



October 15, 2012

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Heat Loss Captured via Thermal Imaging Technology is Not Tangible Evidence under Georgia's Search Warrant Statute

In *Brundige v. State*, S11G1821 (October 15, 2012), the Georgia Supreme Court held that heat loss from the defendant's home captured from a thermal imaging device was not "tangible evidence" within the meaning of O.C.G.A. § 17-5-21(a)(5). In May 2009, a police detective became aware through a confidential informant of an individual suspected of growing marijuana in his residence. Pursuant to the detective's investigation, the suspect was discovered to have visited the defendant's home nine times in one week. The detective then conducted a "trash pull" at the defendant's residence, discovering pieces of Ziploc bags, empty rolling paper packets, and a marijuana amount consistent with a grow operation. The detective also discovered the electrical use at the defendant's residence was nine times higher than similar homes.

To gain further information, the detective sought and obtained a search warrant to conduct thermal imaging on the defendant's residence. A search warrant was sought pursuant to United States Supreme Court precedent holding the use of thermal imaging to obtain information regarding the interior of the home constituted a search, and was thus unreasonable without a warrant. *Kyllo v. United States*, 533 U.S. 27 (2001). The warrant authorized police to "search and seize" the "anomalous heat loss occurring at the described premises." The search was executed and upon finding an abnormal heat signature emanating from the defendant's home, a second search warrant was sought and granted for a physical search of the interior of the residence. When the second search warrant was executed, officers seized items that indicated a marijuana growing operation.

The defendant filed a motion to suppress all evidence seized as a result of the aforementioned warrants. The defendant's motion was denied by the trial court and affirmed by the Court of Appeals. Before the Supreme Court, the defendant argued that a warrant to search and seize "anomalous heat loss" is not authorized under O.C.G.A. § 17-5-21(a)(5) because the evidence sought is not "tangible." O.C.G.A. § 17-5-21(a)(5) states a warrant may be issued for the seizure of "any item, substance, object, thing or matter . . . which is *tangible evidence* of the commission of the crime for which probable cause is shown." The Court first noted that "tangible evidence" is not defined anywhere in the Code. The Court found that giving the "word 'tangible' full effect, it appears the General Assembly intended 'tangible evidence' to mean evidence that is essentially an object with material form that could be touched by a person." Accordingly, the Court held that the term "tangible evidence" as used in the statute does not include the "amorphous heat loss" captured by thermal imaging. Therefore, the Court found that the thermal imaging search pursuant to the first search warrant was not authorized under O.C.G.A. § 17-5-21(a)(5).



State Prosecution Support

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Nonetheless, the Court found the seized evidence as a result of the second warrant was admissible after excising the thermal imaging information, because the remaining evidence by itself was found to be sufficient to establish probable cause.

Of concern in this case is that in so holding, the Court cited with approval a 1977 U. S. Supreme Court decision on a similar issue regarding the understanding of “tangible evidence.” In *United States v. New York Tel. Co.*, 434 U.S. 159, 169-170 (1977), the Court, when interpreting the Federal Rule defining “documents, books, papers and any other tangible objects” which may be seized pursuant to a search warrant, held this definition did not cover a record of electrical impulses caused by a dialed phone, because such are “intangible.” The *Brundige* decision could thus conceivably be used to contest search warrants seeking any electronic or digital evidence on the basis that such evidence is not “tangible” and consequently, unauthorized under O.C.G.A. § 17-5-21(a)(5).

The full text of the opinion may be found at the following link:
<http://www.gasupreme.us/sc-op/pdfs/11g1821.pdf>