

GPS – GLOBAL PEOPLE SURVEILLANCE?

The Fourth Amended to the United States Constitution provides that

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.ⁱ

Consequently, if the police want to conduct a search or seizure, they may do so without a warrant so long as that search or seizure is not *unreasonable*.

What constitutes an unreasonable search or seizure such that a warrant is required? Technological advances since the adoption of the Fourth Amendment have made that a very complicated, and thus hotly litigated, question. Federal and state courts around the nation have been called on to decide whether a search is conducted during a low altitude flight over a suspect's home, through the use of thermal imaging equipment, and through the use of trained K-9 units sniffing the outside of cars, homes, and airplanes. Most recently, however, courts are being called to decide whether the use of global positioning satellite ("GPS") tracking devices constitutes a search or a seizure. This year alone, three different courts from around the United States have all confronted that issue, and their holdings have indicated that the matter is far from settled.

In United States v. Pineda-Morenoⁱⁱ the United States Ninth Circuit Court of Appeals considered whether law enforcement officers violated the Defendant's Fourth Amendment rights "when they enter the curtilage of his home and attach a mobile tracking device to the undercarriage of his car."ⁱⁱⁱ Importantly, the police in this case attached GPS devices to the Defendant's car on seven different occasions, only one of which was while the car was parked in his driveway. On the other occasions, the vehicle was parked on the street or in a public parking lot. After attaching the device and tracking the Defendant for a short time, the police eventually discovered the Defendant was involved in a marijuana cultivation operation, for which he was ultimately arrested and convicted. The Court held that "because Pineda Moreno did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the cartilage of his home."^{iv} His conviction, therefore, was affirmed.

In August of this year, the United States District Court of Appeals for the District of Columbia decided United States v. Maynard.^v In that case, the Defendant also argued that the use of GPS tracking technology infringed on his reasonable expectation of privacy in violation of his Fourth Amendment rights. The case was factually different than *Pineda-Moreno* in that

the police used the GPS device not to track [the Defendant's] movements from one place to another, but rather to track [his] movement 24 hours a day for 28 days as he moved among scores of places, thereby discovering the totality and pattern of his movements from place to place to place.^{vi}

The Court explained that “Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble.”^{vii}

Thus, the case turned not on whether the use of GPS tracking itself was inherently a violation of the Fourth Amendment, but rather whether *prolonged* use of GPS tracking was a violation. The Court held that such prolonged tracking here was a search into an area where the Defendant did have a reasonable expectation of privacy, and thus a warrant was required. Importantly, the Court *did not* address whether a warrant would have been required had the police tracked the Defendant for a shorter period of time, and if so, what amount of time would have moved a search from a reasonable one to an unreasonable one. In other words, this decision was narrowly confined to the specific issue before the Court.

Shortly after the *Maynard* decision, the Virginia Court of Appeal decided Foltz v. Commonwealth of Virginia.^{viii} In that case, the police had suspected the Defendant was engaged in a series of sexual assaults on women. Consequently, they began to track his movements with the aid of a GPS device which they attached to his work van, which itself was parked on the street outside his home.

The Defendant, who was eventually caught in the act of assaulting a woman and ultimately convicted, contended that the attachment of the GPS device to his work van was a search and/or a seizure, and thus a violation of his Fourth Amendment rights. The Court disagreed, holding that the installation of the device was not a search.

Because the actual act of simply placing the GPS device in the bumper of appellant's work van conveyed no private information to the police and because appellant did nothing to prevent the public from observing the bumper, we find he did not exhibit an expectation of privacy in this area of the van. Thus, the installation was not a search that raised a Fourth Amendment privacy issue.^{ix}

Likewise, the Court concluded that the police action did not constitute a seizure of the van because “any interference with appellant's limited possessory interest in the van was not a meaningful interference by the police. Thus, the installation in this case did not constitute a seizure for Fourth Amendment purposes.”^x Consequently, the police were not required to obtain a warrant prior to attaching and using a GPS device to track the Defendant in this case, and his conviction was affirmed.

Three different Courts have thus considered the same issue, to wit, whether attaching and using GPS technology to track a criminal suspect constitutes an unreasonable search and seizure such that a warrant is required. Each of the three Courts have reached different conclusions, and used different rationales to reach their conclusions. Consequently, whether or not the police may lawfully attach and employ a GPS device, without a warrant, in order to track a criminal suspect remains an open question. Hopefully, when the United States Supreme Court takes on this important issue, which they will undoubtedly do in the very near future, it will provide some much needed clarification.

ⁱ U.S. Const., Amend. IV

ⁱⁱ 591 F. 3d 1212 (9th Cir., 2010)

ⁱⁱⁱ *Id.*, at 1213

^{iv} *Id.*, at 1215

^v 2010 WL 3063788 (C.A.D.C., 2010)

^{vi} *Id.*, at 9

^{vii} *Id.*, at 13

^{viii} 2010 WL 3463131 (Va. App., 2010)

^{ix} *Id.*, at 5

^x *Id.*

Hunter H. Chamberlin, Esq.

CHAMBERLIN BUTLER & CROWE, P.A.

Attorneys at Law

Phone: 813.374.2216 | Fax: 813.234.4510

3001 North Rocky Point Drive East | Suite 200 | Tampa, Florida 33607