

The Fourth Amendment takes on New Technologies  
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GPS Devices:

United States v. Jones, 565 US \_\_\_, 132 S.Ct. 945 (2012)

FACTS:

FBI and local law enforcement put GPS tracking device on Antoine Jones' car during a drug investigation. Jones was arrested and charged with federal drug conspiracy charge. He moved to suppress the GPS data, arguing that the warrantless installation of the device violated the Fourth Amendment.

LOWER COURTS:

Most lower courts had ruled that people travelling "public streets" do not have an expectation of privacy in moving from one place to another. Analogy is to being watched or followed by police officers.

In Jones, Court of Appeals for DC overturned conviction, holding that the police action installing the device was a search because it violated Jones' reasonable expectation of privacy.

SUPREME COURT:

The Supreme Court invited briefing on the question of whether the installation of the device without a warrant violated Jones' rights under the Fourth Amendment.

The Supreme Court ruled that the Government's installation of a GPS device on a target's vehicle, and its use of the device to monitor the vehicle's movements, constitutes a search.

Unanimous in the result, but very different in the reasoning.

Justice Scalia's ruling, joined by four Justices, was the majority opinion. He revived a pre-Katz constitutional doctrine revolving around the law of trespass. (Katz – phone booth case holding that 4<sup>th</sup> Amendment protects people, not places, i.e. "reasonable expectation of privacy" the touchstone).

Scalia's opinion, however, does not abandon the "reasonable expectation of privacy" test. It can be considered in a search that does not involve governmental trespass. However, since this case did involve a "trespass" by the government, consideration of the reasonable expectation of privacy is not necessary.

Justice Alito's concurring opinion, emphasized the length of the surveillance – 28 days. He held under the traditional 4<sup>th</sup> Amendment analysis that this would violate the reasonable expectation of privacy of the subject. Thus, if the monitoring had been shorter, these Justices would not have found a violation.

Justice Sotomayor, writing her own concurring opinion, also provided the decisive fifth vote for Scalia's opinion. She emphasized that in some circumstances even short-term monitoring can violate the 4<sup>th</sup>

Amendment. Her emphasis is that Katz augmented but did not displace the common-law trespassing test that preceded it.

#### BOTTOM LINE:

Jones gets a new trial, as DC Circuit Court of Appeals is upheld.

Government tried to argue that even if court found search, it was reasonable – However, Court finds argument not raised below and therefore forfeited

Law enforcement much more likely to seek warrants for GPS placement, and 4<sup>th</sup> Amendment protections may be expanding on the back of a constitutional conservative.

#### Wisconsin GPS cases:

*State v. Brereton*, 2011 WI App 127, rev. granted 3/15/12 (oral argument in September of this year)

Brereton involves a case in which the police obtained a warrant, but the defendant is challenging whether the technology used exceeded the scope of the warrant.

The facts: the police arrested Brereton, towed his car, and then installed a GPS device after obtaining a warrant to do so. They monitored his car continuously for four days.

(Side notes – police stopped Brereton specifically to get access to his car to install the GPS device. The Court of Appeals held that they had PC for the stop, and PC for seizure of the car, so pretext didn't matter. They also never told Brereton that they moved his car)

The Court of Appeals held that the police action was reasonable, even though the GPS device they used was more advanced than the one described in the affidavit (which had to be recovered and data dumped to read) – it allowed continuous, live, remote tracking. Brereton argued that this meant that the warrant was executed unreasonably.

Court reasons that it's generally left to the discretion of the officers how to "proceed with the performance of a search authorized by the warrant."

Court relies on the fact that the monitoring was "only" for four days (contrast with the 28 days in *Jones*).

Looking into the future: "Though we can envision scenarios where prolonged use of this device might be unreasonable under the Fourth Amendment, we do not believe this case crosses the line."

Stay tuned, as the Wisconsin Supreme Court will weigh in next.

#### Dog Searches:

Time permitting, we will also look at two important "dog-sniffing" search cases which were argued October 31, 2012 – *Florida v. Jardines* and *Florida v. Harris*.