

# Court: Warrantless cellphone tracking not illegal search

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Credit: Peter Griffin/Public Domain

Investigators do not need a search warrant to obtain cellphone tower location records in criminal prosecutions, a federal appeals court ruled Tuesday in a closely-watched case involving the rules for changing technology.

The Atlanta-based 11th U.S. Circuit Court of Appeals, overturning a three-judge panel of the same court, concluded that authorities properly got 67 days' worth of records from MetroPCS for Miami robbery suspect Quartavious Davis using a court order with a lower burden of proof.

In its 9-2 decision, the 11th Circuit decided Davis had no expectation of privacy regarding historical records establishing his location near certain cellphone towers. The records were key evidence used to convict Davis of a string of armed robberies, leading to a 162-year prison sentence.

In fact, Circuit Judge Frank M. Hull wrote for the majority, it's clear that cellphone users in today's society understand how companies collect data about calls and that cell towers are a key part of that.

"We find no reason to conclude that cellphone users lack facts about the functions of cell towers or about telephone providers' recording cell tower usage," Hull wrote. "This cell tower method of call connecting does not require a different constitutional result just because the telephone company has decided to automate wirelessly."

Two judges dissented, contending the Fourth Amendment requires probable cause and a search warrant for such records and some judges in the majority agreed in separate opinions that the U.S. Supreme Court should make the ultimate decision. Davis attorney David O. Markus said the dissent could provide a "roadmap" for a likely appeal to the high court.

"Unfortunately, the majority is stuck in the early '80s when cell-phones were the size of bricks and cost \$3,000. The cases from that long-ago era aren't helpful in today's world," Markus said.

Markus called the decision "breathtaking," contending it could mean government investigators could have access without a search warrant to all kinds of personal data stored by a third party such as Facebook posts, purchases on Amazon and even pictures in "cloud" storage.

The Miami case has drawn wide interest from civil liberties groups and others, with briefs in support of the search warrant requirement filed by the ACLU, the Reporters Committee for Freedom of the Press, the National Association of Criminal Defense Lawyers and many others.

"The majority opinion fails to appreciate the necessity of protecting our privacy in the digital age," said Nathan Freed Wessler, staff attorney at the Speech, Privacy and Technology Project of the American Civil Liberties Union.

The 11th Circuit, however, said existing law regarding information possessed by third parties

clearly governs the Davis cellphone tracking data. Those who want the law changed should look to Congress and the state legislatures, not the judicial system, the judges said.

The decision Tuesday is similar to an earlier ruling by the 5th U.S. Circuit Court of Appeals, while the 3rd Circuit has ruled a search warrant may be required for cell tower records if privacy rights might be affected. Federal appeals courts are also considering cases from Maryland and Michigan.

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