

IN THE SUPREME COURT OF THE UNITED STATES

ANTOINE CHAMBERS, aka SEALED DEFENDANT 1,
aka TWIZZIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the government's acquisition, pursuant to a court order issued under 18 U.S.C. 2703(d), of historical cell-site records created and maintained by a cell-service provider violates the Fourth Amendment rights of the individual customer to whom the records pertain.

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No. 17-5692

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A17) is not published in the Federal Reporter but is reprinted at 681 Fed. Appx. 72.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2017. A petition for rehearing was denied on May 22, 2017 (Pet. App. A1). The petition for a writ of certiorari was filed on

August 18, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951; Hobbs Act robbery, in violation of 18 U.S.C. 1951; and kidnapping, in violation of 18 U.S.C. 1201. Pet. App. A3, A20-A21. He was sentenced to 240 months of imprisonment, to be followed by three years of supervised release. Id. at A22-A23. The court of appeals affirmed. Id. at A2-A17.

1. On March 25, 2013, petitioner robbed David Barea after he had collected money he was owed for drugs. Pet. App. A28-A29. Shortly after Barea arrived at the apartment of petitioner's co-conspirator Tyrone Brown to collect the drug money, petitioner and Steven Glisson, another co-conspirator, approached Brown's door and waited outside. Id. at A28. Petitioner had a gun at his waist and carried a hammer, and Glisson carried a revolver. Ibid. When Barea opened the door to leave Brown's apartment, petitioner and Glisson pushed Barea back inside. Ibid. Petitioner tussled with Barea until Glisson threatened Barea with his gun, at which point Barea stopped fighting. Ibid. Petitioner repeatedly hit Barea with the hammer, and he and Glisson eventually took approximately

\$900 from Barea. Ibid. After petitioner and Glisson threatened Barea, Barea stated that he had more money at home, even though he knew that he did not. Id. at A28-A29.

Petitioner and Glisson bound Barea's hands, covered his face, and drove him in their car to his apartment. Pet. App. A29. Barea's wife, Emma Torruella, was at home when they arrived. Ibid. When petitioner and Glisson discovered that Barea had no money in his apartment, petitioner beat Barea with the hammer until Torruella said that the money was at her mother's house. Ibid. Petitioner forced Torruella into the robbers' car and drove her to her mother's apartment, where he followed her into the apartment and waited while she retrieved a bag of money. Ibid. Petitioner and Torruella then returned to Barea's apartment, where petitioner gave the bag of money to Glisson and beat Barea with the hammer again. Ibid. Eventually, petitioner and Glisson left with the money. Ibid.

2. While investigating the crimes, the government discovered two phone numbers associated with the name "Twizie" on Brown's cell phone. Pet. App. A13. Brown's only phone calls on the night of the robbery were to or from one of the Twizie phone numbers. Ibid. A caller identifying himself by petitioner's first name, Antoine, had previously used the other Twizie phone number to place a 911 call from a residence in the Bronx. Ibid. When

law-enforcement agents visited that Bronx address, the landlord reported that petitioner lived there with his girlfriend. Ibid.; C.A. App. 63. Near the Bronx residence, the agents noticed a parked car with a license-plate number that partially matched the number one of the victims had reported for the robbers' car. Pet. App. A13-A14; C.A. App. 63. The parked car was registered to petitioner's girlfriend. Pet. App. A13-A14. In addition, the area code for one of the Twizie phone numbers served Harrisburg, Pennsylvania, where petitioner had previously been arrested. C.A. App. 63.

Based on that information, the government applied to a federal magistrate judge for a court order pursuant to the Stored Communications Act (SCA), 18 U.S.C. 2701 et seq. C.A. App. 59-65. The application sought an order under 18 U.S.C. 2703(d) directing Verizon Wireless (Verizon) to disclose "historical originating and terminating cell site information for all calls made to or from" the Twizie phone number that had communicated with Brown on the night of the robbery for the period from March 1 through April 30, 2013. C.A. App. 59 (emphasis omitted); see id. at 59-65.

The SCA authorizes the government to obtain cell-service providers' records pertaining to their subscribers under specified circumstances. 18 U.S.C. 2703. As relevant here, the government

may require a provider "to disclose a record or other information pertaining to a subscriber * * * (not including the contents of communications)" through "a court order for such disclosure under [18 U.S.C. 2703(d)]." 18 U.S.C. 2703(c)(1)(B). To obtain a Section 2703(d) order, the government must "offer[] specific and articulable facts showing that there are reasonable grounds to believe that * * * the records or other information sought[] are relevant and material to an ongoing criminal investigation." 18 U.S.C. 2703(d).

The magistrate judge issued the requested order, finding that the government's application satisfied the "specific and articulable facts" standard under Section 2703(d). See D. Ct. Doc. 20-3, at 2 (Nov. 18, 2013). In response to the order, Verizon provided the government with its historical cell-site records for the Twizie phone number from March 6 to April 30, 2013. Gov't C.A. Br. 41. Verizon created and maintained those cell-site records in its ordinary course of business. See Trial Tr. 623, 644. The government did not request any cell-site information for text messages or data transmissions, see C.A. App. 59-65, and Verizon's practice was to maintain cell-site records only for "voice calls," Trial Tr. 644.

3. a. Petitioner was charged with offenses related to the robbery and kidnapping. Pet. App. 27a. Before trial, petitioner

moved to suppress the cell-site records for the Twizie phone number. Id. at A61. Petitioner argued that Verizon's production of its business records constituted a Fourth Amendment search of petitioner that could be conducted only pursuant to a warrant supported by probable cause. Id. at A12-A13; see D. Ct. Doc. 18, at 8-16 (Nov. 4, 2013). Petitioner further argued that the government's application for the Section 2703(d) order did not satisfy the SCA's "specific and articulable facts" standard. Pet. App. A12 (citation omitted); D. Ct. Doc. 18, at 16.

The district court denied the motion to suppress. Pet. App. A61-A65 (oral ruling); id. at A55 (written order). The court concluded that cell-phone users lack a Fourth Amendment privacy interest in historical cell-site information that they voluntarily disclose to third parties, including cell-service providers. Id. at A61-A63. The court further held that petitioner had not established a reasonable expectation of privacy in the cell-site records because "he ha[d] not asserted that [the Twizie phone number] belong[ed] to him or even that he used it." Id. at A64. The court also rejected petitioner's statutory suppression argument on the ground that the SCA does not provide a suppression remedy. Id. at A64-A65. The court denied petitioner's subsequent motion for reconsideration. Id. at A53-A54.

b. The case proceeded to trial. Pet. App. A3. Among other evidence, the government presented evidence that the license plate number registered to petitioner's girlfriend's car partially matched the number a victim recalled for the car used for the kidnapping. Id. at A5. When petitioner's girlfriend's car was impounded following a traffic stop months later, it was found to contain a hammer that Barea testified was the one used to beat him throughout the robbery and kidnapping. Ibid. The evidence further established that the Twizie phone number belonged to petitioner, that the phone had been in frequent communication with co-conspirator Brown shortly before the robbery of Barea, and that Brown had called the Twizie phone number shortly after hearing from the police the day after the robbery. Id. at A5, A34.

In addition, an FBI agent testified about the cell-site data for the Twizie phone number. Trial Tr. 621-668. The agent explained that, based on his analysis of the cell-site records, he could offer an opinion on the phone's "general location." Id. at 627. That cell-site evidence showed that the Twizie cell phone (1) was in the vicinity of Brown's apartment shortly before the robbery of Barea; (2) was in the vicinity of petitioner's home several hours later; and (3) moved from the Bronx to New Jersey to Pennsylvania the day after the robbery, following the call from Brown. Pet. App. A5, A33-A35.

The jury found petitioner guilty on the Hobbs Act counts and the kidnapping count. Pet. App. A20-A21. The district court sentenced petitioner to 240 months of imprisonment, to be followed by three years of supervised release. Id. at A22-A23.

4. The court of appeals affirmed. Pet. App. A2-A17. As relevant here, the court rejected petitioner's contention that the district court should have suppressed the historical cell-site records for the Twizie cell phone. Id. at A12-A14. The court understood petitioner to argue that the cell-site records should have been suppressed because "the government's authorization application failed to satisfy the statute's 'specific and articulable' facts standard, [18 U.S.C.] 2703(d), and because the SCA, to the extent it authorizes disclosure on less than probable cause, violates the Fourth Amendment." Pet. App. A12-A13. The court concluded that "[b]oth arguments fail on the merits," because the government's application for an SCA order contained facts that were "sufficiently specific and articulable not only to demonstrate that the sought information would be relevant and material to the ongoing investigation, but also to demonstrate probable cause to think that the sought information would be evidence of a crime." Id. at A13-A14. Based on that finding, the court concluded that it "need not decide whether [petitioner] demonstrated a reasonable expectation of privacy in the Twizie

cellphone, whether a suppression remedy is available under the SCA, or whether the third-party disclosure or good-faith doctrines apply here.” Id. at A13.

5. After the court of appeals denied rehearing, Pet. App. A1, petitioner filed a petition for a writ of certiorari. On October 4, 2017, the government filed a memorandum in response stating that the petition should be held pending the Court’s decision in Carpenter v. United States, No. 16-402 (argued Nov. 29, 2017), and waiving any further response unless the Court requested otherwise. On October 25, 2017, the Court requested a response to the petition.

DISCUSSION

Petitioner renews his claim (Pet. 12-20) that the government violated his Fourth Amendment rights by acquiring, pursuant to a court order issued under 18 U.S.C. 2703(d), Verizon’s historical cell-site records for the Twizie cell phone.

1. For the reasons set forth in the government’s brief in Carpenter v. United States, No. 16-402 (argued Nov. 29, 2017), the government’s acquisition of the cell-site records in this case complied with the Fourth Amendment because petitioner lacked a reasonable expectation of privacy in those business records created and maintained by Verizon and, in any event, Section 2703(d) sets a reasonable standard for acquiring such records.

Petitioner's argument that a Fourth Amendment violation occurred fails for two additional reasons. First, as the district court found, petitioner did not carry his burden of establishing that he had a reasonable expectation of privacy in the Twizie cell phone because he did not assert or otherwise demonstrate that the phone "belong[ed] to him or even that he used it." Pet. App. A64; see Gov't C.A. Br. 49. Second, the cell-site records were admissible under the good-faith exception to the exclusionary rule because the officers in this case reasonably relied on the SCA in acquiring these records. See Gov't C.A. Br. 53-54; see also Illinois v. Krull, 480 U.S. 340, 349 (1987) (good-faith exception applies to "officer[s] acting in objectively reasonable reliance on a statute," later deemed unconstitutional, that authorizes warrantless administrative searches). The government also reasonably relied on binding precedent, see, e.g., Smith v. Maryland, 442 U.S. 735 (1979). See Davis v. United States, 564 U.S. 229, 241 (2011) ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.").

2. In the decision below, the court of appeals declined to decide "whether [petitioner] demonstrated a reasonable expectation of privacy in the Twizie cellphone" or "whether the third-party disclosure or good-faith doctrines apply here." Pet. App. A13.

The court understood petitioner to argue that the SCA violates the Fourth Amendment "to the extent it authorizes disclosure on less than probable cause," and it concluded that petitioner's argument "fail[ed] on the merits" because the facts contained in the government's SCA application "demonstrate[d] probable cause." Id. at A13-A14.

The court of appeals did not further explain the significance of its finding of probable cause, nor did it address petitioner's contention, renewed in this Court, that the Fourth Amendment requires the government to obtain a warrant to compel cell-service providers to disclose cell-site location information. See Pet. C.A. Br. 85. The question whether a warrant is required is presented in Carpenter v. United States, No. 16-402 (argued Nov. 29, 2017). It therefore would be appropriate for this Court to hold the petition pending the Court's decision in Carpenter and then dispose of the petition as appropriate in light of the decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in Carpenter v. United States, No. 16-402 (argued Nov. 29, 2017), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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