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IN THE SUPREME COURT OF APPEAL OF THE STATE OF FLORIDA

SHAWN ALVIN TRACEY,

Petitioner,

vs. CASE NO. SC11-2254

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida and the appellant in the Fourth District Court of Appeal. Respondent was the prosecutor and appellee, respectively. In this brief the parties will be referred to as they appear before the Court.

The following symbols will be used:

"R"	Record on appeal, followed by the appropriate volume and page numbers

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the statement of the case and facts contained in his initial brief.

ARGUMENT

POINT

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS EVIDENCE DERIVED FROM REAL-TIME CELL PHONE SITE INFORMATION WHICH WAS OBTAINED WITHOUT LEGAL AUTHORITY AND IN VIOLATION OF THE FOURTH AMENDMENT.

Respondent argues, *inter alia*, that Petitioner's location would have been inevitably discovered even had the police not had access to the real-time cell site information. Answer brief at 35-36. That argument flies in the face of the factual findings made by the trial court, which stated

> While there was evidence that the investigators had knowledge of at least one "stash house" used by the Defendant and located within a few blocks of where he was arrested, the State was unable to establish that investigators stationed in the area stumbled upon the Defendant; rather, the evidence demonstrated that it was by using the cell phone as a tracking device that they were able to locate him behind the wheel of a GMC Envoy at the intersection of US 441 and Miramar Parkway.

(R2/246-247.) It was the data relating to the real-time cell-site information which enabled police to pinpoint the location of the phone and thus its user (R6/365-366), allowing the police to determine that they were tracking a red GMC Envoy, which, after all, did not belong to Petitioner, but to someone else. Respondent's argument

that the SUV would have been identified even without the cell-site tracking is thus based entirely on sheer speculation ("Law enforcement would have likely detected two cars appearing to travel in tandem. . ." answer brief at 35).

Respondent further argues that the warrantless seizure in the instant case can be justified on the basis of the good faith exception to the warrant requirement. Answer brief at 36. That exception authorizes the admission of evidence seized in reasonable reliance on a warrant even if the warrant is invalid. The exception is not available, however, if the officer who applied for the warrant "acted dishonestly, recklessly, or under circumstances in which an objectively reasonable officer would have known the affidavit or the existing circumstances were insufficient to establish probable cause for the search." United States v. Leon, 468 U.S. 897, 896, 913, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). When an affidavit for a search warrant is so lacking in indicia of probable cause "as to render an official's belief in its existence entirely unreasonable," Montgomery v. State, 584 So.2d 65, 68 (Fla. 1st DCA 1991), or when the affidavit fails to establish a nexus between the objects of the search and the residence to be searched, the exception will not be applied. Gonzalez v. State, 38 So.3d 226, 230 (Fla. 2d DCA 2010) (affidavit seeking search warrant was patently inadequate; officers acknowledged that they did not conduct any investigations to corroborate the anonymous tipster's accusations of illegal drug activity); Garcia v.

State, 872 So.2d 326, 330 (Fla. 2d DCA 2004); Howard v. State, 483 So.2d 844, 847 (Fla. 1st DCA 1986) (good faith exception does not apply when "[t]he supporting affidavit contains absolutely no allegation in regard to any infraction of the law occurring inside the home.").

In the present case, the three-page application for a pen register and trap and trace device submitted by the police did not include a request for cell phone site information of any kind (R1/67-69, 3/41). The trial court correctly found that there was no probable cause for the issuance of a warrant ("The application for the Order sets forth the legal basis for the installation and use of a pen register/ trap and trace device, but does not contain a sufficient factual basis on which to issue a search warrant") (R2/246) based on the untested source of the information provided in it. And while the order issued by the magistrate directed the production of *historical* cell-site information (unsupported by any request for such relief), the order did not authorize the production of *real-time* cell site information.

The police reliance on the court's order below was thus derelict on three fronts: it was based on inadequate probable cause; the police had never requested the cell phone data; and the order on its face did not authorize the production of the real-time data which the law enforcement officials relied on to enable their surveillance. Faced with this complete lack of judicial authority for their actions, the good faith exception

cannot justify the admission of the wrongfully-obtained cell phone information in this case. Dyess v. State, 988 So.2d 146 (Fla. 1st DCA 2008); Mesa v. State, 77 So.3d 218, 223 (Fla. 4th DCA 2011).

Finally, there is a significant distinction between the real-time cell-site information obtained in the present case and historical cell-site information, on which Respondent heavily relies for its argument that there is no reasonable expectation of privacy in cell phone data, answer brief at 11-16. While the latter allows police to determine a caller's location at some time after he has stopped moving, the former permits the government to track a caller's present location. The opportunities such surveillance provides for privacy intrusions have been set forth in Petitioner's initial brief and the authorities cited therein at 18.

These opportunities have only increased with the now-pervasive use of GPS tracking on most cell phones in use today, which operates even when the phone is not actively in use. The United States Supreme Court's decision in United States v. Jones, __ U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) itself commented on even more of the technological changes which already and in the near future dramatically change the scope of available governmental intrusion into location. 132 S.Ct. at 963-64.

With these technological advancements, the use of cell phone data to monitor cell phone users has recently exploded: *The New York Times* reported on July 9, 2012, (Eric Lichtblau, "More Demands on Cell Carriers in Surveillance") that cell phone carriers reported to U.S. representative Edward J. Markey (D-Mass.) that they received *1.3 million demands* for subscriber information from law enforcement agencies last year, with the actual number of such requests almost certainly much higher due to incomplete record-keeping. Moreover, during the same time period, requests for such traditional means of electronic eavesdropping actually *dropped* 14 percent to only 2,732.

The shock with which such information has been received by the general public, as demonstrated by the coverage surrounding the United States Supreme Court's decision in Jones, 132 S.Ct. 945, suggests that, contrary to the State's position, there is at a minimum a real desire by the general public to maintain privacy in information which can be used to track present location. Privacy concerns are only exacerbated with the realization that "cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy." City of Ontario, California v. Quon, __ U.S. __, 130 S.Ct. 2619, 2630, 177 L.Ed.2d 216 (2010).

Respondent argues that because cell phone calls are necessarily distributed via cell phone towers, the caller has "voluntarily" provided his cell phone's location to the service provider by turning on his cell phone. Answer brief at 23. But

> a cell phone customer has not "voluntarily" shared his location information with a cellular provider in any meaningful way. . . [because] it is unlikely that cell phone customers are aware that their cell phone providers *collect* and store historical location information. Therefore, "[w]hen a cell phone user makes a call, the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed and there is no indication to the user that making that call will also locate the caller; when a cell phone user receives a call, he hasn't voluntarily exposed anything at all."

In the Matter of Application of the United States, 620 F.3d 304, 317-18 (3d Cir. 2010) (emphasis original). While a caller's cell phone bill may notify him that his carrier has a record of when and what numbers he called, answer brief at 13, 16, it does not advise him that his location, too, has been tracked and recorded.

The evolving understanding of the expectation of the right to privacy is exemplified in In the Matter of an Application of the United States, 809 F.Supp. 113 (E.D.N.Y. 2011), which held that "there are circumstances in which the legal interest being protected from government intrusion trumps any actual belief that it will remain private." 809 F.Supp. at 124. Thus, even where there may not be an actual expectation of privacy by the citizen, "society's recognition of a particular privacy

right as important swallows the discrete articulation of Fourth Amendment doctrine. . . ." *Id.*; *see* United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010) (email subscriber "enjoys a reasonable expectation of privacy in the contents of emails that are store with, or sent or received through, a commercial ISP;" even though ISP has control over emails and ability to access them, a warrant based on probable cause is required to compel ISP to turn over subscriber's emails).

The New York District Court determined that cell phone location information would be treated as private where 1) the subscriber's disclosure of information was made to a service-provider intermediary, not a third party; and 2) allowing routine government access to cumulative cell-site location information "would permit governmental intrusion into information which is objectively recognized as highly private." 809 F.Supp. at 126. The Court's holding thus constituted a rejection of "the fiction that the vast majority of the American population consents to warrantless government access to the records of a significant share of their movements by 'choosing' to carry a cell phone." 809 F. Supp. at 127.

That case involved a government application to obtain *historical* cell-site data, and it was the lengthiness of the time period for which information was sought (113 days) that the Court found to be the determining factor in its disposition. But where, as in the instant case, the State seeks *real-time* location information, the invasion of

the subscriber's privacy interest is equally unacceptable.

The district court rightly announced that "It is time that the courts begin to address whether revolutionary changes in technology require changes to existing Fourth Amendment doctrine." In the Matter of an Application of the United States, 809 F.Supp. at 127. In Jones, the Supreme Court has likewise acknowledged that the validity of traditional Fourth Amendment analysis has been rendered inadequate by the advances in technology of the last ten years. Therefore, the too-restrictive interpretation of what constitutes a reasonable expectation of privacy which has previously governed electronic surveillance cases should, as suggested by these cases, be reassessed.

In the instant case, Petitioner both subjectively and objectively retained a reasonable expectation of privacy in his cell phone location information. His Fourth Amendment rights were therefore violated when the State failed to establish probable cause or provide specific and articulable facts to believe that production of information sought by the police would produce evidence of a crime, and did not even request an order which authorized the use of such information. Consequently, the evidence obtained as a result of the use of the real-time cell-site information to track his location should have been suppressed.

CONCLUSION

Based upon the foregoing argument and the authorities cited therein, Petitioner requests that this Court reverse the judgment and sentence below and remand this cause with directions to grant Petitioner's motion to suppress the evidence.

Respectfully submitted,

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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).

/s/ Tatjana Ostapoff
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been e-filed in this Court and furnished to Melynda Melear, Assistant Attorney General, 1515 N. Flagler Drive, ninth floor, West Palm Beach, Florida 33401 by e-mail at CrimAppWPD@myfloridalegal.com this 15th day of APRIL, 2013.

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