

GPS Surveillance and the Fourth Amendment

by Sophia M. Stadnyk, Senior Associate Counsel

On the last day of the Term, the United States Supreme Court agreed to hear the appeal in a case involving police use of a global positioning system (GPS) to gather information about a suspect's movements. The case is *U.S. v. Jones*, 625 F.3d 766 (D.C. Cir. 2010), *cert. granted*, 2011 WL 1456728 (U.S. June 27, 2011) (No. 10-1259).

The appeal, from a decision of the U.S. Court of Appeals for the District of Columbia Circuit, involved Antoine Jones, a nightclub operator and owner, suspected of being part of a drug distribution operation in D.C. It was alleged that Jones was the primary supplier of cocaine to members of the operation, who in turn, distributed the drugs to purchasers in D.C. and Maryland. Law enforcement officers found that physical surveillance was ineffective; further, Jones was believed to deal only with known associates, and the officers were unaware of a known source who was in a position to purchase narcotics from Jones or to introduce an undercover officer for that purpose. This limited the investigators' ability to obtain evidence on the manner in which Jones allegedly redistributed large quantities of drugs in the metro D.C. area, the identities of his alleged co-conspirators, and the manner in which they disposed of the proceeds of the operation.

In 2005, as part of their investigation, the officers obtained a warrant authorizing them to install the GPS device on Jones's Jeep within ten days of the issuance of the warrant, and only within D.C. However, the officers did not install the device until eleven days after the warrant was issued, and installed it while the Jeep was parked in a public parking lot in the State of Maryland. The device was used to monitor the Jeep's movements continually over a 28-day period. Using the device, officers were able to track Jones to a suspected "stash house" in Maryland, where officers later found 97 kilograms of powder cocaine, almost a kilo of crack cocaine, and various items used to process and package narcotics. The GPS data was essential to the government's case, enabling prosecutors "to paint a picture of Jones's movements that made credible the allegation that he was involved in drug trafficking."

Following a jury trial, Jones was convicted and sentenced to life imprisonment. Before trial, he moved to suppress the information obtained from the mobile tracking device, arguing the use of the GPS monitor violated his reasonable expectation of privacy and was a "search" subject to the reasonableness requirement of the Fourth Amendment. The government contended that the placement of the GPS device was proper, even in the complete absence of a court order, because Jones lacked a reasonable expectation of privacy in the whereabouts of his vehicle. (In the district court, the government conceded the violations of the court's order confined its arguments to the issue of whether or not a court order was required, and asserted that it was not.) The district court granted in part and denied in part the motion to suppress the GPS-obtained data, finding that the information obtained while the vehicle was on public roads was admissible. *U.S. v. Jones*, 451 F. Supp. 2d 71 (D.D.C. 2006).

On appeal, the D.C. Circuit reversed, ruling that the use of the GPS device to track Jones's movements throughout 28 days was a "search" under the Fourth Amendment. The appellate court referred to the ruling in *United States v. Knotts*, 460 U.S. 276 (1983), in which the U.S. Supreme Court held that the warrantless monitoring of signals from a "beeper" (a radio transmitter), placed inside a container sold to the defendant, did not invade any legitimate expectation of privacy. (Knotts did not challenge the warrantless installation of the beeper.) The governmental surveillance by means of the beeper amounted mainly to the following of a vehicle on public streets and highways. Since a person travelling in an automobile on public thoroughfares had no reasonable expectation of privacy in his movements from one place to another, the monitoring was held to be neither a search nor a seizure within the meaning of the Fourth Amendment. The Court reserved for another day the question of whether the Fourth Amendment would be implicated if 24-hour surveillance was possible: "if such dragnet type law enforcement practices as [Knotts] envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable."

Focusing on that reservation, the D.C. Circuit distinguished *Knotts* on the basis that the monitoring there involved a single journey, rather than a prolonged period of surveillance. Jones had a reasonable expectation of privacy in the public movements of his vehicle over the course of a month because he had not exposed the "totality" of those movements to the public (i.e., the likelihood a stranger would observe all of his movements over a month's time was "essentially nil"). Because Jones had a reasonable expectation of privacy in his movements over the course of a month, "the use of the GPS device to monitor those movements defeated that reasonable expectation." Accordingly, Jones's conviction was reversed because

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it was obtained with evidence procured in violation of the Fourth Amendment.

The issue now comes before the U.S. Supreme Court. In addition to the question presented by the petition for certiorari (whether the warrantless use of a tracking device on Jones's vehicle to monitor its movements on public streets violated the Fourth Amendment), the parties were directed to brief and argue the following question: "Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent." ML

Inside Canada

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chases, with little wait time or screening, were most likely to occur at retail pet stores. "Requiring owners to put additional thought and preparation into their decision to purchase a dog is rationally connected to reducing unwanted dogs in the city."[8]

Other Canadian cities are now looking at enacting similar restrictions.

Notes

1. *International Bio Research v. Richmond (City)*, 2011 BCSC 471, at para. 16 (B.C.S.C. Apr. 15, 2011).
2. *Id.* at para. 6.
3. Council Minutes, Nov. 08, 2010, at para. 3, available at http://www.richmond.ca/cityhall/council/agendas/council/2010/110810_minutes.htm.
4. *International Bio Research*, at para. 3.
5. *Id.* at para. 37.
6. *Id.* at paras. 56,57.
7. *Id.* at para. 83.
8. *Id.* at para. 77. ML

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4. Advisory Committee Notes, Fed. R. Evid. 502(d).
5. For an example of a motion seeking a Rule 502(d) order, *see* City of Dallas' Motion for Entry of Order Protecting Privileges from Waiver with Supporting Brief, *United States. v. Don Hill*, Crim. Action No. 3:07-CR-289-M (N.D. Tex. Aug. 5, 2009), ECF No. 929; and for an example of a Rule 502(d) order, see Order Granting Motion for Entry of a Protective Order as to City of Dallas, *United States v. Don Hill*, *supra* (N.D. Tex. Aug. 14, 2009), ECF No. 934, which provides in pertinent part:

> The motion is GRANTED, and it is hereby ORDERED that pursuant to Federal Rule of Evidence 502(d) and the Court's inherent powers, no privilege or protection for communications or other information claimed as privileged by the City of Dallas, Texas, is waived by disclosure connected with the litigation pending in this case, and that any such disclosure is also not a waiver in any other Federal or State proceeding.

Note that Dallas had to seek relief under common law and inherent powers to protect privileges beyond attorney-client and work product because Rule 502 is limited to protecting only those two privileges. The City's main additional concern was to protect the legislative deliberative privilege for City Council discussions. ML

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Warren Kraft is an Assistant City Attorney/Director of Human Resources for the City of West Bend. He serves as of counsel to the Murphy-Desmond law firm of Madison, and as an attorney for the Village of McFarland, Wisconsin. A 2006 IMLA Local Government Fellow, Warren is a commissioned lay pastor, an active Scout leader, and a substitute lifeguard at the local YMCA. ML

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have deterred broadband deployment or adoption, or that they will do so in the future. If the FCC has genuinely not pre-judged these issues, it should have little trouble concluding that its time and resources are better spent elsewhere. But, if the FCC cannot appreciate the evidence we have placed before them, we are fully prepared to visit the matter with higher authorities such as the Congress, the courts and the people of America—the real owners of the rights-of-way.

Jay Doegey is IMLA's President-Elect and City Attorney of Arlington, Texas. Gerry Lederer is Of Counsel with the law firm of Best Best & Krieger (incorporating the practice of Miller & Van Eaton) and a proud IMLA member. Best Best & Krieger has been honored to assist IMLA in assembling and serving as counsel to the local government coalition.

Notes

1. *In re Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, FCC 11-51 (Apr. 7, 2011).
2. The coalition's members, in addition to IMLA, include: The National League of Cities, National Association of Counties, United States Conference of Mayors, National Association of Telecommunications Officers and Advisors, Government Finance Officers Association, International City/County Managers Association, and the American Public Works Association.
3. *Seventh Broadband Progress Report and Order on Reconsideration* (GN 10-59), dissenting Statement of Commissioner Robert McDowell (released May 20, 2011) at 1. ML