DurhamPhanRespondentBrief

Respondent Brief – Durham & Phan

To be in the Supreme Court of the United States

February term 2018

CARPENTER, PETITIONER

V.

U.S. , RESPONDENT

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Table of Cited Authorities

Introduction

This brief is written by Jack Durham and Alexis Phan on behalf of the Respondent, the United States. This is directed to the Supreme Court of the United States.

Statement of the Facts

In April 2011, police arrested men in connection of a series of armed robberies in Detroit, Michigan. One of the men confessed to working with others to commit robberies in the Detroit area. He willingly gave the numbers of his accomplices – including Petitioner, Timothy Carpenter. Under the Stored Communications Act, 18 U.S.C. § 2703(d), several magistrate judges gave permission for the FBI to obtain records associated with the numbers. The FBI was able to obtain through third parties for location data from Carpenter's phone to implicate him with the armed robberies.

Statement of the Case

The trial court sentenced Carpenter of nine armed robberies and sentenced 1,395 months, ruling that the use of the defendant's cell records were not a search under the Fourth Amendment and that therefore a warrant was unnecessary. The U.S. Court of Appeals for the Sixth Circuit affirmed this decision.

Issue 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

Under *Katz v. United States, 389 U.S. 347 (1967)*; the Stored Communications Act, 18 U.S.C. § 2703(d) and the Fourth Amendment's Third Party Doctrine there is no expectation of privacy when law enforcement ask a third party for cell site data with . The

obtaining of the location data was also not a search or seizure following the Stored Communications Act, 18 U.S.C. § 2703(d).

Argument

Response to Point of Error One: The Stored Communications Act allows law enforcement to obtain the court's permission to obtain certain records and information.

The Stored Communications Act, 18 U.S.C. § 2703(d), states that a court order to disclosure under subsection (b) or (C) may be issued by any court that is a court of competent jurisdiction and shall issue only if the government entity offers specific and articulable facts that showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In application to Carpenter, the FBI applied to magistrate judges for permission to obtain transactional records that would provide evidence that Carpenter and others had violated the Hobbs Act, 18 U.S.C. § 1951. The magistrate judges later granted the applications under the Stored Communications Act, 18 U.S.C. § 2703(d). The applications were granted by magistrate judge from a court of competent jurisdiction, the FBI showed specific and articulable facts from one of the members in the armed robberies and gave the numbers of other accomplices. There were reasonable grounds to believe that the location data was relevant to find out the Petitioner's location during the robberies.

Also in *In re Application of the United States for Historical Cell Site Data 724 F.3d 600*, it was held that "court orders under the Stored Communications Act, 18 U.S.C. § 2703(d) – compelling cell phone service providers to disclose historical cell site location information – are not per se unconstitutional." Displaying that the obtaining of the cell site location data by the government is constitutional.

In sum, law enforcement are able to obtain the court's permission to certain records and information without violating the Fourth Amendment because it used the Stored Communication Act to justify its reason to get the Petitioner's location.

Response to Point of Error Two: Carpenter had no reasonable expectation of privacy in his location or location records.

Katz v. United States, 389 U.S. 347 (1967) established the test to determine if a person has a reasonable expectation of privacy which is whether a person could claim Fourth Amendment protection from government actions had violated his or her "reasonable expectation of privacy" in the object of the search or the area from which the item was seized (1) had an actual expectation of privacy (2) that the expectation must be "be one that

society is prepared to recognize as 'reasonable.'" For example, police are not allowed to eavesdrop on a phone call (even one placed from a public phone booth *Katz v. United States, 389 U.S. 347 (1967)*) without a warrant.

Even if somehow the petitioner shows that he had a reasonable expectation of privacy, the subject of that expectation was not due Fourth Amendment protection. The fourth amendment states that "the right of the people to be secured in their persons, houses, papers, and effects...". The Fourth Amendment further protects some privacy interests allowing individuals to challenge, among other things, the government's recording of conversations in a public phone booth *Katz v. United States, 389 U.S. 347 (1967)*. The government didn't do either here. The data the police got off the petitioner's phone was his inexact location which is not a person, a house, a paper, or an effect. The location data is not a person or a house. Black's Law Dictionary defines real property to include land and anything constructed on it, while personal property is defined as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property." The location data is not a paper because a paper is legal document or where ideas are written and expressed. It also wasn't an effect because an effect is an item or property. The location data wasn't an item in which a reasonable person would have a reasonable expectation of privacy in public space. In a public space a person gives up a reasonable expectation to privacy in his location, particularly on government funded roads which the respondent used. The cell phone itself is property but the information such as location or phone numbers dialed is not private property because as stated by the Maureen E. Brady, "The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection," The Yale Law Journal (February 2016) you have no expectation of privacy in a public space. "The factors that determine an individual's rights to keep these objects free from interference are at best unclear and at worst incoherent." A person's rights to keep objects free from government search or seizure is thus an undefined line. To address the second point of the test Katz v. United States whether society is prepared to recognize as reasonable. According to the Pew Research Center, 74% of Americans use location-based services in their day-to-day lives. Given this ubiquity, it is reasonable to conclude that most people are aware that their cellphones are constantly recording location data.

Another question before the court is whether or not there was a Fourth Amendment search of Carpenter in today's case. The FBI didn't search Carpenter at all because, under the third party doctrine, he willingly gave his information over the third party. The FBI received this information from the third party, not Carpenter, so he was never searched.

The Stored Communications Act, 18 U.S.C. § 2703(d) states that a court order to disclose under subsection (b) or (C) may be issued by any court that is a court of competent jurisdiction and shall issue only if the government entity offers specific and articulable facts that showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and

material to an ongoing criminal investigation. The FBI asked several magistrate judges for permission to obtain transactional records associated with sixteen cell phone numbers associated with a string of robberies. They were given permission to include subscriber information, toll records, call detail records that showed the phone numbers of outgoing and incoming calls, and cell site information at the beginning and end of each call for the numbers in question. The judges granted the application pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d). This was appropriate since the petitioner's phone had relevant material to an ongoing investigation. The FBI sought this information through the mechanism proscribed by Congress under the act used on appropriate mechanism in an appropriate way which afforded Carpenter greater protection than he was due under the Fourth Amendment.

Response to Point of Error Three: There is no expectation of privacy when asking a third party for cell site data by law enforcement agencies.

According to the U.S. Constitution's Fourth Amendment, Bill of Rights As Proposed, Massachusetts Declaration of Rights, and New York Ratification Convention Debates and Proceedings, the people will be protected from "unreasonable searches and seizures." When analyzing whether there is a reasonable expectation of privacy we apply the subjective and objective expectation of privacy test in *Katz v. United States, 389 U.S. 347 (1967)*, the Third Party Doctrine, *Smith v. Maryland, 442 U.S. 735 (1979)*, *United States v. Miller, 425 U.S. 435, 443 (1976)* and *United States v. Graham, 846 F. Supp. 2d 384 (D. Md. 2012)*.

In *Katz v. United States, 389 U.S. 347 (1967)*, federal agents used an eavesdropping device to a public phone booth that Katz used. These conversations were used as evidence to implicate Katz in for transmitting gambling information. The Supreme Court ruled that a physical intrusion into the area that Katz occupied was unnecessary to bring the Amendment into play. In a concurring opinion by Justice Harlan in *Katz v. United States, 389 U.S. 347 (1967)*, the Fourth Amendment prohibits searches where – (1) the parties have exhibited a subjective expectation of privacy and (2) that the expectation must be one that society is prepared to recognize as reasonable otherwise known as an objective expectation of privacy. This test was later adopted by this Court.

Although there was no physical intrusion, the location data is not covered under Fourth Amendment protection because Carpenter didn't have an actual expectation of privacy. Under *Katz v. United States, 389 U.S. 347 (1967)*, for the Fourth Amendment to be able to prohibit searches, Carpenter and the phone company must have exhibited a subjective expectation of privacy and that the expectation must be one that society is prepared to recognize as reasonable or an objective expectation of privacy.

As said in the Orin Kerr, "The missing "subjective expectation of privacy" test," The Washington Post (June 30, 2014)'s article most cases don't apply a subjective expectation test. But if the court were to apply this standard; along with *Smith v. Maryland, 442 U.S.*

735 (1979) where it was held that an expectation of privacy doesn't apply when a person voluntarily turns information over to third parties that is used in the regular conduct of that business, the Third Party Doctrine, that when people voluntarily give information to third parties – such as banks, phone companies, Internet Service Providers (ISPs), and e-mail servers – they have no reasonable expectation of privacy, and *United States v. Miller, 425 U.S. 435, 443 (1976)*, that a person does not have a reasonable expectation of privacy concerning information found in business transaction records, usually conducted through a third party; then it should be expected by anyone that uses location data that it is being transmitted through a separate third party such as wireless carriers. This fails the subjective expectation of privacy.

For an objective reasonable expectation of privacy, an expectation of privacy must be generally recognized by society. This is further expanded in *Rakas v. Illinois 439 U.S. 128 (1978)* by setting a fine line on how an expectation of privacy may be recognized. *Rakas v. Illinois 439 U.S. 128 (1978)* ruled that the expectation of privacy must have a source outside of the Fourth Amendment either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. According to Kathryn Zickuhr, "Location-Based Services," Pew Research Center (September 12, 2013), 74% of Americans use location-based services in their day-to-day lives. It is perfectly acceptable for Americans to use location-based services and for these services to be proficient, it is necessary for the location data to go through third parties such as telephone or wireless companies. This data is often utilized in the modern lifestyle: social media or GPS. Further, if we were to look at *United States v. Miller, 425 U.S. 435, 443 (1976)*, that a person does not have a reasonable expectation of privacy in business transactions when the government obtains it from a third party, which in Miller were banks. To draw comparisons between Carpenter and Miller, both deal with an expectation of privacy with transactions between third parties that are necessary for the parties and their use in modern life. It is thus clear that the Fourth Amendment does not protect information commonly utilized in modern life when it is used in a business transaction. If Americans don't want their location data to be shared, they could simply turn off location-tracking features, which at least 46% of teens and 35% of adults have done once, Kathryn Zickuhr, "Location-Based Services," Pew Research Center (September 12, 2013). Ignorance of such a feature cannot be an excuse, as summarized by James Madison, who said that, "knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."

In total, in following of *Katz v. United States, 389 U.S. 347 (1967)*, there is no reasonable expectation of privacy because there is neither a subjective nor an objective expectation of privacy.

Also in *United States v. Graham, 846 F. Supp. 2d 384 (D. Md. 2012)*, the court ruled that "Historical cell site location data does not enjoy Fourth Amendment protection and

therefore no probable cause is required to release such data." In application with Carpenter, the location data that was obtained does not enjoy Fourth Amendment protections and thus, no probable cause is required to release it.
In conclusion, there is no expectation of privacy that would make the obtaining of the location data violate the Fourth Amendment.

Response to Point of Error Four: United States v. Jones, Boyd v. United States, Ex parte Jackson, and Riley v United States, are distinguishable because they aren't violated.

The Petitioner relies on *Boyd v. United States, 116 U.S. 616, 625 (1886)*, *Ex parte Jackson, 96 U.S. 727 (1878)*, *Riley v. California 573 U.S. __ (2014)*, and *United States v. Jones 132 S.Ct. 945 (2012)*, but they should not apply because this case law isn't violated.
In *Boyd v. United States, 116 U.S. 616, 625 (1886)* it was held that, "the Fourth Amendment... protects against invasion into a person's private matters." There would be no invasion into a person's private matters because it's entirely reasonable that when a person voluntarily uses a third party, such as a wireless carrier, for a service; that person has given up their expectation of privacy. In this case, the Petitioner gave up their reasonable expectation of privacy when the petitioner used the wireless carrier and the court can further conclude that *Boyd v. United States, 116 U.S. 616, 625 (1886)* was not violated.
In *Ex parte Jackson, 96 U.S. 727 (1878)* it was found that, "the government needed a search warrant to open letters and package, but not to use the outward form and weight of those materials, including the name and address of the recipient." In *Ex parte Jackson, 96 U.S. 727 (1878)*, the contents of the letter are not necessary for the carrier to perform its duties while in the case before us the FBI were simply obtaining these from a third party that had to properly perform its duties to have the location data. Even in *United States v. Miller, 425 U.S. 435, 443 (1976)*, banks had to deal with sensitive bank records that the bank could not properly perform its duties without and it was still held legal for the bank to hand over the bank records to law enforcement without a warrant.
In *Riley v. California 573 U.S. __ (2014)* it was held that, "Police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested." *Riley v. California 573 U.S. __ (2014)* deals with a direct search and seizure without the individual's consent of the information to a third party while the case before us deals with the Petitioner's consent of the information to the wireless carriers that was subsequently given to the FBI.
In *United States v. Jones 132 S.Ct. 945 (2012)* it was found that, "the Government's attachment of the GPS device to the vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment." In comparison to the case before the court, the GPS device used in *United States v. Jones 132 S.Ct. 945 (2012)* is a far more precise measurement than cellular data that can only measure within a

two mile area. *United States v. Jones 132 S.Ct. 945 (2012)* should not apply because it deals with precise location obtained with a GPS while Carpenter deals with an imprecise location obtained with cell phone location data.
So in sum, *Boyd v. United States, 116 U.S. 616, 625 (1886)*, *Ex parte Jackson, 96 U.S. 727 (1878)*, *Riley v. California 573 U.S. __ (2014)*, and *United States v. Jones 132 S.Ct. 945 (2012)*, do not apply and should not bind this court.

Conclusion

The obtaining of cell site location data from third parties are legal under the Third Party Doctrine, the Stored Communications Act and *Katz v. United States, 389 U.S. 347 (1967)*.

Prayer

For these reasons, we pray that this court rule in favor of Respondent and affirm the lower court.
