"THE FEDERAL CORNER"

Cell-Site Simulators and the Fourth Amendment

Buck Files

On July 12, 2016, United States District Judge William H. Pauley, III, of the Southern District of New York, granted the defendant's motion to suppress the narcotics and drug paraphernalia recovered by law enforcement agents in connection with a search of his apartment. Judge Pauley held that (1) the warrantless use of *a cell-site simulator* to locate the defendant's apartment as the place of use for the target cell phone, was an unreasonable search; (2) the attenuation doctrine was inapplicable; and, (3) the third-party doctrine was also inapplicable. (emphasis added) *United States v. Lambis*, ___F.Supp.3d___, 2016 WL 3870940 (July 12, 2016)

Because of space constraints, this column will focus only on that portion of the opinion that discusses the use of the cell-site simulator. Judge Pauley's opinion reads, in part, as follows:

[The Facts]

> In 2015, the Drug Enforcement Administration (the 'DEA') conducted an investigation into an international drug-trafficking organization. As a part of that investigation, the DEA sought a warrant for pen register information and cell site location information ('CSLI') for a target cell phone. Pen register information is a record from the service provider of the telephone numbers dialed from a specific phone. CSLI is a record of non-content-based location information from the service provider derived from 'pings' sent to cell sites by a target cell phone. CSLI allows the target phone's location to be approximated by providing a record of where the phone has been used.
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> Using CSLI, DEA agents were able to determine that the target cell phone was located in the general vicinity of 'the Washington Heights area by 177th and Broadway.' (April 12, 2016 Suppression Hearing Transcript ('Supp. Tr.'), at 39.) However, this CSLI was not precise enough to identify 'the specific apartment building,' much less the specific unit in the apartment complexes in the area. (Supp. Tr. at 39.)
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> To isolate the location more precisely, the DEA deployed a technician with a cell-site simulator to the intersection of 177th Street and Broadway. *A cell-site simulator—sometimes referred to as a 'StingRay,' 'Hailstorm,' or 'TriggerFish'—is a device that locates cell phones by mimicking the service provider's cell tower (or 'cell site') and forcing cell phones to transmit 'pings' to the simulator. The device then calculates the strength of the 'pings' until the target phone is pinpointed. (See Supp. Tr. at 40.)* Activating the cell-site simulator, the DEA technician first identified the apartment building with the strongest ping. Then, the technician entered that apartment building and walked the halls until he located the specific apartment where the signal was strongest. (Supp. Tr. at 41.) (emphasis added)
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> The cell-site simulator identified Lambis's apartment as the most likely location of the target cell phone. That same evening, DEA agents knocked on Lambis's apartment door and obtained consent from Lambis's father to enter the apartment. (Supp. Tr. at 8–9.) Once in the apartment, DEA agents obtained Lambis's consent to search his bedroom. (Supp. Tr. at 13.) Ultimately, the agents recovered narcotics, three digital scales, empty zip lock bags, and other drug paraphernalia. (Supp. Tr. at 14.) Lambis seeks to suppress

this evidence.

* * *

[The Fourth Amendment]

The Fourth Amendment guarantees that all people shall be 'secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' U.S. CONST. Amend. IV. '[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable.' New Jersey v. T.L.O., 469 U.S. 325, 337, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). '[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.' Kyllo v. United States, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Barring a few narrow exceptions, 'warrantless searches "are per se unreasonable under the Fourth Amendment."' City of Ontario v. Quon, 560 U.S. 746, 760, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). The home has special significance under the Fourth Amendment. ' "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."' Kyllo, 533 U.S. at 31, 121 S.Ct. 2038 (quoting Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)).

[*Kyllo v. United States*]

In Kyllo, the Supreme Court held that a Fourth Amendment search occurred when Government agents used a thermal-imaging device to detect infrared radiation emanating from a home. 533 U.S. at 40, 121 S.Ct. 2038. In so holding, the Court rejected the Government's argument that because the device only detected 'heat radiating from the external surface of the house,' there was no 'search.' Kyllo, 533 U.S. at 35, 121 S.Ct. 2038. The Court reasoned that distinguishing between 'off-the-wall' observations and 'through-the-wall surveillance' would 'leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home.' Kyllo, 533 U.S. at 35–36, 121 S.Ct. 2038. *Thus, the Court held that '[w]here ... the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.' Kyllo, 533 U.S. at 40, 121 S.Ct. 2038.* (emphasis added)

[The Similarity of the Facts Here to Those in *Kyllo*]

Here, as in Kyllo, the DEA's use of the cell-site simulator to locate Lambis's apartment was an unreasonable search because the 'pings' from Lambis's cell phone to the nearest cell site were not readily available 'to anyone who wanted to look' without the use of a cell-site simulator. See United States v. Knotts, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983); see also State v. Andrews, 227 Md.App. 350, 395–96, 134 A.3d 324 (2016) (holding that the use of a cell site simulator requires a search warrant based on probable cause, and finding that the trial court properly suppressed evidence obtained through the use of the cell-site simulator). The DEA's use of the cell-site simulator revealed 'details of the home that would previously have been unknowable without physical intrusion,' Kyllo, 533 U.S. at 40, 121 S.Ct. 2038, namely, that the target cell phone was located within Lambis's apartment. Moreover, the cell-site simulator is not a device 'in general public use.' Kyllo, 533 U.S. at 40, 121 S.Ct. 2038. In fact, the DEA

agent who testified at the hearing had never used one.

[The Government's Argument and the Court's Response]

The Government counters that Kyllo is not implicated here. In Kyllo, the Court expressed concern that the Government could employ devices, like a thermal imaging device, to learn more intimate details about the interior of the home, such as 'at what hour each night the lady of the house takes her daily sauna and bath.' Kyllo, 533 U.S. at 38, 121 S.Ct. 2038. The Government contends that because the only information to be gleaned from a cell-site simulator is the location of the target phone (for which the Government had already obtained a warrant for CSLI), no intimate details of the apartment would be revealed and Lambis's expectation of privacy would not be implicated. But the Second Circuit has rejected a similar argument even when the search at issue could 'disclose only the presence or absence of narcotics' in a person's home. United States v. Thomas, 757 F.2d 1359, 1366–67 (2d Cir.1985) (holding that a canine sniff that 'constitutes a search under the Fourth Amendment ... when employed at a person's home').

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[*United States v. Karo* and its Application to This Case]

The Supreme Court adopted a similar rationale in United States v. Karo, 468 U.S. 705, 717, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). There, the Court held that '[t]he monitoring of a beeper in a private residence, a location not opened to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence.' Karo, 468 U.S. at 706, 104 S.Ct. 3296.

* * *

. . . the Court explained that '[t]he primary reason for the warrant requirement is to interpose a neutral and detached magistrate between the citizen and the officer engaged in the often competitive enterprise of ferreting out crime,' and that '[r]equiring a warrant will have the salutary effect of ensuring that use of beepers is not abused, by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search.' Karo, 468 U.S. at 717, 104 S.Ct. 3296 (quotations omitted). Thus, even though the DEA believed that the use of the cell-site simulator would reveal the location of a phone associated with criminal activity, the Fourth Amendment requires the Government to obtain a warrant from a neutral magistrate to conduct that search.

The fact that the DEA had obtained a warrant for CSLI from the target cell phone does not change the equation. 'If the scope of the search exceeds that permitted by the terms of a validly issued warrant ..., the subsequent seizure is unconstitutional without more.' Horton v. California, 496 U.S. 128, 140, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); see also United States v. Voustianiouk, 685 F.3d 206, 212 (2d Cir.2012). Here, the use of the cell-site simulator to obtain more precise information about the target phone's location was not contemplated by the original warrant application. If the Government had wished to use a cell-site simulator, it could have obtained a warrant. See Karo, 468 U.S. 705, 718, 104 S.Ct. 3296.

* * *

. . . And the fact that the Government previously demonstrated probable cause and obtained a warrant for CSLI from Lambis's cell phone suggests strongly that the Government could have obtained a warrant to use a cell-site simulator, if it had wished to

do so.

[The Court's Conclusion: What We Have Here is a Violation of the Fourth Amendment]

The use of a cell-site simulator constitutes a Fourth Amendment search within the contemplation of Kyllo. Absent a search warrant, the Government may not turn a citizen's cell phone into a tracking device. *Perhaps recognizing this, the Department of Justice changed its internal policies, and now requires government agents to obtain a warrant before utilizing a cell-site simulator. See Office of the Deputy Attorney General, Justice Department Announces Enhanced Policy for Use of Cell-Site Simulators, 2015 WL 5159600 (Sept. 3, 2015)*...(emphasis added)

* * *

[My Thoughts]

- *Lambis* was the second federal case in which a defendant filed a motion to suppress evidence obtained by the use of a cell-site simulator. It is clear that federal agents are now required to secure a search warrant before they can use a cell-site simulator. Interestingly, Circuit Judge Diana Gribbon Motz, of the United States Court of Appeals for the Fourth Circuit, had already recognized this requirement in Footnote 4 to her opinion in *United States v. Graham,* 824 F.3d 421 (4th Cir. May 31, 2016) which reads, in part:

> *Like these instances of government surveillance, when the government uses cell-site simulators (often called 'stingrays') to directly intercept CSLI instead of obtaining CSLI records from phone companies, the Department of Justice requires a warrant. See Dep't of Justice, Department of Justice Policy Guidance: Use of Cell-Site Simulators 3 (2015) available at https://www.justice.gov/opa/file/767321/download.* (emphasis added)

- In the first federal case in which a defendant filed a motion to suppress evidence obtained by the use of a cell-site simulator, United States District Judge David G. Campbell of the District of Arizona addressed whether a search warrant has to identify a cell-site simulator as being authorized by the warrant:

> Defendant argues that the search exceeded the scope of the warrant because the warrant did not specifically authorize the FBI to use a cell-site simulator.
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> * * *
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> There is no legal requirement that a search warrant specify the precise manner in which the search is to be executed.

United States v. Rigmaiden, 2013 WL 1932800 (D. Ariz. May 8, 2013) [Note: Rigmaiden elected to proceed without the assistance of counsel and filed dozens of motions seeking suppression of evidence or some form of sanction against the Government. Judge Campbell denied this latest motion to suppress and also ordered that he file no further motions for suppression or sanctions based on the Government's searches in this case.]

- So, what is there to worry about? How about that instance in which the Government used a cell-site simulator without first obtaining a warrant and this occurred before *Lambis* and *Graham* were

decided? The answer is simple – raise the issue as to whether a cell-site simulator was used by the Government in the investigation of your client. If you don't, there is a potential for your client to file an ineffective assistance of counsel claim against you. *See Marcantoni v.United States*, 2016 WL 3855644 (D. Md. July 15, 2016). United States District Judge Roger W. Titus of the District of Maryland denied the petitioner's application for habeas relief in which he had alleged multiple instances of ineffective assistance of counsel, including a failure to seek a suppression of evidence. Judge Titus wrote:

> Petitioner also claims his counsel was ineffective in failing to seek suppression of the Line J wiretap evidence on the basis that it was discovered through warrantless use of a cell site simulator.
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> * * *
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> Petitioner has offered no evidence to show his counsel had or should have had any awareness at the time of the suppression hearing that a warrantless cell site simulator was used to find Line J. Counsel cannot be found ineffective for failing to move based on facts unknown to them or facts they cannot reasonably be expected to have known.

- Sadly, I have to admit that I had never heard of a cell-site simulator until I began researching for this column. It's amazing what's out there!