

Data Mining Minnesota Murder Victim's Cell Phone Reveals Smoking Gun Evidence

State v. Ferguson, 804 N.W.2d 586 (Minn. 2011)

Introduction

Television programs routinely show attorneys and investigators engaging in searches for the proverbial “**smoking gun.**” Whether for inculpatory or exculpatory purposes, discovery of essential evidence can make or break a case, especially when a life sentence without parole hangs in the balance.

In the landmark decision cited above the Minnesota Supreme Court overturned a Hennepin County District Court first degree murder conviction. The decision revolved heavily around the lower court's ruling that prohibited admission of evidence identifying an **alternative perpetrator.**

John J. Carney, *Chief Technology Officer* of Carney Forensics, recovered cell phone forensic evidence that, when combined with other defense evidence, surpassed the necessary evidentiary threshold for admissibility described in Justice Paul H. Anderson's majority *Ferguson* opinion. The refusal to allow that evidence in the lower court, according to the Supreme Court, violated Calvin Ferguson's constitutionally-protected right to present a **complete defense.**

A Brief Case History

Irene Burks' tragic shooting death in September, 2006, witnessed by several bystanders, prompted a first degree murder charge against Calvin Ferguson. Hennepin County District Judge Margaret Daly prohibited defense attempts to present evidence of an alternative shooter, Christopher Jennings, "an acquaintance of Burks" (*Ferguson*, at 590), and also evidence that Jennings had direct links to the victim and the crime itself.

Prosecutors did not provide physical evidence that Calvin Ferguson was the shooter and questions regarding eyewitness identification were also restricted. The jury found Ferguson guilty of first degree murder. Judge Daly imposed a life sentence without parole. Ferguson appealed in March, 2010.

The defense appealed the case to the Minnesota Supreme Court on eight separate claims. The Court's decision found that the lower court erred in its improper denial of foundational evidence pointing to an alternative perpetrator. "Ferguson presented multiple pieces of information that may have incriminated Jennings and so had an 'inherent tendency' to connect Jennings to the commission of Burks's murder". *Ferguson*, at 592 (citing *Jones*, 678 N.W.2d at 16)

The exclusion of this foundational evidence prevented Ferguson's presentation of a full defense based on an alternative perpetrator defense to raise reasonable doubt. The Court reversed and remanded for a new trial.

More case history from local newspaper coverage at:

<http://www.startribune.com/local/minneapolis/132158753.html?refer=y>

Digital Forensic Evidence Lays Foundation

Carney Forensics, performing a digital forensic examination of the victim's cell phone in this case, retrieved highly probative evidence. Notably, the victim's cell phone address book contained a contact name, C.J., which matched a known Ferguson alias, C.J.; but also matched the initials of Christopher Jennings, an acquaintance of Burks. The exam also recovered call logs showing Jennings placed phone calls to Burks only three days before the shooting.

The Court noted, "Jennings's initials are C.J., he was listed as C.J. in Burks's cell phone contacts, he had a tattoo of the letters C.J. on his arm, and three days before the shooting—September 9, 2006—Burks spoke to him on the telephone. Further, Jennings's physical description was in several ways similar to the descriptions of the shooter provided by witnesses. Jennings also drove a car that matched some of the descriptions of the car seen at the scene of the shooting." *Ferguson*, at 591.

Carney Forensics' examination recovered a "C.J." phone book contact on Burks' phone and phone calls placed by Jennings to Burks' cell phone three days before the murder. A reverse phone number lookup performed by Carney from the victim's phonebook matched the alternative perpetrator, Jennings, as confirmed by subpoena of cell phone service provider business records. In the Court's view this evidence presented a "reasonable possibility the jury may have reached a different verdict if the jury had known the information regarding Jennings." *Id.*, at 592.

The entire majority opinion and concurring opinion is available here:

<http://caselaw.findlaw.com/mn-supreme-court/1583002.html>

Or, download a PDF copy of the opinion from the Minnesota Supreme Court archives at:

<http://www.lawlibrary.state.mn.us/archive/supct/1110/OPA100499-1019.pdf>

Conclusion and Aftermath

The Supreme Court found that the district court erred in its exclusion of the foundational evidence directly linking an alternative perpetrator to the crime. “Ferguson presented multiple pieces of information that may have incriminated Jennings and so had an ‘inherent tendency’ to connect Jennings to the commission of Burks’s murder.” *Id.*, at 592. (citing *Jones*, 678 N.W.2d at 16)

The prosecution, citing *Atkinson* 774 N.W.2d 590, sought to bar evidence of another shooter. In *Atkinson* the evidence of an alternative perpetrator only “suggested” the alternative perpetrator’s presence at the scene of the crime but failed to adequately tie that person to the crime itself, thus making the evidence inadmissible. *Atkinson*, at 591.

“Alternative perpetrator evidence is admissible only if the defendant makes a threshold showing that the evidence the defendant seeks to admit has an ‘inherent tendency to connect the alternative perpetrator to the commission of the charged crime.’” *Ferguson*, at 591 (quoting *State v. Larson*, 788 N.W.2d 25, 36-37 (Minn. 2010)). By comparison the Ferguson defense wished to admit additional evidence that could conceivably raise reasonable doubt in a jury’s mind, but was denied by Judge Daly.

This exclusion was not “harmless beyond a reasonable doubt” *Ferguson*, at 592 (citing *Hall*, 764 N.W.2d at 842) in the Court’s view and violated the defendant’s constitutional right to

present a complete defense. Justice Anderson, writing the majority opinion and in his rare self-concurring opinion, also critiqued the state case on Ferguson's other claims. Had the cell phone evidence discovered by Carney Forensics been allowed at trial, the jury may have found differently.

This landmark case has produced 19 KeyCite citations in less than one year since its release. Minnesota Supreme Court Chief Justice C.J. Gildea, citing Ferguson in the *Bobo v. State of Minnesota* opinion, sums up the impact of cell phone evidence and other forms of identification evidence: "Indeed, the identification of a specific alternative perpetrator is an important, powerful, and distinct part of a defendant's constitutional right to present a complete defense." *Bobo*, Nos. A11-0070, A11-1671 (Minn. Sup. Ct. August 22, 2012)

Lessons Learned and Practice Tips from *Ferguson*: Acquiring Access and Using Recovered Cell Phone Evidence

In the tragic shooting death of Irene Burks a further possible tragedy of a wrongful conviction was averted when the Minnesota Supreme Court found the constitutional rights of Calvin Ferguson were violated and therefore, reversed and remanded the case for a new trial.

In a nation where nearly everyone owns a cell phone and many people own two or three, it is likely that one or more phones may be present at the scene of a crime. Highly relevant evidence, even "deleted information" in certain circumstances, can be recovered from these phones, especially smart phones, with the specialized tools used by Carney Forensics.

Real life cases are not television programs. Attorneys and investigators searching for the smoking gun may indeed find evidence central to the case on a cell phone. It may be owned by a witness, the perpetrator or, as in the Ferguson case, the victim.

Prosecutors who obtain a search warrant to seize a device would be prudent to obtain another warrant to search it for relevant evidence. Device content may contain personal data and prosecutors may expect motions to suppress, challenges of privilege, or privacy, or scope of the search or other objections by the defense.

Defending attorneys can move the court to order access to the state's devices or subpoena a device owned and used by the victim or a witness to gain physical custody of a cell phone necessary for forensic examination.

Additionally, attorneys may pursue other avenues to get to the phone. Simply asking for access to the phone may occasionally result in agreement and consent. The parties might also agree to a jointly-chosen, independent neutral examination with shared results. These alternatives can be less costly and reduce incidents of spoliation.

Forensic examiners can assist attorneys in other ways as well. Judges may require an offer of proof to demonstrate the evidentiary link to innocence or guilt. As an expert witness an examiner may help show the relevance of the evidence, help formulate an offer of proof, and even draft an affidavit supporting the introduction of digital evidence. Under many circumstances a mobile forensics examiner can provide expert witness opinions and other support.

The *Ferguson* decision will increase court awareness of mobile forensic evidence in Minnesota and likely improve judicial willingness to consider motions or to issue orders and subpoenas for mobile forensic evidence to build an evidentiary foundation. Attorneys using motion practice to acquire and introduce relevant digital evidence can strengthen their case. Data

mining mobile devices and digital forensic expert testimony can establish reasonable doubt as to the guilt of the defendant and point to culpability of an alternative perpetrator.

This case set a new standard for evidence admission. “The foundational evidence offered by Ferguson surpasses the foundational evidence offered in *Atkinson*.” *Ferguson*, at 592. The Ferguson defense overcame the evidentiary threshold established in *Atkinson* by data mining and producing cell phone evidence that directly tied another to the crime scene *and* the crime itself. The digital evidence recovered by Carney Forensics culminated in a Supreme Court reversal and remand for a new murder trial for Calvin Ferguson.

Tags: digital forensics, cell phone forensics, mobile forensics, alternative perpetrator, complete defense, inherent tendency

About the Authors:

John Carney is the Chief Technology Officer at Carney Forensics, a digital evidence retrieval company based in St Paul. He is a graduate of MIT, where he studied computer science, and software engineering after which he had a 30-year computer technology career.

John went to law school later in life and earned his JD from Hamline University School of Law. He is a federally and state licensed Minnesota attorney. He serves on the Council of the Minnesota State Bar Association’s Computer and Technology Law Section as well as the Computer Forensics Advisory Board at Century College.

Anthony Brian Thompson, a paralegal student graduating *with honors* from the Minnesota School of Business-Online in October, 2012, earned an Associate in Applied Science degree in Paralegal Studies.

Prior to enrolling at MSB, he held supervisory and management positions with major retailers for over twenty years; but with the support of friends and family, he decided to pursue a long-held goal of obtaining a degree that reflected his interests in history and law and one in

which his innate writing skills could be utilized. A career as a paralegal suited these requirements.

The dedication of MSB instructors combined with the patience and real world application of legal concepts learned under the tutelage of John Carney have provided Anthony with a solid foundation for a new and exciting legal career. He wishes to acknowledge his deep appreciation to everyone associated with this challenging new endeavor.