

U.S. v. Houston

(6th Cir. 2016) __ F.3d __ [2016 WL 482210]

Issues

Was the warrantless electronic surveillance of the defendant's farm illegal because it was conducted by means of a camera atop a utility pole? If not, did it become illegal because it recorded continuously for ten weeks?

Facts

ATF agents received information that Rocky Joe Houston, a convicted felon, possessed firearms at his farm in Tennessee. Agents attempted to conduct visual surveillance of the farm but it was located in a rural area and, according to an agent, the ATF's vehicles "stuck out like a sore thumb." So they asked a local utility company install a surveillance camera atop a telephone pole located about 200 yards from the property. The camera—which could zoom in and out, and move left and right—transmitted the images of the farm continuously to an ATF computer.

The farm was located on unfenced property and consisted of three structures. An ATF agent testified that the view of the structures captured by the camera "was identical" to what the agents would have been able to see if they had driven on the public roads surrounding the farm. The surveillance lasted ten weeks, over which time the camera recorded Houston in possession of several firearms. Agents then obtained a warrant to search the three structures, and the search netted 45 firearms, most of which were "attributable" to Houston. As the result, he was charged with possession of a firearm by a felon. His motion to suppress the guns was denied, and he was convicted.

Discussion

On appeal, Houston argued that the warrantless electronic surveillance of his property constituted an illegal search because (1) probable cause for the warrant was based on data obtained by means of a surveillance camera that recorded areas in which he had a reasonable expectation of privacy. and (2) electronic surveillance lasting ten days is too intrusive to be permitted without a warrant.

Although the law pertaining to electronic surveillance is far from settled, the prevalent rule seems to be that a warrant is not required if officers utilized technology that (1) was in general public use, and (2) merely permitted them to see things they could have seen from a plausible vantage point (although less clearly and with somewhat more effort).¹ While video surveillance cameras in some cities are as ubiquitous as fire hydrants, they are not so widely used in rural areas, and they are seldom found atop telephone poles. Nevertheless, the court ruled that the initial warrantless surveillance of Houston's farm was lawful because the camera "captured the same views enjoyed by passersby on public roads." In other words, the agents "only observed what Houston made public to any person traveling on the roads surrounding the farm."

The question, then, was whether it mattered that the surveillance was conducted continuously for ten days. There is currently very little law on whether legal electronic

¹ See *Dow Chemical Co. v. United States* (1986) 476 U.S. 227, 238 ["It may well be that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."].

surveillance can become illegal if it was conducted for a long period of time, especially if it was continuous. However, four justices on the Supreme Court indicated in 2012 that four weeks of continuous monitoring of a vehicle by means of a hidden GPS tracker was “surely” too intrusive to be conducted without a warrant.² That was because it would “catalogue every single movement that the defendant made.” The justices added, however, that relatively short-term monitoring of a person’s movements on public streets by means of GPS “accords with expectations of privacy that our society has recognized as reasonable.”

The court in *Houston* acknowledged these concerns, but pointed out that “the surveillance here was not so comprehensive as to monitor Houston’s every move; instead, the camera was stationary and only recorded his activities outdoors on the farm.” Consequently, the court ruled that such long-term warrantless surveillance via a stationary pole camera does not violate a defendant’s Fourth Amendment rights when, as here, “it was possible for any member of the public to have observed the defendant’s activities during the surveillance period.”³ POV

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² *United States v. Jones* (2012) __ U.S. __ [132 S.Ct. 945].

³ Also see *U.S. v. Cuevas-Sanchez* (5th Cir. 1987) 821 F.2d 248, 251 [court said that continuous surveillance of a fenced-in back yard “provokes an immediate visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state.”].