FILED
United States Court of Appeals
Tenth Circuit

August 27, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANTHONY CARLYLE THOMPSON,

Defendant - Appellant.

No. 19-3173
(D.C. No. 5:13-CR-40060-DDC-10)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **EBEL**, and **PHILLIPS**, Circuit Judges.**

Anthony Thompson returns to our court a second time. Seven years ago, he appealed after a jury convicted him of multiple controlled-substances offenses. In that appeal, Thompson raised a Fourth Amendment challenge to the use at trial of his historical cell-service-location information (CSLI) and derivative evidence. He argued that the government couldn't obtain his CSLI without a warrant supported by probable cause. Proceeding on a mistaken belief that his cell-service provider, T-

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

** After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

Mobile, had provided the government his CSLI in response to a district-court order issued under the Stored Communications Act, 18 U.S.C. § 2703(d), Thompson complained that the government had unlawfully bypassed the Fourth Amendment's warrant requirement and merely showed reasonable grounds for the CSLI as required by § 2703(d). We rejected his challenge.

Thompson filed a petition for a writ of certiorari on this issue. Soon afterward, the Supreme Court decided *Carpenter v. United States*, 138 S. Ct. 2206 (2018), holding that "an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records," instead requiring a warrant supported by probable cause. *Id.* at 2221. Accordingly, the Supreme Court vacated our ruling and remanded for our further consideration under *Carpenter*. *See Thompson v. United States*, 138 S. Ct. 2706, 2706 (2018). After concluding that *Carpenter* superseded our earlier decision, we remanded for the district court "to determine whether its alternative holding survives *Carpenter* and for further proceedings consistent with the Supreme Court's decision."[1] *United States v. Thompson*, 740 F. App'x 166, 168 (10th Cir. 2018) (unpublished).

The case took an unusual turn once back in district court. Despite what the parties had maintained on appeal, it turned out that T-Mobile hadn't produced

[1] The "alternative holding" we referred to was the district court's statement that even if the government needed a warrant supported by probable cause to obtain historical CSLI, "the government ha[d] met the requirements for a search warrant under the Fourth Amendment." R. vol. I at 115. But on remand, the district court described this "discussion of probable cause" as "dicta, not an alternative holding." R. vol. III at 372.

Thompson's CSLI in response to a § 2703(d) order. Instead, T-Mobile had provided the CSLI as it released other information that a state court's wiretap order had required be produced. The state court's wiretap order didn't require production of CSLI, real-time or historical.

In view of this, Thompson switched gears. He argued that the production of historical CSLI requires a warrant supported by probable cause. And he contended that the government couldn't rely on the state-court wiretap orders to satisfy the warrant-supported-by-probable-cause condition, because those orders didn't require production of the CSLI. The district court declined to consider Thompson's argument on remand, ruling that he had waived it by not arguing it in the original proceedings in the district court or in his first appeal. We conclude that the district court didn't err in denying Thompson relief, on forfeiture grounds (he didn't make his present argument as part of his previous appeal to this court) and on mandate grounds (his revised argument isn't *Carpenter*-based in that it no longer concerns § 2703(d)).[2] Accordingly, we affirm.

BACKGROUND

During 2012 and 2013, law-enforcement officers investigated a cocaine-base (crack cocaine) network operating in and around Geary County, Kansas. *See United States v. Thompson*, 866 F.3d 1149, 1151 (10th Cir. 2017), *vacated*, 138 S. Ct. 2706

[2] Alternatively, because Thompson concedes that T-Mobile released his CSLI voluntarily (not that the state wiretap order required that it do so), we see no Fourth Amendment basis to support his appeal.

(2018). During the investigation, a Kansas state judge authorized a wiretap of Thompson's and three codefendants' telephone calls. In November 2013, armed with the calls and evidence from multiple controlled buys and searches, federal prosecutors sought and obtained an indictment charging Thompson and twelve codefendants with conspiracy to distribute more than 280 grams of cocaine base, *see* U.S.C. §§ 846 and 841(a)(1), (b)(1)(A), and individual counts of distributing cocaine base, *see* 21 U.S.C. §§ 841(a)(1), (b)(1)(B), (b)(1)(C). One defendant later cooperated with the government. In a consolidated trial, a jury convicted Thompson and five codefendants of the conspiracy charges and multiple individual counts of distribution. *Thompson*, 866 F.3d at 1151.

Before trial, Thompson moved to suppress all evidence obtained from the wiretap orders on several grounds, including that "[a] Kansas district judge may only authorize interception within the judge's own district." R. vol. I at 86. In August 2014, the federal district court limited the government to the use of calls for which "the tapped phones" were "physically present within" the state district court's boundaries "at the time a call was intercepted." *Id.* at 149–50. At this time, the federal district court withheld ruling on individual calls and reset the trial date to enable the government to obtain corresponding CSLI to pinpoint the location of the telephones used during the calls.

To gather this information, the government filed a motion under the Stored Communications Act, 18 U.S.C. § 2703(d), seeking three orders requiring Verizon, Sprint, and T-Mobile to disclose historical CSLI for telephones used by Thompson and

his codefendants.[3] *Thompson*, 866 F.3d at 1151. Section § 2703(d) required the government to "offer[] specific and articulable facts showing that there are reasonable grounds to believe that the contents of [the CSLI is] relevant and material to an ongoing criminal investigation." Thompson and his co-defendants opposed the motion on the ground that collection of historical CSLI must meet the probable-cause standard of the Fourth Amendment. The federal district court rejected this argument and issued the government's requested orders.

Soon afterward, in updating the court on its efforts to obtain the CSLI, the government advised (1) that Verizon no longer retained historical CSLI for the numbers and dates in question, (2) that Sprint had responded to the § 2703(d) order by providing the requested data, and (3) that T-Mobile, Thompson's cell-service provider, no longer had the requested data but had informed the government that T-Mobile had already provided CSLI to the government as it released other information that was in fact required by the state wiretap order. Apparently, the government hadn't realized that it had T-Mobile's data before seeking the § 2703(d) order.

Based on the government's proffered CSLI data, the court ruled that the CSLI "showing that a phone pinged" on certain Kansas cell towers "during a specific call [was] sufficient to establish that phone's location inside the" state-court district. R. vol. I at 180. And at trial, the court admitted evidence from forty-two calls meeting that condition. In thirty-one of these calls, Thompson participated in the telephone conversation.

[3] In the instant appeal, Thompson challenges only the government's obtaining his own CSLI, which the government received from T-Mobile.

On appeal, Thompson challenged the constitutionality of § 2703(d) orders. *Thompson*, 866 F.3d at 1152. He argued that "§ 2703(d) is unconstitutional, because cell-phone users have a reasonable expectation of privacy in their historical CSLI." *Id.* Thus, he contended that collecting historical CSLI is a "search" under the Fourth Amendment, meaning that the government must "procure a warrant." *Id.* In their appellate briefing, apparently focused on defendants' opposition to the § 2703(d) orders, the parties missed that the government hadn't obtained Thompson's T-Mobile CSLI from a § 2703(d) order. Following the parties' lead, we addressed § 2703(d), ruling that ordering production of the historical CSLI on "reasonable grounds" as provided by the Stored Communications Act, and not on a warrant supported by probable cause, did not violate the Fourth Amendment. *See id.* at 1160.

After losing in our court, Thompson filed a petition for a writ of certiorari on the § 2703(d) issue. *See Thompson*, 138 S. Ct. at 2706. Soon afterward, the Supreme Court decided *Carpenter*, a case in which a defendant challenged the government's collection of historical CSLI under § 2703(d), as Thompson had. 138 S. Ct. at 2212–14. The Court held that "an order issued under Section 2703(d) . . . is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant." *Id.* at 2221. Soon after this, the Court remanded Thompson's case to us "for further consideration in light of [*Carpenter*]." *Thompson*, 138 S. Ct. at 2706.

On remand, we ruled "that *Carpenter* supercedes our holding that the historical cell-site orders in *Thompson* . . . did not violate the Fourth Amendment." *Thompson*, 740

F. App'x at 168. We then (mis)understood the case the way the parties had left it with us in the direct appeal—that the issue concerned release of CSLI based on the § 2703(d) order. And we issued the following mandate: "We therefore remand the case[] to the district court to determine whether its alternative holding survives *Carpenter* and for further proceedings consistent with the Supreme Court's decision." *Id.*

Back in the district court, Thompson filed a pro se pleading,[4] entitled "Request to Vacate Mr. Thompson's Conviction or in the Alternative Grant a New Trial." R. vol. III at 218. By then, Thompson had apparently realized that the government hadn't obtained his CSLI from a § 2703(d) order. So he switched his theory from the one he had pursued through his direct appeal. He now argued that the government needed a warrant supported by probable cause to collect his T-Mobile CSLI. And he contested that the state wiretap order didn't supply the needed warrant supported by probable cause, because it didn't purport to order the release of CSLI, historical or real-time.

In response, the government argued two points: (1) that Thompson had waived this argument by not raising it in his appeal, and (2) that Thompson's argument exceeded the scope of our *Carpenter*-based mandate. Agreeing with the government, the district court ruled that Thompson had waived this argument and explained that Thompson's argument was unrelated to *Carpenter*.

[4] We liberally construe Thompson's pro se filings, but we won't go so far as to act as his advocate. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) (citation omitted).

Still proceeding pro se, Thompson sought reconsideration. In denying his motion, the district court again concluded that Thompson had waived his CSLI argument and that his readjusted argument wasn't *Carpenter*-based.[5]

In the instant appeal, Thompson argues that the court erred in concluding (1) that his argument that *Carpenter* requires the government to get a warrant supported by probable cause for the CSLI is outside the scope of our mandate, and (2) that he waived this argument by not raising it in his initial appeal. We have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

When we vacate and remand, the district court must strictly comply with our mandate. *See Dish Network Corp. v. Arrowood Indem. Co.*, 772 F.3d 856, 864 (10th Cir. 2014) (citation omitted). "Interpretation of the mandate is an issue of law that we review de novo." *United States v. Shipp*, 644 F.3d 1126, 1129 (10th Cir. 2011) (citations omitted). After resolving that question, we then "ask whether the court abused the measure of discretion that our mandate left to it." *United States v. Walker*, 918 F.3d 1134, 1143 (10th Cir. 2019) (citation omitted).

[5] In an extra, post-reply filing, Thompson also argued that (1) the government had untimely disclosed the T-Mobile CSLI, and (2) this untimeliness resulted in speedy-trial violations. The court didn't address these issues. On appeal, Thompson contends that the court should hear these arguments. But Thompson's briefing on these issues is conclusory, taking less than a single page. We deem the argument waived. *See Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1175 (10th Cir. 2002), *as modified on reh'g*, 319 F.3d 1207 (10th Cir. 2003) ("[I]ssues will be deemed waived if they are not adequately briefed."). Plus, these arguments aren't *Carpenter*-based, so they exceed our mandate.

"[T]he scope of the mandate on remand in the Tenth Circuit is carved out by exclusion: unless the district court's discretion is specifically cabined, it may exercise discretion on what may be heard." *Dish Network Corp.*, 772 F.3d at 864 (citation omitted). "[T]he district court is to look to the mandate for any limitations on the scope of the remand and, in the absence of such limitations, exercise discretion in determining the appropriate scope." *Id.* (citation omitted). That is, "[w]hen the further proceedings are specified in the mandate the district court is limited to holdings such as are directed." *Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 711 (10th Cir. 2004) (citation omitted). "When the remand is general, however, the district court is free to decide anything not foreclosed by the mandate." *Id.* (citation omitted).

The district court didn't err in interpreting our mandate as limiting the remand to *Carpenter*-based proceedings, meaning those concerning CSLI produced from § 2703(d) orders. *Thompson*, 740 F. App'x at 168. *Carpenter* involved a challenge to the government's acquisition of historical CSLI under § 2703(d). *See* 138 S. Ct. at 2212–14.

Moreover, Thompson has forfeited his post-remand revised argument. *United States v. Nkome*, 987 F.3d 1262, 1283 (10th Cir. 2021) (comparing forfeiture, failing to timely assert a right, to waiver, intentionally not asserting a right (citations omitted)). Nowhere in his initial trial-court proceedings or his original appeal did Thompson make that argument, though he could have. *See Est. of Cummings by & through Montoya v. Cmty. Health Sys., Inc.*, 881 F.3d 793, 801 (10th Cir. 2018) ("Failing to raise an issue on appeal . . . has the same consequences for that litigation as an adverse appellate ruling on that issue. Thus, the mandate rule applies not only to issues on which the higher court

ruled but also forecloses litigation of issues decided by the district court but forgone on appeal or otherwise waived." (alteration, internal quotation marks, and citations omitted)).

CONCLUSION

For the foregoing reasons, we affirm.

Entered for the Court

Gregory A. Phillips
Circuit Judge