



## A DIVIDED SEVENTH CIRCUIT DECLINES TO RESOLVE QUESTIONS ABOUT THE CONSTITUTIONALITY OF USING CELLPHONE-SPYING TECHNOLOGY IN ORDER TO TRACK A SUSPECT



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In *United States v. Patrick*, \_\_\_ F.3d \_\_\_, 2016 WL 6892507 (7<sup>th</sup> Cir. Nov. 23, 2016), a divided panel of the United States Court of Appeals for the Seventh Circuit held that the fact that the police used a cell-site simulator in order to determine Defendant Damian Patrick's location in order to arrest him did not warrant application of the exclusionary rule. Specifically, the Seventh Circuit affirmed the District Court's denial of Patrick's motion to suppress but declined to resolve the larger constitutional issue of whether using a cell-site simulator—such as Stingray—constitutes a search under the Fourth Amendment. The relevant facts are as follows.

The Milwaukee, Wisconsin, police arrested Patrick while he was in a car on a public street. Patrick was serving a term of parole that followed his release from state prison. Patrick had not complied with the conditions of his parole, and so, a state court judge issued a warrant for Patrick's arrest. In order to locate Patrick, the Milwaukee police obtained a second warrant that authorized them to locate Patrick using cell-phone data. Patrick's cell phone revealed his location and allowed the police to find him.

When the police found him, Patrick was armed. Because he was a felon (and, therefore, could not legally possess a firearm), Patrick was charged in federal court with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Thereafter, the District Court denied Patrick's motion to suppress the evidence that he possessed a gun. Accordingly, Patrick pled guilty to the charge and was sentenced to a 57-month term of imprisonment. However, Patrick reserved the right the challenge on appeal the validity of his arrest and the evidence of his possession of the gun.

On appeal, the Seventh Circuit held that, because Patrick was arrested in a public place and because the arrest was supported by both probable cause and a valid arrest warrant that a state court judge had issued before any effort to learn of Patrick's location had begun, it did not need to determine the difficult issues posed by the fact that the police did not reveal the use of a cell-site stimulator to the state court judge who issued the warrant, nor did it need to determine the effect, if any, the fact that the federal prosecutors had not revealed this fact to the District Court. Indeed, the federal

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prosecutors first revealed the use of a cell-site simulator in its opening brief that it filed with the Seventh Circuit.

The United States Department of Justice describes a cell-site simulator (often called a “Stingray” which is the trademark of one brand) as follows:

Cell-site simulators . . . function by transmitting as a cell tower. In response to the signals emitted by the simulator, cellular devices in the proximity of the device identify the simulator as the most attractive cell tower in the area and thus transmit signals to the simulator that identify the device in the same way that they would with a networked tower.

A cell-site simulator receives and uses an industry standard unique identifying number assigned by a device manufacturer or cellular network provider. When used to locate a known cellular device, a cell-site simulator initially receives the unique identifying number from multiple devices in the vicinity of the simulator. Once the cell-site simulator identifies the specific cellular device for which it is looking, it will obtain the signaling information relating only to that particular phone. When used to identify an unknown device, the cell-site simulator obtains signaling information from non-target devices in the target’s vicinity for the limited purpose of distinguishing the target device.

By transmitting as a cell tower, cell-site simulators acquire the identifying information from cellular devices. This identifying information is limited, however. Cell-site simulators provide only the relative signal strength and general direction of a subject cellular telephone; they do not function as a GPS locator, as they do not obtain or download any location information from the device or its applications. Moreover, cell-site simulators used by the Department must be configured as pen registers, and may not be used to collect the contents of any communication, in accordance with 18 U.S.C. § 3127(3). This includes any data contained on the phone itself: the simulator does not remotely capture emails, texts, contact lists, images or any other data from the phone. In addition, Department cell-site simulators do not provide subscriber account information (for example, an account holder’s name, address, or telephone number).

*Id.* at \* 2.

The Seventh Circuit noted that courts that had resolved the issue of whether use of a Stingray constituted a “search” for purposes of the Fourth Amendment had reached different outcomes. The line of cases that has held that the use of a Stingray did not constitute a search likened the use of a Stingray to a pen register that courts have found does not constitute a search because its use reveals the making of a call and the number called but not the call’s communicative content. The contrary line of cases likened the use of a Stingray to GPS locators which are treated as searches when police enter private property to install them and also may be considered to be a search for Fourth Amendment purposes when used for extended durations even if installed with a vehicle owner’s consent.

But, the Seventh Circuit observed that it need not wade into this thorny issue because the Government had conceded, for purposes of this case only, that the use of the Stingray to locate

Patrick constituted a search for purposes of the Fourth Amendment. The Seventh Circuit noted that the police were authorized to use a warrant to obtain evidence to locate a warranted person, and they were entitled to arrest Patrick without a warrant of any kind, let alone the two warrants that they had. Because the United States Supreme Court has held that a valid arrest warrant precludes the suppression of evidence seized in an arrest, even if the arrest was set in motion by officers who had neither probable cause nor knowledge of the warrant, the Seventh Circuit affirmed the District Court's denial of Patrick's motion to suppress. *Utah v. Strieff*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2056 (2016).

As for Patrick's secondary argument that the police officers should have informed the state court judge of their use of the Stingray before the judge issued the warrant so that the judge was fully informed, the Seventh Circuit sidestepped that issue:

we conclude that the answers do not control this appeal. A person wanted on probable cause (and an arrest warrant) who is taken into custody in a public place, where he had no legitimate expectation of privacy, cannot complain about how the police learned his location. Recall that the cell-site simulator (unlike the GPS device in *Jones*) was not used to generate the probable cause for arrest; probable cause to arrest Patrick predated the effort to locate him. From his perspective, it is all the same whether a paid informant, a jilted lover, police with binoculars, a bartender, a member of a rival gang, a spy trailing his car after it left his driveway, the phone company's cell towers, or a device pretending to be a cell tower, provided location information. A fugitive cannot be picky about how he is run to ground. So it would be inappropriate to use the exclusionary rule, even if the police should have told the judge that they planned to use a cell-site simulator to execute the location warrant.

*Id.* at \* 4.

Chief Judge Diane Wood authored a dissenting opinion in which she opined that the Court should have remanded the case to the District Court for further factual findings. In Judge Wood's opinion, "[e]ven if the Stingray revealed no information beyond Patrick's location, we must know how it works and how the government used it before we can judge whether it functions in a manner sufficiently different from the location-gathering methods-specified in the warrant that it amounted to a search outside the warrant's scope." *Id.*

The majority, however, left the Constitutional issue for another day: "Questions about whether use of a simulator is a search, if so whether a warrant authorizing this method is essential, and whether in a particular situation a simulator is a reasonable means of executing a warrant, have yet to be addressed by any United States court of appeals. We think it best to withhold full analysis until these issues control the outcome of a concrete case." *Id.*

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**Note:** Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.