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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Op. No. 28094 (S.C. Sup. Ct. filed April 13, 2022)

THE STATE,

RESPONDENT,

V.

JUSTIN JAMAL WARNER,

PETITIONER

APPELLATE CASE NO 2020-000930

PETITION FOR REHEARING

This Court held that a search warrant issued by an Anderson County magistrate was not invalid for the reason that the search warrant sought property located in another state. This Court further held that petitioner was not entitled to a Neil v. Biggers¹ hearing because petitioner was identified by his probation officer through a video of the crime scene which this Court determined did not constitute an “eyewitness” identification. State v. Warner, Op. No. 28094 (S.C. Sup. Ct. filed April 13, 2022) (Howard Adv. Sh. No. 13 at 37).

Pursuant to Rule 221(a), SCACR, petitioner respectfully requests this Court grant rehearing because this Court took an unjustifiably broad reading of S.C. Code § 17-13-140 in finding that the search warrant was not invalid even though it sought property from an out-of-state corporation that was not located in Anderson County, or in any place in South Carolina.

¹ 409 U.S. 188 (1972).

Furthermore, this Court may have misapprehended what the warrant itself was seeking because this Court neglected to mention the fact that the warrant sought *all* of petitioner's cell phone records, regardless of whether those records reflected data in Anderson County or elsewhere. Finally, this Court may have misapprehended the very real possibility of a misidentification even where the identification witness did not view the crime in real time but instead made their identification through the use of a video recording.

Search Warrant for Petitioner's Cell Phone Records

The Constitutions of the United States and the State of South Carolina set the minimum requirements for the issuance of search warrants. See U.S. Const. amend. IV; S.C. Const. art. I, §10. This is a minimum standard however, and the General Assembly has enacted more stringent requirements for the issuance of search warrants pursuant to S.C. Code § 17-13-140. "A search warrant that would survive constitutional scrutiny may still be defective under the statute." State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987).

S.C. Code § 17-13-140, which is the statute that governs the issuance and execution of search warrants in South Carolina, provides in relevant part:

Any magistrate or recorder or city judge having the powers of magistrates, or any judge of any court of record of the State having jurisdiction over the area where the property sought is located, may issue a search warrant to search for and seize (1) stolen or embezzled property; (2) property, the possession of which is unlawful; (3) property which is being used or has been used in the commission of a criminal offense or is possessed with the intent to be used as the means for committing a criminal offense or is concealed to prevent a criminal offense from being discovered; (4) property constituting evidence of crime or tending to show that a particular person committed a criminal offense; (5) any narcotic drugs, barbiturates, amphetamines or other drugs restricted to sale, possession, or use on prescription only, which are manufactured, possessed, controlled, sold, prescribed, administered, dispensed or compounded in violation of any of the laws of this State or of the United States. Narcotics, barbiturates or other drugs seized hereunder shall be disposed of as provided by Section 44-53-520.

The property described in this section, or any part thereof, may be seized from any place where such property may be located, or from the person, possession or control of any person who shall be found to have such property in his possession or under his control.

§ 17-13-140 (emphasis added).

As an initial matter, this Court found that magistrate judges *are not* limited to or bound by their territorial jurisdiction in issuing search warrants – which for magistrate judges extends only to the county in which they are located. See State ex rel. McLeod v. Crowe, 272 S.C. 41, 47, 249 S.E.2d 772, 776 (1978) (holding that the Constitution of South Carolina requires magistrates to have uniform jurisdiction throughout the state and that “[s]uch uniformity can only be accomplished through legislation which grants all magistrates uniform countywide jurisdiction”). Confusingly though, this Court also found that circuit court judges *are* bound by their territorial jurisdiction in issuing search warrants. See Warner, Op. No. 28094, Howard Adv. Sh. No. 13 at 42, n.5 (specifically finding that the phrase in this statute that states “having jurisdiction over the area where the property sought is located” applies only to “any judge of any court of record of the State,” which necessarily includes circuit court judges). As this Court’s opinion is presently written, the clear and unmistakable import is that a circuit court judge cannot issue a search warrant for property located outside of their territorial jurisdiction, but magistrates, recorders, and city judges can.

This is, with all due respect to this Court, an unreasonable and unjustified reading of this statute. “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). Furthermore, “[a] statute’s language must be construed in light of the intended purpose of the statute.” Id. “The Court should give words their plain and ordinary meaning without resort to subtle or forced

construction to limit or expand the statute's operation.” State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (cleaned up).

“Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention.” State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). It is unfathomable that the General Assembly intended magistrates and city judges, who are not even required to be licensed to practice law in this State, to have greater authority in issuing search warrants than circuit court judges. Compare S.C. Code § 22-1-10 (stating that magistrates need only possess a high school diploma or its equivalent in educational training to be qualified) with S.C. Const. art. V, § 15 (stating that a person must have been licensed to practice law for a minimum of eight years before being eligible to serve as a justice, judge of the court of appeals, or circuit judge).

Another significant problem with this Court’s opinion that magistrates are not limited by territorial jurisdiction in the issuing of search warrants is that this Court did not limit its reading of the statute to digital records as were sought in this case. If, as this Court held in this case, the territorial jurisdiction limitation in S.C. Code § 17-13-140 does not apply to magistrates, recorders, or city judges, then these officials are now permitted to issue search warrants for any property that is located anywhere on Earth.

Petitioner submits that, prior to this Court’s opinion in this case, there was no question that a magistrate could not issue a search warrant for a vehicle located in another state. See State v. Jones, 342 S.C. 121, 128, 536 S.E.2d 675, 678 (2000) (finding that pursuant to S.C. Code § 17-13-140, “[t]he General Assembly has imposed stricter requirements than federal law for issuing a search warrant”); State v. Bonilla, 429 S.C. 253, 282-83, 838 S.E.2d 1, 16 (Ct. App.

2019) (finding that a Dorchester County magistrate properly issued a search warrant for two vehicles *because* the vehicles were properly seized and transported to Dorchester County *before* the issuance of the search warrants). However, this Court disposes of that fundamental jurisdictional notion and instead finds that, because a magistrate is not bound by the territorial jurisdiction limitation in S.C. Code § 17-13-140, it can issue a search warrant for *any property anywhere*. Petitioner respectfully requests this Court to reconsider and alter its opinion and hold that magistrate judges, like circuit court judges, cannot issue search warrants for property located outside of their territorial jurisdiction – which for magistrate judges extends only to the county in which they are located.

Notwithstanding this Court’s unjustifiably broad reading of S.C. Code § 17-13-140, this Court went on to state: “[T]he important fact is T-Mobile clearly does business in South Carolina, in particular, in Anderson County. T-Mobile, therefore, is subject to the jurisdiction of an Anderson County magistrate.” Warner, Op. No. 28094, Howard Adv. Sh. No. 13 at 43. This Court’s use of the term “jurisdiction” was imprecise and unclear as there are numerous different types of jurisdiction such as personal jurisdiction, subject matter jurisdiction, territorial jurisdiction, or extraterritorial jurisdiction – all separate and distinct concepts under the law. See Int’l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement, 326 U.S. 310, 316 (1945) (holding that due process requires in order to subject an out-of-state defendant to a judgment he must have some minimum contacts with the state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”); Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007) (explaining the differences between specific and general personal jurisdiction); State v. Dudley, 364 S.C. 578, 614 S.E.2d 623 (2005) (noting that territorial jurisdiction is not a component of

subject matter jurisdiction and also stating that “extraterritorial jurisdiction extends only to those who have performed acts ‘intended to produce and producing detrimental effects within’ our boundaries”); State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) (explaining that “subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong”); 12 S.C. Jur. Magistrates and Municipal Judges § 17 (“A magistrate's jurisdiction is limited to the county in which he may exercise his authority. His jurisdiction is countywide. This countywide territorial jurisdiction extends to both criminal and civil cases”).

Respectfully, this Court’s opinion here seems to mistakenly blend the concept of personal jurisdiction in the Anderson County magistrate’s power to hale T-Mobile into court under the minimum contacts test with the separate concept of the Anderson County magistrate’s territorial jurisdiction that is countywide. It is the magistrate’s territorial jurisdiction, not personal jurisdiction, that is required in issuing search warrants where the property sought must be located in an *area where the court has jurisdiction*. See § 17-13-140. While certainly the Anderson County magistrate had personal jurisdiction over T-Mobile to the extent it could require T-Mobile to appear before it as a defendant, that does not give the Anderson County magistrate authority to issue a warrant to search and seize the property of T-Mobile regardless of where on the Earth that property is located. For instance, it should be without question that an Anderson County magistrate could not issue a search warrant for a van belonging to T-Mobile that is located in the state of New Jersey simply because T-Mobile does business in South Carolina. The fact that T-Mobile is subject to personal jurisdiction in South Carolina is simply irrelevant to the completely unrelated question of whether an Anderson County magistrate has the authority to issue a search warrant for property located outside of the state. Petitioner respectfully asks this

Court to reconsider and clarify the manner in which the opinion mistakenly blends personal and territorial jurisdiction for the benefit of the bench and bar.

Regarding the specific property that was sought by the search warrant in this case, this Court stated that “[t]he warrant sought records reflecting information generated in South Carolina through the interaction of Warner’s cell phone and cell towers in Anderson County.” This statement is contradicted by the search warrant itself and by the state’s expert witness’ testimony which this Court acknowledged in a previous footnote: “the FBI Special Agent who testified as the State’s expert on CSLI – when asked where the records were stored – did not testify where the records are stored. *He stated only that the records are ‘generated’ in New Jersey, ‘[New Jersey is] where T-Mobile’s compliance people are, where they generate – where all the requests go to and they generate those [records]. The actual records are pulled from the different switches, but [New Jersey is] where the record is generated from...’*” Warner, Op. No. 28094, Howard Adv. Sh. No. 13 at 43, n.6 (emphasis added). This Court appears to contradict itself then when it claims, without support from the record, that petitioner’s cell phone records were generated in South Carolina.

Additionally, even if this Court were correct that petitioner’s cell phone records were generated in South Carolina through the interaction of petitioner’s cell phone and cell towers in Anderson County, this data represents only a portion of what the warrant sought. The information ultimately received and relied on by the state at trial through the search warrant included data not only from Anderson County, but also from Greenville County and Georgia. The search warrant did not, as this Court suggested in its opinion, seek “records reflecting information generated in South Carolina.” Warner, Op. No. 28094, Howard Adv. Sh. No. 13 at 43. Instead, the search warrant listed its description of property as follows: “*Any and all*

subscriber information, calls received by, emanating from, copies of text messages sent to or from, along with pages made to or from [Petitioner's redacted phone number] starting on April 26, 2015 and continuing through May 4, 2015. Also tower locations to include physical addresses and or GPS coordinates." R. 531.

The search warrant on its face sought records far beyond Anderson County and in fact the records ultimately received by and relied on by the state included cell phone records from Greenville County and the State of Georgia. Contrary to this Court's ruling, the search warrant sought records that were indisputably never located within South Carolina and never located in any area over which the Anderson County magistrate had jurisdiction. To the extent this Court believes that the magistrate had the authority to issue a search warrant for petitioner's cell phone records that were supposedly generated in South Carolina, this Court should revise its opinion and state clearly that the Anderson County magistrate could not have authority to issue a search warrant for cell phone records in either Greenville County or in the State of Georgia, as it did here. Petitioner respectfully requests this Court reconsider its findings, which are internally inconsistent and therefore likely to generate confusion and misapplication by the bench and bar.

Finally, counsel takes this opportunity to address this Court's opinion regarding the answers given at oral argument as to how law enforcement can carry out its investigative responsibilities when potential evidence of a crime that occurred in South Carolina is located in a different state. The answer is simple – get a lawfully issued search warrant from a judge that has territorial jurisdiction over the area where the property sought is located. Law enforcement officers have proven time and time again their ability to obtain lawfully issued search warrants for property located in other states by coordinating with local officers and judges in the areas where the property is located. However, this Court found that proposal to be unsatisfactory and

instead answered that magistrate judges in South Carolina – but not circuit court judges – have the authority to issue search warrants for property no matter where on Earth the property is located. It is understandable that this Court has great concern for law enforcement’s ability to carry out its investigative responsibilities, but this Court appears to significantly underestimate law enforcement’s ability to obtain out-of-state search warrants, which in fact is a regular occurrence.

This Court also neglected to mention in its opinion that law enforcement in this very case did in fact obtain an out-of-state search warrant for a car that was located in Georgia. R. 12, l. 6 – 15, l. 22. However, pursuant to this Court’s opinion in this case, law enforcement will no longer need to obtain an out-of-state search warrant for a car located in a different state because this Court has opined that the territorial jurisdiction limitation in S.C. Code § 17-13-140 *does not apply to magistrate judges* in South Carolina. Warner, Op. No. 28094, Howard Adv. Sh. No. 13 at 42, n.5. The idea that getting a properly issued search warrant in the state of New Jersey was too difficult a task for the law enforcement officers of South Carolina is simply not true. Further, even if getting a search warrant in a different state proves to be more difficult than getting a local search warrant, as counsel pointed out at oral argument, the Fourth Amendment does not exist for the convenience of law enforcement but rather the protection of individual persons from government intrusion into their private affairs. See Berger v. State of N.Y., 388 U.S. 41, 62–63 (1967) (noting the Fourth Amendment cannot be disregarded in the name of law enforcement and that “it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one’s home or office are invaded”).

Petitioner’s case is not unlike State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014) where this Court held that the warrantless GPS monitoring of a car was not saved by the “good

faith” exception to the exclusionary rule because the officers had violated S.C. Code § 17-30-140 which required the officers to get a court order prior to GPS monitoring. The state in Adams argued that the officers were unaware of the statute prohibiting their conduct to which this Court responded that there was a “[f]undamental unfairness in holding citizens to the traditional rule that ignorance of the law is no excuse while allowing those entrusted to enforce the law to be ignorant of it.” Adams, 409 S.C. at 653, 763 S.E.2d at 348. This Court went on to hold that “[b]ecause the only binding law in this case was a statute that *forbade* law enforcement officers from installing a GPS device on Adams' car without court authorization, there is no support for the State's invocation of the good-faith reliance exception as an additional sustaining ground to uphold the conviction.” Id.

Here, the state intentionally sought and obtained a search warrant from an Anderson County magistrate that sought records far outside the magistrate’s countywide jurisdiction in violation of S.C. Code § 17-13-140. Respectfully, this conduct should not be accepted or endorsed by this Court. Just as this Court noted in Adams, although the Court must be mindful of the difficult burdens faced by law enforcement every day, “[i]n law, the ends do not justify the means.” Adams, 409 S.C. at 654, 763 S.E.2d at 348.

Petitioner respectfully requests this Court to rehear this matter and alter its opinion to make clear that in order for law enforcement to obtain property that is protected by the Fourth Amendment and located outside of South Carolina, they must obtain a lawfully issued search warrant by a judge who has jurisdiction over the *area* where the property sought is located. That is precisely what the officers in this case did for the car that was located in Georgia. There is simply no justifiable reason to not require them to do the same thing for the records that were located in New Jersey. This Court’s opinion will be interpreted by the bench and bar as

eliminating any territorial jurisdiction limitation on a magistrate's authority to issue a search warrant which will inevitably result in law enforcement seeking and obtaining search warrants for property located far outside of a magistrate's countywide jurisdiction in the name of law enforcement convenience. This result is unjustified, and this Court should grant rehearing.

Neil v. Biggers Hearing

This Court agreed with petitioner that the out-of-court identification procedure that law enforcement used in this case to get petitioner's probation agent Goolsby to identify petitioner in a video of the crime scene was suggestive. However, this Court ultimately determined that petitioner was not entitled to a Biggers hearing because Goolsby, the only person who identified petitioner as the shooter, was not an "eyewitness." Warner, Op. No. 28094, Howard Adv. Sh. No. 13 at 46. In so ruling, this Court stated that "[t]he dangers of misidentification associated with eyewitness identification that threaten 'fundamental conceptions of justice' are simply not present in a situation like the one in this case." Id.

The factors to be considered during a Biggers hearing as to the reliability of the out-of-court identification are: "(1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation." State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (citing Manson v. Brathwaite, 432 U.S. 98 (1977)).

This Court and the state both seem to assume that these factors are not implicated where a witness who did not view the crime in real time identifies a suspect through the use of a video recording which was made under unnecessarily suggestive circumstances. This assumption is

incorrect. Although an identification witness who did not see the crime live *may* not be under the same stressors as a witness who did, it is still possible that their identification is unreliable.

The denial of petitioner's right to a Biggers hearing left defense counsel without a chance to fully explore Goolsby's opportunity to view the video. For instance, it is not known whether Goolsby watched the video one time or a dozen times, nor is it known whether he viewed the video on a large screen in high definition or on a smaller screen such as his cell phone. It is also unknown whether Goolsby had a high degree of attention to the video as he watched it or whether he was distracted by phone calls, emails, or another probationer seated in his office while he was viewing the video.

This Court's definition of "eyewitness" as being limited only to someone who "observed the crime take place in real time" is too narrow of a definition in the modern digital age where live streaming of events and video recordings are ubiquitous. Warner, Op. No. 28094, Howard Adv. Sh. No. 13 at 46. Counsel for the state seemed to concede at oral argument the possibility that a person viewing a live feed of the oral argument could be properly considered an "eyewitness" to the argument. Oral argument at 32:10. Such a person also appears to fall within this Court's definition of "eyewitness" because this Court did not limit its definition to a person observing the crime take place in real time *while physically present at the scene of the crime*. Therefore, if a person viewing a live feed video, such as the oral argument in this case, could be considered an "eyewitness," then it is a very small and reasonable step to say that a person viewing a video recording is on equal footing.

The important fact here is that Goolsby served the function of an eyewitness by identifying petitioner from the BP surveillance video. The fact that Goolsby did not view the crime in real time should not have been the deciding factor in determining whether an in camera

preliminary identification hearing was necessary where Goolsby's identification of petitioner from the film clip was critical evidence for the state during petitioner's trial. Further, the minimal cost of an in camera hearing on identification is small in relation to the irreparable harm of a misidentification where that substantial likelihood of misidentification can be avoided by a relatively brief in camera hearing on the surveillance tape identification.

In our modern day, surveillance videotapes are ever present in businesses and private homes. Identifications from surveillance tapes and video recordings will continue to grow. Some surveillance tapes will undoubtedly be grainy and hard to view, while others may be relatively clear. Some witnesses may have the opportunity to view a recording numerous times and at varying speeds or even "frame-by-frame" while others may only have an opportunity to view a video a single time before making an identification. Still others may be seated alone in a quiet room where they can focus solely on the video while others may only view the video in a loud or distracting environment hampering their attention and ability to view what is taking place on the screen. Therefore, a one size fits all rule that all identifications from surveillance tapes do not require an in camera identification hearing because the identifying witness was not a traditional "eyewitness" and/or because the identifying witness knew the accused is not likely to satisfy due process.

Petitioner respectfully requests this Court grant rehearing, reconsider its holding that Goolsby was not an "eyewitness," and hold that petitioner was entitled to a Biggers hearing on the admissibility of the identification in this highly unusual case pursuant to Perry v. New Hampshire, 565 U.S. 228 (2012) and State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012).

Respectfully Submitted,



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This 28th day of April, 2022.