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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN WHEELER, Defendant Below, Appellant, v. STATE OF DELAWARE Plaintiff Below, Appellee.	)	No. 189, 2018

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT

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Dated: August 20, 2018

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NATURE OF THE PROCEEDINGS

The Delaware State Police arrested Stephen Wheeler ("Wheeler") on October 20, 2016.[1] On January 9, 2017, the Grand Jury indicted Wheeler on the following charges:

- Home Invasion
- Assault in the Second Degree
- Robbery in the First Degree
- Conspiracy in the Second Degree[2]

On March 26, 2018, after a two-day non-jury trial, the Court found Wheeler guilty of all counts.[3]

On April 6, 2018, Wheeler was sentenced as follows: for Home Invasion, 25 years of Level V suspended after 7 years, followed by 8 years of Level 3 probation; for Robbery in the First Degree, 25 years of Level V suspended after 3 years, followed by 8 years of Level 3 probation; for Assault in the Second Degree 15 years of Level V suspended after 3 years,[4] followed by 8 years of Level 3 probation and for Conspiracy in the Second Degree 2 years of Level V suspended

[1] A-001, Docket Entry 1.
[2] A-001, Docket Entry 7; A008-012.
[3] A-006, Docket Entry 58.
[4] It appears that the Court sentenced this offense as if it were a Class C felony rather than a Class D felony which would have been for 8 years. Undersigned counsel intends to file a Motion to Correct Sentence in the Superior Court under Superior Court Rule 35 immediately.

for 1 year Level 3 probation.[5]

A timely Notice of Appeal was filed on April 17, 2018 by Trial Counsel.[6] Trial Counsel sought leave to withdraw as counsel and undersigned counsel was substituted. This is Wheeler's Opening Brief of his direct appeal.

[5] *Exhibit A.*
[6] A-006, Docket Entry 72.

SUMMARY OF THE ARGUMENT

I. Under *Carpenter v. United States*, Wheeler's Rights Under the Fourth Amendment to the U.S. Constitution and Delaware Constitution Article I, § 6 Were Violated by a Court Order That Sought Pen Register/Trap and Trace as Well as Location Information

In June 2018, in *Carpenter v. United States,* the U.S. Supreme Court ruled that a warrant was necessary before obtaining location information of a suspect through a cell phone. The crux of the decision was that location information is private and any access to that information is a significant invasion of privacy requiring a warrant, not simply a court order. In Delaware, Pen Register/Trap and Trace orders are issued pursuant to 11 *Del. C.* §2433. In Wheeler's case, in addition to incoming and outgoing phone calls obtained through the pen register/trap and trace, the order issued pursuant to 11 *Del. C.* § 2433 also authorized location-tracking. Wheeler argues that such location-tracking runs afoul of *Carpenter*.

II. There was Insufficient Credible Evidence to Support a Robbery Conviction so the Superior Court Erred by Denying Motion for Judgment of Acquittal for Robbery.

When the State indicted Wheeler for the crime of robbery, the indictment specified that the property taken was U.S. currency. The day the trial began, the State attempted to amend the indictment to add the words "and/or electronics" after "U.S. currency." The Court denied the amendment and then presided over a bench trial as the finder of fact. Despite contradictory evidence that no U.S. currency was taken, the Court found the victim's testimony that his wallet, containing $10, had

been stolen credible and found Wheeler guilty of robbery. Wheeler argues that in the context of a bench trial with prior knowledge that the State's case was weak on a necessary element of the crime, that the Court improperly denied Trial Counsel's Motion for Judgment of Acquittal.

STATEMENT OF THE FACTS

Around 1AM on October 20, 2016, while 64 year old victim Gerald Mueller was sleeping next to his 19 year old girlfriend Lauren Melton ("Melton"),[7] Mueller was awakened by attackers that were viciously beating him.[8] Unbeknownst to Mueller, his girlfriend was part of a conspiracy that included leaving the downstairs down unlocked and letting the attackers know that they were upstairs asleep.[9]

When police arrived on scene, they quickly suspected that Melton was part of the plan. She gave consent for the police to look through her cell phone[10] and they observed text messages between Melton and the phone number (302) 249-6594.[11] Police obtained a warrant to search the entire contents of her phone,[12] noted exchanges with the number (302) 249-6594,[13]and shortly thereafter sought a pen register/trap and trace order pursuant to 11 *Del. C.* § 2433 for (302) 249-

[7] A052-053.
[8] A053; A055-056.
[9] A062-063.
[10] A042.
[11] A069-070; A073; A076.
[12] A043.
[13] A043-044.

6594.[14] Using "investigatory means" including a "stingray," the police was able to track the location of the phone during the daylight hours of October 20.[15]

Police conducted physical surveillance at 4022 Peachtree Road in Dover and observed Wheeler in a car in the driveway. Police approached and removed Wheeler and a passenger (later identified as Jerome Wheeler, his cousin) from the vehicle.[16] Police testified that a cell phone was sitting on the center console next to Wheeler and that they seized it incident to his arrest.[17] Days after the seizure, the police obtained a search warrant to download the contents of the phone.[18]

On January 9, 2017, the Grand Jury indicted Wheeler on charges of Home Invasion, Assault in the Second Degree, Robbery in the First Degree and Conspiracy in the Second Degree.[19]

A two-day non-jury trial began on March 26, 2018.[20] Testimony was elicited from Melton confirming that Wheeler was involved in the planning and execution of the home invasion/robbery.[21] Detailed cell phone records showed that

[14] A045-046.
[15] A-031-032; A074.
[16] A029-030.
[17] A038; A080.
[18] A039.
[19] A008.
[20] A006, Docket Entry 58.
[21] A062-070.

(302) 249-6594 was in close proximity to the Millsboro address where the incident occurred.

At the conclusion of the trial, Trial Counsel presented an oral Motion for Judgment of Acquittal on the home invasion and robbery counts.[22] The motion was denied.[23]

Wheeler was sentenced to a combined total of thirteen (13) years of Level V incarceration, followed by eight (8) years of Level 3 probation.

[22] A092.
[23] A095.

ARGUMENT

I. Under *Carpenter v. United States*, Wheeler's Rights Under the Fourth Amendment to the U.S. Constitution and Delaware Constitution Article I, § 6 Were Violated by a Court Order That Sought Pen Register/Trap and Trace as Well as Location Information

1. Question presented: In light of *Carpenter vs. United States,* does an application and subsequent order for a pen register/trap and trace also permit law enforcement to track location without a separate warrant? This issue was not preserved.

2. Scope of Review:

When an issue is not preserved at trial, it is subject to a plain error standard of review.[24] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[25]

3. Argument on the Merits

Less than two months ago, the U.S. Supreme Court issued an opinion in *Carpenter v. United States*[26] that made it clear that a warrant was necessary before

[24] *See* Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.")
[25] *Turner v. State,* 5 A.3d 612, 615 (Del. 2010) (quoting *Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986).
[26] *Carpenter v. United States*, 585 U.S. ____ (2018).

law enforcement can access cell site location information of a potential suspect's phone.

Under federal law, a court order issued under 18 *U.S.C.* § 2703(d), can compel the production of the content of stored communications on non-content information, when "specific and articulable facts show []that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."[27]This standard of suspicion is considerably lower than the probable cause required for a typical warrant.

In *Carpenter*, the majority noted that "The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones.* Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic and effortlessly compiled."[28]

[27] 18 U.S.C. § 2703(d).
[28] *Carpenter v. United States*, 585 U.S. ___ (slip Op., at 10) (2018), referring to *United States v. Jones*, 565 U.S. 400 (2012).

The Court declined to apply the third-party doctrine of *Smith v. Maryland*[29]or *United States v. Miller*[30]noting that "[g]iven the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI [cell-site location information].[31]

The Court notes, "…historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones.* Unlike…the car in *Jones*, a cell phone…tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time."[32]

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[29] *Smith v. Maryland*, 442 U.S. 735 (1979), holding that police did not require a warrant to use a pen register to monitor a suspect's outgoing call data.
[30] *United States v. Miller*, 425 U.S. 435 (1976), holding that a defendant had no right to privacy in his banking records, as they were business records belonging to the bank.
[31] *Carpenter v. United States*, 585 U.S. ___ (slip Op., at 11) (2018).
[32] *Id.* at 13.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures."[33]

It is clear that through the years the U.S. Supreme Court has considered the degree of the invasion of privacy to arrive at a pretty comprehensive set of Fourth Amendment search and seizure doctrine.[34] The greater the invasion – the greater the need for probable cause to search.

Under *Carpenter*, it is clear that location information is personal and because the tracking of it is so invasive to privacy, and that a higher threshold must be met before the invasion.

No warrant was issued authorizing the tracking of Wheeler's location. Furthermore, the application sought to ultimately track Wheeler's location is clear on its face that it is seeking pen register and trap and trace information pursuant to 11 *Del. C.* §2433. Pen register/trap and trace only tracks incoming and outgoing

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[33] U.S. CONST. IV.

[34] *See generally Katz v. United States*, 389 U.S. 347 (1967), which established the modern understanding that the Fourth Amendment "protects people, not places"; *Kyllo v. United States*, 533 U.S. 27 (2001), which held that warrant was required for the government to use a thermal imaging device on a home; *Riley v. California*, 573 U.S. ____ (2014), which held that a warrant was generally required to search the contents of a cell phone; *United States v. Knotts*, 460 U.S. 276 (1983), which held that a warrant was not required to follow simple beeper placed in a suspect's car; *United States v. Jones*, 565 U.S.400 (2012), which held that a warrant was required for placement of a GPS device.

phone numbers. Yet, from the application, Order and Affidavit it is evident that in addition to incoming and outgoing phone calls that law enforcement was seeking location information of the cell phone.[35]

Furthermore, there is no doubt that Delaware State Police *actually* tracked the location of Wheeler.[36] Although law enforcement officers never clearly identified all the means used to determine Wheeler's location, it is clear that at least one of the means was a "sting ray" device based on the following exchange:

Trial Counsel:	When you say that you did a location, right, of the suspects, you said you used alternative means to find out their location?
Lt. Windish:	It was found by investigative means. The phone was located by investigative means at the address at 4022 Peachtree Run Road.
Trial Counsel:	And that was the use of a sting ray device?
Lt. Windish:	That's correct.[37]

The legal question is whether a pen register/trap and trace application, and subsequent court order issued under 11 *Del. C.* § 2433 is sufficient to also track the

[35] A013-014, ¶III; A020; A025, ¶11.
[36] *See* A029, "At the time we located him – well, we were using investigative means to identify the location of the cell phone in question…" "An investigatory decision was made at about that point in tie, *based on the location of the cell phone* and other factors…"(emphasis added).
[37] A031-32.

location of a suspect.[38] Wheeler argues that it is not and that a separate warrant should have been issued.

If Wheeler's location was illegally tracked, the argument is that the cell phone that was seized incident to his arrest was illegally seized. The cell phone seizure is integral to the case against Wheeler.[39]

[38] *See* A034-035. "I can say that I know that a pen register was obtained for the monitoring of electronic communications from a forwarded cellular device. That device provided us a location – the cellular device itself provided us locations through our investigative means."

[39] *See* A038. "Q: All right. So the cell phone would be a major part of the evidence to that case, would you agree with me?" "A: Yes."

II. There was Insufficient Credible Evidence to Support a Robbery Conviction so the Superior Court Erred by Denying Motion for Judgment of Acquittal for Robbery.

1. Question presented: Was there sufficient credible evidence to support a robbery conviction? This issue was preserved by the timely filing of a Motion for Judgment of Acquittal at A-092.

2. Scope of Review: This Court reviews the Superior Court's denial of a motion for acquittal *de novo*.[40] "We review *de novo* a trial judge's denial of a motion for a judgment of acquittal to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of a crime."[41]

3. Argument on the Merits

Trial counsel presented an oral motion for judgment of acquittal. The exchange went as follows:

Trial counsel:	Okay. The other one is the robbery in the first degree, that the Court had an issue with, I guess, further research for U.S. currency versus the cell phone or electronics.
The Court:	And the most favorable to the State, the gentlemen testified that his wallet was taken and there was $10 in his wallet.

[40] *See Flonnory v. State,* 893 A.2d 507, 537 (Del. 2006) (citing *Priest v. State,* 879 A.2d 575, 577 (Del. 2005)).
[41] *Id.*

Trial Counsel: And there was no mention of it, and I think there was other testimony. And I get it, most favor[able] to the State…

The Court then denied the Motion for Judgment of Acquittal. During the verdict the Court included the following findings of fact:

> "…The question about whether or not there was U.S. currency, Mr. Mueller testified they took his wallet. And in his wallet was credit cards and $10. The lady [Melton] who testified, you're correct, Mr. Beauregard, that there was uncertainty about that. She was also around – there is a lot going on and it's dark and they are taking things. And her recollection of what was taken did not match his recollection of what was taken as far as all the other stuff, but I'm satisfied that the State has met its burden as to the robbery."

Wheeler argues that the Court erred by finding that the State met its burden as to U.S. currency being taken. While the Court did acknowledge that there was "uncertainty" in Melton's testimony, there is no indication that the Court considered the victim's contradictory statements or that the police also testified that there was no money missing and that it was never included in the inventory of missing property.

The following exchange is telling:

Trial counsel: Does it mention anything about currency in the arrest warrant?

Det. Cathell: I don't believe so. He did report that he had $10 in the house and it was the only currency he had, but he didn't report that is was missing. And that was at the hospital.

He just said the only cash he would have had on hand was $10.

Trial Counsel: All right. To digress just a little bit. So as best you can tell, as lead detective, no cash was ever taken?

Det. Cathell: That's correct.

Following is testimony from Melton that the Court indicated had "uncertainty":

Direct Examination:

DAG: Did they take anything from the house?

Melton: Yes.

DAG: What did they take?

Melton: Electronics.[42]

Cross examination:

Trial Counsel: Now, do you remember, in one of your statements that you made to investigators that you made to investigators, that you said that there was no money in the house and you knew there was no money in the house?

Melton: That's false.

Trial Counsel: I'm just saying, do you remember saying that to any of the detectives?

Melton: No.

Trial Counsel: Do you know whether – if there was any money taken from the house that evening?

[42] A067.

Melton: No, there wasn't.

Trial Counsel: How do you know that?

Melton: Because I seen everything that they took out of the house.

Trial Counsel: There was no money involved?

Melton: No.[43]

Recall that in the findings of fact, the Court found that the victim did testify to missing $10. While it is true that the victim did testify that he was missing $10, even the victim testified unclearly about the money. Following is the additional testimony from the victim that contradicts the testimony that $10 was missing:

DAG: Now, were there any items taken from your house?

Victim: Yes.

DAG: What were they?

Victim: I had purchased a bunch of electronics for my children for the holidays. So there was a new Apple computer, two new Apple iPads, and another laptop, HP, and then two phones and two mini iPads.

DAG: Any money?

Victim: Ten dollars.

DAG: Did you have any money in the house?

Victim: No.

DAG: Other money?

Victim: No.[44]

[43] A071.

In this case the issue of U.S. currency is paramount because while the definition of robbery includes the words "taking of property,"[45] the indictment went a step further and stated the type of property taken, that is, U.S. currency. So, because the State specified U.S. currency in the indictment, the State was required to make a showing that U.S. currency was taken.

Wheeler argues that it is evident that the State knew that they had insufficient evidence that U.S. currency was taken and attempted to remedy the insufficiency by amending the indictment to include the words "and/or electronics" after the words U.S. currency. While the Court denied the motion to amend,[46] in the context of a bench trial, just the submission of the amendment colored the process because the Court, *the finder of fact*, knew that evidence of missing U.S. currency was a necessary element of the crime of robbery.

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[44] A057.

[45] 11 *Del C.* § 831 Robbery in the second degree; class E felony.

> (a) A person is guilty of robbery in the second degree when, in the course of committing theft, the person uses or threatens the immediate use of force upon another person with intent to:
>
> (1) Prevent or overcome resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> (2) Compel the owner of the property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

[46] A041.

While Wheeler concedes that there was testimony of missing U.S. currency, the argument is that there was *more* credible evidence that there was no missing currency and that the Court gave too much weight to the victim's testimony and not enough to the contradictory evidence. When the standard is "beyond a reasonable doubt" and there is contradictory evidence from the victim, a co-defendant and a police officer, it is hard to believe that a rational trier of fact could arrive at a verdict of guilty as to robbery.

CONCLUSION

Wheeler asserts that there are two major issues with his conviction: 1) that his constitutional rights were violated by the police tracking his location and, that as a result, the cell phone seizure was improper; and 2) that he should not have been convicted of robbery because there was insufficient credible evidence that U.S. currency was taken.