LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Mar. 3, 2021 Case No. 20CR102845

STATE OF OHIO
Plaintiff

Paul Griffin
Plaintiff's Attorney

VS

JOE STEIBLE, III
Defendant

Giovanna Bremke
Defendant's Attorney

This matter is before the Court on Defendant's Motion To Suppress, filed October 7, 2020; the State's Objection, filed October 22, 2020; and the Defendant's Response Brief, filed November 2, 2020.[1]

Hearing had January 26, 2021.

The Motion is not well-taken and hereby DENIED.

See Judgment Entry.

IT IS SO ORDERED.

Judge D. Chris Cook

cc: Griffin, Asst. Pros. Atty.
Bremke, Esq.

[1] The Court gave the Defendant leave to file a post-hearing supplemental brief but none was filed.

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I. INTRODUCTION

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II. ABBREVIATED STATEMENT OF FACTS

The facts at issue in this dispute are not substantially contested.

As a condition of bond, the Defendant was placed on a GPS monitoring device ("The Monitor"). The Monitor and its data are administered by the Lorain County Adult Probation Department ("Probation Department") through its Court Supervised Release ("CSR") program. The Monitor was provided by CourtMon, an independent contractor who provides GPS and alcohol monitors to the Court. CourtMon tracks and maintains information provided by The Monitor and reports it to the Probation Department if a violation occurs.

In May, 2020, as part of an ongoing investigation into alleged additional criminal activity, representatives of the Sheffield Lake Police Department ("SLPD") contacted the

Probation Department and requested information regarding the Defendant's GPS activity.[2]

In response to this request, the Probation Department contacted CourtMon and authorized it to cooperate with SLPD and to release the GPS information.

CourtMon did as instructed.

The GPS information confirmed that the Defendant was at the alleged crime location on multiple occasions.

Based in part upon this information, SLPD sought and obtained a search warrant for the same GPS records previously provided by CourtMon. The records obtained by SLPD initially from the warrantless search and subsequent to the search warrant were identical.

The Defendant was thereafter indicted on the new pending charges.

III. LAW AND ANALYSIS

STANDARD OF REVIEW – FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides 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 * * *." Article I, Section 14, of the Ohio Constitution contains nearly identical language. "For a search or seizure to be reasonable under the Fourth Amendment, it must be based upon probable cause and executed pursuant to a warrant, unless an exception to the warrant requirement applies." *State v. Hetrick*, 9th Dist. Lorain No. 07CA009231, 2008-Ohio1455, ¶ 19, citing *Katz v. United States*, 389 U.S. 347, 357 (1967).

"[A]n appellate court's review of the trial court's findings of fact looks only for clear error, giving due deference as to the inferences drawn from the facts by the trial court." *State v. Hunter*, 151 Ohio App.3d 276, 2002-Ohio-7326, ¶ 24 (9th Dist.), citing *State v. Russell*, 127 Ohio App.3d 414, 416 (9th Dist.1998), reference *State v. Soto,* 9th Dist., Lorain No. 17CA011024, 2017-Ohio-4348, at ¶ 6.

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[2] There is some question whether both Chief Campo and Det. Kory or just Chief Campo contacted CourtMon. Regardless, whether one or both of them did is irrelevant for disposition of this matter.

Under the Fourth Amendment, a warrantless search is per se unreasonable unless it falls into one of the few well defined exceptions to the Fourth Amendment's warrant requirement. *State v. Kessler*, 53 Ohio St.2d 204, 207, 373 N.E.2d 1252 (1978). When a motion to suppress evidence obtained in a warrantless search is filed, the state has the burden of establishing that one of the exceptions applies. *Id.* at ¶ 39.

A motion to suppress presents a mixed question of law and fact: When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.

Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. Oberholtz*, 9th Dist. Summit No. 27972, 2016-Ohio-8506, ¶ 5, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372; *State v. Carey,* 2018-Ohio-831, 9th Dist. No. 28689, Summit (3/7/2018) at ¶ 8.

THE RIGHT TO A HEARING

If a defendant in a criminal case files a motion to suppress that complies with Crim. R 47 by setting forth sufficient factual and legal basis for the challenge of evidence obtained as a result of a warrantless seizure, the court must afford the defendant a hearing.

"We therefore hold that in order to require a hearing on a motion to suppress evidence, the defendant must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and court on notice of the issues to be decided." *State v. Shindler,* 70 Ohio St.3d 54 (1994).

"We have held that "[i]n order to require a hearing on a motion to suppress evidence, the accused must state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided." *Shindler,* syllabus. Failure to include or particularly state the factual and legal basis for a motion to suppress waives that issue. *See Defiance v. Kretz,* 60 Ohio St.3d 1, 573 N.E.2d 32 (1991); *State v. Codeluppi,* 139 Ohio St.3d 165, 2014-Ohio-1574, at ¶ 10.

SEARCHES AND THE EXPECTATION OF PRIVACY

The Fourth Amendment of the Constitution protects against unreasonable searches and seizures. The Fourth Amendment protects all areas where a person has a **reasonable**

expectation of privacy. *Katz v. U.S.,* 389 U.S. 347 (1967), emphasis added. The question of exactly what governmental conduct constitutes a search, thus triggering Fourth Amendment protection, has long been a matter of controversy. The United States Supreme Court has not defined the term "search" in this century, but instead has been constantly defining it with reference to what is not included within the term, and thus is not protected because it is not subject to the reasonableness standard of the Fourth Amendment.

In 1967, in *Katz,* the Supreme Court shifted from property interests to privacy interests as the crucial factor in determining Fourth Amendment scope of protection.

Later cases applied *Katz* to limit Fourth Amendment protections. These cases narrowed privacy protections by holding that what one reveals for limited purpose—such as one's presence on the highway, bank records, or telephone numbers dialed—can be used for any governmental purpose. Moreover, even a limited disclosure may lead to additional disclosures. The United States Supreme Court held in *Texas v. Brown*, 460 U.S. 730 (1983), "[i]t is ... beyond dispute that [the police officer's] shining his flashlight to illuminate the interior of [defendant's] car trenched upon no right secured . . . by the Fourth Amendment."

In *Minnesota v. Olsen*, 495 U.S. 91 (1990), the United States Supreme Court applied a new test focused on the American people's expectation of privacy to determine the scope of the Fourth Amendment's protections. *Olsen* raised the question of whether an overnight guest had Fourth Amendment protection in his host's home to have standing to challenge the legitimacy of a police entry of that home, which led to the guest's arrest. Justice White, writing for the majority, held the guest had adequate standing because the guest's expectation of privacy was consistent with the expectations of the American people. There is no better way to determine the reasonableness or legitimacy of a person's privacy expectation than to measure it according to the common expectation that exist in this society.

WHAT ABOUT PRIVACY EXPECTATIONS IN ELECTRONIC COMMUNICATIONS

Clearly, the information regarding the Defendant's movements as recorded and saved by The Monitor qualifies as "Electronic Communications."

The Electronic Communications Privacy Act ("ECPA"), 18 U.S.C.A. §§ 2510, establishes when and how government investigators may compel an electronic communications storage provider to disclose information regarding electronically stored communications.

The information provided to SLPD by CourtMon constitutes "Record Information" under the act. In this case, prior to the Warrant, none of the four requirements for disclosure were met.

Nevertheless, the ECPA expressly lists the available remedies and there is no suppression remedy for an ECPA violation. 18 U.S.C.A. § 2703(c)(1).

DOES WEARING A COURT-ORDERED GPS MONITOR AS A CONDITION OF BOND TRIGGER FOURTH AMENDMENT PROTECTIONS IN THE DATA THAT IS COLLECTED

As discussed *supra,* the touchstone for an alleged Fourth Amendment violation analysis begins with asking, "did a search occur?" If so, did the target of the search have a reasonable expectation of privacy in what was searched? If the answer is affirmative, the final question is: was there a warrant or an exception to the warrant requirement?

THERE WAS A SEARCH

Clearly, SLPD conducted a "search."

Webster's Legal Dictionary defines 'search' as "to look into or over carefully or thoroughly in an effort to find or discover something."

In this case, governmental actors (members of SLPD) sought and obtained information relating to the Defendant from third-parties that SLPD was not otherwise privy to. The only way that SLPD could obtain The Monitor's data was to request it from the Probation Department, who authorized CourtMon to release it.

Once SLPD obtained and "looked into" The Monitor's data and tied it to the Defendant, they completed a search of the Defendant's CourtMon records. See also, *United States v. Jones,* 565 U.S. 400 (2012).

DID THE DEFENDANT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE GPS MONITOR DATA

Resolution of this question is paramount in determining whether or not a Fourth Amendment violation occurred.

If the Defendant had a reasonable expectation of privacy in the information collected and stored by The Monitor, then the Court must consider the final element of the analysis regarding any exceptions that may be present to justify the warrantless search.

If the Defendant did not have a reasonable expectation of privacy in the information collected and stored by The Monitor, then the inquiry is over, as no Fourth Amendment rights were implicated.

This Court finds, as a matter of law, that the Defendant did not have a reasonable expectation of privacy in the information collected and stored by The Monitor.

ANALYSIS

First, the Court notes that the Defendant consented to being outfitted with The Monitor and clearly knew that its purpose was to track his physical movements. When the Court released the Defendant on bond, subject to wearing The Monitor, the Court was very clear in its colloquy with him that he was to stay out of the City of Oberlin and the City of Vermilion and that The Monitor would track his movements to ensure enforcement of these conditions.[3]

Moreover, the seminal GPS case decided by the United States Supreme Court, *Jones, supra,* relied upon by the Defendant, is inapposite.

In *Jones,* unknown to him, police detectives installed a GPS device on his car. The GPS tracked his movements and the information was later used to charge him with drug trafficking. The Supreme Court determined that a search occurred and that Jones had a reasonable expectation of privacy in where he drove, despite the government's argument that he was driving on public roads. The Court ruled that the District Court's suppression of the information obtained by law enforcement from the GPS was proper.

But the facts in *Jones* distinguish it from this case. Here, the Defendant was aware that his every movement was being tracked and the information was being stored. By agreeing to wear The Monitor with the knowledge that his movements were being tracked, the Defendant forfeited any reasonable expectation of privacy in the information The Monitor collected.

An analogy is instructive to illuminate this point.

An individual has a personal cell phone that she pays for and uses for personal/private use. She is aware that all, or most of the information that is transmitted through the phone - call data, text messages, photos, internet searches, etc., is stored and available for retrieval – nevertheless, she clearly has a reasonable expectation of privacy in her own phone records.

[3] The Defendant may, at some point in this litigation, raise the issue of "voluntariness" regarding his acquiescence to being outfitted with The Monitor. As this issue was not raised herein by the Defendant it is waived.

Conversely, our same individual works for an employer that provides her with an employee cell phone and advises her that her usage of that phone and its data will be stored and possibly used by her employer if necessary. Clearly, she does not have a reasonable expectation of privacy in her employer's phone, or if she does, it is substantially reduced.

Similarly, the Defendant herein was outfitted with The Monitor and advised that the information it acquired and stored *might* be used against him in the future under certain situations, for instance, if he entered a restricted zone or failed to appear for court. As such, like our employee with an employer cell phone, the Defendant cannot legitimately claim that he had a reasonable expectation of privacy in information collected by The Monitor when he was aware that he was wearing it and that the information it collected could be later used against him.

Second, the Defendant clearly knew that his every movement was being tracked, that the information was being stored, and that the information was being monitored by the Probation Department as he was placed on and monitored by CSR.

It should further be noted that while the Defendant may not have been explicitly advised that the GPS information could be turned over to the police, he did know that it could be given to the probation department. Pursuant to R.C. 2901.01(11)(b), a probation officer is included in the definition of a law enforcement officer, thus it follows that he was (at least implicitly) aware that the information could be turned over and used by law enforcement.

In any event, unlike our employee cell phone example above or just about any other data collected and stored by third-party providers, we do not anticipate that anyone will be "monitoring" or "reviewing" our private, electronically stored information. But that is not the case with the Defendant's GPS monitor.

The very nature of the device itself and the purpose for its installation on the Defendant's person was to track and store his movements and to make that information available to the CSR team so that they could advise the Court of any alleged violations. Moreover, the Defendant was clearly aware that in addition to violations of the conditions of his bond, the information obtained from The Monitor could be given to law enforcement to charge him with a crime, for instance, violating a protection order, etc.

In support of his argument that he had a reasonable expectation of privacy in The Monitor's information, the Defendant relies heavily on the matter of *United States v. Jackson,* 214 A.3d 464 (D.C. 2019).

This reliance is misplaced as the *Jackson* case supports this Court's determination that the Defendant had no reasonable expectation of privacy in The Monitor's data and that the Probation Department's decision to share it with SLPD was proper.

The facts in the *Jackson* case are strikingly similar to those at hand.

In *Jackson,* the defendant was a convicted felon who was placed on probation. After violating one of the terms of his probation, Jackson was outfitted with a GPS monitor.

The Maryland Police Department, in conformity with a long-standing agreement with the probation department, sought Jackson's GPS information relative to an armed robbery they were investigating. The probation department released the GPS information to law enforcement and Jackson was ultimately charged with committing the crime.

In reaching the conclusion that the release of Jackson's GPS information by the probation department to law enforcement did not violate his Forth Amendment rights, the D.C. Circuit court held,

> We conclude that [the probation department] did not violate Mr. Jackson's reasonable expectation of privacy by granting the police access to his GPS data in furtherance of their mutual law enforcement objectives. The limited police utilization of that access comported with the reason the [probation department] granted it and did not unreasonably intrude on Mr. Jackson's privacy. We therefore conclude that Mr. Jackson's Fourth Amendment rights were not violated.

Jackson, supra, at ¶ 18.

In support of this conclusion, the *Jackson* court relied upon the following eight factors, which will be briefly addressed *seriatim.*

1) As a probationer, the defendant's reasonable expectation of privacy was significantly diminished as the police could search his residence without a warrant with no more than reasonable suspicion of criminal activity there.

2) The intrusion by the police on the defendant's privacy was quite limited in scope.

3) It was the probation department, not the police, that attached the GPS device and collected the defendant's GPS data for its own compliance purposes.

4) The probation department never represented to the defendant that it would not release any GPS information to law enforcement nor did he receive any such assurance from the court or any other source.

5) The defendant's expectation that the probation department would not voluntarily share his GPS data with the police for their mutual, compliance-related purposes would have been objectively unreasonable as a primary objective of probationary supervision is the protection of society from future criminal violations.

6) It is well-settled that because the objective and duties of probation officers and law enforcement personnel are often parallel and frequently intertwined, the law permits cooperation between probation officers and other law enforcement officials so that they may work together and share information to achieve their objectives. The Supreme Court has held that probation officers may share the lawfully-obtained fruits of probation searches with the police even if it would not have been lawful for the police to conduct the searches themselves.

7) The police did not use the defendant's GPS data to pry into his intimate or private affairs or the details of his personal life. They sought and obtained limited information and properly used it for law enforcement purposes.

8) The GPS data revealed only that the defendant was at the crime scene . . . and he did not possess a reasonable expectation that his movements would be private.

Each of these eight factors is applicable to this case but of course, we must address the single factual difference.

A PROBATIONER v. A DEFENDANT ON PRE-TRIAL RELEASE BAIL

As pointed out by the Defendant herein, he was not on probation nor convicted of any offense but instead, was on pre-trial release with certain conditions of bond, including, primarily, a GPS device.

This is a difference without a distinction.

Clearly, a probationer gives up certain rights and expectations when placed on probation (or a community control sanction) – many of which are spelled-out in detail, others, like the use of GPS information, are not.

Similarly, a defendant given a pre-trial bond with conditions also gives up certain rights in exchange for pre-trial release: Such as agreeing to report to specialized supervision (CSR), agreeing to be randomly drug tested, agreeing to call-in for SAM calls, agreeing not to leave the State without permission, agreeing to protection orders in favor of complaining witnesses, agreeing to geographical restrictions, etc.

In reality, there is very little legal distinction between being on pre-trial bail with conditions and being on probation (or community control) with conditions.

Regardless, the factors noted above all buttress this Court's conclusion that the Defendant - regardless of whether on pre-trial bail, like herein, or on probation, like in *Jackson*, - lacked any reasonable expectation of privacy in his GPS data as all eight *Jackson* factors are present and applicable to the Defendant.

WHAT ABOUT THE STATE'S "INEVITABLE DISCOVERY" EXCEPTION ARGUMENT

The inevitable discovery exception is the newest limitation on the derivative evidence rule. This exception was explained by the Supreme Court in *Nix v. Williams*, 467 U.S. 431 (1984), as putting the prosecution in the same, not a worse, position than it would have been in if no police error or misconduct had occurred. The exception works the same way as the independent source doctrine.

In *Nix*, the Court unanimously agreed on the existence of the exception but split on how it should be applied. Under this exception, evidence that was obtained illegally is admitted, nonetheless, if it would inevitably have been obtained lawfully. The Court held that the purpose of the exclusionary rule is to deter illegal police behavior. The inevitable discovery exception works in the same way as the independent source doctrine: if the evidence would have been discovered by lawful means, then the deterrence rationale has so little basis that the evidence should be received.

The inevitable discovery exception was applied by the Ohio Supreme Court in *State v. Jackson*, 57 Ohio St.3d 29 (1991), where fingerprints found at a murder scene matched those of the defendant, which were taken when he was arrested on an unrelated charge.

Regardless, in the case at bar, this Court need not reach the issue of inevitable discovery given the disposition above that the Defendant did not have a reasonable expectation of privacy in the information tracked and stored by The Monitor.

THE DEFENDANT FILES A RESPONSE BRIEF

In his Response Brief, the Defendant raises three additional arguments in support of suppression, to wit: 1) since the information from CourtMon was illegally obtained in the first instance, it cannot be the basis upon which the warrant could issue; 2) the Affiant for the Warrant lacks personal knowledge of the issues to which he testified; and 3) the information obtained by the Warrant exceeds the scope of what was authorized.

None of these additional arguments are persuasive.

First, as this Court has ruled that no constitutional violation occurred by CourtMon's release of The Monitor's information, it was not "illegally obtained" and thus was proper evidence upon which to seek the Warrant.

Regardless, even *if* the Warrant was deemed defective for one or more of the reasons advanced by the Defendant, it is irrelevant as the State did not need a Warrant in the first place. Given that the Defendant had no reasonable expectation of privacy in the information collected by The Monitor, no Fourth Amendment protections arose – and thus no Warrant was required to obtain and rely upon the information collected by The Monitor.

Third, the fact that some information *may* have been obtained beyond the scope of the Warrant hardly invalidates the entire thing nor mandates suppression of all of the information obtained, particularly the legitimate information.

Moreover, the two cases relied upon by the Defendant in support of this proposition of law are inapposite. They both deal with actual physical searches of real property and the scope of what "area" can actually be searched.

But that is not what happened here.

In this matter, no physical search of any real property occurred. The search was for GPS data that showed, allegedly, where the Defendant was personally, physically located at a particular point in time. The data obtained from CourtMon and authorized by the Warrant (presumably) simply revealed the Defendant's whereabouts and while technically a "search," was not a search as contemplated by the *Carter* and *Wolf* decisions cited by the Defendant.

And again, *even if* the search exceeded the scope of the Warrant, it is of no accord as no Warrant was necessary to begin with.

Moreover, as urged by the State in its reply brief, even if the initial search and seizure of the GPS information by SLPD was illegal, the subsequent Search Warrant rectified any anomaly.

There is caselaw to support the proposition that "The police are not precluded from obtaining a search warrant for evidence which was previously unlawfully obtained." *State v. Keith,* 2nd Dist., Montgomery No. 26367, 2016-Ohio-1263, citing *State v. Fugate,* 2nd Dist., Greene No. 2006-CA-111, 2007-Ohio-6589.

Finally, regardless of the propriety, or impropriety of the Warrant, the State did not need a warrant in the first instance – thus, whether is was defective or non-conforming is of no accord.

IV. CONCLUSION

In the case at bar, the Defendant agreed to be fitted with and wear at all times a GPS monitoring device as a condition of pre-trial release bond. He was given instructions relative to the GPS such that his movements would be continually tracked and that he was to avoid certain areas of Lorain County. He was advised that if he violated the terms of his bond, including violations that stemmed from information collected by the GPS Monitor, that he would suffer repercussions.

He agreed to these terms and conditions and was aware, at all times, that his physical movements were being tracked 24/7 by The Monitor and stored for later use and that this information could be used to his detriment by the probation department officers who, by statute, are also law enforcement officers.

As such, the Defendant could not have had a reasonable expectation of privacy in his physical movements throughout the community and by logical extension, the data collected and stored by The Monitor.

Moreover, it is unreasonable for the Defendant to assume that the information The Monitor collected and stored would not be used against him if he violated the conditions of bond or committed some other offense. In fact, quite the opposite – he was well-aware that the information accumulated and stored by The Monitor could be used against him under a myriad of possible scenarios.

As such, when law enforcement officers requested and obtained the Defendant's GPS information from the Probation Department, without a warrant, no constitutional violation occurred because the Defendant had no reasonable expectation of privacy in said information and thus, no Fourth Amendment protections were implicated.

The Motion To Suppress is DENIED.

JUDGE D. CHRIS COOK