FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4514

BRANDON JOSHUA BAILEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Charles W. Arnold, Judge.

November 16, 2020

M.K. THOMAS, J.

Brandon Bailey (Appellant) appeals his judgment and sentence for first-degree murder, armed robbery, and possession of a firearm by a convicted felon. He raises three arguments for reversal. His second argument—that the affidavit used by police to obtain the search warrant for his cell phone records failed to establish probable cause—is rejected, and we affirm without further comment. Appellant's remaining arguments are that the trial court erred: 1) in denying his motion to suppress warrantlessly-obtained Global-Positioning-System (GPS) records tracking his movements in a borrowed car; and 2) by failing to conduct a formal competency hearing before proceeding to trial in light of a previous order for a competency evaluation. For the foregoing reasons, we affirm in part and reverse in part.

I.

In the early morning of February 17, 2016, Dustin Howell, the victim, was found shot to death in a park. His body had been stripped of valuables. Mr. Howell resided at an area hotel equipped with video cameras. Police were able to observe him on surveillance footage leaving the hotel with Appellant just after midnight. The footage also revealed Appellant returning to the hotel alone a few hours later.

Police learned that Appellant had been staying at the hotel with Amanda Green, the sole owner of a Honda Accord. The Honda was equipped with a GPS tracker by agreement between Ms. Green and her financing company.[1] At trial, Ms. Green testified that she periodically gave Appellant permission to use her car. However, she acknowledged that on the night of the murder, she called police to report her car stolen because she did not know that Appellant had left with her car. She also testified that when her car was not returned the next day, she contacted her financing company to track the car's location.

Police contacted Ms. Green's financing company and requested limited GPS records of the Honda's movements from the time of the murder through the following day. The records were provided without a warrant. The GPS recorded the Honda's location in timed increments. The records indicated that the Honda was stopped at a home in the vicinity of the park at 1:32 a.m. and remained there for a short time. The Honda then travelled from the home and stopped at the park (where the victim

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[1] Ms. Green's signed contract with the financing company acknowledged that a GPS tracking device had been installed on the vehicle and provided that her signing of the agreement would constitute a waiver of any "right to privacy in the location of the vehicle." Although the owner of the finance company testified at the suppression hearing that the location information tracked by the device was primarily used to locate a vehicle in the event of theft or default, he also testified that historical data was sometimes accessed to determine past locations in the event the tracker was disabled.

was later found) between 1:49 a.m. and 1:57 a.m. before returning to the home at 2:02 a.m.

When police arrived at the home, the homeowner provided consent to view the home's surveillance cameras. The surveillance footage documented that the Honda had been driven to the home, consistent with the GPS data, and further documented that the codefendant and Appellant were present at the home. Warrants were obtained for a search of the home and for acquisition of the cell phone records of Appellant and the codefendant. Clothes matching those worn by Appellant on the night of the murder were found in the home, and the cell site location information (CSLI) from the cell phones matched the timeline of the GPS records.

After his indictment, Appellant moved to suppress the GPS records and all the fruits thereof, arguing that, pursuant to *Carpenter v. United States*, 138 S. Ct. 2206 (2018), he had a reasonable expectation of privacy in his movements across the public roads. Thus, when the police obtained the records showing his recent movements in the Honda without a warrant, an illegal search occurred. The trial court disagreed and denied the motion to suppress, reasoning as follows:

> This was a third party GPS device that was not owned by the defendant; the defendant had no expectation of privacy on a device that was not his, nor the owner of the car, as it belonged to a finance company that put it on the car for the purpose of taking care of where it was in case they had to go repossess it. And the sheriff's office in this case was not required to obtain either a search warrant or a subpoena to go get the third party information based on the facts of this case. And the Court finds that *Carpenter* just simply does not apply to this case.

Prior to trial, Appellant's attorney requested a competency evaluation which was granted by the trial court. However, the record falls silent regarding any further action taken on the matter.

II.

Whether the Warrantless Acquisition of the GPS Data Constitutes an Illegal Search

A trial court's ruling on a motion to suppress comes to this Court with a presumption of correctness. *See State v. Markus*, 211 So. 3d 894, 902 (Fla. 2017). An appeal of a trial court's ruling on a motion to suppress generally presents a mixed question of law and fact. *See Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002); *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001); *Duke v. State*, 255 So. 3d 478, 480 (Fla. 1st DCA 2018). Florida courts decide search and seizure issues in conformity with the Fourth Amendment decisions of the Supreme Court of the United States. Art. I, § 12, Fla. Const.; *Cox v. State*, 975 So. 2d 1163, 1166 (Fla. 1st DCA 2008).

Appellant argues the trial court erred in denying his motion to suppress because it improperly concluded that no search occurred when the police obtained the vehicle's GPS data—a legal issue reviewed de novo.[2] *See Pagan*, 830 So. 2d at 806. He claims the police action constituted a "search" because he had a reasonable expectation of privacy in his movements while operating the vehicle owned by Ms. Green.[3]

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[2] The parties also raised the issue of standing in their briefs. Although standing arguments are understandable given the longstanding prevalence of the argument in Fourth Amendment jurisprudence, the arguments are misplaced in the context of non-trespassory police activity. Lack of standing in the context of non-trespassory police activity contends that one does not have standing to object to police conduct which only violates another person's constitutional rights against unreasonable searches. Although the reasoning is logical, its application to privacy interests rather than property interests is mislaid. The issue of a defendant's ability to contest to police conduct which he or she believes violates a *Katz* privacy interest is not in question here.

[3] The parties dispute the factual issue of Appellant's authorization to drive the Honda, with Appellant arguing that he had general permission from Ms. Green, and the State contending

In assessing a suppression motion, the court begins with two threshold questions: 1) has there been a search; and 2) if so, was it reasonable? *United States v. Correa*, 908 F.3d 208, 217 (7th Cir. 2018); *see also Carpenter*, 138 S. Ct. at 2215 n.2 (cautioning against "conflat[ing] the threshold question whether a 'search' has occurred with the separate matter of whether the search was reasonable"). Pursuant to *United States v. Knotts*, 460 U.S. 276 (1983), we answer the initial question in the negative as Appellant did not have a reasonable expectation of privacy. We now flesh out our path to this end.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Amend. IV, U.S. Const. Thus, there must be a "search" or a "seizure" to trigger the Fourth Amendment's protections. "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Morgan v. United States*, 323 F.3d 776, 780–81 (9th Cir. 2003) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)). Generally, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

Upon its drafting and ratification, the Fourth Amendment was intended to prevent threats to individual liberty that were prevalent at the founding: intrusions by the government into private property. Such intrusions, in the late-eighteenth century, included general warrants and writs of assistance. *Carpenter*, 138

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that she had withdrawn permission, making the car stolen while he used it during the commission of the crime. It would be difficult to argue that one who has stolen a car has a reasonable expectation of privacy in the stolen property's location, or in his or her movements while operating a stolen car. That said, no specific finding was made by the trial court on this point, and the record is inconclusive. As the resolution of this dispute was not relevant to the trial court's ruling, it is likewise not reviewed here.

S. Ct. at 2264 (Gorsuch, J., dissenting). Thus, historical analysis centered on the Fourth Amendment's immediate connection to property. *Id.* at 2239 (Thomas, J., dissenting) (citing *United States v. Jones*, 565 U.S. 400, 405 (2012)). However, in 1967, the Supreme Court redefined what constitutes "search" and "seizure" and expanded the protections of the Fourth Amendment to include "what [a person] seeks to preserve as private, even in an area accessible to the public." *Katz*, 389 U.S. at 351. Justice Harlan's concurrence in *Katz* announced a new "twofold requirement" to establish Fourth Amendment protection: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361. This "*Katz* test" became the "lodestar" of Fourth Amendment analysis. *Smith v. Maryland*, 442 U.S. 735, 749 (1979). "Over time, the Court minimized the subjective prong of Justice Harlan's test. That left the objective prong—the 'reasonable expectation of privacy' test that the Court still applies today." *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting) (citing Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. Chi. L. Rev. 113 (2015)).

Yet, "recent Fourth Amendment cases have clarified that the [*Katz*] test . . . supplements, rather than displaces, 'the traditional property-based understanding of the Fourth Amendment.'" *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (internal citation omitted) (quoting *Florida v. Jardines*, 569 U.S. 1, 11 (2013)). The *Katz* mechanism has been touted as inconsistent, untenable, and ever-changing. *Carpenter*, 138 S. Ct. at 2244 (Thomas, J., dissenting). The Supreme Court decisions in *Jones* in 2012 and *Carpenter* in 2018 further added to the murkiness of its application. As noted by Justice Alito in his concurring opinion in *Jones*, "it is almost impossible to think of late-18th century situations that are analogous" to 21st-century surveillance techniques. 565 U.S. at 419. Regardless, the judiciary is "obligated, as subtler and more far-reaching means of invading privacy have become available to the government, to ensure that the progress of science does not erode Fourth Amendment protections." *Carpenter*, 138 S. Ct. at 2208.

Fourth Amendment searches now fall into two general hemispheres: 1) trespassory searches in which the government physically intrudes onto the person or property of an individual, and, 2) intrusion into an area in which a person possesses a reasonable expectation of privacy (the *Katz* test). *Jones*, 565 U.S. at 405–08. Here, because there is unquestionably no issue of physical government trespass, Appellant must find relief via the *Katz* test, if he is to be relieved at all. He invokes only the privacy-based approach as there is no dispute that he was not the owner of the Honda which was tracked by GPS. To claim *Katz* protection under the privacy-based approach, an individual must have sought to preserve the information in question as private. *Carpenter*, 138 S. Ct. at 2213. The conduct must exhibit an actual, subjective expectation of privacy and that subjective expectation is one which society recognizes as objectively reasonable. *See Knotts*, 460 U.S. at 280–81. Where these two requirements are met, "official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Carpenter*, 138 S. Ct. at 2213 (citing *Smith*, 442 U.S. at 740).

The first question is whether Appellant had a subjective expectation of privacy regarding the GPS data. Generally, information that a person "knowingly exposes to the public . . . is not subject of Fourth Amendment protection." *United States v. Miller*, 425 U.S. 435, 442 (1976) (quoting *Katz*, 389 U.S. at 351). Therefore, if an individual has conveyed information to a third party or to the public at large, "even if the information is revealed on the assumption that it will be used only for a limited purpose," the government will generally not be required to obtain a warrant before obtaining the information. *Id.* That established, the mere fact that an individual has on some level allowed information to be conveyed to a third person is not an end-all point of consideration preventing successful application of the *Katz* test to a putative privacy interest. As emphasized in *Carpenter*, "the nature of the particular documents sought" must be considered in determining whether "there is a legitimate expectation of privacy concerning their contents." 138 S. Ct. at 2219 (rejecting a "mechanical application" of the third-party doctrine) (quoting *Miller*, 425 U.S. at 442). As such, courts must examine every *Katz* suppression claim on a case-by-case basis to determine whether a search occurred. *Carpenter*, 138 S. Ct. at 2213–14.

The second question—whether the privacy interest is one which society is prepared to recognize—is "informed by historical understandings 'of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.'" *Id.* at 2214 (quoting *Carroll v. United States,* 267 U.S. 132, 149 (1925)). Under this concept, the Fourth Amendment's primary goal is the prevention of activity which would lead to "arbitrary" and "too permeating police surveillance" and power. *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); *see also United States v. Di Re*, 332 U.S. 581, 595 (1948).[4]

Framework and precedent established; we now analyze whether Appellant's expectation of privacy in his recent movements over public roads in a car that was being voluntarily tracked by GPS with consent of the owner is an expectation which society is prepared to recognize as reasonable. Appellant argues that *Carpenter* and *Jones* compel an affirmative response to the question.

In *Carpenter*, the government compelled production of CSLI from a wireless carrier without a warrant. 138 S. Ct. at 2212. Although *Carpenter* acknowledged that CSLI was constantly being transmitted by individuals to third parties, thus implicating third party principles, *id.* at 2216, the Supreme Court determined that

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[4] In *Carpenter*, Justice Gorsuch noted in his dissent:

> The [Fourth] Amendment's protections do not depend on the breach of some abstract "expectation of privacy" whose contours are left to the judicial imagination. Much more concretely, it protects your "person," and your "houses, papers, and effects." Nor does your right to bring a Fourth Amendment claim depend on whether a judge happens to agree that your subjective expectation to privacy is a "reasonable" one. Under its plain terms, the Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.

138 S. Ct. at 2264.

the nature of CSLI data and its transmission was unique and distinguishable. *Id.* at 2217–20. *Carpenter* declared that cell phones are ubiquitous in daily life and are ever-present on an individual's person. Thus, warrantless gathering of CSLI data would mean that the government essentially had an on-demand "ankle monitor" attached to the vast majority of people, allowing an individual's historical movements to be quickly and easily examined and revealing intimate details of a person's life.[5] *Id.* at 2218.

In the 5-4 decision, the *Carpenter* majority concluded that all-encompassing location information was distinguishable from the limited information conveyed in the third-party cases of the past. *Id.* The opinion acknowledged the differences in investigation techniques prior to the digital age because the ability of the police to reconstruct an individual's past movements was limited "by a dearth of records and the frailties of recollection," whereas the government's ability to review CSLI is limited only by the retention policy of wireless carriers. *Id.* Of importance, the Supreme Court concluded that the "newfound tracking capacity" effected every individual in the nation with a cell phone, as opposed to the tracking only being applicable "to persons who might happen to come under investigation." *Id. Carpenter* held that the government invaded a societally recognizable expectation of privacy "in the whole of [the defendant's] physical movements" when it accessed his CSLI data without a warrant. *Id.* at 2219.[6] However, the Supreme Court explicitly limited its holding in *Carpenter* as follows:

> [The decision] is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower

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[5] The majority reasoned in *Carpenter* that, because a phone "faithfully follows its owner beyond public thoroughfares and into private" locations, government examination of CSLI reveals potentially sensitive, private information about an individual, such as their visit to a certain doctor's office or political organizations. 138 S. Ct. at 2218.

[6] The decision in *Carpenter* does not address the "mosaic" theory.

> dumps" . . . . We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information.

Id. at 2220.

We next turn to *Jones*. In *Jones*, the Supreme Court unanimously determined that police attachment of a tracker to Jones' Jeep and use of the device to monitor the vehicle's movements on public streets for a month, without a warrant, constituted an unlawful search under the Fourth Amendment. 565 U.S. at 400. However, the Court was split 5-4 as to the fundamental reasons supporting the ultimate decision. The lower court in *Jones* applied the "mosaic" theory in its analysis that a search occurred. The mosaic theory applies a cumulative understanding of data collection by police and analyzes searches as a collective sequence of steps rather than individual ones. It considers police action to be viewed over time as a collective "mosaic" of surveillance and allows the whole picture to qualify as a protected Fourth Amendment search, even if the individual steps that contribute to the full picture do not, in isolation, reach that constitutional threshold. *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972).

Justice Scalia's majority opinion in *Jones* did not apply the mosaic theory. Instead, the majority determined that by physically installing the GPS device on Jones' car, the police had committed a trespass against his "personal effects" and this trespass, to acquire information, constituted a search *per se*. *Id.* at 404. Two concurring opinions in *Jones* did, however, rely on the mosaic theory in analysis. 565 U.S. at 414–31. "Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer-term GPS monitoring in the investigations of most offenses impinges on expectations of privacy." *Jones*, 565 U.S. at 430 (Alito, J., concurring) (internal citation omitted). This approach to analyzing searches is rationalized because long-term surveillance uncovers "types of information not revealed by short-term surveillance, such

as what a person does repeatedly, what he does not do, and what he does ensemble . . . Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit . . . ." *United States v. Howard*, 426 F. Supp. 3d 1247, 1255 (M.D. Ala. 2019) (quoting *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010)), *aff'd sub nom*.[7] Justice Sotomayor, in her concurring opinion in *Jones*, agreed with the expectation of privacy reasoning regarding long-term surveillance, and she also disputed the constitutionality of warrantless short-term GPS surveillance. 565 U.S. 415. She distinguished *Knotts*, finding its holding suggested that a different principle might apply to situations in which every movement was completely monitored for twenty-four hours. *Id*. at 414 (Sotomayor, J., concurring).[8]

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[7] This contemplates whether the constitutionality of a search may now be based on duration of data acquisition. *See United States v. Skinner*, 690 F.3d 772, 780–781 (6th Cir. 2012) (holding that three days of real-time, non-trespassory cell phone tracking did not "present the concern raised by Justice Alito's concurrence in *Jones*"), *superseded by sentencing guidelines on other grounds*, U.S. Sentencing Guidelines Manual App. C, amend. 794, at 116–18 (Nov. 2015); *United States v Diggs*, 385 F. Supp. 3d 648, 652, 654–55 (N.D. Ill. 2019) (citing *Carpenter* and *Jones* concurrences to determine that warrantless acquisition of one month of historical GPS vehicle data violated the target's reasonable expectation of privacy); *State v. Zahn*, 812 N.W. 2d 490, 497–98 (S.D. 2012) (applying the mosaic theory to determine that twenty-six days of warrantless GPS vehicle tracking violated reasonable expectation of privacy).

[8] The Florida Supreme Court agreed with the court in *United States v. Wilford,* 961 F. Supp. 2d 740, 771 (D. Md. 2013), that the "mosaic" theory has presented "problems in practice . . . where traditional surveillance becomes a search only after some specified period of time." *Tracey v. State,* 152 So. 3d 504, 520 (Fla. 2014). Justice Labarga explained as follows:

> . . . basing the determination as to whether warrantless real time cell site location tracking violates the Fourth Amendment on the length of the time the cell phone is

In *Jones*, the Supreme Court declined to examine whether any exception exists that would render the search "reasonable," because the Government had failed to advance that alternate theory in the lower courts. In leaving resolution of this issue for a future case, the Supreme Court advised, "It may be that achieving the same result through electronic means, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question." *Id*. at 412. This left the question—what are the privacy implications of a warrantless use of GPS data absent a physical intrusion?—unanswered.

We reject Appellant's argument that *Carpenter* and *Jones* compel suppression here. The holding in *Carpenter* is explicitly limited to the warrantless collection of CSLI and did not address other business records that might incidentally reveal location information. Appellant argues that the GPS data at issue here is factually analogous to CSLI. We, however, agree with the State that the two types of data are qualitatively different in that the data at issue here is not the type of arbitrary, all-encompassing surveillance at issue in *Carpenter*.

As explained in *Carpenter*, the harm inherent in a government's warrantless gathering of CSLI is primarily borne of the virtual attachment of the device to its owner—allowing for all-encompassing, perpetual tracking which penetrates private

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> monitored is not a workable analysis. It requires case-by-case, after-the-fact, ad hoc determinations whether the length of the monitoring crossed the threshold of the Fourth Amendment in each case challenged. The Supreme Court has warned against such an ad hoc analysis on a case-by-case basis, stating, "Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment." *Oliver v. United States,* 466 U.S. 170, 181, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984).

Tracey, 152 So. 3d at 520.

spheres—and of the fact that the overwhelming majority of individuals more or less must own a cell phone. 138 S. Ct. at 2218. On these key points, the GPS data at issue is not comparable. The privacy-penetrating capacity of cell phones has been distinguished from cars, which have "little capacity for escaping public scrutiny" as they largely only travel through public thoroughfares. *Id.* (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (noting that individuals regularly leave their cars whereas cell phones are compulsively carried at all times)). Because cars do not bear the same attachment to their owners and cannot penetrate private spaces to the same degree, government acquisition of a vehicle's GPS data does not give rise to the same risk of all-encompassing surveillance as CSLI. An individual often moves about—both publicly and privately—away from their vehicle. Additionally, as an owner's vehicle is frequently in operation and driven by others, GPS tracking of cars does not provide police the level of personal surveillance contemplated with CSLI. Because cell phones are treated as "almost a 'feature of human anatomy,'" tracking of a cell phone *is* tracking of the owner. *Id.* (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)).

An individual cannot claim the same figurative attachment to a vehicle, particularly one that they do not actually own. Here, the GPS data tracked the Honda, while other evidence was required to put Appellant in it. Further, the collection of GPS data in this context encompasses only those car owners who have affirmatively consented to collection of tracking information. Adding further consideration of third-party principles, the consent to tracking on the part of the car owner further dilutes the argument that the precedent of *Carpenter* controls. Although the Court in *Carpenter* forbid the government from warrantlessly accessing seven days of historical CSLI from a target's wireless carriers, it refused to address whether one's "reasonable expectation of privacy in the whole of his physical movements" extends to shorter periods of time or to other location tracking devices. 138 S. Ct. at 2217 n.3, 2219.

Likewise, *Jones* does not mandate a conclusion in this case that acquisition of the GPS monitoring constitutes a search. The Supreme Court expressly limited the holding of *Jones* which found only that the installation of the GPS device on the defendant's car

constituted a trespass, and therefore, was a search. The case did not present the issue of "reasonableness" of such a search. Rather, the conclusion in *Jones* is grounded in the fundamentals of the relevant facts and applicable law.

Instead, we find *Knotts* controlling. In *Knotts*, the Supreme Court permitted the use of a beeper to follow a vehicle because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. at 281. We acknowledge the Court's statement that the "limited use which the government made of the signals from this particular beeper" during a discrete "automotive journey" and reserved the question of whether "different constitutional principles may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible." *Id.* at 283–85 (internal quotation marks omitted).

The fact that GPS data is historical in nature does not alone provide Appellant a reasonable expectation of privacy regarding the information. According to *Knotts*, Appellant had no reasonable expectation of privacy regarding his travels over public thoroughfares. Although technically historical, GPS records of the Honda's location during the commission of the offense remain simply records of his public travels. The fact remains that Appellant chose to operate a car on public roads—a car owned by another who consented to GPS tracking. The police played no role in the recording of the information and simply availed themselves of the advantages afforded by the electronic recording.[9] Under

[9] Although electronic recording of location data would have been out of the question for founding era police, the technology used is not necessarily the relevant consideration. The question is whether the activity itself would be incomprehensible to the founding era public as it would lead to an arbitrary, all-encompassing police state. The "activity" here is police acquisition of information regarding an object's public travels which the object's owner consented to be recorded for access after the fact. One can conceive, for instance, of a founding era shipping company consenting to a valuable shipment being accompanied by a representative of the shipper to record where and how the shipment was transported; it is doubtful that the driver of the

these circumstances, any expectation of privacy on Appellant's part was not objectively reasonable.

Likewise, Appellant's use of the Honda to engage in public travel did not demonstrate a subjective expectation of privacy. As previously stated, the third-party doctrine does not attach automatically to information being transmitted to a third party. Instead, like other aspects of the *Katz* analysis, the nature of any transmission is examined to determine whether a privacy interest will be upset, if information is revealed. *See Carpenter*, 138 S. Ct. at 2219 (rejecting a "mechanical application" of the third-party doctrine). A "lack of voluntariness" cannot be claimed regarding the transmission of GPS information to the financing company. Nothing forced Appellant to use the Honda owned by Ms. Green, and any number of other means of travel were available which were not being tracked. Use of a car owned by another to traverse public streets renders Appellant's purported expectation of privacy unreasonable.

We acknowledge that *Carpenter*'s seemingly sweeping language, its discussion of the fundamental shifts of the technology revolution of the 21st century and discussion of an expansion of individual constitutional rights in this type of data. This may indicate the Supreme Court's willingness to revisit *Knotts*. *See Carpenter*, 138 S. Ct. at 2214. However, the doctrine of *stare decisis* prevails. The Supreme Court has not explicitly overruled *Knotts* and continues to apply its precedent in recent Fourth Amendment analysis. *Id*. at 2018–21. Regarding Supreme Court precedent:

> Its "decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."

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horse-drawn wagon hauling the goods would be able to claim a reasonable expectation of privacy in his location were constables to later ask the company representative about any stops the driver had made. This activity is substantially similar, just in a far more efficient fashion. That said, the activity constitutes unremarkable police conduct which is enhanced with a technological advantage and which does not otherwise present a risk of arbitrary surveillance.

> *Hohn v. United States*, 524 U.S. 236, 252–53, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998). If a Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," the lower court "should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

Howard, 426 F. Supp. 3d at 1258. Because *Knotts* is more factually analogous than *Carpenter*, it controls this Court's holding.

Here, Appellant has failed to demonstrate a *Katz* interest which was encroached upon by the police, and thusly, no search occurred. In the absence of a search, no grounds exist to suppress the evidence. The trial court's denial of the suppression motion is, therefore, affirmed.

The Competency Issue

Appellant also argues that, because the trial court ordered a competency evaluation, it was required to conduct a formal competency hearing before proceeding to trial. The trial court ordered a competency evaluation based on trial counsel's suggestion of incompetence. The record then falls silent regarding the issue. No indication is provided as to whether an expert's report was filed, that any hearing was conducted, or that Appellant was found competent. This constitutes reversible error. *See Berry v. State*, 237 So. 3d 1165 (Fla. 1st DCA 2018).

However, a new trial is not necessarily required. This Court has previously held that "[t]he trial court may make a retroactive determination of competency with no change in Appellant's judgment or sentence, if the evidence that existed prior to the hearing on Appellant's charges supports a finding that he was competent at that time." *Cotton v. State*, 177 So. 3d 666, 668–69 (Fla. 1st DCA 2015). "If the trial court cannot make a retroactive determination, it must properly adjudicate Appellant's present competency and, if the court finds Appellant competent to proceed," conduct a new trial. *Id.* at 669.

For the foregoing reasons, the judgment and sentence are AFFIRMED, in part, REVERSED, in part, and REMANDED for further proceedings consistent with this opinion.

ROBERTS, J., concurs; OSTERHAUS, J., concurs in result with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

OSTERHAUS, J., concurring in result.

I agree that the Fourth Amendment issue should be affirmed. But given the gauntlet of *Carpenter*-related considerations at play, I would not decide this case by holding that individuals lack a reasonable expectation of privacy in the records of their movements recorded by their vehicle's GPS system. Instead, I would affirm based on the good-faith exception to the exclusionary rule.

A couple years back, in *Carpenter v. United States*, 138 S.Ct. 2206, 2217 (2018), the United States Supreme Court restricted law enforcement from obtaining a suspect's cell-site location information (CSLI) from a cell phone company without a warrant because "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." In reaching this decision, the *Carpenter* opinion repeatedly addressed the circumstances involved in its vehicle-GPS case from 2012, *United States v. Jones*, 565 U.S. 400, in which the FBI collected GPS data detailing the movements of a suspect's car for almost a month. *See Carpenter*, 138 S.Ct. at 2215–18. The *Carpenter* opinion addressed the vehicle-GPS issue from *Jones* as follows:

> [F]ive Justices agreed that related privacy concerns would be raised by . . . "surreptitiously activating a stolen

> vehicle detection system" in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone. Since GPS monitoring of a vehicle tracks "every movement" a person makes in that vehicle, the concurring Justices concluded that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"—regardless whether those movements were disclosed to the public at large.
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> A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. . . . [S]ociety's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. Allowing government access to cell-site records contravenes that expectation [of privacy]. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. . . . As with GPS information, the time-stamped [cell-phone] data provides an intimate window into a person's life, revealing . . . his particular movements [and] associations.
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> In *Knotts*, the Court relied on *Smith* to hold that an individual has no reasonable expectation of privacy in public movements that he "voluntarily conveyed to anyone who wanted to look." But when confronted with more pervasive tracking, five Justices agreed that longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search.

Id. at 2215, 2217, 2219–20 (citations omitted).

In view of *Carpenter's* elaboration on *Jones,* its retreat from applying *Knotts* and the third-party disclosure doctrine in continuous digital tracking-oriented cases, *see id.* at 2215–20, I cannot see affirming this case under *Knotts,* or with a holding that

drivers lack a reasonable expectation of privacy in the GPS records of their vehicle's movements.

Rather, I would affirm this case based on the good-faith exception to the exclusionary rule. *See Davis v. United States*, 564 U.S. 229, 236 (2011) (discussing the good-faith exception). That is, even if the evidence involved a protected category of information obtained in violation of the Fourth Amendment, it is not subject to exclusion because the officer acted reasonably in accordance with then-good law. The exclusionary rule is a "prudential' doctrine created by [the Supreme] Court to 'compel respect for the constitutional guaranty'" and "deter future Fourth Amendment violations." *Id.* at 236–37. Suppression is not an automatic consequence of a Fourth Amendment violation, but instead a "last resort," justified only where "the deterrence benefits of suppression . . . outweigh [the] heavy costs" of ignoring reliable, trustworthy evidence bearing on guilt or innocence. *See id.* at 237. It follows that when officers act with "an objectively 'reasonable good-faith belief' that their conduct is lawful," the exclusionary rule doesn't apply because there is little or no deterrence-oriented benefit to be gained. *See id.* at 238.

The good-faith exception applies in this case because, at the time the officer obtained the vehicle GPS data, *Carpenter* hadn't been decided. Under the applicable law in 2016, it was not unlawful for an officer to investigate a crime by seeking pervasive location data from a third-party company who had collected the data for its own business purposes with consent. Instead, the United States Supreme Court had held that individuals lack protectable Fourth Amendment interests in records voluntarily disclosed to and possessed, owned, and controlled by a third party. *See United States v. Miller*, 425 U.S. 435, 442–44 (1976); *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979); *cf. Yarbrough v. State*, 473 So. 2d 766, 767 (Fla. 1st DCA 1985) (finding no legitimate expectation of privacy as to numbers dialed into a commercial telephone system). Thus, here, when the officer obtained the GPS data from the car financing company in 2016, he had no good reason to believe that a warrant was needed. *See also United States v. Davis*, 785 F.3d 498, 513–14 (11th Cir. 2015) (en banc) (noting that pre-*Carpenter, Jones* held that a GPS tracker placed on a private vehicle was a search because the tracker was attached

on private property, not necessarily because real-time tracking intrudes on a reasonable expectation of privacy). The officer here acted reasonably in accordance with then-good law.

One additional reason for applying the good-faith exception in this case is that the car's owner (Appellant's girlfriend) reported it stolen to police, and missing to her car-financing company, during the same time that Appellant was using the car in committing the murder. Under these circumstances, it is hardly unreasonable that law enforcement, with the owner's apparent consent, investigated the vehicle's location for the narrow slice of time that the car went missing (even if the owner's testimony raised questions later about whether the car had really been stolen). For this reason, too, given the objectively reasonable response of law enforcement to her report, this case is ill-suited to applying the exclusionary rule as a Fourth Amendment-related deterrent.

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