

Appellate Ruling Addresses Cell Phone Privacy Concerns

July 17, 2014

In a time of increasing reliance on wireless communication, issues of cell phone privacy have a potential for widespread impact. Pew Research Center data shows that 90 percent of American adults now have a cell phone. For many, a cell phone is a constant companion. The recent opinion from the U.S. Court of Appeals for the Eleventh Circuit in *U.S. v. Quartavious Davis* stands at the crossroad of technology and privacy. In *Davis*, the Eleventh Circuit held that cell site location information is within a cell phone subscriber's reasonable expectation of privacy, and that law enforcement's obtaining of that information without a warrant violates the Fourth Amendment. Cell site location information includes a record of calls made by a cell phone subscriber and reveals the cell tower that carried the call to or from the subscriber (normally, the closest tower). It also reflects the direction of the user from the tower. As a result, law enforcement can use cell site location data to extrapolate, or ping, where a phone is at a certain time and date reflected in the call record. In *Davis*, the government used an order granted under 18 U.S.C. § 2703(d), a provision of the Stored Communications Act, to obtain cell site location data from *Davis*' cell phone provider. The standard under the statute is whether there are specific and articulable facts showing reasonable grounds to believe that the records or other information sought are relevant and material to an ongoing criminal investigation—a lesser standard than the probable cause required for a warrant. *Davis* was charged in connection with a series of robberies at various businesses. Through the use of cell site location information, the prosecution placed *Davis* at the scene of six out of seven robberies. *Davis*' motion to suppress was denied, and the cell site location information was permitted at trial. *Davis* was convicted and on appeal argued (among other issues) that law enforcement violated his Fourth Amendment rights by obtaining cell site location information without a warrant. **Warrantless comparison**

In its analysis, the Eleventh Circuit discussed the 2012 U.S. Supreme Court case *U.S. v. Jones*, which dealt with whether law enforcement's warrantless attachment of a GPS tracking device to a suspected drug dealer's vehicle violated the Fourth Amendment. As a result of law enforcement's trespass on Antoine Jones' vehicle, the court held that the Fourth Amendment was violated. However, the decision in that case turned on a property rights analysis, and the majority did not reach the question of whether law enforcement's obtaining of GPS data violated Jones' reasonable expectation of privacy under the Fourth Amendment. A question unanswered by *Jones* was

therefore how location data issues would play out in an electronic surveillance case not involving a physical trespass. Davis goes beyond the Jones majority opinion. In Davis, the Eleventh Circuit held: "The exposure of the cell site location information can convert what would otherwise be a private event into a public one. When one's whereabouts are not public, then one may have a reasonable expectation of privacy in those whereabouts ... even one point of cell site location data can be within a reasonable expectation of privacy." In applying a reasonable expectation of privacy analysis, Davis rejected the government's claim that Davis did not have a reasonable expectation of privacy because he exposed his location to a third party (the cell provider) when he placed calls, the court recognized that users do not willingly turn over their location data and are most likely unaware that exchanging a phone call will reveal such information. However, the Eleventh Circuit went on to rule that the trial court's denial of Davis' motion to suppress was not reversible error—the good faith exception to the exclusionary rule applied. As the court explained, "the law enforcement officers, the prosecution, and the judicial officer issuing the order all acted in scrupulous obedience" to the Stored Communication Act, and "[a]t that time, there was no governing authority affecting the constitutionality of this application of the Act." In requiring a warrant to obtain cell site location information, Davis is a strong pro-privacy opinion with far-reaching implications. For as the court explained, "One's cell phone, unlike an automobile, can accompany its owner anywhere." *Reprinted with permission from the Thursday, July 17, 2014 edition of the Miami Daily Business Review* © 2014 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 - reprints@alm.com or visit www.almreprints.com.

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