Carpenter v US — Rosenthal v Smith

In the Supreme Court of the United States

February Term, 2018

TIMOTHY IVORY CARPENTER, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITIONER'S OPENING BRIEF

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Oral Argument: Video:https://www.youtube.com/watch?v=yOP3kSrMCiE&t=50s

Table of Contents

TABLE OF AUTHORITIES... 2 – 3

QUESTION PRESENTED………………………………………………………………………………… 4

STATEMENT OF ARGUMENT……………………………………………………………………… 4

ARGUMENT I: STANDARD/EXPECTATION OF PRIVACY……………………………………… 5 – 6

ARGUMENT II: THIRD PARTIES CAN NOT GIVE DATA WITHOUT CONSENT… 7 – 8

PROPOSED STANDARD……………………………………………………………………………… 8

CONCLUSION…………………………………………………………………………………………… 8

Table of Authorities

Cases

Katz V U.S.

389 US 347 (1967) ………………………………………………………………………………………………… 4 – 6

US V Jones

565 US _ (2012) ……………………………………………………………………………………………………5 – 6

Grady V North Carolina

575 US _ (2015) ………………………………………………………………………………………………… 5 , 7

Miranda V Arizona

384 US _ (1966) ………………………………………………………………………………………………… 5

Other Authorities

Stored Communications Act ....
6

Electronic Communications Privacy Act...
6

Third Party Doctrine 6

U.S. Const. amend. IV..
3 – 5

Pew Research Center...3

Question Presented

Does the warrantless search and seizure of cell phone records including location data over the course of 127 days violate the Fourth Amendment?

Statement of Argument

If a person cannot be found through either camera footage, cellular data, or social media, they are an outlier in the accessibility of the average American. Because of the recently developed universal companionship of Americans and their cell phones, which are owned by at least 95% of Americans, every person can easily be tracked with a high level of accuracy. This continuous surveillance goes against the intent of the Fourth Amendment, which is designed to protect the privacy of the individual and must develop and evolve alongside technology and the new expectations it creates. Constant surveillance by Governmental entities using these new methods is blatantly against the intent of the Founders of the United States, who knew well the value of protections against governmental intrusions on the private lives of citizens. Even though the police use all established protocol and rules for the obtainment of Carpenters location, the obtainment of such private documents was still unconstitutional.

Carpenter had a right to privacy

The Fourth Amendment was created in 1792 and clearly states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It still holds the same intention of protecting the American people from excessive governmental intrusion. Of course predicting the future is a game of chance and it is unreasonable to have expected the founders to have predicted the rise of the technologies and methods that we are now exposed to. But the Founders intent does not change over time. The specific usage of 'The People' in the Fourth Amendment helps inculcate that the Fourth Amendment's point is to protect citizens and their privacy, not arbitrary or special interests but the denizens of the Nation themselves.

Certainly it is not contested that phone conversations are prefered to be private. This is evident in the existence of speakerphone being an option disabled by default on most cell phones, or the vibrate function when receiving communication, both of which function to reduce the apparent visibility and noticeability of communications. While not in wide use anymore, phone booths even put physical barriers between the user and the outside world to create a exclusive environment. Katz V. US established that the FBI after bugging a phone booth to obtain information violated Katz's expectation of privacy. The case further established that the Fourth Amendment provided protections where one has a 'reasonable expectation' of privacy. This certainly applies to cell phones. Furthermore, as noted in the concurring opinion of US V. Katz, "Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people — and not simply "areas" — against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." In the instance of Carpenter, even though Carpenter did not directly walk into a phone booth and close the door behind him to express an interest in privacy, it is clear that in the modern age certain steps must be taken to make a call 'public', so it is naturally assumed that the intent of any given call where those actions are not taken is privacy. This assertion of a natural right to privacy is backed by various phone manufactures and is perhaps best illustrated in the recent Apple-FBI Dispute, where the FBI requested that Apple build an unconventional but still accessible entrance into a locked phone. Apple refused on the grounds that this would jeopardize consumer privacy. In Carpenter v U.S., Carpenter has a natural expectation of privacy when taking a call because privacy is a feature built into the phone by phone producers, the expectation must be specifically waived and there is no indication that Carpenter did this.

The 2012 case US V. Jones established that to place a GPS device on one's vehicle constituted a 'search' and was thereby prohibited under the Fourth Amendment. The Justices' concurring opinion noting, "the use of longer term GPS monitoring in investigations of most offenses' is no good." Justice Scalia also wrote in the majority opinion

that a 'reasonable expectation of privacy' changes as cultures and technologies develop, and the development of computers which we always carry with us and store huge amounts of personal information on assuredly fit the criteria of property worth being protected from unwarranted searches and seizures. A vehicle is different from a phone but nonetheless the standard established, that continuously tracking a person through one of their commonly used accessories counts as a search and thus requires a warrant. Because phones are a GPS, along with other functions, continuously tracking them without a warrant is unconstitutional. The case of Grady V. North Carolina further built off of US v Jones, establishing that constant tracking of a person by GPS, not by vehicle by tracker, amounted to a search and required a warrant. The problem primarily arose because Grady can not give consent to being tracked, due to being forced to wear the tracking monitor.

The fourth amendment protects people and not just areas. Carpenter had a right to privacy while still in public due to the precedent established through Katz v US as well as the innate features of phones that encourage privacy. Cell phones contain, and thus function as, GPSs and because of this, as established through the rulings of US v Jones and Grady v NC, require a warrant. In both proceeding court cases, the tracking of the position of cell phones is continuous and therefore unconstitutional without, again, acquiring a warrant. Carpenter did not have the opportunity to consent to having his location tracked because he did not know his phone was being tracked. Had Carpenter discovered that his phone could be used as a GPS, then it would be justifiable to argue that he was willingly giving up his right to privacy for access to communication. However, because Carpenter had no knowledge that he was forfeiting his privacy he could not act accordingly to make his actions private. A lack of knowledge is equivalent to a lack of consent in the same sense that consent may not be valid if the consenter lacks important information.

The value of informing someone before allowing self-incrimination can be seen in Miranda V. Arizona, under which an arrested person must be informed of their rights or else what they say is inadmissible in court. As said in the majority opinion by Earl Warren, "We [the Supreme Court] will not presume that a defendant has been effectively appraised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that an effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record" Because Carpenter lacked relevant information to know that using his phone could be used to incriminate himself, and because he did not consent in the first place, it was unconstitutional to track his phone.

Third parties cannot give data without consent

The third party doctrine describes the legal principle that when one gives a third party, such as cell phone providers and internet services, access to personal data that information no longer has an expectation of privacy. It is therefore assumed that third parties can give away personal information of their users without a warrant. Like many political theories, there is not an explicit law establishing the third party doctrine but rather it relies on conclusions drawn from court decisions, laws, and other legal sources, most prominently the Stored Communications Act.. The viability of it as applied to the modern world has been questioned on several occasions, notably during U.S. V. Jones. Justice Sotomayor herself said, "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks" As the doctrine is not an actual law it relies on interpretation to act as its mode of enforcement.

The Third Party Doctrine and similar ideologies rely on several cases and laws. Smith V. Maryland ruled that police could seize information from pen registers, but various laws which include the Electronic Communications Privacy Act (ECPA) continue to extend protections against wiretapping and other methods of data extraction. Title I of the ECPA provides protections and requires more stringent warrant requirements regarding communications of most forms done in transit. The limits on what is considered 'transit' are debatable but the intent is to protect public conversation, and Carpenter was never stated to have not been in public during his calls, which can further be assumed because most calls happen in public. Title II, more commonly known as the stored communications act, addresses disclosure of communication records by and to third parties, specifically ISPs. It defines Electronic Communication Services as "any service which provides to users thereof the ability to send or receive wire or electronic communications" and it defines Remote Computing Services as "the provision to the public of computer storage or processing services by means of an electronic communications system.", where the former requires a warrant and the latter can be obtained with a subpoena. In Carpenter the FBI obtained and utilized a subpoena but not a warrant, despite the fact that any given cell provider, including the one used by Carpenter, falls into the first category. Title III protects cell phone dialing, signaling, addressing and routing communications and prohibits their obtainment without a court order. Tracking a call is typically done by tracing when the call occurred as well as it's internal GPS, so Title III must also prohibit tracking as seen in Carpenter V. U.S. as well.

Court cases are also used in support of the Third Party Doctrine, most commonly U.S. V. Graham. It is important to note that U.S. V. Graham has only been decided in the

Maryland District court and so creates little real president. In Graham it was found that a phone's past locations are accessible without a warrant by the police, so the assumption is that police can always track a phone's past location. This is flawed reasoning because the case does not conflict with Katz V. U.S., which held that 4th amendment protections exists which there is an expectation of privacy. As the Government argued, in Graham a false name and other fake information were used and by using false information the expectation of privacy is indirectly abandoned. By using a fake name and giving false particulars that Graham did not trust the Fourth amendment protections and decided not to use it at all, thus he gave them up. Graham could be constitutionally monitored specifically because he waived his expectation of privacy, and so tracking his location among other things did not violate any rights. In Carpenter false information was never used, and an expectation of privacy was never eliminated, thus the standard established in Katz still applies. Even ignoring that argument though, Katz is a Supreme Court Case and so it wins if the two were to conflict.

Proposed Standard

Under this privacy standard on the tracking of an individual's phones and other effects which can easily reveal location and other data and with which the user has a reasonable expectation of privacy, shall not occur without a formal warrant issued by a judge and accompanied by probable cause.

Conclusion

The fourth amendment has started off, and will continue to be used as a means to protect the American people from unjust searches and seizures. It does not matter whether the property protected is information, or a tangible item. The warrantless search and seizure of most private entities is unconstitutional. Any information pertaining to an individual's phone is also protected from search and seizure for couple of reasons. First, because 95% of americans own a cellphone phones, and as the court has established through Riley v California, that searching a phone's contents without a warrant is unconstitutional. The new standard is then indirectly advanced through the holdings of US v Jones and Grady v North Carolina. Both establish the continuous tracking of a person without their consent is deemed a search, and is unconstitutional without a warrant. Obtaining infinite accessibility to a person's call history is the continuous tracking of an individual, and therefore should only be legal in a court with a warrant.

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