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## Judge suppresses GPS data obtained without a warrant

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Hinsdale police violated the Fourth Amendment when they failed to obtain a search warrant before accessing GPS data detailing a car's location over a five-week period, a federal judge held.

In a written opinion Monday, U.S. District Judge Gary Feinerman granted Tobias Diggs' motion to suppress the data.

Diggs was charged in a jewelry store robbery after GPS data showed a car he regularly drove was in the alley behind the store at the time of the crime.

Diggs and two co-defendants were initially indicted by a DuPage County grand jury.

That indictment was later dropped and the men were indicted by a federal grand jury in March 2018 on charges of violating the Hobbs Act.

In his opinion, Feinerman rejected the contention that police did not conduct a search as defined by the Fourth Amendment when they downloaded data from the car's electronic tracking device.

In two concurring opinions in *United States v. Jones*, 565 U.S. 400 (2012), a total of five U.S. Supreme Court justices recognized that people have a reasonable expectation of privacy in their long-term physical movements, Feinerman wrote.

He acknowledged those justices did not identify the length of time needed to turn the tracking of a vehicle into a search.

But the justices agreed that tracking the vehicle driven by the defendant in *Jones* for four weeks constituted a search, Feinerman wrote.

Feinerman also rejected prosecutors' contention that the third-party doctrine defeats any reasonable expectation of privacy Diggs had in his physical movements.

“The third-party doctrine arises from *Smith v. Maryland*, 442 U.S. 735 (1979), where the government used a pen register to record outgoing phone numbers dialed on a landline, and *United States v. Miller*, 425 U.S. 435 (1976), where the government subpoenaed the defendant’s bank records,” Feinerman wrote.

In those cases, he wrote, the Supreme Court held people do not have a legitimate expectation of privacy in information they voluntarily give a third party.

Last year, however, the high court declined to extend the third-party doctrine to historical cell-site location information, Feinerman wrote.

Quoting *Carpenter v. United States*, 138 S. Ct. 2206 (2018), he wrote the court held obtaining such information — data showing the time a cellphone connected to a particular cell tower — from a wireless carrier was a search because it intruded on the phone user’s “legitimate expectation of privacy in the record of his physical movements.”

In reaching that holding, the court explained there was “a world of difference between the limited types of personal information addressed in *Smith* and *Miller*” and “the exhaustive chronicle of location information” available to wireless carriers as a result of 40 years of technological advances, Feinerman wrote, quoting *Carpenter*.

“Applying the third-party doctrine to the GPS data here,” he wrote, “would require essentially the same extension of the doctrine that the [Supreme] Court rejected in *Carpenter*.”

In addition to holding the acquisition of the GPS data from the car Diggs drove was a search, Feinerman held the search was unreasonable.

“[W]arrantless searches are typically unreasonable where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing,” he wrote, quoting *Carpenter*.

He wrote further proceedings are needed to determine whether the GPS data led to other information that should be suppressed as the fruit of the poisonous tree.

Diggs is represented by Douglas E. Whitney of Douglas Whitney Law Offices LLC.

Whitney said Feinerman’s decision is the only one he knows of addressing the issue of obtaining GPS data in the wake of the *Carpenter* ruling.

“We are grateful for Judge Feinerman’s meticulous legal analysis and scholarly opinion,” Whitney said in an e-mail.

“But what is quite disturbing is that this is not the only instance in which local law enforcement officials investigating this matter violated the constitutional rights of defendants.”

In September 2018, Whitney filed a motion to suppress statements Diggs made to Hinsdale police following his arrest.

Whitney alleged police questioned Diggs over three days despite his repeated assertion that he did not want to speak to them without an attorney present.

Feinerman denied the motion as moot after prosecutors agreed not to use Diggs' statements.

In the motion, Whitney also alleged police surreptitiously videotaped a privileged conversation between another suspect and his attorney after falsely assuring the attorney they had turned off the recording equipment in the interrogation room.

That suspect was not charged.

On March 17, 2017, a Razny Jewelers store in Hinsdale was robbed.

Hinsdale police gathered information — witness statements, surveillance videos and an anonymous tip — that led them to believe the getaway car was a 2003 Lexus RX owned by Diggs' wife.

Diggs' wife, Devinn Adams, had bought the car on credit in July 2016 from Headers Car Care.

In the sales contract, Adams agreed to allow Headers to use the car's electronic tracking device to find the vehicle.

The device was serviced by Air Assault Asset Track GPS Systems.

Following the robbery, a Headers employee authorized a Hinsdale detective to access all GPS records from Air Assault's website concerning Adams' car.

The detective downloaded a spreadsheet that included all GPS data from March 1 through April 4, 2017.

The data showed the car traveled from Diggs' residence to the homes of his two co-defendants, Marvon Hamberlin and Joshua McClellan, and then to Hinsdale on the day of the robbery.

In his opinion, Feinerman rejected the argument that the GPS data is admissible because Hinsdale police relied in good faith on then-current case law when they obtained the data, about 14 months before *Carpenter* was decided.

In 2011, the Supreme Court had held the good-faith exception applied only when "binding appellate precedent specifically *authorizes* a particular police practice," Feinerman wrote, quoting *Davis v. United States*, 564 U.S. 229 (2011).

And he wrote prosecutors had not pointed to any such precedent applying the good-faith exception "to long-term historical GPS data or its equivalent."

The case is *United States v. Tobias Diggs, et al.*, No. 18 CR 185.

The lead prosecutor in the case is Assistant U.S. Attorney Albert Berry III.

Spokesman Joseph Fitzpatrick of the U.S. Attorney's Office declined to comment.

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