



August 14, 2012

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U.S. v. Skinner:
6th Circuit Rules Post-Jones That No Court Authorization Is Necessary For GPS Tracking Of Defendant's Cell Phone

In *Devega v. State*, 286 Ga. 448 (2010), the Georgia Supreme Court ruled that no court authorization was necessary for GPS tracking of the defendant's cell phone as he traveled on public roads. The Court cited *U.S. v. Karo*, 468 U.S. 705 (1984) and *U.S. v. Knotts*, 460 U.S. 276 (1983), for the long-held proposition that there is no reasonable expectation of privacy in one's location and movement on public roads.

The viability of this ruling became unclear when the U.S. Supreme Court issued its ruling in *U.S. v. Jones*, 132 S.Ct. 945 (2012). In *Jones*, a 4-1-4 divided Court ruled that a search warrant was required in order to attach a tracking device to the vehicle of the defendant. The rationale was that because the act of attaching the device to the defendant's property was a physical trespass at common law, the Fourth Amendment is violated unless authorized by a court in advance: "The government physically occupied private property for the purpose of obtaining information." The *Knotts* and *Karo* cases were specifically distinguished (lack of a trespass), not overruled. However, Justice Scalia, writing for the majority, speculated that, "It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question." This statement certainly called into question the propriety of warrantless tracking of cell phones, either by GPS or cell-site data.

On August 14, 2012, eight months after the decision in *Jones*, the 6th Circuit Court of Appeals confronted that very question directly in *U.S. v. Skinner*, No. 09-6497, 2012 U.S. LEXIS 16920. In *Skinner*, the DEA was involved in an investigation of large-scale marijuana trafficking, and had reason to believe that the defendant was driving an RV loaded with marijuana and that he was using a certain "pay-as-you-go" cell phone to communicate with co-conspirators. They tracked the defendant's cell phone via GPS as he traveled on public roads and then, using that information, arrested him at a rest stop. They found 61 bales of marijuana (over 1,100 pounds) in the motor home. The Court's opening line of the opinion said it all:

When criminals use modern technological devices to carry out criminal acts and to reduce the possibility of detection, they can hardly complain when the police take advantage of the inherent characteristics of those very devices to catch them.

The Court quickly concluded that the defendant had no reasonable expectation of privacy:

There is no Fourth Amendment violation because *Skinner* did not have a reasonable expectation of privacy in the data given off by his pay-as-you-go cell phone. If a tool used to transport contraband gives off a signal that can be tracked for location, certainly the police can track the signal.



State Prosecution Support

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In determining that Skinner had no reasonable expectation of privacy, the Court further stated the following:

... [W]e determine whether a defendant's reasonable expectation of privacy has been violated by looking at what the defendant is disclosing to the public, and not what information is known to the police.

The *Skinner* Court relied on *Knotts* and *Karo* and distinguished *Jones* because of the absence of any trespass on the part of the government. The Court further noted that the period of surveillance had been relatively short in this case (only 3 days) compared to the 28 days in *Jones*: “Relatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that society has recognized as reasonable.”

Although *Skinner* is only persuasive authority, it may still be used to argue that the *Devega* ruling remains intact and that no court authorization is constitutionally required in Georgia for tracking a cell phone by cell-site data or GPS, at least in cases involving relatively short-term tracking.