



“The best trial attorneys ensure that they continually educate themselves, not only on core competencies, but on the technology relevant to their clients’ cases.”

Young Lawyers

BY MATTHEW DIGESTI, ESQ., YOUNG LAWYERS SECTION CHAIR

TECHNOLOGY: THE DIFFERENCE BETWEEN FREEDOM AND A PRISON SENTENCE FOR YOUR CLIENT

A criminal jury trial is like no other forum in the world. Best-selling books are written about them. Courtroom television dramas draw millions of viewers. Twenty-four hour news coverage sensationalizes criminal trials in real time. Representing an individual in a criminal jury trial is a pressure unlike any other; that makes understanding the technology involved in your case critical. Technology may mean the difference between freedom and a prison sentence for your client.

An effective criminal defense lawyer is, in my opinion, the cream of the trial attorney crop. It takes years, if not decades, to master the art of trial. While a significant emphasis is placed on training criminal defense lawyers in trial technique, insufficient emphasis is placed on ensuring criminal defense lawyers understand technology. As will be demonstrated, criminal defense lawyers have an obligation, not only to improve trial technique, but to continually improve their own understanding of technological advances. If this obligation is neglected, an attorney may find himself or herself defending against a claim for ineffective assistance of counsel in violation of the client’s Sixth Amendment rights.

Before I transitioned to business litigation full-time, I represented felons who challenged their convictions through writs of habeas corpus. It was an excellent exercise in criminal law and procedure. I reviewed criminal cases, from start to finish, with a single goal — find each mistake defense counsel made and use that mistake to argue that the court must vacate the defendant’s judgment of conviction.

For those attorneys unfamiliar with post-conviction proceedings, an individual convicted of a crime may petition the district court for relief from their judgment of conviction. (NRS 34.360). The petition generally argues that the petitioner’s Sixth Amendment right to effective assistance

of counsel was violated because counsel’s representation at trial, or on appeal, fell below an objective standard of reasonableness. (*Strickland v. Washington*, 466 U.S. 668, 690 (1998)).

More and more frequently, courts across the country are finding that attorneys violate an individual’s constitutional right to effective assistance of counsel if an attorney fails to properly research and argue technology issues that arise in a case. This article will highlight one common, yet relatively unknown, technology issue that arises in many criminal proceedings: tracking the location of cellular phones.

Cellular phones are ubiquitous. Given their ubiquity, law enforcement focuses on cellular phone evidence from the outset of almost every criminal investigation. One study found that in 2013, 37,839 subpoenas, court orders and search warrants were served on AT&T alone. These requests for information focused on a single item: location data.

When a cellular phone is used, it either transmits or receives signals from a cellular phone tower. That location data is stored for a certain period of time and is subject to retrieval by law enforcement agencies during criminal investigations. The theory is simple: if tower data can place a defendant at the scene of a crime, on the date and at the time the crime was committed, a strong argument exists for conviction. This theory, however, is a trap for the uninformed defense attorney.

On May 25, 2002, a prostitute was strangled to death. Her naked body was found in Kelley Point Park in Portland, Oregon. The medical examiner performing the autopsy opined that the woman died at 11:40 a.m. On August 16, 2002, Portland police arrested Lisa Roberts, the victim’s partner, and charged her with intentional murder, assault, harassment and menacing.

As the case neared trial, the prosecution disclosed that it had conducted an analysis of Roberts' cellular phone data on the day the crime was committed. According to the prosecution, the analysis showed that Roberts' cellular phone was near Kelley Point Park on the morning of the murder. Defense counsel hired an expert to analyze the cellular phone data, but the analysis was never completed. Once confronted with the prosecution's expert report and opinion, Roberts chose to plead guilty to a lesser charge: manslaughter in the first degree. Roberts was sentenced to 15 years in prison.

Contrary to somewhat common belief, cellular phone towers cannot pinpoint a cell phone's location. A single tower can only place a mobile phone in a broad area and, even then, variables such as call load, network tower software and cellular phone software can affect the accuracy of the placement.

Moreover, if a prosecutor wants to place a cellular phone at an exact location, at an exact time, a three-tower triangulation must be conducted. However, even a triangulation has limits. A triangulation cannot reveal past locations; it can only reveal the location of a cellular phone

at the time the triangulation was conducted. Therefore, any criminal charges based on cellular tower data must be carefully scrutinized by an expert.

In April of this year, a judge in Oregon granted Roberts' post-conviction writ of habeas corpus. Among other findings, the court held that defense counsel "failed to take reasonable steps to collect the relevant data and independently evaluate the reliability of the [prosecution's] analysis before advising his client to plead guilty to manslaughter." The District Attorney's office responded by stating that, although they felt Roberts' was indeed guilty, it would not seek to prosecute her further, because she was nearing the end of her sentence. In all, Roberts served nine years and four months in prison for a crime of which she was never found guilty.

Technology changes at a rapid pace. The best trial attorneys ensure that they continually educate themselves, not only on core competencies, but on the technology relevant to their clients' cases. It is a never-ending learning process. But, as the Roberts case demonstrates, only you, as the attorney, stand between your client and a prison sentence. ■

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