SIGNIFICANT DECISIONS
UNITED STATES SUPREME COURT AND THE COURT OF CRIMINAL APPEALS
FROM SEPTEMBER 2018 TO APRIL 2019

HON. DAVID C. NEWELL
JUDGE, PLACE 9
Court of Criminal Appeals

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Acknowledgement

I would like to acknowledge all the hard work and care that my briefing attorney, Megan Reed, put into this paper. There. I've acknowledged it. She's awesome. I did some too though. I leave it to you to determine who did what, except to say that I did the commentary. She can't be blamed for failing to stop me.

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I. INTRODUCTION

This paper covers the published opinions issued by the Court of Criminal Appeals between September 1, 2018 and April 12, 2019. It also includes the significant criminal cases from the United States Supreme Court that have broad applicability, issued during that same time frame. If you feel something is missing, please email me though Nichole Reedy at Nichole.Reedy@txcourts.gov and we'll do our best to either correct or explain ourselves. Additionally, I will continue to update the paper throughout the terms of the respective courts. If you'd like a copy of the updated paper, do not lose the email mentioned above.

II. MOTIONS TO SUPPRESS

A. There is no legitimate expectation of privacy in less than three hours of real-time location information records accessed by police though pinging a person's phone less than five times. In 2014, Annie Sims was found dead on the porch of her home. Annie's mother, Mary Tucker, told police that Christian Vernon Sims (Annie's grandson) and his girlfriend, Ashley Morrison, were possible suspects. Annie's Toyota Highlander, Annie's purse, and two guns were missing from the home. Annie's husband called to cancel her credit cards, and the credit card company told him that the cards had been used three times, including once at a Wal-Mart in McAlester, Oklahoma.

Officers from McAlester Police Department went to the Wal-Mart to investigate and discovered that a young man and woman used Annie's credit card and left in a Toyota Highlander. Christian's grandfather looked at pictures from the security footage and identified the two people as Christian and Morrison.

Deputy Chief Jeff Springer from the Lamar County Sheriff's Office thought there was probable cause to believe that Christian committed murder, burglary of a habitation, unauthorized use of a motor vehicle, and credit card abuse. Springer also believed that Christian and Morrison were a danger to the public because they were likely armed. Instead of seeking a warrant to "ping" Christian's and Morrison's cell phones, Sergeant Steve Hill used an "EMERGENCY SITUATION DISCLOSURE" form provided by Verizon Wireless to request current location information. Using that information, police located Christian and Morrison at a motel and arrested them.

Pretrial, Christian filed a motion to suppress, alleging that accessing the real-time location records stored in his cell phone violated the Fourth Amendment, the Texas Constitution, the Stored Communications Act ("SCA"), and Article 18.21 of the Texas Code of Criminal Procedure. The trial court denied Christian's motion. Christian appealed, and the court of appeals affirmed.

The Court of Criminal Appeals unanimously affirmed the court of appeals. ***Sims v. State*, 2019 WL 208631 (Tex. Crim. App. Jan. 16, 2019) (9:0).** Writing for the Court, Judge Hervey first discussed whether suppression is a remedy for violation of the SCA or Article 18.21. Both statutes contain provisions stating that, absent a federal constitutional violation (the SCA) or a federal or state constitutional violation (Article 18.21), the only available judicial remedies are those provided for in the statutes. The Court then applied the "general versus specific" canon of statutory construction to determine whether those exclusivity provisions control over Article 38.23, which provides the remedy of suppression. The Court concluded that the exclusivity provisions controlled.

The Court then considered Christian's Fourth Amendment Claim. The Court reviewed precedent on physical movements and location and the third-party doctrine. The Court discussed *Carpenter v. United States*, 138 S. Ct. 2206 (2018), which held that the defendant had a reasonable expectation of privacy in seven days of historical cellphone location information. The Court here stated that, although *Carpenter* dealt with historical location information—not real-time location information—it believed that the Supreme Court's reasoning in *Carpenter* applies to both types of records.

Therefore, whether a particular government action constitutes a "search" or "seizure" does not turn on the

content of the location information. Instead, it turns on whether the government searched or seized "enough" information that it violated a legitimate expectation of privacy. The Court concluded that Christian did not have a legitimate expectation of privacy in his physical movements or location in the less than three hours of real-time location information records accessed by police though pinging his phone less than five times.

[**Commentary:** Note that the opinion relies heavily on the fact that the police only took a little bit of information for a discrete purpose. In this way, the Court hopes to distinguish this case from *Carpenter*. That said, it also may be attractive to the Texas Legislature. At the time of this writing, there are several bills that might impact the continued viability of the holding in this case. We'll have to wait and see what, if anything, gets passed.]

B. Blood Draws

1. Possible IV treatment is insufficient to justify a warrantless blood draw if there is no evidence of current, ongoing medical treatment. Joel Garcia was involved in a car crash, which led to three peoples' death, and he was taken to a hospital. Law-enforcement officers, suspecting that Garcia was intoxicated and concerned that he might receive an IV treatment soon, took a sample of Garcia's blood without a warrant. An analysis of the sample showed that Wood had a blood-alcohol concentration of 0.268, and it detected the presence of "Benzoylecgonine," a cocaine metabolite. Garcia was charged with three counts of intoxication manslaughter, and he filed a motion to suppress the warrantless blood draw.

After an extensive hearing on the motion, the trial court suppressed the blood evidence. The trial court found that the officers' testimony that exigent circumstances existed was not credible. The State appealed, and the court of appeals reversed the trial court's ruling.

The Court of Criminal Appeals reversed the court of appeals. ***State v. Garcia*, 2018 WL 6521579 (Tex. Crim. App. Dec. 12, 2018) (6:2:1).** Writing for the Court, Judge Keasler noted that the court of appeals gave three reasons for its conclusion that the trial judge erred in suppressing the evidence. The Court addressed each reason in turn.

First, the court of appeals supported its conclusion by the fact that "Garcia's accident resulted in three deaths, several cars afire, and the necessity of numerous officers on the scene." But the Court stated that the seriousness of the offense itself does not create exigent circumstances justifying a warrantless search. And, insofar as the accident's severity might have adversely affected the officers' ability to apply for a warrant, under the trial judge's findings, that was not a concern here.

Second, the court of appeals reasoned that the officers' need for contemporaneous blood evidence was extraordinarily high because cocaine and other narcotics are eliminated at an unknown rate. The Court stated that it did not disagree with this reasoning in principle but noted that it must be supported by facts. And here it was not. Nothing in the record showed how or why the officers might reasonably have suspected Garcia was using cocaine.

Third, the court of appeals reasoned that potential IV treatment created exigent circumstances. But the Court noted that the trial court's findings show that the officers were not faced with any such dilemma over whether to intervene due to possible IV treatment. When the officers ordered the phlebotomist to take a sample of Garcia's blood, all medical treatment of Garcia had stopped. Thus, the Court, deferring to the trial court's findings of fact, held that the trial court did not abuse its discretion in suppressing the blood evidence.

Judge Yeary dissented. Relying upon his prior dissenting opinions, Judge Yeary argued that the Court erroneously believes that exigent circumstances to justify a warrantless blood draw must be evaluated on a case-by-case basis. According to Judge Yeary, this case demonstrates why that case-by-case approach is problematic.

Presiding Judge Keller and Judge Keel concurred without written opinion.

2. Individuals have a reasonable expectation of privacy in their blood that is drawn at a hospital for medical purposes. Juan Martinez was involved in a

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