

**COMPETITION PROBLEM FOR THE
2013 ROBERT ORSECK MEMORIAL MOOT COURT COMPETITION**

While most Tampa Bay Buccaneers fans remember October 16, 2011, as one of the few winning game days in a tough season, a few fans were not so lucky that day. During that balmy afternoon game, six cars parked in a row in Lot 15 of the stadium were burglarized. Passenger side windows were smashed; and wallets, purses, credit cards, and cash were stolen. All of the car owners filed reports with the Hillsborough Police Department. The police were unable to lift fingerprints off the cars, but were hopeful that they could catch the criminal(s) involved when the victims' credit cards were used.

Indeed, three stolen Visa credit cards were used at Walmart, Publix, and Target stores in Hillsborough County on October 17, 18, and 19 respectively. When the investigating police Detective, Jim Coffee, of the Hillsborough Police Department's Special Investigations Unit, viewed the surveillance video from Walmart, he thought he recognized the man using the credit cards as Stewart West.

Detective Coffee believed he recognized Stewart West because he had testified against Mr. West in a 2010 vehicle burglary case. In that case, Detective Coffee caught Mr. West breaking into a string of cars in broad daylight in a residential neighborhood in New Tampa. Mr. West, who was wearing gloves at the time, broke out passenger windows and stole several iPods, iPhones, Garmin GPS devices, and removable car stereo components from cars parked along one city street. Mr. West was convicted of several counts of burglary of a conveyance by a jury and sentenced by the judge to time served and probation.

Detective Coffee recalled that Mr. West had a lengthy rap sheet at the time of the 2010 arrest, and when Detective Coffee pulled an updated criminal history report, he saw several cases involving Mr. West. One case from 1997 involved a guilty plea to charges of fraudulent use of a credit card related to breaking into a race trailer at the infield garage at Daytona International Speedway during the day of the Daytona 500. The Visa credit card was used at a Target store across the street from the Speedway the day after the race. In that case, Mr. West pled guilty to burglary and fraudulent use of a credit card.

On December 16, 2011, Stewart West was arrested for the crimes that occurred on October 16-19, 2011, and charged with six counts of felony burglary of a conveyance and three counts of misdemeanor fraudulent use of a credit card. As the case headed toward trial, Mr. West offered to plea to one misdemeanor crime: using a credit card for a \$78 purchase as captured on video at Walmart. Mr. West claimed that he found a wallet on the ground and used a credit card in the wallet to buy a few things he desperately needed. He offered to plea guilty to this crime and serve three months' time in county jail. However, Mr. West denied breaking into any vehicles and denied using any of the other credit cards.

After learning about Mr. West's plea offer and having a quick consultation with the prosecutor, Detective Coffee decided to obtain the historical cell site data from Mr. West's Verizon Wireless cell phone on the night of the Buccaneers' football game and each of the days that the stolen credit cards were used. Historical cell site information involves records that identify the cell

phone tower through which customer calls are handled, thereby identifying the location from which a call is made. Wireless phones constantly communicate with nearby cell towers, revealing approximate locations for the phones at any time. The wireless providers store the cell sites, together with other information from each outgoing and incoming call such as the calling number, the time, and the area code for the location. The information is automatically collected and maintained in most wireless providers' billing departments.

Detective Coffee issued and properly served an investigative subpoena on Verizon Wireless under subsection 934.23(4)(b), Florida Statutes (2011). The subpoena sought the historical cell site information from Mr. West's cell phone for the week of October 16, 2011. No court order or warrant was obtained by the Special Investigations Unit in connection with the issuance of the subpoena, nor was Mr. West notified by law enforcement authorities or Verizon Wireless that the records were being requested.

Although it took Verizon Wireless some time to produce information responsive to the investigative subpoena, Verizon Wireless's billing department produced a huge stack of paper showing the location of Mr. West's cell phone every minute on October 16-22, 2011. The Verizon Wireless billing records showed Mr. West's phone to be in the vicinity of Raymond James Stadium on the afternoon of October 16, 2011, although it could not precisely pinpoint him to Lot 15. The records did show Mr. West's phone to be in Wal-Mart on the morning of October 17, and Target on the afternoon of October 19. None of the records showed a location near Publix on October 18.

Detective Coffee provided this information to the prosecutor, who in turn handed it over to Mr. West's defense attorney as discovery in the case. Armed with evidence that Stewart West (or at least his cell phone) was near the scene of the burglaries and two of the three stores, the prosecutor rejected Mr. West's plea offer and did not make an offer.

Mr. West's defense attorney immediately moved to suppress the evidence. He filed a written motion and set a hearing, where he argued that the Fourth Amendment was implicated and a warrant was required before any cell phone data could be produced. At minimum, the attorney claimed, subsection 934.23(4)(a), Florida Statutes required a warrant or a court order instead of an investigative subpoena. Furthermore, he argued that the cell phone data, having been obtained improperly, must not be allowed into evidence at trial. The trial court judge denied the motion to suppress, and commented that although perhaps a court order should have been obtained, he would have granted the order because he saw reasonable grounds to believe the cell phone records were relevant, and did not violate Mr. West's expectation of privacy because the information provided by Verizon merely established Mr. West's cell phone location while in a public place.

After successfully defeating Mr. West's motion to suppress, the prosecutor filed a notice of intent to use similar fact evidence and properly provided a written statement that the State intended to introduce evidence of the 2010 car burglaries and the 1997 trailer burglary. Mr. West's defense attorney objected that these crimes were being offered merely to show the Defendant's propensity to break into vehicles. The prosecutor responded that the prior crimes were proper collateral crimes evidence, commonly referred to as Williams Rule evidence, used to show motive, plan, scheme, and identity of the defendant. The trial court looked at whether Mr. West committed the prior crimes, whether the prior crimes were sufficiently similar, when the prior crimes occurred, and whether it

would be too prejudicial to admit evidence of the prior crimes. After weighing these factors, the trial court judge ruled in favor of the State, allowing the introduction of evidence of the 2010 car burglaries and the 1997 trailer burglary, particularly commenting that since identity was an issue in the case, the prosecutor could use the prior crimes.

The case proceeded to trial in April 2012. Evidence of the prior crimes, as well as the cell phone data, were introduced into evidence at trial over defense objections. After thirty (30) minutes of deliberation, the jury convicted Mr. West of all charges, except the use of the credit card at Publix. The trial court judge sentenced Mr. West to time served on the misdemeanor crimes and consecutive terms of imprisonment on the felony crimes, resulting in a combined total prison sentence of thirty (30) years. Mr. West appealed his conviction, raising two (2) issues on appeal.

First, Mr. West's attorney argued that the Fourth Amendment was implicated and a finding of probable cause by a judge and a subsequent warrant was required before the historical cell phone data could be produced. By failing to obtain a warrant, the police illegally searched Mr. West's phone records to find his physical location, in violation of his Fourth Amendment rights.

Second, Mr. West's attorney argued that evidence of the 2010 car burglaries and the 1997 trailer burglary should not have been admitted. The prior crimes were not sufficiently similar, were remote in time, were highly prejudicial to Mr. West, and became a feature at trial.

The appellate court agreed with both of the Defendant's arguments on appeal. Judge Herbert Smith of Florida's Second District Court of Appeal wrote the majority opinion holding that there was a search under the Fourth Amendment which required a search warrant, or at least a court order, under subsection 934.23(4)(a), Florida Statutes. He also held that the defense attorney's objections to the Williams Rule evidence had merit and that it was error to admit evidence of the prior convictions. The majority further concluded that neither error could be considered harmless. The majority opinion reversed and remanded the case for a new trial precluding the admission of the cell phone data or prior crimes. The opinion also certified the following question of great importance to the Florida Supreme Court: Whether a warrant establishing probable cause is necessary before law enforcement may seek historical cell site data.

Specifically, on the Fourth Amendment issue, Judge Smith found that obtaining a week's worth of locations, including public and private areas, implicated Fourth Amendment protections. Obtaining cell site information, at least for the extended period of time in this case, would require more than compliance with subsection 934.23(4)(b), Florida Statutes. The detective and the State should have obtained a warrant or court order establishing probable cause in order to obtain Mr. West's cell phone data. Judge Smith wrote, in relevant part:

It does not appear that the State could have shown probable cause. It did not know what the historical cell phone data would reveal, whether it would show the defendant in private areas or only on public roadways. Cell phones are often used indoors, in private homes, in bedrooms, or in bathrooms. No person would invite the police to monitor his or her bedroom or bathroom every sixty

seconds. The home, the bedroom, and the bathroom have the highest expectation of privacy – which the police here necessarily invaded.

The majority opinion continued:

[a]lthough other courts have found differently, in light of *United States v. Jones*, — U.S. —, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), where the U.S. Supreme Court unanimously ruled that the governments installation of a GPS device and tracking of twenty-eight days worth of car movements was a search, we must find that the historical cell site information obtained in this case was a search, and the police search was not reasonable.

On the Williams Rule issue, Judge Smith held that the prior crime evidence was used to establish identity, which requires proof of substantial similarity between the past crimes and the current charges. In holding the trial court abused its discretion in admitting the similar crimes evidence, the majority stated:

These crimes were not sufficiently similar, and there was no pattern that showed something special or unusual that pointed to the Defendant. Indeed, Detective Coffee did not suspect Mr. West until seeing him on videotape. And, the facts are not unique in nature nor do they establish a pattern so unusual to suggest the burglaries could have only been committed by Mr. West.

Conversely, a short dissenting opinion by Judge Alfred Adams distinguished historical data from real time searches:

The police did not follow Mr. West around; they simply obtained past information to determine whether he was at the scene of the crime at the time of the crime. While it would have been more prudent to obtain a warrant, no warrant or showing of probable cause was necessary. Technology, especially in the hands of a third party, should be allowed to be put to good use catching known thieves. Although the majority opinion makes much of privacy issues in this case, if a person gives his cell phone provider access to his bedroom and bathroom, then the police should be invited into these spaces as well.

Judge Adams also would have found no error in admitting the prior convictions. He wrote:

It is clear that Mr. West's prior convictions are evidence of relevant collateral crime evidence under Williams Rule. Mr. West's past criminal history shows him to be a burglar, who breaks into the same type of vehicles from the same window. The vehicles are relevant to establish a unique pattern and shows identification of the defendant.

Unlike many burglars, who operate under cover of darkness, this burglar operates during the day time, wearing gloves, and when he is successful in stealing credit cards, also uses them during the daytime. These crimes were not too remote in time to be relevant, and were highly probative. Whether any prior crimes can be admitted under the Williams Rule is a highly individualized and factual inquiry, and, as the trial court made a proper inquiry, we should defer to that judge on the facts.

The State of Florida retained your firm as special counsel to assist the Attorney General's office and represent the State before the Florida Supreme Court. The Supreme Court of Florida accepted jurisdiction over the case, and asked for briefing on both issues on appeal. Both state and federal law, as well as secondary sources, may be used to address the legal issues. Cases and other authorities may also be used if desired to provide more information on the mechanics of recording, storing, and obtaining historical cell cite information.

ISSUES ON APPEAL

The only issues on appeal are as follows:

- I. Whether the appellate court incorrectly held that obtaining historical cell site information was a search requiring a warrant or other showing of probable cause when there was no reasonable expectation of privacy in records held by a third party?**

- II. Whether the appellate court erred in reversing the trial court's decision to allow in Williams Rule evidence when the prior convictions were similar, recent, and not unduly prejudicial?**

All briefs will be written as initial briefs by the Petitioner, the State of Florida. The issues can be restated in your brief on the merits. Your discussion of both issues should include the standard of review and what relief should be afforded if the State of Florida prevails on that issue.

When presenting oral argument, one team will argue for the State of Florida and the other team will argue for Mr. West. One team member from each team will argue the first issue, and another team member will argue the second issue.