**IN THE DISTRICT COURT OF APPEAL**
**FIRST DISTRICT OF FLORIDA**

**KENDRICK HERRING**,

Appellant,

v. CASE NO. **1D13-5304**

**STATE OF FLORIDA**,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

References to the five-volume trial/sentencing transcript are by "T" and the volume number followed by the page number, all in parentheses. References to the supplemental record of the Rule 3.800(b)(2) motion are by "M" followed by the page number, all in parentheses. References to the supplemental record of the hearing on the motion to suppress are by "S" followed by the page number, all in parentheses. References to the State's Answer Brief are by "AB" followed by the page number, all in parentheses. References to Appellant's Initial Brief are by "IB" followed by the page number, all in parentheses.

## ARGUMENT

The undersigned reasserts and relies on the arguments and authorities cited in Appellant's Initial Brief and submits the following additional argument in response to the State's Answer Brief:

**I. Whether the trial court erred in denying the Motion to Suppress Evidence, where law enforcement sought and obtained real-time cellular location information from the carrier without seeking a warrant.**

Standing: In its Answer Brief, the State argues that Mr. Herring "lacked standing to challenge the warrantless search of a cell phone's location data where the phone was shared with others and was primarily used for selling narcotics." (AB. 15.) In large part, the State's argument is based on Mr. Herring's practice of lending the phone to others and using the phone to arrange drug deals. The State posits that a person cannot possess a legitimate expectation of privacy in a cellular phone that has been used to make an illegal drug transaction, because such a phone is contraband, pursuant to section 932.701(2)(a)(1), Florida Statutes. (AB. 20-21.) See Illinois v. Cabelles, 543 U.S. 405 (2005). The undersigned counsel suggests that it is not the *physical phone* in which Mr. Herring has asserted a legitimate privacy right, but rather the *location information* surreptitiously collected by T-Mobile and forwarded to law enforcement officers. If this Court were to accept the State's argument that the phone was contraband and that this status foreclosed a legitimate expectation of privacy in the location information gleaned from the

phone, any person who facilitated a crime by making a phone call would instantly be subject to the possibility of unlimited and unfettered geotracking.

The State has also argued that Mr. Herring lacked standing to challenge the search in this case because he accepted his phone as a gift and he shared his phone with others. (AB. 18.) In drawing this conclusion, the State cites Watson v. State, 979 So. 2d 1148, 1151-52 (Fla. 1st DCA 2008) (citing Hicks v. State, 852 So. 2d 954, 959 (Fla. 5th DCA 2003)), for its holding that "temporary visitors or short-term invitees…are generally unable to advance a position of privacy with success." (AB. 19.) The factual scenarios in both Watson and Hicks are vastly different from the factual scenario in Mr. Herring's case. In each of those cases, an appellant was found not to have a reasonable expectation of privacy where he was a temporary visitor in another person's home. See Watson at 1152; Hicks at 959. Those cases have no precedential effect in this Court's consideration of Mr. Herring's claim.

"Real-time" Versus "Historical" Cellular Information: In its Answer Brief, the State characterizes as "historical" the GPS location information e-mailed from T-Mobile to Sergeant Corbitt shortly before Mr. Herring's arrest. (AB. 39.) The undersigned counsel respectfully disagrees with this characterization, as it is not supported by the record. There were two types of cellular information collected in this case: historical cell site location information (CSLI) and GPS location information. This appeal does not challenge the use of the CSLI, which was

obtained after Mr. Herring's arrest, pursuant to a search warrant. (IB. 18.) (T1. 128.)

Sergeant Corbitt's testimony in this case demonstrates why the State's characterization is incorrect. In his trial testimony, Sergeant Corbitt explained that "historical records" were records of the usage of cellular accounts maintained by the carriers; carriers "maintain records of things like data sessions and voice calls and text messaging." He explained that historical records could provide the following information: date and time of the event, how long a phone call lasts, whether a phone call is incoming or outgoing, what number is dialed, or what number is calling. (T2. 183.) He further explained that these historical records usually indicated "the cell site that that handset is communicating with for the beginning of that event and the cell cite it was communicating with at the end of that event." (T2. 183-84.) During the hearing on the motion to suppress, Sergeant Corbitt also differentiated between historical and real-time information, advising that the spreadsheet he received from T-Mobile that showed the cell cites with which the phone interacted "were not realtime, they were historical." (S. 248.) The State's Answer Brief cites this statement as supporting its position that the GPS location information was historical. (AB. 39.) This quotation actually demonstrates that *it is the cellular site information that is historical, not the GPS location information.*

At trial, Sergeant Corbitt drew a distinction between (1) historical records and (2) the GPS location information he received in e-mails from T-Mobile in the early morning hours following the shooting. He described the "GPS coordinates we received from the handset" as "real-time information." (T2. 177.) At the hearing on the motion to suppress, Sergeant Corbitt testified that he received the first GPS location e-mail from T-Mobile at 2:51 a.m., and it indicated the GPS location of Mr. Herring's phone at 2:50 a.m., one minute earlier. The second e-mail came in at 3:10 a.m. and indicated the phone's location at 3:00 a.m. (S. 253-55.) Given Sergeant Corbitt's technical expertise, this Court should accept his testimony that this was "real-time" information. (S. 237-38.) Sergeant Corbitt consistently testified that this GPS location was happening in "real-time." (T2. 177, 182.) At the hearing on the motion to suppress, Sergeant Boccio testified that he had requested real-time location of the mobile device (E911) by checking that box on the form that was sent to T-Mobile. (S. 228-29.) Although there is a dearth of case law dealing with real-time location of cellular phones, the law that does exist supports Sergeant Corbitt's characterization of GPS location information as "real-time" information. See United States v. Skinner, 690 F.3d 772 (6th Cir. 2012), cert. denied, 133 S. Ct. 2851 (2013); United States v. Caraballo, 963 F. Supp. 2d 341 (D. Vt. 2013).

The State further argues as follows:

> Appellant claims that law enforcement violated Chapter 934 by failing to seek a warrant within 48 hours after the interception of the data, as required by section 934.09(7). (IB 46) ("Of course, no such application was ever made in [Appellant's] case."). This claim is rather inexplicable given Appellant's own statement of facts: **"Later, a search warrant was completed for the historical cell phone records of [Appellant's] phone**; Sergeant Corbitt analyzed them and found that they were consistent with the phone's being in the location of the homicide when it occurred." (IB 18.) (emphasis added).

(AB. 38-39.) Again, as explained in detail above, there were two different types of information obtained from T-Mobile in this case: real-time GPS location information and historical CSLI. The real-time GPS location information, which is the subject of this appeal, was obtained without a warrant; the historical CSLI was obtained pursuant to a search warrant.

Exigency: In its Answer Brief, the State argues that the motion to suppress was properly denied because the exigency of the situation rendered the Fourth Amendment's warrant clause inapplicable. (AB. 22-31.) The factors addressed by the State do not suggest that anyone was in immediate danger of harm or death at the time this warrantless search was conducted. Mr. Eubanks was being treated and could be safely secured by law enforcement officers. There is no suggestion that the suspect had any motivation to seek out and harm any other person.

In its Answer Brief, the State asserts as follows, referring to an argument made in the Initial Brief: "Appellant claims the time period between the shooting and the search was too far apart for exigent circumstances to exist." The State

alleges that "Appellant's reliance on Alvarado is misplaced" in part because "the search in *Alvarado* occurred **14 hours** after the offense" and the search in this case "occurred within only **5 hours** after the offense." (AB. 30.) First, this is clearly a misstatement of the argument in the Initial Brief; the relevant points in time are not "the shooting" and "the search[,]" and no such claim was made in the Initial Brief. The relevant points in time are the point at which officers become aware that a crime has occurred and the point at which they conduct a search or arrest. (IB. 40-44.) In this case and in the case cited in the Initial Brief, the relevant period of time was the time between the report of a crime and the time of the search or arrest. See Alvarado v. State, 466 So. 2d 335, 336-37 (Fla. 2d DCA 1985) (The victim identified Mr. Alvarado as her attacker "at approximately 11:30 in the evening" and police arrested Mr. Alvarado at his home three-and-a-half hours later.). The time at which a crime is alleged to have occurred is irrelevant; it is obvious that officers cannot be faulted with failing to seek a warrant before they are even informed that a crime has occurred. The court in Alvarado held that "sufficient time elapsed *between the officers' conversation with the victim and the arrest* of [the suspect] for the police to have made at least a minimal attempt to obtain a warrant." Id. at 337 (emphasis added). Thus, the Alvarado court held that three-and-a-half hours was a sufficient period of time for officers to seek a warrant. Id. at 336-37.

In Mr. Herring's case, by midnight officers had the phone number that was the target of their investigation. Although there was a judge on-call who could review and sign a warrant, no officer sought one. (S. 229-35.) Given that the target phone number was determined by midnight at the latest and officers did not send the "exigency" form until two hours *after that*, it seems clear that the level of exigency in this case is greatly exaggerated. The two-hour delay between obtaining the target phone number and requesting the real-time location information could have been used to—as the Constitution contemplates—obtain a warrant.

Exclusionary Rule: In its Answer Brief, the State argues that "if exigent circumstances did not exist, the officers were acting in good faith by reasonably relying on the controlling legal authority at the time" and that evidence obtained in the search of real-time GPS location information was not subject to the exclusionary rule. (AB. 32.) The State argues that "law enforcement officers in this case were reasonably operating under the longstanding and controlling legal principal that 'a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.' " (AB. 33.) See Smith v. Maryland, 442 U.S. 735, 743-44 (1979). The Florida Supreme Court recently held as follows regarding the good faith exception to the exclusionary rule in a similar context:

> We further hold that under the circumstances of this case in which there was no warrant, court order, or binding appellate precedent authorizing real time cell site location tracking upon which the officers could have reasonably relied, the "good faith" exception

> to the exclusionary rule for "objectively reasonable law enforcement activity" set forth by the Supreme Court in *Davis v. United States*, ––– U.S. ––––, 131 S. Ct. 2419, 2429, 180 L.Ed.2d 285 (2011), is not applicable. Thus, Tracey's motion to suppress the evidence should have been granted.

Tracey v. State, No. SC11-2254, 2014 WL 5285929, at *20 (Fla. Oct. 16, 2014), reh'g denied (Dec. 8, 2014).

The same logic holds true in Mr. Herring's case. At the time officers were acting, there was no "binding appellate precedent authorizing real time cell site location tracking upon which the officers could have reasonably relied[,]" thus, the good faith exception to the exclusionary rule "is not applicable." Id. There existed at the time of the search in this case no binding appellate precedent specifically authorizing the police practice of gathering real-time GPS location information. See Davis v. United States, 131 S. Ct. 2419, 2429 (2011).

**II. Whether the trial court erred by sentencing Mr. Herring to a mandatory minimum of Life in prison, under the 10-20-Life statute, based on the jury's finding that in the commission of the attempted second degree murder offense he "discharged a firearm attempting to cause death or great bodily harm."**

Great Bodily Harm: The undersigned counsel writes on this claim only to note that both the trial court and the State on appeal appear to suggest that being shot in the arm and receiving medical attention necessarily constitutes "great bodily harm." (M. 171; T5. 613; AB. 11-12, 46.) A gunshot to an extremity is not, *per se*, great bodily harm. See, e.g., Johnson v. State, 53 So. 3d 360, 363 (Fla. 5th DCA 2011).

## CONCLUSION

The appropriate remedy for claim I is reversal of the trial court's denial of the motion to suppress and remand to the trial court with instructions to dismiss the charges against Mr. Herring. The appropriate remedy for claim II is vacation of Mr. Herring's Life sentence in Count II and remand to the trial court for the entry of a legal sentence. Mr. Herring hereby requests all appropriate relief.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been electronically served on Trisha Meggs Pate, Assistant Attorney General, counsel for the State of Florida, crimapptlh@myfloridalegal.com, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; and has been furnished by U.S. Mail to Kendrick Herring, Appellant, DC# C02011, Gulf Correctional Institution - Annex, 699 Ike Steele Road, Wewahitchka, Florida 32465-0010, on this date, December 19, 2014.

## CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Times New Roman 14 Point.

Respectfully submitted,

Office of Jeffrey E. Lewis
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