UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:15-CR-184-FL-6

UNITED STATES OF AMERICA v. JOHN [redacted]	REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS FRUITS OF GPS CELL PHONE TRACKING

In reply to the Government's Response to Defendant's Motion to Suppress GPS Cell Phone Tracking, the Defendant, through counsel, shows this Honorable Court as follows:

This motion [D.E. 128] relates to the 266-day continuous warrantless GPS tracking of Mr. [redacted] phones in real time by the Raleigh Police department. Within four hours and three minutes of first tracking him, the Raleigh Police had begun tracking him within his home without a warrant, id. at 3—a clear violation of well-settled Supreme Court law. See United States v. Karo, 468 U.S. 705, 715 (1984).

The Government does not contest that the GPS cell phone tracking was a search under the Fourth Amendment. Rather, the Government suggests that the GPS cell phone tracking orders are the equivalent of warrants and that the Raleigh Police acted in objectively reasonable reliance on these orders. The Court should reject these arguments for the following reasons:

I. THE GPS CELL PHONE TRACKING ORDERS ARE NOT THE FUNCTIONAL EQUIVALENT OF WARRANTS.

First, the orders fail to meet the particularity and specificity required of a warrant because they allow the GPS tracking of any "telephones with which Mr. [redacted] phones communicate." [D.E. 128-3] at 6 (alterations omitted).

The Fourth Amendment requires that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." "'The particularity requirement is fulfilled when the warrant identifies the items to be seized by their relation to designated crimes and when the description of items leaves nothing to the discretion of the officer executing the warrant.'" United States v. Shah, 5:13-CR-328-FL, Order on Motion to Suppress [D.E. 39] at 21, 2015 WL 72118 at *12 (E.D.N.C. Jan. 6. 2015) (Flanagan, J.) (quoting United States v. Williams, 592 F.3d 511, 519 (4th Cir. 2010). Moreover, "the scope of the warrant [must] be limited by the probable cause on which the warrant is based." Id. [D.E. 39] at 20-22 (quoting In re Grand Jury Subpoena Dated Dec. 10, 1987, 926 F.2d 847, 856 (9th Cir. 1991)).

Allowing the GPS tracking of any phones that communicate with Mr. [redacted] phones gives unlimited discretion to police officers—or in this case "**any [ ] applying officer**" [D.E. 128-3] at 6 (emphasis in original)—to track the exact real-time location of an untold number of people without any suspicion of wrongdoing by those other parties, without any belief that the location of those other parties might lead to evidence of a particular crime, and without any relationship between the facts alleged in the application and those "other telephones." Simply calling Mr. [redacted] phone accidentally, or receiving a call from him, would suffice under this order for any law enforcement officer to GPS track a person's every move for 60 days.

Thus, the orders do not provide any meaningful limit on the discretion of the executing officers and are "so facially deficient [ ] in failing to particularize the place to be searched or the things to be seized [ ] that the executing officers cannot not [have] reasonably presume[d] [them] to be valid." United States v. Leon, 468 U.S. 897, 923 (1984).

Second, the orders are not the equivalent of warrants because they were issued based on a standard that is lower than probable cause. The standard for an order under 18 U.S.C. § 2703(d) is that "**there are reasonable grounds to believe that . . . the records or other information sought[] are relevant and material to an ongoing criminal**." (Emphasis added). The state court orders granted the GPS cell phone tracking requests based on this standard, as they state: "**there are 'reasonable grounds' to believe that 'records or other information'** . . . **[are] 'relevant and material'** . . . **to this ongoing criminal investigation** . . . . [T]he 'records and other information'. . . include[] . . . prospective Global Positioning Location (GPS) for the duration of the order[.]" [D.E. 128-3] at 5, ¶¶ 5, 6 (emphasis added).

This standard of "reasonable grounds to believe" is less than that required for a probable cause warrant. E.g., Shah, 5:13-CR-328-FL [D.E. 39] at 9 (noting that the standard for orders under § 2703(d) is "not a probable cause warrant."). Therefore, the GPS cell phone tracking orders were issued based on a finding that was less than probable cause.

Third, even if the Court finds that the GPS cell phone tracking orders were intended to be probable cause orders, the applications were so factually deficient they were insufficient to establish probable cause and that any official reliance on them was objectively unreasonable. For example, the only factual information provided in the first application was that, at an unknown time, an anonymous person alleged that Mr. [redacted] ships marijuana from California to Raleigh, and that the anonymous person knew the names of a few women who live in Raleigh, Mr. [redacted] address, what cars he owns, and a phone number that was one digit off from his phone number. [D.E. 128-3] at 1-2. The remainder of the application consists of the bare conclusory statement that, at some unknown time, "[a]dditional information has been developed that [Mr.] [redacted] is structuring large cash deposits into Wells Fargo Bank,"

although the police had not obtained his banking records. Id. at 2; see, e.g., United States v. Wilhelm, 80 F.3d 116, 119 (4th Cir. 1996) (warrants may not be based on "conclusory allegations").

This application contains fewer facts than the application in Wilhelm,[1] which the Fourth Circuit found so bare bones that it failed to establish probable cause and that any reliance on it was objectively unreasonable. 80 F.3d at 120-22. Moreover, in Wilhelm, the court noted that "[m]ere confirmation of innocent static details is insufficient to support an anonymous tip. The fact that a suspect lives at a particular location or drives a particular car does not provide any indication of criminal activity." Id. at 120 (internal quotation marks omitted).

Here, the information provided in the application merely indicated that an anonymous tipper made an allegation of marijuana dealing and then listed details about Mr. [redacted] that someone who knows him, or anyone who had researched government databases, would know.

Since the application here provides less information from a less reliable source than the affidavit rejected as "bare bones" in Wilhelm, the Court should find the application insufficient to establish probable cause and so lacking that any reliance upon it would have been objectively

[1] The Fourth Circuit in Wilhelm described the affidavit in question as follows:

> On 3–7–94 applicant received information from a reliable source who is a concerned citizen, a resident of Iredell County, a mature person with personal connections with the suspects and has projected a truthfull [sic] demeanor to this applicant. Informant stated to applicant the directions to this residence and the directions have been confirmed to be true by the applicant through surveillance on this date. The informant described the substance he/she believed to be marijuana and the informants [sic] description is consistent with the applicants [sic] knowledge of marijuana. Informant described transactions between residents and patrons that purchase marijuana at this residence and his/her descriptions of these actions are consistent with applicants [sic] knowledge of how marijuana is packaged and sold. Informant has personally observed residents selling marijuana at this residence within the last 48 hours. Informant also observed a quanity [sic] of un-sold marijuana at this residence within the last 48 hours.

Wilhelm, 80 F.3d at 118.

unreasonable. See Wilhelm, 80 F.3d at 120-22; Shah, 5:13-CR-328-FL [D.E. 39] at 26 ("The 'good faith' exception does not apply . . . when the affidavit supporting the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." (quoting United States v. Wellman, 663 F.3d 224, 228-29 (4th Cir. 2011)).

Similarly, probable cause is lacking and the reasonable officer would not have relied on the order as a probable cause warrant because the application failed to provide any temporal proximity between the allegations and the time of the search. See United States v. Doyle, 650 F.3d 460, 745 (4th Cir. 2011) (suppressing evidence because affidavit in support of warrant lacked temporal proximity between allegations and time of search); United States v. Carroll, No. 7:12-CR-57-F, 2012 WL 3780449, at *5 (E.D.N.C. Aug. 31, 2012) (same).

Fourth, because the Raleigh Police did not intend for these orders to be warrants, the Court should decline to grant the GPS cell phone tracking orders the constitutional imprimatur of warrants. These GPS cell phone tracking warrants were sought pursuant to 18 U.S.C. § 2703(d) ("Requirements for Court Order"), as opposed to 18 U.S.C. § 2703(c)(1)(A), which requires the police to obtain a warrant "issued using the procedures described in the Federal Rules of Criminal Procedure [] or . . . using State warrant procedures[.]" The Court should not *post hoc* grant the police a warrant when they did not seek one. To do so would encourage police to disregard the statutory requirement under the Stored Communications Act that police must obtain a warrant using Fed. R. Crim. P. 41 or state warrant procedures.

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For these reasons, the Court should reject the Government's assertion that these GPS cell phone tracking orders satisfy the constitutional warrant requirement.

II. THE GOOD FAITH EXCEPTION SHOULD NOT APPLY.

The Government is correct that, for the good faith exception to apply, the officers must have "act[ed] in reasonable reliance on an enacted statute, a properly issued warrant or court order that is not clearly defective, or binding appellate precedent." [D.E. 157] at 9. But the Government cannot show that any of these bases for applying the good faith exception exist here.

First, the court orders purportedly relied on were facially defective. Not only were the orders facially defective for the reasons discussed in Section I above; the orders were also facially defective because they failed to establish any geographic limits as required by the pen register statutes.

Both the state and federal pen register state, "An order issued under this section shall specify the geographic limits of the order." 18 U.S.C. § 3123(b)(1)(C) & N.C. Gen. Stat. § 15A-263(b)(1)(c) (alterations omitted). Thus, such orders that are "without geographical limits" are invalid. Id.; see also United States v. Mamalis, 498 Fed. Appx. 240, 244 (4th Cir. 2012) (unpublished) (holding that pen register orders were not invalid for being "without geographical limits" because the orders "clearly establish that the pen registers are to be 'installed and used within the jurisdiction of [the state] Court.'"). The orders in this case provided that the police may "install and monitor a pen register and/or trap and trace device(s) **without geographical limits**." E.g., [D.E. 128-3] at 6, ¶ 1 (emphasis in original). Therefore, these orders were also facially defective for their failure to adhere to the clear requirements of the pen register statutes.

Second, there is no statute allowing the police to continuously track the precise location of a suspect without a warrant. The DOJ manual on obtaining electronic evidence states that most courts "have held that as a matter of statutory construction, the Pen/Trap statute and 18 U.S.C. § 2703(d) [of the Stored Communications Act] cannot be used to obtain

prospective cell-site information."[2] As the manual explains, CSLI is far less intrusive than the precision location tracking that occurred in this case:

> Cell-site data . . . identifies the antenna tower . . . to which a cell phone is connected at the beginning and end of each call . . . . [A]t best, this data reveals the neighborhood in which a cell phone user is located at the time a call starts and at the time it terminates; it does not provide continuous tracking and is not a virtual map of a cell phone user's movements.[3]

The GPS tracking that is the subject of this motion was "continuous tracking" that allowed the police to obtain "a virtual map of [the] cell phone user's movements." Moreover, unlike CSLI, GPS tracking data is not a business record of the cell phone service provider, and GPS tracking data is not voluntarily conveyed to the cell phone service provider. Declaration of Cell Phone Expert Larry E. Daniel [D.E. 128-2] at ¶¶ 9-11, 14, 20, 21. Because the pen register statute explicitly prohibits obtaining location information under its authority, 42 U.S.C. § 1002(a), and because the Stored Communications Act merely allows police to obtain business records from cell phone and other service providers containing information that has been voluntarily disclosed to the service provider, these distinctions show that the laws purportedly relied upon in the orders do not authorize the tracking that was conducted here.

These differences between CSLI and GPS tracking also distinguish this case from the cases the Government relies on in its response to suggest that the tracking was statutorily authorized—for each of those cases dealt with CSLI, not with GPS tracking. See State v. Perry, 776 S.E.2d 528 at 531, 538 (N.C. App. 2015) (noting that the "[d]efendant has not shown any evidence of any GPS or 'real-time' tracking"; rather, "AT&T provided the records of the

[2] DOJ Manual: Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations, Published by Office of Legal Education, Executive Officer for United States Attorneys, P. 160-61 (internal citation marks and quotations omitted) (available at: http://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf (last accessed November 30, 2015)).
[3] DOJ Manual, supra n. 1 at 159.

location of the cell phone tower 'hits' or 'pings' whenever a call was made to or from the cell phone"); United States v. Graham, 796 F.3d 332, 338 (4th Cir. 2015) ("We conclude that the government's warrantless procurement **of the CSLI** was an unreasonable search in violation of Appellants' Fourth Amendment rights." (emphasis added)), reh'g en banc granted, No. 12-4659 L, 2015 WL 6531272 (4th Cir. Oct. 28, 2015); United States v. Bey at al, 5:15-CR-166-BR-3 Defendant Dixon's Motion to Suppress All **Cell Site Location Information** [D.E. 134] at 3.

The Government has not cited, and cannot cite, a single case to support its theory that the statutory law allows police, without a warrant, to usurp a person's phone so they can track the precise location of that phone (and any other phone with which the suspect's phone communicates), including tracking them within their home. No such case exists because no statute authorizes the warrantless precision cell phone tracking that occurred in this case.

Third, there is no binding appellate precedent allowing the police to surreptitiously turn a person's cell phone into a tracking device for the purpose of allowing the police to surveil the person's every movement, including their movements within their home. Rather, the clearly established Supreme Court precedent prohibits this police conduct. See United States v. Karo, 468 U.S. 705, 715 (1984) (establishing that tracking a person's movement in their home constitutes a search requiring a warrant); United States v. Jones, 132 S.Ct. 950, 954 (2012) (Sotomayor, J., concurring) (when the government "usurp[s] [a person's] property for the purpose of conducting surveillance on him, [it] invad[es] privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection.").

The Government attempts to circumvent this clearly established binding precedent by arguing that the officers relied on their "past experience" in a state trial court suppression hearing about a less intrusive category of cell phone location information, CSLI. [D.E. 157] at 10.

However, the "good faith exception is not a license for law enforcement to forge ahead with new investigative methods in the face of uncertainty as to their constitutionality[, and] '[t]he justifications for the good-faith exception do not extend to situation in which police officers have interpreted ambiguous precedent or relied on their own extrapolations from existing case law.'" United States v. Sparks, 711 F.3d 58, 67-68 (1st Cir. 2013) (quoting United States v. Davis, 598 F.3d 1259, 1267 (11th Cir. 2010), aff'd 131 S. Ct. 2419 (2011)).

Therefore, this past experience with a hotly contested constitutional issue, which was on appeal throughout this investigation, would have informed the reasonable officer that a warrant was required here. Similarly, the officers' experience in this case with a federal judge explicitly prohibiting this tracking would also have informed the reasonable officer that a warrant was required. See [D.E. 128] at 13; [D.E. 128-4] at 4-5 (Magistrate Judge Numbers' Order prohibiting real-time location tracking). Thus, if relevant at all, these officers' experience supports the application of the exclusionary rule in this case.

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Since there was neither binding appellate precedent nor any statute allowing this tracking, and because the orders were facially deficient, the good faith exception to the exclusionary rule should not apply here.

III. CONCLUSION

Because the GPS cell phone tracking constituted a warrantless search, and because the good faith exception should not apply to the officers' conduct, the Defendant respectfully submits that the Court should grant Defendant's Motion and suppress the fruits of the 266-day warrantless GPS tracking odyssey.

Finally, without waiving Mr. [redacted] claims as to the unconstitutionality of the searches based on each of the GPS tracking orders, Mr. [redacted] respectfully submits that the Court need only address the constitutionality of the GPS cell phone tracking conducted pursuant to the first order [D.E. 128-3] because each of the subsequent GPS tracking orders was a fruit of the search conducted pursuant to this first order.

Respectfully submitted, this the 3rd day of December, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date shown below he electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to Assistant United States Attorneys Jonathan Holbrook and Dena King.

This the 3rd day of December, 2015.

/s/ Elliot S. Abrams
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