



## **THE INDIANA SUPREME COURT HOLDS THAT A CRIMINAL SUSPECT HAD NO EXPECTATION OF PRIVACY REGARDING THE LOCATION INFORMATION ON HIS CELLPHONE.**



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In *Zander v. State of Indiana*, \_\_\_ N.E.3d \_\_\_, 2017 WL1739426 (Ind. May 4, 2017), the Indiana Supreme Court held that a criminal suspect had no expectation of privacy regarding the location information on his cellphone, and therefore, the police did not violate his federal or state constitutional rights by obtaining that information without first obtaining a warrant before arresting him. The relevant facts are as follows.

On the evening of January 31, 2015, a masked man walked into Whitey's Liquor Store in Lawrenceburg, Indiana, and pointed a handgun at the cashier's face. The gunman grabbed cash, Newport cigarettes, and two bottles of Patron Tequila before disappearing into the night.

Six days later, a similar robbery happened at J & J Liquor Store in nearby Dillsboro, Indiana. Around 9:00 p.m., J & J's phone rang, and someone with an Ohio number asked what time they closed. A half-hour later, a masked gunman barged in, took cash and 1800 Tequila, and sped off in a red Pontiac G6. The next morning, police plugged that Ohio number into Facebook's search engine, and the top result was Marcus Zander's publicly accessible profile. That profile featured a flurry of multimedia posts from the day after each robbery. On the morning after the Whitey's robbery, for example, Zanders posted a picture of a Patron bottle. And on the morning after the J & J robbery, Zanders posted several pictures of cash and a video tour of his Mother's apartment. The tour began with a bottle of 1800 Tequila in the kitchen and ended with a pile of cash in a bedroom.

Based on this Facebook information, Indiana police began to search for Zanders and asked Ohio police for assistance. At 1:57 p.m. the same day, an Indiana detective faxed a request to Zander's cell-service provider—Sprint—seeking historical cell-site location information ("CSLI") which are business records identifying which cell towers handled Zander's calls for the past thirty days. But, just two minutes later—at 1:59 p.m.—the search was over because Ohio officers located Zanders driving a red Pontiac in Cincinnati, Ohio. The Ohio police officers arrested Zanders for driving with a suspended license and found a cell phone in his pocket that had the Ohio number used to call J & J.

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Indiana detectives promptly traveled to Ohio to interview Zanders. Zanders told the Indiana police officers that his mother owned the red Pontiac G6, that he smoked Newport cigarettes, that he enjoyed Patron Tequila, and that he had his cell phone the entire day of February 6. When asked about some of his Facebook posts, Zanders claimed that the cash in the pictures was his mother's rent money and his casino winnings. Zanders also said he had never been to Indiana. After learning he was being accused of armed robbery, Zanders terminated the interview.

Police, then, obtained and executed search warrants for Zanders' mother's and brother's apartments. In the searches, police found luggage and a shoe box containing cash, clothing matching what the robber wore, a handgun, Newport cigarettes with an Indiana tax stamp, a box of Patron Tequila, and a bottle of 1800 Tequila with a price tag identical to those used by J & J. The State of Indiana charged Zanders with two counts of robbery with a deadly weapon and two counts of unlawful possession of a firearm by a serious violent felon. The State also filed a habitual offender enhancement.

At Zanders' jury trial, Sprint's historical CSLI was admitted into evidence over Zanders' objection. The State also introduced testimony from Detective Carl Pieczonka, who had analyzed the CSLI. Detective Pieczonka explained that Sprint collects CSLI when a cell phone makes or receives a call. He elaborated that Sprint identifies the particular towers and even the sides of those towers that connect the beginning and end of each call. Detective Pieczonka then detailed what the CSLI revealed about Zanders' cell phone. Within minutes of each robbery, the phone was serviced by towers near (and sides facing) the liquor stores. And shortly after each robbery, the phone was serviced by towers near (and sides facing) Zanders' mother's apartment.

The jury convicted Zanders on all four counts, and he pleaded guilty to the habitual offender charge. The trial court imposed an aggregate sentence of sixty-one years.

The Indiana Court of Appeals reversed Zanders' convictions. For purposes of this article, the majority held that obtaining the historical CSLI without a warrant violated the Fourth Amendment, reasoning that Zanders had a reasonable expectation of privacy in the records. In reaching this conclusion, the majority declined to apply the third-party doctrine—the principle that a person does not have Fourth Amendment protection in information voluntarily provided to third parties. Thereafter, the Indiana Supreme Court granted the State's request to review the Court of Appeals' decision.

The Indiana Supreme Court began its opinion by explaining that, in general, cell-service providers gather two types of CSLI: network-based (from the towers handling the phone's calls) and handset-based (from the phone itself). The first type of CSLI—network-based—may take several different forms. For example, it may be either historical or real-time—historical when it shows past tower locations, and real-time when it shows current tower locations. It may also be either active or passive. Active CSLI logs tower locations when calls or texts are sent or received while passive CSLI logs tower locations as the phone connects with them automatically every few seconds. Network-based CSLI may also be enhanced or manufactured through methods like “triangulation” and “pinging.” Triangulation is when service providers use multiple towers to calculate a phone's location. And pinging is when providers affirmatively send signals to a phone in real-time, instead of waiting for the phone to make or receive a call.

By contrast, handset-based CSLI (also known as GPS data) tends to be more accurate because it uses satellites to locate the phone itself. This CSLI can typically pinpoint the phone's location within thirty-three feet.

This case involved only historical, active, network-based CSLI—revealing only the towers that routed Zanders' calls, not the content of his communications or any high-resolution location data. Accordingly, the Indiana Supreme Court left other types of data—GPS, pinging, triangulation, passive, real-time, and so on—for another day.

Thereafter, the Indiana Supreme Court found that the police did not violate the United States Constitution or the Indiana Constitution by gathering Zanders' historical active cell-site location information without a warrant. In reaching this conclusion, the Indiana Supreme Court opined that the "third-party doctrine" applied to the police obtaining of defendant's historical cell-site location information without a search warrant. The "third-party doctrine" holds that individuals do not reasonably expect privacy in information they voluntarily relinquish to third parties. The Indiana Supreme Court cited numerous federal cases in concluding that the gathering of Zanders' CSLI without a warrant did not violate his Fourth Amendment rights because gathering the CSLI from Sprint did not constitute a search for purposes of the Fourth Amendment. The Indiana Supreme Court opined that Zanders voluntarily relayed his CSLI to Sprint, and therefore, he did not have a reasonable expectation of privacy in the information that it would be protected by the Fourth Amendment or that would require the police to obtain a warrant before gathering the CSLI.

The Indiana Supreme Court also found that the police's gathering of Zanders' CSLI from his phone did not violate his rights under the Indiana Constitution. Under Article 1, Section 11 of the Indiana Constitution, the State bears the burden of showing that police conduct was reasonable under the totality of the circumstances. This inquiry balances three factors: (1) the degree of concern, suspicion, or knowledge that a violation has occurred, (2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and (3) the extent of law enforcement needs.

Here, the Indiana Supreme Court determined that the police conduct was reasonable under the circumstances. First, the level of suspicion was high. When police searched Facebook for the phone number that called J & J Liquor Store, Zanders' profile popped up, featuring a video and pictures of tequila and cash. Next, the level of intrusion was low because police obtained only historical CSLI. Although other types of CSLI can paint an intimate picture of one's life, the historical CSLI admitted at Zanders' trial was much less sophisticated as it did not locate Zanders but only the cell towers that connected his calls. Finally, law enforcement needs were still urgent, i.e., preventing an armed-robbery suspect from striking again. Accordingly, the Indiana Supreme Court found no violation of Zanders' Constitutional rights, and it re-instated Zanders' convictions and sentence.

Two of the justices on the Indiana Supreme Court dissented. These justices felt that, even given the limited CSLI requested here, the intrusion was high because it allowed police to track the movements of private citizens who are using their phones, likely unbeknownst to them. The dissenting justices were also troubled with the majority's conclusion that law enforcement needs here were sufficiently high so that the police could not obtain a warrant. The dissent noted that this was not the case where there is a missing person or obvious exigency. Instead, there was an armed robber who had fled the State, and police had at least some information about Zanders and where he may be living. The

dissent queried why, instead of completing and faxing a request to obtain the phone records, the police did not do the legwork necessary to secure a warrant because, in today's world, search warrants can be requested and, where warranted, obtained within minutes, not hours or days. The dissent agreed with the majority that the trial court did not err in allowing Detective Pieczonka's testimony because the detective testified as a skilled witness, not an expert witness.

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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.*