ORIGINAL

No. 21-5379

IN THE

SUPREME COURT OF THE UNITED STATES

JEROME MACK- PETITIONER

VS.

PEOPLE OF THE SATE NEW YORK-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED FOR REVIEW

1. Does expressing a finding of probable cause in a court order authorizing the acquisition of cell site information effectively make the court order a warrant, for the purposes of Carpenter v. United States, 138 S.Ct. 2206 (2018)?

2. Should the cell site location information obtained from warrantless search gathered through a wireless company have been suppressed; and is Carpenter binding on cases that were not final at the time of the Supreme Court's ruling?

LIST OF PARTIES

[√] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all Parties to the proceeding in the court whose judgment is the subject of this Petition is as follow:

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INDEX TO APPENDICES

APPENDIX A – Court Order Subpoena for Cellsite Information for cell phone numbers (917) 531-2443 and (917) 549-3793 (Jerome Mack's phones). .

APPENDIX B – Warrant Application for Cellsite Information for Samsung Galaxy 5 S, Model Number SM-G900A, Serial Number R38F31FK87K (Edgar Wilson's phone).

APPENDIX C - Lower Courts Decisions

Petitioner Direct Appeal was Affirmed on May 27, 2020. See People v. Mack, 183 A.D. 3d 916 [2nd Dept. 2020]

Leave to Appeal to the New York Court of Appeals was denied on September 18, 2020. See People v. Mack, 35 N.Y. 3d 1092.

TABLE OF AUTHORIZES CITED

Cases

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

- The Appellate Division, Second Department, did not address the issue before this court, although the issue was raised in the pro se supplemental brief. The Court ruled that the remaining issues in petitioner's pro se supplemental brief were meritless. See, People v. Mack, 183 A.D.3d 916 (2020).
- The New York Court of Appeals denied leave appeal on September 18, 2020. People v. Mack, 35 N.Y.3d 1095 (2020)

RELEVANT CONSTITUTIONAL PROVISION

- The Fourth Amendment to the United States provides in relevant part "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."
- The Fourteen Amendment to the United States Constitution provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

THE STATEMENT OF FACTS

On October 9, 2014, the defendant was arrested and subsequently charged with Attempted Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree.

The charges against the defendant stemmed ostensibly from the shooting of Devon Simmons which occurred on October 9, 2014. Devon Simmons was released from Otisville Correctional Facility earlier that day and was picked up at the facility by individuals alleged to be driving a white Hyundai Sonata.

Mr. Simmons was later found by Mount Hope Police Officer, Kevin McGrath at the Otisville train station. Mr. Simmons was found laying on the platform covered in blood.

It was alleged that the defendant and his alleged accomplice had conspired to pick up Mr. Simmons from the Otisville Correctional Facility in an attempt to kill Mr. Simmons.

On October 9, 2014, petitioner and codefendant Edgar Wilson were arrested in New York City and transported to Orange County.

On October 30, 2014, the defendant was subsequently arraigned in County Court on indictment #2014-649. He was indicted on the charges of Attempted Murder in the Second Degree, assault in the First Degree, Criminal Possession of a Weapon in the Second Degree, Criminal Use of a Firearm in the First Degree, Conspiracy in the Second Degree, Conspiracy in the Fourth Degree, Grand Larceny in the Fourth Degree and Criminal Possession of Stolen Property.

On November 7, 2014, the People applied for a search warrant to seize the cell site location information for codefendant Edger Wilson's phone.

On November 10, 2014, counsel filed a motion for discovery. Counsel specifically requested, "All search warrants, including affidavits, supporting documents and returns in connection thereto, as well as a list of all items seized by reason of such warrant(s), and all arrest warrants and supporting affidavits, drafted in relation to this matter."

On December 5, 2014, defense counsel, Alex Smith, filed an omnibus motion. Among the issues addressed in counsel's motion was the suppression of unlawfully obtained evidence.

On January 9, 2015, the Court issued an order directing SPRINT/NEXTEL corporation to provide the Orange County District Attorney's Office and/or the New York State Police with cell site location information for petitioner's phones.

After a jury trial, petitioner was convicted of Attempted Murder, Assault in the First Degree, Criminal Possession of a weapon in the Second Degree, Criminal Use of a Firearm in the First Degree, Conspiracy in the Fourth Degree and Criminal Possession of Stolen Property.

On June 1, 2015, the Court sentenced petitioner to an aggregate sentence of 30 years imprisonment followed by 10 years of post release supervision.

REASON FOR GRANTING THE WRIT

POINT I

CELL SITE LOCATION INFORMATION OBTAINED FROM WARRANTLESS SEARCH SHOULD HAVE BEEN SUPPRESSED; AND THE HOLDING IN CARPENTER IS BINDING ON THE INSTANT CASE SINCE THE INSTANT CASE WAS NOT FINAL AT THE TIME OF THE SUPREME COURT'S RULING IN CARPENTER.

A. A Court Ordered Subpoena Can Not Be Used As A Substitute For A Warrant

Under United States v. Carpenter, 138 S.Ct. 2206 (2018), an individual maintains a legitimate expectation of privacy for Fourth Amendment purposes in the record of his physical movements as captured through cell site location information. The government must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier. Consequently, an order issued under section 2703(d) of the Stored Communication Act (SCA) is not a permissible mechanism for accessing historical cell-site records.

On October 9, 2014 petitioner was arrested for attempted murder and other charges. Six warrants were issued in relation to this investigation: one for petitioner's home; two for the vehicle suspected to have been used during the alleged crime; two for the home of co-defendant Edgar Wilson; and one for the cell phone of Edgar Wilson. The warrants were issued between October 10, 2014, and November 7, 2014.

In contrast to obtaining a warrant for the CSLI in connection with Wilson's phone, Judge Jeffrey G. Berry signed a court order pursuant to USC 18 §2703 on

January 9, 2015, directing the Sprint/Nextel Corporation to turn over cell site location information for phone numbers (917) 549-3793 and (917) 531-2443, for the time period of October 1, 2014 through October 10, 2014; this court order was based on an application submitted by Senior Investigator Joseph Kolek (Appendix A)..

The above court order resulted in 156 pages of cell-site information as well as two maps depicting cell-site locations for the above mentioned phone numbers. As there was no physical evidence connecting the petitioner to the alleged crimes, District Attorney Michael Milza relied heavily upon this illegally obtained information. In an effort to tie petitioner's movements to the alleged crimes, the People subpoenaed Sprint/Nextel representative Joseph Trawecki to testify at trial regarding the cell-site information obtained by the court order (TT.[1] 4/22/15, pgs. 853-869).

During closing arguments the People referred to it as "the evidence that cannot lie, that cannot be mistaken" (closing Arguments, pg 50, Lines 2, 3 and 5); and again on the very same page as "incontrovertible" (See, closing arguments pg. 50 lines 10-12). The People refer to the cell-site information again on pg 60 lines 15-18, pg 61, lines 13-25, -g 62 lines 1 and 2; pg 73-78, pg. 79, lines 13-18, pg 83 line 25, 25, pg 84, lines 1-4. Of 36 pages of closing arguments almost half are about or refer to the illegally obtained cell-site information.

[1] **For the convenience of the court, all references to transcripts baring the following abbreviations TT (Trial Transcript); PTH (PreTrial Hearing); GJ (Grand Jury); Proceedings (Trial) S or Sent (Sentencing Hearing) relate to the stated hearings, etc. All evidence and documents presented herein as exhibits were generated by the Respondents and submitted by them as evidence in support of their case at trial.**

Carpenter had not been decided at this point; However, United States v. Jones, 565 U.S. 400 (2012), addressed a person's expectation of privacy in his physical location and movements and was decided in 2012, two years before petitioner's arrest. Carpenter declined to extend Smith v. Maryland, 442 U.S. 735 (1979) and United States v. Miller, 425 U.S. 435 (1976), decisions to cover cell-site location information it does not however fail to extend Jones.

It is important to note that in this case investigator Joseph Kolek submitted an application for a warrant to obtain cell-site location information from the phone of co-defendant Edgar Wilson on 11/7/14. See, Appendix A (Warrant Application date 11/7/14, notarized by Hon. Jeffrey G. Berry). A warrant for the cell-site information of Edgar Wilson's phone and other data was issued on 11/7/14. The People neglected to obtain a warrant for the cell-site data of the phones listed under the subscriber information of Jerome Mack, even though the people had every opportunity to do so.

While Carpenter does allow for certain exigent circumstances to obtain CSLI without a warrant, none of those instances are applicable to the case at bar. The People had the time and means to secure a valid search warrant for petitioner's phone records, as they had done for co-defendant Wilson's.

By circumventing the process of obtaining a warrant, the People effectively prevented petitioner from controverting the validity of the search and seizure of his phone records in order to track his personal movements through cell site location information. In doing so, the People violated petitioner's Fourth Amendment Rights.

If the People had acquired the requisite warrant, the petitioner would have been afforded the opportunity to be heard and put forth grounds on which the seized information might be suppressed. However, the law does not give a defendant standing on which to quash a court ordered subpoena. See, Miller, supra at 444; also see, People v. Harris, 36 Misc.3d 613, 616 (2012).]

Conversely, it is well settled that a defendant is entitled to a hearing under both New York State and Federal law, in which he may challenge the truthfulness of the allegations in the affidavit supporting a search warrant only where he attacks the veracity of the police officer affiant, and not where the credibility of the source of information is challenged (People v. Slaughter, 37 N.Y.2d 596 (1975); Franks v. Delaware, 438 U.S. 154 (1978). Therein, the United States Supreme Court stated:

> **Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the alleged false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.**
>
> **The truthfulness of the statements by the affiant does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true.**
>
> **The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any non-governmental informant (Supra, at 155-156)**

Accordingly, petitioner was entitled to be heard before the CSLI was ever allowed to be admitted into evidence. Thus, the court ordered subpoena violated this court's the holding in Carpenter.

The People rely on the Appellate Court's decision in People v. Clark, 171 A.D.3d 942 (2019), where the Court held:

> **"[T]he court order authorizing the acquisition of the records made as express finding of probable cause, which was supported by the People's evidentiary showing. Accordingly, the order "was effectively a warrant" which complied with the requirement of Carpenter."** (citations omitted) Id. at 943

However, Carpenter changed the landscape for CSLI and "[a]s a matter of due process, the defendant must be afforded an opportunity to be heard." Id, at 386. The order in the instant case relied on the same statute used in Carpenter, the Stored Communication Act, although the judge in the instant case found probable cause to support the warrant. However, the petitioner has not had the opportunity to challenge the finding of probable cause to issue the court order. At the time of the issuance of the court order in this case, the law in New York was that an individual does not have a legitimate expectation of privacy in his/her CSLI. Therefore, there was no legal basis for the petitioner to challenge the acquisition of this evidence and no due process rights of the defendant were violated. Giving the holding in Carpenter, the defendant now has standing to challenge the acquisition of his CSLI records held by a third-party cell phone carrier, and therefore, certain due process rights related to the finding of probable cause.

The New York Court of Appeals noted in Matter of Abe A., 56 N.Y.2d 288, 296 (1982):

> **"At this point it seems appropriate to add, since here there was no exigency, that the course followed by the People in bringing on its original application on notice to the suspect was no more than is required by such circumstances. After all, when frustration of the purpose of the application is not at risk, it is an elementary tenet of due process that the target of the application be afforded the opportunity to be heard in opposition before his or her constitutional right to be left alone may be infringed."** (citations omitted).

The People's reliance on Clark, and more specifically, the phrase in the subpoena of a finding of "probable cause" is misplaced, because the cell site location information was admitted into evidence in violation of appellant's due process right to be heard regarding allegations alleged in the subpoena.

Petitioner appeared before the Court on January 9, 2015, yet the record is devoid of any mention of an application for C.S.L.I. Thus, it was sometime before or after appellant's appearance that the court ordered the subpoena on January 9, 2015, and the defendant was not afforded the opportunity to be heard then or at any time thereafter.

If the courts in New York are allowed to set the precedent that a court order articulating a finding of probable cause is effectively a warrant, it would give the subpoena the same power as a warrant while stripping a criminal defendant of vehicles such as Mapp/Dunaway hearings used to controvert the basis for the order. Such a precedent would allow prosecutors to subvert the protections afforded under the Fourth Amendment of the Constitution.

B. Carpenter Is Binding On Cases Not Final At The Time Of The Court's Ruling

Since the petitioner's conviction was not final, as his direct appeal was *sub judice*, he was entitled to any benefit from the ruling in Carpenter. The New York State Court of Appeals has ruled that cases on direct appeal are generally decided in accordance with the law as it exists at the time the Appellate Decision is made. (See People v. Favor, 82 N.Y.2d 254; People v. Vasquez, 88 N.Y.2 561; People v. Jean-Baptiste, 11 N.Y.3d 539 (2008).

The United States Supreme Court has held that "our prior decisions establish a general rule that a change in the law occurring after a relevant event in a case will be given effect while the case is on direct review." (See, Hamlin v. United States, 418 U.S. 87 (1974).

Accordingly, the controlling authority in petitioner's case is United States v. Carpenter, supra, since direct review was still pending and the judgment had not yet become final. The petitioner should have benefited from the relief required under Carpenter. See, Hamlin, supra; also see People v. Streeter, 112 A.D.2d 332 (1985).

In relation to the Carpenter issue, there is no question that Petitioner can benefit from the Supreme Court's holdings in Carpenter. See, Hamlin, supra. The Second Department has long held that "direct appeals are not final in New York State until an application for leave to appeal to the New York State Court of Appeal is denied or the Court affirms the Appellate Division's ruling." (see, People v. Breazil, 31 A.D.3d 461 (2006); People v. Jordan, 167 AD3d1044).

At the outset of proceedings, defense counsel made an attempt to challenge all the known "search warrants" in his Omnibus Motion in December, 2014. In total, defense counsel challenged six (6) search warrants, none of which included "cell site location information," because they were acquired by court subpoena and Carpenter had yet to be decided.

Contrary to the People's position, petitioner's Carpenter issue was preserved for appellate review. As the lower court noted in People v. Simpson, 62 Misc3d 374, 389 (2018) "[a]t the time of the issuance of the Court order in this case, the law in New York was that an individual does not have a legitimate expectation of privacy in his/her CSLI." Since Carpenter, "the defendant now has standing to challenge the acquisition of his CSLI records held by a third-party cell phone carrier, and therefore, certain due process right related to the finding of probable cause." Id.

CONCLUSION

For the foregoing reasons this honorable court should grant petitioner the Writ of Certiorari and rule in the totality of all the circumstances found in this petition. Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Dated: December 15, 2020

Respectfully Submitted,

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