

APPENDIX

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311 So.3d 303
District Court of Appeal of Florida, First District.

Brandon Joshua BAILEY, Appellant,

v.

STATE of Florida, Appellee.

No. 1D18-4514

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November 16, 2020

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Rehearing Denied February 8, 2021

Synopsis

Background: After denial of defendant's motion to suppress GPS records tracking his travel in borrowed car, which were transmitted to car owner's financing company, and obtained without warrant by law enforcement, defendant was convicted in the Circuit Court, 4th Judicial Circuit, Duval County, [Charles W. Arnold](#), Senior Judge, of first-degree murder, armed robbery, and possession of a firearm by a convicted felon. Defendant appealed.

Holdings: The District Court of Appeal, [M. Kemmerly Thomas, J.](#), held that:

[1] defendant had no objectively reasonable expectation of privacy in GPS records; and

[2] defendant did not demonstrate a subjective expectation of privacy in GPS records; but

[3] reversal and remand was required for trial court to determine defendant's competency to proceed.

Affirmed in part, reversed in part, and remanded.

[Osterhaus, J.](#), filed specially concurring opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (27)

[1] **Criminal Law** 🔑 Reception of evidence

A trial court's ruling on a motion to suppress evidence comes to the Court of Appeal with a presumption of correctness.

[2] **Criminal Law** 🔑 Illegally obtained evidence

An appeal of a trial court's ruling on a motion to suppress evidence generally presents a mixed question of law and fact.

[3] **Courts** 🔑 Construction of federal Constitution, statutes, and treaties

State courts decide search and seizure issues in conformity with the Fourth Amendment decisions of the Supreme Court of the United States. [U.S. Const. Amend. 4](#).

[4] **Criminal Law** 🔑 Searches and seizures in general

In assessing a suppression motion, a court begins with two threshold questions: has there been a search and, if so, was it reasonable. [U.S. Const. Amend. 4](#).

[5] **Searches and Seizures** 🔑 Fourth Amendment and reasonableness in general

There must be a "search" or a "seizure" to trigger the Fourth Amendment's protections. [U.S. Const. Amend. 4](#).

[6] **Searches and Seizures** 🔑 Fourth Amendment and reasonableness in general

The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. [U.S. Const. Amend. 4](#).

[7] **Searches and Seizures** 🔑 Necessity of and preference for warrant, and exceptions in general

Generally, searches conducted outside the judicial process, without prior approval by

judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. [U.S. Const. Amend. 4](#).

purpose, the government will generally not be required to obtain a warrant before obtaining the information. [U.S. Const. Amend. 4](#).

[8] Searches and Seizures 🔑 What Constitutes Search or Seizure

Fourth Amendment searches now fall into two general hemispheres: trespassory searches in which the government physically intrudes onto the person or property of an individual, and intrusion into an area in which a person possesses a reasonable expectation of privacy. [U.S. Const. Amend. 4](#).

[9] Searches and Seizures 🔑 What Constitutes Search or Seizure

Searches and Seizures 🔑 Expectation of privacy

In order to claim protection from unreasonable search under the privacy-based approach to the Fourth Amendment, a defendant's conduct must exhibit an actual, subjective expectation of privacy and that subjective expectation must be one which society recognizes as objectively reasonable; where these two requirements are met, official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. [U.S. Const. Amend. 4](#).

[10] Searches and Seizures 🔑 Expectation of privacy

Generally, information that a person knowingly exposes to the public is not subject of Fourth Amendment protection. [U.S. Const. Amend. 4](#).

[11] Searches and Seizures 🔑 Expectation of privacy

If an individual has conveyed information to a third party or to the public at large, even if the information is revealed on the assumption that it will be used only for a limited

[12] Searches and Seizures 🔑 Expectation of privacy

The mere fact that an individual has on some level allowed information to be conveyed to a third party is not an end-all point of consideration preventing such individual from showing a subjective expectation of privacy in regards to a putative privacy interest, as required to bring such information within the protections of the Fourth Amendment. [U.S. Const. Amend. 4](#).

[13] Searches and Seizures 🔑 Expectation of privacy

The nature of particular documents sought must be considered in determining whether there is a legitimate expectation of privacy concerning their contents, such that law enforcement's acquisition of them is a “search” to which the protections of the Fourth Amendment apply. [U.S. Const. Amend. 4](#).

[14] Criminal Law 🔑 Persons entitled to object

Courts must examine every suppression of evidence claim based on a defendant's privacy interest on a case-by-case basis to determine whether a “search” occurred such that the protections of the Fourth Amendment apply. [U.S. Const. Amend. 4](#).

[15] Searches and Seizures 🔑 Expectation of privacy

The question of whether a privacy interest is one which society is prepared to recognize, as required for it to come within the protections of the Fourth Amendment, is informed by historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted. [U.S. Const. Amend. 4](#).

[16] Searches and Seizures 🔑 Fourth Amendment and reasonableness in general

In the context of historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted, the Fourth Amendment's primary goal is the prevention of activity which would lead to arbitrary and too-permeating police surveillance and power. *U.S. Const. Amend. 4.*

[17] Searches and Seizures 🔑 What Constitutes Search or Seizure

The “mosaic theory” applies a cumulative understanding of data collection by police and analyzes searches as a collective sequence of steps rather than individual ones; it considers police action to be viewed over time as a collective “mosaic” of surveillance and allows the whole picture to qualify as a protected Fourth Amendment search, even if the individual steps that contribute to the full picture do not, in isolation, reach that constitutional threshold. *U.S. Const. Amend. 4.*

[18] Searches and Seizures 🔑 Expectation of privacy

Telecommunications 🔑 Carrier's cooperation; pen registers and tracing

The harm inherent in a government's warrantless gathering of cell site location information is primarily borne of the virtual attachment of the cellular device to its owner—allowing for all-encompassing, perpetual tracking which penetrates private spheres—and of the fact that the overwhelming majority of individuals more or less must own a cell phone. *U.S. Const. Amend. 4.*

[19] Searches and Seizures 🔑 Expectation of privacy

Telecommunications 🔑 Carrier's cooperation; pen registers and tracing

Telecommunications 🔑 Transponders or "beepers" in general; warrantless proceedings

Because cars do not bear the same attachment as cellphones to their owners and cannot penetrate private spaces to the same degree, government acquisition of a vehicle's GPS data does not give rise to the same risk of all-encompassing surveillance as cell site location information, in the context of Fourth Amendment protection against unreasonable searches. *U.S. Const. Amend. 4.*

[20] Searches and Seizures 🔑 Expectation of privacy

Telecommunications 🔑 Carrier's cooperation; pen registers and tracing

Telecommunications 🔑 Transponders or "beepers" in general; warrantless proceedings

As an owner's vehicle is frequently in operation and driven by others, GPS tracking of cars does not provide police the level of personal surveillance contemplated with cell site location information, in the context of Fourth Amendment protection against unreasonable searches. *U.S. Const. Amend. 4.*

[21] Searches and Seizures 🔑 Expectation of privacy

Telecommunications 🔑 Carrier's cooperation; pen registers and tracing

Because cell phones are treated as almost a feature of human anatomy, tracking of a cell phone is tracking of the owner, in the context of the Fourth Amendment protection against unreasonable searches. *U.S. Const. Amend. 4.*

[22] Searches and Seizures 🔑 Expectation of privacy

Searches and Seizures 🔑 Private persons

Telecommunications 🔑 Transponders or "beepers" in general; warrantless proceedings

Murder defendant had no objectively reasonable expectation of privacy in GPS records transmitted from his borrowed car to car owner's

financing company such that law enforcement's warrantless acquisition of such records would constitute a "search" implicating the protections of the Fourth Amendment, even though GPS data was technically historical in nature; GPS records of the car's location during the commission of the offense were records of defendant's travels over public thoroughfares, car's owner consented to GPS tracking, and police played no role in recording the GPS information. *U.S. Const. Amend. 4.*

- [23] **Searches and Seizures** 🔑 Abandoned, surrendered, or disclaimed items

Searches and Seizures 🔑 Private persons

Telecommunications 🔑 Transponders or "beepers" in general; warrantless proceedings

Murder defendant did not demonstrate a subjective expectation of privacy in GPS records transmitted from his borrowed car to car owner's financing company such that law enforcement's warrantless acquisition of such records would constitute a "search" implicating the protections of the Fourth Amendment, even though GPS information was transferred to a third-party; car was not owned by defendant and was allegedly taken without permission, defendant used car to traverse public streets, car's owner had consented to tracking, and transmission of GPS information to financing company did not reflect a lack of voluntariness, as nothing forced defendant to borrow car, and other means of untracked travel were available to defendant. *U.S. Const. Amend. 4.*

- [24] **Courts** 🔑 Decisions of United States Courts as Authority in State Courts

The United States Supreme Court's decisions remain binding precedent until it sees fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.

- [25] **Courts** 🔑 Decisions of United States Courts as Authority in State Courts

If a United States Supreme Court precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the lower court should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.

- [26] **Criminal Law** 🔑 Mental examination; determination of competency

Criminal Law 🔑 Mental capacity

Reversal and remand was required for trial court to determine defendant's competency to proceed in prosecution for first-degree murder, armed robbery, and possession of a firearm; trial court ordered a competency evaluation on counsel's suggestion of incompetence, and record gave no indication as to whether expert's report was filed, any hearing was conducted, or defendant was found competent.

- [27] **Criminal Law** 🔑 Mental capacity

Criminal Law 🔑 Mandate and proceedings in lower court

On remand, trial court would be required either to make a retroactive determination of murder defendant's competency or to properly adjudicate defendant's present competency and, on a finding of competence, conduct a new trial.

*307 On appeal from the Circuit Court for Duval County. Charles W. Arnold, Judge.

Attorneys and Law Firms

Andy Thomas, Public Defender, and M. J. Lord, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Benjamin L. Hoffman, Assistant Attorney General, Tallahassee, for Appellee.

Opinion

M.K. Thomas, J.

Brandon Bailey (Appellant) appeals his judgment and sentence for first-degree murder, armed robbery, and possession of a firearm by a convicted felon. He raises three arguments for reversal. His second argument—that the affidavit used by police to obtain the search warrant for his cell phone records failed to establish probable cause—is rejected, and we affirm without further comment. Appellant's remaining arguments are that the trial court erred: 1) in denying his motion to suppress warrantlessly-obtained Global-Positioning-System (GPS) records tracking his movements in a borrowed car; and 2) by failing to conduct a formal competency hearing before proceeding to trial in light of a previous order for a competency evaluation. For the foregoing reasons, we affirm in part and reverse in part.

I.

In the early morning of February 17, 2016, Dustin Howell, the victim, was found shot to death in a park. His body had been stripped of valuables. Mr. Howell resided at an area hotel equipped with video cameras. Police were able to observe him on surveillance footage leaving the hotel with Appellant just after midnight. The footage also revealed Appellant returning to the hotel alone a few hours later.

Police learned that Appellant had been staying at the hotel with his girlfriend, the sole owner of a Honda Accord. The Honda was equipped with a GPS tracker by agreement between the girlfriend and her financing company.¹ At trial, she testified that she periodically gave Appellant permission to use her car. However, she acknowledged that on the night of the murder, she called police to report her car stolen because she did not know that Appellant had left with her car. She also testified that when her car was not returned the next day, she contacted her financing company to track the car's location.

Police contacted the automobile financing company and requested limited GPS records of the Honda's movements from the time of the murder through the following day. The records were provided without a warrant. The GPS recorded the Honda's location in timed increments. The records indicated that the Honda was stopped at a home in the vicinity of the park at 1:32 a.m. and remained there for a short time. The Honda then travelled from the home and stopped at the park (where the victim was later found) between 1:49 a.m. and 1:57 a.m. before returning to the home at 2:02 a.m.

***308** When police arrived at the home, the homeowner provided consent to view the home's surveillance cameras. The surveillance footage documented that the Honda had been driven to the home, consistent with the GPS data, and further documented that the codefendant and Appellant were present at the home. Warrants were obtained for a search of the home and for acquisition of the cell phone records of Appellant and the codefendant. Clothes matching those worn by Appellant on the night of the murder were found in the home, and the cell site location information (CSLI) from the cell phones matched the timeline of the GPS records.

After his indictment, Appellant moved to suppress the GPS records and all the fruits thereof, arguing that, pursuant to  *Carpenter v. United States*, — U.S. —, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018), he had a reasonable expectation of privacy in his movements across the public roads. Thus, when the police obtained the records showing his recent movements in the Honda without a warrant, an illegal search occurred. The trial court disagreed and denied the motion to suppress, reasoning as follows:

This was a third party GPS device that was not owned by the defendant; the defendant had no expectation of privacy on a device that was not his, nor the owner of the car, as it belonged to a finance company that put it on the car for the purpose of taking care of where it was in case they had to go repossess it. And the sheriff's office in this case was not required to obtain either a search warrant or a subpoena to go get the third party information based on the facts of this case. And the Court finds that  *Carpenter* just simply does not apply to this case.

Prior to trial, Appellant's attorney requested a competency evaluation which was granted by the trial court. However, the record falls silent regarding any further action taken on the matter.

II.

*Whether the Warrantless Acquisition of the
GPS Data Constitutes an Illegal Search*

[1] [2] [3] A trial court's ruling on a motion to suppress comes to this Court with a presumption of correctness. See *State v. Markus*, 211 So. 3d 894, 902 (Fla. 2017). An appeal of a trial court's ruling on a motion to suppress generally presents a mixed question of law and fact. See *Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002); *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001); *Duke v. State*, 255 So. 3d 478, 480 (Fla. 1st DCA 2018). Florida courts decide search and seizure issues in conformity with the Fourth Amendment decisions of the Supreme Court of the United States. Art. I, § 12, Fla. Const.; *Cox v. State*, 975 So. 2d 1163, 1166 (Fla. 1st DCA 2008).

Appellant argues the trial court erred in denying his motion to suppress because it improperly concluded that no search occurred when the police obtained the vehicle's GPS data—a legal issue reviewed de novo.² See *Pagan*, 830 So. 2d at 806. He *309 claims the police action constituted a “search” because he had a reasonable expectation of privacy in his movements while operating the vehicle owned by his girlfriend.³

[4] In assessing a suppression motion, the court begins with two threshold questions: 1) has there been a search; and 2) if so, was it reasonable? *United States v. Correa*, 908 F.3d 208, 217 (7th Cir. 2018); see also *Carpenter*, 138 S. Ct. at 2215 n.2 (cautioning against “conflat[ing] the threshold question whether a ‘search’ has occurred with the separate matter of whether the search was reasonable”). Pursuant to *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), we answer the initial question in the negative as Appellant did not have a reasonable expectation of privacy. We now flesh out our path to this end.

[5] [6] [7] The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Amend. IV, U.S. Const. Thus, there must be a “search” or a “seizure” to trigger the Fourth Amendment's protections. “The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.” *Morgan v. United States*, 323 F.3d

776, 780–81 (9th Cir. 2003) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991)). Generally, “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Upon its drafting and ratification, the Fourth Amendment was intended to prevent threats to individual liberty that were prevalent at the founding: intrusions by the government into private property. Such intrusions, in the late-eighteenth century, included general warrants and writs of assistance.

Carpenter, 138 S. Ct. at 2264 (Gorsuch, J., dissenting). Thus, historical analysis centered on the Fourth Amendment's

immediate connection to property. *Id.* at 2239 (Thomas, J., dissenting) (citing *United States v. Jones*, 565 U.S. 400, 405, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012)). However, in

1967, the Supreme Court redefined what constitutes “search” and “seizure” and expanded the protections of the Fourth Amendment to include “what [a person] seeks to preserve as

private, even in an area accessible to the public.” *Katz*, 389 U.S. at 351, 88 S.Ct. 507. Justice Harlan's concurrence in

Katz announced a new “twofold requirement” to establish Fourth Amendment protection: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ ” 389 U.S. at 361, 88 S.Ct.

507. This “*Katz* test” became the “lodestar” of Fourth Amendment analysis. *310 *Smith v. Maryland*, 442 U.S. 735, 749, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). “Over

time, the Court minimized the subjective prong of Justice Harlan's test. That left the objective prong—the ‘reasonable expectation of privacy’ test that the Court still applies today.”

Carpenter, 138 S. Ct. at 2238 (Thomas, J., dissenting) (citing Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. Chi. L. Rev. 113 (2015)).

Yet, “recent Fourth Amendment cases have clarified that the [*Katz*] test ... supplements, rather than displaces, ‘the traditional property-based understanding of the Fourth

Amendment.’ ” *Byrd v. United States*, — U.S. —, 138 S. Ct. 1518, 1526, 200 L.Ed.2d 805 (2018) (internal

citation omitted) (quoting [Florida v. Jardines](#), 569 U.S. 1, 11, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013)). The [Katz](#) mechanism has been touted as inconsistent, untenable, and ever-changing. [Carpenter](#), 138 S. Ct. at 2244 (Thomas, J., dissenting). The Supreme Court decisions in [Jones](#) in 2012 and [Carpenter](#) in 2018 further added to the murkiness of its application. As noted by Justice Alito in his concurring opinion in [Jones](#), “it is almost impossible to think of late-18th century situations that are analogous” to 21st-century surveillance techniques. [565 U.S. at 419, 132 S.Ct. 945](#). Regardless, the judiciary is “obligated, as subtler and more far-reaching means of invading privacy have become available to the government, to ensure that the progress of science does not erode Fourth Amendment protections.” [Carpenter](#), 138 S. Ct. at 2208.

[8] [9] Fourth Amendment searches now fall into two general hemispheres: 1) trespassory searches in which the government physically intrudes onto the person or property of an individual, and, 2) intrusion into an area in which a person possesses a reasonable expectation of privacy (the [Katz](#) test). [Jones](#), 565 U.S. at 405–08, 132 S.Ct. 945. Here, because there is unquestionably no issue of physical government trespass, Appellant must find relief via the [Katz](#) test, if he is to be relieved at all. He invokes only the privacy-based approach as there is no dispute that he was not the owner of the Honda which was tracked by GPS. To claim [Katz](#) protection under the privacy-based approach, an individual must have sought to preserve the information in question as private. [Carpenter](#), 138 S. Ct. at 2213. The conduct must exhibit an actual, subjective expectation of privacy and that subjective expectation is one which society recognizes as objectively reasonable. See [Knotts](#), 460 U.S. at 280–81, 103 S.Ct. 1081. Where these two requirements are met, “official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.” [Carpenter](#), 138 S. Ct. at 2213 (citing [Smith](#), 442 U.S. at 740, 99 S.Ct. 2577).

[10] [11] [12] [13] [14] The first question whether Appellant had a subjective expectation of privacy regarding the GPS data. Generally, information that a person “knowingly exposes to the public ... is not subject of Fourth

Amendment protection.” [United States v. Miller](#), 425 U.S. 435, 442, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976) (quoting [Katz](#), 389 U.S. at 351, 88 S.Ct. 507). Therefore, if an individual has conveyed information to a third party or to the public at large, “even if the information is revealed on the assumption that it will be used only for a limited purpose,” the government will generally not be required to obtain a warrant before obtaining the information. [Id.](#) That established, the mere fact that an individual has on some level allowed information to be conveyed to a third person is not an end-all point of consideration preventing successful application of the [Katz](#) test to a putative privacy interest. As emphasized in [311 Carpenter](#), “the nature of the particular documents sought” must be considered in determining whether “there is a legitimate expectation of privacy concerning their contents.” [138 S. Ct. at 2219](#) (rejecting a “mechanical application” of the third-party doctrine) (quoting [Miller](#), 425 U.S. at 442, 96 S.Ct. 1619). As such, courts must examine every [Katz](#) suppression claim on a case-by-case basis to determine whether a search occurred. [Carpenter](#), 138 S. Ct. at 2213–14.

[15] [16] The second question—whether the privacy interest is one which society is prepared to recognize—is “informed by historical understandings ‘of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.’ ” [Id.](#) at 2214 (quoting [Carroll v. United States](#), 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925)). Under this concept, the Fourth Amendment’s primary goal is the prevention of activity which would lead to “arbitrary” and “too permeating police surveillance” and power. [Id.](#) (quoting [Boyd v. United States](#), 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886)); see also [United States v. Di Re](#), 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948).⁴

Framework and precedent established; we now analyze whether Appellant’s expectation of privacy in his recent movements over public roads in a car that was being voluntarily tracked by GPS with consent of the owner is an expectation which society is prepared to recognize as reasonable. Appellant argues that [Carpenter](#) and [Jones](#) compel an affirmative response to the question.

In  *Carpenter*, the government compelled production of CSLI from a wireless carrier without a warrant.  138

S. Ct. at 2212. Although  *Carpenter* acknowledged that CSLI was constantly being transmitted by individuals to third parties, thus implicating third party principles,  *id.* at 2216, the Supreme Court determined that the nature of CSLI data and its transmission was unique and distinguishable.

 *Id.* at 2217–20. *Carpenter* declared that cell phones are ubiquitous in daily life and are ever-present on an individual's person. Thus, warrantless gathering of CSLI data would mean that the government essentially had an on-demand “ankle monitor” attached to the vast majority of people, allowing an individual's historical movements to be quickly and easily examined and revealing intimate details of a person's life.⁵

 *Id.* at 2218.

In the 5-4 decision, the  *Carpenter* majority concluded that all-encompassing location information was distinguishable from the limited information conveyed in the third-party cases of the past.  *Id.* The opinion acknowledged the differences in investigation techniques prior to the digital age *312 because the ability of the police to reconstruct an individual's past movements was limited “by a dearth of records and the frailties of recollection,” whereas the government's ability to review CSLI is limited only by the retention policy of wireless carriers.  *Id.* Of importance, the Supreme Court concluded that the “newfound tracking capacity” effected every individual in the nation with a cell phone, as opposed to the tracking only being applicable “to persons who might happen to come under investigation.”  *Id.*  *Carpenter* held that the government invaded a societally recognizable expectation of privacy “in the whole of [the defendant's] physical movements” when it accessed his CSLI data without a warrant.  *Id.* at 2219.⁶ However, the Supreme Court explicitly limited its holding in  *Carpenter* as follows:

[The decision] is a narrow one. We do not express a view on matters not before us: real-time CSLI or “tower dumps” We do not disturb the application of  *Smith* and  *Miller*

or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information.

 *Id.* at 2220.

[17] We next turn to  *Jones*. In  *Jones*, the Supreme Court unanimously determined that police attachment of a tracker to Jones’ Jeep and use of the device to monitor the vehicle's movements on public streets for a month, without a warrant, constituted an unlawful search under the  Fourth Amendment. 565 U.S. at 400, 132 S.Ct. 945. However, the Court was split 5-4 as to the fundamental reasons supporting the ultimate decision. The lower court in  *Jones* applied the “mosaic” theory in its analysis that a search occurred. The mosaic theory applies a cumulative understanding of data collection by police and analyzes searches as a collective sequence of steps rather than individual ones. It considers police action to be viewed over time as a collective “mosaic” of surveillance and allows the whole picture to qualify as a protected Fourth Amendment search, even if the individual steps that contribute to the full picture do not, in isolation, reach that constitutional threshold.  *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972).

Justice Scalia's majority opinion in  *Jones* did not apply the mosaic theory. Instead, the majority determined that by physically installing the GPS device on Jones’ car, the police had committed a trespass against his “personal effects” and this trespass, to acquire information, constituted a search *per se*.  *Id.* at 404, 132 S.Ct. 945. Two concurring opinions in  *Jones* did, however, rely on the mosaic theory in analysis.  565 U.S. at 414–31, 132 S.Ct. 945. “Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer-term GPS monitoring in the investigations of most offenses impinges on expectations of privacy.”  *Jones*, 565 U.S. at 430, 132 S.Ct. 945 (Alito, J., concurring) (internal citation omitted). This approach to analyzing searches is rationalized because long-term surveillance uncovers “types

of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble ... Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit” *United States v. Howard*, 426 F. Supp. 3d 1247, 1255 (M.D. Ala. 2019) (quoting *313 *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010)), *aff’d sub nom.* ⁷ Justice Sotomayor, in her concurring opinion in *Jones*, agreed with the expectation of privacy reasoning regarding long-term surveillance, and she also disputed the constitutionality of warrantless short-term GPS surveillance. *565 U.S. at 415, 132 S.Ct. 945.* She distinguished *Knotts*, finding its holding suggested that a different principle might apply to situations in which every movement was completely monitored for twenty-four hours. *Id. at 414, 132 S.Ct. 945* (Sotomayor, J., concurring). ⁸

In *Jones*, the Supreme Court declined to examine whether any exception exists that would render the search “reasonable,” because the Government had failed to advance that alternate theory in the lower courts. In leaving resolution of this issue for a future case, the Supreme Court advised, “It may be that achieving the same result through electronic means, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.” *Id. at 412, 132 S.Ct. 945.* This left the question—what are the privacy implications of a warrantless use of GPS data absent a physical intrusion?—unanswered.

We reject Appellant's argument that *Carpenter* and *Jones* compel suppression here. The holding in *Carpenter* is explicitly limited to the warrantless collection of CSLI and did not address other business records that might incidentally reveal location information. Appellant argues that the GPS data at issue here is factually analogous to CSLI. We, however, agree with the State that the two types of data are qualitatively different in that the data at issue here is not the type of arbitrary, all-encompassing surveillance at issue in *Carpenter*.

[18] [19] [20] [21] As explained in *Carpenter*, the case that acquisition of the GPS monitoring constitutes a search. The Supreme Court expressly limited the holding of *Jones* which found only that the installation of the

perpetual tracking which penetrates private spheres—and of the fact that the overwhelming majority of individuals more or less must own a cell phone. *138 S. Ct. at 2218.* On these key points, the GPS data at issue is not comparable. The privacy-penetrating capacity of cell phones has been distinguished from cars, which have “little capacity for escaping public scrutiny” as they largely only travel through public thoroughfares. *Id.* (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (noting that individuals regularly leave their cars whereas cell phones are compulsively carried at all times)). Because cars do not bear the same attachment to their owners and cannot penetrate private spaces to the same degree, government acquisition of a vehicle's GPS data does not give rise to the same risk of all-encompassing surveillance as CSLI. An individual often moves about—both publicly and privately—away from their vehicle. Additionally, as an owner's vehicle is frequently in operation and driven by others, GPS tracking of cars does not provide police the level of personal surveillance contemplated with CSLI. Because cell phones are treated as “almost a ‘feature of human anatomy,’ ” tracking of a cell phone is tracking of the owner. *Id.* (quoting *Riley v. California*, 573 U.S. 373, 385, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)).

An individual cannot claim the same figurative attachment to a vehicle, particularly one that they do not actually own. Here, the GPS data tracked the Honda, while other evidence was required to put Appellant in it. Further, the collection of GPS data in this context encompasses only those car owners who have affirmatively consented to collection of tracking information. Adding further consideration of third-party principles, the consent to tracking on the part of the car owner further dilutes the argument that the precedent of *Carpenter* controls. Although the Court in *Carpenter* forbid the government from warrantlessly accessing seven days of historical CSLI from a target's wireless carriers, it refused to address whether one's “reasonable expectation of privacy in the whole of his physical movements” extends to shorter periods of time or to other location tracking devices. *138 S. Ct. at 2217 n.3, 2219.*

Likewise, *Jones* does not mandate a conclusion in this case that acquisition of the GPS monitoring constitutes a search. The Supreme Court expressly limited the holding of *Jones* which found only that the installation of the

GPS device on the defendant's car constituted a trespass, and therefore, was a search. The case did not present the issue of “reasonableness” of such a search. Rather, the conclusion in  *Jones* is grounded in the fundamentals of the relevant facts and applicable law.

Instead, we find  *Knotts* controlling. In  *Knotts*, the Supreme Court permitted the use of a beeper to follow a vehicle because “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”  460 U.S. at 281, 103 S.Ct. 1081. We acknowledge the Court's statement that the “limited use which the government made of the signals from this particular beeper” during a discrete “automotive journey” and reserved the question of whether “different constitutional principles may be applicable” if “ twenty-four hour surveillance of any citizen of this country [were] possible.”  *Id.* at 283–85, 103 S.Ct. 1081 (internal quotation marks omitted).

[22] The fact that GPS data is historical in nature does not alone provide Appellant a reasonable expectation of privacy regarding the information. According to  *Knotts*, Appellant had no reasonable expectation *315 of privacy regarding his travels over public thoroughfares. Although technically historical, GPS records of the Honda's location during the commission of the offense remain simply records of his public travels. The fact remains that Appellant chose to operate a car on public roads—a car owned by another who consented to GPS tracking. The police played no role in the recording of the information and simply availed themselves of the advantages afforded by the electronic recording.⁹ Under these circumstances, any expectation of privacy on Appellant's part was not objectively reasonable.

[23] Likewise, Appellant's use of the Honda to engage in public travel did not demonstrate a subjective expectation of privacy. As previously stated, the third-party doctrine does not attach automatically to information being transmitted to a third party. Instead, like other aspects of the  *Katz* analysis, the nature of any transmission is examined to determine whether a privacy interest will be upset, if information is revealed. See  *Carpenter*, 138 S. Ct. at 2219 (rejecting a “mechanical application” of the third-party doctrine). A “lack of voluntariness” cannot be claimed regarding the transmission of GPS information to the financing company.

Nothing forced Appellant to use the Honda owned by his girlfriend, and any number of other means of travel were available which were not being tracked. Use of a car owned by another to traverse public streets renders Appellant's purported expectation of privacy unreasonable.

[24] [25] We acknowledge that  *Carpenter*'s seemingly sweeping language, its discussion of the fundamental shifts of the technology revolution of the 21st century and discussion of an expansion of individual constitutional rights in this type of data. This may indicate the Supreme Court's willingness to revisit  *Knotts*. See  *Carpenter*, 138 S. Ct. at 2214. However, the doctrine of *stare decisis* prevails. The Supreme Court has not explicitly overruled  *Knotts* and continues to apply its precedent in recent Fourth Amendment analysis.  *Id.* at 2218–21. Regarding Supreme Court precedent:

Its “decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.”

 *Hohn v. United States*, 524 U.S. 236, 252–53, 118 S. Ct. 1969, 141 L.Ed. 2d 242 (1998). If a Supreme Court precedent “has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions,” the lower court “should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions.”  *316 *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L.Ed. 2d 526 (1989).

Howard, 426 F. Supp. 3d at 1258. Because  *Knotts* is more factually analogous than  *Carpenter*, it controls this Court's holding.

Here, Appellant has failed to demonstrate a  *Katz* interest which was encroached upon by the police, and thusly, no search occurred. In the absence of a search, no grounds exist to suppress the evidence. The trial court's denial of the suppression motion is, therefore, affirmed.

The Competency Issue

[26] Appellant also argues that, because the trial court ordered a competency evaluation, it was required to conduct a formal competency hearing before proceeding to trial. The

trial court ordered a competency evaluation based on trial counsel's suggestion of incompetence. The record then falls silent regarding the issue. No indication is provided as to whether an expert's report was filed, that any hearing was conducted, or that Appellant was found competent. This constitutes reversible error. See *Berry v. State*, 237 So. 3d 1165 (Fla. 1st DCA 2018).

[27] However, a new trial is not necessarily required. This Court has previously held that “[t]he trial court may make a retroactive determination of competency with no change in Appellant’s judgment or sentence, if the evidence that existed prior to the hearing on Appellant’s charges supports a finding that he was competent at that time.” *Cotton v. State*, 177 So. 3d 666, 668–69 (Fla. 1st DCA 2015). “If the trial court cannot make a retroactive determination, it must properly adjudicate Appellant’s present competency and, if the court finds Appellant competent to proceed,” conduct a new trial. *Id.* at 669.

For the foregoing reasons, the judgment and sentence are AFFIRMED, in part, REVERSED, in part, and REMANDED for further proceedings consistent with this opinion.

Roberts, J., concurs; Osterhaus, J., concurs in result with opinion.

Osterhaus, J., concurring in result.

I agree that the Fourth Amendment issue should be affirmed.

But given the gauntlet of *Carpenter*-related considerations at play, I would not decide this case by holding that individuals lack a reasonable expectation of privacy in the records of their movements recorded by their vehicle’s GPS system. Instead, I would affirm based on the good-faith exception to the exclusionary rule.

A couple years back, in *Carpenter v. United States*, — U.S. —, 138 S.Ct. 2206, 2217, 201 L.Ed.2d 507 (2018), the United States Supreme Court restricted law enforcement from obtaining a suspect’s cell-site location information (CSLI) from a cell phone company without a warrant because “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.”

In reaching this decision, the *Carpenter* opinion repeatedly addressed the circumstances involved in its vehicle-GPS case from 2012, *United States v. Jones*, 565 U.S. 400, 132

S.Ct. 945, in which the FBI collected GPS data detailing the movements of a suspect’s car for almost a month.

See *Carpenter*, 138 S.Ct. at 2215–18. The *Carpenter* opinion addressed the vehicle-GPS issue from *Jones* as follows:

[F]ive Justices agreed that related privacy concerns would be raised by ... “surreptitiously activating a stolen vehicle detection system” in Jones’s car to track Jones himself, or conducting GPS tracking of his cell phone. Since GPS monitoring of a vehicle tracks “every movement” a person makes in that vehicle, the concurring Justices concluded *317 that “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy”—regardless whether those movements were disclosed to the public at large.

....

A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. ... [S]ociety’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period. Allowing government access to cell-site records contravenes that expectation [of privacy]. Although such records are generated for commercial purposes, that distinction does not negate *Carpenter*’s anticipation of privacy in his physical location. ... As with GPS information, the time-stamped [cell-phone] data provides an intimate window into a person’s life, revealing ... his particular movements [and] associations.

....

In *Knotts*, the Court relied on *Smith* to hold that an individual has no reasonable expectation of privacy in public movements that he “voluntarily conveyed to anyone who wanted to look.” But when confronted with more pervasive tracking, five Justices agreed that longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search.

Id. at 2215, 2217, 2219–20 (citations omitted).

In view of [Carpenter's](#) elaboration on [Jones](#), its retreat from applying [Knotts](#) and the third-party disclosure doctrine in continuous digital tracking-oriented cases, *See* [id.](#) at 2215–20, I cannot see affirming this case under [Knotts](#), or with a holding that drivers lack a reasonable expectation of privacy in the GPS records of their vehicle's movements.

Rather, I would affirm this case based on the good-faith exception to the exclusionary rule. *See* [Davis v. United States](#), 564 U.S. 229, 236, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (discussing the good-faith exception). That is, even if the evidence involved a protected category of information obtained in violation of the Fourth Amendment, it is not subject to exclusion because the officer acted reasonably in accordance with then-good law. The exclusionary rule is a “prudential” doctrine created by [the Supreme] Court to “compel respect for the constitutional guaranty” and “deter future Fourth Amendment violations.” [Id.](#) at 236–37, 131 S.Ct. 2419. Suppression is not an automatic consequence of a Fourth Amendment violation, but instead a “last resort,” justified only where “the deterrence benefits of suppression ... outweigh [the] heavy costs” of ignoring reliable, trustworthy evidence bearing on guilt or innocence. *See* [id.](#) at 237, 131 S.Ct. 2419. It follows that when officers act with “an objectively ‘reasonable good-faith belief’ that their conduct is lawful,” the exclusionary rule doesn't apply because there is little or no deterrence-oriented benefit to be gained. *See* [id.](#) at 238, 131 S.Ct. 2419.

The good-faith exception applies in this case because, at the time the officer obtained the vehicle GPS data, [Carpenter](#) hadn't been decided. Under the applicable law in 2016, it was not unlawful for an officer to investigate a crime by seeking pervasive location data from a third-party company who had collected the data for its own business purposes

with consent. Instead, the United States Supreme Court had held that individuals lack protectable Fourth Amendment interests in records voluntarily disclosed to and possessed, owned, and controlled by a third party. *See* *318 [United States v. Miller](#), 425 U.S. 435, 442–44, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976); [Smith v. Maryland](#), 442 U.S. 735, 743–44, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *cf.* [Yarbrough v. State](#), 473 So. 2d 766, 767 (Fla. 1st DCA 1985) (finding no legitimate expectation of privacy as to numbers dialed into a commercial telephone system). Thus, here, when the officer obtained the GPS data from the car financing company in 2016, he had no good reason to believe that a warrant was needed. *see also* [United States v. Davis](#), 785 F.3d 498, 513–14 (11th Cir. 2015) (en banc) (noting that pre-[Carpenter](#), [Jones](#) held that a GPS tracker placed on a private vehicle was a search because the tracker was attached on private property, not necessarily because real-time tracking intrudes on a reasonable expectation of privacy). The officer here acted reasonably in accordance with then-good law.

One additional reason for applying the good-faith exception in this case is that the car's owner (Appellant's girlfriend) reported it stolen to police, and missing to her car-financing company, during the same time that Appellant was using the car in committing the murder. Under these circumstances, it is hardly unreasonable that law enforcement, with the owner's apparent consent, investigated the vehicle's location for the narrow slice of time that the car went missing (even if the owner's testimony raised questions later about whether the car had really been stolen). For this reason, too, given the objectively reasonable response of law enforcement to her report, this case is ill-suited to applying the exclusionary rule as a Fourth Amendment-related deterrent.

All Citations

311 So.3d 303, 45 Fla. L. Weekly D2559, 46 Fla. L. Weekly D312

Footnotes

- 1 The girlfriend's signed contract with the financing company acknowledged that a GPS tracking device had been installed on the vehicle and provided that her signing of the agreement would constitute a waiver of any “right to privacy in the location of the vehicle.” Although the owner of the finance company testified at the

suppression hearing that the location information tracked by the device was primarily used to locate a vehicle in the event of theft or default, he also testified that historical data was sometimes accessed to determine past locations in the event the tracker was disabled.

- 2 The parties also raised the issue of standing in their briefs. Although standing arguments are understandable given the longstanding prevalence of the argument in Fourth Amendment jurisprudence, the arguments are misplaced in the context of non-trespassory police activity. Lack of standing in the context of non-trespassory police activity contends that one does not have standing to object to police conduct which only violates another person's constitutional rights against unreasonable searches. Although the reasoning is logical, its application to privacy interests rather than property interests is mislaid. The issue of a defendant's ability to contest to police conduct which he or she believes violates a  *Katz* privacy interest is not in question here.
- 3 The parties dispute the factual issue of Appellant's authorization to drive the Honda, with Appellant arguing that he had general permission from his girlfriend, and the State contending that she had withdrawn permission, making the car stolen while he used it during the commission of the crime. It would be difficult to argue that one who has stolen a car has a reasonable expectation of privacy in the stolen property's location, or in his or her movements while operating a stolen car. That said, no specific finding was made by the trial court on this point, and the record is inconclusive. As the resolution of this dispute was not relevant to the trial court's ruling, it is likewise not reviewed here.

- 4 In  *Carpenter*, Justice Gorsuch noted in his dissent:

The [Fourth] Amendment's protections do not depend on the breach of some abstract "expectation of privacy" whose contours are left to the judicial imagination. Much more concretely, it protects your "person," and your "houses, papers, and effects." Nor does your right to bring a Fourth Amendment claim depend on whether a judge happens to agree that your subjective expectation to privacy is a "reasonable" one. Under its plain terms, the Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.

 138 S. Ct. at 2264.

- 5 The majority reasoned in  *Carpenter* that, because a phone "faithfully follows its owner beyond public thoroughfares and into private" locations, government examination of CSLI reveals potentially sensitive, private information about an individual, such as their visit to a certain doctor's office or political organizations.

 138 S. Ct. at 2218.

- 6 The decision in  *Carpenter* does not address the "mosaic" theory.

- 7 This contemplates whether the constitutionality of a search may now be based on duration of data acquisition.

See  *United States v. Skinner*, 690 F.3d 772, 780–781 (6th Cir. 2012) (holding that three days of real-time, non-trespassory cell phone tracking did not "present the concern raised by Justice Alito's concurrence in  *Jones*"), *superseded by sentencing guidelines on other grounds*, U.S. Sentencing Guidelines Manual App. C, amend. 794, at 116–18 (Nov. 2015); *United States v. Diggs*, 385 F. Supp. 3d 648, 652, 654–55 (N.D. Ill. 2019) (citing  *Carpenter* and  *Jones* concurrences to determine that warrantless acquisition of one month of historical GPS vehicle data violated the target's reasonable expectation of privacy); *State v. Zahn*, 812 N.W. 2d 490, 497–98 (S.D. 2012) (applying the mosaic theory to determine that **twenty**-six days of warrantless GPS vehicle tracking violated reasonable expectation of privacy).

- 8 The Florida Supreme Court agreed with the court in  *United States v. Wilford*, 961 F. Supp. 2d 740, 771 (D. Md. 2013), that the "mosaic" theory has presented "problems in practice ... where traditional surveillance becomes a search only after some specified period of time."  *Tracey v. State*, 152 So. 3d 504, 520 (Fla. 2014). Justice Labarga explained as follows:

... basing the determination as to whether warrantless real time cell site location tracking violates the Fourth Amendment on the length of the time the cell phone is monitored is not a workable analysis. It

requires case-by-case, after-the-fact, ad hoc determinations whether the length of the monitoring crossed the threshold of the Fourth Amendment in each case challenged. The Supreme Court has warned against such an ad hoc analysis on a case-by-case basis, stating, “Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.”  *Oliver v. United States*, 466 U.S. 170, 181, 104 S. Ct. 1735, 80 L.Ed. 2d 214 (1984).

 *Tracey*, 152 So. 3d at 520.

- 9 Although electronic recording of location data would have been out of the question for founding era police, the technology used is not necessarily the relevant consideration. The question is whether the activity itself would be incomprehensible to the founding era public as it would lead to an arbitrary, all-encompassing police state. The “activity” here is police acquisition of information regarding an object’s public travels which the object’s owner consented to be recorded for access after the fact. One can conceive, for instance, of a founding era shipping company consenting to a valuable shipment being accompanied by a representative of the shipper to record where and how the shipment was transported; it is doubtful that the driver of the horse-drawn wagon hauling the goods would be able to claim a reasonable expectation of privacy in his location were constables to later ask the company representative about any stops the driver had made. This activity is substantially similar, just in a far more efficient fashion. That said, the activity constitutes unremarkable police conduct which is enhanced with a technological advantage and which does not otherwise present a risk of arbitrary surveillance.

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APPENDIX

B

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

February 08, 2021

CASE NO.: 1D18-4514

L.T. No.: 16-2017-CF-005817-AXXX

Brandon Joshua Bailey

v.

State of Florida

Appellant / Petitioner(s),

Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion filed November 25, 2020, is granted in part, and denied in part. Appellant's request for the redacting of a non-party's name from the opinion is granted. However, Appellant's requests for rehearing and certification of a question of great public importance are denied. A corrected opinion will be issued simultaneously with this order.

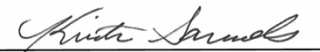
I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

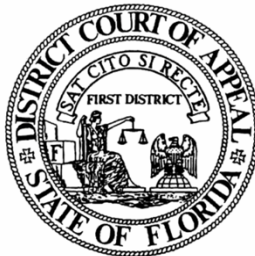
Served:

Hon. Ashley Moody, AG
Hon. Jessica J. Yeary, PD
Victor D. Holder, APD

Benjamin Louis Hoffman, AAG
M. J. Lord, APD
Hon. Charles W. Arnold, Judge

ks


KRISTINA SAMUELS, CLERK



APPENDIX

C

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

BRANDON JOSHUA BAILEY,

Appellant/Petitioner,

CASE NO.: 1D18-4514

LT NO: 2016CF5817 (DUVAL COUNTY)

v.

STATE OF FLORIDA,

Appellee/Respondent.

_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION OF FLORIDA
SUPREME COURT

Appellant/Petitioner, through the undersigned counsel and pursuant to Florida Rule of Appellate Procedure 9.120(a)-(c), hereby invokes the discretionary jurisdiction of the Florida Supreme Court to review the February 8, 2021, decision of this Court, for which Appellant/Petitioner's motion for rehearing and request for certification of a question of great public importance was granted in part and denied in part, and a corrected opinion was issued by the Court on February 8, 2021. Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure, allows the Florida Supreme Court to exercise its discretionary jurisdiction where the decision of a district court of appeal expressly construes a provision of the federal constitution. The First District's decision in the instant case expressly construes a provision of the Fourth Amendment of the United States Constitution.

RECEIVED, 03/10/2021 04:46:27 PM, Clerk, First District Court of Appeal

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by electronic mail to Trisha Meggs Pate, Office of the Attorney General, at crimapptlh@myfloridalegal.com, and Benjamin Hoffman, Office of the Attorney General, at benjamin.hoffman@myfloridalegal.com this 10th day of March, 2021.

Respectfully submitted,

/s/ Victor Holder

VICTOR HOLDER

Assistant Public Defender

Florida Bar No. 71985

Leon County Courthouse

301 South Monroe Street, Suite 401

Tallahassee, FL 32301

(850) 606-8500

victor.holder@flpd2.com

ATTORNEY FOR

APPELLANT/PETITIONER

APPENDIX

D

Supreme Court of Florida

MONDAY, JUNE 14, 2021

CASE NO.: SC21-382

Lower Tribunal No(s).:

1D18-4514; 162016CF005817AXXXMA

BRANDON JOSHUA BAILEY vs. STATE OF FLORIDA

Petitioner(s)

Respondent(s)

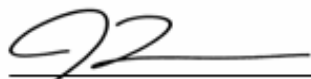
This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

POLSTON, LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ.,
concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



CASE NO.: SC21-382

Page Two

lc

Served:

VICTOR HOLDER

EVAN EZRAY

BENJAMIN L. HOFFMAN

JEFFREY PAUL DESOUSA

AMIT AGARWAL

TRISHA MEGGS PATE

HON. CHARLES WARNER ARNOLD JR., JUDGE

HON. KRISTINA SAMUELS, CLERK

HON. JODY PHILLIPS, CLERK

APPENDIX

E

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 2016-CF-5817

DIVISION: CR-B

STATE OF FLORIDA

VS.

BRANDEN BAILEY

AMENDED MOTION TO SUPPRESS CELL PHONE RECORDS

Defendant, BRANDEN BAILEY, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 3.190(g), Florida Rules of Criminal Procedure, the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution, respectfully moves this Honorable Court to suppress the cell phone records for cell number (904) 210-1875 seized pursuant to a search warrant directed to Sprint.

As grounds for this motion, Defendant states the evidence was seized under the authority of a warrant that: (1) did not state probable cause to believe the records contained evidence relevant to proving a felony; (2) was issued on an affidavit that contained material misrepresentations of fact which were made either deliberately or with reckless disregard for the truth and which, when removed from the affidavit, left the affidavit insufficient to demonstrate probable cause; (3) was issued on an affidavit that relied upon illegally seized evidence, which, when removed from the affidavit, left the affidavit insufficient to demonstrate probable cause, and (4) was the kind of general warrant that is prohibited under the law.

Defendant further states he has standing to contest the legality of said seizure.

A general statement of the facts on which this motion is based is as follows:

Amended Motion to Suppress
Physical Evidence

Page 2

1. Detective Chapman swore to an affidavit for the issuance of a search warrant for telephone records, including cell site location records, for cell phone number (904) 210-1875. That cell phone belonged to Mr. Bailey and the records were in the custody of Sprint. The affidavit, search warrant and return are attached hereto as Composite Exhibit A.

2. The affidavit does not state probable cause to believe that evidence relevant to proving a robbery or murder would be found in the cell phone records. In fact, the only allegation about a cell phone in the affidavit is: "The phone number and accompanying information being sought belongs to Branden Bailey and was possibly used on the day of the murder to coordinate the crime. The cell site information and call records will collaborate (sic) the information obtained from the vehicle tracking device." There is no allegation that the phone belonged to Bailey on the day of the crime, that he carried it with him on the day of the crime or at any time between February 15 and February 22, that he used it on the day of the crime or between February 15 and February 22 to send a text, make a call, receive a call, or take a photo or video, that he usually carried that cell phone, that it was the only cell phone he owned, or that he had used it at some time close to the crime. The allegation that he "possibly used" it on the day of the crime is pure speculation. The allegation that the cell site and call records "will collaborate (sic)" other information is conclusory and merely tells how the records may be useful in the investigation; it does not state probable cause to get them. The affidavit basically says: (a) we have probable cause to believe he committed this crime; (b) he owns a cell phone; (c) we want his cell phone records to see what is in them that may possibly help prove the crime. An affidavit must state probable cause, not just tell why a search may prove helpful.

3. The lack of probable cause is also demonstrated by the fact that three days later, with an affidavit that was almost identical, detectives sought a search warrant for cell phone records, including cell site location records, for phone number (904) 250-1672, a number which they alleged also belonged to Branden Bailey. They did not have probable cause to direct them to

Amended Motion to Suppress
Physical Evidence

Page 3

either phone. They were just speculating that he might have been carrying one of the phones on the day of the crime.

4. The warrant that was issued allows a search of every conceivable record in the possession of Sprint related to phone number (904) 210-1875, yet there are no allegations about texts, data, pictures or videos, drafts or deletions. The warrant is the type of general warrant that is prohibited by the United States Constitution and the Florida Constitution.

5. The affidavit contains material misrepresentations of fact which were either made deliberately or with reckless disregard for the truth. Concerning the GPS tracking device for the Honda that Bailey was thought to be driving, the records do not show that the car was "at" the location where the victim's body was found. The records merely show a vicinity, or a range of addresses, where the car was, not a specific address or pinpoint location. Detectives had reviewed those records and knew what they said. The affidavit also misrepresents that the Honda's tire tread "matches the tire prints found near the victim's body." At the time the affidavit was submitted there had been no expert comparison, and detectives knew they were not qualified to declare a "match" of even one tread mark, let alone suggest that all of the marks "matched." The later examination by an expert showed that there were similarities in some of the tread marks, but not a "match" for any of them. The false allegations must be removed from the affidavit, and when they are, the remaining allegations do not demonstrate probable cause. Franks v. Delaware, 438 U.S. 154 (1978).

6. The affidavit relies upon illegally seized evidence. The affidavit refers to GPS tracking device records which were obtained from the finance company that had financed the purchase of the Honda. They were obtained without a search warrant and without any other sort of judicial review, in violation of the law. Carpenter v. United States, No 16-402 (June 22, 2018). Those allegations must be stricken from the affidavit, and probable cause must be determined by the remaining allegations. State v. Rabb, 920 So.2d 1175 (Fla. 4th DCA 2006). The remaining allegations do not state probable cause.

Amended Motion to Suppress
Physical Evidence

Page 4

7. The good faith exception to the warrant requirement cannot apply to justify this search, because: (1) in issuing the warrant the magistrate was misled by allegations the affiant knew were false or that he made with reckless disregard for the truth, and (2) the affidavit was so lacking in probable cause as to render official belief in its existence entirely unreasonable. United States v. Leon, 468 U.S. 897, 923 (1984).

WHEREFORE, Defendant respectfully requests the Court to suppress the above-mentioned evidence.

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Suppress Physical Evidence has been furnished to the Office of the State Attorney, by hand and/or electronically, this 24th day of July, 2018.

Respectfully submitted,

CHARLIE COFER
PUBLIC DEFENDER

BY: Alan Chipperfield
Alan Chipperfield 217786
Assistant Public Defender

Received
4/11/17
Jimmie G. Galt

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA)
)
COUNTY OF DUVAL)

AFFIDAVIT FOR SEARCH WARRANT

Before me, a Judge of the Circuit Court of the Fourth
Judicial Circuit of Florida, personally appeared, Detective H.W.
Chapman ID 7863, of the Jacksonville Sheriff's Office, who being
by me first duly sworn, deposes and says that she has probable
cause to believe and does believe that in the Location described
as:

LOCATION:

Sprint

Attn: Subpoena and Court Order Compliance

6480 Sprint Pkwy
Overland Park, KS 66251
PH: (800)877-7330
FAX: (816) 600-3111
A business, with branch offices in Duval County, Florida.
Hereinafter referred to as the "Location,"

PROPERTY:

The following records associated with user accounts
identified as mobile number (904)210-1875:

- A.) Content of all incoming and outgoing SMS or Text
Messages, including but not limited to sent text, data,
picture or video messages, received text, data, picture or
video messages, draft text data, picture or video messages
and deleted text, data, picture or video messages
associated with the identified user accounts from and
including February 15, 2016 through and including February
22, 2016;

EXHIBIT A

B.) All connection logs and records of user activity for each such account including all subscriber information, verbatim call detail records, toll records and all call site data from and including February 15, 2016 through and including February 22, 2016.

C.) All connection logs and records of user activity for each such account from and including February 15, 2016 through and including February 22, 2016, related to the messages including:

1. Connection dates and times.
2. Disconnect dates and times.
3. Method of connection (e.g., telnet, ftp, http)
4. Data transfer volumes.
5. User name associated with the connections.
6. Telephone caller identification records.
7. Any other connection information, such as the Internet Protocol address of the source of the connection.
8. Connection information for the other computer to which the user of the above-referenced accounts connected, by any means, during the connection period, including the destination IP address, connection time and date, disconnect time and date, method of connection to the destination computer, and all other information related to the connection from cellular service provider.
9. Physical address of cell sites and RF coverage maps.

D.) All of the above records whether possessed by Sprint or any other cellular service provider.
Hereinafter referred to as the "Property,"

Contained within/ concealed at the Location is the Property, described above, evidence of the commission of a felony, specifically the violation of laws relating to Murder and Armed robbery-Firearm in violation of 782.04 and 812.13(2)(A), Florida Statutes;

Affiant's reasons for the belief that the Location contains/holds/conceals evidence of the commission of a felony as described above and the facts establishing the grounds for this Affidavit and the probable cause for believing that such facts exist are, as follows:

Your affiant is a detective with the Jacksonville Sheriff's Office Homicide Unit, with over 16 years of police experience. Your affiant is investigating the murder of Dustin Howell.

On 02-17-16, patrol officers were dispatched to a deceased body at 3621 Owen Road in Jacksonville, Florida. The victim, Dustin Howell, was shot in the head and body multiple times during an apparent robbery. The victim's death was ruled a homicide.

A canvass of the area revealed multiple people who heard gunshots in the area on 02-17-16 between 0140 and 0155.

Evidence technicians were able to obtain cast impressions from tire tracks that were located near the victim's body along with other physical evidence.

On 02-17-16, the victim's family and co-workers reported him missing. The investigation revealed that the victim was staying at the Extended Stay America Hotel located at 1413 Prudential Drive. The hotel surveillance cameras showed the victim walking out of the hotel with Branden Bailey on 02-17-16 at approximately 0030. Mr. Bailey returned to the hotel by himself on 02-17-16 at approximately 0330.

On 02-19-16, detectives from the Jacksonville Sheriff's Office made contact with Amanda Green, who is the girlfriend of Brendan Bailey. Ms. Green reported that she allowed Brendan Bailey to drive her 2003 Honda Accord (Florida license tag EQFM89) on 02-17-16. The vehicle is equipped with a GPS device that allows the leasing company to track the vehicle's location. The tracking device confirmed that the vehicle was at location where the victim's body was located at the same time as the gunshots were reported by the witnesses.

An examination of the vehicle's tire tread revealed that it matches the tire prints found near the victim's body.

The phone number and accompanying information being sought belongs to Branden Bailey and was possibly used on the day of the murder to coordinate the crime. The cell site information and call records will collaborate the information obtained from the vehicle tracking device.

WHEREFORE, Affiant prays that a search warrant be issued commanding the Sheriff of the Consolidated City of Jacksonville, or any of his deputies, with the proper and necessary assistance,

to search the "Location" above-described, and all spaces therein,
for the "Property" above-described, making the search in the
Daytime or Nighttime, as the exigencies may demand or require, or
on a Sunday, and if the same be found on the "Location" to seize
the same as evidence and to arrest any person in the unlawful
possession thereof.

W 7863
Affiant, H.W. Chapman ID 7863
Detective
Jacksonville Sheriff's Office

SWORN AND SUBSCRIBED before me,

this the 2nd day of February, 2016.

John O. My
Circuit Court Judge
Fourth Judicial Circuit,
Duval County, Florida

INVENTORY AND RECEIPT
(SEARCH WARRANT)

SA# 16CF012661

SEARCH WARRANT

IN THE NAME OF THE STATE OF FLORIDA
TO: ALL AND SINGULAR THE SHERIFF OR
DEPUTY SHERIFFS OF DUVAL COUNTY, FLORIDA,

WHEREAS, complaint on oath and in writing, supported by affidavit, having been made this day before the undersigned Judge of the Fourth Judicial Circuit, in and for Duval County, Florida;

AND WHEREAS, said facts made known to me have caused me to certify and find that there is a probable cause to believe that the certain Location thereof, in Duval County, Florida, known and described as follows:

LOCATION:

Sprint

Attn: Subpoena and Court Order Compliance

6480 Sprint Pkwy
Overland Park, KS 66251
PH: (800) 877-7330
FAX: (816) 600-3111
A business, with branch offices in Duval County, Florida.
Hereinafter referred to as the "Location,"

PROPERTY:

The following records associated with user accounts identified as mobile number (904)210-1875:

- A.) Content of all incoming and outgoing SMS or Text Messages, including but not limited to sent text, data, picture or video messages, received text, data, picture or video messages, draft text data, picture or video messages and deleted text, data, picture or video messages associated with the identified user accounts from and including February 15, 2016 through February 22, 2016.

B.) All connection logs and records of user activity for each such account including all subscriber information, verbatim call detail records, toll records and all cell site data from and including February 15, 2016 through, February 22, 2016.

C.) All connection logs and records of user activity for each such account from and including February 15, 2016 through February 22, 2016, related to the messages including:

1. Connection dates and times.
2. Disconnect dates and times.
3. Method of connection (e.g., telnet, ftp, http)
4. Data transfer volume.
5. User name associated with the connections.
6. Telephone caller identification records.
7. Any other connection information, such as the Internet Protocol address of the source of the connection.
8. Connection information for the other computer to which the user of the above-referenced accounts connected, by any means, during the connection period, including the destination IP address, connection time and date, disconnect time and date, method of connection to the destination computer, and all other information related to the connection from cellular service provider.
9. Physical address of cell sites and RF coverage maps.

D.) All of the above records whether possessed by Sprint or any other cellular service provider.

Hereinafter referred to as the "Property,"

Contained within/ concealed at the Location is the Property, described above, evidence of the commission of a felony, specifically the violation of laws relating to Murder and Armed robbery-Firearm, in violation of Chapter 782.04 and 812.13(2)(A), Florida Statutes;

AND WHEREAS the facts establishing the grounds for this application are set forth in the affidavit of Detective H.W. Chapman ID 7863 Jacksonville Sheriff's Office;

NOW THEREFORE, you or either of you, with such lawful assistance as may be necessary, are hereby commanded, in the daytime or in the nighttime, or on Sunday, as the exigencies of the occasion may require, to enter and search the aforesaid Location, for the property described in this warrant, to-wit: the following records associated with user accounts identified as mobile number (904)210-1875 : A) Content of all incoming and outgoing SMS or Text Messages including but not limited to sent text, data, picture or video messages, received text, data, picture or video messages, draft text data, picture or video messages and deleted text, data, picture or video messages associated with the identified user accounts from and including February 15, 2016 through and including February 22, 2016; B) All connection logs and records of user activity for each such account including all subscriber information, verbatim call detail records, toll records and all cell site data from and including February 15, 2016 through and including February 22, 2016, C) All connection logs and records of user activity for each such account from and including February 15, 2016 through and including February 22, 2016, related to the messages including: 1. Connection dates and times; 2. Disconnect dates and times; 3. Method of connection (e.g., telnet, ftp, http); 4. Data transfer volume; 5. User name associated with the connections; 6. Telephone caller identification records; 7. Any other connection information, such as the Internet Protocol address of the source of the connection; 8. Connection information for the other computer to which the user of the above-referenced accounts connected, by any means, during the connection period, including the destination IP address, connection time and date, disconnect time and date; method of connection to the destination computer, and all other information related to the connection from cellular service provider; and D) All of the above records whether possessed by Sprint, or any other cellular service provider; and if necessary, searching officers are authorized to employ the use of outside experts, acting under the direct control of the investigating officers, to access and preserve any computer data, if the same or any part thereof be found, you are hereby commanded to seize and secure same, giving proper receipt therefore and delivering a completed copy of this Warrant to the person in charge of the

Location, or in the absence of any such person, leaving a complete copy where the property is found, and making a return of your doings under this Warrant within ten (10) days of the date hereof; and you are further commanded to bring said property so found and also any person arrested in connection therewith before the Court having jurisdiction of this offense to be disposed of according to law.

WITNESS my hand and seal, .

this 2nd day of February, 2016.


Circuit Court Judge
Fourth Judicial Circuit,
Duval County, Florida

INVENTORY AND RECEIPT
(SEARCH WARRANT)

904-250-4622 BB CELL PHONE
210 1875

CELL PHONE RECORDS

DATED this 26 day of FEBRUARY, 2016,

[Signature]
Officer

6788

RETURN
(SEARCH WARRANT)

STATE OF FLORIDA)
COUNTY OF DUVAL)

Received this Search Warrant on the 2nd day of MARCH, 2016, and executed and served the same in Duval County, Florida, on the 2nd day of MARCH, 2016, by searching the premises described therein and by taking into my custody the property described in the above Inventory and Receipt and by having read and delivered a copy of this Search Warrant and Inventory and Receipt to

I, DET A. SANTIAGO, the officer by whom the Warrant was executed, do swear that the above Inventory and Receipt contains a true and detailed account of all the property taken by me on said warrant.

[Signature]
Officer

67885

Sworn to and subscribed before me
this 2 day of MARCH, 2016.

[Signature]
Circuit Court Judge
Fourth Judicial Circuit,
Duval County, Florida

APPENDIX

F

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 2016-CF-5817

DIVISION: CR-B

STATE OF FLORIDA

VS.

BRANDEN BAILEY

**AMENDED MOTION TO SUPPRESS GPS RECORDS
AND FRUITS OF THAT EVIDENCE**

Defendant, BRANDEN BAILEY, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 3.190(g), Florida Rules of Criminal Procedure, the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 12 and 23 of the Florida Constitution, respectfully moves this Honorable Court to suppress the GPS tracking records that Detective Santiago obtained from Worth Avenue Finance, Inc. on February 19, 2016 and all other evidence derived from the use of those records, as set forth below.

As grounds for this motion, Defendant states the evidence was obtained without a warrant.

Defendant further states he has standing to contest the legality of said seizure.

A general statement of the facts on which this motion is based is as follows:

1. Defendant is charged with the murder of Dustin Howell on February 17, 2016. He became a suspect shortly after the murder because a surveillance video at a hotel showed him leaving with the victim shortly before the victim was killed.

Amended Motion to Suppress
Physical Evidence

Page 2

2. Detective Santiago learned that at the time of the murder Bailey may have been driving a car owned by his girlfriend, and he learned that the car was equipped with a GPS tracking system installed by Worth Avenue Finance, Inc., the company that had financed the purchase of the car. That GPS system revealed the location of the car at every moment, whether the car was stationary or in motion. Detective Santiago called Worth Avenue Finance, Inc., and asked for the GPS tracking records for the car. He did not obtain a subpoena or a warrant for the records. Nevertheless, he was given the records which covered the period from 2/16/16 through 2/18/16. Using the records, he was able to obtain incriminating evidence against Bailey.

3. Under the recent United States Supreme Court opinion in Carpenter v. United States, No. 16-402 (June 22, 2018), Detective Santiago was required to obtain a warrant for the GPS tracking records. Those records are much more precise in following the travels of a person driving the car than were the the cell phone records involved in Carpenter. Cell phone records do not pinpoint the particular roads that a person travels on. GPS records do. As such, even though the records here covered 3 days and not 7, they are much more invasive of the privacy of a person driving the car. Obtaining them without a warrant violated Bailey's right to be free from unreasonable searches and seizures and his right to privacy. (Footnote 3 of the Carpenter opinion notes that the Court is not deciding the length of the period of tracking that gives rise to the need for a warrant.)

4. The records which were illegally seized allowed Detective Santiago to track the movements of the car for that 3-day period. While tracking the movements Detective Santiago learned that the car had been in the vicinity of the address where the body was found at the approximate time when witnesses heard gunfire. He also learned that the car had been in the vicinity of the home where codefendant Desi Hall lived. That led to him getting the surveillance video at Hall's home which showed Bailey and Hall entering and exiting the home before and after the murder. All those facts were then alleged in an affidavit for a search warrant to search Hall's home. Inside Hall's home officers found a pair of camouflage pants that was later found

Amended Motion to Suppress
Physical Evidence

Page 3

to contain blood that matched the DNA of the victim. The facts about the GPS tracking records were also alleged in an affidavit for a warrant for Bailey's arrest. The arrest warrant was executed, and during the arrest observations were made which led to an affidavit for a search warrant to search the trailer where he was arrested. Inside the trailer officers found ammunition that was the same as ammunition found at the scene of the murder and that bore the same cycling marks, indicating they had been cycled in the same firearm as shell casings found at the scene of the murder. All of the evidence mentioned was found as a direct result of the acquisition of the GPS tracking records, so all is a fruit of the poisonous tree and should be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

WHEREFORE, Defendant respectfully requests the Court to suppress the above-mentioned evidence.

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Suppress Physical Evidence has been furnished to the Office of the State Attorney, by hand and/or electronically, this 24th day of July, 2018.

Respectfully submitted,

CHARLIE COFER
PUBLIC DEFENDER

BY: Alan Chipperfield
Alan Chipperfield 217786
Assistant Public Defender