

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

: Case No. 2011-0033

Appellee,

:

:

:

v.

:

:

SUDINIA JOHNSON,

:

:

Appellant.

:

On Appeal from the Court of Appeals for the Twelfth District
Case No. CA2009-12-307

MERIT BRIEF OF APPELLEE STATE OF OHIO

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STATEMENT OF FACTS

Over a six-month period in 2009, Detective Mike Hackney of the Butler County Sheriff's Office received information from three confidential informants that Appellant Sudinia Johnson was involved in cocaine trafficking. (Tr. 30-35.¹) Specifically, Detective Hackney learned that Appellant had recently distributed several kilograms of cocaine and intended to acquire seven more kilograms. (Tr. 37.) Police were told that Appellant used a white Chevy van in order to transport the drugs. (Tr. 11.)

On October 23, 2009, Detective Hackney and two other law enforcement officers went to Appellant's residence. (*Id.*) The two agents removed trash that was on the curb in front of Appellant's house. (*Id.*) They discovered receipts for gas purchased on the same date in both the Chicago and Cincinnati areas. (Tr. 13.) Police also located a white Chevy van parked across the street from the residence. (Tr. 11.) Detective Hackney attached a battery-powered global positioning system ("GPS") device to the undercarriage of the van. (*Id.*) The device was not hard-wired to the van's electrical system, but instead was affixed to a piece of metal on the van via magnets attached to a case enclosing the device. (Tr. 11-12.)

For the next six days, police intermittently monitored the location of the GPS device by means of a secure website. (Tr. 14.) During the first five days of monitoring, the device only moved from its location near Appellant's house in Hamilton, Ohio, to an address in Fairfield and back again. (*Id.*) On October 28, police checking the website learned that the device was in Calumet City, a

¹Citations to the transcript refer to the suppression hearing conducted by the trial court on March 3, 2009.

suburb of Chicago in Cook County, Illinois. (*Id.*) On that date, the device was moved from an address on 171st Street in Calumet City to a shopping center, also in Calumet City. (*Id.*) Upon learning this, Hackney contacted Bob Medellin, an employee of the Cook County Sheriff's Office. (Tr. 15.) Medellin called his brother, Rudy Medellin, a retired Immigration and Customs officer, who went to the shopping center and confirmed the presence of the white Chevy van to which Hackney had attached the GPS device. (*Id.*)

Rudy followed the van from the shopping center back to its prior location on 171st Street and watched as its occupants entered a residence there. (Tr. 16.) One of the occupants, later identified as Appellant, left the residence with a package and re-entered the van. (*Id.*) The other man, later identified as Otis Kelly, emerged from the house's garage driving a car with an Ohio license plate. (*Id.*) Rudy continued his visual surveillance of the two vehicles as they traveled south in a two-car caravan on I-65 and eventually back into Butler County. (*Id.*) As Rudy followed the vehicles, he communicated with Hackney via cell phone. (*Id.*)

Hackney, in turn, contacted other officers throughout Ohio, readying them to assist once Appellant and Kelly re-entered the state. (Tr. 17.) While an officer was constantly assigned to monitor the GPS device's location via the secure website in the event that Rudy lost sight of the vehicles, Rudy was able to maintain his visual surveillance. (*Id.*) Hackney told law enforcement officers to stop the vehicles if they "were able to find probable cause to make a stop." (Tr. 19.) After observing Appellant commit a marked lane violation, Butler County Sheriff's Deputy Daren Rhoads, a canine handler, initiated a traffic stop. (Tr. 75.) Appellant was removed from the car, and officers deployed a narcotics-detection canine, who made a passive response on the driver's side

door and the rear cargo door. (Tr. 78.) Appellant also gave his consent to have the van searched. (Tr. 77-78.) While no drugs were found in the van, seven kilograms of cocaine were found in a hidden compartment within in the trunk of the vehicle driven by Kelly. (Tr. 20-22, 79.) Appellant was carrying a key that opened the concealed compartment in Kelly's car. (Tr. 101.)

Appellant was indicted for trafficking in cocaine, possession of cocaine, and having weapons while under a disability. *State v. Johnson*, 190 Ohio App.3d 750, 944 N.E.2d 270, 2010-Ohio-5808, ¶ 15. He filed numerous motions to suppress, arguing that the use of a GPS device to track his van in the absence of a warrant was unlawful; that the stop of his van was unlawfully initiated; that Appellant was detained longer than necessary to issue him a traffic citation; that search warrants that authorized the search of Appellant's home and a rented storage unit were issued in the absence of probable cause; and that he was denied his right against self-incrimination. *Id.* All of these motions were denied. *Id.* Following a bench trial, Appellant was acquitted of the weapons charge. *Id.* at ¶ 16. He entered a plea of no-contest to the drug charges, for which he was sentenced to an aggregate prison term of fifteen years. *Id.*

On appeal to the Twelfth District, Appellant raised two issues: the lawfulness of the traffic stop of his van and the lawfulness of the use of a GPS device to track his vehicle. The court of appeals affirmed his convictions. *Id.* at ¶ 62. This Court allowed a discretionary review on the sole question of whether law enforcement officers must obtain a warrant prior to using a GPS device to track a vehicle's movements on public roads. 128 Ohio St.3d 1425, 943 N.E.2d 572, 2011-Ohio-1049.

ARGUMENT

PROPOSITION OF LAW:

Because an individual does not have a reasonable expectation of privacy in the movement of his or her vehicle on public streets and highways, law enforcement officers need not seek a warrant prior to using a GPS device to track a vehicle's movements.

The Fourth Amendment of the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. "The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy." *California v. Ciraolo* (1986), 476 U.S. 207, 211, 106 S.Ct. 1809. A government action constitutes a search for Fourth Amendment purposes only where two conditions are satisfied: first, an individual must have manifested a subjective expectation of privacy in the object of the challenged search, and second, society must be willing to recognize that expectation as reasonable. *Id.* Official conduct "that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment." *Illinois v. Caballes* (2005), 543 U.S. 405, 408, 125 S.Ct. 834. Because an individual who moves or permits the movement of his vehicle along public thoroughfares does not manifest an objectively reasonable expectation of privacy, the monitoring of these movements by the government does not implicate the interests protected by the Fourth Amendment.

A. The use of a magnet to attach a GPS device to a metallic portion of the exterior of a car parked on a public street does not violate the Fourth Amendment.

The Fourth Amendment prohibits police from making warrantless and non-consensual entries into a suspect's home. *Payton v. New York* (1980), 445 U.S. 573, 100 S.Ct. 1371. A vehicle, however, carries a diminished expectation of privacy: "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels upon public thoroughfares where both its occupants and its contents are in plain view." *United States v. Knotts* (1983), 460 U.S. 276, 281, 103 S.Ct. 1081, quoting *Cardwell v. Lewis* (1974), 417 U.S. 583, 590, 94 S.Ct. 2464.

In this case, Appellant's van was parked on a public street when it was found by Detective Hackney. Thus, the police did not enter a home, a garage or even the curtilage of Appellant's property in order to install the GPS device. As one court has noted, a GPS device like the one utilized in the instant case does not "affect the car's driving qualities, [does] not draw power from the car's engine or battery, [does] not take up room that might have been occupied by passengers or packages, [and does] not even alter the car's appearance." *United States v. Garcia* (C.A. 7, 2007), 474 F.3d 994, 996. The *Garcia* court, in comparing the use of a GPS tracking device to satellite imaging and surveillance cameras, held that the only distinction between the two is that "in the imaging case nothing touches the vehicle, while in the case at hand the tracking device does. But it is a distinction without a difference." *Id.* at 997.

Appellant argues that the placement of the GPS device constituted a trespass on his vehicle, and that this trespass translates into a Fourth Amendment violation. (Appellant's Brief at 16-17.) The US Supreme Court, however, has made clear that the law of trespass is not part of its Fourth Amendment jurisprudence. In *Oliver v. United States* (1984), 466 U.S. 170, 182, 104 S.Ct. 1735, the Court recognized that the police had trespassed in order to find marijuana being cultivated on "secluded land" behind fences. Nonetheless, the Court held that the Fourth Amendment was not implicated by the government's actions. "The existence of a property right is but one element in determining whether expectations of privacy are legitimate. The premise that property interests control the right of the Government to search and seize has been discredited." *Id.* at 183.

Moreover, an individual has no expectation of privacy in the undercarriage of his automobile. In *United States v. McIver* (C.A. 9 1999), 186 F.3d 1119, the court held that police officers did not violate the Fourth Amendment when they enter into the curtilage of a defendant's property and installed a magnetic GPS device on the undercarriage of the defendant's Toyota 4Runner. The court held that because the defendant "did not produce any evidence to show that he intended to shield the undercarriage of his Toyota 4Runner from inspection by others," the placement of the GPS device was not a search within the meaning of the Fourth Amendment.² *Id.* at 1127. Moreover, because even on the curtilage of McIver's property, the officers "did not pry into a hidden or enclosed area,"

²Although Appellant does not make any argument that the placement of the GPS device on his van constituted a seizure, it is important to note that the *McIver* court examined and rejected that argument, too, because the device did not "meaningfully interfere with McIver's possessory interest" in his vehicle. 186 F.3d at 1127.

the defendant lacked any cognizable Fourth Amendment interest that was violated by placement of the GPS unit.

Appellant emphasizes that the GPS device was attached to his van “under the cover of darkness.” (Appellant’s Brief at 1.) This fact, though, is not of constitutional significance. In *McIver*, the officers entered the defendant’s driveway at 3:30 am. *Id.* at 1126. In determining whether a defendant’s right to be free of unreasonable searches was violated by the placement of a GPS device, “the time of day is immaterial.” *United States v. Pineda-Moreno* (C.A. 9 2010), 591 F.3d 1212, 1215. In this case, Appellant did nothing to indicate a reasonable expectation of privacy in the undercarriage of his van. He did not lock the van in a garage or take it to a private parking facility. Instead, he left it on a public street, where it was visible to and available for inspection by any passers-by. Thus, the placement of the GPS device did not constitute a search under the Fourth Amendment.

B. Tracking a vehicle’s movements with a GPS device is not a search within the meaning of the Fourth Amendment.

Had police officers surreptitiously followed Appellant from Ohio to Illinois, no court would have difficulty rejecting an argument that their conduct breached the Fourth Amendment. This is because even under early Fourth Amendment jurisprudence, “[v]isual surveillance was unquestionably lawful because ‘the eye cannot by the laws of England be guilty of a trespass.’” *Kyllo v. United States* (2001), 533 U.S. 27, 31-32, 121 S.Ct. 2038, quoting *Boyd v. United States* (1886), 116 U.S. 616, 628, 6 S.Ct. 524. Appellant seeks to require law enforcement officers to obtain a

warrant to use a machine to obtain the same information—in fact, less information—than they could lawfully obtain absent a warrant without the use of a machine. But a determination of whether government conduct constitutes a search under the Fourth Amendment does not, and never has, turned on the sophistication of police technology. *See, e.g., United States v. Dubrofsky* (C.A. 9 1978), 581 F.2d 208, 211 (noting that “[p]ermissible techniques of surveillance include more than the five senses of officers” and include “[b]inoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar arms, radar devices, and bait money”). Instead, the central question is whether an individual has made any effort to keep private the object of the purported search. No such effort is present with respect to the movement of a vehicle along public thoroughfares.

1. Fourth Amendment jurisprudence does not justify finding a reasonable expectation of privacy in the movement of a vehicle in public places.

Almost thirty years ago, the US Supreme Court ruled that the use of an electronic device to track the movements of a car through public space does not fall within the ambit of the Fourth Amendment. In *Knotts, supra*, police officers installed a radio frequency beeper inside a five-gallon container of chloroform that was sold to the defendant. *Id.* at 278, 282. The Court upheld the clandestine use of the tracking device, reasoning that that the beeper simply permitted the police to do what they would have “been able to do . . . had they relied solely on their naked eyes.” *Id.* at 285.

In an effort to circumvent the clear holding of *Knotts*, Appellant’s argument relies extensively on *United States v. Kyllo, supra*, and *United States v. Karo* (1984), 46 U.S. 705, 104 S.Ct. 3296.

Both cases, however, illustrate that the outcome-determinative issue of any Fourth Amendment analysis is not the quality or sophistication of the technology used, but rather whether a defendant enjoyed an objectively reasonable expectation of privacy that was violated by the challenged government conduct. The use of a GPS device to track a vehicle's movements falls squarely within the boundaries set in *Knotts*, *Karo*, and *Kyllo*.

In *Kyllo*, agents of the Department of the Interior used a thermal imager to scan a home for infrared radiation. 533 U.S. at 29. The scan showed that certain areas of the house were relatively hot. *Id.* at 30. Based on this information, along with tips from informants and utility bills, the agents obtained a search warrant, and eventually found an extensive indoor marijuana-growing operation. *Id.* In holding that the use of the imager constituted a search, the Court focused its analysis on the subject of the government's observation: the defendant's home. "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Id.* at 37. Further, the Court reasoned, "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Id.* (emphasis in original). By confining his marijuana cultivation to the interior of his home, the defendant had evinced an effort to keep his actions private. And this effort to keep his conduct away from the public eye was the pivotal fact in the *Kyllo* analysis.

Attempting to distinguish this case from *Knotts*, Appellant argues that a GPS device cannot distinguish between public and private property, therefore making its warrantless use impermissible under *Karo*. *Karo*, however, does not support Appellant's desired result. In that case, agents placed a beeper tracking device in a can of ether that a government informant subsequently sold to the

defendant. 468 U.S. at 708. For five months, agents used the beeper to track the ether as it was transported to various locations. *Id.* at 709-10. Based “in part on information derived through use of the beeper,” agents obtained a warrant to search the defendant’s residence; upon executing the warrant, they seized cocaine and laboratory equipment. *Id.* at 710.

On appeal, the Supreme Court concluded that the transmissions from the beeper that emanated from in the defendant’s home should not have been used to establish probable cause in applying for a search warrant. *Id.* at 714-18. But this was not the end of the Court’s analysis. In conducting a *Franks* analysis,³ the Court concluded that even absent those impermissible transmissions, the warrant application contained enough lawfully obtained information to justify issuance of the warrant. In so holding, the Court relied on the “months-long tracking” of the ether through “visual and beeper surveillance.” *Id.* at 719-20. The decision in *Karo*, then, turned not on the government’s use of technology or the length of time the tracking device was employed, but instead on whether the government-installed tracker actually intruded into private spaces—spaces where an individual would enjoy a legitimate expectation of privacy. Only the information obtained as a result of this actual intrusion was subject to suppression. *Karo*, then, stands for the proposition that while information gained from a tracking device during the time they are in a place in which a defendant has a reasonable expectation of privacy may not be used by law enforcement, information gained from the same device at other times does not implicate the Fourth Amendment, regardless of the length of time the device is used.

³*See Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674.

The Court's decision in *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, further illustrates the importance of the context of location in determining whether an individual has a reasonable expectation of privacy in his actions. In *Katz*, the Court deemed unlawful the use of a microphone to record a defendant's end of a conversation on a phone in a public telephone booth. The Court explained that while the defendant's presence in a phone booth might not be the subject of a reasonable expectation of privacy, the words he spoke in the booth were:

[W]hat he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

Id. at 352 (footnotes omitted).

The defendant in *Katz* made efforts to keep his conversation private. He thus had a reasonable expectation of privacy in his words, which were not exposed to the public. On the other hand, Appellant asks this Court to find that Appellant had a reasonable expectation in the location of his van, which was information that was continuously exposed to the public.

At times, Appellant seems to argue that a reasonable expectation of privacy may be established based on what an individual believes other, non-law enforcement officers are likely to do. But this type of "likelihood" test has been eschewed by the Supreme Court in determining whether challenged government conduct runs afoul of the Fourth Amendment. Most people would not expect to look outside their homes and see a neighbor rifling through their curbside trash. Despite a "subjective" expectation of privacy that trash will not be searched once it is placed outside

for collection, though, that expectation is not “objectively reasonable.” *California v. Greenwood* (1988), 486 U.S. 35, 39-40, 108 S.Ct. 1625. Once someone places trash bags on the curb where they can be accessed by anyone who wishes to look inside, “the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that *could have been* observed by any member of the public.” *Id.* at 41 (emphasis added).⁴ “Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Rakas v. Illinois* (1978), 439 U.S. 128, 143 n.12, 99 S.Ct. 421. A “subjective expectation of not being discovered” cannot give rise to a legitimate expectation of privacy. *Id.*

Fourth Amendment cases reveal several other types of conduct that, while socially or perhaps even legally impermissible when undertaken by members of the general public, do not implicate the Fourth Amendment when carried out by members of law enforcement. A property owner would hardly expect an individual to fly over his property in an airplane equipped with a camera, taking pictures of his land that would later be enhanced. The government may do so, however, without obtaining a warrant. *Ciraolo, supra*; *Florida v. Riley* (1989), 488 U.S. 445, 109 S.Ct. 693; *Dow Chemical Co. v. United States* (1986), 476 U.S. 227, 106 S.Ct. 1819.

Similarly, one might be shocked to see a person enter private property past a “No Trespassing” sign and into a secluded field that is not visible from any point of public access.

⁴*Cf. Bond v. United States* (2000), 529 U.S. 334, 337-39, 120 S.Ct. 1462 (holding that a bus passenger does not expose his bag to the public for physical manipulation by placing it in an overhead compartment, and distinguishing between the “visual, as opposed to tactile, observation” of an item in a public place).

Likewise, no one subjectively expects someone to infiltrate her group of friends, wear hidden radio equipment, and transmit their conversations to police officers. But regardless of those subjective expectations, these activities are not searches under the Fourth Amendment when undertaken by government agents. *See Oliver, supra; United States v. White* (1971), 401 U.S. 745, 91 S.Ct. 1122 (plurality). *White* holds that the Fourth Amendment does not protect “a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.” *Id.* at 749, quoting *Hoffa v. United States* (1966), 385 U.S. 293, 302, 87 S.Ct. 408. Correspondingly, Appellant’s incorrect belief that police will not continuously monitor his vehicle’s movements on public roads does not create a Fourth Amendment interest protecting him against such monitoring.

An expectation that a vehicle’s movements on public streets will not be observed is not reasonable. When a person drives (or permits someone else to drive) his van on city streets or interstate highways, he makes no effort to keep the location of his vehicle private. The Supreme Court’s Fourth Amendment cases make clear that absent such effort, no reasonable expectation of privacy can accrue. That such an expectation is unreasonable is further demonstrated by the realities of twenty-first century life. Central to the results in the “flyover” cases that involved visual inspections of private areas was that “private and commercial flight in the private airways is routine.” *Ciraolo*, 476 U.S. at 215; *see also Riley*, 488 U.S. at 453 (O’Connor, J., concurring) (the defendant’s backyard was “exposed” to the public because overflight was common). Just as flights over private property are commonplace, the continuous government surveillance of public streets is now

quotidian. The cities of Chicago⁵ and Washington, D.C.,⁶ for instance, each employ thousands of crime cameras to monitor their streets. Ohio cities are following suit: Cincinnati,⁷ Columbus,⁸ and Canton⁹ residents all are monitored, to various degrees, via crime cameras when they move about their respective cities. Courts have repeatedly held that the use of surveillance cameras by the police in public areas is not a search under the Fourth Amendment, *See, e.g., McIver*, 186 F.3d at 1125 (approving use of unmanned surveillance cameras in a remote part of a national forest); *State v. Henry*, 151 Ohio App.3d 128, 783 N.E.2d 609, 2002-Ohio-7180, ¶ 38 (police use of cameras in the common area of a public restroom does not intrude on a reasonable expectation of privacy because “there is no reason why the police would be precluded from viewing what would be visible to a private citizen”); *McCray v. State* (Md. Ct. Spec. App. 1990), 84 Md. App. 513, 519, 581 A.2d 45

⁵*Daley Defends City’s Camera Network*, CBS Chicago (Feb. 8, 2011), <http://chicago.cbslocal.com/2011/02/08/aclu-blasts-chicagos-network-of-cameras/>.

⁶Aileen B. Xenakis, *Washington and CCTV: It’s 2010, Not Nineteen Eighty-Four*, 42 Case W. Res. J. Int’l L. 573, 580 (2010).

⁷*Surveillance Cameras To Be Installed Throughout City*, WLWT.com, <http://www.wlwt.com/news/16711143/detail.html> (June 25, 2008) (reporting 120 crime cameras that can be accessed by police officers’ laptop computers were to be installed in Cincinnati).

⁸*Five Columbus Neighborhoods to Get Crime Cameras*, Columbus Dispatch (Oct. 7, 2010), http://www.dispatch.com/live/content/local_news/stories/2010/10/07/five-columbus-neighborhoods-to-get-crime-cameras.html.

⁹Ed Balint, *Canton Police Launch Video Surveillance Program*, CantonRep.com (Dec. 22, 2010), <http://www.cantonrep.com/stark/canton/x1808773710/Canton-police-launch-video-surveillance-program> (reporting the installation of crime cameras linked to police officers’ laptop computers).

(video surveillance of a defendant “in public view, walking across the street ... poses no Fourth Amendment problem”).

The use of a mobile tracking device by police is merely a substitute for visual surveillance, or “tailing” a vehicle. Since visual surveillance is not a constitutional violation, and monitoring a GPS serves the same function as tailing a car, the use of a GPS is not a search. This is because police actually obtain less information from the use of a GPS device than they would through visual observation of a vehicle. When police visually observe—either in person or through a network of crime cameras—the movements of a vehicle, they are able to determine who occupies the vehicle, and where those occupants go while the vehicle is stationary. This is not so when police use a GPS device to track a vehicle’s location. For instance, when a vehicle is parked in the parking lot of a plaza, absent visual surveillance, police do not know who drove it to the location; whether it remains occupied; by whom it remains occupied; whether anyone else approaches the vehicle; and to which of the various stores (if any) in the plaza the vehicle’s occupants go.

A car cannot, for the most part, escape public scrutiny as it travels upon thoroughfares open to the public “where both its occupants and its contents are in plain view.” *Knotts*, 460 U.S. at 281. Because a car’s occupants and contents are visible to the naked eye, visual surveillance is actually *more* intrusive and revealing than the monitoring of a mobile tracking device. A GPS unit does not afford the “viewer” the same amount of information that visual surveillance would. Instead, a GPS device can tell an officer only the time, date, and longitudinal and latitudinal coordinates of the vehicle. These tracking devices are not equipped with microphones and therefore cannot transmit conversations; the devices cannot transmit images either.

Appellant argues that GPS tracking allows intrusions into an individual's private affairs, permitting the police to be informed about trips to "a minister, a psychiatrist, abortion clinic, union meeting, home of a police critic, divorce attorney office, gay bar, and AIDS treatment clinic." (Appellant's Brief at 22.) This is simply not the case. GPS devices do not have the capabilities to relay such information. To the contrary, an officer cannot know this information by using a mobile tracking device. An officer using a GPS tracking device knows only where the vehicle to which it is attached is located, not who was present when the vehicle was taken there or where its occupants went once the vehicle completed its journey, or whether they went as a patron or a protestor.

Appellant further asserts that "*a person's* total movement in private and public can be recorded over unlimited periods of time" and that "instantaneous access of *a person's* whereabouts is available" through use of a GPS device. (*Id.*) (emphasis added). This vastly overstates the capability of a GPS unit. A GPS device attached to a vehicle, in the absence of visual surveillance, tells an officer nothing about the location or travel habits of any particular person; it reveals data only about the movements of the vehicle. A GPS device does not give any more information to those monitoring it than the latitude and longitude of the tracking device, and thus it cannot be considered "surveillance" of any kind. Reliance on a GPS unit takes away an officer's ability to "see," limiting the information gleaned from tracking devices to the physical coordinates of the vehicle. As mentioned previously, visual surveillance would reveal more than a GPS unit ever could, allowing an officer, for example, to see an individual entering an establishment, talking to another individual, or exchanging a package from inside the vehicle.

It is of no constitutional significance that a GPS device continues to transmit regardless of whether it has been moved into a private area. Assuming for the sake of argument that a GPS device attached to a vehicle can be taken to a place in which its owner enjoyed a reasonable expectation of privacy,¹⁰ the Court's decision in *Karo* explains the proper remedy. While the transmissions made from that place of privacy may not be used against the defendant, those that were made while the transmitter was in public places may. *Karo*, 468 U.S. at 719-20. Given that the GPS unit attached to Appellant's vehicle did not move into an area in which Appellant might enjoy a reasonable expectation of privacy while it was being monitored, the selective use of information obtained from the unit is not an issue in this case.

Further, just as *Knotts* leaves no doubt that there is no reasonable expectation of privacy in the movements of a vehicle on "public thoroughfares," monitoring a tracking device as it moves from public to private property does not create a Fourth Amendment violation. *Knotts* specifically references this issue, noting that visual surveillance (like the information obtained from a GPS unit) would have "conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he *exited from public roads onto private property.*" *Knotts*, 460 U.S. at 282 (emphasis added).

Appellant's reliance on language from *Arizona v. Gant* (2009), 556 U.S. ___, 129 S.Ct. 1710, regarding the "privacy interests at stake" in the search of an automobile is misplaced. (Appellant's Brief at 23.) *Gant* deals with the search of the interior of an automobile. When *Gant*—or virtually

¹⁰This is a dubious assumption in light of the large size of a vehicle and the "open fields" doctrine. See, e.g., *Oliver, supra*.

any Supreme Court case involving the application of the Fourth Amendment to an automobile—discusses privacy interests, it is referring to the reasonable expectation a vehicle’s owner or occupants have in the contents of the *interior* of the vehicle. The Court has never suggested that an individual enjoys a privacy interest that protects him or his vehicle against observation while traveling on a public thoroughfare. *Compare Texas v. Brown* (1983), 460 U.S. 730, 103 S.Ct. 1535 (holding that a police officer can look through a window into a defendant’s automobile without implicating the Fourth Amendment) *with New York v. Class* (1986), 475 U.S. 106, 114-115, 106 S.Ct. 960 (holding that “a car’s interior as a whole is ... subject to Fourth Amendment protection from unreasonable intrusions by the police”).

The Fourth Amendment is properly invoked only when a law enforcement officer engages in conduct that constitutes a search or seizure. Because an individual does not have a reasonable expectation of privacy regarding the location of his vehicle on public roads, the use of a GPS unit to track a vehicle is not a search. Therefore, officers need not seek a warrant prior to the installation of a GPS unit on a suspect’s vehicle.

- 2. Almost every court to consider the issue has held that the use of a GPS device to track a vehicle’s movements is not a search within the meaning of the Fourth Amendment.**

The Seventh and Ninth Circuit Courts of Appeals have both rejected Fourth Amendment challenges to the use of a GPS device to monitor the location of vehicles. In *United States v. Garcia*, *supra*, police found the defendant’s car parked on a public street and, without first obtaining a warrant, placed a GPS device underneath the rear of the car. 474 F.3d at 995-96. The Seventh Circuit

held that no Fourth Amendment violation occurs when the police use a tracking device as a substitute for visual surveillance because “[t]he substitute ... is for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment.” *Id.* at 997 (emphasis in original). The *Garcia* court continued, reasoning that if surveillance cameras and satellite imaging is not a search under the Fourth Amendment, neither is GPS tracking; thus, attaching a GPS device to a car while in a public place does not convert the tracking of the car into a search. *Id.* at 996-98.

The Ninth Circuit reached a similar conclusion in *United States v. Pineda-Moreno* (C.A.9 2010), 591 F.3d 1212. In that case, drug enforcement agents monitored the defendant’s car for four months after attaching a magnetic mobile tracking device to the underside of his car. *Id.* at 1213. After the tracking device showed the vehicle leaving an area that agents suspected was used to grow marihuana, police stopped the vehicle. *Id.* at 1214. The court concluded that the use of the tracking device was not a Fourth Amendment search because “[t]he only information the agents obtained from the tracking devices was a log of the locations where Pineda-Moreno’s care traveled, information the agents could have obtained by following the car.” *Id.* at 1216.

The decisions of the Seventh and Ninth Circuit are consistent with other federal and state court decisions.¹¹ *See, e.g., United States v. Marquez* (C.A. 8 2010), 605 F.3d 604, 607 (“A person

¹¹In Ohio, one court has declined to uphold the warrantless use of a GPS device that officers hard-wired into a vehicle’s electrical system. *See State v. Dalton*, Lorain App. No. 09CA009589, 2009-Ohio-6910, ¶ 18. *Dalton* is distinguishable, however, because when police use this type of device, they seize the car battery’s power, thus interfering with the car owner’s possessory interests in a way not implicated with a self-powered device like the one used in the instant case.

traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another.”); *United States v. Burton* (N.D. Fla. 2010), 698 F. Supp. 2d 1303, 1307 (“[T]he Defendant had no legitimate expectation of privacy in the movements of his automobile on public roads.”); *Foltz v. Commonwealth* (Va. Ct. App. 2010), 57 Va. App. 68, 84, 698 S.E.2d 281, 289 (rejecting defendant’s “concerns of an Orwellian society resulting from the use of sophisticated technologies such as GPS tracking”); *Stone v. State* (Md. Ct. Spec. App. 2008), 178 Md. App. 428, 941 A.2d 1238 (holding that a GPS device “is simply the next generation of tracking science and technology from the radio transmitter ‘beeper’ in *Knotts*”).¹²

The only support for Appellant’s position is found in *United States v. Maynard* (C.A.D.C. 2010), 615 F.3d 544, *cert. granted sub nom. United States v. Jones* (June 27, 2011), ___ S.Ct. ___, 79 U.S.L.W. 3610. In *Maynard*, police used a GPS device to track the movements of the defendant’s vehicle for a month. The D.C. Circuit became the first court to apply the “mosaic theory” to the Fourth Amendment and in doing so, held that the month-long use of the GPS device, in the absence of a warrant, ran afoul of the Fourth Amendment. The court explained the mosaic theory:

Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can reveal more about a person than does any individual trip viewed in isolation. ... A person who knows all of another’s travels can deduce whether he is a weekly church goer, a heavy drinker, a

¹²At least two other federal trial courts have reached consonant conclusions. See *United States v. Williams* (W.D. Ky. 2009), 650 F. Supp. 2d 633; *United States v. Moran* (N.D.N.Y. 2005), 349 F. Supp. 2d 425.

regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.

615 F.3d at 562.

To date, no other federal appellate court has adopted the mosaic theory as part of its Fourth Amendment jurisprudence.

In distinguishing *Knotts*, the *Maynard* court relied heavily on the length of time police monitored the location of the defendant's vehicle, as opposed to the single trip for which the beeper was used in *Knotts*. 615 F.3d at 556.¹³ Even those courts that have entertained the possibility of applying the “mosaic theory” to the Fourth Amendment have held that its use should be limited to those specific facts present in *Maynard*: a continuous, month-long stretch of GPS tracking. See *United States v. Cuevas-Perez* (C.A. 7 2011), 640 F.3d 272 (*Maynard* not applicable to 60-hour GPS surveillance); *In re Application of the United States for an Order Authorizing Release of Historical Cell-Site Information* (E.D.N.Y. Feb. 16, 2011), 2011 WL 679925 (government's request for cell-site data for a continuous period of two days and a separate continuous period of six days does not implicate *Maynard*). In the instant case, Appellant's car was tracked over a period of just six days. Even if the “mosaic theory” articulated in *Maynard* were to be adopted by this Court, it would not be applicable to the present case, given the short duration for which the tracking device was used.

¹³The D.C. Circuit's heavy emphasis on the length of time the vehicle was monitored runs directly contrary to the Supreme Court's decision in *Karo, supra*, which permitted the use of information gained as a result of the warrantless tracking of a vehicle on public roads over a period of five months. Nothing in *Karo* indicates that the length of time a vehicle is tracked is of constitutional concern.

Moreover, the *Maynard* court's reasoning has been repeatedly criticized by courts analyzing the legality of GPS tracking. In *United States v. Walker* (W.D. Mich. Feb. 11, 2011), ___ F. Supp. 2d ___, 2011 WL 651414, the court declined to apply the mosaic theory, noting that "the great weight of the law from other federal circuits rejects" the *Maynard* approach. *Id.* at *4. In *United States v. Sparks* (D. Mass 2010), 750 F. Supp. 2d 384, the court thoroughly refuted *Maynard*, rejecting the vague, difficult-to-apply standard created by the application of the mosaic theory to the Fourth Amendment:

Although the continuous monitoring may capture quantitatively more information than brief stints of surveillance, the type of information collected is qualitatively the same. Spark's aggregation argument against prolonged surveillance, as supported by the court in *Maynard*, is also practically unappealing. The exclusionary remedy for Fourth Amendment violations is a strong and blunt instrument. To avoid improper application of this strict remedy it is important to provide the police with clear *ex ante* rules. The court in *Maynard*, however, leaves police officers with a rule that is vague and unworkable. It is unclear when surveillance becomes so prolonged as to have crossed the threshold and created this allegedly intrusive mosaic. What's more, conduct that is initially constitutionally sound could later be deemed impermissible if it becomes part of the aggregate. Finally ... a rule prohibiting prolonged GPS surveillance due to the quantity or quality of information it accumulates would also incidentally outlaw warrantless visual surveillance and this Court is unwilling, and unable, to extend the reach of the Fourth Amendment that far.

750 F. Supp. 2d at 392-93 (internal citations omitted).

Further repudiation of *Maynard* is found in Judge Flamm's concurring opinion in *Cuevas-Perez*. Rejecting *Maynard's* "probabilistic approach," he writes that a "person's expectations about actual likelihoods may indicate whether a person had a subjective expectation of privacy, but those expectations are not talismanic on the question of whether a person's expectation of privacy is objectively reasonable." 640 F.3d at 280. According to Judge Flamm, *Maynard* misses the point. "The point is that, having become aware of the fact that there are people in public spaces who root

through garbage ... or that people in aircraft might peer down from the sky ... a person is not *entitled* to expect that he will remain free from observation.” *Id.* at 281 (emphasis in original). Finally, echoing the concerns of the Massachusetts federal court, Judge Flamm points out that “the probabilistic ‘actual exposure’ approach to Fourth Amendment searches is problematic because it is unworkable.” *Id.* at 283. Moreover:

Indeed, *Maynard’s* conception of probabilities might render unconstitutional a great deal of bread-and-butter law enforcement work. Few people would expect that they are being investigated at all, much less for prolonged periods of time, regardless of the technology at issue. Are all prolonged investigations on the constitutional chopping block unless police have probable cause and a warrant? If *Maynard* aims at preserving traditional law enforcement techniques while addressing legitimate concerns about the government’s ability to use technology to peer into the lives of its citizens, its concept of actual exposure seems to miss the mark.

Id.

Even judges from the D.C. Circuit have rejected the *Maynard* analysis. “The reasonable expectation of privacy as to a person’s movements on the highway is, as concluded in *Knotts*, zero. The sum of an infinite number of zero-value parts is also zero.” *United States v. Jones* (C.A.D.C. 2010), 625 F.3d 766, 769 (Sentelle, C.J., dissenting from the denial of rehearing en banc). Judge Sentelle, joined by three other judges of his court, rejected the *Maynard* panel’s conclusion that the defendant had not exposed his vehicle’s movements to the public. “The fact that no particular individual sees them [the movements] all does not make the movements any less public. Nor is it evident at what point the likelihood of a successful continued surveillance becomes so slight that the panel would deem the otherwise public exposure of driving on a public thoroughfare to become private.” *Id.* at 768. In *Maynard*, the court improperly focused on what an individual member of the public, acting alone, could observe. The test articulated in cases such as *Knotts*, *Karo*, and *Kyllo*, however,

emphasizes what the public could observe. Taken to its logical extreme, the *Maynard* analysis would preclude multiple officers from working in concert to conduct visual surveillance.

This Court should adopt the approach of the vast majority of American courts and hold that the use of a GPS device to track the movements of a vehicle in public places for less than a week is not a search under the Fourth Amendment. A car owner has no reasonable expectation of privacy in the location of his vehicle when it is in public. Thus, the police need not obtain a warrant prior to using an electronic device to track a vehicle. Appellant's Fourth Amendment challenge should be rebuffed, and the judgment of the court below should be affirmed.

C. Even if this Court holds that GPS tracking is a search, application of the exclusionary rule is not appropriate.

The Fourth Amendment protects only against "unreasonable" searches and seizures. In the present case, even if the use of a GPS device to track Appellant's movements was a search, it was not an unreasonable one. "There is nothing in the amendment's text to suggest that a warrant is required in order to make a search or seizure reasonable." *Garcia*, 474 F.3d at 996. The police did not engage in indiscriminate tracking of vehicles. Instead, the police had received information from multiples sources that Appellant was engaged in drug trafficking and that he used his white Chevy van in furtherance of that crime. Thus, any "search" created by the use of the GPS device was a reasonable one that does not violate the Fourth Amendment.

But even if this Court holds that Appellant's Fourth Amendment rights were violated by the tracking of his vehicle, suppression is not automatic. The Supreme Court has recently explained that

the exclusionary rule should not be applied to remedy every Fourth Amendment violation. In *Davis v. United States* (June 16, 2011), ___ S.Ct. ___, 2011 WL 2369583, the Court held that the exclusionary rule should not be utilized when police officers act in reasonable reliance on appellate precedent. “Under our exclusionary rule precedents, [the] absence of police culpability dooms Davis’s claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield ‘meaningful’ deterrence, and culpable enough to be ‘worth the price paid by the justice system.’” *Id.* at *8.

In this case, officers reasonably relied on *Knotts* in placing a GPS device on Appellant’s car without first seeking a warrant. “[T]he holding of *Knotts* governs GPS monitoring. The practice of using these devices to monitor movements on public roads falls squarely within the Court’s consistent teaching that people do not have a legitimate expectation of privacy in that which they reveal to third parties or leave open to view by others.” *Cuevas-Perez*, 640 F.3d at 276 (Flamm, J., concurring). Further, by the time officers attached the GPS device to Appellant’s van, the Seventh Circuit had already decided *Garcia*, thus providing officers additional grounds to believe that their conduct was lawful. Because the exclusionary rule is not “a strict-liability regime,” it should not be applied to the instant case. *Davis* at *8.

D. The Ohio Constitution does not preclude the warrantless use of a GPS device to track the location of a vehicle in public places.

Appellant argues that in the absence of Fourth Amendment protection against the use of GPS devices to track the location of a vehicle, this Court should interpret the Ohio constitution to provide such protection. Appellant's argument is not supported by Ohio law.

Section 14, Article I of the Ohio Constitution provides that the "right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated." This language is "virtually identical to the language of the Fourth Amendment." *State v. Smith*, 124 Ohio St.3d 163, 920 N.E.2d 949, 2009-Ohio-6426, ¶ 10 n.1. Thus, this Court has repeatedly held that Section 14, Article I of the Ohio Constitution provides the same protection as the Fourth Amendment in felony cases. *Id.*; *State v. Buzzard*, 112 Ohio St.3d 451, 860 N.E.2d 1006, 2007-Ohio-373; *State v. Murrell*, 94 Ohio St.3d 489, 764 N.E.2d 986, 2002-Ohio-1483; *State v. Robinette*, 80 Ohio St.3d 234, 685 N.E.2d 762, 1997-Ohio-343.

This Court has allowed that in some instances, "when there are persuasive reasons" to do so, the Court may recognize an area in which the Ohio Constitution provides greater protection than the Fourth Amendment.¹⁴ *Murrell*, 94 Ohio.App.3d at 494. Here, Appellant has not proffered any reason why this Court should not follow its general policy of harmonizing its interpretations of the

¹⁴Presently, the only recognition of greater protection embodied in Section 14, Article 1 than in the Fourth Amendment is found in *State v. Brown*, 99 Ohio St.3d 323, 792 N.E.2d 175, 2003-Ohio-3931. In ruling that the Ohio constitution provides protection against arrests for minor misdemeanors not present in the federal constitution, this Court relied on the prohibition against such arrests in R.C. § 2935.26. Appellant enjoys no analogous statutory protection in the instant case.

federal and state protections against unreasonable searches and seizures. Appellant correctly notes that three state courts of last resort have invalidated the warrantless use of tracking devices under their respective state constitutions. However, each of these courts was interpreting a state constitutional provision that was historically broader than the Fourth Amendment. See *People v. Weaver* (2009), 12 N.Y.3d 433, 444, 909 N.E.2d 1195 (“We note that we have on many occasions interpreted our own Constitution to provide greater protections when circumstances warrant and have developed an independent body of state law in the area of search and seizure.”); *State v. Jackson* (2003), 150 Wash.2d 251, 259-60, 76 P.3d 217 (“The inquiry under [the Washington constitution] is broader than under the Fourth Amendment ... and focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass.”); *State v. Campbell* (1988), 306 Or. 157, 164 n.7, 759 P.2d 1040 (“We note that there is no presumption that interpretations of the Fourth Amendment by the Supreme Court of the United States are correct interpretation of [the Oregon constitution].”).¹⁵

This Court has not historically interpreted Section 14, Article I of the Ohio Constitution more broadly than the Fourth Amendment to the federal constitution. Thus, this Court should follow the approach of the Nevada Supreme Court, which held that under that state’s constitution, an individual does not enjoy a reasonable expectation of privacy in the exterior of a vehicle. *Osburn v. State* (2002), 118 Nev. 323, 44 P.3d 523. In reaching that conclusion, the court reasoned:

¹⁵Additionally, in *Commonwealth v. Connolly* (2009), 454 Mass. 808, 822, 913 N.E.2d 356, the court held that the use of a GPS device that police had hard-wired to a vehicle’s battery violated the Massachusetts Declaration of Rights, “which, in the area of motor vehicles, provides protection at least equal to, and at times greater than, that provided by the Fourth Amendment.”

The exterior of a vehicle, including its bumper, is open to public view and susceptible to casual inspection by the passerby. In fact, the safe and lawful operation of a modern automobile would be impossible without certain highly visible exterior features, such as headlights, turn signals, license plates and brake lights. Moreover, manufacturers, dealers and owners often take advantage of this public visibility by displaying model names, company logos, decals and bumper stickers on the exteriors of automobiles. In light of these facts, we can see no objective expectation of privacy in the exterior of an automobile.

Id. at 327.

Given the absence of persuasive reasons to deviate from this Court's general preference to interpret this state's constitution as providing protection against unreasonable searches and seizures that is coterminous with that provided in the federal constitution, this Court should decline to depart from federal authority in this case. The Ohio Constitution, simply put, has not previously been read to create a privacy interest in the movement of a vehicle in public places; nothing in the case at bar compels the Court to forge such an interest from whole cloth today.¹⁶

Finally, in the event that this Court finds that the use of a GPS device to track a vehicle's movements offends the Ohio Constitution but not the federal constitution, this Court should decline to apply the exclusionary rule. Historically, Ohio law did not forbid the State from using at trial evidence obtained in contravention of Section 14, Article I of the Ohio Constitution. *See, e.g., State v. Lindway* (1936), 131 Ohio St. 166, 2 N.E.2d 490. Ohio courts began to apply the exclusionary rule only after the US Supreme Court ruled, in *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, that evidence obtained in violation of the Fourth Amendment is inadmissible in a criminal

¹⁶*See Nat'l Aeronautics and Space Admin. v. Nelson* (2011), ___ U.S. ___, 131 S.Ct. 746, 765 (Scalia, J., concurring) ("One who asks us to invent a constitutional right out of whole cloth should spare himself and us the pretense of tying it to some words of the Constitution.").

prosecution in state court. Should this Court choose to decouple its understanding of Section 14, Article I from the Fourth Amendment, then this Court should take the opportunity to restore its interpretation of the Ohio Constitution to its historical roots, which do not mandate suppression as a remedy for a state constitutional violation.¹⁷

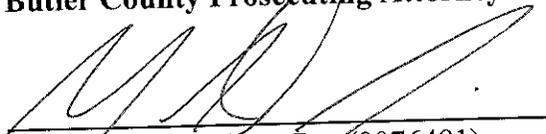
CONCLUSION

Because Appellant cannot claim a reasonable expectation of privacy in the location of his vehicle along public streets, the use of a GPS device to track his vehicle was not a search under either the Fourth Amendment to the US Constitution or Section 14, Article I of the Ohio Constitution. Therefore, the judgment of the Court of Appeals should be affirmed.

¹⁷Presently, only two cases, *Brown, supra*, and *State v. Farris*, 109 Ohio St.3d 519, 849 N.E.2d 985, 2006-Ohio-3255, sanction suppression of evidence obtained in violation of the Ohio Constitution but not its federal counterpart. Neither opinion offers analysis as to why the exclusionary rule should be applied to such a violation.

Respectfully submitted,

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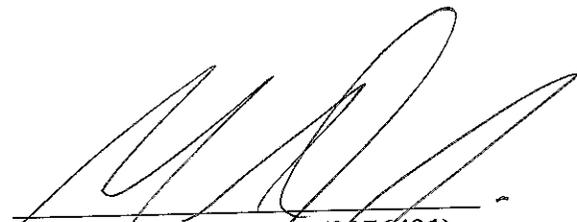
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PROOF OF SERVICE

This is to certify that a copy of the foregoing was served upon the following by ordinary U.S. mail this 1st day of July, 2011:

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