

IN THE SUPREME COURT OF THE STATE OF FLORIDA

SHAWN ALVIN TRACEY,)
)
 Petitioner,)
)
 vs.) CASE NO.
)
 STATE OF FLORIDA,)
)
 Respondent.)
)
 _____)

PETITIONER’S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Police filed an application for an order authorizing the installation and use of a pen register and a trap and trace device regarding Petitioner's¹ cell phone. The application's sole factual allegation was that an informant had indicated that Petitioner "obtains multiple kilograms of cocaine from Broward County, for distribution on the West Coast of Florida" and that he used a particular cell phone number. The trial court granted the application and also, even though there had been no request for it, directed the Petitioner's cell phone company to provide the sheriff's office with "historical Cell Site Information."²

¹ Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in the lower tribunal. Respondent, the state of Florida, was the Respondent and the prosecution, respectively. In the brief, the parties will be referred to as they appear before this Court.

²Historical cell site information refers to records kept by the cell phone company of past tracking of the cell phone's location.

Police then traced Petitioner's location using real-time cell site information.³ They tracked him from a location in Broward County as he drove across the state of Florida. He was ultimately stopped and arrested for driving without a suspended license, and a search uncovered a kilogram brick of cocaine in his car.

Petitioner moved to suppress the evidence, challenging the legality of the police use of the real time cell site information. The motion was denied, and Petitioner was convicted by a jury of possession of more than 400 grams of cocaine.

On direct appeal, the Fourth District Court of Appeal affirmed Petitioner's conviction, holding in part that this case does not involve a Fourth Amendment violation. Petitioner's motion for rehearing was denied by the appellate court on October 14, 2011. Notice of his intent to seek this Court's discretionary review was filed on Monday, November 14, 2011.

This jurisdictional brief follows.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in the instant case

³Real time cell site information refers to tracking undertaken by the cell phone company of the location of a cell phone through the use of cell phone towers and triangulation of the information from the three nearest cell phone towers picking up the phone's signal. Cell phone location can also be determined in a similar way through the use of GPS (global positioning system) technology available on over 90% of cell phones in use today.

expressly construes a provision of the federal Constitution by holding that police use of real time cell phone information does not implicate the Fourth Amendment of the United States Constitution.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY CONSTRUES A PROVISION OF THE UNITED STATES CONSTITUTION.

Article 5 section 3(b)(3) of the Florida Constitution provides for discretionary review of district court decisions declaring valid state statutes or expressly construing a provision of the state or federal constitution. In the instant case, the decision of the Fourth District Court of Appeal expressly construes a provision of the United States Constitution, namely, the reach of the Fourth Amendment. The district court held that the Fourth Amendment was not violated where law enforcement used real time cell phone location information to track Petitioner's location as he travelled across the state. The district court relied on a decision of the United States Supreme Court, United States v. Knox, 460 U.S. 276 (1983), which held that a "person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281-82.

But as argued by Petitioner below, a clear majority of federal courts have held that the production of real-time cell-site information requires the government to establish the existence of probable cause to believe that the data sought will yield evidence of a crime.

Thus, in In the Matter of Application of the United States for an Order Authorizing Disclosure of Location Information of a Specific Wireless Telephone, ___ F.Supp.2d ___, 2011 WL 3423370 (D. Md. Aug. 3, 2011), the federal district court recently reviewed the government’s request for information which would allow it to obtain the physical location of a suspect’s cell phone location *via* cell site and GPS data provided by the cell phone company. The government and the defense agreed “that this matter is at heart a question of Fourth Amendment interpretation.” 2011 WL at *8. The district court held that an individual has a reasonable expectation of privacy in both his location revealed by real-time location data and in his movements where his location is subject to continuous tracking over an extended period of time. 2011 WL at *9. In this aspect, real-time cell-site information is clearly more invasive than historical cell-site information, which can only reveal where the phone user has been; real-time or prospective information, on the other hand, shows where he *is*.⁴ The federal district court concluded that

⁴The fact that real-time cell-site information reveals a target’s present location distinguishes the instant case from the historical cell-site information which was at issue in Mitchell v. State, 25 So.3d 632 (Fla. 4th DCA 2009), which the Fourth District Court of Appeal had previously held did not implicate the Fourth Amendment, based on In re Application of U.S. for Orders Pursuant to Title 18 U.S.C. §2703(d), 509 F.Supp.2d 76 (D. Mass. 2007).

as the majority of other courts that have examined this issue have found, the Fourth Amendment requires that the government must show probable cause prior to accessing such data. See e.g., *In re Application of the United States*, . . ., 396 F.Supp.2d 294, 323 (E.D.N.Y. 2005) (“Because the government cannot demonstrate that cell site tracking could never under any circumstances implicate Fourth Amendment privacy rights, there is no reason to treat cell phone tracking differently from other forms of tracking. . . which routinely require probable cause.”); *In re Application of the United States*, . . . 441 F.Supp.2d 816, 837 (S.D. Tex. 2006) (“[D]etailed information, such as triangulation and GPS data, [] unquestionably implicate Fourth Amendment privacy rights.”) *In re Application the [sic] of the United States*, 402 F.Supp.2d 597, 604-05 (D.Md. 2005) (recognizing that monitoring of cell phone location information is likely to violate a reasonable expectation of privacy).

2011 WL 3423370 at *11.⁵

⁵A somewhat similar issue, involving the government’s use of a GPS tracking device placed on the defendant’s car without his knowledge to track his movements for a period of time is presently pending before the United States Supreme Court. United States v. Antoine Jones, Case No. 10-1259 (oral argument heard November 8, 2011).

This ruling is undoubtedly inspired by the recognition that today, we take our cell phones everywhere: to restaurants, theaters and sporting events; to churches, synagogues, and other places of religious worship; to meetings with ex-wives or ex-husbands; to business and financial offices; to appointments at psychiatrist's and psychologist's offices; to family planning clinics; to AA and NA meetings; and into our homes and the homes of family members, friends, and personal and professional associates. Many people, especially younger ones, no longer have landline phones, but use cell phones exclusively for all telephonic communication. The federal district court's emphasis on the privacy interests that would be invaded by the tracking of cell phone calls is thus not surprising:

Instructive on the scope of the Fourth Amendment in this context is Silverman v. United States, 365 U.S. 505 (1961), where the government recorded conversations using a "spike mike" that "usurped" a portion of the heating system for the petitioners' house. The Supreme Court held that this usurpation of private property was a search, even though the physical intrusion was no more than a "fraction of an inch." *Id.* at 512. In the instant case, Petitioner likewise had a reasonable expectation of privacy that his cell phone was available solely for his use and could not be simultaneously used by the government to monitor his movements without his knowledge or consent.

Not only does this analysis compel the conclusion that a person has a reasonable expectation of privacy in the location of his cell phone calls, thereby activating his right to the protections of the Fourth Amendment, United States v. Karo, 468 U.S. 705 (1984), it also implicates the constitutional right to privacy guaranteed in Florida by Article I section 23 of the Florida Constitution. Certainly, the cases cited herein do not authorize the production of real-time cell-site information based solely on the relaxed showing set forth in the pen register/trap and trace statutes of either the state or federal government.⁶

Because of the significant expansion of government surveillance opportunities represented by the use of cell phone technology, the instant case presents an issue which requires resolution by this Court. The refusal of the Fourth District Court of Appeal to recognize the applicability of the Fourth Amendment to the instant case must be corrected. Consequently, this Court should exercise its discretion and grant review of the instant decision by the Fourth District Court of Appeal.

⁶See Kevin McLaughlin, *The Fourth Amendment and Cell Phone Location Tracking: Where Are We?* 29 Hastings Comm. & Ent. L.J. 421-424 (2007).

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court exercise its discretion and accept jurisdiction of the instant cause for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Sue-Ellen Kenny, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by U.S. mail this _____ day of NOVEMBER, 2011.

Assistant Public Defender

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief has been prepared in 14 point Times New Roman font, in compliance with Fla. R. App. P. 9.210(a)(2).

Assistant Public Defender