In a recent case United States v. Cuevas-Perez, 2011 WL 1585072 (C.A. 7 (Ill.)), the Seventh Circuit Court of Appeals considered whether the warrantless installation of a GPS device which allowed "real time" tracking of a suspect vehicle for approximately 60 hours while it traveled from Arizona to Illinois violated the Fourth Amendment. The Court concluded that there was simply no constitutionally relevant difference between devices which simply record and store information for later retrieval and GPS units which furnish real time data. In fact, the Seventh Circuit indicated that GPS units which record and store historical data are less akin to the publicly exposed data on which permissible Fourth Amendment GPS tracking is based. Id. at 3. In referencing an earlier Seventh Circuit case the Court stated "GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking" See., United States v. Garcia, 474 F.3d 944 (7th Cir. 2007)

As law enforcement officers continue to add to their "toolbox", coupled with the advent of continually increasing technology, officers are faced with daily constitutional questions regarding whether these new tools comport with Fourth Amendment Constitutional standards.

As a preliminary question - Police Officers need to determine whether the Fourth Amendment is even implicated. If the Fourth Amendment is not in "play", then police conduct is deemed constitutionally valid. Always remember that State Constitutions are free to be more restrictive of government conduct. Thus, government actions which comport with the Fourth Amendment may still be in violation of a stricter state constitutional standard. See., People v. Weaver, 12 N.Y.3d 433 (2009), Commonwealth v. Connolly, 454 Mass. 808 (2009), State v. Jackson, 150 Wash. 2d 251 (2003), (all indicating that placement of a GPS is a search under their respective state constitutions, which must be supported by probable cause and a warrant)
THREE THINGS MUST BE PRESENT FOR THE FOURTH AMENDMENT TO BE IMPLICATED:

1) **Government conduct** - the 4th Amendment does not apply to private actors. See, *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) - evidence illegally obtained by private parties and turned over to police is not a 4th Amendment violation.

2) **Standing** - 4th Amendment rights are personal. There must be a sufficient nexus between the area or item subjected to the search/seizure and the person claiming a constitutional violation. See, *Rakas v. Illinois*, 439 U.S. 128, 138-39 (1978) – mere passengers in a vehicle have no standing to contest the legality of a search of the vehicle.

3) **Reasonable Expectation of Privacy (REP)** – must exist in the area or item subjected to the search or seizure. The individual must exhibit a subjective expectation of privacy in the item or area and that expectation of privacy must be objectively reasonable to society as a whole. See, *Katz v. United States*, 389 U.S. 347 (1967)- indicating that a two part analysis governs whether an expectation of privacy exists ie., there must be a subjective REP exhibited, and it must be objectively reasonable to society. If any of the three are absent, the 4th Amendment is simply not implicated.

The foundational Supreme Court precedent for GPS related cases is *United States v. Knotts*, 460 U.S. 276 (1983), holding that the use of a beeper device, secreted within a drum of chemicals, to track a suspect did not violate the 4th Amendment, because there was no search under the Fourth Amendment. The Supreme Court explained that a person traveling in a motor vehicle on public thoroughfares has no reasonable expectation in their movements. The Court commented that the use of GPS devices does not permit the discovery of any information that could not have been obtained by physical, visual surveillance of an auto traveling on public roads. In closing, the Court noted that nothing in the 4th Amendment prohibited the augmenting of sensory faculties via scientific and technological advancements. Id. at 282.

**A CIRCUIT BY CIRCUIT DISCUSSION FOLLOWS - RE: STATE OF THE LAW WITH GPS DEVICES**

**1ST CIRCUIT**

In *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977), the First Circuit held that while the lesser expectation of privacy associated with motor vehicles justifies the use of a beeper without a warrant to track vehicles, this can only be done if officers have sufficient probable cause. The Court went on to acknowledge that potentially a lesser standard than probable cause may be constitutionally acceptable.
A more recent case in the 1st Circuit, *United States v. Sparks*, 750 F.Supp.2d 384 (2010), claims that *U.S. v. Moore*’s 1977 holding that probable cause is required for the installation of a tracking device, is no longer good law following the U.S. Supreme Court's 1983 holding in *U.S. v. Knotts*. District Court Justice Young commented that "where the use of a tracking device serves only as a technological substitute for an otherwise legal activity, it must remain constitutionally sound." *Knotts* at 284. In *Sparks*, FBI agents attached a GPS unit to a suspected bank robber's vehicle. The Court ruled that the suspect had neither a subjective expectation of privacy in the open air parking lot (where GPS was affixed), the exterior of the vehicle, or the movement of his vehicle on the streets. *Id.* at 396. With the absence of any REP, the Court indicated that no warrant or court order was needed to install or monitor the GPS. *Id.* In essence the 1st Circuit defaulted to *U.S. v. Knotts*, claiming since no REP exists there are no 4th Amd concerns.

**2ND CIRCUIT**

In *Morton v. Nassau County Police Department*, 2007 WL 4264569 (E.D.N.Y.), plaintiff’s brought a civil rights claim against police alleging the warrantless installation and use of a GPS violated her Fourth and Fourteenth Amendments rights against unreasonable searches and seizures. Nassau County Police had attached a GPS device to plaintiff’s vehicle based upon previous sightings at residential burglaries.

The Court cited approvingly to *U.S. v. Knotts*, “a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” *Knotts* at 281. The Court noted “the use of the GPS device did not permit the discovery of any information that could not have been obtained by following an automobile traveling on public roads either physically or through visual surveillance, conduct that neither requires a warrant nor implicated Fourth Amendment rights.” *Id.* at 282. In continuing to follow *Knotts* the Court held there was no reasonable expectation of privacy in one’s movements on public ways, and thus there was no search, seizure or Fourth Amendment implication by mere placement of a GPS device. *Morton v. Nassau County Police Department* at 4. See, *U.S. v. Moran*, 349 F.Supp. 2d 425 (N.D. N.Y. 2005).

**3RD CIRCUIT**

In *United States v. Hosbach*, 518 F.Supp. 759 (E.D. Pa. 1980), DEA agents attached a bumper beeper to a suspect’s vehicle after obtaining judicial authorization. While noting that most courts have held that prior judicial authorization is unnecessary for the installation of a bumper beeper (citing to 8th, 9th, and 10th Circuit cases), the Court declined to decide the issue because a warrant based upon probable cause had been obtained. *Id.* at 769.

**4TH CIRCUIT**
Similarly, a Fourth Circuit District Court declined to rule on the issue. In United States v. Berry, 300 F.Supp. 2d 366 (D. Md. 2004), police obtained a court order to affix a GPS onto a vehicle believed to be traveling from Baltimore to the New York City area. While acknowledging that under U.S. v. Knotts, the Supreme Court allowed the installation and monitoring of a beeper without seeking judicial authorization, the Court expressed reservations about whether the Supreme Court’s analysis would cover a GPS. Id. at 368. The Court indicated that it was unwilling to decide whether the new technology employed by state of the art GPS devices was so intrusive so as to necessitate a court order, noting that police had in fact obtained a court order. Id.

5th Circuit

The Fifth Circuit standard for the warrantless installation of an electronic tracking device is an “intermediate standard”, requiring law enforcement officers to have reasonable suspicion that criminal activity is afoot. United States v. Michael, 645 F.2d 252 (5th Cir. 1981). In U.S. v. Michael, the Fifth Circuit held that DEA’s warrantless attachment of an electronic tracking device, to the exterior of a suspect’s vehicle while parked in a public place, based upon reasonable suspicion was sufficient to allay any Fourth Amendment concerns. Id. at 257.

At the same time, the Fifth Circuit noted that some members of the majority would hold that installation of a beeper is not a search or seizure at all, and thus does not implicate any Fourth Amendment interests. Id. at 256. The 5th Circuit en banc, noted expressly “While we do not reject this view, ... under the facts presented, the installation of the beeper was permissible, even if we assume the installation was a search.” Id. at 256.

Thus in the Fifth Circuit in an abundance of caution warrantless GPS installation should be based upon reasonable suspicion that the suspect (vehicle) is involved in criminal activity.

6th Circuit

In United States v. Bailey, 628 F.2d 938 (6th Cir. 1980), DEA agents acting in an undercover capacity delivered precursor chemicals to a Detroit, Michigan address. Prior to delivery agents sought and obtained a warrant authorizing DEA to install a beeper in a drum of chemicals. The Sixth Circuit subsequently held that the warrant was invalid, based upon the failure to specify any time limitations on the beeper monitoring (surveillance). Id. at 945. The Sixth Circuit indicated that “installation and monitoring of the beeper under the facts of this case was a search and seizure and had to meet Fourth Amendment standards.” Id. The Sixth Circuit continued “Ordinarily this means the surveillance (installation and monitoring of the beeper) must have been authorized by a warrant based upon
probable cause and issued in advance.” Id. Thus in the Sixth Circuit, law enforcement officers need to obtain a warrant based upon probable cause in order to install and monitor a beeper.

7TH CIRCUIT

The Seventh Circuit has continually held that there is no search or seizure under the 4th Amendment when police attach a GPS tracking device underneath a suspect’s vehicle, that does not draw power from the engine or battery, does not take up room occupied by passengers or packages, and does not alter the vehicles appearance. See, United States v. Garcia, 474 F.3d 994 (7th Cir. 2007), United States v. Cuevas-Perez, 2011 WL 1585072 (C.A.7 (Ill.)).

The 7th Circuit noted that if police use of surveillance cameras and use of satellite imaging are not searches in Fourth Amendments terms, than neither is GPS tracking. U.S. v. Garcia, at 997.

In United States v. Cuevas-Perez, the 7th Circuit commented that the principles derived from Knotts and Garcia, that GPS tracking does not constitute a search controlled. Cuevas-Perez at 2. The 7th Circuit was unconcerned that the GPS unit affixed by police was capable of sending minute by minute messages regarding the vehicle’s location, or where continued GPS surveillance lasted for over 60 hours. Id. at 3. Thus in the Seventh Circuit warrantless attachment of a GPS unit is not a search within the terms of the Fourth Amendment.

8TH CIRCUIT

In United States v. Marquez, 605 F.3d 604 (8th Cir. 2010), the Eighth Circuit held that as a preliminary matter the defendant lacked standing to contest the installation of a GPS device in a vehicle in which he was only an occasional passenger. The Eighth Circuit noted that even if the defendant had standing, no reasonable expectation of privacy had been violated by DEA agents installing the GPS. Id. at 607. The Court explained that a person traveling in a motor vehicle via public roads has no reasonable expectation of privacy in his movements from one locale to another. Id. at 608. The 8th Circuit held that when police have reasonable suspicion that a specific vehicle is transporting drugs, a warrant is not required to install a non-invasive GPS tracking device, while the vehicle is parked in a public place, for a reasonable period of time. Id. at 610. Thus in the Eighth Circuit while law enforcement officials do not need a warrant to install a GPS device, they must possess a reasonable suspicion that the vehicle is involved in criminal activity.

9TH CIRCUIT
Surprisingly, the Ninth Circuit in following U.S. v. Knotts, ruled that United States Forest Service officers warrantless placement of two electronic tracking devices on the undercarriage of a suspect’s vehicle while parked outside the cartilage did not constitute a seizure in a Fourth Amendment sense. United States v. McIver, 186 F.3d 1119, 1127 (9th Cir. 1999). The Ninth Circuit cited to several cases which indicated that there is no reasonable expectation of privacy in the exterior of a vehicle. See, New York v. Class, 475 U.S. 106 (1980) - “(t)he exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a search” Id. at 114.

In United States v. Pineda-Moreno, 617 F.3d 1120 (9th Cir. 2010), the 9th Circuit rejected a petition for a rehearing en banc, where police surreptitiously attached a GPS tracking device to the underside of a vehicle, which was parked in a driveway. In rejecting the petition for rehearing en banc the 9th Circuit held simply that the 4th Amendment was not implicated. Id. at 1121. The 9th Circuit followed U.S. v. Knotts, in holding that the warrantless placement of an electronic tracking device does not violate any reasonable expectations of privacy thus there are no 4th Amendment issues.

10th CIRCUIT

In United States v. Shovea, 580 F.2d 1382 (10th Cir. 1978), federal agents became aware of a suspicious order of precursor chemicals from a New York based company for the production of methamphetamine. Id. at 1383. Physical surveillance of the pick-up of the precursor chemicals, coupled with the suspicious manner of transport, and subsequent arrival at an airport for a transcontinental trip provided agents with the requisite probable cause to place an electronic tracking device onto a suspect’s vehicle. Id. at 1384. The 10th Circuit noted that although whether the installation of an electronic tracking device on a motor vehicle is a search or seizure under the 4th Amd was a difficult question, it need not be reached in the present case. Id. at 1387. The 10th Circuit assumed without deciding that the installation of the tracking device was a search under the 4th Amd, that was justified by the existence of probable cause and exigent circumstances (ie., the inherent mobility of vehicles making the application for a warrant impracticable ie., motor vehicle exception) Id. at 1388. Thus in the 10th Circuit, the warrantless installation of a tracking device based upon probable cause without initially acquiring a court order does not violate the 4th Amd. Id.

11th CIRCUIT

In United States v. Smith, 387 Fed.Appx. 918, 2010 WL 2825488 (C.A. 11 (Fla.)), a DEA Task-Force Officer, without the benefit of a warrant attached a GPS unit to a marijuana trafficker’s Cadillac Escalade. The Court found that the GPS was installed in a public place and held that Smith lacked any reasonable expectation of privacy in the exterior of his vehicle. Id. at 921. The Court indicated that
without any legitimate expectations of privacy there were no 4th Amendment issues. See, United States v. Barton, 698 F.Supp.2d 1303 (N.D. Fla. 2010) – “there is no 4th Amd violation for using a tracking device as a substitute for visual surveillance”. In the 11th Circuit warrantless installation of GPS devices does not impede on any reasonable expectations of privacy, thus no Fourth Amendments concerns exist.

**D.C. CIRCUIT**

The District of Columbia is the only Federal Circuit to claim that U.S. v. Knotts, is not controlling precedent regarding the warrantless installation and prolonged monitoring of a GPS device. The D.C. Circuit claims that the Supreme Court reserved the question of whether prolonged “twenty-four hour surveillance” was a search under the Fourth Amendment. United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010). The D.C. Circuit squarely differentiated between tracking “movements from one place to another” and tracking movements 24 hours a day for 28 days ...thereby discovering the totality and pattern of his movements from place to place. Id. at 559.

In Maynard, FBI agents tracked the movements of a suspect 24 hours a day for 4 weeks, via warrantless installation of a GPS on his vehicle. Id. at 565. The D.C. Circuit recognized that prolonged GPS monitoring “yields a highly detailed profile of where a person travels, their associations, including political, religious, amicable and amorous” in essence laying out a pattern of a person’s activities. Id. at 562. The D.C. Circuit found a reasonable expectation of privacy in a person’s movement over the course of a month. Id. at 564.

In effect, the D.C. Circuit held that prolonged GPS monitoring was a search under 4th Amd rationale. Id. at 565. The D.C. Circuit imputed that warrantless searches are “per se unreasonable, subject only to a few specifically established and well delineated exceptions” Katz v. U.S., 389 U.S. 347, 357 (1967). Here since the warrantless installation and monitoring of the GPS ran afoul of the 4th Amendment, the resulting evidence gleaned from the GPS monitoring improperly contributed to the defendant’s conviction and reversal is warranted. Id. at 568. Thus in the District of Columbia, GPS installation appears to be subject to probable cause and warrant requirements.

**FINAL NOTE**

As a final note, I would like to address the concept of “Target Worthiness.” In essence regardless of the particular jurisdiction’s requirements regarding GPS tracking protocol, if the target of the investigation is deemed sufficiently “worthy”, ie., a significant amount of time or police resources have been or will be expended then careful consideration should be given to procuring a warrant or court order. For example it has been my experience that police often have obtained at a minimum reasonable suspicion if not probable
cause that a particular vehicle is involved in criminal activity prior to installing a GPS device. Thus if investigators are sufficiently armed with probable cause, then the only remaining step would be to apply for a court order or warrant. If investigators are currently only in possession of reasonable suspicion, then perhaps it can be bolstered through further investigative means (physical surveillance, informants, criminal records inquiry, etc.) to meet the probable cause threshold. There are several benefits of obtaining a warrant prior to GPS installation, all conduct performed pursuant to a warrant is presumptively reasonable, Defendant’s now have the burden of litigating whether probable cause exists, and in close cases the police get the benefit of the doubt based upon their due diligence.

NOTE: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal advisor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

SEE ALSO:

D.C. Court of Appeals... Search Warrant Needed for GPS Tracking

U.S. v. Juan Pineda-Moreno, 9th Circuit Upholds GPS Tracking (Legal Update 2010)

Court Order Or Search Warrant Requirements For GPS Tracking On Vehicles (Legal Question 2008)
http://www.llrmi.com/articles/legal_questions/4-oct08.shtml

Learn to Recover and Analyze GPS Data (PATCtech Training Class)
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