# Supreme Court of Kentucky

Case No. 2020-SC-0116-DG

COMMONWEALTH OF KENTUCKY — *Appellant*

On Motion for Discretionary Review from
the Court of Appeals
v. Case No. 2018-CA-1574-MR

Appeal from Woodford Circuit Court
Indictment No. 2017-CR-34

DOVONTIA REED — *Appellee*

## REPLY BRIEF FOR THE COMMONWEALTH OF KENTUCKY

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### Certificate of Service

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## ARGUMENT

The officers here did not conduct a Fourth Amendment search because Dovontia Reed had "no reasonable expectation of privacy in his movements" while "travelling in an automobile on public thoroughfares." *See United States v. Knotts*, 460 U.S. 276, 281 (1983). That conclusion necessarily follows from the holding of *Knotts*. The only difference between these two cases is that the officers here tracked Reed's location using electronic signals from a cellular phone, while the officers in *Knotts* tracked the defendant's location using electronic signals from a beeper. But if a Fourth Amendment principle exists that makes that difference material, Reed has failed to identify it. This Court should therefore reverse the decision below and reinstate the circuit court's judgment.

### I. The officers did not conduct a search by tracking Reed's location using electronic signals from his phone.

Reed urges the Court to abandon *Knotts* as "antiquated" and "unworkable." [*See* Reed Br. at 11, 12]. He is wrong on both counts.

1. Start with whether *Knotts* is antiquated. Reed's argument goes like this: Surveillance technology today is more "intrusive" than what existed at the time of *Knotts*. [*See id.* at 8]. Cellular phones, in particular, make it possible to monitor a person's movements almost every hour of every day. [*Id.* at 13–14]. The United States Supreme Court recognized this in *Carpenter v. United States*, ~ U.S. ~, 138 S. Ct. 2206, 2219 (2018), when it held that individuals have a reasonable expectation of privacy

in the "whole" of their "physical movements." [Reed Br. at 11 (quoting *Carpenter*, 138 S. Ct. at 2219)]. And so, Reed argues, *Carpenter* "made *Knotts* inapplicable" whenever the police use a cellular phone to track the defendant's movements. [*Id.* at 13].

The most obvious problem with Reed's theory is that the United States Supreme Court disagrees. *See Carpenter*, 138 S. Ct. at 2215, 2220. In *Carpenter*, the Supreme Court considered whether to apply the rule in *Knotts* to historical cellular location data. *Id.* at 2215, 2220. The Court could have distinguished the case as Reed suggests here by holding that technology has advanced too much to keep applying *Knotts*. But it did not do so. Instead, the Supreme Court focused on the expansive nature of historical location data and how it differed from tracking an individual "during a discrete automotive journey." *See id.* at 2215, 2220 (cleaned up). Unlike real-time monitoring of an individual on a public road, historical location data allows the government to retrospectively create a "detailed chronicle of a person's physical presence compiled every day, every moment, over several years." *Id.* at 2220. That creates Fourth Amendment problems "far beyond" short-term monitoring during a single trip on the highway because it allows the government to obtain information that is "otherwise unknowable" with ordinary surveillance. *Id.* at 2220, 2219.

If that line of reasoning sounds familiar, it should. It's the same reasoning that led the Supreme Court to adopt the *Knotts* rule in the first place. Recall that in *Knotts* the Supreme Court explained that the issue turned on whether the officers used new technology to obtain information "that would not have been visible to the naked eye."

*Knotts*, 460 U.S. at 285. Because law enforcement could follow a suspect as he drove along a public road using ordinary surveillance, the Supreme Court held that following the same suspect on the same road using sense-enhancing technology (like a beeper) did not amount to a Fourth Amendment search. *Id.* at 283–285. But that same analysis led to the opposite conclusion in *Carpenter*: Because officers cannot "travel back in time" and "chronicle" every movement of a suspect over five years using ordinary surveillance, doing so with historical cellular location data *is* a Fourth Amendment search. *See Carpenter*, 138 S. Ct. at 2217–18. *Carpenter*, in other words, did not create a new categorical rule for cellular phones. Rather, it simply applied *Knotts* to the uniquely expansive amount of information that law enforcement can obtain with historical location data. *Id.* at 2217.

*Carpenter* made this point directly. In his dissenting opinion, Justice Kennedy criticized the *Carpenter* majority for what he perceived as abandoning *Knotts*. *See Carpenter*, 138 S. Ct. at 2232 (Kennedy, J., dissenting). Chief Justice Roberts, writing for the Court, did not respond to that criticism by declaring *Knotts* "antiquated" in light of modern technology. Instead, he explained that *Carpenter* was distinguishable because, unlike *Knotts*, *Carpenter* was not a case "about . . . a person's movement at a particular time." *Id.* at 2220. In other words, *Knotts* remains good law—it just did not apply to the facts of *Carpenter* because the officers there did much more than follow a defendant's "movement at a particular time." *Id.* That is a far cry from Reed's claim

that *Carpenter* created a new rule that applies whenever officers use cellular location data to track a defendant. [*See also* Commonwealth Br. at 11].

Reed also relies on Justice Alito's concurrence in *United States v. Jones*, 565 U.S. 400 (2012), for his claim that *Knotts* is antiquated. [Reed Br. at 13]. But that opinion likewise reaffirms the core holding of *Knotts*. Recall that in *Jones* the Supreme Court held that monitoring a car for 28 days using GPS amounted to a search under the Fourth Amendment because of the physical trespass involved in attaching the GPS to the car. *See Jones*, 565 U.S. at 403–04. Five justices separately agreed that the 28-day tracking violated the defendant's reasonable expectation of privacy as well. *See id.* at 419 (Alito, J. concurring); *id.* at 415 (Sotomayor, J., concurring). Justice Alito authored the primary concurrence (joined by Justices Ginsburg, Breyer, and Kagan) in which he explained that "long-term monitoring of the movements of the vehicle" violated the defendant's privacy interests. *Id.* at 419 (Alito, J., concurring). According to Reed, the same rule applies here.

But Reed leaves out a key passage in Justice Alito's concurrence. Citing *Knotts*, Justice Alito first explained that "relatively short-term monitoring of a person's movements on public streets [with a GPS device] accords with expectations of privacy that our society has recognized as reasonable." *Id.* at 430 (Alito, J., concurring) (citing *Knotts*, 260 U.S. at 281–82). The problem in *Jones* arose only because the government monitored the car non-stop for 28 days. *Id.* (Alito, J., concurring). Had the case involved only a short period of surveillance, the fact that the officers used advanced

GPS technology would not have independently created a Fourth Amendment problem. *See id.* (Alito, J., concurring).

So in sum, Reed argues that both *Carpenter* and the concurring opinion in *Jones* "made *Knotts* inapplicable" here. [Reed Br. at 13]. But both of those decisions recognized that short-term monitoring of an individual's movement along a public road does not amount to a Fourth Amendment search. And in doing so, both decisions affirmed that *Knotts* applies exactly as the Commonwealth argues it should. So the Commonwealth is not, as Reed suggests, "theoriz[ing]" about a novel way to apply *Knotts*. [Reed Br. at 11]. To the contrary, the Commonwealth's position has been repeatedly affirmed by the United States Supreme Court, even as recently as three years ago. And so Reed is simply wrong to claim that *Knotts* is "antiquated."[1]

2. Reed's second argument that *Knotts* is "unworkable" is likewise incorrect. He contends that the rule is impossible to apply because "the government can almost never be certain what the real-time location of a person will" end up being. [Reed Br. at 11]. Yet that was true in *Knotts* as well. When the officers used the beeper to track the defendant's location, they did so because they lost visual surveillance. *See Knotts*,

[1] Reed also suggests that the officers failed to follow the Stored Communications Act. [*See* Reed Br. at 18–20, 24 (citing 18 U.S.C. § 2703)]. That statute imposes certain requirements on law enforcement and courts before requiring that a service provider turn over records related to an individual. *See id.* The record here indicates, however, that the cellular service provider voluntarily provided the information, and so the Stored Communications Act does not apply. [*See* VR 5/2/18 at 9:54:54–9:55:24].

460 U.S. at 278–79. So the officers could not have known whether the vehicle had stopped moving or whether the defendant had moved into a private residence. And yet, the Supreme Court still held that no Fourth Amendment search occurred because "there [was] no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin." *Id.* at 285.

Compare that to what happened a year later in *United States v. Karo*, 468 U.S. 705 (1984). In *Karo*, law enforcement used the same beeper technology at issue in *Knotts*. But instead of tracking a defendant along a public highway, the officers in *Karo* followed the signal as the defendant moved contraband from one private location to another. *See id.* at 708. Facing these new facts, the Supreme Court could have declared its rule in *Knotts* "unworkable" because it turned on whether the defendant "happened to be on a road when the [beeper] tracking occurred." [*See* Reed Br. at 11]. But instead, the Court simply applied its rule and held that law enforcement conducted a Fourth Amendment search because it used the beeper signal "to obtain information that it could not have obtained by observation from outside the curtilage of the house." *See Karo*, 468 U.S. at 715. The United States Supreme Court had no difficulty applying that rule, and there is no reason why this Court or the Commonwealth's lower courts should have any difficulty either.

* * *

The bottom line is this: It is not some accident of history that the Supreme Court ruled the way it did in *Knotts*. The Fourth Amendment is about protecting an

individual's reasonable expectations of privacy. *See Traft v. Commonwealth*, 539 S.W.3d 647, 649 (Ky. 2018). When someone drives along a public highway, that individual's location is not—in any meaning of the word—"private." *See Knotts*, 460 U.S. at 281–82. And no matter whether police find that location through their own personal observations, or by asking an eyewitness which way the individual went, or by asking the individual's cell phone provider where to find the individual, the key point is that the individual has no expectation of privacy as to that location. It's not like the inside of a phone booth where telephone conversations cannot be heard. *See Katz v. United States*, 389 U.S. 347, 352 (1967). Nor is it like the inside of a house where even a neighbor's wandering eye cannot penetrate. *See Kyllo v. United States*, 533 U.S. 27, 34 (2001). An individual's location on a public road is available for anyone to see. *Knotts*, 460 U.S. at 281–82. And that's why the Supreme Court in *Knotts* held that discovering this particular kind of information—even with advanced technology—does not violate anyone's expectation of privacy.

Reed misses this key point throughout his brief. He never explains why his location on a public road should be treated as *private* simply because he carried a cellular phone instead of a beeper. And that's the real crux of the Fourth Amendment analysis here. Nothing about Reed's movement as he drove along the road is private, and so the officers did not need a warrant to locate him with the electronic signals from a cellular phone.

## II. The good-faith exception applies.

The good-faith exception applies when officers "conduct a search in objectively reasonable reliance on clearly established precedent from this Court or the United States Supreme Court." *Parker v. Commonwealth*, 440 S.W.3d 381, 387 (Ky. 2014). Reed contends that the exception does not apply here because there was no "clear cut, specific rule" that allowed the officers to track him using real-time cellular data. [*See* Reed Br. at 21]. According to Reed, the Commonwealth is urging the Court "to partake in complex legal reasoning to reach a conclusion there was binding precedent when there clearly was not." [*Id.*].

While there is no rule that counsels against using "complex legal reasoning" to resolve a case, the argument here could not be simpler. Here it is:

> Thirty years ago the Supreme Court held that "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Knotts*, 460 U.S. at 281.

> The officers tracked Reed's location while he was "travelling in an automobile on public thoroughfares." *See id.*

> Therefore, Reed had "no reasonable expectation of privacy in his movements from one place to another." *See id.*

That's it. Under a straightforward application of *Knotts*, "clearly established precedent" authorized the alleged search here. *See Parker*, 440 S.W.3d at 387.

Reed's only answer is to regurgitate the analysis from the Court of Appeals, which held that dicta from *Hedgepath v. Commonwealth*, 441 S.W.3d 119 (Ky. 2014), suggested that the law was unsettled as to whether real-time cellular tracking

amounted to a search. [Reed Br. at 21–23]. But as explained in the Commonwealth's principal brief, dicta cannot unsettle otherwise settled law. [Commonwealth Br. at 26–27]. And at the time of the search here, *Knotts* had settled the law on when and how the government can use electronic surveillance to monitor an individual driving along public roads. And so even if this Court concludes that *Carpenter* altered the analysis, *Knotts* plainly applied at the time of the search.

It was also settled law that an individual does not have a reasonable expectation of privacy in records held by a third party, like cellular phone records in the possession of a service provider. [*See id.*]. Reed does not discuss this at all in his brief. Yet this Court has applied the third-party doctrine in a variety of contexts, and prior to *Carpenter* there was no reason to believe that the United States Supreme Court would carve out a different rule for historical cellular location data. *See, e.g., Deemer v. Commonwealth*, 920 S.W.2d 48, 50 (Ky. 1996); *Williams v. Commonwealth*, 213 S.W.3d 671, 682–84 (Ky. 2006). The third-party doctrine is an independently sufficient basis to apply the good-faith exception here.

One last point about *Hedgepath*. Even if the language discussing real-time location data was not dicta, it would not change the outcome here. Reed glosses over an important part of that case: It had nothing to do with tracking an individual driving along a road. That was critical to this Court's understanding of the case because other "courts [had] suggested that police intrusion into [real-time] data" required a warrant "*at least when the phone is not travelling on a public roadway and is in a private residence.*"

*Hedgepath*, 441 S.W.3d at 125 (emphasis added). In other words, the Court recognized the distinction between tracking an individual's location during a "discrete automotive journey" on a public road, *see Carpenter*, 138 S. Ct. at 2215 (cleaned up), and using that same technology to locate an individual in a private residence. The first circumstance does not raise the privacy problems that the second does, and Reed has identified no binding authority suggesting otherwise.

The good-faith exception applies. This Court should therefore decline to apply the judicially created exclusionary rule, which will needlessly allow a "guilty defendant[] [to] go free." *See United States v. Leon*, 468 U.S. 897, 907 (1984).

## CONCLUSION

The Court should reverse the decision of the Court of Appeals and reinstate the circuit court's judgment.

Respectfully submitted,

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