Nos. 14-24-00514-CR & 14-24-00515-CR

In the Court of Appeals
for the Fourteenth District
Houston, Texas

Jeremiah Mallery	§	**Appellant**
	§	
vs.	§	
	§	
The State of Texas	§	**Appellee**

Appellant's Brief

Appeal from the 179th District Court
Trial Cause No. 1461737 and 1465779
Harris County, Texas

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Oral Argument Requested

Identification of Parties

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Statement of the Case

A. Cause Number 1461737

On March 20, 2015, Appellant was charged with the felony offense of aggravated robbery that was alleged to have been committed on March 19, 2015. (CR 7). He was indicted on June 23, 2015. (CR 11). On August 27, 2015, Appellant entered a plea of guilty without an agreed recommendation. (CR 14). He waived his right to appeal his plea of guilty. (CR 23). He was placed on deferred adjudication on August 27, 2015. (CR 24).

B. Cause Number 1465779

On April 23, 2015, Appellant was charged with the felony offense of aggravated robbery that was alleged to have been committed on February 8, 2015 (CR 8). He was indicted on June 23, 2015. (CR 13). On August 27, 2015, Appellant entered a plea of guilty without an agreed recommendation. (CR 16). He waived his right to appeal his plea of guilty. (CR 25). He was placed on deferred adjudication on August 27, 2015. (CR 26).

C. Consolidated Proceedings

On April 22, 2021, the State filed a motion to adjudicate in both

cause numbers wherein it was alleged that Appellant did commit the offenses of evading arrest with a motor vehicle on April 21, 2021, murder on December 4, 2020 and possession of a firearm on December 4, 2020. (CR 38).

The trial court denied Appellant's motion to suppress evidence in cause numbers 1465799 and 1461737 and entered written findings of fact and conclusions of law on April 14, 2024.[1] (CR 246, cause number 1461737)(CR 354, Cause number 1465799) .

On June 10, 2024, Appellant entered a plea of true to the motion to adjudicate guilt. (CR 267). In accordance with the plea agreement, the trial court assessed Appellant's punishment at 20 years confinement in the Texas Department of Criminal Justice. (CR 264). Any other pending charges were dismissed by the State. The trial court certified that matters were raised by Appellant by written motion before trial and certified that Appellant had the right to appeal. (CR 269). According to

[1] The motion to suppress evidence ruled on by the trial court was filed in cause number 1719633 on April 1, 2024, wherein Appellant was charged with murder which was dismissed on February 1, 2024. Appellant has requested that the clerk include the motion to suppress filed and considered by the trial court in a supplemental clerk's record.

the docket sheet, Appellant filed a notice of appeal on July 10, 2024.[2]

Statement Concerning Oral Argument

Appellant believes that oral arguments will assist this Court in its determination of the merits of his appeal. The four corners of the search warrant must be examined to determine whether there is sufficient nexus between the murder of Davontray Watts on December 4, 2020 and Appellant's use of a cell phone before, during or after the commission of the offense that evidences Appellant's responsibility for the murder.

Issue Presented

Trial court abused its discretion in denying Appellant's Motion to Suppress Evidence filed in cause numbers 1461737 and 1465770 in which the search of his cell phone seized when he was arrested for the offense of murder, charges for which was later dismissed.

[2] Appellant filed a notice of appeal in cause numbers 1461737 and 1465779 on July 10, 2024. It was included only in the clerk's record in cause number 1461737. Appellant has requested the clerk to prepare a supplement the record in cause number 1465799 to include the notice of appeal filed.

TO THE JUSTICES OF THE FOURTEENTH COURT OF APPEALS:

COMES NOW, JEREMIAH SHAKER JOSEPH MALLER, Appellant herein, by and through his attorney, STANLEY G. SCHNEIDER, and pursuant to Tex. R. App. P. 38, files this appellate brief and would show the Court as follows:

Statement of Facts

On April 24, 2024, the trial court held a hearing in cause numbers 1461737 and 1465770 regarding a motion to suppress evidence filed by the defense related to the pending motions to adjudicate hearing filed by the State in both cases. (2 RR 4). The motions to adjudicate filed in both cases alleged that Appellant violated the terms of his community supervision by committing the offenses of evading arrest with a motor vehicle on April 19, 2021, murder on December 4, 2020 and possessing, shipping, transporting, receiving purchasing a firearm on December 4, 2020. (CR 32).

Prior to the presentation of Appellant's motion to suppress evidence, the trial court considered Appellant's motion to suppress evidence of extraneous offenses at a hearing on the motions to adjudicate filed.

The Appellant requested that the trial court exclude any evidence of

any extraneous offense at the adjudication hearing based on the State's failure to give Appellant notice of any extraneous offense that it might wish to introduce at the adjudication hearing. (2 RR 5). The State had dismissed pending murder charges against Appellant based on insufficient evidence. (2 RR 5-6). The State asserted to the trial court that evidence regarding the murder allegation against Appellant should be considered by the trial court even though the charge was dismissed. (2 RR 6).

The State informed the trial court that the images and information resulting from the Appellant's cell phone extraction should be considered during a punishment hearing. (2 RR 5). Further, the State argued that the Appellant had notice of the murder charge, even though dismissed,[3] as it was alleged in the motion to adjudicate.

The State also argued that Appellant had notice of any extraneous offense resulting from the search of his phone based on the motion to suppress that Appellant filed. (2 RR 6).

The State argued that the Appellant's request did not include a request for notice of extraneous offenses introduced during punishment.

[3] The murder charge was dismissed based on insufficient evidence.

(3 RR 6). The trial court did not rule on Appellant's objection to the admissibility of the evidence resulting in the phone extraction.

The Appellant introduced into evidence the affidavit and search warrant issued to access Appellant's cell phone as law enforcement was investigating a murder that occurred on December 4, 2020, where the "shooter" got out of a red four door sedan and Appellant received a ticket while driving a red four door sedan owned by his fiancee. (2 RR 18).

The defense introduced into evidence Defense Exhibits 1 and 2, the search warrant and affidavit in support of the search of his cell phone that was recovered when he was arrested on a warrant for murder. (2 RR 14). Appellant offered into evidence a text message that was discovered from an individual named Puncho that says "No face, no case. I'm finna go hit dis bih." (2 RR 20).

Appellant argued that the text message referred to future acts and was not relevant to the murder investigation. (2 RR 22). Further, Appellant argued that there was no nexus between the text message to the complainant's girlfriend several days after the murder and any possible involvement of Appellant in the murder. Appellant argued that based on the four corners of the affidavit, probable cause did not exist to

tie the cell phone to any criminal activity. (2 RR 22).

Defense Exhibit 1, which authorizes the search of Appellant's cell phone, a contains the following information:

1. The affidavit describes the circumstances of the murder of Davontray Watts referred to as the victim in the affidavit that occurred on December 4, 2020. (5 RR 2). The shooting occurred at approximately 9:06 p.m. Surveillance video showed a person exiting the front passenger door of a parked vehicle and run toward the victim, shooting at the victim several times. (5 RR 2).

2. A summary of the surveillance video regarding a small 4 door sedan parked near the victim's residence. (5 RR 2). The vehicle was seen at the residence at 7:23 p.m.

3. A statement by a witness that observed the suspect vehicle leaving scene who stated that the vehicle was "red". (5 RR 3).

4. An investigator interviewed the victim's girlfriend, Deja Martin, who stated that she was talking to the victim when he was shot. The investigator found that the statement was not true. (5 RR 3).

5. Ms. Martin allowed law enforcement to examine her phone. She had texted several other witnesses who had been detained at the

murder scene and the investigator found a draft message that read "Hopefully they investigate here and don't." (5 RR 3).

6. Appellant was not identified as an individual with whom Ms. Martin was texting on the day of the murder.

7. Ms. Martin received a text message from Appellant, three days after the murder, in which he states "" No face no case I'm finna go hit in dis bih". (5 RR 3).

8. A search warrant was obtained for Appellant historical cellular data.

9. The cellular history indicates that Appellant's cell phone accessed a cell tower 1.04 miles from the victim's residence at 8:32 p.m. The Appellant's cell phone accessed a cell tower 3.62 miles northeast of the victim's residence at 9:21 p.m. The investigator believed that the historical cellular data is consistent with Appellant being present in the area of the murder at the time of the murder and leaving after the murder occurs. (5 RR 3).

10. Appellant denied ever visiting the victim's residence or knowing anyone who lived near there or around there. (5 RR 4).

Defendant's Exhibit 2 is the search warrant and supporting affidavit

to obtain from Verizon Wireless Electronic Customer Data for phone number 832-520-1907 for the time period of December 3, 2020 through December 7, 2020. (5 RR 15).

The affidavit in support of the production of the Historical Data from Verizon Wireless contains the following information:

1. The affidavit describes the circumstances of the murder of Davontray Watts referred to as the victim in the affidavit that occurred on December 4, 2020. (5 RR 9). The shooting occurred at approximately 9:06 p.m.

2. A summary of the surveillance video regarding a small 4 door sedan parked near the victim's residence. (5 RR 9). The vehicle was seen at the residence at 7:23 p.m.

3. A statement by a witness that observed the suspect vehicle leaving scene who stated that the vehicle was "red" (5 RR 9).

4. Investigator interviewed the victim's girlfriend, Deja Martin, who stated that she was talking to the victim when he was shot. The investigator found that the statement was not true. (5 RR 9).

5. Ms. Martin allowed investigators to examine her cell phone. She had been texting several other witnesses who had been detained at

the murder scene and the investigator found a draft message that read "Hopefully they investigate here and don't." (5 RR 9).

6. Appellant was not identified as an individual with whom Ms. Martin was texting on the day of the murder.

7. Ms. Martin received a text message from Appellant, three days after the murder, in which he states "" No face no case I'm finna go hit in dis bih". (5 RR 9).

On May 8, 20 2024 the trial court entered the following ruling:

> THE COURT: We are here to address the defense motion to suppress. We had the hearing on the last setting and the parties were awaiting a ruling from the Court. The Court has considered the evidence presented during the hearing, also the briefs presented by both sides. The Court has considered the official trial records.
>
> At this time the Court denies the defendant's motion to suppress. The Court has entered findings -- written findings of fact and conclusions of law. In summary of those findings, the Court finds that there are several reasonable inferences that can be made from the four corners of the affidavit on Defense's Exhibit No. 2. The Court finds that the district judge who was presented this warrant could reasonably infer that Ms. Martin was not being truthful to the officers, considering that the officers found the number on Mr. Watts' called-in screen did not belong to Ms. Martin. Ms. Martin had stated that she was the person speaking to Mr. Watts during the shooting. The defendant's phone number was saved on Ms. Martin's cell phone and the Court finds that that is more than a coincidence and that the defendant knew Ms. Martin and therefore, was either connected with Mr. Watts or at least communicating with Ms. Martin at the time of the incident.

In addition, the officers found Ms. -- in Ms. Martin's phone a draft message stating, quotes, "Hopefully they investigate here and don't," end quote. The Court can reasonably infer that that indicates that Ms. Martin was aware of an ongoing or potential investigation regarding Mr. Watts' murder.

The text message sent from the defendant's phone to Ms. Martin's phone stating, quote, "No face, no case," end quote, was sent within three days, or 96 hours, of Watts' murder. That same text message could be interpreted as someone implying that anonymity or lack of identifiable individuals make it challenging to attribute responsibility or legal culpability.

That same text message sent within three days of the murder combined with Ms. Martin's prior saved draft message found in her phone after Mr. Watts' murder that stated, "Hopefully they investigate here and don't," could indicate that Ms. Martin and the defendant could have been communicating about the murder's investigation. And that provides facts beyond mere speculation that the defendant's cell phone was used shortly after the crime.

In addition, the lighting profile and placement of the rear of the suspect's vehicle at the time of the scene and that distinct pattern and placement of those lights that that car had are the same as the ones observed by the affiant on the defendant's -- on the vehicle the defendant was driving when he was pulled over about 90 days after the murder. In addition, the witness that described the car involved in the murder described that car to be a red in color car, four-door vehicle. And the vehicle that Mr. Mallery was driving at the time of the traffic stop 90 days later was also a red car, also four-door vehicle. Those two similarities could be a reasonable inference or a reasonable conclusion that both vehicles could be one and the same.

And therefore, the Court finds that there is enough information provided by the affidavit that will establish probable

> cause that a specific offense has been committed and that the electronic customer data sought constitutes evidence of that offense or evidence of that particular person committing the offense.
>
> And then I believe the defense had conceded the argument that if the Court found that the first warrant, Defense 2, was sufficient, I believe they were conceding the argument on Defense 1. Nonetheless, the Court will incorporate those same findings and in addition, the Court will find that on the second warrant regarding the actual search of the phone, the officers also found that the cell tower data from the defendant's cell phone on the night of Watts' murder is consistent with the defendant being present in the area of the murder and even after the murder occurred. All those facts combined with the original text messages of "No face, no case" will give probable cause for the officers to search the phone.

(3 RR 4-7).

The trial court entered written findings of facts and conclusions of law incident to Appellant's motion to suppress evidence.

On June 10, 2024, in accordance with a plea agreement, Appellant entered a plea of true to the allegations in the motions to adjudicate guilt filed and the trial court sentenced him to 20 years confinement in the Texas Department of Criminal Justice to be served concurrently.

Issue Presented Restated

Trial court abused its discretion in denying Appellant's Motion to Suppress Evidence filed in cause numbers 1461737 and 1465770 in which the search of his cell phone seized when he was arrested for the offense of murder, charges for which was later dismissed.

Argument and Authorities

A. Standard of Review

Appellate review of a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Lerma v. State*, 543 S.W.3d 184, 189-90 (Tex. Crim. App. 2018). The review of the trial court's factual findings is for an abuse of discretion but review the trial court's application of the law to the facts de novo. *Id.* Appellate court are deferential to the trial court's factual determinations also applies to the trial court's conclusions regarding mixed questions of law and fact that turn on credibility or demeanor. *State v. Ortiz*, 382 S.W.3d 367, 372 (Tex. Crim. App. 2012); *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). Purely legal questions are reviewed *de novo*. *State v. Woodard,* 341 S.W.3d 404, 410 (Tex. Crim. App. 2011).

B. Requirements of the Fourth Amendment

The Fourth Amendment mandates that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See* U.S. Const. amend. IV. Probable cause exists for Fourth

Amendment purposes when, "under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location." *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013); *see also State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012); *Illinois v. Gates,* 462 U.S. 213, 238-39, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). In other words, there must be "a sufficient nexus between criminal activity, the things to be seized, and the place to be searched." *Bonds*, 403 S.W.3d at 873.

This Court's duty is to ensure that a magistrate had a substantial basis for concluding that probable cause existed. When in doubt, reviewing courts should defer to all reasonable inferences a magistrate could have made. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007). Reviewing courts should not invalidate a warrant by interpreting an affidavit in a hyper-technical rather than commonsense manner. *State v. McLain*, 337 S.W.3d 268, 271-72 (Tex. Crim. App. 2011); *State v. Elrod*, 538 S.W.3d 551, 554 (Tex. Crim. App. 2017); *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013). In determining whether an affidavit provides probable cause to support a search warrant, an issuing court and

a reviewing court are constrained to the four corners of the affidavit. *McLain*, 337 S.W.3d at 271-72.

Probable cause is a "flexible and non-demanding standard," *Bonds*, 403 S.W.3d at 873, and "[a]s long as the magistrate had a substantial basis for concluding that probable cause existed, we will uphold the magistrate's probable cause determination." *McLain*, 337 S.W.3d at 271.

The Fourth Amendment mandates that "no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See* U.S. Const. amend. IV. "Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location." *Bonds*, 403 S.W.3d at 873.

In other words, there must be "a sufficient nexus between criminal activity, the things to be seized, and the place to be searched." *Id*. As applicable to a cell phone search warrant, the application must state the facts and circumstances providing the applicant with probable cause to believe that searching the telephone or device is "likely to produce

evidence in the investigation" of specific criminal activity described in the affidavit. Tex. Code Crim. Proc. art. 18.0215(c)(5).

C. The Samsung phone

Under the Fourth Amendment, law enforcement may not embark on "a general, evidence-gathering search" of a cell phone for personal information. *See State v. Granville*, 423 S.W.3d 399, 412 (Tex. Crim. App. 2014); *see also Butler v. State,* 459 S.W.3d 595, 601 n.3 (Tex. Crim. App. 2015) (acknowledging that both the United States Supreme Court and the Texas Court of Criminal Appeals have recognized that cell phone users have a reasonable expectation of privacy in content of their cell phones). Searches of a cellular telephone or other wireless communications device under Texas law are governed by a specific provision of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 18.0215.

To search a person's cell phone after a lawful arrest, a peace officer must submit an application for a warrant to a magistrate. *Id.* art. 18.0215(a). The application must "state the facts and circumstances that provide the applicant with probable cause to believe that (A) criminal activity has been, is, or will be committed; and (B) searching the telephone

or device is likely to produce evidence in the investigation of the criminal activity described in Paragraph (A)." *Id*. art. 18.0215(c)(5); *see also State v. Baldwin*, ---S.W.3d---, 2022 Tex. Crim. App. LEXIS 321, 2022 WL 1499508, at *8 (Tex. Crim. App. 2022).

An affidavit offered in support of a warrant to search a cell phone contents must usually include facts that a cell phone was used during the crime or shortly before or after. *Diaz v. State*, 604 S.W.3d 595, 603 (Tex. App.—Houston [14th Dist.] 2020), aff'd, 632 S.W.3d 889 (Tex. Crim. App. 2021) (citing *Walker v. State*, 494 S.W.3d 905, 908-09 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *Humaran v. State*, 478 S.W.3d 887, 893-94 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)).

D. Probable Cause

While there is no statutory definition of "probable cause," under the Fourth Amendment, an affidavit is sufficient to establish probable cause if, from the totality of the circumstances reflected in the affidavit, the magistrate was provided with a substantial basis for concluding that probable cause existed. *Illinois v. Gates,* 462 U.S. 213, 238-39 (1983).

A probable cause affidavit supporting a cell phone search must

contain evidence of the requisite nexus the individual use of the cell phone before during or after the offense with more than mere conclusory allegations. The Court noted that in *Diaz v. State*, 604 S.W.3d 595, 598 (Tex. App.—Houston [14th Dist.] 2020), aff'd, 632 S.W.3d 889 (Tex. Crim. App. Oct. 27, 2021), an investigators recovered the back cover of a cell phone and a cell phone battery in a house following a burglary. Three cell phones found on Diaz were searched pursuant to a warrant. *Id.* at 599. Diaz argued that the probable-cause affidavit failed to establish a nexus between the cell phones and the burglary. *Id.* His motion was denied. *Id.* Because the probable-cause affidavit stated that police recovered cell phone parts from the crime scene, the Fourteenth Court of Appeals found that the magistrate could have reasonably inferred the perpetrators possessed or used cell phones before or during the burglary and that the recovered cell phones could have evidence of the burglary. *Id.* at 604. The court of appeals expressly stated that it wasn't relying on statements in the probable-cause affidavit that criminals generally use cell phones in crimes. *Id. See also Baldwin v. State*, 664 S.W.3d 122 (Tex. Crim. App. 2022) (an insufficient factual nexus existed to search the suspect's cell

phone when the affidavit supporting the search warrant set forth merely the officer's generalized belief, based on his experience and training, that suspects plan crimes using their phones).

E. Four Corners of the Search Warrant Affidavit

The fallacy in the trial court's factual analysis of the factual basis for its probable cause determination lies within the contradictions resulting from the cell phone's historical data obtained and the surveillance video described.

The four corners of the affidavit presents the following facts:

1. On December 4, 2020, the affiant began an investigation of the murder of Davontray Watts.

2. Watts was allegedly on the phone with his girlfriend when he told her he had just got shot.

3. Affiant observed Watts' body at the scene.

4. Affiant reviewed a black and white video surveillance footage from a nearby residence which showed a small four door sedan parked **"one house down from the victim's residence at approximately 7:23 p.m..**

5. At approximately **9:06 p.m., the victim exits his gate and**

a person exits the front right passenger door of the suspect's[4] **vehicle and runs towards the victim, shooting at the victim several times.**

6. The victim falls to the ground.

7. Suspect stands over the victim.

8. Suspect runs back to the vehicle.

9. Affiant is able to see the lighting profile and placement on the rear of the vehicle and notice its distinct pattern and placement.

10. **A witness, Aaron Reinhard** identified the vehicle after the shooting as being a **red colored 4 door sedan**.

11. The victim's girlfriend, Deja Martin, told investigators that she was face timing with the victim at the time of the shooting.

12. Ms. Martin provided her cell phone number to investigators.

13. The victim's phone called ended screen showed a phone number of 832-764-1811, which belonged to a different woman.

14. Affiant inspected Martin's cell phone and discovered that she was text messaging other witnesses at the scene after the shooting.

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[4] No assertion or identification that Appellant's vehicle was at this scene other than his girlfriend had red Kia that he drove.

15. Affiant found a "draft" message that reads "Hopefully they investigate here and don't".

16. Affiant discovered a text message containing a picture of a black male covering his face with his arm and a text which stated, "No face, no case. Im finna go hit dis bih." That text message was sent on December 7, 2020 from phone number 832-520-1907 and saved under Martin's phone contacts as "Puncho".

17. Affiant researched that phone number and found that it was associated with a person named Jeremiah Mallery.

18. A comparison of a booking photo of Mallery showed a tattoo visible similar to a tattoo on the picture of the black male sent to Martin's cell phone on December 7, 2020.

19. **A review of the historical cellular data for the defendant's cell phone showed that the device access a cell tower 1.07 miles from the murder scene at 8:32 p.m. and 3.62 miles from the murder scene at 9.21 p.m.**

20. The affiant concluded that the historical cellular data placed Appellant being **present in the area** of the murder at the time of the murder and leaving after the murder occurs.

21. Appellant was arrested on a murder warrant.

22. At the time of Appellant's arrest, he had the instant cell phone in his possession.

23. In an interview, Appellant admitted seeing the victim at TSU and that he drives his girlfriends 4 door red colored Kia.

24. Appellant admitted that he never visited the murder scene and did not know anyone who lived there or around there. Affiant concluded that statement contradicted evidence in the case. (5 RR 2-3).

Based on the for corners of the search warrant, probable cause does not exists that there might be evidence on the cellular device that would link Appellant to an offense or criminal conduct. The test that must be applied is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a "substantial basis" for issuing the warrant. *Id*.

This Court must examine whether the sworn affidavit filed in support of the search warrant set forth facts sufficient to establish probable cause (1) that a specific offense was committed, (2) that the specifically described property or items to be searched for or seized

constitute evidence of the offense or evidence that a particular person committed it, and (3) that the evidence sought is located at or on the person, place or thing to be searched. *See* Tex. Code Crim. Proc. Ann. art. 18.01(c); *Baldwin*, 664 S.W.3d at 130.

According to the affidavit filed in support of the search warrant, the reviewed surveillance video and the 4 door sedan seen parked near the victim's home at 7:32 pm. through the shooting at 9:06 never moved. There was no assertion that anyone is seen on the surveillance video either entering or exiting the vehicle during that time period except for the person who shot the victim at 9:06 pm. Yet the historical data obtained for Appellant's cell phone number showed that his cell phone was over a mile away from the shooting scene at 8:32 pm.

The search warrants affidavits infer or suggest that a cell phone utilizing a cell tower over a mile from the shooting scene as evidence that Appellant's cell phone was stationary at the victim's home. Based on the four corners of the search warrant, there is no evidence that supports that inference.

Like *Baldwin,* the search warrant suggests that the cell phone will establish criminal activity and the involvement of Appellant and others in the murder. (5 RR 4). The affiant suggests that Appellant's cell phone will establish his relationship with Ms. Martin and others unidentified persons and the victim.

Yet, there is no factual assertion that the cell tower which captured Appellant's cell phone at 8:32 p.m. was the only cell tower in the vicinity of the victim's home which could possible capture a call or use.

The text message received by Ms. Martin is not an inculpatory statement and is subject to many different and varied interpretations. There is no showing that the vehicle observed on the surveillance video was a Kia. And, no witness placed a Kia at the scene.

The affiant made conclusory statements without proof that provides the nexus required to connect Appellant's cellular device to the murder investigation being conducted. The affiant's conclusory statements infer that the historical data from Appellant's cell phone number proves that he was over a mile away from the victim's home at a time when the vehicle being investigated was stationary and parked near the victim's

home.

Based on the four corners of the search warrant affidavit probable cause does not exists that can act as a nexus being the murder Davontary Watts and Appellant's use of his cell phone before or during the murder. There is no evidence that the text message to Ms. Martin three days after the murder was connected to the murder.

Based on the four corners of the affidavit probable cause did not exists to support the issuance of the search warrant to search the contents of Appellant's cell phone after he was arrested.[5]

Prayer

Wherefore premises considered Appellant prays that this Court reversed the judgments of the trial court and remand this cause to the trial court for a new trial on the State's motions to adjudicate his community supervision.

[5] Appellant would have contested the validity of the arrest warrant wherein he was accused of murder but that charge was dismissed prior to the hearing on his motion to suppress the search of his cell phone.

Respectfully submitted,

/s/ Stanley G. Schneider

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Certificate of Service

This is to certify that a true and correct copy of the attached and foregoing Appellant's Brief has been served on Harris County Assistant District Attorney Jessica Caird at caird_jessica@dao.hctx.net via electronic filing on December 30, 2024.

/s/ Stanley G. Schneider
Stanley G. Schneider

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/s/ Stanley G. Schneider
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