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Taylor vs. State, 132 Nev. Adv. Op. 27 (April. 21, 2016)

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CRIMINAL PROCEDURE

Summary

The Court determined that (1) access and usage of historical cell phone connection data without a warrant does not violate the Fourth Amendment if the "specific and articulable facts" standard is met,[2] (2) the out-of-court and in-court identifications did not violate Taylor's constitutional rights to due process of law, (3) the prosecutorial conduct during closing arguments did not violate Taylor's Sixth Amendment right to a fair trial or Fifth Amendment right against self-incrimination, and (4) there was sufficient evidence at trial to support the jury's finding of guilt.

Background

Donald Taylor appealed from a judgment of conviction, pursuant to a jury verdict, of (1) burglary while in possession of a firearm, (2) conspiracy to commit robbery, (3) robbery with the use of a deadly weapon, and (4) murder with the use of a deadly weapon. More specifically, on appeal, Taylor alleged that the access and usage of his historical cell phone connection data without a warrant violated the Fourth Amendment. Taylor further alleged that the key witness, Angela Chenault's, positive identification of him during the show-up procedure and in-court procedures violated his constitutional right to due process of law. Finally, Taylor alleged that the prosecutorial conduct during closing arguments violated his Sixth Amendment right to a fair trial and his Fifth Amendment right against self-incrimination.

The robbery-murder

On November 18, 2010 Angela Chenault witnessed the Defendant rob her daughter's significant other of a bag of marijuana in her own house, and his subsequent murder by two men, allegedly his friends.

Incidents leading to Taylor's arrest

Law enforcement officials tracked the victim's phone records, which lead them to the arrest of Defendant Donald Taylor.

The out-of-court identification procedure

At 11:45 PM, Detective Wildemann brought Chenault to the parking lot, where Taylor was being held to conduct a one-on-one. Detective Wildemann had to superimpose lighting on Taylor by pulling vehicles around, and drove Chenault around twice for her to better see Taylor. After Detective Wildemann showed Chenault Taylor's photograph, she gave a positive identification.

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[2] 18 U.S.C. § 2703(d).

Taylor's indictment and conviction

On January 14, 2011, after a six-day jury trial, Taylor was indicted on all four charges listed above. The district court denied Taylor's motion for a new trial and filed the judgment of conviction on March 7, 2014. This appeal followed.

Discussion

The warrantless access and use of Taylor's historical cell phone location data did not violate Taylor's Fourth Amendment rights

Taylor argued his Fourth Amendment rights were violated because the State did not have a warrant.

A search warrant is not required to obtain historical cell site location information

Law enforcement can acquire two (2) types of cell site location information (CSLI) from cell phone companies – historical CSLI (records containing CSLI, kept by cell phone companies) and prospective CSLI (incoming CSLI as received from a user's cellphone in "real" time).[3] Traditionally, a warrant is required for obtaining prospective CSLI. The Court applied the "specific and articulable facts" standard and considered judicial decisions within other circuits to determine whether obtaining historical CSLI also requires a warrant. The Court recognized that circuit courts are not consistent when ruling on this particular issue.

A warrant is not required under the Fourth Amendment to obtain historical CSLI

The United States Court of Appeals for the Third Circuit held that, should the location information sought by law enforcement infringe a person's Fourth Amendment privacy rights, a judge has discretion in requiring a warrant for historical CSLI.[4] There, the Court concluded that many cell phone users do not relinquish such information voluntarily because they are not aware that cell phone providers collect and store historical CSLI.[5] However, the Court additionally found that obtaining a warrant for historical CSLI does not require a showing of the "traditional probable cause determination."[6]

In contrast, the United States Court of Appeals for the Fifth Circuit held that, generally, cell phone users do not have an expectation of privacy regarding historical CSLI for four (4) reasons: Cell phone users have knowledge that: 1. to wirelessly connect the call, the cellphone must send a signal to a near by cell tower; 2. that signal is sent when the cell phone user makes or receives a call; 3. the signal is then sent to the service provider; and 4. the cellphone user,

[3] Kyle Malone, *The Fourth Amendment and the Stored Communications Act: Why the Warrantless Gathering of Historical Cell Site Location Information Poses No Threat to Privacy*, 39 PEPP. L. REV. 701, 710 (2013).
[4] *In re* Application of U. S. for an Order Directing Provider of Elec. Commc'n Serv. to Disclose Records to Gov't, 620 F.3d 304, 319 (3rd Cir. 2010).
[5] *Id.* at 317-18.
[6] *Id.* at 313.

being aware of this procedure, is conveying the information voluntarily to the cell phone provider.[7] There, the Court upheld the "specific and articulable facts" standard.[8]

Finally, the Eleventh Circuit Court of Appeals held that a cell phone user "ha[s] no reasonable expectation of privacy in business records made, kept, and owned by [his or her cell phone provider]."[9] There, the Court reasoned that historical CSLI only reveals the precise location of the cell phone towers but not the location of the cell phone or the cell phone user.[10] Finally, the Court emphasized the importance of a showing of a compelling government interest when ruling on whether historical CSLI violates the Fourth Amendment.

Here, the Court followed the Eleventh Circuit Court of Appeals and upheld not only the "specific and articulable facts" standard but also the Court of Appeals' conclusion that a "defendant has no reasonable expectation of privacy in business records made, kept, and owned by his or her cell phone provider."

Taylor's Fourth Amendment rights were not violated

The Court held that law enforcement's warrantless access to Taylor's historical CSLI did not violate his Fourth Amendment right to privacy for two reasons. First, the § 2703(d) order was necessary to obtain Taylor's historical CSLI to determine necessary facts regarding the murder; and second, Taylor did not have a reasonable expectation of privacy regarding business records made, kept, and owned by his cell phone provider.

The out-of-court and in-court identifications did not violate Taylor's constitutional right to due process of law

A pretrial identification is constitutionally sound if, considering the totality of circumstances, the identification procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellant] was denied due process of law."[11] A suggestive and unnecessary procedure is shown by "lack of emergency or exigent circumstances."[12] However, even if the procedure was suggestive and unnecessary, should the identification be sufficiently reliable, the jury has the burden of weighing the evidence and assessing the witnesses.[13]

Exigent circumstances justified the show-up identification procedure

Exigent circumstances, which justify a show-up identification procedure include: ensuring fresher memory, exonerating innocent people by making prompt identifications, and ensuring that those committing serious dangerous felonies are swiftly apprehended.[14] Those

[7] *In re Application*, 724 F.3d at 612–13 (5th Cir. 2013).
[8] *Id.*
[9] United States v. Davis, 785 F.3d 498, 517 (11th Cir. 2015).
[10] *Id.* at 504.
[11] Banks v. State, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978).
[12] *Id.*
[13] Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1029 (1980).
[14] *Banks*, 94 Nev. at 94, 575 P.2d at 595.

factors could outweigh the danger of a show-up procedure being suggestive in itself due to "law enforcement officials believ[ing] they have caught the offender."[15]

Therefore, the Court concluded that the exigent circumstances here - murder during the course of an armed robbery, possession of marijuana and a high possibility of the suspects to commit further felonies, justified the show-up identification procedure.

The show-up identification was unreliable

The Court found the show-up identification procedure was unreliable. The Court applied the following factors: Opportunity of the witness to view the suspect at the time of the crime; degree of attention paid by the witness; accuracy of the witness' prior description of the suspect; level of certainty demonstrated by the witness at the time of show-up; and length of time between the crime and the show-up.[16]

The in-court identification by Chenault was independently reliable

The Court concluded the in-court identification by the witness was independently reliable because the Supreme Court has allowed an in-court subsequent identification following an unnecessarily suggestive pre-trial procedure producing an unreliable identification. The Court here applied the same factors as for show-up identification procedures.

The error was harmless

The Court held the error was harmless because, even though the district court erroneously allowed the out-of-court identification into evidence, the prosecution proved beyond a reasonable doubt that the error did not contribute to the verdict.

In conclusion, for the reasons listed above, the Court held that the out-of-court and in-court identifications did not violate Taylor's constitutional rights to due process of law.

The prosecutorial conduct during closing arguments did not violate Taylor's Sixth Amendment right to a fair trial or Fifth Amendment right against self-incrimination

The PowerPoint slide with "GUILTY" superimposed on it did not violate Taylor's right to a fair trial

A PowerPoint slide may only be used to make arguments, which would be proper if made orally.[17] However, this Court has previously held that a photograph with the word "Guilty" shown during closing arguments is insufficient for a finding of error.

[15] Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979).
[16] Gehrke, 96 Nev. at 584, P.2d at 1030.
[17] Watters v. State, 125 Nev. Adv. Op. 94, 313 P.3d 243, 247 (2013).

Here, the Court concluded that the PowerPoint slide did not violate Taylor's right to a fair trial because the slide was displayed briefly at the end of the prosecutor's closing arguments and defendant did not object to the slide.

The comments made during closing arguments did not violate Taylor's Sixth Amendment right to a fair trial or Fifth Amendment right against self-incrimination

The prosecutor's comments during closing arguments were permissible

Here, the Court found the prosecutor's statements "reasonable conclusions based on the evidence."

The prosecutor did not comment on Taylor's decision not to testify

Should the prosecution directly comment on the defendant's decision not to testify, the prosecution would be in violation of the Fifth Amendment right against self-incrimination.[18] Here, the Court held that the prosecutor's comment only indirectly referenced Taylor's failure to testify, and did not intend for the comment to have an impression on the jury.

There was sufficient evidence at trial to support the jury's finding of guilt

The Court reviewed the evidence before the jury and held that a jury's verdict is valid if, acting reasonably, the jury could be convinced of the defendant's guilt by evidence it had the right to consider, including circumstantial evidence.[19] Considering the statements from the witnesses and the cell phone company records, the Court held there was sufficient evidence at trial to support the jury's finding of guilt.

Conclusion

The Court established that a warrant is required for obtaining prospective CSLI but, as long as all conditions for a § 2703(d) order are met (the "specific and articulable facts" standard), a warrant is not required for historical CSLI. The Court further found that the erroneous admission of the out-of-court identification constituted a harmless error beyond a reasonable doubt, the in-court identification was sufficiently independent. Furthermore, the Court held that the prosecutorial misconduct during closing arguments and the prosecutor's indirect comments regarding Taylor's decision not to testify were insufficient for a finding of error. Finally, the Court found there was sufficient evidence at trial to support the jury's finding of guilt. Therefore, the Court affirmed the judgment of conviction.

[18] Griffin v. California, 380 U.S. 609, 615 (1965).
[19] Edwards v. State, 90 Nev. 255, 258–59, 524 P.2d 328, 331 (1974).