

1 IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

2 STATE OF NEBRASKA,) CASE NO. CR16-3170
3 PLAINTIFF,)
4 VS.)
5 ROLANDER BROWN,)
6 DEFENDANT.) SUPPLEMENTAL BILL OF EXCEPTIONS
7)
8) VOLUME I OF I
9) PROCEEDINGS
10) (Pages 1-10, incl.)

11 Proceedings heard before the HONORABLE JAMES T. GLEASON,
12 DISTRICT JUDGE, on July 3, 2017.

13 **FILED**

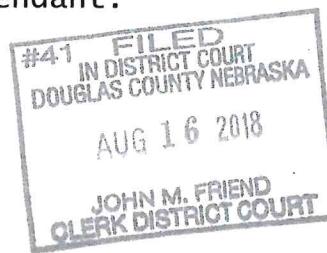
14 **AUG 20 2018**

15 NEBRASKA SUPREME COURT
16 COURT APPEALS

17 A P P E A R A N C E S

18 MR. CHAD BROWN
19 Deputy County Attorneys
20 100 Hall of Justice
Omaha, NE 68183
Appearing telephonically
on behalf of Plaintiff;

21 MR. THOMAS RILEY
22 Public Defender
23 MS. YVONNE SOSA
24 Assistant Public Defender
H05 Civic Center
1819 Harney Street
Omaha, NE 68183
Appearing on behalf
of Defendant.



25 ALSO PRESENT: THIS BILL OF EXCEPTIONS
SHALL NOT BE TAKEN APART PURSUANT TO RULE 5B (3)d
OF THE NEBRASKA SUPREME
COURT RULES.

Susan M. McKenzie, Official Court Reporter
(402) 444-7039

Appendix D.

C E R T I F I C A T E

2 I, Susan M. McKenzie, Official Court Reporter
3 within and for the District Court of Nebraska for the Fourth
4 Judicial District, do hereby certify that the within and
5 following Bill of Exceptions is correct and complete and
6 contains all matters required to be included herein pursuant
7 to the praecipe filed on the 31st day of July, 2018, and the
8 rules of the Supreme Court of the State of Nebraska; that
9 said Bill of Exceptions consists of:

10 VOLUME I -- Proceedings
(Pages 1-10, incl.)

12 that the cost of said Bill of Exceptions is
13 \$ 32.50, an amount permitted to be charged by Rule
14 5B(1)e and Neb. Ct.R. of Official Ct. Rptrs.

15
16 Dated this 16th day of August, 2018.

Susan McKenzie
Susan M. McKenzie
Official Court Reporter

I N D E X

PAGE NOS.

Motion hearing 4-10

1 (On July 3, 2017, in the District Court of Douglas
2 County, Omaha, Nebraska, before the HONORABLE JAMES T.
3 GLEASON, DISTRICT JUDGE, with Mr. Chad Brown appearing
4 telephonically as counsel on behalf of the Plaintiff, with
5 Mr. Thomas Riley and Ms. Yvonne Sosa appearing as counsel on
6 behalf of the Defendant, and with the defendant being present
7 in person, the following proceedings were had:).

8 THE COURT: We're here on the matter of State
9 of Nebraska vs. Rolander Brown, CR16-3170.

10 Do you wish to proceed, Mr. Riley?

22 Is that acceptable, chad?

23 MR. BROWN: It is.

24 THE COURT: That works for me. Does that
25 include -- was I asked to take judicial notice of the federal

1 statute, the Stored Communications Act?

2 MR. RILEY: I think that would be appropriate,
3 yes, Your Honor.

4 THE COURT: Any objection to my taking
5 judicial notice of the Federal Stored Communications Act?

6 MR. BROWN: No, sir.

7 THE COURT: All right. I will take judicial
8 notice.

9 MR. RILEY: As we talked about last week off
10 the record, the Court was willing to allow us to make sure
11 the record was complete prior to entering a ruling on this.
12 And over the weekend, opposing counsel and myself were in
13 contact and kind of agreed on a stipulation as to information
14 that would be provided by a witness from the FBI had he been
15 here to testify.

16 And I'll read it into the record, what I submitted
17 to you Chad, and you can add the portion you wanted to add.
18 Is that okay?

19 MR. BROWN: Yeah, that will work.

20 MR. RILEY: All right. If Agent Horan were to
21 testify in person, he would testify, first of all, that the
22 search warrant/order required Sprint to produce in relevant
23 part, one, cell site sector information; two, goal
24 positioning system GPS data; three, real time data, which is
25 acronym RTD; and four, per call measurement data for voice,

1 SMS, text message and data. Agent Horan of the FBI CAST
2 unit, that's another acronym, C-A-S-T, received information
3 provided to OPD, Omaha Police Department, by Sprint. That
4 was provided by the Omaha police to him. Horan used
5 historical cell site data to track the movement of the target
6 cell phone at pertinent times to this investigation. And the
7 phone number 402-838-9844 was the target cell phone that he
8 was analyzing the data on. That the data provided to him
9 from Sprint will only be released by Sprint to police through
10 the use of a search warrant or a court order pursuant to 18
11 USCA Section 2107, Subparagraph 3, which is the Federal
12 Stored Communications Act that the Court has already referred
13 to. He would further testify that when the phone is in use
14 and receiving or sending a call or text, the signal connects
15 to a cell tower for purposes of transmitting the
16 communication. When the phone is idle, that is, that the
17 phone is turned on but not actively engaged in communicating
18 with another device, the historical cell site information is
19 not obtained. However, if the phone is idle and turned on,
20 the historical cell site information is obtained when the
21 phone is alerted through the use of an app transmitting
22 information from a site, for example, CNN or ESPN. As a
23 result, it is common that the historical cell site
24 information is obtained even in the absence of a call or text
25 message. The location of the cell tower associated with a

1 given communication, including the time of the communication,
2 is retained by a cell phone provider, in this case Sprint.
3 The duration of time that this information is retained is
4 determined by the cell phone provider and varies from company
5 to company. Agent Horan analyzed the data provided in an
6 effort to identify the location of the cell phone at certain
7 times pertinent to the investigation. Through his training,
8 he knows that there are two methods of analyzing this data
9 which he identifies as, one, longitude and latitude, two,
10 another acronym, A-R-C, ARC. He uses the ARC method which he
11 believes to be more precise. Through the use of this
12 analytical method, he is able to locate the target cell phone
13 with varying degrees of exactitude depending on the location
14 of the cell towers and whether one or two cell tower can
15 track the phone. In this case, at various times he is able
16 to locate the phone from within one-tenth of a mile to
17 six-tenths of a mile. Collection of data is used by the cell
18 provider for several reasons. One reason is to assure the
19 quality of their delivery of service which includes
20 determining if the traffic at certain cell sites is such as
21 to warrant additional or fewer cell towers to provide
22 service. Another reason for collecting this data is because
23 it is required by law. U.S. Congress passed Communications
24 Assistance to Law Enforcement Act, CALEA, to aid law
25 enforcement in its efforts to conduct criminal investigations

1 requiring wiretapping of digital telephone networks. The Act
2 obliges telecommunication companies to make it possible for
3 law enforcement agencies to tap any phone conversations
4 carried out over networks as well as making call detail
5 records available. The Act stipulates that it must not be
6 possible for a person to detect that his or her conversation
7 is being monitored by the respective government agency.
8 Sprint's privacy policy specifically states that Sprint
9 automatically collects location information about where the
10 user's device is located when it is turned on. The policy
11 also states that the location information can be disclosed to
12 comply with lawful requests or legal process.

13 That's what I have. Now, you wanted had to add
14 something else, Chad?

15 MR. BROWN: Yes. First off, I don't have a
16 problem with that stipulation. We discussed that.

17 THE COURT: So the record will show that both
18 parties stipulate that Agent Horan -- very special Agent
19 Horan, would testify as Mr. Riley just read into the record.

20 Okay. Go ahead. Mr. Brown, what do you want?

21 MR. BROWN: The only other piece of the
22 stipulation that I suggested is that when Mr. Riley
23 specifically asked Agent Horan, can you tell me that you can
24 pinpoint his location within the margin of error of plus or
25 minus a tenth of a mile on that ARC, Agent Horan's response

1 would be no. It's another piece of -- I think he said it's
2 another problem of that. And I believe in his communication,
3 what he's saying it's another piece of circumstantial
4 evidence in conjunction with anything else that puts him
5 there, but specifically, he cannot pinpoint this phone and
6 tell for certain where he's at even with that plus or minus
7 tenth of a mile. That's the only other piece of the
8 stipulation I would add.

9 THE COURT: Agreed?

10 MR. RILEY: Yes, I agree that's what he said.
11 How credible it is is another matter. But that's what he
12 said. So I agree with that.

13 THE COURT: All right. The Court will accept
14 the stipulation.

15 Anything further you wish to get into the record for
16 the purposes of the suppression motion?

17 MR. RILEY: No, Judge.

18 THE COURT: Mr. Brown, anything further?

19 MR. BROWN: The only other thing I would ask
20 for to be on the record is, in the event the Court does find
21 there's a Fourth Amendment protection here, that there is a
22 violation pursuant to that court order or what the police
23 have called a search warrant, the State would formally make
24 the argument of the good faith exception to the exclusion
25 rule, and I would just ask that that argument be a part of

1 the record so the Court can consider that.

2 THE COURT: The Court deems that argument to
3 have been made.

4 Anything further?

5 MR. RILEY: I have nothing.

6 THE COURT: All right. We're all done. Thank
7 you all. Everybody is excused.

8 (Adjournment Accordingly.)

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