



SECOND CIRCUIT REVIEW

Expert Analysis

Electronic GPS Tracking And the Fourth Amendment

Two recent decisions by the U.S. Court of Appeals for the Second Circuit appear to reflect the court's growing interest in the constitutionality of the government's use of location information obtained electronically from global positioning systems (GPS). In both *U.S. v. Caraballo*, 831 F.3d 95 (2d Cir. 2016) and *U.S. v. Gilliam*, No. 15-387, 2016 WL 70009952 (2d Cir. Dec. 1, 2016), the Second Circuit considered whether a defendant-appellant's Fourth Amendment right is violated when law enforcement determines his location by acquiring GPS information from a cellular phone provider, and then uses this information to carry out an arrest.

In each case, although the Second Circuit affirmed the district court's approval of the government's conduct, it did so based on exigent circumstances. As a result, the court has left open the looming question of at what point information obtained via GPS violates an individual's Fourth Amendment right, and is therefore unconstitutional.

Background

The Supreme Court recently considered the use of GPS monitoring in its decision in *U.S. v. Jones*, 132 S. Ct. 945 (2012). In *Jones*, law enforcement officers obtained a warrant permitting the installation of

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a GPS tracking device on a vehicle registered to the respondent's wife. While the court ruled that the installation of a GPS tracking device on a vehicle and the tracking of that vehicle's movements via GPS constitutes a search under the Fourth Amendment, it explicitly left open the question of whether government surveillance exclusively through

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electronic means (i.e. without the use of a physical tracking device) could be unconstitutional.

'U.S. v. Caraballo'

In *U.S. v. Caraballo*, the Second Circuit considered the constitutionality of police officers' warrantless acquisition of the GPS coordinates of the defendant-appellant's phone. The panel, in a decision authored by Judge Guido Calabresi, and joined by Judge Gerard E. Lynch, and Judge Raymond

Lohier, ruled that exigent circumstances justified police officers' warrantless acquisition of the GPS coordinates of the defendant-appellant's phone.

The Vermont State Police accessed Caraballo's GPS data in the aftermath of the shooting death of Melissa Barratt, which the responding police officers determined to be a homicide, and likely an execution. Barratt had come to the attention of local law enforcement shortly before her death when she was arrested for selling drugs. Barratt told the arresting police officers that she was afraid of her associate, Frank Caraballo, whom she reported possessed multiple firearms and had committed assault or possibly homicide on previous occasions.

Based on Barratt's report, Vermont Police conducted an in-depth, covert investigation of Caraballo which confirmed Barratt's statements. When Barratt's body was discovered, local law enforcement believed it highly likely that Caraballo was involved.

Viewing time to be of the essence, the investigating police officers requested that Caraballo's cellular phone provider "ping" his phone, which would produce, through GPS location technology precise information about the whereabouts of Caraballo's phone and, the officers hoped, Caraballo. The officers did not obtain a warrant, but completed a standard form provided by the cellular phone provider on which they outlined the exigency of the situation, noting that this request was related to a "suspect in [a] possible homicide." Shortly after

initiating the “pinging” process, officers were able to identify Caraballo. Following a brief period of visual surveillance, the officers arrested him.

Before trial, Caraballo moved to suppress the evidence recovered following his arrest, arguing that the pinging of his cell phone constituted a warrantless search in violation of the Fourth Amendment. The district court denied Caraballo’s motion to suppress, ruling, among other things, that exigent circumstances rendered the warrantless search of Caraballo’s cell location to be reasonable. The Second Circuit panel agreed with the district court that exigent circumstances justified the officers’ pinging of Caraballo’s cellular phone.

The court’s opinion focused on the exigent circumstances analysis, the core question being whether the facts, as they appeared “at the moment of entry,” would lead a reasonable, experienced officer to believe that there was an urgent need to render aid or take action. As part of this analysis, the panel acknowledged the need to consider the degree to which the police officers intruded on the defendant’s privacy interests. The panel explained that the greater the invasion of privacy (i.e. a physical intrusion into the home being the most serious of invasions), the more stringent the requirements that the search be urgently undertaken in order for the exigency exception to apply.

Applying the exigency standard to the facts of the case, the panel agreed that GPS monitoring of Caraballo’s cellular phone was justified by exigent circumstances. Most notably, the panel observed that the degree of the intrusion into Caraballo’s privacy was slight. As an initial matter, the pinging was “strictly circumscribed,” aimed at finding Caraballo as quickly as possible, and was terminated as soon as Caraballo was located.

The panel also observed that the expectation of privacy that Caraballo had in his cellular phone was “dubious” at best, in light of the fact that these events took place before the Supreme Court’s decision in *Jones*. Noting the current division in other circuit courts on the expectation of privacy an individual has in his cellular phone, the panel observed

that an expectation of privacy in one’s cellular phone is not yet a “core privacy value.”

‘U.S. v. Gilliam’

In the Second Circuit’s decision in *U.S. v. Gilliam*, the Second Circuit once more considered the constitutionality of police officers’ warrantless acquisition of the GPS location of the defendant-appellant’s phone. In a decision written by Judge Jon O. Newman, and joined by Judge Ralph K. Winter and Judge José A. Cabranes, the

The panel in ‘Gilliam’ agreed that the facts available to law enforcement at the time—that Gilliam had Jasmin in his custody, with the intention of forcing her to work as a prostitute—presented an emergency sufficient to justify warrantless action by the investigating officers.

panel once more ruled that law enforcement officers’ conduct was justified by exigent circumstances.

The defendant-appellant, Jabar Gilliam, met Jasmin, a minor, in late 2011, and asked her to work for him as a prostitute. In the course of forcing Jasmin to work as a prostitute, Mr. Gilliam abused her on multiple occasions and, on at least one instance, abused her sexually. Late in 2011, Jasmin’s foster mother reported Jasmin missing, informing local law enforcement that she believed Jasmin to be with Gilliam. After confirming this information, investigating law enforcement officers determined that it was necessary to find Gilliam immediately.

Without first obtaining a warrant, the lead investigating officer told Gilliam’s cellular phone provider that officers were investigating a missing child who was being prostituted, and that they needed GPS location information for Gilliam’s phone. The phone company complied with the officer’s request, and shortly thereafter began to provide the real-time location of Gilliam’s phone to the investigating officer. This information allowed police officers to arrest Gilliam.

Gilliam challenged law enforcement’s use of the GPS location through his phone to make his arrest. The district court denied Gilliam’s

motion. Affirming the district court’s denial, the Second Circuit focused on whether the facts of the case legitimately presented “exigent circumstances” justifying the warrantless acquisition of location information via GPS to arrest an individual.

The panel agreed that the facts available to law enforcement at the time—that Gilliam had Jasmin in his custody, with the intention of forcing her to work as a prostitute—presented an emergency sufficient to justify warrantless action by the investigating officers. The panel referenced other case law identifying the prostitution of a minor as posing a significant risk of bodily injury, a key component in the exigency analysis. The panel also referenced case law justifying the warrantless entry into premises to avoid the risk of injury to a minor held in such premises.

In reaching its conclusion affirming the district court’s decision, the panel also noted, citing *Caraballo*, that Congress had deemed it reasonable to subordinate any individual privacy interest in cell phone location information to society’s more compelling interest in preventing an imminent threat of death or serious bodily injury and, in furtherance of that objective, had given cellular phone service providers the authority to make decisions on whether a true emergency exists, justifying access to an individual’s location information via GPS.

Conclusion

These recent Second Circuit decisions have put, front and center, the timely question of privacy in the digital age. Whether or not an individual has a “legitimate” privacy interest in his or her cellular phone is likely to be a question that will divide courts for years to come. Indeed, *Caraballo* and *Gilliam* suggest that the Second Circuit may be interested, in the near future, in addressing the question left unanswered by the Jones court: At what point does law enforcement’s electronic acquisition of location information cross the line in violation of the Fourth Amendment?