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Police use of tracking devices at issue

WILMINGTON -- A criminal case making its way to the Delaware Supreme Court could help define personal privacy and set limits on how far police can go when using electronic surveillance in Delaware and perhaps across the United States.

The American Civil Liberties Union this week filed a brief in *Delaware v. Michael D. Holden*, urging the state justices to uphold a lower court ruling that essentially bars police from using Global Positioning Systems (GPS) to track people without a court-approved warrant.

Holden, 28, of Newark, was suspected of dealing drugs and was electronically tracked for more than 20 days by police without a warrant, ending with his arrest after police discovered 10 pounds of marijuana in his vehicle after he visited a suspected drug distribution house. The judge in the case tossed out the drug evidence, ruling that the lengthy warrantless tracking of Holden amounted to an illegal search.

In its brief, the ACLU notes the U.S. Supreme Court has not yet ruled on this issue and legal experts agreed the state case could be part of a growing national debate over the reach of technology versus the boundaries of privacy.

The case will likely turn on the concept of the "reasonable expectation of privacy," said defense attorney and former prosecutor Peter N. Letang.

With GPS devices in nearly all cellphones and in many cars and with the popularity of online applications with which users broadcast their locations to others in real time, Letang and others said the definition of what is private and what is public may have shifted. They also believe the permission that consumers have to give companies such as Apple and Google to use their equipment makes GPS tracking more common and potentially available to police if they subpoena those companies.

"It is tough to carve out an expectation of privacy when everyone else knows where you are," Letang said.

Widener University associate professor Wesley Oliver said companies like Apple and Google are using GPS information collected from phones and applications to make a profit. "They are selling information about your movement to advertisers," he said, who in turn may use it to send information to you about sales or cheap gas in your area.

"And if Apple can use my movement to sell me gas, why can't the government [use similar information] to break up drug rings or find terrorists?" Oliver asked. "This stuff cuts both directions."

Legal experts and courts that have ruled on the issue are divided.

"The difference is -- it is the state in one case," said defense attorney Joseph A. Gabay, "and it is Google [or some other corporation] in the others. You can sue Google for invasion of privacy but there is no constitutional remedy."

Oliver said without court-imposed restraints, detailed GPS information could be used to track a candidate for political office and conduct "opposition research" by seeking things like visits to strip clubs, clinics or a mistress's home and be well within the law.

"That is what makes this a hard question," Oliver said.

In the Holden case, Superior Court Judge Jan R. Jurden sided with Holden attorney John Deckers in concluding that a drug unit's use of a tracking device attached to Holden's vehicle amounted to an unreasonable search and invaded Holden's privacy.

Police used the GPS device to follow Holden's movements in a white 1998 Lexus from Feb. 5 to Feb. 24, 2010, and then moved in when the device showed he was headed to a house suspected of being a drug distribution point in Carneys Point, N.J.

After witnessing an exchange of duffel bags, police again relied on information from the GPS device to determine Holden was crossing the Delaware Memorial Bridge into Delaware. Holden was then pulled over and police found a bag with 10 pounds of marijuana in the car. Holden was arrested and charged with trafficking.

Jurden agreed with prosecutors that police had the ability to follow a suspect -- without a warrant -- as he or she drives from place to place in plain view. However, she said the unblinking, round-the-clock supervision provided by a GPS device is different.

"The advance of technology will continue ad infinitum," she wrote in December. "An Orwellian state is now technologically feasible. Without adequate judicial preservation of privacy, there is nothing to protect our citizens from being tracked 24/7."

Deckers and the ACLU argue in court papers filed with the Delaware Supreme Court that Jurden got it right.

"This case is especially important because of its impact on the privacy rights of all Delawareans, including the vast majority who will never be charged with a crime," wrote ACLU attorney Richard Morse and attorney Beth Moskow-Schnoll in their brief.

Deputy Attorney General Paul R. Wallace argued the case is a conventional police surveillance matter.

Wallace wrote that police were acting on information supplied by informants about Holden and that the GPS tracking device was only used as an aid to help officers do their job, like "binoculars or a flashlight."

Wallace said the device only tracked Holden's car as it moved along public roads, as could easily be observed by an undercover officer following in a police car. And while the device was in place for 20 days, it only came into play in the 24 hours leading to Holden's arrest after police received specific information that Holden was about to engage in a drug transaction.

Legal experts said the test of whether this case will go to the U.S. Supreme Court will be in how the Delaware Supreme Court frames its ruling.

If the state justices limit their ruling -- as Jurden did -- to the protections contained in the Delaware Constitution, then the case will not go to the U.S. Supreme Court, said James Diehm, a professor at Widener University and a former federal prosecutor.

However, state prosecutors argue in court papers that the privacy protections in Delaware law and the Fourth Amendment are virtually identical.

And beyond that, Oliver said if the Delaware Supreme Court echoes Jurden and uses the same kind of hot-button words in its ruling, "That does get people more interested."

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