



**A District Court follows other federal courts in concluding that that a criminal suspect had no expectation of privacy regarding the location information on his cellphone.**



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In *United States v. Rosario*, 2017 WL 2117534 (N.D. Ill. May 16, 2017), the United States District Court for the Northern District of Illinois considered Defendant Joel Rosario's motion to suppress evidence that Rosario claimed law enforcement officials had obtained against him in violation of his Fourth Amendment rights. Specifically, Rosario argued that law enforcement officials violated his Fourth Amendment rights by conducting an unconstitutional search when they obtained information from a cell phone service provider, without first obtaining a warrant, that helped to identify Rosario as a suspect in a burglary. The relevant facts are as follows.

On or around December 5, 2013, a store in Ann Arbor, Michigan, was burglarized after it closed for the day. The store specialized in the sale of firearms, rare coins, and precious metals. Twenty-four firearms, as well as various collector coins and other property, were stolen from the premises.

According to the store's owner, three men entered the store to look at firearms about forty-five minutes before closing time on December 5. The next morning, the owner discovered that the store had been burglarized overnight. The owner also determined that, after the store had closed for the day on December 5, it had received a phone call from a private caller. The owner passed this information to law enforcement officers, who in turn contacted Comcast, the store's telephone service provider, to request the private caller's phone number. Comcast accommodated this request and provided the phone number to the officers.

Using open-source records, law enforcement officers determined that Sprint was the service provider for the cell phone corresponding to the number Comcast had provided. The officers contacted Sprint to request the historical cell-site location information ("CSLI") for the cell phone, and Sprint provided the requested information. The CSLI revealed that the phone had "pinged" off of various cell towers in Illinois on December 3 and 4. It also revealed that the phone had pinged off of a tower in Lansing, Michigan, at 9:26 p.m. on December 4 and a tower in Ann Arbor, Michigan, at 11:14 p.m. later that same night.

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Finally, the CSLI showed that, from 11:14 p.m. on December 4 to 6:37 p.m. on December 5, all of the pings from the cell phone came from towers in the Ann Arbor area. In addition to requesting the CSLI, officers attempted to determine the owner of the cell phone that was associated with the number Comcast had provided. After surveying hotels in the Ann Arbor area, officers learned that the phone number had been provided to a Comfort Inn under Rosario's name.

Ultimately, Rosario was arrested and charged with one count of interstate transportation of stolen property in violation of 18 U.S.C. § 2314 and with one count of possession of a firearm in violation of 18 U.S.C. § 922(g) in connection with the robbery that took place in Ann Arbor. The Government disclosed the CSLI to defense counsel during discovery, and Rosario moved to suppress that evidence, arguing that the CSLI was improperly used as a basis for his arrest and prosecution. Rosario argued that the Government requested the CSLI in violation of his Fourth Amendment rights by failing to first obtain a warrant supported by probable cause authorizing the CSLI's acquisition.

The District Court began its consideration of Rosario's motion to suppress by noting that the United States Court of Appeals for the Seventh Circuit had not yet addressed the issue of whether the Government's acquisition of CSLI from a third-party service provider violates a reasonable expectation of privacy so as to constitute a search under the Fourth Amendment. The District Court further noted, however, that every federal court of appeals to confront the issue has held that the acquisition of CSLI from a third-party service provider is not a search under for purposes of the Fourth Amendment. Indeed, districts courts within the Seventh Circuit that have considered the issue have concluded that the acquisition of CSLI is not a Fourth Amendment search.

The issue of whether the acquisition of CSLI constitutes a search for Fourth Amendment purposes is key because the Fourth Amendment protects individuals from unlawful searches and seizures. Without a search, there is no violation of the Fourth Amendment. A search falls within the ambit of the Fourth Amendment when the Government violates a subjective expectation of privacy that society recognizes as reasonable.

Here, the District Court concluded that the Government's acquisition of CSLI from Rosario's service provider was not a search in violation of the Fourth Amendment. In reaching this conclusion, the District Court relied upon and adopted the "third-party doctrine." Under the third-party doctrine, an individual does not have a reasonable expectation of privacy in information that he voluntarily turns over to a third-party, and the Government, therefore, does not engage in a Fourth Amendment search when it acquires such information. The reason for this rule is that an individual takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. The third-party doctrine applies to information provided to a third-party even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third-party will not be betrayed.

The District Court explained that it was persuaded to adopt the third-party doctrine in this case based upon the United States Supreme Court's reasoning in *Smith v. Maryland*, 442 U.S. 735 (1979). In *Smith*, the Supreme Court considered whether the Government's use of a pen register to record the numbers dialed on a home telephone constituted a search under the Fourth Amendment. *Id.* at 73. The Supreme Court applied the third-party doctrine to hold that such use of a pen register is not a

Fourth Amendment search. Id. at 743-76. In so holding, the Supreme Court explained that, “[w]hen he used his phone, petitioner voluntarily conveyed numerical information [i.e., the phone numbers he dialed] to the telephone company and ‘exposed’ that information to its equipment in the ordinary course of business.” Id. at 744. Therefore, the petitioner could “claim no legitimate expectation of privacy” in the numbers that he dialed. Id.

In this case, the District Court concluded that a cell phone user voluntarily conveys CSLI to his third-party service provider when he operates his cell phone, and therefore, the Government’s acquisition of CSLI is not a Fourth Amendment search. The District Court reached this conclusion, first, based on the common-sense recognition that “[a]ll telephone users realize that they must ‘convey’ phone numbers to the telephone company . . . [and] that the phone company has facilities for making permanent records of the numbers they dial.” Smith, 442 U.S. at 742.

Second, cell phone users are or should be aware that a cell phone must send and receive wireless signals to and from a nearby cell tower to transmit phone calls and text messages. “When an individual purchases a cell phone and chooses a service provider, he expects the provider will, at a minimum, route outgoing and incoming calls and text messages. As most cell phone users know all too well, proximity to a cell tower is necessary to complete these tasks.” United States v. Graham, 824 F.3d 421, 430 (4th Cir. 2016)(en banc).

Third, the decision to purchase a phone, select a service provider, turn on the phone, and make a call or send a message involves voluntary acts at every step. Because a cell phone user knows that his phone sends signals to a nearby cell tower whenever he operates it, the user voluntarily conveys those signals to his service provider when he chooses to make a call or send a message, as well as when he leaves the phone on so that it can receive incoming calls and messages. In other words, when the user operates his phone, he voluntarily conveys CSLI to his service provider which records the CSLI based on the signals transmitted to its cell towers. In this regard, cell phone users are similar to the telephone users considered in Smith who “voluntarily conveyed” phone numbers to service providers that in turn kept records of those numbers “in the ordinary course of business.”

In short, the District Court held that Rosario voluntarily conveyed his CSLI to Sprint when he operated his cell phone. Under the third-party doctrine, Rosario did not have a reasonable expectation of privacy in Sprint’s records of his CSLI, and the Government’s acquisition of the CSLI from Sprint was not a search implicating Rosario’s Fourth Amendment rights. Accordingly, the District Court denied Rosario’s motion to suppress the CSLI evidence.

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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.