



Government GPS Tracking Since *U.S. v. Jones*

By Christopher B. Hopkins

In *U.S. v. Jones*, the Supreme Court held that the government violated the Fourth Amendment by installing and using a GPS to warrantlessly monitor the movements of a person's car. But *Jones* is not the final word on GPS tracking since: (a) *Jones* did not address GPS tracking *with* a warrant; (b) *Jones* arguably left open whether warrantless GPS tracking is permissible when both reasonable suspicion and probable cause exists; (c) *Jones* may not exclude GPS evidence which was acquired pre-*Jones*; and (d) the government may be permitted to warrantlessly track public employees. Along these lines, since *Jones* was decided upon "physical intrusion," and not the "expectation of privacy" standard which has dominated the field since the late 1960's, much of our recent pre-*Jones* precedent provides only half of the analysis.

Three cases from 2013 highlight the tension between warrantless GPS surveillance and the Fourth Amendment.

In *U.S. v. Katzin*, three brothers were charged with a string of burglaries after data from a GPS transmitter attached to their van connected them to a heist. Among other arguments, the government claimed that (a) warrantless GPS searches were permissible (a) under reasonable suspicion alone and, if not, (b) when probable cause existed. The Third Circuit disagreed and held that the police must obtain a warrant prior to a GPS search; moreover, the "good faith" exception would not permit admissibility of the pre-*Jones* GPS evidence. Relying upon a quote from *Jones*, the court held that planting a GPS was akin to a "constable concealing himself in the target's coach in order to track its movements."

Let's examine the *Katzin* arguments for warrantless GPS surveillance. First, the government argued that warrantless searches based upon reasonable suspicion were permitted in various circumstances such as those articulated in *Terry v. Ohio* and its progeny which held that a search was reasonable when an officer reasonably believed there was danger to himself or others. The court held that a mere frisk was not comparable to a prolonged GPS tracking and that a GPS would hardly reveal weapons. Making a broader statement, court concluded that, "absent highly specific circumstances not present in this case, the police cannot justify a warrantless GPS search with reasonable suspicion alone."

Second, the government argued that warrantless GPS tracking was allowable when there was probable cause under the "automobile exception." This too failed since there were no exigent circumstances, on the one hand, and that the GPS search "extends the police intrusion well past the time it would normally take officers [to enter a vehicle to search for evidence]." Indeed, the GPS search actually extended *into the future* since it reveals a person's actions which had not occurred at the time the GPS was installed.

Katzin is important since it illustrates the fact that the government can impermissibly violate the Fourth Amendment but that fruit-of-the-poisonous-tree evidence may still be admissible under the "exclusionary rule." That discussion

devoured dozens of pages regarding the "good faith exception" which is complex and case-specific. Indeed, the "exclusionary rule" cuts a wide path in terms of allowing GPS evidence; practitioners should firmly recognize that other courts may not be so ardent in declining to admit GPS evidence. That said, *Katzin* clearly outlines the arguments for future cases.

In *Cunningham v. New York*, the government placed a GPS transmitter on a state employee's personal car in order to ascertain if he was submitting false time slips. The court held that the search did not require a warrant but that the search was unreasonable in scope. Thus, *Cunningham* is significant since it leaves open a wide opportunity for a public employer to use GPS surveillance on employees under "reasonable" conditions.

Under *Jones*, the installation of the GPS was a "search" however the *Cunningham* court acknowledged that *Jones* did not address whether a GPS search is *ever* permissible without a warrant. In this case, the "workplace exception" to the warrant requirement existed: searches by public employers for non-investigatory, work-related purposes are allowed. The "location of a personal car used by the employee during working hours" was held to be no more private than a personal item in the employee's workspace. That said, the search was unreasonable in its scope since it continued to track the employee on evenings, weekends, and vacations -- despite the fact that, when it wanted to, the government removed the GPS three times. The court held, "[w]here an employer conducts a GPS search without making a reasonable effort to avoid tracking an employee outside of business hours, the search as a whole must be considered unreasonable." Taken the other way, *Cunningham* suggests that (limited) warrantless GPS tracking of state employees is permissible.

Finally, in early 2013, the U.S. Supreme Court revisited the Fourth Amendment for the first time after the *Jones* case. In *Florida v. Jardines*, the question was whether a drug-sniffing dog investigating the contents of the house from a homeowner's porch was considered a Fourth Amendment search. This case presented the Court with an opportunity to explain that the (dormant) "physical intrusion" standard existed despite the fact that courts had been applying the "expectation of privacy" standard, nearly exclusively, for the last 50 years. While the *Jardines* opinion held that the government improperly physically intruded on the defendant's property, the remaining minority opinions discussed how the two tests might reach harmonious results.

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