

## Criminal law update

In a rather unexpected decision, the U.S. Supreme Court held recently that a GPS device attached to a vehicle and used to monitor the vehicle's movements violated the Fourth Amendment prohibition of unreasonable searches in *U.S. v. Jones*. Many were expecting that the conservative majority would come down on the other side of the issue. The opinion does have two alarming hints that should be watched closely. First, Justice Alito's concurrence did introduce the novel thought that "whether a search has occurred depends on the nature of the crime being investigated."<sup>1</sup> Alito's concurrence also over-emphasized the thought that the Fourth Amendment only protects against meaningful interference with possessory interests.<sup>2</sup> He reasoned that the installation of the GPS device was so small that no violation had occurred. Fortunately, the majority did not adopt this reasoning although three other justices did.

In *Jones*, the Federal District Court authorized the installation within 10 days of a GPS tracking device on the drug-trafficking suspect's jeep. On the 11th day, the device was installed. It recorded and transmitted data for the next 28 days.

The fact that the warrant was issued was ignored for purposes of the opinion as the

government stipulate that the officers did not comply with the terms of the warrant. Hence the issue before the court was whether the warrantless use of the GPS device violated the Fourth Amendment. Had the officers complied with the terms of the warrant, there would have been no meaningful Fourth Amendment challenge.

That said, the court began its opinion with the presumption that the Fourth Amendment analysis is inherently tied to common law trespass. The presumption should not be ignored by criminal defense practitioners whom should understand that this foundation was expanded in *Katz v. United States* wherein the U.S. Supreme Court emphasized that the Fourth Amendment is designed to protect persons, not places. The U.S. Supreme Court then reasoned that the Fourth Amendment was meant to address government trespass on particular areas. The amendment itself uses the word "effect." Ultimately, the jeep was just such an "effect" meant to be protected by the Fourth Amendment. The installation without a warrant violated the amendment. Reading the other concurring opinions and understanding how the majority developed, should create enough uncertainty to give most criminal defense lawyers pause.

In *U.S. v. Osborne*, the Sixth Circuit Court of Appeals reminds us to object: Osborne was convicted of charges related to drug and firearms activity near a school. He argued that the trial court failed to instruct the jury that proximity to the school is an essential element of the offense. But because he failed to object to the instructions, the issue was reviewed for plain error. He was required to show error that was plain, which affected substantial rights and that "seriously affect(ed) the fairness, integrity or public reputation of judicial proceeding." The court understood the challenge when it wrote, "That is not easy." Lesson learned: It is not easy to argue error in jury instructions if you fail to object. ♦

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### Endnotes

<sup>1</sup> *U.S. v. Jones*, 565 U.S. (2012).

<sup>2</sup> *Id.* at concurrence p. 2.

