBI CAST training as its basis for expert qualification. BOR at 23. Petitioner concedes that the state argued to the trial judge that Hightower was qualified based upon "a combination of everything, his training, his experience ... all these classes, his certifications." R. 69, ll. 21-25. Of course, this argument occurred *after* it was revealed the FBI CAST certificate made clear that Hightower's attendance at the program was not sufficient to render him an expert. However, because the FBI CAST program was the only one that Hightower claimed dealt with "historical cell site analysis," this had to be the training on which the state primarily relied as it was the one directly related to the area in which the state to have him qualified as an expert. See R. 14, ll. 14-21.

Finally, the state alleged Petitioner inaccurately claimed Hightower testified that the proximity of the cell phone tower was the determining factor for what tower and sector were utilized for cell phone service. BOR at 23. Although the state is correct that Hightower did testify about the strength of the tower having an impact, careful scrutiny of Hightower's

testimony concerning about the towers used by Petitioner's phone shows Hightower did, in fact, tell the judge that the proximity of the tower was the determining factor. When discussing the map he made "for demonstrative purposes," Hightower explained that the shaded area on the map did not mean the tower covered that entire shaded area. R. 45, ll. 11-16. Instead, the coverage would depend on the strength of the tower. R. 45, ll. 16-17. However, Hightower contradicted any claim that the strength of the tower would control which tower picked up a particular call when he asserted that because the location was "2.67 miles away from that specific tower," it was "well within that tower's range." R. 45, ll. 23-25. Thus, Hightower merely gave lip service to the expert literature indicating the tower's strength was the determining factor, not the distance.

The state chides Petitioner for "repeatedly referencing a University of Toledo Law Review article." BOR at 23. Thereafter, the state disparages the author of the law review article by calling the author "a non-expert law student" with no "authority on the science and trustworthiness of tower/sector analysis." BOR at 24. Certainly, the University of Toledo Law Review screens its published articles for accuracy prior to publication. The state's vilification of the author and the University of Toledo Law Review is unprofessional and beneath the dignity of the state. There are limits to what historical cell site location information can provide despite Hightower's insistence on the infallibility of using such information to track individuals' movements. See Roberts v. Howton, 13 F.Supp.3d 1077, 1102-1103 (D. Ore. 2014) (holding an inmate made a colorable showing of actual innocence and granting federal habeas relief where trial counsel failed to investigate the historical cell site location information used by the state to place the inmate at the scene of the crime because the state's evidence failed to take into account variables including the height of the tower, the call load, the network of cell towers, and the cell

phone provider's proprietary software); see also Tom Jackman, Experts Say Law Enforcement's Use of Cell phone Records Can Be Inaccurate, Wash. Post (June 27, 2014); Douglas Starr, What Your Cell Phone Can't Tell the Police, New Yorker, June 26, 2014).

The state misconstrues Petitioner's reference to the technology behind historical cell site location information as a challenge to the reliability of the science. BOR at 23-24. According to the state, this Court may not consider the science when considering whether the solicitor's employee was qualified as an expert because "such information is not part of the factual record in this matter, such information was not put forth by the defense via a competing expert witness, such information was not utilized as part of a voir dire to gauge Mr. Hightower's understanding of the science, and such information is ultimately irrelevant to the issue of whether Mr. Hightower possessed sufficient training and experience so as to qualify as an expert in the field." BOR at 24. In essence, the state misapprehended Petitioner's argument to be a challenge to the reliability prong of Rule 702, SCRE. Petitioner is not challenging the reliability of the science forming the foundation of historical cell cite location information; rather, Petitioner's reference to the law review article's explanation of how historical cell site location information actually works was to demonstrate Hightower's lack of skill, knowledge, and training about the subject. Of course, this Court – and trial courts – must consider the underlying science about which the alleged expert purportedly intends to testify. The easier the science, the less skill, knowledge, and training required for an individual to be an expert in that science; the harder the science, the more skill, knowledge, and training required for an individual to be an expert in that science.

Finally, the state argued that even if the trial court erred in qualifying Hightower as an expert, Petitioner suffered no prejudice because Petitioner "confessed to being at the precise location of the kidnapping, the precise location of the murder, and the precise location of the

body's disposal at the time those events were taking place." BOR at 25. Although Petitioner gave multiple statements to police, these were hardly conclusive proof of his guilt. Petitioner's statements were not consistent with each other, were internally inconsistent, and were not consistent with physical evidence; thus, the reliability of the statements to show conclusive proof of guilt was diminished by these inconsistencies. Petitioner's evolving statements show a man desperate to tell the police what they want to hear so that he could get out of jail. Petitioner's statements to police could not negate the damage done by Hightower's "expert" testimony. See State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015) (explaining how prejudice is heightened when the evidence is presented through a witness "imbued with the imprimatur of an expert witness"). The cell phone records provided independent and virtually irrefutable evidence against Petitioner in stark contrast to the other evidence presented against him, particularly the testimony of other witnesses who had everything to gain by testifying against him. See State v. Henson, 407 S.C. 154, 167, 754 S.E.2d 508, 515 (2014) (rejecting the state's argument that evidence was harmless where Henson's coconspirators testified against him because the coconspirators "faced charges for their participations in the crimes and thus, had an incentive to downplay their involvement and shift blame onto others"). The trial judge's qualification of the solicitor's employee as an expert constituted reversible error.

CONCLUSION

Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2022.