Recent Case Report

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United States v. Jones

(2012) __ U.S. __ [2012 WL 17117]

Issues

Must officers obtain a search warrant to install a GPS tracking device to the undercarriage of a vehicle, and utilize the device to monitor the vehicle's whereabouts?

Facts

FBI agents and officers with the Metropolitan Police Department (Washington, D.C,) suspected that Antoine Jones was a drug dealer. In the course of their investigation, they obtained a search warrant which authorized them to install a GPS monitoring device on Jones' Jeep. One day after the warrant expired, the officers installed the device to the undercarriage of the vehicle while it was parked in a public parking lot. For the next 28 days, they used the transmissions from the GPS tracker to monitor Jones' travels, and these transmissions revealed, among other things, that he had visited a "stash house" where officers had found $850,000 in cash, 97 kilograms of cocaine, and one kilogram of crack cocaine. This information was part of the evidence that was used against Jones at his trial, and he was found guilty of conspiracy to distribute drugs.

Discussion

On appeal to the United States Supreme Court, Jones argued that the installation and monitoring of the device constituted a "search." And because the officers had installed the device one day after the warrant expired, the search was unlawful.

Addressing only the legality of the installation, the Court ruled that an officer's act of attaching a device to a vehicle would constitute a "search" if the device permitted the officer to obtain information. And because a GPS device reveals the vehicle's whereabouts, the Court ruled the officers had, in fact, "searched" Jones' vehicle when they installed it. Said the Court, "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."

Significantly, the Court did not rule that a warrant would be required to conduct such a "search." Instead, it simply affirmed the D.C. Circuit's ruling, but without explaining what parts of the ruling it approved other than to say that the "admission of the evidence obtained by warrantless use of the GPS device . . . violated the Fourth Amendment."

Comment

In 1991, the Supreme Court said, "We have noted the virtue of providing clear and unequivocal guidelines to the law enforcement profession."[1] Well, if it is truly "virtuous" for the courts to provide officers with "clear and unequivocal guidelines," the Court's handling of the issues in *Jones* would fall into the category of "depraved." In fact, judging

[1] *California* v. *Acevedo* (1991) 500 U.S. 565, 577

by the uncertainty even among commentators and law professors as to what the Court had actually ruled, its opinion not only lacked clarity, it was virtually incoherent.

This was particularly troubling because the Court had previously ruled that neither the installation nor monitoring of a tracking device while the vehicle was on public streets would qualify as a search. Specifically, in *United States* v. *Knotts* the Court ruled that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[2] And on two other occasions the Court ruled that a technical trespass (such as occurred in *Jones*) has little bearing on Fourth Amendment privacy determinations. Here is what the Court said:

- "The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated."[3]
- "But it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment."[4]

But now the Court announces—without any discussion or explanation—that for the past 30 years it was wrong; that a physical trespass is not really "marginally relevant." On the contrary, it is pivotal when, as is almost always the case, the officers' objective was to obtain information.

Strangely, the Court did not explain why it decided not to analyze the issues by subjecting the facts to traditional Fourth Amendment analysis; i.e., that the officers' actions would have constituted a search only if their intrusion under the Jeep and their monitoring of Jones' movements infringed on Jones' reasonable privacy expectations.[5] Such an analysis would have been helpful because the Court would have had to reaffirm or overturn its earlier decisions that people cannot reasonably expect that their travels on streets and highways will be private.[6] The Court might also have addressed the issue of whether the use of sophisticated surveillance technology affects the privacy analysis, and whether, as the D.C. Circuit determined, it matters that the surveillance was conducted over a lengthy period of time.

In fairness, the Court did not completely ignore these issues. It said: "We may have to grapple with these vexing problems in some future case . . . but there is no reason for rushing forward to resolve them here." But isn't it the job of the United States Supreme Court to "grapple" with "vexing" constitutional problems that are causing widespread uncertainty in the courts?

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[2] (1983) 460 U.S 276, 281.
[3] *United States* v. *Karo* (1984) 468 U.S. 705, 712-13.
[4] *Oliver* v. *United States* (1984) 466 U.S. 170, 183, fn.15.
[5] See *Maryland* v. *Macon* (1985) 472 U.S. 463, 469 ["A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."]; *Katz* v. *United States* (1967) 389 U.S. 347, 353 [a "search" occurs if the Government's activities "violated the privacy upon which [the defendant] justifiably relied"]; *Kyllo* v. *United States* (2001) 533 U.S. 27, 33 ["[A] Fourth Amendment search does not occur … unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable."].
[6] See *United States* v. *Knotts* (1983) 460 U.S. 276, 281 ["A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."]; *Cardwell* v. *Lewis* (1974) 417 U.S. 583, 590-91 [a car "travels public thoroughfares where its occupants and its contents are in plain view"].

Perhaps even more troubling was the Court's demeaning itself by dodging the complex technological and privacy issues presented in this case by resorting to 18th century trespassing law, citing cases from 1765 and 1886, and topping it off with a quote from a Lord Chancellor in old England (Lord Camden, 1714-1794) about "tread[ing] upon his neighbor's ground." Sadly, it appears the Supreme Court of the United States will be dragged kicking and screaming into the 21st century.

The Court's decision in *Jones* is, however, consistent with its current policy of providing little, if any, guidance as to how to analyze the complex privacy issues that result from the use of modern telecommunications technology. As we discussed in our Winter 2012 article on the subject of obtaining email, the Court had an opportunity to provide some direction in this area in 2010 but it not only ducked the issue, it advised the lower courts to do the same. Said the Court, "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."[7] There is, however, nothing unclear about the role of this emerging technology: it plays a *dominant* role, as millions of people rely on it daily—almost hourly—to obtain information and communicate with others.

Meanwhile, the fallout from the Court's indecision is naturally causing lots of problems for criminal investigators. For example, *USA Today* reported that the FBI has decided to cut back on its use of GPS surveillance while it tries to figure out the "potential implications" of the decision. A former FBI counterterrorism official was quoted as saying that, without GPS, "surveillance becomes hugely labor-intensive, especially in cases in which you need round-the-clock coverage. It's something that could strap the bureau."

Adding to the confusion, some commentators and journalists reported that the Court ruled that officers must now have a warrant to install and monitor tracking devices on vehicles. That is wrong. In fact, the Court said that officers might not need a warrant at all if they had probable cause, or maybe even reasonable suspicion. But because the Government did not raise the issue below, the Court said "We have no occasion to consider this argument." Thus, the highly-regarded SCOTUSBLOG observed that the Court merely "suggested that police probably should get a warrant."

Still, we recommend that officers seek a warrant if they have probable cause, at least until the lower courts have had an opportunity to address the issues that were avoided in *Jones*. In light of the concurring opinion in the case, it is especially important to seek a warrant if, as is usually the case, officers want to conduct such surveillance for more than a few days. Note that such a warrant should ordinarily authorize officers to (1) install the device on the vehicle in a public place or in the driveway of the suspect's home, and (2) monitor the signals from the device without limitation for ten days; i.e., until the warrant expires. (While it is possible that a warrant could authorize monitoring for more than ten days, there is no express authority for it in California.) We have prepared a search warrant form that officers may find useful. To obtain a copy via email, send a request from a departmental email address to POV@acgov.org.

Finally, it should be noted that there is nothing in *Jones* to suggest the officers would need a warrant to conduct "bait car" operations, or to install a GPS device on a car if it was subject to warrantless search per the terms of the owner's parole or probation, or if

[7] *City of Ontario* v. *Quon* (2010) __ U.S. __ [130 S.Ct. 2619]. Also see *Rehberg* v. *Paulk* (11th Cir. 2010) 611 F.3d 828, 844 ["The Supreme Court's most-recent precedent *[Quon]* shows a marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable."].

the GPS device was launched during a pursuit; e.g. StarChase. Third, evidence obtained by means of a warrantless GPS tracking device before *Jones* was decided should not be suppressed. As the Supreme Court explained in *Davis* v. *United States,* "[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply."[8] POV

[8] (2011) __ US __ [2011 WL 2369583].