"THE FEDERAL CORNER"

The Supreme Court Giveth and The
Courts of Appeal Taketh Away

Buck Files

For all those clients and their lawyers who have *Carpenter* issues on appeal, August was *BAD NEWS MONTH* for them. We all remember that on June 22, 2018, the Supreme Court held that the Government must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier. *Carpenter v. United States*, 138 S.Ct. 2206 (2018). What I did not pay attention to in the opinion was the second clause of this sentence: "The judgment of the Court of Appeals is reversed, *and the case is remanded for further proceedings consistent with this opinion*." (emphasis added)

On August 21, 2018, a panel of the United States Court of Appeals for the Second Circuit held that cell phone evidence did not have to be suppressed on Fourth Amendment grounds. [Note: In the opinion, the Court explains that "…*under the 'good faith' exception*, when the Government 'act[s] with an objectively reasonable good-faith belief that their conduct is lawful,' the exclusionary rule does not apply." (emphasis added)] *United States v. Zodhiates*, ___F.3d___, 2018 WL 3977030 (2d Cir. August 21, 2018) [Panel: Circuit Judges Parker and Raggi and Jesse M. Furman (District Judge, sitting by designation). (Opinion by Chief Judge Parker)]

On August 24, 2018, a panel of the United States Court of Appeals for the Seventh Circuit held that the government's warrantless collection of cell site location information recorded by defendant's cell-phone provider, in violation of Fourth Amendment, fell within the *good faith exception to exclusionary rule. United States v. Curtis*, ___F.3d___, 2018 WL 4042631 (7th Cir. August 24, 2018) [Panel: Chief Judge Wood, Circuit Judges Bauer and Kanne (Opinion by Chief Judge Wood)]

In each of these cases, the Government obtained CSLI records through a subpoena issued pursuant to the Stored Communications Act. The defendant filed a motion to suppress in the district court as had the defendant in *Carpenter*. The district court denied the motion to suppress and the issue was preserved for appellate review. The appellate court denied relief and based its decision on the good faith exception to the exclusionary rule.

In *Zodhiates*, Chief Judge Parker's opinion reads, in part, as follows:

[The Defendant's Contention]

> Zodhiates contends that the government violated the Fourth Amendment when it secured his cell phone records by subpoena under the SCA because it was required to proceed by a warrant supported by probable cause and, consequently, the records were inadmissible.

* * *

[*Carpenter v. United States*]

During the pendency of this appeal, the Supreme Court decided *Carpenter v. United States*, —— U.S. ——, 138 S.Ct. 2206, —— L.Ed.2d —— (2018), in which it held that 'an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell service location information]' and, therefore, under the requirements of the Fourth Amendment, enforcement officers must generally obtain a warrant before obtaining such information. *However, Zodhiates is not entitled to have the records suppressed because, under the 'good faith' exception, when the Government 'act[s] with an objectively reasonable good-faith belief that their conduct is lawful,' the exclusionary rule does not apply. Davis v. United States, 564 U.S. 229, 238, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (internal quotation marks omitted). This exception covers searches conducted in objectively reasonable reliance on appellate precedent existing at the time of the search. See United States v. Aguiar, 737 F.3d 251, 259 (2d Cir. 2013).* (emphasis added)

[The Third Party Doctrine]

In 2011, appellate precedent—the third party doctrine—permitted the government to obtain the phone bill records by subpoena as opposed to by warrant. Under this doctrine, the Fourth Amendment 'does not prohibit the obtaining of information revealed to a third party and conveyed by [the third party] to Government authorities.' *Miller*, 425 U.S. at 443, 96 S.Ct. 1619. In *Miller*, the Supreme Court held that the government was entitled to obtain a defendant's bank records with a subpoena, rather than a warrant, because the bank records were 'business records of the banks' and the defendant had 'no legitimate expectation of privacy' in the contents of his checks because those documents 'contain[ed] only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.' (internal quotation marks omitted). Similarly, in *Smith*, the Supreme Court held that a defendant did not have a reasonable expectation of privacy in the telephone numbers that he dialed because '[t]elephone users ... typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes.' (emphasis added)

These cases stand for the proposition that, in 2011, prior to Carpenter, a warrant was not required for the cell records. We acknowledged as much in United States v. Ulbricht, 858 F.3d 71 (2d Cir. 2017), when we considered ourselves bound by the third party doctrine in Smith 'unless it is overruled by the Supreme Court.' (emphasis added)

[Zodhiates' Argument]

To escape this result, *Zodhiates* directs us to *United States v. Jones*, 565 U.S. 400,

404, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), which held that when the government engages in prolonged location tracking, it conducts a search under the Fourth Amendment requiring a warrant. However, *Jones* is of no help to him. It was decided in 2012, after the Government's 2011 subpoena and consequently is not relevant to our good faith analysis. For these reasons, we conclude that the District Court properly denied Zodhiates' motion to suppress the cell location evidence.

[The Conclusion]

For the foregoing reasons, the judgment of the District Court is affirmed.

In *Curtis*, Chief Judge Wood's opinion reads, in part, as follows:

[The Defendant's Argument]

Curtis… argues that the district court should have excluded evidence of his cell-site location information ('CSLI'), which he alleges was obtained in violation of the Fourth Amendment.

* * *

[*Carpenter v. United States*]

The Supreme Court resolved Curtis's Fourth Amendment argument in *Carpenter v. United States*, ––– U.S. ––––, 138 S.Ct. 2206, ––– L.Ed.2d –––– (2018). There it decided that a person in Curtis's position, for whom data was collected for a substantial time, maintains a legitimate expectation of privacy for Fourth Amendment purposes in the records of his physical movements disclosed by CSLI. It declined to say whether there was 'a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny,' deciding only that accessing seven days' or more worth of information was enough. In *Carpenter*, as here, the prosecutors had obtained court orders under the SCA, and those court orders purported to authorize the collection of the target's cell phone records. The Court said that SCA compliance did not matter, because the showing required by the SCA 'falls well short of the probable cause required for a warrant.' The Court also rejected the applicability of the 'third-party doctrine,' which (when it applies) allows the collection of business records collected by a third party in the ordinary course of operations. *It remanded the case for further proceedings.* (emphasis added)

[The Second Issue]

Our case stands in the same position as the Carpenter remand. The Court has resolved the question whether an SCA order obviates the need for the warrant, but it has not spoken to what should happen next. We must decide whether this conceded error automatically results in relief for Curtis, for whom records covering 314 days were collected. We conclude that it does not. A different part of Fourth Amendment jurisprudence is, in our view, dispositive: evidence obtained

in good-faith reliance on a statute later declared unconstitutional need not be excluded. Illinois v. Krull, 480 U.S. 340, 349–50, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) (emphasis added)

[Curtis's Unsuccessful Attack on *Krull*]

Curtis's proposed path around *Krull* is ambitious. He does not argue that officers obtained his CSLI in bad faith. Far from it: his motion to suppress seemingly concedes that there would have been probable cause to seek a search warrant. It is *Krull* itself that he attempts to push out of the picture. He argues that *Krull* applies only to statutes authorizing administrative searches. His logic proceeds in three steps. First, he urges, the good-faith exception to the exclusionary rule cannot be applied so as to insulate statutes from constitutional challenge. To do so would 'destroy[ ] all incentive on the part of individual criminal defendants to litigate the violation of their Fourth Amendment rights.' *Krull*, 480 U.S. at 369, 107 S.Ct. 1160 (O'Connor, J., dissenting). Second, he suggests that the *Krull* majority could sidestep that concern because the target of an administrative search necessarily knows that a search is impending. A forewarned target still has reason to 'bring an action seeking a declaration that the statute is unconstitutional and an injunction barring its implementation' notwithstanding the good-faith exception. Third, he points out that the target of an SCA order issued under section 2703(d) has no knowledge of the order until the CSLI has been collected and used in a criminal proceeding. At that late hour, a defendant has no incentive to challenge the statute because the good-faith exception permits admission of the fruits of an unconstitutional search.

[Defendants Can Still Contest the Validity of a Statute]

Experience has shown that the good-faith exception has not had the chilling effect that Curtis fears. Curtis, like many others, has challenged section 2703(d) of the SCA on Fourth Amendment grounds notwithstanding the risk that the exception may apply. See, *e.g.*, *Carpenter*, *supra*; *United States v. Graham*, 824 F.3d 421, 425 (4th Cir. 2016) (*en banc*); *United States v. Daniels*, 803 F.3d 335, 351–52 (7th Cir. 2015); *Davis*, 785 F.3d at 511; *In re U.S. for Historical Cell Site Data*, 724 F.3d 600, 608 (5th Cir. 2013). This is just what the *Krull* majority predicted: defendants will still 'contest the validity of statutes [even] if they are unable to benefit directly by the subsequent exclusion of evidence....'

[The Exclusionary Rule]

The exclusionary rule is designed primarily to deter unconstitutional conduct. Nothing substantiates the fear that when passing laws such as the SCA 'legislators are inclined to subvert their oaths and the Fourth Amendment.' Even if there were a need to deter legislators, 'there is nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the statute prior to the declaration of its invalidity will act as a significant, additional deterrent.' We conclude,

therefore, that even though it is now established that the Fourth Amendment requires a warrant for the type of cell-phone data present here, exclusion of that information was not required because it was collected in good faith.

* * *

[The Conclusion]

Not all constitutional injuries have a remedy. In this case, good faith renders the Fourth Amendment violation non-redressable… We therefore affirm the judgment.

[My Thoughts]

- Ah, the good faith exception to the exclusionary rule. When *Carpenter* was decided, I wrote: "I will be surprised if this case impacts us at all. The Government will have a higher hurdle to get over before they will be able to obtain cell site location information; however, there's nothing magic about obtaining a search warrant for this information." "The Federal Corner" *VOICE for the Defense* July/August 2018, p. 17. I will stick with that prediction.
- I would now predict that there will be few, if any, cases with *Carpenter* issues that will survive a good faith exception to the exclusionary rule analysis by a Circuit Court.
- It will be interesting to see what the United States Court of Appeals for the Sixth Circuit does on remand when they have the opportunity to reconsider *Carpenter*. Will the good faith exception to the exclusionary rule take away Carpenter's win? Stay tuned.