

Real-time cell phone tracking in statutory and constitutional law

Cell phones have become one of the most important sources of evidence today.

Not only can they contain valuable information, but also people carry their phones with them everywhere. Being able to track a cell phone location can mean placing the defendant at the scene of the crime or finding a suspect on the run. But both state and federal law have their own series of requirements for tracking cell phone locations that can be a minefield for the unwary.

In *Sims v. State*, the Court of Criminal Appeals took up two important issues on cell phone tracking: 1) whether exclusion of evidence is a remedy for not following state and federal statutes on cell phone tracking and 2) whether the Fourth Amendment requires a warrant for cell phone tracking.

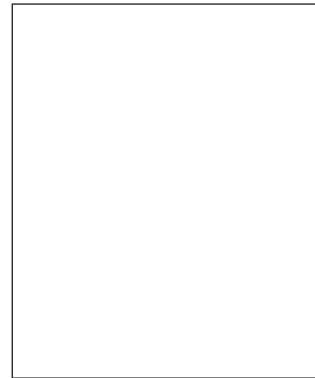
*Sims v. State*¹

Sims' grandmother was found dead on her back porch, shot once in the back of the head. Her Toyota Highlander, purse, and two handguns were missing. One of her credit cards had been used three times since the murder, including at a Wal-Mart in Oklahoma. Surveillance footage showed that Sims and his girlfriend had used the stolen credit card and left in a Highlander.

The police decided to ping the suspects' cell phones to try to locate them faster. Instead of getting a warrant, they pinged out Verizon's Emergency Situation Form. Verizon provided ping information showing that the phone was at a truck stop along the Indian Nation Turnpike in Oklahoma. Sims and his girlfriend were found at a motel across the road, along with a loaded gun, a bloody towel, and other evidence.

Stored Communications Act and Art. 18.21

Sims tried to suppress the evidence at trial because Verizon's Emergency Situation Form did not meet the requirements of either the federal Stored Communications Act² or Art. 18.21 of the Texas Code of Criminal Procedure. Both statutes deal with accessing electronically stored data,



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such as cell phone location information. The Court of Criminal Appeals (CCA) presumed that the State violated the statutes, but the question was whether the evidence should be excluded.³

Ordinarily, any evidence obtained in violation of a state or federal law is excluded under Art. 38.23 of the Texas Code of Criminal Procedure. But both the Stored Communications Act and Art. 18.21 contain exclusivity clauses, stating that the only remedies for violating the acts are those listed in the statutes themselves.⁴ Sims argued that the clauses were not specific enough because they did not specifically exclude a statutory remedy.⁵ But the CCA found that an exclusivity clause does not have to be that specific. There would be no practical way for a statute to list every possible federal and state remedy and then exclude it. Rather, the general statements that only the remedies in the statute are available for violations is enough.

Sims also argued that CCP Art. 38.23 should control because it is the more expansive statute, but the rules of code construction dictate that the more specific statute controls over the general.⁶ Both the Stored Communication Act and Art. 18.21 are more specific statutes, and they were enacted after Article 38.23 was passed. That means their specific rules are considered exceptions to Art. 38.23's more general rule of exclusion.

Therefore, even if the State did violate both statutes, the evidence does not have to be ex-

cluded under either the Stored Communications Act or CCP Art. 18.21.

Fourth Amendment

Even though the Stored Communications Act and Art. 18.21 did not require the evidence to be excluded, Sims argued that the cell phone tracking was generally unconstitutional and should still be excluded. The lower court of appeals ruled that Sims had no expectation of privacy in the records because a person does not have an expectation of privacy when he is in a public place.⁷

The CCA reviewed the U.S. Supreme Court's sometimes contradictory caselaw. In *Knotts*, a 1983 decision, the Supreme Court concluded that a person did not have an expectation of privacy in his movements in public areas after the police placed a tracker in a vat of chemicals used to manufacture methamphetamine.⁸ The Court concluded that there was no expectation of privacy because the defendant's movements were voluntarily conveyed to anyone who chose to look. But importantly, it reserved the question for whether a different principle might apply if 24-hour surveillance became possible.

The future contemplated in *Knotts* has become possible, so the Supreme Court re-examined current technology in *Carpenter*,⁹ where the FBI had remotely monitored the defendant's car for 28 days. The Court developed the mosaic theory, determining that long-term GPS monitoring could reveal not only a person's physical location but also a snapshot of familial, political, professional, religious, and sexual associations that would affect the expectation of privacy. Also, the Court concluded that the traditional third-party doctrine that there is no expectation of privacy in evidence voluntarily turned over to a third party did not apply because cell phone location records are not intentionally handed over to cell phone providers.

The CCA determined that *Carpenter*, not *Knotts*, applied in *Sims*.¹⁰ Neither the third-party doctrine nor the public-place doctrine prevented Sims from having an expectation of privacy in his cell phone location information. Instead, the question centers on whether the police obtained enough information under the mosaic theory to violate a reasonable expectation of privacy. The Court provided no clear answer for when enough information is found for a privacy violation, but the Court of Criminal Appeals concluded that Sims did not reach this threshold.¹¹ The police pinged Sims's phone fewer than 10

times total, which was not enough to reach into the privacies of his life and so did not violate a reasonable expectation of privacy. Thus, the cell phone tracking did not violate the Fourth Amendment, and the CCA upheld Sims's conviction.

Also note that the CCA did not address the State's argument in *Sims* that exigent circumstances justified the warrantless seizure of the cell phone location information. In a case where an ongoing emergency necessitates quick access to information from a cell phone, officers and prosecutors should be sure to justify any warrantless seizure of this type of information by explanation of all the facts that established an emergency that precluded them from getting a warrant.

Going forward

What does *Sims* mean for prosecutors? The best way to get cell phone location information is always a warrant. However, *Sims* does give some protection if a warrant was not or could not be obtained. First, its SCA/Art.18.21 holding takes a big weight off our shoulders. Defense attorneys have been raising these claims more often, and that forced prosecutors to fight the war on two fronts. Now we can focus solely on the constitutional arguments.

The expectation of privacy holding is not groundbreaking. It is simply an application of the Supreme Court's recent *Carpenter* decision, and prosecutors should watch the U.S. Supreme Court to make sure that in future cases, the justices agree with the way the CCA has read *Carpenter*. But it is still good to have the CCA's interpretation of the matter. It reinforced that each decision has to be on a case-by-case basis; there is no bright-line rule that all tracking under a certain number of days is acceptable. Rather, the court has to consider all the factors, such as how long the tracking lasted, the number of pings involved, and what type of information was retrieved. A search solely to find a suspect on the run from a recent offense does not have the same impact on privacy as a longer-term surveillance that shows the suspect going to friends' houses, churches, or his mistress's place. It is important to lay out all the factors in a case that make it less of an invasion of privacy and more a matter of public concern.

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Endnotes

¹ Sims v. State, ___ S.W.3d ___, No. PD-0941-17, slip op. at 4-7 (Tex. Crim. App. Jan. 16, 2019).

² 18 U.S.C. § 701.

³ Sims, slip op. at 10.

⁴ 18 U.S.C. § 708; Tex. Code Crim. Proc. art. 18.21, § 3 (renumbered as art. 18B.553 effective Jan. 1, 2019). The statutes provide civil and administrative remedies instead.

⁵ Sims, slip op. at 10-11.

⁶ Tex. Gov't Code § 11.026(a).

⁷ Sims v. State, 526 S.W.3d 638, 644 (Tex. App. 8th Dist. Texarkana 2017).

⁸ United States v. Knotts, 460 U.S. 276 (1983).

⁹ Carpenter v. United States, 138 S.Ct. 2206 (2018).

¹⁰ Sims, slip op. at 18-19.

¹¹ Id. at 20.

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