

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellant,

vs.

MONTIE E. SULLIVAN,

Appellee.

On Appeal from the Fairfield
County Court of Appeals,
Fifth Appellate District

14-0011

Court of Appeals
Case No. 13-CA-10

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT, STATE OF OHIO

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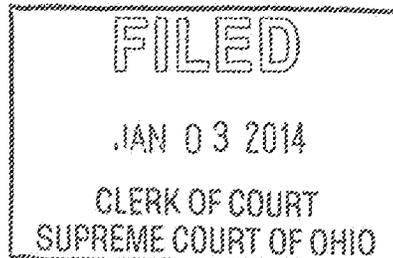


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EXPLANATION OF WHY THIS FELONY CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST, INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY LEAVE TO APPEAL SHOULD BE GRANTED.

The State of Ohio requests that this Court accept this case to provide legal standards regarding the use of Global Positioning System (“GPS”) electronic tracking technology by law enforcement both before and after the United States Supreme Court decision in *United States v. Jones*, 556 U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). This case involves two substantial constitutional questions. The first is how courts should apply the exclusionary rule to cases involving the installation and monitoring of a GPS tracking device when the state of the law was unclear. The second substantial constitutional question is whether the installation and monitoring of a GPS tracking device without a warrant is a reasonable search based on a balancing of the intrusion on individual privacy versus the promotion of legitimate governmental interests.

Multiple decisions from the Supreme Court of the United States clarify that the exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence.’” *Herring v. United States*, 555 U.S. 135, 141, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009) (quoting *United States v. Leon*, 468 U.S. 897, 909, 104 S.Ct. 3430, 82 L.Ed.2d 677 (1984)). The application of the exclusionary rule in cases like this one imposes a heavy cost on the judicial system by excluding evidence that is reliable and trustworthy. When officers act in good faith, based on a reasonable understanding of the state of the law, the suppression of evidence only deters conscientious police work. In this case, Corporal Minernd of the Franklin County Sheriff’s Office installed and

monitored a GPS tracking device two years before the United States Supreme Court issued its decision in *United States v. Jones*, 556 U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). In this case, the Court of Appeals for the Fifth District of Ohio excluded evidence from the installation and monitoring of a GPS tracking device that was installed in January 2010, two years before the decision of the United States Supreme Court in *United States v. Jones*. *State v. Sullivan*, Fifth Dist. No. 13-CA-10, 2013-Ohio-5276. There was no case law regarding the use of GPS tracking devices from the Ohio Supreme Court, the Tenth District Court of Appeals, or the Fifth District Court of Appeals at the time Franklin County Sheriff's Office Corporal Minerd installed the GPS tracking device.

This question is one of public and great general interest. Five of Ohio's District Courts of Appeal have considered the application of the exclusionary rule in cases such as this one. In this case, the Fifth District's opinion mentions the State's argument, but does not engage in the balancing required by the United States Supreme Court's exclusionary rule decisions. *State v. Sullivan*, Fifth Dist. No. 13-CA-10, 2013-Ohio-5276, ¶ 27. The Twelfth District, which did engage in the required balancing test, determined that the exclusionary rule was not the appropriate remedy in circumstances such as this. *State v. Johnson*, Twelfth Dist. No. CA2012-11-235, 2013-Ohio-4865. The Second, Eighth, and Eleventh Districts held that the good faith exception did not apply in cases where there was no binding precedent, relying on a narrow reading of only the *Davis* decision. *State v. Henry*, Second Dist. No. 11-CR-8239, 2012-Ohio-4748; *State v. Allen*, Eighth Dist.

No. 99289 & 99291, 2013-Ohio-4188; *State v. Allen*, Eleventh Dist. No. 2011-L-157, 2013-Ohio-434.

The first question is a substantial constitutional question and also one of public and great general interest because the imposition of the exclusionary rule in these circumstances creates a toll on the judicial system by requiring courts to ignore reliable, trustworthy evidence obtained by officers who acted in adherence with a reasonable understanding of the Fourth Amendment under the case law that existed at the time they installed the GPS tracking device.

The second substantial constitutional question is also one of public and great general interest because the use of a GPS tracking device is critically important to many law enforcement investigations. Although the United States Supreme Court decided that the installation and monitoring of a GPS tracking device constituted a search within the meaning of the Fourth Amendment, the Court did not hold that the attachment and monitoring of the GPS tracking device required a warrant. *United States v. Jones*, 556 U.S. ___, 132 S.Ct. 945, 954, 181 L.Ed.2d 911 (2012).

Not every Fourth Amendment search requires a warrant or probable cause. The Supreme Court of the United States has stated that under its "general Fourth Amendment approach," it "examine[s] the totality of the circumstances" to determine whether a search or seizure is reasonable under the Fourth Amendment. *Samson v. California*, 547 U.S. 843, 848, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006), citing *United States v. Knights*, 534 U.S. 112, 118, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). Under that analysis, the reasonableness of a search or seizure is determined "by assessing, on the one hand, the

degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* The United States Supreme Court has also "recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." *United States v. Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *see also Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); *South Dakota v. Opperman*, 428 U.S. 364, 368, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

Requiring that a search warrant be obtained to use a GPS tracking device would severely hinder the ability of law enforcement to use technology to assist them in conducting criminal investigations, particularly, to monitor vehicle movements using GPS tracking technology when they have reasonable suspicion to believe an individual is involved in criminal activity.

The Fifth District's decision affects a number of cases in which a GPS tracking device was attached to a vehicle and the data monitored without prior court review and approval before the *Jones* decision. The State requests that this Court grant leave to appeal in order to clarify how and when law enforcement may install and monitor GPS tracking devices after *Jones*, as well as how Ohio courts should evaluate the admissibility of evidence obtained using these devices before *Jones*.

STATEMENT OF THE CASE AND FACTS

After a series of home invasion robberies took place in early January 2010, Corporal Richard Miner of the Franklin County Sheriff's Office was assigned to

investigate. The robberies shared certain features that led Corporal Minernd to believe they were being committed by the same person or persons -- they took place in the same region, occurred in a short time span, involved firearms, and witnesses noted the involvement of two African-American men driving a white car. During the investigation, the American Automobile Association ("AAA") phoned law enforcement after responding to a service call for a white Honda Civic and finding in its place a green Toyota Camry. Corporal Minernd verified that the Camry had been stolen during one of the home invasion robberies. The tag number provided during the AAA call was registered to a white Honda Civic owned by Appellee who resided at 2399 Hudson Bay Way in Columbus, Ohio. Further investigation revealed that Appellee was associated with his co-defendant, David L. White.

On January 11, 2010, Corporal Minernd began surveillance on this address and noted a white Honda Civic in the parking lot of the apartment complex. Detectives from the Franklin County Sheriff's Office continued visual surveillance over the next three days and followed the vehicle whenever they noted that either Appellee or White was driving, but effective surveillance required more resources than the Franklin County Sheriff's Office could devote at that time. Although visual surveillance provided more information than GPS tracking, due to the lack of resources, Corporal Minernd and an undercover officer installed a small GPS unit under the car's bumper that magnetically attached to the vehicle.

Corporal Minernd monitored the GPS data showing the movements of the white Honda Civic approximately three to four times a day for approximately ten minutes

each time. Approximately nine days after the installation of the device, he noticed that the car was moving suspiciously in Licking County. Corporal Minernd continued to monitor the GPS device data until the vehicle returned to Hudson Bay Way. Less than two hours later, he observed that the white Honda Civic was driving in Fairfield County and stopped in the 3400 block of Bickel Church Road. After approximately ten minutes of this activity, he called the Fairfield County dispatcher, identified himself, explained what he was observing, and suggested a deputy be dispatched to the location. From the Fairfield County Sheriff's Office dispatcher, he learned that a homeowner in the 3400 block had called to report that two African-American men broke into his house, shot and killed his dog, then fled in a white car. Corporal Minernd tracked the car as it returned to Hudson Bay Way and informed his office of its location. Upon execution of search warrants for the apartment and car, officers found property from a recent robbery in the Honda Civic. In the apartment, officers found weapons and property from previous robberies. Later that day, Appellee was arrested at a motel.

The Fairfield County Grand Jury indicted Appellee and his co-defendant, David White, for one count of Improperly Discharging a Firearm, with two firearm specifications; one count of Aggravated Burglary, with two firearm specifications; one count of Aggravated Robbery, with two firearm specifications; one count of Grand Theft, with a firearm specification; and one count of Tampering with Evidence. Appellee raised a pretrial motion seeking the suppression of the GPS device data and any evidence derived therefrom. After a lengthy hearing, the trial court issued a fifteen-page decision overruling the motion on July 12, 2010.

On October 19, 2010, Appellee entered a plea of no contest to Improperly Discharging a Firearm into a Habitation, with one firearm specification, and to Aggravated Burglary. The remaining charges and specifications were dismissed. After a contested sentencing hearing, Appellee was sentenced to a nineteen-year prison term, including three years of mandatory time for the firearm specification, and ordered to pay \$1,000 in restitution.

In a two-to-one decision, the Fifth District Court of Appeals reversed the trial court's denial of the motion to suppress and remanded the case. *State v. Sullivan*, Fifth Dist. No. 2010-CA-52, 2011-Ohio-4967. The Fifth District certified a conflict between its decision and a decision from the Twelfth District. *State v. Sullivan*, Fifth Dist. No. 2010-CA-52, Judgment Entry, Oct. 28, 2011. This Court accepted jurisdiction, then directed that the judgment of the Fifth District Court of Appeals be vacated and remanded the case to the trial court to apply *United States v. Jones*, 556 U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). 01/18/2012 Case Announcements, 2012-Ohio-136; and *State v. Sullivan*, 132 Ohio St.3d 75, 2012-Ohio-1985.

The trial court, after setting aside Appellee's pleas, sustained Appellee's motion to suppress in a two-page decision based upon consideration of the 2010 evidentiary hearing and the memoranda filed by the parties. The State appealed that decision. On November 22, 2013, the Fifth District Court of Appeals affirmed the trial court's denial of the motion to suppress the GPS tracking evidence, but reversed the trial court's order suppressing Appellee's statements. *State v. Sullivan*, Fifth Dist. No. 13-CA-10, 2013-Ohio-5276. The State of Ohio asks that this Court accept jurisdiction and review the

Fifth District Court of Appeals' decision regarding the exclusionary rule and the use of GPS tracking devices.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: The exclusionary rule does not apply to a search conducted by attaching and monitoring a GPS tracking device when the search was conducted prior to the decision of the United States Supreme Court in *United States v. Jones* and when the officers did not display a deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights.

The ruling of the Fifth District Court of Appeals imposes a heavy cost on the judicial system by excluding evidence obtained by officers who acted in good faith, based on a reasonable understanding of the state of the law. In this case, the officer's understanding of the law regarding the use of GPS tracking devices was shared by many lawyers and judges. Prior to *Jones* and after the use of the GPS device in this case, the Twelfth District Court of Appeals concluded that the installation and monitoring of a GPS tracking device was not a search, as did a Fifth District Court of Appeals judge who dissented from that court's previous ruling in this case. *State v. Johnson*, 90 Ohio App.3d 750, 2010-Ohio-5808, 944 N.E.2d 270; *State v. Sullivan*, Fifth Dist. No. 2010-CA-52, 2011-Ohio-4967 (Hoffman, J., dissenting).

When Corporal Minerd installed the GPS tracking device, the state of the law was unclear. He installed and tracked the device two years before the United States Supreme Court issued its decision in *United States v. Jones*, 556 U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). There was no case law regarding the use of GPS tracking devices from the Ohio Supreme Court, the Tenth District Court of Appeals or this Court at the time the officers installed the tracking device. Multiple federal circuit courts concluded

that a search warrant was not a prerequisite to installing and using a GPS device because such monitoring was not a Fourth Amendment search in light of *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 1087, 75 L.Ed.2d 55 (1983) See *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir.2010); *United States v. Marquez*, 605 F.3d 604 (8th Cir.2010); and *United States v. Garcia*, 474 F.3d 994 (7th Cir.2007). The D.C. Circuit decision finding that sustained monitoring of a GPS device constituted a search was not decided until August 2010, more than six months after the installation of the GPS device in this case. *United States v. Maynard*, 615 F.3d 544, 556 (D.C. Cir.2010), affirmed in part, *United States v. Jones*, 556 U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). The D.C. Circuit distinguished the *Knotts* case because of the “comprehensive or sustained monitoring” at issue in that case, *United States v. Maynard*, 615 F.3d 544, 556 (D.C. Cir.2010), affirmed in part, *United States v. Jones*, 556 U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), not on the basis of the trespass, as the United States Supreme Court did in the *Jones* opinion. *Jones*, 556 U.S. ___, 132 S.Ct. 945, 951, 181 L.Ed.2d 911 (2012).

The United States Supreme Court has directed that courts weigh the costs of exclusion against the deterrence benefits before suppressing evidence obtained in violation of the Fourth Amendment. *Davis v. United States*, 564 US ___, 131 S.Ct. 2419, 2427, 180 L. Ed. 2d 285 (2011). The exclusionary rule imposes a “costly toll upon truth-seeking and law enforcement objectives” because it often results in “letting guilty and possibly dangerous defendants go free,” *Herring* at 141, and requires courts “to ignore reliable, trustworthy evidence bearing on guilt or innocence,” *Davis* at 2426. It is a “last resort.” *Davis* at 2427 (quotation marks omitted). The purpose of the exclusionary rule

is to deter future Fourth Amendment violations. *Davis* at 2426. Even if a court determines that a violation of the Fourth Amendment occurred, it must engage in a separate analysis to determine whether the remedy afforded by the exclusionary rule is appropriate. *Illinois v. Gates*, 462 U.S. 213, 233, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). When the deterrence benefits of suppression outweigh the costs imposed, exclusion is the appropriate remedy. *Herring*, 555 U.S. at 141; *Davis*, 131 S.Ct. at 2427.

Evidence should only be suppressed “if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.” *Leon*, 486 U.S. at 919 (citation omitted). Exclusion may be warranted “to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” *Herring*, 555 U.S. at 144; *Davis*, 131 S. Ct. at 2427. “But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force and exclusion cannot pay its way.” *Davis*, 131 S. Ct. at 2427-2428.

In this case, the Fifth District applied the exclusionary rule reflexively, without weighing the costs and benefits of the rule. That decision, as well as the decisions from the Second, Eighth, and Eleventh Districts, contravenes the United States Supreme Court’s rejection of the notion that there is a bright line of when the exclusionary rule should apply. *State v. Henry*, Second Dist. No. 11-CR-8239, 2012-Ohio-4748; *State v. Allen*, Eighth Dist. No. 99289 & 99291, 2013-Ohio-4188; *State v. Allen*, Eleventh Dist. No. 2011-L-157, 2013-Ohio-434. The United States Supreme Court has not limited the

application of the good faith exception to circumstances where there is a “binding” appellant precedent. The Court has directed that courts are to balance the deterrence value of suppression against the heavy costs imposed before applying the exclusionary rule because exclusion is a remedy of last resort.

In this case, that balancing weighs against the imposition of the exclusionary rule. Corporal Minerd acted based upon a reasonable understanding of the Fourth Amendment. Given the unsettled state of the law at the time he installed the GPS device, Corporal Minerd cannot be said to have had knowledge, or to have been properly charged with knowledge, that installing the device without a search warrant was improper. The use of a GPS tracking device accomplishes many of the same objectives that a beeper, like that installed in *Knotts*, does and the two technologies are very similar. The United States Court of Appeals for the First Circuit offered a precise explanation for why the *Davis* good faith exception should apply to the post-*Knotts*-pre-*Jones* use of GPS devices just as it does to the search of a passenger compartment post-*Belton*-pre-*Gant*: a bright-line rule appeared to have been established by the earlier cases; “both rules have turned out not to be as categorical as they seemed, but that is not a reason to penalize the police for applying them faithfully before those clarifications occurred.” *United States v. Sparks*, 711 F.3d 58, 67 (1st Cir.2013), referring to *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) and *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

Corporal Minerd did not display a deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights. Corporal Minerd showed respect for the

Fourth Amendment and adhered to a reasonable understanding of the Fourth Amendment under the case law that existed at that time. There would be no deterrent value in suppressing evidence in this case. The Fifth District Court of Appeals' ruling would impose a costly toll because it would prevent the prosecution of a violent felony offense, deter conscientious police work, and require the court to ignore reliable, trustworthy evidence.

PROPOSITION OF LAW NO. 2: A GPS tracking device may be attached to a privately owned vehicle, and its data monitored and recorded, when such a search is reasonable based on an examination of the totality of the circumstances.

The Fourth Amendment balancing test should be used to decide what standard is necessary for the installation and monitoring of a GPS device. "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), quoting *United States v. Rabinowitz*, 339 U.S. 56, 66, 70 S.Ct. 430, 94 L.Ed. 653 (1950). Many law enforcement actions that qualify as Fourth Amendment searches or seizures, may nevertheless be conducted without a warrant or probable cause. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 16 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (holding that a "stop and frisk" is a search but does not require probable cause) *United States v. Place*, 462 U.S. 696, 706, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (upholding seizure of traveler's luggage on reasonable suspicion that it contains narcotics); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554-555, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (upholding suspicion-less vehicle stops at fixed border patrol checkpoints); *Samson*, 547 U.S. at 847 (individualized suspicion not required for search of parolee's home or person); *Knights*, 534 U.S. at 118-

121 (upholding search of probationer's home based on reasonable suspicion); *New Jersey v. T.L.O.*, 469 U.S. 325, 341-342, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (upholding search of public school student based on reasonable suspicion).

The use of GPS devices is critically important to law enforcement. The devices allow officers to conduct a minimally intrusive initial investigation of tips and leads regarding drug trafficking, patterns of crime, and other offenses. Requiring probable cause or a warrant would seriously hamper the efforts of law enforcement. These devices are often a very productive step in the initial investigation and are used to build the probable cause necessary to obtain a search warrant. Installation and use of a GPS device without a warrant is minimally intrusive but of critical importance to law enforcement. GPS devices are less intrusive than a "stop and frisk" and reveal less information than live visual surveillance.

The *Jones* decision established only that the attachment of a GPS tracking device constitutes a search because it involves a physical intrusion onto a constitutionally protected area. *Jones*, 132 S.Ct. at 951, n. 3. The Court stated explicitly that it did not reach the issue of whether the warrantless search was reasonable and lawful under the Fourth Amendment because the government did not raise the argument until the case was before the Supreme Court. *Id.* at 954. In a concurring opinion, Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, stated that holding that the installation of a GPS device was a search "strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial." *Jones*, 132 S.Ct. at 958 (Alito, J., concurring). The concurring justices identified the Fourth

Amendment violation as the long-term monitoring of the vehicle's movements, not the installation of the device. *Id.* at 958-64 (Alito, J., concurring). Justice Sotomayor joined the majority opinion, but also concurred separately, stating that long-term GPS monitoring "impinges on expectations of privacy" and that short-term monitoring requires "particular attention." *Jones*, 132 S.Ct. at 955 (Sotomayor, J. concurring), quoting *id.* at 964 (Alito, J. concurring).

"Together, these undertheorized opinions produce a clear outcome – that a search occurred – but no broad rationale." *Leading Cases: Fourth Amendment – Search and GPS Surveillance: United States v. Jones*, 126 Harv.L.Rev. 226, 233 (2012). Legal scholars agree that the United States Supreme Court has not yet stated whether the use of a GPS tracking device requires a warrant. *See, e.g.,* Peter Swire, *A Reasonableness Approach to Searches after the Jones GPS Tracking Case*, 64 Stan.L.Rev. Online 57 (2012) ; Tom Goldstein, *Why Jones is Still Less of a Pro-Privacy Decision than Most Thought*, Jan. 30, 2012, available at <http://www.scotusblog.com/?p=138066>; Thomas K. Clancy, *United States v. Jones: Fourth Amendment Applicability in the 21st Century*, 10 Ohio St.J.Crim.L. 303, 319 n. 44 (2012); and Erin Murphy, *Back to the Future: The Curious Case of United States v. Jones*, 10 Ohio St.J.Crim.L. 325, 325 (2012).

In the present case, Corporal Miner's investigation revealed that Appellee, his co-defendant, and a white Honda Civic registered to Appellee's co-defendant were linked to a series of home invasion robberies in three contiguous counties. Although visual surveillance provided more information than GPS tracking, due to the lack of resources, Corporal Miner and an undercover officer located the vehicle and installed

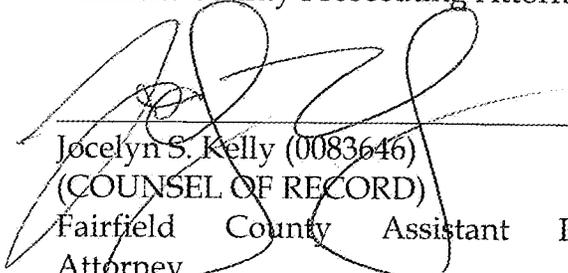
a small GPS unit under its bumper. The device was a small device that attached to the vehicle by magnets. It did not change the operation of the car. It did not reveal to Corporal Minerd who was driving the car, who was in the car, or what they were doing. The installation of the GPS device was minimally intrusive. But the GPS device was a critical step in establishing probable cause to obtain a search warrant for the apartment and car. The installation and use of a GPS device is minimally intrusive but of critical importance to law enforcement. Such searches are reasonable and lawful under the Fourth Amendment when conducted without a warrant.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and presents a substantial constitutional question. Leave to appeal should be granted in this felony case to permit this Court to provide legal standards regarding the use of GPS electronic tracking technology by law enforcement both before and after the United States Supreme Court decision in *United States v. Jones*, 556 U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

Respectfully submitted,

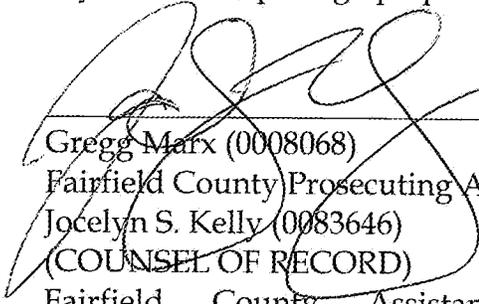
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction was served upon Mark P. Ort, Counsel for Appellee, 13297 Rustic Drive, NW, Pickerington, Ohio 43147, by ordinary U.S. Mail, postage prepaid, this 3rd day of January, 2014.



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APPENDIX

Opinion and Judgment Entry of the Fifth District Court of Appeals

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BOOK 20 Pgs. 671-683

STATE OF OHIO

Plaintiff-Appellant

-vs-

MONTIE E. SULLIVAN

Defendant-Appellee

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 13-CA-10

OPINION

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DEBORAH SHALLEY
CLERK OF COURTS
FAIRFIELD CO. OHIO

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Court of
Common Pleas, Case No. 2010-CR-0043

JUDGMENT:

Affirmed in part; Reversed in part and
remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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For Defendant-Appellee

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Hoffman, P.J.

{¶1} Plaintiff-appellant the state of Ohio appeals the January 28, 2013 Judgment Entry entered by the Fairfield County Court of Common Pleas sustaining a motion to suppress filed by Defendant-appellee Montie E. Sullivan, and ordering all evidence obtained by law enforcement as a result of the unlawful search and seizure be suppressed.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

{¶2} Following a series of home invasions believed to be committed by the same person or persons, the Franklin County Sheriff's Office identified a white Honda Civic belonging to Appellee as being an automobile connected to the robberies. The officers commenced surveillance of the address to which the automobile was registered and the parking lot of the apartment complex.

{¶3} Detectives continued visual surveillance over a three day time period and followed the vehicle whenever Appellee or his co-defendant, David White, were driving. Due to a lack of resources, constant surveillance remained difficult.

{¶4} Due to limited resources to continue the visual surveillance, Corporal Miner of the Franklin County Sheriff's Office and an undercover officer installed a small GPS unit under the vehicle's bumper. The device attached to the vehicle by magnets.

{¶5} Corporal Miner monitored the GPS data showing the movements of the white Honda Civic approximately three to four times a day for approximately ten minutes at a time.

{¶6} On January 23, 2010, Miner noticed the car moving suspiciously in the 3400 block of Bickel Church Road. He observed the vehicle slowed through

neighborhoods and circled an area in Licking County. Corporal Minernd continued to monitor the GPS device data until the vehicle returned to the residence. Two hours later, the vehicle again drove slowly through neighborhoods and circled an area in Fairfield County. Minernd contacted the Fairfield County dispatcher, identified himself, and explained the situation. He learned a home invasion had occurred in the suspect area

{¶17} A search warrant was issued for Appellee's residence and the vehicle. Upon execution of the warrant, officers found property from a recent robbery, as well as, previous robberies.

{¶18} Appellee was indicted on one count of improperly discharging a firearm, at or into a habitation, with two firearm specifications; one count of aggravated burglary, with two firearm specifications; and one count of grand theft, with a firearm specification.

{¶19} Appellee filed a motion to suppress the GPS device data and any evidence derived therefrom. Via Judgment Entry entered July 22, 2010, the trial court overruled the motion to suppress.

{¶10} On October 19, 2010, Appellee entered a plea of no contest to improperly discharging a firearm into a habitation, with one firearm specification, and to one count of aggravated burglary. The remaining charges were dismissed.

{¶11} The trial court sentenced Appellee to nineteen years in prison, including three years of mandatory time for the firearm specification. The trial court ordered Appellee pay \$1000.00 in restitution.

{¶12} Appellee filed an appeal of the conviction and sentence to this Court in *State v. Sullivan*, 5th Dist. No. 2010-CA-52, 2011-Ohio-4967. This Court reversed the

trial court's denial of the motion to suppress and remanded the case to the trial court for further proceedings.

{¶13} On October 28, 2011, this Court certified a conflict of the decision rendered in *Sullivan*, supra, with the holding of another jurisdiction. The Ohio Supreme Court accepted jurisdiction, ultimately directing the judgment of this Court be vacated, and ordering the case remanded to the trial court to apply the United States Supreme Court decision in *United States v. Jones*, 556 U.S. ____, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). See *State v. Sullivan*, 132 Ohio St.3d 75, 2012-Ohio-1985.

{¶14} On May 15, 2012, Appellee filed a petition for post-conviction relief in the trial court, and moved for summary judgment on an action for post-conviction relief based on the United States' Supreme Court decision in *Jones*, supra.

{¶15} Via Judgment Entry of January 28, 2013, the trial court sustained Appellee's motion to suppress. The trial court ordered all evidence obtained by law enforcement as a result of the unlawful search and seizure be suppressed.

{¶16} The State certified the trial court's ruling rendered its proof of the charges so weak in its entirety any reasonable possibility of effective prosecution was destroyed, and timely filed a notice of appeal.

{¶17} The State now assigns as error:

{¶18} "I. THE TRIAL COURT IMPROPERLY APPLIED THE EXCLUSIONARY RULE WHEN EXCLUDING ALL EVIDENCE WOULD ONLY DETER CONSCIENTIOUS POLICE WORK AND WOULD IMPOSE A COSTLY TOLL BECAUSE IT WOULD PREVENT THE PROSECUTION OF A FELONY OFFENSE AND REQUIRE THE COURT TO IGNORE RELIABLE, TRUSTWORTHY EVIDENCE.

{¶19} "II. THE TRIAL COURT IMPROPERLY SUPPRESSED APPELLEE'S STATEMENTS TO LAW ENFORCEMENT WHEN THAT STATEMENT WAS NOT DERIVED FROM THE USE OF THE GPS TRACKING DEVICE.

{¶20} "III. THE TRIAL COURT IMPROPERLY SUPPRESSED EVIDENCE FROM THE INSTALLATION AND TRACKING OF A GPS DEVICE. THE USE OF THAT DEVICE WAS A REASONABLE SEARCH AND WAS PERMISSIBLE UNDER THE FOURTH AMENDMENT."

I. and III.

{¶21} Appellant's first and third assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶22} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress.

{¶23} First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991); *State v. Guysinger*, 86 Ohio App.3d 592, 621 N.E.2d 726 (4th Dist.1993). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams*, 86 Ohio App.3d 37, 619 N.E.2d 1141 (4th Dist.1993). Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate

or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry*, 95 Ohio App.3d 93, 641 N.E.2d 1172 (8th Dist.1994); *State v. Claytor*, 85 Ohio App.3d 623, 620 N.E.2d 906 (4th Dist.1993); *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996), "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶24} The Fourth Amendment protects people, not places. *Katz v. United States* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1976). In *Jones*, 556 U.S. ____, 132 S.Ct. 945, 181 L.Ed2d 911 (2012), the United States Supreme Court held,

{¶25} "'The Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment. *United States v. Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). We hold that the Government's installation of a GPS device on a target's vehicle, [Footnote omitted] and its use of that device to monitor the vehicle's movements, constitutes a 'search.'"

{¶26} The Supreme Court declined to address the issue of whether the warrantless search was reasonable and lawful under the Fourth Amendment as the government did not raise the issue below.

{¶27} In the case sub judice, the State maintains even if a violation of the Fourth Amendment occurred the trial court must engage in a separate analysis to determine

whether the remedy afforded by the exclusionary rule is appropriate. *Illinois v. Gates*, 462 U.S. 213 (1983). The purpose of the exclusionary rule is to deter future Fourth Amendment violations. *Davis v. United States*, 564 U.S. ___, 131 S. Ct. 2419 (2011). Exclusion is the appropriate remedy when the deterrence benefits of suppression outweigh the costs imposed. *Herring v. United States* 555 U.S. 135, 129 S.Ct. 695.

{¶28} The State asserts the officers herein acted in good faith and without knowledge installing the device was improper under *United States v. Jones*, 556 U.S. ___, 132 S.Ct. 945, 181 L.Ed2d 911 (2012). Rather, the officers objectively relied upon the search warrant as valid. Further, the State asserts there is no deterrent value in suppressing the evidence in this case, and exclusion would only deter conscientious police work.

{¶29} The United States Court of Appeals for the District of Columbia Circuit held in *United States v. Maynard*, 615 F.3d 544 (CADDC, 2010), the predecessor to *Jones*, *supra*,

{¶30} "It does not apodictically follow that, because the aggregation of Jones's movements over the course of a month was not exposed to the public, his expectation of privacy in those movements was reasonable; 'legitimation of expectations of privacy must have a source outside the Fourth Amendment,' such as 'understandings that are recognized or permitted by society,' *United States v. Jacobsen*, 466 U.S. 109, 123 n. 22, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (quoting *Rakas*, 439 U.S. at 143 n. 12, 99 S.Ct. 421). So it is that, because the 'Congress has decided ... to treat the interest in 'privately' possessing cocaine as illegitimate,' 'governmental conduct that can reveal

whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest.' *Id.* at 123, 99 S.Ct. 421.

{¶31} "The Government suggests Jones's expectation of privacy in his movements was unreasonable because those movements took place in his vehicle, on a public way, rather than inside his home. That the police tracked Jones's movements in his Jeep rather than in his home is certainly relevant to the reasonableness of his expectation of privacy; 'in the sanctity of the home,' the Court has observed, 'all details are intimate details' *Kyllo*, 533 U.S. at 37, 121 S.Ct. 2038. A person does not leave his privacy behind when he walks out his front door, however. On the contrary, in *Katz* the Court clearly stated "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.' 389 U.S. at 351, 88 S.Ct. 507. Or, as this court has said, outside the home, the 'Fourth Amendment ... secur[es] for each individual a private enclave, a 'zone' bounded by the individual's own reasonable expectations of privacy.' *Reporters Comm. for Freedom of Press v. AT & T*, 593 F.2d 1030, 1042–43 (1978).

{¶32} "Application of the test in *Katz* and its sequellae to the facts of this case can lead to only one conclusion: Society recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable, and the use of the GPS device to monitor those movements defeated that reasonable expectation. As we have discussed, prolonged GPS monitoring reveals an intimate picture of the subject's life that he expects no one to have—short perhaps of his spouse. The intrusion such monitoring makes into the subject's private affairs stands in stark contrast to the relatively brief intrusion at issue in *Knotts*; indeed it exceeds the intrusions occasioned

by every police practice the Supreme Court has deemed a search under *Katz*, such as a urine test, see *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (urine test could 'reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic'); use of an electronic listening device to tap a payphone, *Katz*, 389 U.S. at 352, 88 S.Ct. 507 (user of telephone booth 'entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world'); inspection of a traveler's luggage, *Bond*, 529 U.S. at 338, 120 S.Ct. 1462 ('travelers are particularly concerned about their carry-on luggage'); or use of a thermal imaging device to discover the temperature inside a home, *Kyllo*, 533 U.S. at 37, 121 S.Ct. 2038 ('In the home, *all* details are intimate details').

{¶33} "We note without surprise, therefore, that the Legislature of California, in making it unlawful for anyone but a law enforcement agency to 'use an electronic tracking device to determine the location or movement of a person,' specifically declared 'electronic tracking of a person's location without that person's knowledge violates that person's reasonable expectation of privacy,' and implicitly but necessarily thereby required a warrant for police use of a GPS, California Penal Code section 637.7, Stats.1998 c. 449 (S.B.1667) § 2. Several other states have enacted legislation imposing civil and criminal penalties for the use of electronic tracking devices and expressly requiring exclusion of evidence produced by such a device unless obtained by the police acting pursuant to a warrant. See, e.g., Utah Code Ann. §§ 77-23a-4, 77-23a-7, 77-23a-15.5; Minn. Stat. §§ 626A.37, 626A.35; Fla. Stat. §§ 934.06, 934.42; S.C.Code Ann. § 17-30-140; Okla. Stat., tit. 13, §§ 176.6, 177.6; Haw. Rev. Stat. §§ 803-42, 803-44.7; 18 Pa. Cons.Stat. § 5761.

{¶34} "Although perhaps not conclusive evidence of nationwide 'societal understandings,' *Jacobsen*, 466 U.S. at 123 n. 22, 104 S.Ct. 1652, these state laws are indicative that prolonged GPS monitoring defeats an expectation of privacy that our society recognizes as reasonable. So, too, are the considered judgments of every court to which the issue has been squarely presented. See *Weaver*, 12 N.Y.3d at 447, 882 N.Y.S.2d 357, 909 N.E.2d 1195 ('the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause'); *Jackson*, 76 P.3d at 223–24 (under art. I, § 7 of Washington State Constitution, which 'focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass,' 'use of a GPS device on a private vehicle involves a search and seizure'); cf. *Commonwealth v. Connolly*, 454 Mass. 808, 913 N.E.2d 356, 369–70 (Ma.2009) (installation held a seizure).****"

{¶35} We are persuaded by the holding in *Jones*, supra, and the rationale of the Circuit Court of Appeals in *Maynard*, supra. We find the installation of the GPS tracking device by law enforcement in this case without a warrant, for an extended period of time, is a violation of the vehicle owner/operator's reasonable expectation of privacy and amounts to an unlawful search. We find the trial court correctly ruled the GPS evidence should be suppressed.

{¶36} The first and third assignments of error are overruled.

II.

{¶37} In the second assignment of error, the State maintains the trial court erred in suppressing Appellee's statements made to law enforcement which were not derived from the use of the GPS tracking device. We agree.

{¶38} During the course of the investigation, Corporal Minerd obtained a search warrant for Appellee's cell phone. Minerd traced Appellee using cell phone tower information relayed to Appellee's phone. Appellee's cell phone was tracked and located at the Motel 6. After checking the hotel registry, law enforcement confirmed Appellee was registered at the hotel. Appellee was found at the hotel and taken into custody. The officers read Appellee his Miranda rights, and conducted an interview. The trial court determined the statements were voluntary, and Appellee understood his rights. However, the trial court suppressed Appellee's statements made while in custody as being derived from the use of the GPS tracking device.

{¶39} The exclusionary rule "prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes 'so attenuated as to dissipate the taint.'" *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed. 2d 472 (1988), quoting *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

{¶40} Appellee's location at the hotel was obtained utilizing information obtained from his cell phone records, not the GPS monitoring. Appellee was located and taken into custody at the hotel, Mirandized and questioned. We find the statements were not derived from the use of GPS monitoring.

{¶41} Accordingly, we agree with the state of Ohio, the trial court improperly suppressed Appellee's statements.

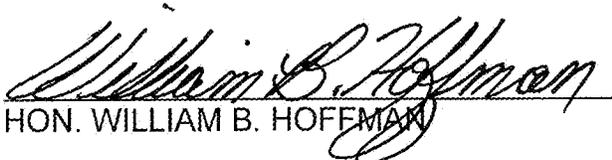
{¶42} The second assignment of error is sustained.

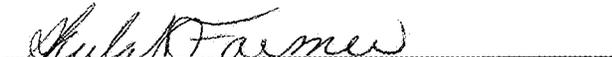
{¶143} The judgment of the Fairfield County Court of Common Pleas is affirmed in part, reversed in part and remanded for further proceedings in accordance with this Opinion and the law.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER


HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED

2013 NOV 22 PM 12:41

DEBORAH SMALLEY
CLERK OF COURTS
FAIRFIELD CO. OHIO

STATE OF OHIO

Plaintiff-Appellant

-vs-

MONTIE E. SULLIVAN

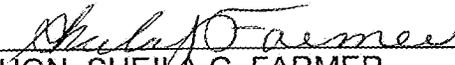
Defendant-Appellee

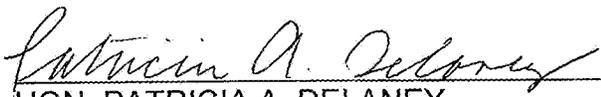
JUDGMENT ENTRY

Case No. 13-CA-10

For the reasons stated in our accompanying Opinion, the judgment of the Fairfield County Court of Common Pleas is affirmed in part, reversed in part and remanded to the trial court for further proceedings in accordance with our Opinion and the law. Costs waived.


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER


HON. PATRICIA A. DELANEY