

IOWA POLICE JOURNAL



OFFICIAL PUBLICATION FOR THE IOWA STATE POLICE ASSOCIATION

XIPHOS LEGAL UPDATE

Historical CSLI does not require probable cause showing

By Ken Wallentine

Pearson brought a bag of marijuana to the home of his girlfriend's mother. Two men came to the home and spoke with Pearson. Pearson placed the bag of marijuana on the table and spoke to the men about money. One of the men responded, "No, we're taking this."

Pearson said, "Take it." The men began going through Pearson's pockets. Pearson tried to grab a gun from his waistband. The men fatally shot Pearson and fled with the marijuana.

Pearson's girlfriend told detectives that Pearson made phone calls and spoke about selling drugs to someone he called "D." The detectives examined Pearson's cell phone and traced a recently dialed number to Archer. The detectives conducted surveillance on Archer and watched her enter a bar. She came out of the bar with Taylor.

The detectives stopped Archer and Taylor and seized Taylor's cell phone. A detective called the number that Pearson had called shortly before his murder. Taylor's phone rang.

Under the procedures established in the Stored Communications Act (18 USC § 2703(d)), the detectives obtained historical cell site location information (CSLI) from Taylor's service provider. The Stored Communications Act allows investigators to obtain CSLI with a subpoena instead of a search warrant. The CSLI placed Taylor's phone near the murder scene at the time of the murder.

Taylor claimed that the detectives violated the Fourth Amendment because he had a legitimate expectation of privacy in his CSLI and they should have obtained a search warrant based upon probable cause, rather than a subpoena under the Stored Communications Act. The court disagreed, holding that Taylor's Fourth Amendment rights were not violated because he held no reasonable expectation of privacy in the CSLI: "Because Taylor does not have a reasonable expectation of privacy in business records made, kept, and owned by his provider, Sprint-Nextel, a warrant requiring probable cause was not required before obtaining that information."

Obtaining real-time or prospective CSLI does generally require a warrant. The issue gets murkier, however, with *historical* CSLI. Many federal courts agree that probable cause is not required as long as investigators can demonstrate "specific and articulable facts showing 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” — the standard that the court applied to this case. Federal Courts of Appeals for the Third, Fifth, Sixth and 11th Circuits have followed this approach.

However, in a case previously discussed in *Xiphos* (“Warrant required for cell site location information?” August 2015), the Fourth Circuit took a different approach, requiring a search warrant. That case was recently reconsidered by the entire circuit *en banc* and a decision is expected soon. In addition, appellate courts in a number of states, including Massachusetts, New Jersey and Florida, as well as a few federal trial courts, have ruled that police need a search warrant to obtain historical CSLI.

Taylor failed in his effort to persuade the court to apply a probable cause standard and the court ruled that the CSLI evidence was properly used against him. This case adds to the divide on the CSLI issue and makes it even more likely that the U.S. Supreme Court will review the standard for obtaining historical CSLI. *Taylor v. State*, 2016 WL 1594007 (Nev. 2016)

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