University of Michigan Journal of Law Reform Caveat

Volume 45 | Issue 1

2012

Signal Lost: Is a GPS Tracking System the Same as an Eyeball?

Eric Andrew Felleman
University of Michigan Law School

UNIVERSITY OF MICHIGAN

JOURNAL *of* LAW REFORM ONLINE

COMMENT

SIGNAL LOST: IS A GPS TRACKING SYSTEM THE SAME AS AN EYEBALL?

Eric Andrew Felleman*

On November 8th, the Supreme Court will hear arguments in United States v. Jones. One of the primary issues in the case is whether law enforcement personnel violated Mr. Jones' Fourth Amendment right to freedom from unreasonable searches and seizures by using a GPS tracking device to monitor the location of his car without a warrant. The 7th Circuit and the 9th Circuit have both recently held that use of GPS tracking is not a search under the Fourth Amendment.[1]

The Court will have to decide whether the information gathered by a GPS device is unique, or if it is sufficiently similar to information about an individual's location that we can gather with our basic senses. The government argues that this is a case of officers "observ[ing] matters conducted in the open, which anyone could see,"[2] information which is not considered protected under the Fourth Amendment.[3] Respondent Jones predictably responds that the GPS device generates unique data which is not actually open for anyone to see.[4] Jones' case will be significantly weakened if the Court agrees with the government's theory.[5]

---

* J.D. Candidate, December 2013, University of Michigan Law School.

1. United States v. Cuevas-Perez, 640 F.3d 272 (7th Cir. 2011), United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010).

2. Brief of Petitioner at 12, United States v. Jones, No. 10-1259.

3. *See* United States v. Knotts, 460 U.S. 276, 283-85 (1983).

4. Brief for Respondent at 11, United States v. Jones, No. 10-1259 ("Although a person traveling on public thoroughfares knowingly exposes himself to visual observation, he does not knowingly offer GPS data to public viewing. The government can obtain GPS data only by using a GPS device").

5. A separate issue in the case is whether the physical placement of the GPS device was an improper search or seizure under the Fourth Amendment. This will be decided by separate determinations.

The issue is novel on its face, but can be viewed as another incarnation of what has become a common question in contemporary courtrooms: to what extent should new technology be treated as merely an extension or augmentation of its predecessors, and when should it be viewed as fundamentally different from our current understanding of a field? While the detail in the information provided by a GPS receiver includes precise measurements of altitude, latitude, and longitude that cannot be acquired by the human eye, the ultimate use of the data by law enforcement can conceivably be seen as in the same class of information that is available to an observer on the street.

Jones' brief, on the other hand, argues that the GPS location data is fundamentally different from that gathered by the human eye because it involves complex calculations different in kind and quality from our vision systems.[6] But instead of getting bogged down in technical minutiae, the court should examine our expectations that surround our personal information. Prior courts have noted, for example, that our expectations of privacy in a motor vehicle are "diminished,"[7] but these estimations are obviously and necessarily based on a very different context from GPS tracking.[8] That we volunteer some information when we drive in our cars is a natural conclusion, but that doesn't mean we volunteer it *all*.

For instance, physical surveillance has natural limits that provide protection against unnecessary data collection which GPS tracking removes. As the amount of information acquired from physical surveillance scales upwards, the cost increases quickly, as each officer placed on the job is removed from another assignment. In contrast, GPS data can be automatically stored and examined collectively at a later point in time; the cost of acquiring location information after the initial placement of the GPS receiver is effectively zero. The harm thus is that the government, freed from the need to economize on its information gathering, is likely to gather large amounts of "innocent information," and not

---

6. Brief for Respondent at 29, United States v. Jones, No. 10-1259.

7. *See* U.S. v. Knotts, 460 U.S. 276, 281 (1983).

8. *See id.* (Discussing specifically that driving voluntarily conveys information to "anyone who wanted to *look*" (emphasis added)).

requiring a warrant would place almost no restrictions on the ability of law enforcement to engage in this practice.[9]

It remains to be seen what lens the Court will use to analyze this issue. A highly formalistic analysis essentially requires a blanket determination to be made that GPS tracking either is or is not the same as physical surveillance techniques. This approach would skirt the real question at the core of our Fourth Amendment law: what outcome would best accord with our own reasonable expectations of privacy, and the values that this expectation reflects? As technology changes, we need to be able to revisit areas of law to maintain the desired balance of interests at stake. Allowing law enforcement to use systems like these unchecked and without warrants would constitute a broad expansion of their power and a corresponding encroachment on our right to privacy. It would be disappointing if analogies between GPS tracking systems and the human eye distract us from the underlying issues in the case.

9. *See* Brief for Respondent at 25-26, United States v. Jones, No. 10-1259.