RENDERED: FEBRUARY 7, 2020; 10:00 A.M. TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001574-MR

DOVONTIA REED

APPELLANT

APPEAL FROM WOODFORD CIRCUIT COURT v. HONORABLE JEREMY MICHAEL MATTOX, JUDGE ACTION NO. 17-CR-00034

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; GOODWINE AND L. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Dovontia Montaya Reed appeals from a final

judgment of the Woodford Circuit Court following his entry of a conditional guilty

plea. His appeal presents an issue of first impression: whether the Fourth

Amendment is violated when police use real-time cell site location information

("CSLI") to track a suspect's cell phone without first obtaining a warrant based on

probable cause. The United States Supreme Court recently ruled that a warrant is required to obtain historic CSLI data, but expressly left unresolved whether its holding applies to the procurement of real-time CSLI. *Carpenter v. United States*, ---- U.S. ---, 138 S. Ct. 2206, 2220, 201 L. Ed. 2d 507 (2018) ("Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI[.]"). Nor has our state Supreme Court ruled on the real-time CSLI question, although it recently commented that the issues presented in *Carpenter* do "not fit neatly under existing search and seizure precedent due to the unique nature of cell phone location records." Whitlow v. Commonwealth, 575 S.W.3d 663, 671 (Ky. 2019) (citation omitted). Having reviewed the arguments of counsel and the applicable law, we hold that individuals have a reasonable expectation of privacy in real-time CSLI and, consequently, the acquisition of such data by the police constitutes a search triggering the protections of the Fourth Amendment. Furthermore, the good faith exception does not apply to prevent suppression in this case because no binding appellate precedent existed in Kentucky to support the decision of the police to collect Reed's real-time CSLI without a warrant.

The underlying facts of the case are not in dispute. They were presented at the suppression hearing through the testimony of Officer Jordan Lyons of the Versailles Police Department. Late in the evening on April 26, 2017, Kirby Caldwell received a phone call from Reed asking for his assistance, claiming he

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had run out of gas and did not have any money. Caldwell agreed to meet Reed at a gas station in Versailles, Kentucky. When Caldwell arrived at the gas station, he parked his car beside a dark Nissan Altima. Reed climbed from the front passenger side of the Altima and into the front passenger seat of Caldwell's car. He pulled out a black handgun and demanded Caldwell give him all his money. Caldwell initially gave Reed \$100 but Reed insisted Caldwell had more money and demanded all of it. Caldwell eventually gave him a total of \$500. Reed then forced Caldwell to throw his car keys out of the window and over a hillside. Reed then returned to the Altima and departed.

Caldwell reported the incident to the police. Officer Jordan Lyons of the Versailles Police Department received the report at approximately 12:35 a.m. and proceeded to the gas station where he interviewed Caldwell, who described Reed as a thin, light-skinned black male with long dreads and wearing a hoodie. Caldwell also told him that the Altima had distinctive grey plastic hubcaps. Officer Lyons watched surveillance video footage from the gas station and observed the Altima as described by Caldwell. Officer Lyons obtained Reed's cell phone number from Caldwell. Caldwell told him the number was the one Reed had called from to set up their meeting.

Officer Lyons relayed Reed's cell phone number to police dispatch. According to Lyons, dispatch contacted the cell phone carrier which "pinged" the

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phone. According to Lyons, the phone carrier needs only the number of the cell phone and for the cell phone to be turned on in order to "ping" it. The cell phone carrier relayed the information to dispatch which was able to track the phone and send its location to Lyons and other officers. Lyons did not obtain a warrant to "ping" the cell phone.

Police dispatch continued to relay the cell phone's location to Officer Lyons for an hour and a half. The cell phone traveled to Springfield and back. Officer Lyons waited on the road he anticipated Reed would take to return to Versailles. Lyons was easily able to identify the Altima when it passed by because it matched Caldwell's description and resembled the vehicle Lyons had observed on the surveillance footage.

Lyons pulled over the Altima at approximately 2:09 a.m. and waited for backup officers to conduct a "felony traffic stop." When the other officers arrived, they ordered the occupants of the Altima out of the car. An individual named Jamal Thomas exited from the driver's seat and Reed emerged from the front passenger's side. The officers patted the men down and placed them into custody. Lyons ran the license plate number of the Altima and discovered it belonged to Thomas's girlfriend. While performing an exterior visual search of the car, Lyons smelled marijuana by the open driver's side window. He searched the

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interior and found marijuana and some cash on the driver's side of the car and a black handgun in the trunk.

Reed was charged with one count of first-degree robbery, one count of possession of a handgun by a convicted felon, and one count of receiving stolen property, firearm. He filed a motion to suppress the evidence recovered in the search of the vehicle. Following a hearing, the trial court denied the motion. Reed thereafter entered a plea of guilty to the charges as set forth in the indictment with the exception of the first-degree robbery charge which was amended to second-degree robbery. He received a total sentence of seven years. His plea was conditioned on the right to appeal the denial of the suppression motion.

Our standard when reviewing a trial court's denial of a motion to suppress "requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) (footnotes omitted).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. CONST. amend. IV. In *Katz v. United States*, 389 U.S. 347,

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88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the United States Supreme Court extended the protections of the Fourth Amendment beyond the realm of personal property rights "to protect certain expectations of privacy as well." *Carpenter*, 138 S. Ct. at 2213. "The Constitution's protection extends only to legitimate expectations of privacy, that is, those situations where the defendant has exhibited an actual (subjective) expectation of privacy, and where the expectation is one that society is prepared to recognize as reasonable." *Easterling v. Commonwealth*, 580 S.W.3d 496, 503 (Ky. 2019) (footnote omitted) (citing *Katz*, 389 U.S. at 361, 88 S. Ct. 507 (Harlan, J., concurring)). When such a reasonable expectation exists, the police may not execute a search unless they first obtain a warrant or meet one of several specific exceptions to the warrant requirement. *See Bishop v. Commonwealth*, 237 S.W.3d 567, 569 (Ky, App. 2007).

In *Carpenter*, the United States Supreme Court applied the *Katz* test to determine whether the acquisition of historic CSLI data by police constituted an intrusion upon an individual's legitimate expectation of privacy. The Court described the data-gathering process as follows: "Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the phone connects to a cell site,

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it generates a time-stamped record known as cell-site location information (CSLI)." *Carpenter*, 138 S. Ct. at 2211. In *Carpenter*, the police sought historic CSLI records to establish that the defendant was near four robbery locations at the time they occurred. The records produced by the wireless carriers consisted of 12,898 historical location points for the defendant covering a period of 127 days. *Id.* at 2212.

In deciding whether a warrant was required to obtain these records, the Supreme Court observed that "requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake." *Id.* at 2214-15. These two lines of cases address people's expectation of privacy in their physical location and movements, and in information they have turned over to a third party, *i.e.*, a cell phone carrier.

Under the first line of cases, the United States Supreme Court concluded that police planting a beeper on a car in order to track its movements was not a search because a person traveling in a car in a public thoroughfare had no reasonable expectation of privacy in his movements, and the beeper merely augmented visual surveillance. *See United States v. Knotts*, 460 U.S. 276, 282, 103 S. Ct. 1081, 1085-86, 75 L. Ed. 2d 55 (1983).

Under the second line of cases, the Court held that individuals also have no reasonable expectation of privacy in information they voluntarily turn over

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to a third party, such as bank records, *see United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976), or telephone numbers they have dialed, *see Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

Carpenter concluded that historic CSLI does not fall neatly into either of these two earlier categories of cases due to the unique character of the modern cell phone, which the Court described as having become almost a feature of human anatomy capable of tracking nearly exactly the movements of its owner and providing a "detailed and comprehensive record of the person's movements." Carpenter, 138 S. Ct. at 2217. Unlike following an automobile in a public thoroughfare or accessing third-party business records, "[m]apping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations." Id. (citation omitted). Because of its potential for an unprecedented and unexpected level of intrusion into an individual's personal life, the Court held that a warrant was required to obtain historic CSLI data.

Although the *Carpenter* Court expressly limited its holding to the acquisition of historic CSLI, Reed urges us to extend its reasoning to encompass the acquisition of real-time CSLI or "pinging." He also relies on opinions of courts

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in other jurisdictions which have held that a warrant is required to acquire real-time CSLI. *See e.g., Tracey v. State*, 152 So. 3d 504 (Fla. 2014) (pre-*Carpenter* case comparing the acquisition of CSLI to GPS tracking and rejecting a case-by-case approach as unworkable and potentially leading to arbitrary and inequitable enforcement); *State v. Andrews*, 134 A.3d 324, 348 (Md. Ct. Spec. App. 2016) (quoting *United States v. Graham*, 796 F.3d 332, 355 (4th Cir. 2015)) (pre-*Carpenter* case rejecting "the proposition that cell phone users volunteer to convey their location information simply by choosing to activate and use their cell phones and to carry the devices on their person"); *State v. Sylvestre*, 254 So. 3d 986, 987 (Fla. Dist. Ct. App. 2018) (applying reasoning of *Carpenter* to real-time CSLI).

We agree that the acquisition of real-time CSLI implicates significant, legitimate privacy concerns. As the Supreme Judicial Court of Massachusetts recently observed, when the police are able to ping a cell phone in order to discover its location, they also acquire the ability to identify the real-time location of its owner, which is "a degree of intrusion that a reasonable person would not anticipate[.]" *Commonwealth v. Almonor*, 120 N.E.3d 1183, 1195 (Mass. 2019) (quoting *State v. Earls*, 70 A.3d 630, 642 (N.J. 2013)). This distinguishes the situation from one in which the police track an individual in the public thoroughfare or seek access to records held by a third party. "Although our society may have reasonably come to expect that the voluntary use of cell phones -- such

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as when making a phone call -- discloses cell phones' location information to service providers, and that records of such calls may be maintained, our society would certainly not expect that the police could, or would, transform a cell phone into a real-time tracking device without judicial oversight." *Id.* (citations omitted).

Thus, because pinging a cell phone enables the police almost instantaneously to track individuals far beyond the public thoroughfare into areas where they would have a reasonable, legitimate expectation of privacy, we conclude that a warrant is required to acquire real-time CSLI.

One exception to the warrant requirement occurs "when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 460, 131 S. Ct. 1849, 1856, 179 L. Ed. 2d 865 (2011) (citations and internal quotation marks omitted). So, for example, "[p]olice officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect." *Id.* (citation omitted). In the case before us, the police sought to locate an individual, Reed, who reportedly had just fled after committing an armed robbery. These circumstances may have been sufficiently exigent to justify the warrantless pinging of his cell phone, but this argument was not raised by the Commonwealth, which bears the burden of proving the availability and applicability of this exception, and consequently no evidence was elicited nor

findings made by the trial court regarding its applicability. *See Commonwealth v. Garrett*, 585 S.W.3d 780, 790 (Ky. App. 2019).

The Commonwealth argues that suppression is not the appropriate remedy in this case because the actions of the police were protected by the "good faith" exception to the warrant requirement. This judicially-created exception to the exclusionary rule may be invoked upon a showing that the police "conduct[ed] a search in objectively reasonable reliance on clearly established precedent from this Court or the United States Supreme Court[.]" Parker v. Commonwealth, 440 S.W.3d 381, 387 (Ky. 2014). The Supreme Court's opinion in Carpenter was rendered on June 22, 2018, more than two years after Reed's arrest. The trial court considered Carpenter in ruling on the motion to suppress but concluded that controlling precedent at the time of the incident placed no requirement on the police to obtain a warrant or a court order. The Commonwealth agrees, contending that prior to Carpenter, the pinging of Reed's cell phone was permissible under the prevailing third-party doctrine set forth in cases such as *Smith* and *Miller*, *supra*, which held that individuals have no reasonable expectation of privacy in information which they voluntarily turn over to third parties.

To support its argument that the third-party doctrine was clearly established precedent at the time of Reed's arrest, the Commonwealth points to the *Carpenter* Court's deliberate and thorough explanation of why the third-party

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doctrine did not apply to historical CSLI, as when it stated: "In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." Carpenter, 138 S. Ct. at 2223. The Commonwealth has also drawn our attention to the dissenting opinions of Justices Kennedy, Thomas, and Alito, which criticize the majority for abandoning the well-established precedent that defendants have no reasonable expectation of privacy in business records belonging to third parties. Id. at 2223-25 (Kennedy, J., dissenting); 2242 (Thomas, J., dissenting); and 2255 (Alito, J., dissenting). The Commonwealth also points to several Kentucky cases recognizing that individuals have no expectation of privacy in information they voluntarily hand over to third parties, such as photos for processing, Deemer v. Commonwealth, 920 S.W.2d 48 (Ky. 1996); materials such as a name, address, and screen name provided to an internet service provider, Hause v. Commonwealth, 83 S.W.3d 1 (Ky. App. 2001); and prescription records, Williams v. Commonwealth, 213 S.W.3d 671 (Ky. 2006).

But in 2014, the Kentucky Supreme Court specifically addressed the constitutional status of real-time CSLI in a case involving a detective who pinged the cell phone of a suspect who was accused of beating his girlfriend and then disappearing with her children. We set forth in full the Supreme Court's analysis,

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which does not affirmatively adopt the third-party doctrine and instead emphasizes

the unresolved and complex nature of CSLI for Fourth Amendment purposes:

Whether the location information of a cell phone is entitled to constitutional protection under the Fourth Amendment is an open question, at least to the extent that neither this Court nor the U.S. Supreme Court has decided the question. *See United States v. Caraballo*, 963 F. Supp. 2d 341, 352 (D. Vt. 2013) (describing it as an "open question"); *Cucuta v. New York City*, 13 CIV. 558 AJP, 2014 WL 1876529 (S.D.N.Y. May 9, 2014) ("[I]t is far from clearly established whether an individual has a legitimate and reasonable expectation of privacy in his real-time location data conveyed by his cell phone, especially where law enforcement affirmatively pings a phone to determine its location.").

While the U.S. Supreme Court has recently held that the warrantless placement of a GPS tracking device on a suspect's car violates the Fourth Amendment, *see United States v. Jones*, --- U.S. ---, 132 S. Ct. 945, 949, 181 L. Ed. 2d 911 (2012), it did so under a trespass theory, *id.* at 949-52. That is not what happened here. Instead, [the detective] (really, AT & T) analyzed the electronic signals emanating from [the suspect]'s phone to divine its location. As to "[s]ituations involving merely the transmission of electronic signals without trespass," the Supreme Court noted that they "would *remain subject to Katz analysis.*" *Id.* at 953. The *Katz* analysis is the familiar reasonable-expectation-of-privacy test derived from *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

Whether a cell phone's real-time location information is protected under *Katz* is a difficult question. Some courts, including the Sixth Circuit, have held that, at least under some circumstances, there is no reasonable expectation of privacy in the data given off by a cell phone. *E.g.*, *United States v. Skinner*, 690 F.3d 772, 777 (6th Cir. 2012). Other courts have suggested that police intrusion into this data, at least when the phone is not travelling on a public roadway and is in a private residence, is limited to situations constituting an emergency, such as is allowed under 18 U.S.C § 2702. *See, e.g., Caraballo*, 963 F. Supp. 2d at 362-63.

Hedgepath v. Commonwealth, 441 S.W.3d 119, 124-25 (Ky. 2014) (emphasis added).

Unfortunately for our purposes, the *Hedgepath* Court did not rule on the matter because it was able to resolve the case on other grounds, but its commentary makes it clear that at the time Reed's cell phone was pinged, there was no clearly established, binding precedent in Kentucky regarding real-time CSLI upon which the police could rely. In the absence of such precedent, the decision to proceed without a warrant and without a showing of exigent circumstances or other exception does not support a finding of good faith. "*Davis*'s good-faith exception is not a license for law enforcement to forge ahead with new investigative methods in the face of uncertainty as to their constitutionality." *United States v. Sparks*, 711 F.3d 58, 67 (1st Cir. 2013).

For the foregoing reasons, the trial court erred in denying the motion to suppress. The judgment is reversed and the matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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