LEGAL UPDATE

City of Madison Police Department

Spring 2012 Captain Victor Wahl

GPS Tracking

***United States v. Jones*, 132 S.Ct. 945 (2012); Decided January 23, 2012 by the United States Supreme Court.**

In *Jones*, police suspected a nightclub owner (Jones) of being involved in drug trafficking. Officers utilized a number of techniques to investigate Jones, and eventually obtained a warrant authorizing them to place a GPS tracking device on Jones's vehicle. The officers subsequently installed the device, however they did so outside the scope of the warrant (the warrant authorized installation of the device within 10 days, though it was not installed for 11 days; also, the vehicle was located in Virginia when the device was installed, not in the District of Columbia where the warrant was issued). Officers monitored the vehicle's movement for the next 28 days, and eventually Jones was arrested and charged for a variety of federal drug offenses. The GPS tracking data was utilized in the prosecution, and Jones sought to have the evidence suppressed.

The case eventually reached the U.S. Supreme Court. The court ruled in favor of Jones, stating "we hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" The *Jones* decision was contrary to how most lower courts had ruled on the issue, and left a number of important questions unanswered.

Placement of the GPS device: five of the justices concluded that the physical placement of the GPS device on Jones's vehicle was a search. Notably, the court did not rely on the well-known reasonable expectation of privacy standard to reach this conclusion. Instead, the court relied on physical property/trespass approach: "when the Government does engage in a physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." Because the placement of the device involved a physical intrusion (even though a very minor one) to Jones's personal property, the court deemed it a search.

Notably, the court did not rule that a warrant was required to place a GPS device on a vehicle; they simply ruled that such an action was a search under the Fourth Amendment. They expressly declined to consider the Government's argument that the search was reasonable because it was supported by probable cause (that Jones was involved in drug activity). So, the question of whether the physical placement of a GPS device on a vehicle requires a warrant or might be reasonable without a warrant (based on the auto exception, for example), will have to wait for another day.

Monitoring the vehicle's movements: Four of the justices who concluded that placement of the GPS device was a search declined to address whether the actual monitoring of the device was a search. However, five justices concluded that the long-term monitoring of Jones's vehicle did constitute a search.

So, while the *Jones* case has been portrayed as a clear ruling that GPS monitoring always requires a warrant, the ruling is actually more complicated, and the decision leaves a number of unanswered questions that will have to wait for future courts to resolve. For now, while there may be some limited instances where GPS placement and monitoring without a warrant might be permissible, the safest and preferred course of action will be to obtain a warrant.

The bigger question is whether (and how) the trespass approach to Fourth Amendment analysis utilized in *Jones* will be applied to other contexts. The reasonable expectation of privacy concept is well-developed and fairly easy for officers to apply. Time will tell the extent to which the *Jones* trespass analysis impacts other Fourth Amendment cases.

Confrontation Clause

The Sixth Amendment reads, in part: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…" Historically, this rule had not been applied literally, and in practice there were many circumstances under which statements could be introduced at a criminal prosecution without the actual presence at trial (and with it the opportunity for cross-examination) of the person who made the statement.

This changed in 2004, with the U.S. Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The *Crawford* case involved a stabbing trial, in which the prosecution played a recording of a statement the defendant's wife made to police. The wife did not testify (due to the marital privilege), though her statement to police implicated her husband in the stabbing. The *Crawford* decision reversed years of precedent, and ruled that the Sixth Amendment's Confrontation Clause barred introduction of the wife's recorded statement. The Court stated:

> Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required:

> unavailability and a prior opportunity for cross-examination.

The *Crawford* court did not expressly define "testimonial," but stated that it included "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." So, under *Crawford*, the Constitution precludes a witness from testifying at a criminal trial about "testimonial" statements made by another person unless that other person is unavailable for trial and was already subject to cross-examination by the defense.

A couple of years later, the Court heard another Confrontation Clause case, *Davis v. Washington*, 547 U.S. 813 (2006). In *Davis*, the court ruled that statements made to a 911 operator were "nontestimonial" and therefore not subject to the Confrontation Clause analysis articulated in *Crawford*. The *Davis* court stated:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The *Davis* court also clarified that the Confrontation Clause will offer no protections when witness intimidation is involved: "when defendants seek to undermine the judicial process by procuring or coercing silence form witnesses and victims, the Sixth Amendment does not require courts to acquiesce."

Last year, the court ruled further on the Confrontation Clause in *Michigan v. Bryant*, 131 S.Ct. 1143 (2011). In *Bryant*, officers responded to a shooting and asked questions of the victim (who had shot him, what they looked like, etc.). The court concluded that under the circumstances (an unknown suspect, a violent crime involving a weapon, an unknown crime scene or suspect location, etc.) demonstrated that the statements were "nontestimonial" and therefore not subject to Confrontation Clause protections.

So, while the *Bryant* decision may signal some loosening of Confrontation Clause protections, *Crawford* still significantly restricts the ability of a prosecutor to introduce hearsay statements in a criminal trial. A decision (in *Williams v. Illinois*) is expected soon from the Supreme Court on the latest Confrontation Cause issue: whether an expert can testify about results of DNA testing conducted by another analyst who has not appeared as a witness at the trial.

The Federal Law Enforcement Training Center has offered these suggestions for officers to be prepared for Confrontation Clause challenges:

Be able to find the witness for trial: the basic imperative of these cases is that witnesses must appear and testify in person. America is a mobile society. The time lapse between crime and trial is often measured in years. Even with the Internet, finding witnesses again can be difficult. Asking, "who are the two people you don't live with who will always know where you are and what are their phone numbers?" and a few similar questions may yield huge dividends later.

Plan for their unavailability: The great majority of victims in domestic abuse will not testify against their abusers. Witnesses are reluctant to testify against gangs. Lots of people consider it dishonorable to snitch. So:

> Corroborate the statement. Quick thinking will lead to corroborating evidence that may be admissible even if the statement falls to the Confrontation Clause.
>
> Memorialize the facts that will later help the prosecutor characterize the statement as nontestimonial. If the statement is nontestimonial, the Confrontation Clause will not block the officer who took the statement from testifying about its contents if the declarant is unavailable. Per *Bryant*, the statement will be nontestimonial when the primary purpose of taking the statement was to enable police assistance to meet an ongoing emergency. Extrapolating from the cases, here is a list of some of the factors that will help the prosecutor win that argument and admit the statement:
>
> - The suspect is unidentified.
> - The suspect got away.
> - The suspect was armed.
> - The suspect committed a violent crime.
> - Similar unsolved crimes had been committed earlier; the suspect may have committed them and is likely to commit similar crimes in the future.
> - The questions that produced the statement were clearly pointed toward catching the criminal and preventing future crimes.
> - The questions that produced the statement were brief, informal and unstructured.
> - The questions that produced the statement were asked near in time and place to the crime itself.
> - The questions that produced the statement were clearly focused on finding other injured victims or dealing with other exigencies generated by the crime or the criminal's escape.

Towing Vehicles

There have been instances where property owners have towed vehicles from their private lots without MPD involvement. This is not permitted by statute 349.13(3m):

> No vehicle involved in trespass parking on a private parking lot or facility shall be removed without the permission of the vehicle owner, except upon the issuance of a repossession judgment or upon formal complaint and a citation for illegal parking issued by a traffic or police officer.

Emergency Rooms—Patient Confidentiality

There have been some recent disputes at UWER between officers and ER physicians regarding officer access to patients during their treatment. ER staff has certain responsibilities to protect the confidentiality of health care information under HIPAA and Wisconsin State Statutes, and this has led to some confusion during investigations in the ER. The biggest issue has been whether it is appropriate for officers to be present in an examination room when the ER physician treats the patient. UW hospital has worked with MPD and UWPD to put together a short guideline for their personnel to follow under these circumstances. The guidelines:

Emergency Department Guidelines for Interactions with Department of Corrections And Law Enforcement Officers

It is the practice of UW/UWHC health care providers to be as cooperative as possible with Department of Corrections ("DOC") and law enforcement officers while simultaneously respecting patient privacy and providing the best possible medical care. In recognition of these goals, the following guidelines shall apply in the Emergency Department ("ED"). These guidelines have been developed in cooperation with UW and UWHC Legal, ED Leadership, the UW Police Department and the City of Madison Police Department.

Non-Custodial Situations:
It is presumed that law enforcement officers should not be present in patient rooms when the patient is not in custody (e.g. not under arrest) while health care providers are conducting a health history screening and/or physical examination. When an officer is asked to leave the room while a screening or physical examination is conducted, health care providers are expected to notify the officer immediately when he/she may be permitted back into the patient room. This is expected to take approximately 5 to 15 minutes, absent extenuating circumstances.

There are exceptions to this presumption as follows:

- The patient poses a safety risk to health care providers and others present in the ED;
- Evidence chain of custody must be preserved;
- The patient states that s/he would like the officer present (e.g. the patient is a victim);
- The officer informs health care providers of a specific time-sensitive need for access to the patient.

In each case described above, law enforcement officers are expected to notify health care providers that one of the above exceptions exist requiring his/her presence in the patient room. Health care providers are encouraged to document in the medical record the need for law enforcement to be present.

Custodial Situations:
When a patient is in the custody of DOC or law enforcement officers, or will be arrested or taken into custody as soon as law enforcement officers come into contact with the patient, they may be present in patient rooms at all times requested. In the event a patient in custody needs an examination or treatment which is sensitive (e.g. patient must be fully undressed), health care providers and DOC or law enforcement officers are expected to work together to ensure officers can maintain control of the patient while not exposing the patient to undue embarrassment, etc.

A few key points on these guidelines:

- There is a critical distinction between custodial and non-custodial situations. If a patient is in our custody (or we are about to take them into custody) then we are able to stay with them at **all** times. If the patient in custody needs some type of treatment or evaluation that is sensitive, officers should work with medical staff to maintain oversight and control of the subject while minimizing embarrassment, etc.

- For non-custodial situations, the general presumption is that officers will not be in the examination room during the health history screening/questioning. However, there are a number of exceptions (safety risk, evidence preservation, consent, or any other time-sensitive need for access to the patient) that are outlined in the guidelines. Be sure to clearly and promptly notify ER staff if one of these situations apply.

- If one of the exceptions does not apply, ER staff should try to minimize the time that the health history screening takes (5-15 minutes). If more time has elapsed, please ask ER staff if the screening is complete and remind them of your need to access the patient.

- These guidelines apply only to UWER, and other emergency rooms may have their own guidelines and practices. However, the UWER guidelines are consistent with laws related to confidentiality of patient health care information in case any disputes arise.

If any additional issues arise regarding access to patients in an emergency room, please notify both Captain Balles and Captain Wahl for follow up.

Cell Phone Searches

***United States v. Flores-Lopez*, 2012 U.S. App. LEXIS 4078 (7th Cir.2012); Decided February 29, 2012 by the 7th Circuit Court of Appeals.**

In *Flores-Lopez*, the 7th Circuit Court of Appeals considered the appropriateness of a warrantless "search" of a cell phone. The case involved a major drug investigation, where a suspect was arrested with a significant amount of methamphetamine. Officers searched the suspect and his vehicle incident to arrest, and also located three cell phones (one on the suspect and two in the vehicle). The officers searched the three cell phones at the scene of the arrest, for the limited purpose of obtaining the phones' numbers. This information was used later to subpoena call history from the phone companies. This call history was used at trial to incriminate Flores-Lopez (one of the conspirators in the case). Flores-Lopez argued that the search of the cell phones (to obtain the numbers used to secure the subpoenas) was unreasonable because it was not supported by a warrant.

The question of whether a cell phone may be "searched" incident to arrest has been addressed by a number of courts, with somewhat inconsistent results. The Wisconsin Supreme Court, in *State v. Carroll*, 778 N.W.2d 1(2010), reviewed a case in which the warrantless search of a cell phone was an issue. However, the *Carroll* court reached a decision on other grounds, and expressly declined to address the issue of searching a cell phone incident to arrest.

The *Flores-Lopez* court engaged in a lengthy discussion of the issue, and the difficulty in analogizing the traditional search-incident-to arrest doctrine to cell phones (or other comparable electronic storage devices): "the potential invasion of privacy in a search of a cell phone is greater than in a search of a 'container' in a conventional sense even when the conventional container is a purse that contains an address book (itself a container) and photos. Judges are becoming aware that a computer (and remember a modern cell phone is a computer) is not just another purse or address book." The court also discussed some of the issues that would support a search of a cell phone incident to arrest: safety ("one can buy a stun gun that looks like a cell phone") and exigency (the phones could have been remotely "wiped" and evidence then destroyed).

In the end, however, the *Flores-Lopez* court declined to provide a sweeping statement on searches of cell phones incident to arrest. Instead, the court ruled that the officers' actions—simply looking in the cell phones to obtain the phones' numbers—was permissible as a search incident to arrest. The court left a decision for more extensive searches of cell phones incident to arrest for another day:

> We need not consider what level of risk to personal safety or to the preservation of evidence would be necessary to justify a more extensive search of a cell phone without a warrant, especially when we factor in the burden on the police of having to traipse about with Faraday bags or mirror-copying technology and having to be instructed in the use of these methods for preventing remote wiping or rendering it ineffectual. We can certainly imagine justifications for a more extensive search.

While the court seemed willing to allow more expansive analysis of cell phones incident to arrest, a clear ruling will have to wait for a future case.

So, it remains difficult to articulate clear guidelines regarding searches of cell phones incident to arrest. However, the current state of the law suggests that examination of cell phone data (as a search incident to arrest) under these circumstances will be permissible.

- Limit searches to circumstances where it appears the phone contains evidence of the offense of arrest. So, while it is probably reasonable to believe that a phone in the possession of someone arrested for a drug offense—particularly one involving sale or trafficking—will contain evidence related to the offense, there are many offenses for which this will not be the case (traffic offenses, etc.).
- A limited examination of a phone at the time of arrest to obtain the phone's number should be reasonable.
- The search should be contemporaneous to the arrest. Ideally, it should take place at the location where the arrest occurs and within a short time after the arrest. The further removed (in time and location) from the arrest a search takes place, the more unlikely it is to be viewed as a valid search incident to arrest. Examining cell phone data after the arrestee has been booked is unlikely to be justified as a search incident to arrest.
- If certain data appears unrelated to criminal activity that particular data should not be examined further.
- Any articulation of exigency—that the data contained in the phone might be lost—may provide additional justification for the search.
- Articulate where the phone was located; courts appear more likely to uphold searches of phones discovered on the arrestee's person than those simply within the arrestee's area of immediate control at the time of arrest.
- Search in this context means manually navigating through menus to visually examine call lists, photos, messages, etc. It does not mean a full forensic examination (which is unlikely to ever be permitted as a search incident to arrest). Results of the visual examination should be documented. If further examination through a forensic examination is desired, the phone should be seized and a search warrant obtained.
- Finally, always consider asking for consent.