IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DONALLEN LEROY MCFARLIN,
Appellant.

No. 2 CA-CR 2020-0034
Filed March 26, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201900328
The Honorable Delia Neal, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

S T A R I N G, Vice Chief Judge:

¶1 Donallen McFarlin appeals from his convictions and sentences for second-degree burglary, stalking, threatening or intimidating, and harassment. McFarlin argues "the trial court abuse[d] its discretion when it denied [his] motion to suppress the fruits of the warrantless [ping] where there were no exigent circumstances allowing for" such a "search." For the following reasons, we affirm.

Factual and Procedural Background

¶2 We review a trial court's denial of a motion to suppress for an abuse of discretion, but we review accompanying constitutional and purely legal issues de novo. *See State v. Blakley*, 226 Ariz. 25, ¶ 5 (App. 2010). To that end, "we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the court's ruling." *Id.* (citation omitted).

¶3 On June 2, 2018, D.T. informed the Apache Junction Police Department that McFarlin, her estranged husband, had been making threats toward her. When a police officer responded to her home, she further reported that her car had been broken into and her garage-door opener stolen, and that she had been notified that her garage-door alarm had been activated while she was at work.

¶4 The officer left to respond to another call but eventually returned to D.T.'s home. She then informed him that McFarlin had driven near her residence and left her several voicemails. McFarlin left the initial voice messages between 9:30 and 11:00 p.m. on June 2, and they contained various threats, including: "I could have . . . gotten in your house . . . ."; "You know . . . you're not safe at any time, any place, anywhere. Because you're gonna get got."; "You better have fuckin' protection or someone around you 24/7."; and "I'll . . . fuck your ass up . . . . Wherever you go, I might just be there, okay?"

¶5 After listening to these messages, the officer warned his supervisor he was concerned McFarlin was "right around the corner" and would have access to D.T.'s home. The officer and his supervisor then decided to "ping" McFarlin's cell phone,[1] which revealed it was located near Tempe. Officers pinged McFarlin's phone twice more over the following two hours to confirm he was not headed toward D.T.'s home in Apache Junction. Between the second and third pings, D.T. received two additional voicemails from McFarlin, in which he stated: "You're gonna get fucked up, dead, or in the hospital, fucked up for life. Your house is gonna be no good, because I'm gonna . . . burn the motherfucker up . . . and you with it," and "I'm gonna get you . . . I could have went in your house today. How do you think I know [your dog] was there, dummy?" The subsequent pings again showed that McFarlin was in Tempe, where he was eventually arrested and made some incriminating admissions.

¶6 After a jury trial, McFarlin was convicted as noted above. He was sentenced to concurrent terms of imprisonment, the longest of which was fifteen years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶7 The Fourth Amendment to the United States Constitution and the Arizona Constitution's Private Affairs Clause "protect against unlawful searches and seizures" and, absent an exception, require a warrant for such state action. *State v. Peoples*, 240 Ariz. 244, ¶¶ 8-9 (2016); *see* Ariz. Const. art. II, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). A search occurs under these provisions "when an expectation of privacy that society is prepared to consider reasonable is infringed." *State v. Allen*, 216 Ariz. 320, ¶ 13 (App. 2007) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); *see State v. Juarez*, 203 Ariz. 441, ¶ 16 (App. 2002).

¶8 An exception to the warrant requirement exists when exigent circumstances are present. *See Mazen v. Seidel*, 189 Ariz. 195, 197 (1997); *State v. Hernandez*, 244 Ariz. 1, ¶ 23 (2018) (Arizona constitutional protections "generally coextensive with Fourth Amendment analysis"). Such circumstances occur when "a substantial risk of harm to the persons

[1] "Pinging" occurs when an individual's cell-phone company is asked to provide the real-time location of the customer's cell phone.

involved or to the law enforcement process would arise if the police were to delay until a warrant could be obtained." *Mazen*, 189 Ariz. at 197 (quoting *State v. Greene*, 162 Ariz. 431, 432-33 (1989)).

¶9 Before trial, McFarlin filed a motion to suppress evidence obtained following his "illegal seizure." He argued police had "performed 3 warrantless searches of [his] cell-site location information in violation of . . . the 4th Amendment" and, specifically, *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206 (2018). Thus, he asserted, pursuant to the United States and Arizona Constitutions, all evidence should be suppressed as "fruit of the poisonous tree."[2] The trial court disagreed, concluding that "the situation [was not] similar" to *Carpenter*, and that it was clear there had been "an exigent circumstance that demanded that law enforcement locate . . . McFarlin immediately after the level of the threat had increased."

¶10 On appeal, McFarlin contends there were no exigent circumstances sufficient to justify the initial ping of his cell phone given the "several other options" available to police to "ensure [D.T.'s] safety." He also claims that because the ping showed he was in Tempe, there was no "imminent threat" to D.T. in Apache Junction. Thus, he concludes "[t]he warrantless search of [his] cell phone location violated both the Fourth Amendment of the U.S. Constitution and the Arizona Constitution's right to privacy."

¶11 The state primarily responds that *Carpenter* is inapplicable here, and thus, the pinging did not constitute a search. The state also contends that even if a search occurred, it was nonetheless justified by exigent circumstances. Finally, the state asserts that the good-faith exception to the exclusionary rule requires us to affirm the trial court's ruling, and that even if the court erred "in admitting the evidence obtained as a result of the cell phone pings," such error would have been harmless given the "overwhelming evidence" in the form of McFarlin's voicemails and D.T.'s testimony identifying his voice.

¶12 *Carpenter*, which McFarlin relied on below, concluded that individuals have a reasonable expectation of privacy in certain cell-phone location data. 138 S. Ct. at 2219. But, the Supreme Court made clear that *Carpenter* involved a "detailed chronicle of a person's physical presence

[2] At the suppression hearing, McFarlin also argued the exigent-circumstances exception did not apply.

compiled every day, every moment, over several years." *Id.* at 2220. And, in *Carpenter*, the Court also wrote:

> Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to [cell-site location information (CSLI)] in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.

Id. at 2223.

¶13 Because exigent circumstances nonetheless justified the cell-phone pings in this case, we need not decide whether McFarlin enjoyed a reasonable expectation of privacy under *Carpenter*.[3] As noted above, D.T. informed the officer that her garage-door opener had been stolen earlier in the day. Then, police heard the threats McFarlin had made on D.T.'s voicemail, in which he stated he could have gotten into her home, she needed to look out for her safety at all times and places, and she would "get got." Justifiably, police maintained they had "reason to believe [McFarlin] had access to the garage door" and feared "that he was right around the corner." Thus, were they to delay pinging and locating McFarlin until being granted a warrant, a substantial risk of harm to D.T. would have escalated.[4] *See Mazen*, 189 Ariz. at 197.

¶14 As to the third ping, before it was initiated, McFarlin mentioned being able go into D.T.'s house and knowing her dog was inside. With this information, police officers once again ensured McFarlin was not headed toward D.T. and assisted local law enforcement in locating him. Again, even if the third ping constituted a warrantless search, exigent

[3]McFarlin has not provided, and we are not aware of, binding case law supporting the assertion that the cell-phone pings constituted a search under the Private Affairs Clause.

[4]Similar to the first ping, which was used to locate McFarlin for D.T.'s safety, "the second ping was [used] to make sure that [McFarlin] wasn't driving" toward her.

circumstances justified it. *See id*. We find no abuse of discretion in the trial court's denial of McFarlin's motion to suppress.

Disposition

¶15 For the foregoing reasons, we affirm McFarlin's convictions and sentences.