STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2014AP1769-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LANCE DONELLE BUTLER, JR.,

Defendant-Appellant.

ON APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND DENIAL OF A POSTCONVICTION MOTION IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLES DENNIS R. CIMPL (JUDGMENT OF CONVICTION) AND GLENN H. YAMAHIRO (POSTCONVICTION MOTION), PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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Authorities Cited

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ARGUMENT

RESPONSE TO THE STATE'S ARGUMENT THAT TRIAL COUNSEL WAS NOT INEFFECTIVE.

The State's brief raises three major points:

(1) Trial counsel could not have been ineffective because, at the time the case was commenced against Butler, the law was unsettled: there was no published decision on the application of Wis. Stat. § 907.01 and 02 to cell phone mapping.

(2) The great weight of the precedent from other jurisdictions allows the use of cell phone mapping.

(3) Butler's postconviction motion did not allege ineffectiveness for trial counsel's failure to object to the testimony of the witnesses from the cell phone companies, which the State claims was the essentially the same as that provided by Officers Brosseau and Draeger, who merely described how the mapped the coordinates of the cell towers with data supplied by the cell phone companies.

A. The State's "New Law" Argument.

The State first argues that trial counsel could not have been ineffective for failing to raise a *Daubert* challenge to the officers' cell phone testimony, for the legislature had only adopted the *Daubert* principles a few months before Butler was arrested and no precedent in Wisconsin supported Butler's postconviction argument (State's brief at 6).

As a general rule, defense counsel is ineffective for failing to know a defense provided by statute. *State v. Felton*, 110 Wis. 2d 485, 504, 329 N.W.2d 161 (1983). The A.B.A. Defense Function Standard 5.1(a) obliges defense counsel to be fully informed of the law pertinent to the case and advise the client accordingly.

It is important to remember that the question should not be whether case law existed on the issue of cell phone

mapping. The real question is whether defense counsel should have asked for a *Daubert* hearing on admissibility. The Wisconsin legislature adopted *Daubert* with some fanfare. *Wisconsin Lawyer* magazine published an article describing the new law soon after its enactment. Daniel Blinka, *The Daubert Standard in Wisconsin: A Primer.* Wisconsin Lawyer, March, 2011. Moreover, even though Butler was arrested on a few months after the adoption of the new law, his trial commenced a year later, in March of 2012.

In essence, the State's argument is that a defendant cannot seek relief under a new law if defense counsel is ignorant of the law. An ignorant lawyer provides no avenue for redress because a lawyer is not charged with responsibility for knowing recent changes in the law. Under the State's formulation, defendants cannot avail themselves of a new law unless asserted by their lawyer, and as long as no lawyer asserts it and no published decision ensues, defendants are perennially out of luck because the lack of precedence would preclude a successful ineffective assistance of counsel claim.

For this reason, a recent change in the law should not preclude a successful claim of ineffective assistance based on defense counsel's failure to apprehend the new law.

B. The Cases Relied Upon by the State Support Butler's position.

The State cites *U.S. v. Jones*, 918 F.Supp.2d 1 (D.D.C. 2013), for the proposition that the use of cell phone location records to determine the general location of a cell phone is widely accepted (State's brief at 7, 17). But *Jones* strongly qualified the use of this evidence:

> Agent Eicher did not claim that the defendant's phone was within the pie-shaped wedges at the time the call was made. However, the Court agrees that the use of the wedges could confuse members of the jury and mislead them into believing that defendant's phone must have

> been within that space. *Thus, in order to avoid any unfair prejudice to the defendant, the arcs used to depict the outer limit of the pie-shaped wedges should be removed from agent Eicher's report.* The wedges will then appear as open-ended "V" shapes opening out in the direction of the sector used by the phone. With this modification, the Court does not believe that there is any danger of unfair prejudice.
>
> *U.S. v. Jones*, 918 F.Supp.2d at 6 (emphasis added).

The map used against Butler would not have passed muster under *Jones*. Officer Brosseau's pie-shaped wedges were shaded orange, and this orange coloring showed a limit to the sector's outward range. At the hearing on the postconviction motion, Officer Brosseau testified as follows:

> Q: And the different orange areas that look like sort of pie pieces or double pie pieces relate to what you would call areas of service for a particular sector from a particular cell tower. That's what you were purporting to exhibit with Exhibit 10, correct?
>
> A: Correct.
>
> Q: And when you plot the shaded area, for example on Exhibit 10, when I say shaded it's orange, you're showing the approximate range of service for that tower. Fair to say?
>
> A: Correct.
>
> Q: At any given moment that line – that is the perimeter for service would in fact may be have to get moved out a little bit or pulled in a little bit. You're showing an approximate range of service. Fair to say?
>
> A: Correct
>
> Q: And that orange sector, its furthest point from what would be Tower 317 on that map is designed – to show an area that covers how far away? A half mile, a mile, mile-and-a-half?
>
> A: I believe that's approximately a mile-and-a-half.
>
> Q: Approximate?

A: Yes.

Q: Based on your training and experience what's – assuming unobstructed, what we'll call regular strength for a tower, do you know based on your training and experience and with no other towers around how far out would a tower reach?

A: In the Milwaukee metro area we find that these towers generally cannot reach more than a mile-and-a-half.

Q: How about out in the countryside in Nebraska in the middle of nowhere with no mountains on a clear day, that kind of thing? Do you have some sense about how far a tower could take calls from, how far away?

A: Certainly within a few miles. Five miles would not be unheard of.

Q: On the day in question, February 21, 2011, you have no idea whether or how obstructions, weather, topography, any of that may have affected your findings represented by that map?

A: Correct.
(89:7, 21-22)

Officer Brosseau's testimony was consistent with what the *Jones* court found prejudicial: the officer drew a finite area representing the reach of each cell tower. Although he may not have bounded the area of coverage with an arc as was done in *Jones*, he achieved the same by shading orange a finite area. This showed an outer limit to pie slices or sectors.

Additionally, without any basis for knowing, Officer Brosseau proposed a 1.5 mile limit to the tower range, while acknowledging it could not extend as far as five miles in the absence of obstructions (such as in Nebraska), even though he was unable to say whether any obstruction affected the coverage range in this case.

The State also relied upon *U.S. v. Evans*, 892 F.Supp. 2d 949 (N.D.Ill 2012) (State's brief at 17-18). In *Evans*, Special Agent Raschke was only allowed to testify as to the cell data obtained for Evans' phone and the location of the cell towers used by Evans' phone in relation to other locations relevant to the crime. But he was not allowed to testify, in the absence of satisfying *Daubert*, about granulization theory or the process by which a cell phone connects to a given tower. *Id.* at 954.

Granulization theory involves identification of (1) the physical location of the cell towers used by the phone during the relevant time period, (2) the specific antenna used at each cell site, and (3) the direction of the antenna's coverage. Then, the range of each antenna's coverage is estimated based on the proximity of the tower to other towers in the area, which will be the area the cell phone could connect with the tower given the angle of the antenna and the strength of its signal. *Id*. at 952.

Despite Special Agent Raschke's expertise, the federal district court was not convinced of the reliability of granualization theory. This theory was untested by the scientific community. Special Agent Raschke presented no scientific evidence and did not consider the multiple factors that could affect the strength of a tower. *Id*. at 956.

Special Agent Raschke was only allowed to testify as to the location of the cell tower in relation to the locations relevant to the crime. This does not comport with Officer Brosseau's drawing of the shaded pie slices or sectors that purportedly showed the area of coverage by individual towers. This testimony went beyond a mere showing of the cell tower's location and the scene of the crime.

C. The Cell Phone Company Employees Did Not Provide the Same Testimony as the Milwaukee Police Officers.

The State makes much of the fact that Butler did not object to the testimony of the two cell phone company employees (State's brief at 8, 14, 19-20). This testimony, the State argued, was the same as the two police officers, and because Butler did not object, he cannot now successfully claim prejudice from his lawyer's failure to object to the officer's testimony (*Id.*).

But the police officers supplied "expert" testimony for which they were unqualified and that went beyond the testimony from the cell phone company employees.

Ryan Harger, from Sprint Nextel, testified that all calls go to the strongest tower, not necessarily the closest one, and that factors such as network congestion, terrain, weather conditions and maintenance may affect which tower receives a signal from a particular cell phone at any specific time (80:75-76). Daniel Markus, from Verizon, also testified about the effect of obstructions on whether the closest tower receives the cell call (80:100-101).

Moreover, as the State admits, the cell phone company "provided the number of the cell tower, the GPS coordinates for the tower, and the sector or direction of the antenna" (State's brief at 14). But, contrary to the State's assertion, Officer Brosseau did more than use this information to plot the location of the cell towers on a map. As noted above, he drew ranges of coverage for the antennae, as depicted by the orange-shaded pie slices on his map.

Only the cell tower information (location and direction of the antennae) came from the cell phone company witnesses; Officer Brosseau mapped the pie slices based on

his purported expertise. He did not and could not explain any areas of potential overlapping coverage and the potential influence of confounding factors.

CONCLUSION

For the reasons set forth here and in his brief-in-chief, Mr. Butler respectfully urges this court to vacate the judgment of conviction or remand the case for a *Machner* hearing.

Dated: January 20, 2015

Respectfully submitted,

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CERTIFICATION OF LENGTH AND FORM

I certify that this brief conforms to the rules for a brief produced using a proportional serif font. The length of this brief is 2,182 words.

Dated: January 20, 2015

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that pursuant to Wisconsin Statutes (Rule) 809.19(12), I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and form to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: January 20, 2015

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