In the Supreme Court of the State of Vermont, Docket No. 2019-029

State of Vermont, Appellee

V.

Chavis Murphy, Appellant

Appeal from the
Superior Court of Vermont – Criminal Division
Chittenden County
Docket No. 4791-12-15 Cncr

Reply Brief of the Appellant

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Statement of the Issues

Table of Contents

Table of Authorities

Cases

Argument

I. A cellphone ping for real-time CSLI is a search that requires a warrant in Vermont pursuant to the Fourth Amendment and under Article 11.

When Det. Nash requested AT&T ping Mr. Murphy's phone to find him, that request constituted a search under the Fourth Amendment and Article 11, triggering the warrant requirement. Controlling precedent in Vermont broadly defines privacy interests protected by the United States and Vermont Constitutions. "Freedom from unreasonable government intrusions into legitimate expectations of privacy [is] a core value protected by Article 11." *State v. Savva*, 159 Vt. 75, 84 (1991). Against this long-established backdrop of insistence on the warrant as *the* balance to ensure the privacy rights of Vermonters, the Court must find—like the majority of the states that have considered it—that even a single request for real-time CSLI is a search. *Id.* at 85 (citations omitted).

A. Controlling precedent in Vermont, which define protected privacy interests broadly, necessarily require a determination that real-time CSLI is a search.

Even predating *Carpenter*, in Vermont, the State's request for a real-time ping would be a search because this Court has long recognized that privacy protected by the Fourth Amendment "concerns not only our interest in determining *whether* personal information is revealed to another person but also our interest in determining *to whom* such information is revealed." *In re Search Warrant*, 2012 VT 102, ¶ 50 (emphasis in the original) (citation omitted). There, this Court squarely rejected the State's argument that a person forfeits privacy rights and protections under the Fourth Amendment when information acquired by the Government was already revealed to a third party. The Court explained that constitutional protections continue to hold because "privacy interests are… deeply sensitive to the identification of the recipient of the information[.]" *Id.* ¶ 51. Further,

> [a] citizen's relationship with a police officer engaged in an investigation is asymmetric in power and laden

> with potential consequences. Unlike virtually any other person, an investigating police officer has the power to place a citizen at the mercy of the State. *We have the greatest interest in keeping our private information from someone who could do the most damage with it.*

Id. ¶ 53 (emphasis added).

Under the Vermont Constitution, this Court has also held that a person maintains protected privacy interests even in one's garbage that has been placed on the curb in view of the public. *State v. Morris*, 165 Vt. 111, 123 (1996) (where there is a possibility that one's garbage is susceptible to invasion by raccoons or other scavengers, it is still reasonable to expect that the government will not systematically examine one's trash bags in the hopes of finding evidence of criminal conduct.). The Court's precedent extending constitutional protection to digital information and discarded trash dictates this Court finding a person has a privacy interest in one's own real-time CSLI.

B. The highest courts of several other state jurisdictions agree that when law enforcement acquire private and personal cell-site location information (CSLI) to immediately find a person, a search has been committed.

Most courts that have considered the question of whether real-time CSLI is a search after *Carpenter* have held that a ping request for real-time CSLI is a search. *State v. Brown*, 202 A.3d 1003 (Conn. 2019) ("The concerns expressed by the court in *Carpenter* regarding historical CSLI apply with equal force to prospective CSLI."); *Commonwealth v. Almonor*, 120 N.E. 3d 1183, 1196 (2019)("[B]y causing the defendant's cell phone to reveal its real-time location, the Commonwealth intruded on the defendant's reasonable expectation of privacy in the real-time location of his cell phone."); *Tracey v. State*, 152 So. 3d 504, 525 (Fl. 2014) (concluding that Tracey had a subjective expectation of privacy in the location signals transmitted to enable the private and personal use of his phone even on public roads that he did not voluntarily relinquish); *State v Muhammad*, 451 P.3d 1060, 1073–1074

(Wash. 2019) (individuals have subjective expectation of privacy in location data that society recognizes as reasonable, thus a ping is a search under both the Washington and federal constitutions); *United States v. Baker*, 563 F.Supp.3d 361 (M.D. Penn. 2021) (the government's requested ping constituted a Fourth Amendment search).

In doing so, they acknowledge that when people sign cellphone contracts, they do not have any expectation that the Government will always have instantaneous access to their location. See *Almonor*, 120 N.E. 3d at 1193 ("[S]ociety's expectation has been that law enforcement could not secretly and instantly identify a person's real-time physical location at will."); *Tracey*, 152 So. 3d at 522 ("Indeed, the ease with which the government, armed with current and ever-expanding technology, can now monitor and track our cell phones, and thus ourselves, with minimal expenditure of funds and manpower, is just the type of 'gradual and silent encroachment' into the very details of our lives that we as a society must be vigilant to prevent.") (quoting James Madison, Speech in the Virginia Ratifying Convention on Control of the Military).

Summarily dismissing this caselaw without discussion, the State instead points to a single federal appellate court that has no binding authority in Vermont and that turns on facts inapplicable here. Appellee's Br. at 13–14 (citing *United States v. Hammond*, 996 F.3d 374, 389 (7th Cir. 2021)). This Court must reject the State's half-hearted invitation to adopt the Seventh Circuit's conclusion in *Hammond* that a real-time request for location data is a limited intrusion that does not constitute a search because the case is distinguishable on its facts from this case. Furthermore, to the extent that the Seventh Circuit announced a test based on the length of the timeframe for real-time CSLI, such a test if flawed and completely unworkable.

The Seventh Circuit "stressed that this holding, like that of *Carpenter*, is narrow and limited to the particular facts of this case." 996 F.3d at 392. Mr. Hammond had left his weapon behind at one of the armed robberies, so the police were able to trace the firearm through its seller. The police got a

name this way, and Mr. Hammond's physical description and his car matched eyewitness descriptions at the scene from the continuing string of armed robberies. The court likened the factual scenario of Hammond to "a slow-speed car chase" because the police knew that Mr. Hammond had committed five successful armed robberies and two attempted armed robberies in a short period of time. *Id.* at 391.In contrast, no probable cause was present here. Even the detective who requested the search readily admitted that there was insufficient probable cause to support a warrant at the time that Mr. Murphy's CSLI was acquired. In addition, there was no ongoing string of armed crimes to suggest a likelihood that more violence was imminent, another fact critical to the Seventh Circuit's ruling.

Hammond also erred when it based the determination of whether a search occurs on the duration of the request for real-time CSLI or where the person turns out to be when pinged is also problematic. As the Washington Supreme Court noted:

> The limited nature of the information provided by a one-time ping is not dispositive of whether cell phone location data is a private affair. Such an argument is essentially result driven and seizes solely on the extent of a privacy intrusion rather than the nature of the information at issue. Here, the cell phone ping placed Muhammed in an open field. Had the warrantless ping placed Muhammad not in a field fixing a fence but at a relative's home or found him seeking solace in a house of worship, the limited information argument collapses. This one-time ping reveals only limited information, but the nature of the information has changed—exposing a cell phone user's attendance at a location a person would reasonably expect to be private. . .
>
> The ability of law enforcement to pinpoint any cell phone user's location at any moment would intrude on privacy in the same way as allowing police to listen in on an ongoing phone call or to peruse a text message conversation. Just because a given phone call may not contain private information does not

> mean that the phone call can be monitored by the police without a warrant. The same is true for a person's location identified via cellphone.

State v. Muhammad, 194 Wash. 2d 577, 589 (2019). The Washington high court's analysis underscores how the *Hammond* Court's distinction fails to protect important Fourth Amendment and state constitutional rights.

Furthermore, adopting the *Hammond* Court's reasoning would be to backtrack into an unworkable thicket, where courts would need to decide post-hoc whether the real-time CSLI request the police made in each case revealed a location that was public or private or went on for too long an amount of time. *Tracey*, 152 So. 3d at 521 ("Nor can we avoid this danger by setting forth a chart designating how many hours or days of monitoring may be conducted without crossing the threshold of the Fourth Amendment.") Such a system gives little practical guidance to law enforcement, and, as such, there is a great danger for arbitrary and inequitable enforcement. *Id.*; *Muhammad*, 451 P.3d at 1072–1073. "[I]f police are to have workable rules, the balancing of the competing interests . . . must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers." *Tracey,* 152 So. 3d at 521 (alterations in original) (internal quotation marks omitted) (quoting *Riley v. California,* 573 U.S. 373, 398 (2014). To do so would fail to acknowledge the reality that no one assumes the Government can track their movements when they purchase a cellphone.

II. A request for real-time CSLI without a warrant cannot be justified by exigent circumstances.

When the police wait until 34 hours into an investigation to request real-time CSLI data to locate "a good suspect," whom they do not have probable cause to arrest, there is simply no excuse not to get a warrant. The determination of whether exigent circumstances justify a police search without a warrant is a fact-driven analysis, generally determined on a "case-by-case basis." *Birchfield* v. *North Dakota*, 579 U.S. 438 (2016). The exception "requires a court to examine whether an emergency justified a warrantless search in each particular case"—which reflects the nature of emergencies.

Lange v. California, 141 S. Ct. 2011, 2018 (2021) (quoting *Riley*, 573 U.S. at 402). Whether a "now or never situation" actually exists—whether an officer has "no time to secure a warrant"—depends upon facts on the ground. *Id.* This was not a now or never situation.

The timeline of the investigation underscores both how little information the police were acting on when they asked for the search and how little urgency there was to dispense with a warrant: First, Detective Nash made an exigent ping request to AT&T before he could put Mr. Murphy at the scene with a gun, which the State concedes on p. 16 of its brief.

Second, AT&T could not give him the information initially because the phone was turned off. A day later, before he received any real-time CSLI, Det. Nash requested and got both an arrest warrant for Mr. Murphy and a warrant for Mr. Murphy's historical cell phone data. That warrant tracked both the phone and its location and also asked for information about who Mr. Murphy placed calls to and when. Though both warrants were granted within the hour they were requested, it took several weeks for AT&T to provide that more detailed historical cell phone data to the police.

Third, when the West Springfield police arrested Mr. Murphy, they did so by using the real-time CSLI from the warrantless ping. Finally, when Det. Nash asked AT&T for the real-time ping, he got that information without a subpoena or warrant—as soon as AT&T had it available—in real-time.

When it evaluates exigent circumstances, this Court considers the factors set forth in *State v. Petrucelli*, 170 Vt. 51, 61 (1999) to determine whether the State has met its heavy burden to overcome the presumption of unreasonableness that attaches to warrantless searches. The Court will analyze whether:

> (1) a grave offense, particularly a crime of violence, is involved; (2) the suspect "is reasonably believed to be armed"; (3) police had "a clear showing of probable cause . . . to believe that the suspect committed the crime"; (4) police had "strong reason to believe that the suspect is in the premises being entered"; (5)

> there is "a likelihood that the suspect will escape if not swiftly apprehended"; and (6) the entry was made peaceably.

When it reviews these factors under Article 11, the Court must also bear in mind that warrantless searches are permitted in Vermont only in those extraordinary circumstances "which make the warrant and probable-cause requirement impracticable." *State v. Welch*, 160 Vt. 70, 78 (1992). This Court demands that exceptions to the warrant requirement "be factually and narrowly tied to exigent circumstances and reasonable expectations of privacy." *State v. Savva,* 159 Vt. 75, 87 (1991).

Analysis of these factors does not support an exigency justifying a warrantless request for CSLI data. First, there was no evidence that Mr. Murphy was armed or dangerous at the time of the warrantless ping request, almost two days after the offense. While the person who committed the offense was clearly armed at that time, there was no evidence that Mr. Murphy presented a continuing threat of violence. And in fact, when he was arrested, he was not armed.

Furthermore, a crime's random and violent nature alone cannot pose exigent circumstances validating a warrantless search. Rather, "the State must articulate objective facts showing an immediate law enforcement need for the entry. Those facts must be independent of the underlying offense's grave nature. And they must be present when the police enter the home." *State v. Willis*, 150 Hawai'i 235, 237 (2021). The Massachusetts Supreme Court has also emphatically rejected such generalizations:

> The Commonwealth argues that 'inherent' in the aftermath of any violent crime or crime involving a firearm is 'an objectively reasonable belief' that there is a 'likelihood' that others will be harmed if the police maintain physical surveillance of the premises while seeking a warrant. Were we to agree, no warrant would be required in any case where the police search for suspects in the aftermath of a violent crime. None of our cases supports such a

ruling.

Com. v. Tyree, 919 N.E.2d 660, 675–676 (2010). Here, the police had no pattern of violence—no string of crimes—ongoing in the community, and certainly none that were tied to Mr. Murphy. Nor does Mr. Murphy have a history of violent offenses. In *United States v. Caraballo*, 831 F.3d 95 (2d Cir. 2016), the Second Circuit found that exigent circumstances justified a cell phone ping where several law enforcement persons were undercover trying to infiltrate a drug conspiracy putting officer safety directly at issue. The crime in question involved a woman who had worked for Mr. Caraballo, had refused to cooperate with law enforcement for fear of retaliation, and who turned up dead in an execution style shooting. In contrast here, the police had no such evidence to justify a continuing potential for violent crime.

Most critical is the third factor. The police lacked probable cause to believe Mr. Murphy committed the shooting when they requested CSLI. In fact, they knew little then: They had no motive for why Mr. Murphy might have shot Mr. Adedapo, nor did they have anywhere close to a "clear showing of probable cause" that he was the shooter—they had no witness that attached Mr. Murphy to the gun used in the offense, or any gun for that matter. Other courts have justified warrantless real-time CSLI pings by law enforcement on the basis of exigency, but not where probable cause was conceded lacking as it was when the ping request was made here. For example, in *United States v. Hobbs*, 24 F.4th 965 (4th Cir. 2022), an estranged partner forcibly entered the home of his ex-girlfriend brandishing a semiautomatic weapon and threatening her and her seven-year-old daughter. When he left, the court affirmed the use of an exigent ping request that was prepared at the same time as the arrest warrant. Or in *People v. Lincona-Ortega*, 2022 COA 27, ¶ 23, the Colorado appellate court found that exigent circumstances justified the police's request that T-Mobile provide a ping of Mr. Lincona-Ortega's phone where the police reviewed video surveillance from the bar, which showed a gruesome killing, and witnesses identified the shooter as Lincona-Ortega. Those investigative details were lacking here.

Finally, with respect to factor five, the police had no reasonable believe

when they made the request that Mr. Murphy was trying to escape. In fact, at trial it became clear that Mr. Murphy had come from West Springfield to Burlington earlier on the day of the shooting at the Zen Lounge. When he requested the ping, all Det. Nash knew was that he had a good suspect who was not at his home. He had no particularized reason to think that there was evidence was in danger of being destroyed or that the suspect was trying to escape.[1]

Here, the State has done exactly what the Hawai'i and Massachusetts courts reject. It substitutes generalizations about violent crime as an excuse to use a new and hugely encroaching law enforcement tool without first obtaining a warrant. The timeline in this case shows precisely how much time the police had and how quickly they could have obtained a warrant, thus there was no reason not to have applied for a warrant. Sacrificing Constitutional protections for police expediency based on unfounded generalizations is exactly what this Court has stated it will not do. See *Savva*, 159 Vt. at 91. The "mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Id.* at 83–84 (quoting *Mincey v. Arizona,* 437 U.S. 385, 393 (1978)); *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (warrant requirement "has been a valued part of our constitutional law for decades . . . It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency"); *Johnson v. United States*, 333 U.S. 10, 15 (1948) ("inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate ... are never very convincing reasons and ... certainly are not enough to by-pass the constitutional [warrant] requirement").

Finally, while it certainly took several weeks for AT&T to provide the historical CSLI and information from Mr. Murphy's phone, the ping for real-time CSLI happened quickly. In addition, a warrant was granted quickly. In *Hobbs*, the Fourth Circuit remarked "most notably" that Hobbs' cell phone

[1] Factors four and six are not particularly relevant here where the search was not of a building. The warrantless intrusion on Mr. Murphy's privacy was profound, whether or not his arrest was peaceable.

provider was known to be "notoriously slow" in responding to law enforcement warrants and could take several days to produce cell phone location information. *Hobbs*, 24 F. 4th at 971. There seems to be a disconnect. Just because cell phone providers are willing to give real-time CSLI in an exigency without a warrant and take longer to process requests for historical data does not mean that a warrant is not required—and cannot be easily obtained—to support a fast turnaround request for real-time CSLI when necessary.

III. The evidence gathered in the West Springfield hotel room and Mr. Murphy's statements upon his arrest must be suppressed pursuant to the Vermont and federal exclusionary rules.

Evidence obtained in violation of the Vermont Constitution may not be admitted at trial in a state prosecution because such evidence "eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct." *State v. Walker-Brazie*, 2021 VT 75, ¶ 37 (citation omitted). When the police turn cellphones into tracking devices because they think they have a good suspect, without judicial oversight, that conduct must be sanctioned under both the Fourth Amendment and Article 11. The trial court correctly ignored the State's argument that Det. Nash's subsequent decision to get a warrant for Mr. Murphy's arrest and his historical cell phone data before (or contemporaneous to) when it received the real-time CSLI information revealing his location should mitigate his failure to request a warrant for the ping for real-time CSLI. The State cites no caselaw to suggest that continued police work after an unlawful search compensates for using the fruits of an illegal search to make an arrest, because there is none, and accordingly, the evidence from the hotel room and Mr. Murphy's statements to the police must be suppressed.

Without a remedy, the rights protected by Article 11 are just an empty promise. This Court recognizes that the constitutional right to privacy requires protection up front: before the violation occurs. "Although criminal defendants may seek court review of searches and seizures, these after-the-fact challenges do not serve Article 11's purpose of protecting the rights of

everyone—law-abiding as well as criminal—by involving judicial oversight *before* would-be invasions of privacy." *In re Search Warrant,* 2012 VT at ¶ 31 (quoting *Savva*, 159 Vt. at 86).

Furthermore, this Court has also repeatedly rejected the good faith exception, which goes straight to any argument that this was not a problem because the police later got a warrant anyway. See *State v. Oakes*, 157 Vt. 171, 174 (1991) (rejecting good-faith exception to exclusionary rule for searches made in good faith under warrant later found invalid). This Court declined to adopt the "good faith exception" because it was based on an unpersuasive cost-benefit analysis, and "the focus of any cost-benefit analysis concerning application of the [state] exclusionary rule should be on the individual constitutional rights at stake." *State v. Lussier*, 171 Vt. 19, 34 (2000).

IV. The failure to give a limiting instruction on flight was plain error in this case where it was the central evidence in State's case.

The State's theme at trial was "Man on the Run." It announced this theme at both opening and closing, and it devoted a considerable amount of time at trial to taking the jury through each item found in Mr. Murphy's hotel room and explaining how each suggested he was planning for a new life. "Who does those things?," the prosecution asked. "Someone who's afraid of being arrested. Someone who knows that they've committed a horrible crime and they're afraid of getting caught." Again and again, the State presented evidence of Mr. Murphy's flight and encouraged the jury to consider it as evidence of his guilt. While this Court has not held that a trial court's failure to include a limiting instruction after admitting evidence of flight as consciousness of guilt, absent a request for such an instruction, is plain error requiring reversal, see *State v. Stephens*, 2020 VT 87, ¶¶ 35-37, given the State's repeated driving at this questionable evidence, and the paucity of any other evidence linking Mr. Murphy to the crime, it was plain error for the court not to give a limiting instruction here.

In *Stephens*, defendant was accused of attempted sexual assault in an

apartment stairwell in Burlington. Defense's theory of the case was that the conduct was consensual and so was focused heavily upon the testimony and credibility of the complaining witness. The prosecution sought to present evidence that Mr. Stephens left Vermont because he was guilty: The police interviewed Mr. Stephens and told him that they would be back with a warrant for his DNA the following day. The State obtained the security video footage from the apartment building showing Mr. Stephens leaving later that night, apparently with his belongings in a shopping cart. Over a defense objection, the court allowed the evidence. As here, because defendant did not seek a limiting instruction advising the jury on the weight they could give the evidence, this Court considered only whether the omission of a limiting instruction constituted plain error.. *Id.* at ¶ 35.

The *Stephens* Court acknowledged that in *Welch* it said the "[b]est practice" would be to instruct jurors on the limited probative value of evidence of flight as consciousness of guilt, informing them that such evidence is not sufficient alone to support a guilty verdict, but rather should be weighed along with other evidence presented at trial." *Id*. ¶ 16. But it clarified that did not mean that a trial court's failure to provide a limiting instruction constitutes plain error as a matter of law.

Of course, it did not. In *Stephens*, the complainant's direct testimony provided ample evidence of a nonconsensual sexual assault. The case hinged on her credibility, so the video of Mr. Stephens moving out was far more tangential to the jury's determination. In this case, there was not ample evidence to convict: there was vague and shifting testimony from two witnesses who thought it must have been Chavis but who never saw him shoot. There was testimony from two other people present on Church Street that night who could not remember what they saw. And then there was the prosecutor's relentless drumbeat: "Who does those things? Someone who is afraid of being arrested. Someone who knows they've committed a horrible crime and they're afraid of getting caught."

This Court will look at the instructions in light of the record evidence as a whole and determine if any error "would result in a miscarriage of

justice." *State v. Rounds*, 2011 VT 39, ¶¶ 31-35 quoting *State v. Lambert,* 2003 VT 28, ¶ 14. In *Rounds*, this Court found that the jury instruction given by the lower court did not correctly state the law and constituted plain error. *Id.* at 34.This case is like *Rounds*, not *Stephens.*

Not giving any guidance on how to treat evidence of flight as evidence of guilt was the equivalent of misstating the law. This was an obvious error—this Court has a lengthy jurisprudence on evidence of flight and the requisite limiting instructions that the trial court should have been aware of. In this case, evidence of flight was nearly the State's entire case; the State had no motive, no gun, no fingerprints, no gun powder residue on Mr. Murphy's clothing, and no security footage of Mr. Murphy shooting Mr. Adedapo. Aside from the evidence of flight, the case was hinged on the shifting testimony of two reluctant witnesses who were originally suspects themselves. Without an instruction on how to evaluate the evidence of flight and what to use it for, there is a real danger that the jury gave it the undue weight that the State urged the jury to give it. This Court must now correct the error because it absolutely undermines confidence in the jury's verdict.

Conclusion

For the foregoing reasons and those set forth in Appellant's opening brief, this Court must reverse Mr. Murphy's conviction.

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Certificate of Compliance

I certify that the above brief submitted under V.R.A.P. 32 was typed using Microsoft Word for Office 365 and the word count is 4,500.

Dated at Montpelier, Vermont this 10th day of June, 2022.

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