

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge
Appellate Case No. 2017-001846

THE STATE,

Appellant,

vs.

JAVON D. GIBBS,

Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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JAN 14 2019
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON REPLY1

ARGUMENT2

The ruling in Carpenter does not explicitly require a search warrant for the collection of cell site location information for the limited period of five days. Regardless, the good faith exception to the warrant requirement applies.2

CONCLUSION4

TABLE OF AUTHORITIES

Cases

Carpenter v. United States, _ U.S., _, 138 S. Ct. 2206 (2018)..... 2, 3
Davis v. United States, 564 U.S. 229, 131 S. Ct. 2419 (2011) 4
United States v. Chavez, 894 F.3d 593 (4th Cir. 2018) 3
United States v. Gaskin, 2018 WL 4926331 (N.D. Ga. Sept. 7, 2018) 4
United States v. Graham, 824 F.3d 421 (4th Cir. 2016) 2
United States v. Jones, 565 U.S. 400, 132 S. Ct. 945 (2012) 3
United States v. Joyner, 899 F.3d 1199 (11th Cir. 2018) 4

Statutes

18 U.S.C.A. § 2703(d) 2

Other Authorities

An Equilibrium-Adjustment Theory of the Fourth Amendment, 125 Har.L.Rev. 476 (2011)..... 3
Theory of the Fourth Amendment (April 1, 2012) 111 Michigan Law Review 311 (2012)..... 3

STATEMENT OF ISSUE ON APPEAL

The ruling in Carpenter does not explicitly require a search warrant for the collection of cell site location information for the limited period of 5 days. Regardless, the good faith exception to the warrant requirement applies.

ARGUMENT

The ruling in Carpenter does not explicitly require a search warrant for the collection of cell site location information for the limited period of five days. Regardless, the good faith exception to the warrant requirement applies.

The State takes this opportunity to address the United States Supreme Court's monumental ruling in Carpenter¹ and how it should *not* affect the analysis of this case. Carpenter held that a search occurred and a search warrant was required when law enforcement collected 7 days of historical cell site location information (CSLI) from the defendant's wireless carrier without a warrant. Carpenter overruled a number of circuit court of appeals' decisions and a portion of the Stored Communications Act². As relied on in the initial brief, Graham³ which held no search warrant was required to collect CSLI was binding precedent at the federal level at the time the trial court suppressed the CSLI in this case pre-trial. Carpenter does not alter the law at the time of the collection here. What Carpenter makes clear is that there was no authority to support the trial court's suppression of the CSLI in this case.

First, Carpenter leaves open the question of whether the collection of CSLI for *less* than seven days is afforded protection under the Fourth Amendment. Carpenter, 138 S. Ct. at 2217 n.3 (“We need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.”). The Supreme Court refrained from issuing a bright line rule that *any* collection of location information requires a valid search warrant. Justice Alito's dissent notes the majority opinion “suggests that less than seven days of location information may not require a warrant.” Carpenter, 138 S. Ct. at 2234. This Court should

¹ Carpenter v. United States, __ U.S. __, 138 S. Ct. 2206 (2018).

² 18 U.S.C.A. § 2703(d).

³ United States v. Graham, 824 F.3d 421 (4th Cir. 2016).

interpret Carpenter to allow law enforcement to conduct a short-term limited collection of information without a warrant. This framework is consistent with prior Fourth Amendment precedent. The more limited the search, the less protection afforded by the Fourth Amendment. In United States v. Jones⁴, the Supreme Court held that the collection and analysis of GPS data over 28 days constituted a search but similarly left open the question of whether collection of GPS data for a period less than 28 days constitutes a search. Scholars have coined this reasoning the “mosaic theory” where large scale and long-term collection of data provide such an invasive look into a person’s life that a search warrant is required. See Kerr, Orin S., The Mosaic Theory of the Fourth Amendment (April 1, 2012) 111 Michigan Law Review 311 (2012). The idea is that these large scale surveillance collections are available because of advances in technology and that the Fourth Amendment must adjust to protect against the growing power of the government. See Orin S. Kerr, An Equilibrium-Adjustment Theory of the Fourth Amendment, 125 Har.L.Rev. 476 (2011). This framework is helpful in interpreting the holding of Carpenter. In this case, CSLI was obtained with a warrant for a period of five days. Carpenter’s warrant requirement should not apply to this limited and short term collection.

Second, Courts who have addressed the Fourth Amendment implications of Carpenter since its issuance have universally found that the good faith exception to the warrant requirement applies. The law at the time of collection determines whether law enforcement acted in good faith. See United States v. Chavez, 894 F.3d 593, 608 (4th Cir. 2018) (“[w]hile Carpenter is obviously controlling going forward, it can have no effect on” cases where law enforcement acted in “[o]bjectively reasonable good faith,” which “includes ‘searches conducted in reasonable reliance on subsequently invalidated statutes’ ” (quoting Davis v. United States, 564 U.S. 229, 239, 131 S. Ct. 2419 (2011))); United States v. Joyner, 899 F.3d 1199, 1205 (11th Cir.

⁴ 565 U.S. 400, 132 S. Ct. 945 (2012).

2018) (ruling applying the good faith doctrine to a post-Carpenter challenge to the collection of CSLI); see also United States v. Gaskin, 2018 WL 4926331 (N.D. Ga. Sept. 7, 2018) (ruling that when the binding law at the time of collection did not require a warrant for CSLI, then the good faith exception to the warrant requirement applied).

So, while Carpenter provides a framework for investigations and collections moving forward, it does not affect the analysis in this case. The law at the time did *not* require law enforcement to make any showing of probable cause to obtain CSLI, and the officers involved in this case acted in good faith.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the ruling of the trial court should be reversed, and the case should be remanded for trial.

Respectfully submitted,

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January 14, 2019

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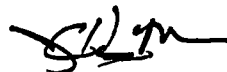
Respondent.

CERTIFICATE OF SERVICE

I, Clay Mitchell, counsel for the Appellant, certify that I have served the within Initial Reply Brief of Appellant on Respondent by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record: Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 14th day of January, 2019.



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January 14, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: *The State vs. Javon D. Gibbs*
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Dear Ms. Kitchings:

Enclosed for filing please find the original Initial Reply Brief of Appellant, together with Certificate of Service in the above-referenced case. If you should have any questions, please feel free to contact me.

Sincerely,

Clay Mitchell
Assistant Attorney General

CM/dmd
Enclosures

cc: Robert M. Dudek, Esq. (w/two copies of encls.)
The Honorable Jimmy A. Richardson, III, Solicitor, Fifteenth Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)