



DPS LEGAL REVIEW

June 2018 | Volume 17 No. 6

Georgia Department of Public Safety | Legal Services Office | (404) 624-7423

NEW LEGISLATION EFFECTIVE JULY 1, 2018

Please be aware that several newly enacted bills, including the new Hands-Free Georgia Act, become effective on July 1, 2018. The Legal Services Office's 2018 Legislative Summary contains information on all such bills that are relevant to the Department of Public Safety and was e-mailed to all employees on June 14, 2018. The Legislative Summary is a brief overview of the bills and is **not a substitute for reading the actual bills**. The full text of the bills can be viewed at www.legis.ga.gov.

UNITED STATES SUPREME COURT

WARRANT REQUIREMENT - CELL SITE LOCATION INFORMATION

In 2011, FBI agents investigating a series of robberies in Detroit arrested four people in connection with the crimes. One of the suspects identified several other people that he alleged were involved in the robberies. Based on the information provided, the FBI began to investigate those individuals.

As part of their investigative efforts, the FBI applied for a court order under a U.S. law that would allow agents "to obtain cell phone records" for several suspects merely by offering "'specific and articulable facts showing that there are reasonable grounds to believe' that the records sought 'are relevant and material to an ongoing criminal investigation.'" The FBI did not, however, obtain a warrant for the information, and thus did not demonstrate that probable cause existed to justify the search.

Among the data obtained by the FBI from cell phone carriers was so-called "cell site location information" (CSLI) of the suspects being investigated. CSLI consists of time-stamped location data for a phone generated when a phone attempts to locate and connect to the nearest radio antennae. Those connection attempts, which are recorded and retained by wireless service providers, can create a location history for cell phones and their users, even when the phone is not in use by the user.

Timothy Carpenter was one of the suspects for whom the FBI sought and obtained CSLI. Based in part upon the CSLI the government obtained, Carpenter was charged with several crimes related to the robberies in federal court. Carpenter moved to suppress all evidence of his location based upon the CSLI data, arguing that the government was not entitled to obtain such information without a warrant supported by probable cause. The district court denied Carpenter's motion and, on appeal, the Sixth Circuit Court of Appeals upheld the decision. The Sixth Circuit stated that since the CSLI is routinely disclosed to a third-party (the wireless service provider), individuals such as Carpenter have no reasonable expectation of privacy in the data, and therefore no warrant is required to obtain it. Carpenter appealed this ruling to the U.S. Supreme Court, which agreed to hear the case.

The U.S. Supreme Court overruled the lower courts and held that **law enforcement cannot obtain CSLI without probable cause and a warrant (or satisfying an exception to the warrant requirement)**. The Court explained that CSLI greatly affects privacy concerns because it gives "the Government near perfect surveillance and allow[s] it to travel back in time to retrace a person's whereabouts, subject only to the... retention policies of... wireless carriers." The Court also held that **the third-party sharing of CSLI with wireless carriers does not overcome individuals' reasonable expectation of privacy**. The Court explained that because of the invasive nature of the location information revealed by CSLI, it is unlike other data that has been previously considered under the third-

party sharing doctrine. Moreover, the Court held the third-party sharing in this instance does not overcome the individual's reasonable expectation of privacy. The CSLI is shared automatically by the cell phone without any affirmative act by the user. As such, the government is required to justify searches of CSLI with probable cause and either a warrant or an otherwise applicable exception to the warrant requirement. *Carpenter v. U.S.*, No. 16-402, 2018 WL 3073916 (U.S., June 22, 2018).

11TH CIRCUIT COURT OF APPEALS

ARGUABLE PROBABLE CAUSE FOR ARREST OF ROBBERY SUSPECT

Birmingham Police Officer Cedric Thomas was investigating the robbery and attempted robbery of two pharmacies in which "the perpetrator wore a partial face mask and handed the pharmacy technician a note that said he was a bomb specialist carrying explosives." The suspect obtained six pills in two pill bottles at the first pharmacy, but obtained nothing at the second pharmacy. During the course of the investigation, surveillance footage from "the attempted robbery was shown on *Crime Stoppers*, a television program designed to elicit tips and information from the public about unsolved crimes."

After airing the footage, "*Crime Stoppers* received an anonymous tip that [Jeffrey] Cozzi 'resembled the subject featured.'" A law enforcement officer in a different jurisdiction also received a tip from a confidential informant that "he recognized the person in the *Crime Stoppers* video as Cozzi based on a unique walking style; the hat and shoes the perpetrator wore; and the mask, which the informant said was similar to the kind Cozzi used for painting cars." The confidential informant also "provided Cozzi's address and said that Cozzi had a severe Lortab addiction and drove a purple truck." Both tips were sent to Officer Thomas, who then obtained a search warrant for Cozzi's house.

Upon arriving at Cozzi's house to execute the search warrant, Officer Thomas and two other detectives encountered Cozzi outside, where they

detained and handcuffed him while conducting their search. The officers did not find any clothing, mask, or note that appeared to have been used in the robbery, but did recover "a plastic bag containing 32 loose pills." Cozzi's roommate, Michael Thompson, was at home during the search. Officer Thomas "showed Thompson a photograph of the perpetrator" taken at one of the robberies, and Thompson "could see from the picture it was not Cozzi." Thompson "explained to [Officer] Thomas that the person in the photograph had 'numerous tattoos up and down his arm,' but Cozzi 'only had one tattoo.'" Despite this discrepancy, and despite the fact that Cozzi was still on the scene, no officer "viewed or asked about Cozzi's tattoo."

Officer Thomas eventually arrested Cozzi, but he was released after further questioning failed to reveal any other evidence that "could substantiate a warrant for his arrest." Cozzi later sued Officer Thomas and others in the U.S. District Court for the Northern District of Alabama claiming a violation of his constitutional rights for, among other things, unlawful arrest without probable cause. Officer Thomas moved for summary judgment with respect to that claim and the district court denied his motion. Officer Thomas then appealed that decision to the Eleventh Circuit.

The Eleventh Circuit explained that under the doctrine of qualified immunity, an arresting officer sued for unlawful arrest under the Fourth Amendment "may be entitled to qualified immunity even if there was no actual probable cause for the arrest... if there was arguable probable cause" for the arrest. *Arguable probable cause* "exists where reasonable officers in the same circumstances and possessing the same knowledge as the defendant could have believed that probable cause existed to arrest." Despite this lesser standard, the Court held that in this case, "**under the totality of the circumstances, Thomas lacked arguable probable cause to arrest [Cozzi].**" **The Court explained that, in this case, there was only very limited evidence implicating Cozzi, most of which came from an anonymous source and a confidential informant whose reliability was unknown to Officer Thomas.** Moreover, Thomas also "received easily verifiable exculpatory information from Thompson – that Cozzi's single

tattoo did not match the multiple tattoos visible on the perpetrator in the crime scene photograph that Thomas showed Thompson.” The Court thus explained that “[Officer] Thomas ‘unreasonably disregarded’ evidence establishing that Cozzi was not the perpetrator of the crimes.” Because Thomas lacked arguable probable cause to arrest Cozzi, he was not entitled to qualified immunity. *Cozzi v. City of Birmingham*, No. 17-11011, 2018 WL 3030837 (11th Cir., June 19, 2018).

GEORGIA COURT OF APPEALS

SEARCH INCIDENT TO ARREST: BACKPACK

During the early-morning hours of January 10, 2017, Athens Clarke-County police officer David Kelley responded to an apartment following a call from a third-party that a woman had been beaten up by her boyfriend, later identified as Jamarcus Huff. “When Kelley knocked on the door, Huff got up and, while wearing a backpack, went into a bedroom. Huff returned without the backpack and answered the door.” During the course of the investigation, Officer Kelley spoke with Huff, Huff’s girlfriend who was also in the apartment, and the third-party caller. Eventually, “Huff asked if he could get his backpack out of the bedroom. [Officer] Kelley retrieved Huff’s backpack from the bedroom, and Huff put it on his back.”

Officer Kelley ultimately decided to arrest Huff for domestic violence battery. “Officers stood [Huff] up and put his hands behind his back to handcuff him, slid the backpack off his back, and told him he was being arrested for domestic violence. An officer then picked up the backpack from the floor, asked if it belonged to Huff and told him that he would not be able to return to the apartment. Huff asked [his girlfriend] to give the backpack to his sister, which [his girlfriend] agreed to do.” Nevertheless, the officers took the backpack along with Huff out of the apartment building, through a courtyard and another apartment building, and down a sidewalk. The officers told Huff they were taking the backpack because “it was on his person when he was

arrested.” The officers then searched the backpack and discovered a handgun.

During Huff’s subsequent prosecution, Huff moved to exclude the handgun from evidence, arguing that the officers’ search of the backpack was an unjustified warrantless search. The trial court denied that motion, stating that the search was justified as a search incident to arrest because “Officer Kelley was justified to search the backpack for a weapon while Huff was still close enough to potentially grab the backpack.” Huff appealed the ruling to the Georgia Court of Appeals.

The Court of Appeals overruled the trial court and held that the officers’ search of the backpack was unjustified. The Court explained that, **at the time the backpack was searched, “the law enforcement officers had exclusive control of Huff’s backpack, and Huff was handcuffed.” Therefore, “there was no longer any danger that Huff could gain access to the backpack to seize the weapon or destroy evidence.” Furthermore, the Court explained, “the State did not argue, nor was there any evidence to show, that the officers had any reason to believe that the backpack contained anything related to the crime for which he was arrested.”** As such, the Court excluded the handgun from evidence because the search was not justified as a search incident to arrest. *Huff v. State*, No. A18A0073, 2018 WL 2472129 (Ga. Ct. App., June 4, 2018).

ALS REMINDERS

1. You must file a written continuance motion if you are unavailable for an ALS Hearing.
2. You must personally serve the copy of the 1205 form marked “DRIVER” on the driver and send the copy of the 1205 form marked “DEPARTMENT OF DRIVER SERVICES” to DDS. Please make sure the correct copy of the 1205 Form is provided to the Driver and to DDS.

Published with the approval of
Colonel Mark W. McDonough.

LEGAL SERVICES
Melissa Rodgers, Director
Joan Crumpler, Deputy Director
Dee Brophy, ALS Attorney
Zack Howard, Legal Services Officer