

**Case Note:** Supreme Court - Warrant is required to install a tracking device on the exterior of a vehicle while the vehicle is parked in a public place.

*United States v. Jones*, 586 U.S. \_\_\_\_ (January 23, 2012). Opinion at: <http://www.supremecourt.gov/opinions/11pdf/10-1259.pdf>

**FACTS:** As part of a drug distribution investigation, officers in a federal task force obtained a warrant from the Federal District Court in D.C. to place a GPS tracking device on a vehicle registered to defendant Jones's wife. The vehicle was used exclusively by the defendant.<sup>1</sup> The warrant authorized installation in D.C. within ten days. On the eleventh day officers installed the device on the exterior underbody of the vehicle while it was parked in a public place in Maryland, not in D.C. The GPS tracking device was used to monitor the vehicle's movements for 28 days. The defendant filed a motion to suppress all of the evidence obtained through the GPS tracking. The government conceded noncompliance with the warrant but argued that a warrant was not required. The District Court granted defendant's motion to suppress as to evidence obtained while the vehicle was in defendant's garage, but denied the motion as to all of the other evidence, ruling that defendant's Fourth Amendment rights were not violated because he had no reasonable expectation of privacy (REP) in his movements in public. The remaining collected data was used to convict the defendant in federal court. The D.C. Court of Appeals reversed the conviction, holding that defendant's Fourth Amendment rights were violated by the government's warrantless use of the GPS tracking device.

**ISSUE:** Did the attachment of the GPS tracking device on the vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitute a search or seizure within the meaning of the Fourth Amendment?

**HELD:** Attaching the device to the vehicle for the purpose of obtaining information was not a seizure, but it was a search.

**RATIONALE:**

1. The Fourth Amendment was intended to protect "persons, houses, papers and effects" against unreasonable searches and seizures by the government. The vehicle being used by the defendant was an "effect" within the meaning of the Fourth Amendment and, as such, was entitled to constitutional protection. Because there was no meaningful interference with the defendant's ability to possess or use the vehicle, there was no seizure. But, when the government "physically occup[ies] private property for the purpose of obtaining information," a search of constitutional significance has occurred. *Jones* at 4. "By attaching the device to the Jeep, officers encroached on a protected area." *Jones* at 9. Thus, their trespass constituted a search.<sup>2</sup> "Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information." *Jones* footnote 5 at 7.
2. In addition to a trespass-type search, an intrusion of constitutional significance also occurs when the government violates one's reasonable expectation of privacy. In *Katz v. United States*, 389 U. S. 347, 353 (1967), the Court held that "the Fourth Amendment protects

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<sup>1</sup> The D.C. Court of Appeals held that defendant had standing to raise the Fourth Amendment issues, and the government did not challenge that ruling in the Supreme Court.

<sup>2</sup> The Court did not decide whether the search at issue was reasonable because the government did not raise that argument in the lower court.

people – and not simply ‘areas’ – against unreasonable searches and seizures[.]” In deviating from the long established property-based approach, however, “*Katz* did not narrow the Fourth Amendment’s scope.” *Jones* at 7. Rather, it expanded it by creating an *additional* type of Fourth Amendment search that could be recognized when a defendant’s person or property was not physically intruded upon. The *Jones* Court relied upon the trespass doctrine to hold that a search occurred and did not decide whether the defendant had REP in the information collected by the GPS device.

#### **FUTURE IMPLICATIONS FOR GPS INSTALLATION AND MONITORING:**

1. It is essential to appreciate that a warrantless intrusion involving a tracking device can be analyzed using a *Jones* trespass approach, a traditional *Katz* REP approach, or both. So, a search triggering Fourth Amendment protections will occur when:
  - a. the government physically occupies (as in this case by attaching the device) private property for the purpose of obtaining information; or
  - b. the government violates (physically or otherwise) a person’s REP.

It is not hard to imagine how installation and monitoring of a GPS tracking device could trigger both analyses. Installation of the device on personal property owned or controlled by a target will most often constitute a trespass, while warrantless tracking within an REP area is a violation of the Fourth Amendment.

Five justices (Scalia, Roberts, Kennedy, Thomas, and Sotomayor) declined to address whether and/or when collection of GPS tracking data in public areas was sufficiently invasive to constitute an intrusion into REP. However, the remaining four plus Sotomayor agreed that even when conducted in public areas “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.” *Jones* at 13 (Alito, Ginsburg, Breyer and Kagan concurring). Warrantless collection of voluminous amounts of tracking data in public areas over time could also rise to the level of an REP violation. Resolution of those issues awaits a future case.

#### 2. For future investigations

To ensure Fourth Amendment compliance with both installation of monitoring of GPS tracking devices, law enforcement officials should consider the following guidance:

- a. Obtain a warrant for both interior and exterior installations of tracking devices on any personal property of the target, no matter how minimal the physical intrusion; and
- b. Ensure the warrant allows collection and monitoring of the tracking data in public and REP areas.

The specific procedures, requirements, and limitations for tracking warrants are set forth in Federal Rule of Criminal Procedure 41(b)(4), (e)(2)(c) and (f)(2).

Law enforcement officers would be wise to obtain a warrant even when the vehicle at issue is not owned or exclusively controlled by the target of the surveillance. While the installation may not constitute a trespass upon the target’s personal property – as in the case of a rental vehicle

to be used by a target in the future, a vehicle owned or controlled by one who provides consent, or a previously installed device such as OnStar<sup>3</sup> or LoJack<sup>4</sup> – collection or monitoring of the tracking information may constitute a violation of the target’s REP.

3. For current investigations/cases involving warrantless GPS tracking

- a. Stop the tracking and get a warrant.

In *United States v. Johnson*, 457 U.S. 537, 562 (1982), the Supreme Court held that “a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.”

Even if the device was placed on the vehicle with the knowledge and consent of the owner/operator, getting a warrant is advisable because of the likelihood of tracking within an REP and the risk that a court will determine that the tracking in public areas was an REP violation.

- b. Warrantless tracking data obtained prior to the *Jones* decision on January 23, 2012, may be admissible pursuant to the good faith exception to the exclusionary rule in those federal circuits where binding precedent had previously authorized it.

In *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011), the Supreme Court held that “the harsh sanction of exclusion ‘should not be applied to deter objectively reasonable law enforcement activity.’ Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.” (internal cite omitted).

As of the *Jones* decision, the following federal circuits had authorized warrantless installation of tracking devices onto the exterior of a vehicle while that vehicle was in a public place:

Fifth Circuit – *United States v. Hernandez*, 647 F.3d 216 (2011)

Seventh Circuit – *United States v. Cuevas-Perez*, 640 F.3d 272 (2011); *United States v. Garcia*, 474 F.3d 994 (2010)

Eighth Circuit – *United States v. Marquez*, 605 F.3d 604 (2010)

Ninth Circuit – *United States v. Pinedo-Moreno*, 591 F.3d 1212 (2010)

4. Officers should obtain a warrant to monitor a tracking device that will be placed into non-vehicular property, such as a package, when it is within the government’s control. While the installation will not constitute a trespass, collection of the tracking data once the property is provided to the target may constitute a violation of REP.

**UNANSWERED QUESTIONS:**

Law enforcement agencies should examine their policies and talk with prosecutors in their jurisdictions to determine where a *Jones* trespass analysis may apply even though there is no

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<sup>3</sup> OnStar equipped vehicles have a built-in GPS that can track and record a vehicle’s movements.

<http://www.onstar.com/web/portal/landing>

<sup>4</sup> LoJack is a radio transmitter installed on a vehicle that can aid in tracking the vehicle. <http://www.lojack.com/>

violation of REP. Such areas of consideration might be:

1. Collecting evidence from the exterior of a vehicle parked in a public place. While the Court has long held that looking at and in a vehicle in a public place is not a search, most law enforcement agencies teach that one can collect evidence such as debris, fingerprints, trace evidence, tire impressions, and paint scrapings from the exterior of a vehicle without a warrant in such a setting. This policy should be reexamined in light of *Jones* to determine whether such an intrusion constitutes a trespass upon personal property for the purpose of gathering information.
2. Entering upon curtilage. While most jurisdictions hold there is no expectation of privacy on a sidewalk, driveway, or front porch, a physical intrusion into such areas may – under a *Jones* analysis – be considered a trespass search nonetheless if officers intrude there to collect information.
3. Use of cell site data. At least five members of the Court would consider the possibility of an REP violation in the case of extensive, warrantless GPS tracking because the data reveal voluminous amounts of intimate information about the target. Since cell-site data<sup>5</sup> similarly discloses a target's whereabouts, defendants can be expected to argue that such an intrusion requires a warrant, rather than a court order<sup>6</sup>, to satisfy the Fourth Amendment's reasonableness requirement.

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<sup>5</sup> Cell site data are the result of using tower locations with which a cell phone is communicating to reveal the location of a target's cellular phone.

<sup>6</sup> Such court orders are issued pursuant to 18 U.S.C. § 2703(d) and do not require probable cause.