

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2013-446736-001 DT

08/19/2014

HONORABLE HUGH HEGYI

CLERK OF THE COURT  
E. Rosel  
Deputy

STATE OF ARIZONA

TIFFANY LEIGH BRADY

v.

JOHN FRANCIS KOVACICH III (001)

LAWRENCE I KAZAN

UNDER ADVISEMENT RULING

This matter came on for hearing before the Court August 15, 2014 with regard to Defendant's June 25, 2014 Motion to Suppress re Unlawful Search (hereafter referred to as the "Motion to Suppress") and his June 25, 2014 Motion for Dessureault Hearing (the "Motion for Hearing"). Following evidentiary hearing and argument, the Court took the matters presented under advisement. Having further considered those matters, the Court hereby enters its decision.

Motion for Hearing

Defendant's Motion for Dessureault Hearing was premised on his review of a copy of the photo line-up presented in which, in Defendant's opinion, his photo was much lighter than the other five images depicted "as if a spotlight has been shined on it." Motion at 2:24-3:1. The black and white copied attached to the Court's copy also indicated a substantially lightened photo.

However, the original line up that was admitted as a hearing exhibit varies substantially. Defendant's photograph appears no more prominently than any of the other photos included. Consequently, the Court does not find the pretrial identification procedure employed to be unduly suggestive.

Motion to Suppress

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Defendant's Motion to Suppress argues that he had a reasonable expectation of privacy in his cellular phone location data that was transmitted to his carrier, that the procedure used by the police department to obtain information concerning his location at or near the time of the motor vehicle incident in question constituted a seizure of that information, that the procedure used by the police to obtain the information required only a finding of reasonable cause to believe a criminal offense had been committed, and that the acquisition of the data consequently constituted a seizure not complying with the constitutional requirement of probable cause to obtain a warrant. This appears to be an issue of first impression in Arizona.

Defendant relies on the holding of the United States Court of Appeals in U.S. v. Davis, 754 F.3d 1205, 1216-17 (11th Cir. 2014). That opinion, in turn, relies on the finding of the United States Court of Appeals in the Third Circuit in In re Electronic Communications Service to Disclose, 630 F.3d 304, 317 (3d Cir. 2010), that, "[I]t is unlikely that cell phone customers are aware that their cell phone providers collect and store historical location information." Davis, *supra* at 1217. No empirical evidence is cited in support of this proposition, which is apparently founded on the intuition or experience of the opinions' authors.

With respect, this Court disagrees and finds it quite likely the cellular phone customers and users are aware that their location information is transmitted, collected, and stored by their service providers. The Court notes that virtually all cellular phone customers are aware that if their telephone is lost it can be located through location services available through their service provider. Virtually all customers are aware that vast quantities of information are collected and stored by their phone's provider in order, among other things, that the provider can substantiate phone usage for billing purposes against customer claims the charges have been generated by theft of the telephone, fraud by third parties, or incorrect or fraudulent charges by the provider. That information includes a phone's location that may substantiate the provider's position with regard to these matters.

The Court finds Defendant had no reasonable expectation of privacy with regard to his cellular phone location data, and that the reasonable cause standard employed in order to obtain these records was sufficient to pass constitutional muster.

Conclusion

For the foregoing reasons,

IT IS ORDERED denying Defendant's Motion for Dessureault Hearing and Motion to Suppress.