

By: Sherman, Sr.

H.B. No. 3914

A BILL TO BE ENTITLED

AN ACT

relating to warrants and orders issued for the use of tracking equipment and access to electronic communications to further a criminal investigation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 18.02(a), Code of Criminal Procedure, is amended to read as follows:

(a) A search warrant may be issued to search for and seize:

(1) property acquired by theft or in any other manner which makes its acquisition a penal offense;

(2) property specially designed, made, or adapted for or commonly used in the commission of an offense;

(3) arms and munitions kept or prepared for the purposes of insurrection or riot;

(4) weapons prohibited by the Penal Code;

(5) gambling devices or equipment, altered gambling equipment, or gambling paraphernalia;

(6) obscene materials kept or prepared for commercial distribution or exhibition, subject to the additional rules set forth by law;

(7) a drug, controlled substance, immediate precursor, chemical precursor, or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state;

1 (8) any property the possession of which is prohibited
2 by law;

3 (9) implements or instruments used in the commission
4 of a crime;

5 (10) property or items, except the personal writings
6 by the accused, constituting evidence of an offense or constituting
7 evidence tending to show that a particular person committed an
8 offense;

9 (11) persons;

10 (12) contraband subject to forfeiture under Chapter 59
11 ~~[of this code]~~;

12 (13) electronic customer data held in electronic
13 storage, including:

14 (A) the contents of and records and other
15 information related to a wire communication or electronic
16 communication held in electronic storage; and

17 (B) location information; or

18 (14) a cellular telephone or other wireless
19 communications device, subject to Article 18.0215.

20 SECTION 2. Article 18.02(b)(2), Code of Criminal Procedure,
21 is amended to read as follows:

22 (2) "Electronic customer data," ~~[data" and]~~
23 "electronic storage," and "location information" ~~[storage"]~~ have
24 the meanings assigned by Article 18B.001.

25 SECTION 3. Article 18B.001, Code of Criminal Procedure, is
26 amended by amending Subdivisions (1), (4), and (7) and adding
27 Subdivision (9-a) to read as follows:

(1) "Authorized peace officer" means:

(A) a sheriff or deputy sheriff;

(B) a constable or deputy constable;

(C) a marshal or police officer of a municipality;

(D) a ranger or officer commissioned by the Public Safety Commission or the director of the department;

(E) an investigator of a prosecutor's office;

(F) a law enforcement agent of the Texas Alcoholic Beverage Commission;

(G) a law enforcement officer commissioned by the Parks and Wildlife Commission;

(H) an enforcement officer appointed by the inspector general of the Texas Department of Criminal Justice under Section 493.019, Government Code;

(I) an investigator commissioned by the attorney general under Section 402.009, Government Code; ~~or~~

(J) a member of an arson investigating unit commissioned by a municipality, a county, or the state;

(K) a criminal investigator of the United States as described by Article 2.122(a); or

(L) a peace officer appointed by a federal agency listed in Article 2.122(a) as a criminal investigator of the agency.

(4) "Designated law enforcement office or agency" means:

(A) the sheriff's department of a county with a

1 population of 3.3 million or more;

2 (B) a police department in a municipality with a
3 population of 500,000 or more; ~~[or]~~

4 (C) the office of inspector general of the Texas
5 Department of Criminal Justice;

6 (D) the office of a prosecutor; or

7 (E) a federal agency described by Article
8 2.122(a) that has employed:

9 (i) a criminal investigator; or

10 (ii) a peace officer described by
11 Subdivision (1)(L).

12 (7) Except as otherwise provided by this chapter,
13 "electronic [~~Electronic~~ customer data" means data or records
14 that:

15 (A) are in the possession, care, custody, or
16 control of a provider of an electronic communications service or
17 provider of a remote computing service; and

18 (B) contain:

19 (i) information revealing the identity of
20 customers of the applicable service;

21 (ii) information about a customer's use of
22 the applicable service;

23 (iii) information that identifies the
24 recipient or destination of a wire or electronic communication sent
25 to or by a customer;

26 (iv) the content of a wire or electronic
27 communication sent to or by a customer; ~~[and]~~

(v) any data stored with the applicable service provider by or on behalf of a customer; and

(vi) location information.

(9-a) "Location information" means information that reveals the location of a wireless communications device obtained by any of the following methods:

(A) using GPS location-based measurements, including the querying of the target device's GPS service and the returned coordinates;

(B) comparing a record of the target device's IP address to a list of known IP addresses and approximate known locations;

(C) querying the target device's operating system for the identity of nearby cellular towers and uploading the information to a server where the cellular tower identification may be compared to a list of known cellular tower locations;

(D) querying the target device's operating system for the identifier (such as SSID or (B)SSID) associated with a nearby Wi-Fi access point and uploading that information to a server where the access point's identifier may be compared to a database or list of known identifiers of Wi-Fi access points in known locations;

(E) using records derived from the device's connections to radio antennas through which a provider of an electronic communications service or provider of a remote computing service provides wireless service to that device;

(F) using enhanced 9-1-1 location-based

1 measurements; and

2 (G) any combination of methods described in this
3 subdivision or another similar method used to determine the
4 location of a wireless communications device.

5 SECTION 4. Articles 18B.051(a), (c), and (d), Code of
6 Criminal Procedure, are amended to read as follows:

7 (a) A prosecutor with jurisdiction in a county within a
8 judicial district described by Article 18B.052 may file with a
9 district judge in the judicial district an application for the
10 installation and use of a pen register, ESN reader, trap and trace
11 device, or similar equipment or the use of similar equipment that
12 does not require installation [~~that combines the function of a pen~~
13 ~~register and a trap and trace device~~].

14 (c) A prosecutor must make an application personally and may
15 not make the application through an assistant or other person
16 acting on the prosecutor's behalf if the prosecutor:

17 (1) files an application on the prosecutor's own
18 motion; or

19 (2) files an application for the use or installation
20 and use, as applicable, of a pen register, ESN reader, or similar
21 equipment on the request of an authorized peace officer not
22 commissioned by the department, other than an authorized peace
23 officer employed by a designated law enforcement office or agency.

24 (d) A prosecutor may make an application through an
25 assistant or other person acting on the prosecutor's behalf if the
26 prosecutor files an application for the use or installation and
27 use, as applicable, of:

(1) a pen register, ESN reader, or similar equipment on the request of:

(A) an authorized peace officer who is commissioned by the department; or

(B) an authorized peace officer of a designated law enforcement office or agency; or

(2) a trap and trace device or similar equipment on the request of an authorized peace officer, regardless of whether the peace officer is commissioned by the department.

SECTION 5. Article 18B.053, Code of Criminal Procedure, is amended to read as follows:

Art. 18B.053. APPLICATION REQUIREMENTS. An application under this subchapter must:

(1) be made in writing under oath;

(2) include the name of the subscriber and the telephone number and location of the communication device on which the pen register, ESN reader, trap and trace device, or similar equipment will be used, to the extent that information is known or is reasonably ascertainable; ~~and~~

(3) state that the use or installation and use, as applicable, of the device or equipment will likely produce information that is material to an ongoing criminal investigation; and

(4) state articulable facts sufficient to support a finding of probable cause to believe that the use or installation and use, as applicable, of the device or equipment will:

(A) produce evidence of an offense in the

1 criminal investigation; or

2 (B) result in the apprehension of a fugitive from
3 justice.

4 SECTION 6. Article 18B.101(a), Code of Criminal Procedure,
5 is amended to read as follows:

6 (a) On presentation of an application under Subchapter B, a
7 judge may order the use or installation and use, as applicable, of a
8 pen register, ESN reader, or similar equipment by an authorized
9 peace officer commissioned by the department or an authorized peace
10 officer of a designated law enforcement office or agency.

11 SECTION 7. Article 18B.104(a), Code of Criminal Procedure,
12 is amended to read as follows:

13 (a) An order for the use or installation and use of a device
14 or equipment under this subchapter is valid for a period not to
15 exceed 60 days after the earlier of the date the device or equipment
16 is installed or used or the 10th day after the date the order is
17 entered, unless the prosecutor applies for and obtains an extension
18 of the order from the court before the order expires.

19 SECTION 8. Article 18B.105, Code of Criminal Procedure, is
20 amended to read as follows:

21 Art. 18B.105. SEALING RECORDS OF APPLICATION AND ORDER. A
22 district court shall seal an application and order granted under
23 this chapter. The court may not unseal the application and order
24 until after the order has expired.

25 SECTION 9. Article 18B.151(b), Code of Criminal Procedure,
26 is amended to read as follows:

27 (b) An authorized peace officer employed by a designated law

1 enforcement agency [~~A peace officer authorized to possess, install,~~
2 ~~operate, or monitor a device under Subchapter E, Chapter 18A,~~] may
3 use or install and use, as applicable, a pen register, ~~[or]~~ trap and
4 trace device, ESN reader, or other similar device if the peace
5 officer has probable cause to believe [~~reasonably believes~~]:

6 (1) an immediate life-threatening situation exists
7 that:

8 (A) is within the territorial jurisdiction of the
9 peace officer or another authorized peace officer the peace officer
10 is assisting; and

11 (B) requires the use or installation and use of a
12 pen register, ~~[or]~~ trap and trace device, ESN reader, or other
13 similar device before an order authorizing the installation and use
14 can, with due diligence, be obtained under this chapter; and

15 (2) there are sufficient grounds under this chapter on
16 which to obtain an order authorizing the use or installation and use
17 of a pen register, ~~[or]~~ trap and trace device, ESN reader, or other
18 similar device.

19 SECTION 10. Article 18B.152, Code of Criminal Procedure, is
20 amended to read as follows:

21 Art. 18B.152. ORDER AUTHORIZING EMERGENCY INSTALLATION OR
22 [~~AND~~] USE. (a) A peace officer who installs or uses a pen register,
23 ~~[or]~~ trap and trace device, ESN reader, or other similar device
24 under Article 18B.151 shall:

25 (1) promptly report the installation or use of the
26 device to the prosecutor or an assistant of the prosecutor in the
27 county in which the device is installed or used; and

1 (2) within 48 hours after the installation of the
2 device is complete or the use of the device begins, whichever occurs
3 first, obtain an order under Subchapter C authorizing the use or
4 installation and use of the device.

5 (b) A judge may issue an order authorizing the use or
6 installation and use of a device under this subchapter during the
7 48-hour period prescribed by Subsection (a)(2). If an order is
8 denied or is not issued within the 48-hour period, the peace officer
9 shall terminate use of, and if necessary remove, the [~~pen register~~
10 ~~or trap and trace~~] device promptly on the earlier of the denial or
11 the expiration of 48 hours.

12 SECTION 11. Article [18B.153](#), Code of Criminal Procedure, is
13 amended to read as follows:

14 Art. 18B.153. ADMISSIBILITY OF EVIDENCE OBTAINED. The
15 state may not use as evidence in a criminal proceeding any
16 information gained through [~~the use of~~] a pen register, [~~or~~] trap
17 and trace device, ESN reader, or other similar device installed or
18 used under this subchapter if an authorized peace officer:

19 (1) does not apply for authorization for the [~~pen~~
20 ~~register or trap and trace~~] device; or

21 (2) applies for but does not obtain that
22 authorization.

23 SECTION 12. Article [18B.202](#)(c), Code of Criminal Procedure,
24 is amended to read as follows:

25 (c) The affidavit must:

26 (1) state the name, department, agency, and address of
27 the applicant;

1 (2) identify the vehicle, container, or item to which,
2 in which, or on which the mobile tracking device is to be attached,
3 placed, or otherwise installed;

4 (3) state the name of the owner or possessor of the
5 vehicle, container, or item identified under Subdivision (2);

6 (4) state the judicial jurisdictional area in which
7 the vehicle, container, or item identified under Subdivision (2) is
8 expected to be found; and

9 (5) state the facts and circumstances that provide the
10 applicant with probable cause [~~a reasonable suspicion~~] that:

11 (A) criminal activity has been, is, or will be
12 committed; and

13 (B) the installation and use of a mobile tracking
14 device is likely to produce information that is material to an
15 ongoing criminal investigation of that criminal activity.

16 SECTION 13. Article [18B.253](#), Code of Criminal Procedure, is
17 amended to read as follows:

18 Art. 18B.253. LIMITATION: PEN REGISTERS AND SIMILAR
19 DEVICES. To prevent inclusion of the contents of a wire or
20 electronic communication, a governmental agency authorized to use
21 or install and use a pen register, trap and trace device, ESN
22 reader, or similar device under this chapter or other law must, as
23 applicable:

24 (1) use reasonably available technology to only record
25 and decode electronic or other impulses used to identify the
26 numbers dialed, routed, addressed, or otherwise processed or
27 transmitted by the communication; or

1 (2) otherwise configure the device such that the
2 device does not collect the content of a wire or electronic
3 communication, and if necessary, immediately delete the content of
4 a wire or electronic communication incidentally collected in using
5 the device.

6 SECTION 14. Chapter 18B, Code of Criminal Procedure, is
7 amended by adding Subchapter G-1 to read as follows:

8 SUBCHAPTER G-1. CERTAIN ELECTRONIC CUSTOMER DATA

9 Art. 18B.321. DEFINITION. In this subchapter, "electronic
10 customer data" means data or records, other than the content of a
11 wire or electronic communication, that:

12 (1) are in the possession, care, custody, or control
13 of a provider of an electronic communications service or provider
14 of a remote computing service; and

15 (2) contain:

16 (A) information revealing the identity of
17 customers of the applicable service;

18 (B) information about a customer's use of the
19 applicable service;

20 (C) information that identifies the recipient or
21 destination of a wire or electronic communication sent to or by a
22 customer; and

23 (D) location information.

24 Art. 18B.322. PROSPECTIVE SURVEILLANCE; APPLICABILITY OF
25 OTHER PROVISIONS. (a) With respect to location information, this
26 subchapter applies only to a warrant described by Article 18B.323
27 for the required disclosure of location information that is created

1 after the issuance of the warrant.

2 (b) Article 18B.104 applies to the duration of a warrant
3 issued under this subchapter in the same manner as that article
4 applies to an order issued under Subchapter C.

5 (c) Articles 18B.355, 18B.356, and 18B.357 apply to a
6 warrant required under this subchapter to obtain electronic
7 customer data.

8 Art. 18B.323. REQUIREMENTS REGARDING REQUEST FOR AND FILING
9 OF APPLICATION. (a) To require a provider of an electronic
10 communications service or a provider of a remote computing service
11 to disclose electronic customer data held in electronic storage,
12 only a prosecutor with jurisdiction in a county within a judicial
13 district described by Article 18B.052(3) or (4) may file with a
14 district judge in the judicial district an application for a
15 warrant under this subchapter.

16 (b) A prosecutor may file an application under this
17 subchapter or under federal law on:

18 (1) the prosecutor's own motion; or
19 (2) the request of an authorized peace officer,
20 regardless of whether the peace officer is commissioned by the
21 department.

22 (c) A prosecutor must make an application under this
23 subchapter personally and may not make the application through an
24 assistant or other person acting on the prosecutor's behalf if the
25 prosecutor:

26 (1) files an application on the prosecutor's own
27 motion; or

1 (2) files an application on the request of an
2 authorized peace officer not commissioned by the department, other
3 than an authorized peace officer employed by a designated law
4 enforcement office or agency.

5 (d) A prosecutor may make an application under this
6 subchapter through an assistant or other person acting on the
7 prosecutor's behalf if the prosecutor files the application on the
8 request of:

9 (1) an authorized peace officer who is commissioned by
10 the department; or

11 (2) an authorized peace officer of a designated law
12 enforcement office or agency.

13 Art. 18B.324. APPLICATION AND ISSUANCE OF WARRANT. (a) On
14 the filing of an application under this subchapter, a district
15 judge may issue a search warrant under this article for electronic
16 customer data held in electronic storage by a provider of an
17 electronic communications service or a provider of a remote
18 computing service described by Article 18B.355(b), regardless of
19 whether the customer data is held at a location in this state or
20 another state. An application made under this subsection must
21 demonstrate probable cause for the issuance of the warrant and must
22 be supported by the oath of the applicant.

23 (b) A search warrant may not be issued under this article
24 unless the sworn affidavit required by Article 18.01(b) provides
25 sufficient and substantial facts to establish probable cause that:

26 (1) the disclosure of the electronic customer data
27 sought will:

1 (A) produce evidence of an offense under
2 investigation; or

3 (B) result in the apprehension of a fugitive from
4 justice; and

5 (2) the electronic customer data sought is held in
6 electronic storage by the service provider on which the warrant is
7 served under Article 18B.355(c).

8 (c) Only the electronic customer data described in the sworn
9 affidavit required by Article 18.01(b) may be seized under the
10 warrant.

11 (d) A warrant issued under this article shall run in the
12 name of "The State of Texas."

13 (e) A district court shall seal an affidavit and warrant
14 granted under this subchapter and may not unseal the affidavit and
15 warrant until after the order expires.

16 SECTION 15. Article 18B.352(a), Code of Criminal Procedure,
17 is amended to read as follows:

18 (a) A court shall issue an order authorizing disclosure of
19 contents, records, or other information, other than location
20 information, of a wire or electronic communication held in
21 electronic storage if the court determines that there is a
22 reasonable belief based on specific articulable facts that:

23 (1) the information sought is relevant to a legitimate
24 law enforcement inquiry; and

25 (2) the information:

26 (A) reveals the identity of customers of the
27 applicable service; or

1 (B) is about a customer's use of the applicable
2 service.

3 SECTION 16. Articles 18B.355(b) and (c), Code of Criminal
4 Procedure, are amended to read as follows:

5 (b) An order issued under Article 18B.352 or a [A] warrant
6 issued under Article 18B.354 may be served only on a provider of an
7 electronic communications service or a provider of a remote
8 computing service that is a domestic entity or a company or entity
9 otherwise doing business in this state under a contract or a terms
10 of service agreement with a resident of this state, if any part of
11 that contract or agreement is to be performed in this state.

12 (c) An order issued under Article 18B.352 or a [A] search
13 warrant issued under Article 18B.354 is served when an authorized
14 peace officer delivers the warrant by hand, by facsimile or other
15 electronic transmission, or, in a manner allowing proof of
16 delivery, by means of the United States mail or a private delivery
17 service to:

18 (1) a person specified by Section 5.255, Business
19 Organizations Code;

20 (2) the secretary of state in the case of a company or
21 entity to which Section 5.251, Business Organizations Code,
22 applies; or

23 (3) any other person or entity designated to receive
24 the service of process.

25 SECTION 17. Article 18B.501(a), Code of Criminal Procedure,
26 is amended to read as follows:

27 (a) An authorized peace officer seeking electronic customer

1 data under Article 18B.351 or other customer information under this
2 chapter may apply to the court for an order commanding the service
3 provider to whom a warrant, subpoena, or court order is directed not
4 to disclose to any person the existence of the warrant, subpoena, or
5 court order. The order is effective for the period the court
6 considers appropriate.

7 SECTION 18. The changes in law made by this Act by amending
8 Article 18.02 and Chapter 18B, Code of Criminal Procedure, apply
9 only to a warrant or other court order issued on or after the
10 effective date of this Act. A warrant or order issued before the
11 effective date of this Act is governed by the law in effect on the
12 date the warrant or order was issued, and the former law is
13 continued in effect for that purpose.

14 SECTION 19. This Act takes effect January 1, 2020.