State v. Perry, Cell Site Location Information, and the Exclusionary Rule

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Last week, the court of appeals decided State v. Perry. It's the appellate division's first foray into cell site location information and a case that raises questions about the status of the exclusionary rule in North Carolina.

Facts. A Raleigh officer arrested a man for possessing marijuana. The man identified his supplier and gave the officer the supplier's phone number. The arrestee and the officer called the supplier, who indicated that he would be coming to Raleigh the next day.

The officer applied for a court order requiring the supplier's cell phone company, AT&T, to provide detailed records about the supplier's account for the previous month and for the next two days. The information sought by the officer included cell site location information (CSLI). A superior court judge issued the order as requested, relying in part on 18 U.S.C. § 2703(d), which allows a court to issue such an order based on a showing of "specific and articulable facts showing that there are reasonable grounds to believe that the . . . information sought [is] relevant and material to an ongoing criminal investigation."

AT&T complied with the order. As to information generated after the order was signed, AT&T provided such information every 15 minutes, apparently after a five- to seven-minute delay. Sometimes the information allowed the officer to determine the phone's location within a few yards, but sometimes it only enabled the officer to determine the phone's location within several hundred yards.

Based on the CSLI, the officer determined that the supplier was at a specific hotel. After additional investigation, not pertinent here, officers arrested the supplier and several others.

The supplier/defendant was charged with trafficking in heroin. He moved to suppress the CSLI, arguing (1) that in obtaining such information, the officer invaded the defendant's reasonable expectation of privacy and so conducted a search under the Fourth Amendment, and (2) that a search requires a warrant based on probable cause, not a court order issued based on a lesser standard. The trial judge denied the motion, the defendant was convicted at trial, and the defendant appealed.

Majority opinion. Judge Tyson, writing for himself and Judge Dietz, affirmed. He concluded:

- The order concerned "historical" rather than "real time" CSLI. Although the pertinent CSLI was collected after the order was issued, it was collected by AT&T, then, after some delay, was transmitted to the officer: "The officers did not interact with Defendant's cell phone, nor was any of the information received either directly from the cell phone or in 'real time.'" This point is important because (1) some courts have questioned whether the Stored Communications Act, of which 18 U.S.C. § 2703(d) is a part, authorizes real time data collection at all, and (2) some courts have held that real time data collection requires a search warrant while historical data collection may be authorized under a lower standard. As detailed below, Chief Judge McGee disagreed with the majority's conclusion on this issue.

- The collection of historical CSLI does not invade a cell phone user's reasonable expectation of privacy under the third-party doctrine of *Smith v. Maryland*, 442 U.S. 735 (1979). The majority reasoned as follows: a cell phone user reveals his or her location to his or her service provider in the course of carrying and using a cell phone. Therefore, the user can't claim that CSLI is private when the government obtains it from the provider. This means that the Fourth Amendment is not implicated when officers obtain CSLI, and a search warrant is not constitutionally required.

- Several federal courts have agreed with the above analysis. The majority cited several federal cases on point. It appeared to be skeptical of the Fourth Circuit's contrary ruling in the recent case of *United States v. Graham*, which I summarized here and discussed further here. It also noted that *Graham* ruled that a warrant is required to obtain CSLI "for an extended period of time," while in this case the officers sought CSLI only for portions of two days which "cannot reasonably be argued" to be an extended period. (As an aside, I am not sure that this is completely accurate. As I read the order, available as part of the record on appeal, AT&T was required to provide "precision location/GPS" information only for two days, but was required to provide "[c]omplete cell site information" from November 13, 2012 through December 12, 2012.)

- Even if the officers had violated the Fourth Amendment by obtaining CSLI without a warrant, they acted in good faith, so the exclusionary rule would not apply. The officers "reasonably relied on the [Stored Communications Act]" in seeking a court order.

Concurrence. Chief Judge McGee concurred "in the final disposition" of the case but disagreed with the majority's conclusion that the CSLI obtained in this case was historical rather than real time. She concluded that because the order required AT&T to transmit CSLI that was generated after the order was issued, it was not limited to historical information. Further, AT&T provided the information with a "frequency and contemporaneousness" that law enforcement was able to draw conclusions about the defendant's current location. Thus, it was real time information.

However, Chief Judge McGee declined to analyze whether the defendant had a reasonable expectation of privacy in such information or whether a warrant was required, as she "agree[d] with the majority opinion that the good-faith exception to the Fourth Amendment warrant requirement would allow the challenged evidence to stand."

Analysis. A few things about this case stand out to me.

First, the court's analysis of the good faith exception doesn't address the state constitution. The court observes that "the Supreme Court of the United States recognizes a good-faith exception to the exclusionary rule," but makes no mention of *State v. Carter*, 322 N.C. 709 (1988), where the state supreme court rejected a good faith exception to the exclusionary rule under the state constitution. (The *Carter* court reasoned in part that admitting evidence obtained through an unreasonable search or seizure would impair the integrity of the judicial process even if the seizing officer acted in good faith, and concluded that "[i]f a good faith exception is to be applied" it should "done by the legislature" rather than the courts.) The defendant's brief argues the state constitution and cites *Carter*, so I am not sure why the court of appeals elected not to mention it. Of course, it is possible that the state supreme court would overrule *Carter* if given the chance.

Second, as noted above, this case is largely at odds with *Graham.* The state appellate courts are not obliged to follow the Fourth Circuit, so this is not a criticism. However, the result may leave officers unsure about whether a warrant is required to obtain CSLI. Because I believe that the state supreme court and/or the United States Supreme Court will eventually rule on CSLI, and because officers may sometimes want to take their cases to federal court, I continue to recommend that officers use search warrants or the functional equivalent when obtaining CSLI.

Third, although both the application and the order in this case referred to probable cause, the court never addressed

whether the order might be viewed as the functional equivalent of a warrant that could satisfy the Fourth Amendment if the Fourth Amendment were implicated. Instead, it analyzed the order as if it were based exclusively under the lower statutory standard created by 18 U.S.C. § 2703(d). This surprised me given that the probable cause finding is argued in the State's brief, though given the court's disposition of the case, any discussion on this point may have been dicta. (For those interested in the details, the application asserts that "[t]here is probable cause to believe that records [sought] constitute evidence of a crime and/or the identity of a person participating in this crime," while the order states that the officer "has offered specific and articulable facts showing that there is probable cause to believe" that the information sought was material to the investigation.)

What's next?

I would expect the defendant to seek review in the state supreme court. Rule 14 of the Rules of Appellate procedure create a right to review if there's "a dissenting opinion in the Court of Appeals," which technically there wasn't, or if there's a "substantial constitutional question," which it seems to me that there is. Even if there is no right to review, the defendant could seek discretionary review and given the importance of this issue, I would not be surprised if the court were to allow it. Ultimately, I expect this issue, though not necessarily this specific case, to be addressed by the United States Supreme Court. If and when that happens, you can read about it here.