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NEWSLETTER

Divided Sixth Circuit Okays Cell Phone GPS Search

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Whether the government may freely track individuals using GPS devices, unconstrained by Fourth Amendment search rules, is among the current privacy issues where there seems to be a lack of consensus among federal judges. The Sixth Circuit's August 14 divided panel decision in *U.S. v. Skinner*, 2012 U.S. App. Lexis 16920, a ruling in the government's favor, adds another data point but likely will do more to stir debate than provide clear guidance.

Authors

Bruce L. McDonald
Senior Counsel
202.719.7014
bmcdonald@wiley.law

Background

The Sixth Circuit's decision affirmed the appellant's conviction for transporting marijuana across the country in a motorhome. This courier activity was part of a "large-scale drug-trafficking operation" that involved importing drugs from Mexico and transporting them for sale in eastern states. The law enforcement authorities had learned a number of facts about the drug-trafficking operation from lawful wiretaps and from informants. These included that a courier called "Big Foot" was going to transport about 900 pounds of marijuana from Tucson, Arizona, beginning on July 11, 2006. He would be driving an RV "with a diesel engine" and would be accompanied by his son driving an "F-250 pickup truck, both with Southern license plates." They also understood Big Foot would be carrying a prepaid cell phone provided by his supervisors to coordinate the pickup and delivery, whose number was 520-869-6820.

In that context, the "authorities obtained an order from a federal magistrate judge" authorizing the "phone company to release subscriber information, cell site information, GPS real-time location and 'ping' data" for that phone. They did not seek a search warrant. By dialing the cell phone and then hanging up before it rang, the

authorities were able to "ping" or "gather data on the phone's physical location."

They determined the phone's location in that manner over several days. At 2:00 a.m. on July 16, 2006, the authorities determined that the phone was "stopped somewhere near Abeline, Texas" on Route 40. Drug Enforcement Administration (DEA) agents went to a truck stop there and discovered a "motorhome and a truck with Georgia license plates." They knocked and requested consent to search, which the occupant denied. They then conducted a "perimeter sniff" by K-9 dog, which dog "alerted officers to the presence of narcotics." They then searched the motorhome, found the narcotics and arrested the occupant, "later identified as Skinner."

Skinner moved to suppress the evidence obtained from the motorhome, which motion was denied. Skinner was thereafter convicted by a jury based on that evidence.

The Majority's Analysis

Circuit Judge John M. Rogers' majority opinion (joined by Circuit Judge Eric L. Clay) rejected Skinner's argument that "use of the GPS location information emitted from his cell phone was a warrantless search that violated the Fourth Amendment." All three judges on the panel viewed the issue as to whether Skinner enjoyed a "constitutionally protected reasonable expectation of privacy," a test described by Justice Harlan concurring in *Katz v. United States*, 389 U.S. 347, 360 (1967). This test includes whether the individual had a subjective expectation of privacy and, perhaps more importantly, whether "society is willing to recognize that expectation as reasonable."

Here the majority found that Skinner "did not have a reasonable expectation of privacy in the data given off" by the cell phone. That would apply not just to a criminal; "an innocent actor would similarly lack a reasonable expectation of privacy in the inherent locatability of a tool that he or she bought." The majority viewed the location data as something the cell phone user was "disclosing to the public." The majority also relied on cases finding that police engaged in visual tracking of people on public highways did not engage in a Fourth Amendment search. Judge Rogers reasoned that while "the cell site information aided the police in determining Skinner's locations, the same information could have been obtained through visual surveillance" and there is "no inherent constitutional difference between tracking a defendant and tracking him via such technology."

The majority distinguished the Supreme Court's recent decision in *United States v. Jones*, where a search by GPS was held to be a Fourth Amendment search (see *Privacy In Focus*, February 2012), on the grounds that here the police did not install the GPS device by trespass, and here the surveillance was "only" three days in length, not the "comprehensive" 28 days in *Jones*.

The "Concurrence"

Circuit Judge Bernice B. Donald (the most recent appointee to the Sixth Circuit) concurred in the judgment of affirmance but disagreed with the majority's Fourth Amendment analysis. Her bottom line was that Skinner did have "a reasonable expectation of privacy in the GPS data emitted from his cellular phone."

She faulted the majority analysis in that it is "not accurate" to say the police here "acquired only information that they could have otherwise seen with the naked eye." The police could not have achieved their goal by visual inspection, because they "did not know the identity of their suspect, the specific make and model of the vehicle he would be driving, or the particular route by which he would be traveling." Thus they would not know whom to visually observe or where to look for that person. Consequently, she concluded the GPS data were both different from visual surveillance and critical to identifying and locating the suspect.

Judge Donald felt the key question was "whether society is prepared to recognize a legitimate expectation of privacy in the GPS data emitted from any cell phone," a question she would answer "in the affirmative." Therefore, the police "should have obtained a warrant."

Despite that conclusion, Judge Donald voted to affirm the conviction. In her view, the police did have probable cause sufficient to get a warrant and had "erroneously obtained a court order" with respect to the release of data by the phone company. Because there was no "deliberate police misconduct," an exception to the normal rule excluding the evidence from a violative search was justified.

So Where Are We?

These judges clearly held differing perspectives on whether society is prepared to recognize a legitimate expectation of privacy in the GPS data emitted from cell phones. Neither side discussed how a court should determine whether society is so prepared, and it appeared the opinion writers relied on their subjective views. To the extent that is so, it seems likely to be some time before this and similar issues are resolved.