

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA : No. CR-1868-2014  
: CR-2186-2013  
vs. :  
DAVID BEAN, :  
Defendant : PCRA

**OPINION AND ORDER**

This Court noted in its July Order that it was not clear to the court whether the historical cell-site location information (CSLI) was based on information obtained from Petitioner's cell phone, Petitioner's cell phone provider, his co-defendant's or accomplice's cell phones, or other providers, or some combination thereof.

There are no material issues of fact in dispute. The testimony at the hearings established that Pennsylvania State Police (PSP) Corporal Jeffrey Vilello, in March of 2014, obtained a court order for records from Petitioner's cell phone provider. During the same time period, he obtained a search warrant for information on Petitioner's cell phone.

In early May of 2014, he obtained the electronic cellular records for Petitioner's cell phone from the cell phone provider. Subsequently, in mid-May of 2014, he provided the records obtained from the cell phone provider to Stephen Kruzik, the GIS Specialist, utilized by the Commonwealth at the trial in this matter. He also provided to Mr. Kruzik a list of the dates/times of the known burglaries that occurred during the relevant timeframe.

Corporal Vilello's testimony established that the data provided to and used by Mr. Kruzik in his creation of the GIS maps utilized at trial, did not come from Petitioner's cell phone but rather came from the records provided by Petitioner's cell phone provider pursuant to a court

order.

GIS Specialist Kruzik testified to how he constructed the maps that were admitted at trial, and which compared the location of Petitioner's cell phone at the times of certain burglaries with the location of the burglaries themselves. The CSLI in the case put Petitioner in the general location of the burglaries for which he was charged.

It is clear and both parties acknowledge that Mr. Kruzik utilized only the records obtained pursuant to a court order in response to an application under the Wiretapping and Electronic Surveillance Control Act.

Petitioner first argues that trial counsel was ineffective in "failing to understand the importance of the *Jones*<sup>1</sup> case and its application to a situation, such as existed presently, that no valid warrant to obtain information from Petitioner's phone existed allowing for the process of triangulating his whereabouts."

Petitioner argues that pursuant to the reasoning set forth in *United States v. Jones*, 565 U.S. 400 (2012), law enforcement needed to obtain a search warrant supported by probable cause in order to obtain CSLI from a wireless service provider. The court cannot agree. *Jones* did not involve CSLI or cell phone records. It involved government agents placing a Global Positioning System (GPS) tracker on a suspect's vehicle without a valid warrant, and the case was decided on a trespass theory. Here, unlike *Jones*, no trespass occurred.

While there is dicta in Justice Sotomayor's concurring opinion in *Jones* suggesting that electronic devices should be treated differently given their prevalence and

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<sup>1</sup> *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945 (2012).

technological advancements which would not require a trespass to obtain what many individuals would consider private information,<sup>2</sup> this was not the prevailing view in the case. Thus, it was not until the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), that law was established requiring a search warrant supported by probable cause in order to obtain historical CSLI from a wireless service provider. The decision in *Carpenter* was decided subsequent to Petitioner's trial and counsel cannot be deemed ineffective for failing to predict developments or changes in the law. *Commonwealth v. Gribble*, 863 A.2d 454, 464 (Pa. 2004). Moreover and as argued by the Commonwealth, the information was obtained via a lawful court order and would have been inevitably discovered.

Additionally, Petitioner has not established prejudice. As the court noted previously, prejudice is established if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Commonwealth v. Stewart*, 84 A.3d 701, 707 (Pa. Super. 2013); *Commonwealth v. Hawkins*, 2020 PA Super 280, 2020 WL 7251072 (December 10, 2020). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Stewart, id.* Prejudice is measured by whether there is a reasonable probability that the result of the proceedings would have been different. *Commonwealth v. Pierce*, 786 A.2d 203, 213 (Pa. 2001). The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) cautioned, however, that this standard is not intended to be viewed as mechanical. "Although those principles should guide the process of decision, the

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<sup>2</sup> *Jones*, 132 S.Ct. at 957 (Sotomayor, concurring).

ultimate focus of inquiry must be on the fundamental fairness of the proceeding which is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” *Strickland, Id.* at 696; *Commonwealth v. Spatz*, 84 A.3d 294, 312 (Pa. 2014).

Indeed, there are certain limited circumstances where prejudice is so likely that it is presumed. Such examples include, but are not limited to, the actual or constructive denial of counsel at a critical stage of the trial; when counsel fails entirely to provide meaningful adversarial testing of the prosecution’s case; circumstances wherein no lawyer, regardless of general competency, could have provided effective assistance of counsel; and the failure to secure an interpreter where the petitioner was not a native English speaker and could not fully understand the proceedings. *U.S. v. Cronin*, 466 U.S. 648 (1984), *Commonwealth v. Diaz*, 226 A.3d 995 (Pa. 2020).

Petitioner argues that the CSLI in this case put Petitioner in the general location of the burglaries for which he was charged. Petitioner argues that there is “no underestimating the importance of this type of evidence and it should lead to a conclusion that Petitioner was prejudiced in this case by the admission of the evidence.” The court concludes that Petitioner cannot satisfy prejudice. While certainly the CSLI testimony was important, the testimony and other evidence presented at trial was overwhelming. Even if the evidence had been excluded, the record and testimony from both the trial and the evidentiary hearing make clear that Petitioner confessed to all of the burglaries for which the mapping was utilized. Additional witnesses

corroborated these confessions including witnesses who assisted Petitioner in connection with the burglaries. Furthermore and with respect to one of the burglaries, Petitioner was actually apprehended at the scene.

Petitioner next argues that his conviction resulted from a violation of a constitutional right. Specifically, Petitioner argues that his constitutional rights were violated by the failure to secure phone records through a validly issued search warrant.

Pursuant to 42 Pa. C.S.A. §9543(a)(2), a PCRA petitioner may be eligible for relief if his conviction or sentence resulted from a violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

Petitioner argues that his constitutional rights were violated by the failure to secure his phone records through a validly issued warrant.

Petitioner argues further that although the Commonwealth accessed the CSLI from Petitioner's carrier pursuant to a court order, such access invaded his reasonable expectation of privacy. In support of his argument, Petitioner cites not only the *Carpenter* decision but also the decision of the Pennsylvania Superior Court in *Commonwealth v. Davis*, 241 A.3d 1160 (Pa. Super. 2020). Clearly, present law requires the issuance of a warrant to obtain historical CSLI. However, both *Carpenter* and *Davis* were decided after Petitioner's trial.

Petitioner claims that this court is bound by the holding in *Commonwealth v. Pacheco*, 227 A.3d 358 (Pa. Super. 2020), *appeal granted in part*, 237 A.3d 396 (Pa. 2020). In

*Pacheco*, the petitioner argued that the warrantless collection of his real time CSLI evidence from his cell phone provider was unconstitutional. As Petitioner noted in his brief, the *Pacheco* court found no meaningful distinction between the privacy issues related to historical and real time CSLI. The Court extended the Supreme Court's rationale in *Carpenter*. The Court held that an individual maintains a legitimate expectation of privacy in the record of his physical movement as captured through real time CSLI. The Court found that while the government conducted a search when it obtained Petitioner's real time CSLI, the search was constitutional because the court order issued under the Pennsylvania Wiretap Act satisfied the Fourth Amendment warrant requirement.

The court cannot accept Petitioner's argument that his constitutional rights were violated pursuant to *Pacheco*. Indeed, *Pacheco* supports the Commonwealth's argument. Pursuant to *Pacheco*, the court order issued in this case pursuant to the Wiretap Act qualifies as a warrant such that Petitioner's constitutional rights were not violated. While the court recognizes that the Pennsylvania Supreme Court could reverse the Superior Court's decision in *Pacheco*, unless or until it does so, the court is required to follow the Superior Court decision.

As for *Carpenter*, the court agrees but as Petitioner correctly noted, it is not retroactive. Moreover, in light of the Supreme Court's decision in *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021), the court cannot accept Petitioner's argument that the decision in *Carpenter* established a "watershed rule."

In sum, the constitutional right established in *Carpenter* was not recognized as such at the time of Petitioner's trial and as a result, Petitioner's conviction could not have

resulted from a violation of the Constitution that so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

Additionally, although the court does not accept Petitioner's argument that the decision in *Carpenter* was "nothing more than an extension of the analysis" in *Jones*, if the court were to accept such, his constitutional claim would be waived. For PCRA purposes, "an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, ...on appeal or in a prior state postconviction proceeding." 42 Pa. C.S.A. §9544(b). Petitioner never raised this constitutional issue via a suppression motion, an omnibus pretrial motion or on direct appeal, although he arguably could have and his case could have been the one announcing the "new rule" instead of *Carpenter*.

Finally, and as set forth previously, Petitioner has not sustained his burden of proving prejudice.

### **ORDER**

**AND NOW**, this \_\_\_ day of July 2021, the court DENIES Petitioner's Post Conviction Relief Act (PCRA) petition.

Petitioner is hereby notified that he has the right to appeal from this order to the Pennsylvania Superior Court. The appeal is initiated by the filing of a Notice of Appeal with the Clerk of Courts at the Lycoming County courthouse, and sending a copy to the trial judge, the court reporter and the prosecutor. **A separate notice of appeal is required for each case number.** Pa. R.A.P. 341; *Commonwealth v. Walker*, 646 Pa. 456, 185 A.3d 969 (2018). The form and contents of the Notice of Appeal shall conform to the requirements set

forth in Rule 904 of the Rules of Appellate Procedure. The Notice of Appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. Pa.R.A.P. 903. If the Notice of Appeal is not filed in the Clerk of Courts' office within the thirty (30) day time period, Petitioner may lose forever his right to raise these issues.

**The Clerk of Courts shall mail a copy of this order to Petitioner by certified mail, return receipt requested.**

By The Court,

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Marc F. Lovecchio, Judge

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