

Appendix

1

Supreme Court
of the
State of New York



100 CENTRE STREET
NEW YORK, N.Y. 10013

January 19, 2017.

ALUJAH CUTTS DIN: 12 A 3019
Great Meadow Correctional Facility
11739 State Route 22
P.O. Box 51
Comstock, New York 12821-0051

Please be advised that on January 11, 2017, the Hon. Juan Manuel Merchan rendered a decision denying your CPL §440 motion.
Enclosed is a certified copy of the Decision/Order.

Your right to an appeal from the order determining your motion is not automatic except in the single instance where the motion was made pursuant to CPL §440.30(1-a) for forensic DNA testing of evidence. For all other motions under article 440, you must apply to a Justice of the Appellate Division, First Department, for a certificate granting leave to appeal. This application must be filed within 30 days after your being served with the court order denying your motion. You may also apply for leave to appeal as a poor person.

The application must contain your name and address, indictment number, the questions of law or fact which you believe ought to be reviewed and a statement that no prior application for such certificate has been made. You must include a copy of the court decision and/or order of the court.

You must mail your application to the Appellate Division, First Department, 27 Madison Avenue, New York, NY 10010. In addition, you must serve a copy of your application on the New York County District Attorney's Office, One Hogan Place, New York, NY 10013.

If the Appellate Division issues a certificate granting you leave to appeal, you must follow the directions on the certificate concerning additional steps you must take within 15 days pursuant to CPL §460.10(4)(b).

Respectfully,

K. Carney, SCC
Motion Clerk
Supreme Court-New York County

enc.

cc: ADA S. Strain

Supreme Court
of the
State of New York

Part 59 - New York County

-----X
The People of the State of New York

INDICTMENT: 3923-2009

MOTION FOR: CPL §440.10

-against-

ALUJAH CUTTS

CALENDAR DATE:
September 22 , 2016

Defendant
-----X

Ordered that upon the papers submitted, this motion is hereby

GRANTED _____

DENIED _____

Date 9.11.17

Hon. [Signature]

Supreme Court
of the
State of New York

Part 59 - New York County

-----X
The People of the State of New York

INDICTMENT: 3923-2009

-against-

MOTION FOR: CPL §440.10

ALUJAH CUTTS

CALENDAR DATE:
September 22 , 2016

Defendant
-----X

Ordered that upon the papers submitted, this motion is hereby

GRANTED _____

DENIED ☒ _____

Date 9-11-17

Hon. [Signature]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 59

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ALJULAH CUTTS,

Defendant.
-----X

DECISION AND ORDER

Indictment Number: 03923-2009

HON. JUAN M. MERCHAN, A.J.S.C.:

On June 20, 2012, the Defendant was sentenced to an aggregate prison term of twenty-five years to life, to be followed by five years of post-release supervision, after being found guilty of Murder in the First Degree (Penal Law § 125.27[1][a][vii][b]), Murder in the Second Degree (Penal Law § 125.25[3]), and Robbery in the First Degree (Penal Law § 160.15[1]). The judgment of conviction was affirmed by the Appellate Division, First Department on November 24, 2015. *People v. Cutts*, 133 A.D.3d 544 (1st Dept. 2015).

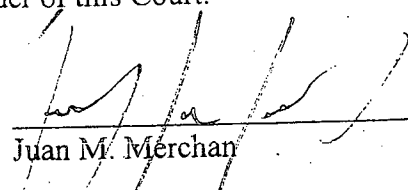
Defendant moves, pursuant to Criminal Procedure Law § 440.10 (hereinafter "CPL"), to vacate his judgment of conviction on two grounds. First, he claims that the police exceeded the scope of a search warrant, which authorized the installation and use of a pen register and trap and trace device on his cell phone but alleges that the authorization was limited to the date of the crime. He claims the police used that limited authorization to determine his real-time geographic location in order to arrest him, thus violating his right against unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article I, § 12 to the New York Constitution. Second, he claims that his trial counsel failed to assert the Fourth Amendment claim and, consequently, failed to provide Defendant with the effective assistance of counsel in violation

of the Sixth Amendment to the United States Constitution and Article I, § 6 to the New York Constitution.

Defendant's Fourth Amendment claim is procedurally barred, pursuant to CPL § 440.10(2)(c), because sufficient facts appear on the record of the proceedings to have permitted appellate review but the claim was not raised on appeal. *See Cutts*, 133 A.d.3d at 545. In any event, the claim is meritless. As the People correctly argue, the search warrant (a copy of which the People have appended to their opposition papers) authorized the wireless company to provide the police with historical as well as real-time cell site information, thus, making Defendant's claim that counsel was ineffective for not asserting that the police had exceeded the scope of the search warrant meritless. Defendant's remaining claims of ineffective assistance are denied, pursuant to CPL §§ 440.30(4)(a) and (b), because they either lack a legal basis or the motion does not contain sworn allegations substantiating all the essential facts.

This opinion constitutes the decision and order of this Court.

Dated: January 11, 2017
New York, New York



Juan M. Merchan

Judge of the Court of Claims
Acting Justice - Supreme Court

Appendix

2

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. Dianne T. Renwick
Justice of the Appellate Division

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The People of the State of New York,

M-1320
Ind. No. 3923/09

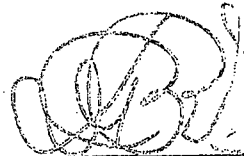
-against-

CERTIFICATE
DENYING LEAVE

Aljulah Cutts.

Defendant.
-----X

I, Hon. Dianne T. Renwick, a Justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application timely made by the above-named defendant for a certificate pursuant to Criminal Procedure Law, sections 450.15 and 460.15, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, New York County, entered on or about January 11, 2017 is hereby denied.



Associate Justice

Dated: April 6, 2017
New York, New York

ENTERED: APR 8 2017

Appendix

3

Supreme Court
of the
State of New York



100 CENTRE STREET
New York, N.Y. 10013

January 28, 2019

Mr. Aljulah Cutts 12A3019
Great Meadow Correctional Facility
PO Box 51
Comstock, New York 12821-0051

Ind.# 3923-09

Dear Mr. Cutts:

In response to your motion filed in this court, please be advised that the Hon. Juan M. Merchan rendered a decision denying your CPLR §2221 motion.

Enclosed is a certified copy of the decision/order.

Respectfully yours,

A handwritten signature in black ink, appearing to read "F. Halwick", is written over a horizontal line.

F. Halwick, ACC
CAP Unit

Supreme Court, Criminal Term

enc.

cc: ADA S. Strain

Supreme Court
of the
State of New York

Part 59 - New York County

-----X
The People of the State of New York

INDICTMENT: 3923-09

-against-

MOTION FOR: CPLR § 2221

Aljulah Cutts,

CALENDAR DATE: September 13, 2018

Defendant
-----X

Ordered that upon the papers submitted, this motion is hereby

GRANTED _____

DENIED ✓ _____ DATE _____

I hereby certify that the foregoing
is a true copy of the original
filed for the Court.

Date 11.07.18

Hon. [Signature]

PT. 59 NOV. 07 2018

HON. JOAN M. MERCHAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 59

----- X
THE PEOPLE OF THE STATE OF NEW YORK,

-against-

ALJULAH CUTTS,

Defendant.

:
: DECISION AND ORDER
:

: Indictment Number: 3923-09
:

HON. JUAN M. MERCHAN, A.J.S.C.:

The Defendant was convicted on June 20, 2012, after a jury trial, of Murder in the First Degree, Murder in the Second Degree, and Robbery in the First Degree. He subsequently moved before this court for an order vacating his conviction pursuant to Criminal Procedure Law (hereinafter "C.P.L.") §440.10 on the ground that, *inter alia*, the police exceeded the scope of a search warrant when they allegedly obtained cell-site location information ("CSLI") to determine his whereabouts in order to arrest him.¹ In a decision dated January 11, 2017, this Court held that his claim was procedurally barred because sufficient facts appeared in the record to have permitted appellate review but the claim was not raised on appeal.² Moreover, this Court found his claim that counsel was ineffective for failing to assert that the police

¹ "Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called 'cell sites...' Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site... Each time the phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store CSLI for their own business purposes." An individual's physical movements can be captured through CSLI. See *Carpenter v. United States*, 138 S.Ct. 2206, 2211-2212 (2018).

² See *People v. Cutts*, 133 A.D.3d 544 (1st Dept. 2015), lv. den. 26 N.Y.3d 1144 (2016).

had exceeded the scope of the search warrant to be meritless, as the search warrant at issue did authorize the wireless company to provide the police with the historical as well as real-time cell site information, which was used to locate the defendant and led to his arrest.³

Defendant now moves, *pro se*, for an order pursuant to Civil Procedure Law and Rules (CPLR) §2221 (e)(2) granting leave to renew his previously decided C.P.L. §440.10 motion on the ground that *Carpenter v. United States*, 138 S.Ct. 2206 (June 22, 2018), a recently decided United States Court of Appeals decision, invalidates this Court's previous C.P.L. §440 decision. CPLR §2221 (e)(2) provides that a motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination. The defendant contends that *Carpenter* constitutes a significant change in the law, as it represents a departure from the United States Supreme Court's prior jurisprudence.

The People argue that *Carpenter* is not a retroactive change of controlling law that would change the outcome of the judgment herein. They also argue that the court order authorizing the installation of a pen register and trap device in this case does satisfy the *Carpenter* requirement as it was "effectively a warrant supported by probable cause." The People further maintain that, if *Carpenter* were to apply retroactively, the exclusionary rule would not apply to the Defendant's cell-site location information data because the People relied on binding precedent at the time, which held in New York State that obtaining a defendant's CSLI data without a warrant did not violate the Fourth Amendment. In support, the People cite cases in which New York Appellate Courts have found that defendants had no reasonable expectation of privacy while traveling in public, nor did they have any such reasonable expectation

DATE
I hereby certify that the foregoing
is a true copy of the original
as filed in my office.

³ Defendant, and the Court, refer to a search warrant (which was also issued in this case), however the document in question is actually a "court order authorizing the installation of a pen register and trap device."

of privacy in information voluntarily disclosed to third parties.⁴ Thus, the People argue that applying the exclusionary rule to CSLI data that was collected based on the law at the time would not deter unlawful searches in the future. Finally, they maintain that the Defendant's guilt was established notwithstanding the cell site data, as there was overwhelming evidence that he committed the crimes.

In a reply affidavit, Defendant contends that the People failed to address the issue of ineffective assistance of counsel in their response to his reargument motion. He reiterates his previously-rejected argument, that trial counsel failed to conduct basic research into the propriety of obtaining CSLI under an order pursuant to the Stored Communications Act (SCA) found in 18 USC §2703(d), and failed to challenge the warrantless tracking of his cellular device. Defendant further replied that the violation of his constitutional rights, as articulated in *Carpenter*, cuts against the quantum of evidence that the People characterize as "overwhelming."

In *Carpenter v. United States*, *supra*, law enforcement obtained location-related data on the defendant's cell phone site record pursuant to a court order issued under the SCA, which required the government to show "reasonable grounds for believing that the records were relevant and material to an ongoing investigation." The United States Supreme Court found that the Government's acquisition of historical cell site records revealing the aggregated location information of a defendant constituted a search under the Fourth Amendment. The Court noted that "cell phone location information (CSLI) is detailed, encyclopedic, and effortlessly compiled...An "individual maintains a legitimate expectation of privacy in records of his physical movements as captured through CSLI." *Carpenter*, *supra* at 2216. The Court held that a warrant supported by probable cause must generally be obtained before acquiring such records, and that the

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paper is a true copy of the
themselves, filed in my office.

⁴ See *People v. Hall*, 86 A.D.3d 450 (1st Dept. 2011), l.v. den. 19 N.Y.3d 961 (2012); *People v. Sorrentino*, 93 A.D.3d 450 (1st Dept. 2012), l.v. den. 19 N.Y.3d 977 (2012); *People v. Jiles*, 158 A.D.3d 75 (4th Dept. 2017), l.v. den. 31 N.Y.3d 1149 (2018).

showing under the SCA fell "well short of the probable cause required for a warrant." *Carpenter*, *supra* at 2221.

The *Carpenter* Court did not specifically address whether its ruling should be applied retroactively and New York State appellate courts have not yet addressed *Carpenter*'s application. Notwithstanding, if *Carpenter* is to be treated as announcing a new rule under *Teague v. Lane*, 489 U.S. 288 (1989)⁵, defendants whose convictions became final prior to *Carpenter* cannot benefit from its holding. See *Chaidez v. United States*, 133 S.Ct. 1103 (2013) ("*Teague* makes the retroactivity of our criminal procedure decisions turn on whether they are novel. When we announce a 'new rule,' a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding. Only when we apply a settled rule may a person avail herself of the decision on collateral review." *Chaidez* at 347). This Defendant's conviction became final well before *Carpenter* was pronounced, when his application for leave to appeal to the Court of Appeals was denied. See *People v. Cutts*, *supra*.

Consequently, the motion is procedurally barred pursuant to CPL 440.10(3)(b), which provides that the court may deny a motion to vacate a judgment when the grounds or issues raised in the motion were previously determined on the merits in a prior motion *absent a retroactively effective change in the law* (emphasis supplied). Defendant's motion raises claims previously denied by this court, and there is no retroactively effective change in the law to alter such denial. In the alternative, assuming *arguendo* that *Carpenter* does apply retroactively, the result herein would remain unchanged, as the court order in this case was indeed supported by probable cause (unlike the court order in *Carpenter*) and

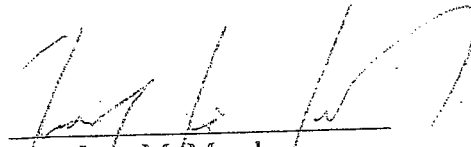
The United States Supreme Court held in *Teague* that the question of whether federal constitutional rules apply retroactively to cases no longer subject to direct review hinges on whether a rule is "old" (in which case it is retroactively applicable) or "new" in which case it is not. *People v. Baret*, 23 N.Y.3d 777, 783-784, (2014), *cert. den.* 135 S.Ct. 961. A rule is "new" when "the result was not *dictated* by prior precedent existing at the time the defendant's conviction became final" while a constitutional rule which is "susceptible to debate among reasonable minds" qualifies as a new rule. *Baret* at 784 (citation and internal quotations omitted) (emphasis in original).

authorized the wireless company to provide the police with historical as well as real-time cell site information. The order authorized the installation and use of a pen register and a trap device, including caller identification and cell site information, and indicated that "[p]robable cause has been established to show that GPS/precision location is relevant to an ongoing criminal investigation." See order of Hon. Kevin B. McGrath, Jr., J., dated August 5, 2009. Thus, the order obtained to locate and arrest Defendant fully complied with the requirement under *Carpenter*.

This opinion constitutes the Decision and Order of the Court.

Dated: November 7, 2018
New York, New York

PT. 59 NOV 07 2018



Juan M. Merchan
Judge of the Court of Claims
Acting Justice - Supreme Court

HON. JUAN M. MERCHAN

Appendix

4

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. Ellen Gesmer
Justice of the Appellate Division

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The People of the State of New York,

M-940
Ind. No. 3923/2009

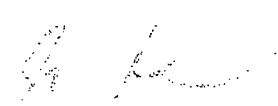
-against-

CERTIFICATE
DENYING LEAVE

Aljulah Cutts,

Defendant.
-----X

I, Ellen Gesmer, a Justice of the Appellate Division, First Judicial Department, certify that, upon the application of the above-named defendant for a certificate pursuant to Criminal Procedure Law, sections 450.15 and 460.15, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, New York County, entered on or about November 7, 2018, is denied.



Hon. Ellen Gesmer
Associate Justice

Dated: April 1, 2019
New York, New York

ENTERED: MAY 21 2019

**Additional material
from this filing is
available in the
Clerk's Office.**