EFiled: Dec 11 2018 04:54PM EST
Filing ID 62756737
Case Number 189,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN WHEELER, Defendant Below, Appellant, v. STATE OF DELAWARE Plaintiff Below, Appellee.	)	No. 189, 2018

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPERIOR COURT

Law Offices of
Murray, Phillips & Gay

By: */s/ Julianne E. Murray*
Julianne E. Murray, Esquire
Bar ID 5649
215 E. Market Street
Georgetown, DE 19947
(302) 855-9300
Attorney for Appellant

Dated: December 11, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Delaware Constitution

Statutes

ARGUMENT

I. Under *Carpenter v. United States*, Wheeler's Rights Under the Fourth Amendment to the U.S. Constitution and Delaware Constitution Article I, § 6 Were Violated Because a Warrant was not Obtained Prior to Seeking Location Information

It is interesting that instead of arguing about whether a warrant was required under *Carpenter,* in the Answering Brief the State has instead argued that the warrant was not necessary for a host of other reasons. The reasons cited are 1) Wheeler had no expectation of privacy in a phone that he allegedly disclaimed; 2) the real time tracking was "very limited"; and 3) the tracking of the cell phone was supported by probable cause even though a warrant was not obtained. Wheeler asserts that none of these reasons is sufficient to support the violation of his rights under the Fourth Amendment to the U.S. Constitution and Article I, § 6 of the Delaware Constitution.

No Expectation of Privacy

The State asserts that Wheeler disclaimed the cell phone. This is simply not true.[1] Furthermore, for the purposes of this argument, there was testimony that the phone was Wheeler's[2] and the Court made a factual finding that the cell phone was

[1] See AR-022. Q: Did anyone claim ownership of that phone? A: No. Wheeler did not testify at trial and his police interview was not played at trial so it is impossible to say that he disclaimed the phone based on the record.

[2] See AR022-023. Q: And whose phones were those? A: Both Lauren Melton's and Stephen Wheeler's phones were.

Wheeler's.[3] The State cannot have it both ways by saying he disclaimed the phone but he was found to own the phone at trial. The phone has been ascribed to Wheeler. As such, he has a personal right to protect.

Real-Time Tracking was Limited and Therefore *Carpenter* is Inapplicable

It is not a surprise that the State points to the language in *Carpenter* that acknowledges that the decision is based on historical cell site location information (as opposed to real-time information) and that the Court declined to rule on whether the government needs to obtain a warrant for a limited period of time (and how long that period might be.) The State does not want *Carpenter* to apply so the State is arguing that because the information obtained was for *only* an 18-hour period that it does not run afoul of *Carpenter.*

Wheeler argues that just because the U.S. Supreme Court did not include real-time tracking or a window of time that runs afoul of the Fourth Amendment does not mean that *Carpenter* does not apply. The U.S. Supreme Court worked with the facts that they had before them. In *Carpenter*, the information was several days' worth of historical information and the Court found that seven days of cell site location information (CSLI) constituted a Fourth Amendment search. Wheeler

[3] See AR026-027. "I'm thinking it's reasonable to infer your client's phone was sitting on the console. And that's what I find as far as the facts of the case.

argues that the overarching premise of *Carpenter* is applicable – namely, that CSLI is private and is protected by the Fourth Amendment. Chief Justice Roberts was very clear that CSLI gives "the ability to chronicle a person's past movements through the record of his cell phone signals" and that "historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones.* Unlike…the car in *Jones*, a cell phone…tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time.[4]

Under *Carpenter*, it is clear that location information is personal and because the tracking of it is so invasive to privacy, and that a higher threshold must be met before the invasion of a person's privacy. Wheeler argues that the fact that it was hours rather than days does not make a difference – a warrant was necessary before his privacy was invaded. Furthermore, the distinction that the State attempts to make about real-time tracking versus historical tracking falls short because by the very nature of the window of time the police were reviewing, there was historical information used to track Wheeler, it just happens that it was not a very long historical period.

[4] *Carpenter v. United States,* 585 U.S. ___ (slip Op., at 10) (2018), referring to *United States v. Jones*, 565 U.S. 400 (2012).

The State's argument that *Knotts*[5] is more applicable is incorrect because the beeper in a container is not the same as a cell phone signal of a cell phone that is near or on the suspect. The cell phone signal is essentially a homing beacon to the location of a person – not the location of a container that is on a "discrete 'automotive journey'"

The Court Order Was Supported by Probable Cause

The State argues that there is no problem in Wheeler's case because the application, affidavit and court order were all supported by probable cause. This is an interesting argument but is unavailing. The fact that the State can cite to boiler-plate language that "the following information is offered in support of probable cause" and that the Superior Court judge signed off on a boiler-plate paragraph that suggests "…a finding of probable cause" does not mean that the proper analysis was actually conducted. This is a particularly important point in a *pre-Carpenter* world where location information was not subject to a warrant. Wheeler argues that prior to *Carpenter* that a reviewing official would not be looking at the information through a lens of probable cause for a warrant, but rather, would be looking for information sufficient to support the issuance of a court order pursuant to 11 *Del. C.* §2433.

[5] *United States v. Knotts,* 460 U.S. 276 (1983).

The State then asserts that the Affidavit "provides ample probable cause by detailing the evidence of the crime, tying Wheeler to the crime, and seeking the order "for purposes of obtaining the location of an unknown male, possibly identified as Stephen Wheeler."[6] There are several problems with this argument: 1) at the time the application was made for the pen register/trap and trace Stephen Wheeler's name had not been supplied to police as a possible suspect;[7] 2) the basis of the identification was emojis with a picture associated with a contact in a cell phone and text messages back and forth with an unknown party[8] and 3) no statements had been made to implicate Wheeler specifically. This means that the pen register/trap and trace was a fishing expedition of an unknown suspect.[9] Once the pen register/trap and trace call detail gave police information they should have applied for a warrant to track his location. Wheeler argues that the failure to obtain a warrant to specifically track his location runs afoul of *Carpenter*. Wheeler argues that the warrant necessary to access the location can be likened to a wiretap application where necessary investigative steps (including a pen register issued pursuant to 11 *Del. C.* §2433) must be exhausted before the wiretap application can be issued under

---

[6] *Ans. Br.* at 17.
[7] AR-007. Melton gave Wheeler's name in April 2017, several months later.
[8] AR008-009. Melton testified there was no name associated with contact. It was middle finger emojis and a picture of Melton and Wheeler, who was not identified by name.
[9] AR-011. "On Ms. Melton's phone, there was text messages from her phone to, *at that point in time*, an unidentified party." (Emphasis added).

11 *Del. C.* §2407. The State's "one stop shopping" court order that permits tracking incoming and outgoing calls as well as location information does not pass constitutional muster.

The State's argument that as a result of the boiler-plate language in the application, affidavit and court order that stated probable cause had been achieved protects Wheeler's constitutional privacy interest in this information is without merit. At the time the pen register/trap and trace order was issued so that they could track *location information of an unknown suspect* – the State had no interest in protecting Wheeler's right to be free of unreasonable search and seizure.

The State's Final Argument

The last argument the State made regarding the failure to obtain a warrant is that there were actually three forms of evidence related to the 249 cell phone and that two of them were obtained by search warrant from independent sources. The problem with this argument is that the evidence the State is referring to was obtained *well after* the issuance of the pen register/trap and trace court order. Wheeler argues that when reviewing whether a warrant was necessary that the review must be constrained to what the police *knew at the time* that they attempted to establish probable cause. All the police had at the time they sought the court order (instead of a warrant as required by *Carpenter)* is text messages between Lauren Melton and a specific phone number.

Use of a Sting Ray Device

Carpenter is directed to the use of CSLI to track a suspect's activities. The mode typically used for tracking is the use of a pen register/trap and trace which authorizes the cell phone provider to disclose incoming and outgoing phone calls and then the "pings" to the closest cell phone towers used for the incoming and outgoing phone calls gives the approximate location of the suspect. There is another way that location can be tracked and that it is the use of a sting ray device. A sting ray acts like a cell phone tower so that the suspect's cell phone pings to the sting ray instead, allowing the police to track the location of the suspect because the string ray is "communicating" with the suspect's cell phone.

For the purposes of Wheeler's argument, tracking location is the same whether through pen register/trap and trace pings or through a sting ray. Wheeler argues that both circumstances would require a warrant under *Carpenter* although *Carpenter* is not specifically directed to the use of sting rays. Wheeler is mentioning the sting ray use for the purposes of making sure that this Court is aware that there is a difference between these modes of tracking and to ensure that the Court is aware of relevant case law when evaluating this claim.[10]

[10] *United States v. Lambis,* 197 F. Supp 3d 606 (2016) holding that warrantless use of a cell-site simulator, to locate defendant's apartment as the place of use for the target cell phone, was an unreasonable search. The DEA employed a cell-site

The Delaware State Police did not hide that they were tracking Wheeler's location. Although the record is not crystal clear as to exactly what methods the police used to track Wheeler, it is evident that they used both CSLI from the pen register/trap and trace as well as a sting-ray, and that they did not have a warrant that specifically authorized location tracking.

simulator to investigate an international drug-trafficking organization, but only sought a warrant for pen register information and cell site location information for a target cell phone. *See also* 2015 WL 5159600 "Justice Department Announces Enhanced Policy for Use of Cell-Site Simulators" which details that law enforcement agents must now obtain a search warrant supported by probable cause before using a cell-site simulator.

II. There was Insufficient Credible Evidence to Support a Robbery Conviction so the Superior Court Erred by Denying Motion for Judgment of Acquittal for Robbery.

The State's argument that Wheeler conceded that there was credible evidence of missing U.S. currency mischaracterizes Wheeler's argument. The full text of the sentence is "[w]hile Wheeler concedes that there was testimony of missing U.S. currency, the argument is that there was *more* credible evidence that there was no missing currency and that the Court gave too much weight to the victim's testimony and not enough to the contradictory evidence."[11]

When Wheeler used the words "more credible evidence that there was no missing currency" the use of the words "more credible" was merely an acknowledgment of the Court's finding in the verdict that the victim's testimony was credible.[12]

Furthermore, the State's argument that this claim should fail because the standard of the review requires this Court to review all evidence *in the light most favorable to the State* completely ignores Wheeler's argument that the Court gave

---

[11] *Op. Br.* at 19.

[12] See A097-A098"…The question about whether or not there was U.S. currency, Mr. Mueller testified they took his wallet. And in his wallet was credit cards and $10. The lady who testified, you're correct, Mr. Beauregard, that there was uncertainty about that … and her recollection of what was taken did not match his recollection of what was taken as far as all the other stuff, but I'm satisfied that the State has met its burden as to the robbery.

too much weight to the victim's testimony and *not enough weight* to the contradictory evidence. It is almost as if the State is arguing that the Court's finding that there was U.S. currency taken is all that has to be considered and that no reconciliation with contradictory evidence is necessary. Wheeler argues that this is a misapplication of the standard and that even in the light most favorable to the state that if there is contradictory evidence that it must be at least acknowledged in the decision.

Recall in Wheeler's Opening Brief that the police officer testified that no money was taken, the co-defendant Melton and the victim himself all testified that no money was taken.[13] While the Court commented about "uncertainty" about the money, the uncertainty was only about Melton's testimony creating the uncertainty. There was no acknowledgement about the victim's contradictory statement or the police officer's assertion that no money was taken. Furthermore, when Trial Counsel tried to push the police officer about whether or not the missing $10.00 was in his police reports, the Court unwittingly assisted the State by calling a recess as follows:

Trial Counsel:	Any money that was taken?
Det. Cathell:	I believe maybe a small amount. Like I want to say $10.
Trial Counsel:	You did a report on this, right? You did several reports did you not?

[13] *Op Br.* at 15-18.

Det. Cathell: That is correct.

Trial Counsel: Can you show us in any of your reports where it indicates that $10 or a small amount of money was taken?

The Court: Tell you what, it looks like a big report. We will break for lunch and he can look for it, and it's either there or not there, and we'll come back at 1:15. That gives everybody just a little bit more than an hour. Okay.[14]

When the testimony resumed after the lunch recess, Trial Counsel pressed the officer about exactly when the victim disclosed that money was missing and the fact that a listing was provided by the victim of missing property that was then included in a supplemental report and that *no cash was taken.*[15]

The State uses the Court's finding that Wheeler's "intent was to get the money … to get the money by robbing and assaulting [the victim]"[16]to bolster the assertion that $10 was taken. Quite simply - the intent does not prove the money was taken. Wheeler's argument if very finely focused to the fact that the State included U.S. currency in the indictment instead of just using the language of the statute which is "taking of property." As a result of the State specifying that U.S. currency was taken, they had a burden to show that U.S. currency was taken.

---

[14] AR001-002.

[15]AR005.

Trial Counsel: All right. To digress just a little bit. So as best you can tell, as lead detective, no cash was ever taken?

Det. Cathell: That's correct.

[16] *Ans. Br.* at 23

Finally, the State's argument that the trial judge was highly experienced and made clear that he was aware of his role as factfinder does not cure the problem. Simply because the trial judge states that he is "filter[ing] it through the filters that the Supreme Court wants any trial of fact to do"[17]does not mean that he filtered everything the way that he was supposed to filter. There is unreconciled contradictory testimony that was completely ignored. Wheeler is not asserting that the Court had any bad intent by ignoring the contradictions. Mistakes happen – even to experienced trial judges that are presiding over a trial in the last week before retirement.

When the standard is "beyond a reasonable doubt" and there is contradictory evidence from the victim, a co-defendant and a police officer as to whether currency was missing, it is hard to believe that a rational trier of fact could arrive at a verdict of guilty as to robbery, particularly when the Court (as fact finder) is aware that the State specified U.S. currency in the indictment and attempted to amend that indictment to NOT be limited to only U.S. currency.

[17] B246.

CONCLUSION

Wheeler asserts that there are two major issues with his conviction: 1) that his constitutional rights were violated by the police tracking his location without a warrant and, that as a result, the cell phone seizure was improper; and 2) that he should not have been convicted of robbery because there was insufficient credible evidence that U.S. currency was taken.