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# A DAY LATE, A WARRANT SHORT

***An investigative delay puts warrantless electronic tracking in front of the Supremes***

*By Julius (Jay) Wachtel*. Thanks to a goof by the Feds and a friendly appeals court Antoine Jones is for the time being an extremely lucky alleged drug dealer. Whether his fortune will hold will soon be decided by the Supreme Court.

In 2004 the FBI and Washington D.C. police were investigating Jones, the owner of a D.C. nightclub, for running a cocaine ring. Agents placed a camera outside the club and got a warrant to listen in to his cellular phone calls. They also obtained a warrant to place a GPS unit on the Jeep Grand Cherokee he was driving. Federal law has never required agents to get court approval to plant a tracking device on a vehicle, so the step was apparently taken as a matter of prudence.

Agents had ten days to install the GPS, but they didn't get it done until the eleventh, while the Jeep sat in a parking lot in Maryland, a different judicial district. Within days they replaced the battery, again in Maryland.

In 1997 the Ninth Circuit affirmed the conviction of two suspected marijuana growers, Christopher McIver and Brian Eberle. Their movements had been tracked for about ten days by Forest Service agents who attached a beeper to the undercarriage of McIver's vehicle without securing a warrant. Justices ruled that McIver did not have a legitimate expectation of privacy in his driveway, where the car had been parked, and that placing a device on his vehicle's undercarriage was not a "seizure" deserving of Fourth Amendment protection.

As the century turned law enforcement agencies were transitioning from beepers to the more modern GPS. Signals emitted by beepers must be physically tracked with portable receivers that analyze signal strength and direction. They are far less effective than GPS units, which place targets on a map with up to 50 foot accuracy. On the other hand both kinds of devices perform the same function: to help keep suspects safely under observation while minimizing the risk of detection and using as few resources as possible. Trailing vehicles in an urban setting without getting "burned" (or being involved in an accident) is an art form, and to successfully pull it off over any distance without the benefit of a tracking device can require multiple ground units and, preferably, air support.

At the time of the Antoine Jones investigation the issue of planting tracking devices on vehicles had not been specifically addressed by the Supreme Court. But it got close in 1984 when it ruled in U.S. v. Knotts that agents did not need a warrant to hide a beeper in a container of chloroform that was provided to suspected illicit drug manufacturers during a narcotics sting. Agents used the device to help them follow the suspects' vehicle on public roads and ultimately to a remote cabin. They got a warrant for the cabin, and the fruits of that search were ruled admissible.

In *Knotts* the surveillance only lasted a few days. Antoine Jones was a different matter. Helped along by the GPS unit the Feds trailed him for a month. Using information from fixed and GPS-aided

surveillance and wiretaps they obtained search warrants for several locations, recovering large amounts of cash, drugs and related paraphernalia.

At trial Jones objected to the GPS evidence. Since the delay had rendered the warrant invalid the judge issued a split ruling. Evidence that stemmed from mobile tracking was admissible. But he disallowed GPS information for periods during which the Jeep was in a private garage for which Jones had a reasonable expectation of privacy, as that could only be offset by a valid court order. Jones and his principal codefendant, club manager Lawrence Maynard were eventually convicted of a drug trafficking conspiracy and got life.

Then one of them got lucky. It wasn't Maynard. Being caught in a van full of cocaine-soaked cash is pretty damning, and on August 8, 2010 the D.C. Circuit Court of Appeals affirmed his conviction. But Jones was a different story. His conviction relied on observations made during a GPS-assisted surveillance that went on twenty-four/seven for a month:

> *Knotts* held only that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," id. at 281, not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end, as the Government would have it.

Paradoxically, the D.C. circuit's argument that *Jones* wasn't controlled by *Knotts* was inspired by a passage in the latter:

> Respondent…expresses the generalized view that the result of the holding sought by the Government would be that "twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision"… But the fact is that the "reality hardly suggests abuse"…if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.

As far as the D.C. Circuit was concerned a "dragnet-like" situation had come to pass and they weren't going to let the government get away with it. Jones' conviction was overturned.

Prosecutors were flummoxed. "Dragnets," they insisted, are when cops don't know who did it so they round up the "usual suspects," not when they have particularized suspicion and focus on just one. But the D.C. circuit insisted that *Jones* is special:

> The whole of one's movements over the course of a month is not constructively exposed to the public because, like a rap sheet, that whole reveals far more than the individual movements it comprises. The difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life, nor the departure from a routine that, like the dog that did not bark in the Sherlock Holmes story, may reveal even more.

One circuit that reviewed similar circumstances and came to the opposite conclusion is the notoriously liberal Ninth. In U.S. v. Pineda-Moreno (1/11/2010) justices approved the warrantless planting of a

string of devices on a drug suspect's vehicle over a period of *four months*. One of the gadgets was a GPS device that stored location information, enabling officers to sit back and wait, then download the data when their target returned.

That's the approach that cops took in Wisconsin. Eager to nail a meth cooker who bragged that he couldn't be caught, they affixed a memory-type GPS device to his car, then retrieved it days later. Officers learned that the vehicle had been on a certain tract of land. Its owner gave consent to search. Sure enough, cops found an improvised meth lab. All they had to do was hide and wait until the suspect returned. According to the Seventh Circuit (U.S. v. Garcia, 2/2/2007) planting the device while the car was parked in a public place wasn't a significant intrusion, thus not a seizure. And under *Knotts* tracking a vehicle isn't a search. It was all perfectly legal.

It's unlikely that the Supreme Court will let *Jones* stand. Fiddling with established notions about what is public and under what conditions could upset an entire area of law. How to legally plant a device without having a warrant was settled by *Knotts*. And what supposedly wasn't – the appropriate length and intrusiveness of warrantless surveillance – seems far too vague a concept to be a useful guide, at least as articulated in *Jones*.

On the other hand, planting a beeper or GPS is not a trivial act. One can empathize with the D.C. Circuit's grasp for a means to corral what could be a dangerous beast. Only a handful of states, including Florida, Minnesota, Utah and South Carolina require court authorization for tracking devices, but all that must be shown is that the information being sought is relevant to a criminal investigation. Even if the Supremes were inclined to take it a step further and devise a rule, say, that calls for reasonable suspicion, they would probably want evidence that police have been abusing surveillance technology. That presents a conundrum, as most of what we know about tracking devices comes from court challenges, and with rare exception (check out the video for an embarrassing flub-up) law enforcement officers seem to have acted properly.

One thing's for sure. With all the flack that's been stirred police are likely to pay closer attention to the circumstances under which high-tech surveillance takes place. And that's clearly a good thing.