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Montana Code Annotated 2011

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Constitution of Montana -- Article II -- DECLARATION OF RIGHTS

Section 11. Searches and seizures. The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

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Constitution of Montana -- Article II -- DECLARATION OF RIGHTS

Section 10. Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

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U.S. Constitution

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AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Supreme Court hears cell-phone privacy case in Bozeman

By GAIL SCHONTZLER, Chronicle Staff Writer | Posted: Tuesday, May 4, 2010 12:15 am

Attorneys battled before the Montana Supreme Court, meeting Monday in Bozeman, over how much power police have to record cell phone conversations without a search warrant.

Attorney Koan Mercer, representing a Havre man convicted of a bloody pistol-whipping assault, argued that if the cell-phone recordings are allowed, "then the government can use this form of surveillance to gather and record intimate information about anyone, at any time, for as long as the government desires."

On the other side, Matthew Cochenour, assistant attorney general, argued that the state Supreme Court should uphold the legal rules that Montana courts and police have followed for the last 30 years. Those rules allow police recordings of phone calls to be used as evidence as long as one party to the conversation consents.

The argument over cell phones and Montanans' fundamental rights to privacy and against unreasonable searches was conducted at Montana State University during Law Day. About 250 students and community members took the chance to watch the seven black-robed Supreme Court justices in action.

The case started with the conviction of Brian Hayden Allen for beating Louis Escobedo owed Allen money for a drug deal. On Jan. 27, 2008, Allen drove with his girlfriend to Escobedo's home, got him into her car, demanded money and when Escobedo said he couldn't pay, pistol whipped him 15 to 20 times until he blacked out. Then Allen held a gun to the man's head and shot out the car's back window. With his blood all over the car, Escobedo was let go. He required seven staples in his head for his injuries.

A week later, the girlfriend, Kristen Golie, went to police. A drug task force had her secretly record her cell phone conversations with Allen.

A jury convicted Allen of two counts of assault with a weapon and one of criminal endangerment. Mercer challenged the conviction on three grounds and asked for a new trial.

Mercer's main challenge was the cell phone recordings. He asked the justices to overturn their previous decisions and declare the recordings illegal.

Before the Supreme Court hearing began, Andrew King-Ries, associate professor at the University of Montana Law School, explained to the audience that the Fourth Amendment to the U.S. Constitution protects all citizens against unreasonable searches. But Montana's Constitution also protects citizens' right to privacy, and the Montana high court has used that right to provide greater protections against searches.

"It means a cop in Montana is more likely to need a search warrant than a cop in the federal system," King-Ries said.

In 2008 the Montana Supreme Court ruled that people have a reasonable expectation of privacy in face-to-face conversations in their homes, King-Ries said. A key argument Monday was whether average Montanans also expect privacy when they conduct cell phone conversations in public. Mercer argued that just because Montanans talk on the cell phone around other people, at a bank and a drive-up window, for example, it doesn't mean they expect the government to be recording their conversations. The drug task force had plenty of time to get a search warrant from a judge, he added.

Arguing for the state, Cochenour said that the key factor in whether a privacy expectation is reasonable is whether the person can exert control over the situation. He argued that when Allen conducted a cell-phone conversation, while doing errands around town, he couldn't tell if someone else was listening. The conversation could have been on speaker phone, or coming out through the Blue Tooth system in a car's speakers.

Mercer rebutted that just because there's a possibility of police listening in, that doesn't change the fact that Montanans expect their cell phone chats are private.

"You mean our expectations of privacy are defined by the technology?" asked Justice James Nelson. "That's a scary thought."

Cochenour also argued that there was plenty of evidence to convict Allen, even without the cell-phone recordings.

Two other issues were challenged by Allen's attorney. One was that one potential juror, apparently eager to get out of jury duty, said he had read news stories, was pro-law enforcement, and would have trouble being impartial, especially if the trial took longer than two days. The judge should have kicked the man off the jury, instead of making the defense use up one of its limited preemptory challenges, Mercer said. He also argued that the jury should have been instructed that because the girlfriend was an accomplice, her testimony should be viewed with mistrust.

After the hearing, high school seniors Josh Allen and Ray Jimenez from Bozeman's Mount Ellis Academy said they'd learned a lot.

Justice Mike Wheat of Bozeman, who joined the court in January, said he thinks it's "terrific" that the Supreme Court holds sessions around the state. "It lets the public see how we do our work," Wheat said.

Carson Taylor, a Bozeman city commissioner and attorney, said he'd asked his MSU business students taking introduction to law to observe the case, which had good arguments on both sides and good questioning from the justices.

"This is the most fun I've had since I was elected," Taylor said.

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Press Release
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ACLU of Montana Seeks Details on Government Phone Tracking

Letters are part of a coordinated ACLU campaign that is one of the largest information requests in American history

HELENA – The American Civil Liberties Union of Montana sent letters today to the state of Montana and to local law enforcement in six counties requesting information about if and how they are using cell phone data to track Montanans.

Letters were sent to the Montana Division of Criminal Investigation and to sheriffs in Cascade, Yellowstone, Missoula, Gallatin, Flathead and Butte-Silver Bow counties.

"We want to assure that privacy protections keep pace with technological advances," said ACLU of Montana Legal Director Betsy Griffing. "Relying upon the express right of privacy in the Montana Constitution, the Montana Supreme Court has ruled that cell phone communications are private and cannot be monitored without a warrant. We believe that right of privacy also protects location information law enforcement can get from every person's cell phone."

Law enforcement agencies are being asked for information including:

- Policies and procedures for obtaining cell phone location records;
- Statistics on how frequently law enforcement agencies obtain cell phone location data;
- The use of cell phone location records to identify users at a particular location or within "communities of interest," and
- Other policies and procedures related to mobile phone location data.

The ACLU of Montana's requests are part of a massive coordinated information-seeking campaign, in which 34 ACLU affiliates in 31 states today are sending similar requests to more than 370 law enforcement agencies large and small. The campaign is one of the largest coordinated information act requests in American history. The requests, being filed under the states' freedom of information laws, are an effort to strip away the secrecy that has surrounded law enforcement use of cell phone tracking capabilities.

"The ability to access cell phone location data is an incredibly powerful tool and its use is shrouded in secrecy. The public has a right to know how and under what circumstances their location information is being accessed by the government," said Catherine Crump, staff attorney for the ACLU Speech, Privacy and Technology Project. "A detailed history of someone's movements is extremely personal and is the kind of information the Constitution protects."

Law enforcement's use of cell phone location data has been widespread for years, although it has become increasingly controversial recently. Just last week, the general counsel of the National Security Agency suggested to members of Congress that the NSA might have the authority to collect the location information of American citizens inside the U.S. Also, this spring, researchers revealed that iPhones were collecting and storing location information in unknown files on the phone.

The U.S. Supreme Court has agreed to decide whether police need a warrant to place a GPS tracking device on a person's vehicle. While that case does not involve cell phones, it could influence the rules police have to follow for cell phone tracking.

Congress is considering the Geolocation Privacy and Surveillance Act, a bill supported by the ACLU that would require police to get a warrant to obtain personal location information. The bill would protect both historical and real-time location data, and would also require customers' consent for telecommunications companies to collect location data.

Today's requests are part of the ACLU's Demand Your dotRights Campaign, the organization's campaign to make sure that as technology advances, privacy rights are not left behind.

Requests filed in Montana are available at www.aclumontana.org. More information about requests in other states can be found at www.aclu.org/locationtracking

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