SIMPSON THACHER

NEW YORK COURT OF APPEALS ROUNDUP

GPS TRACKING AS ILLEGAL SEARCH, RULING ON OPTIONAL SAFETY FEATURE

ROY L. REARDON AND MARY ELIZABETH MCGARRY*
SIMPSON THACHER & BARTLETT LLP

JUNE 11, 2009

The Court of Appeals ruled in a case we discuss this month that the attachment of a GPS device to a vehicle without a warrant constitutes an illegal search under the New York state constitution. In another case, it reversed a decision granting summary judgment to the defendant in a product liability case, finding a genuine issue of material fact as to whether a product sold without an optional safety feature was defectively designed. This month we also discuss a recent U.S. Supreme Court decision that reversed a 2007 supremacy clause decision of the Court of Appeals.

Illegal Search Via GPS

In People v. Weaver, decided May 12, all members of the Court appeared to be uncomfortable with the length of time during which movements of defendant's van were recorded by a global positioning system (GPS) device surreptitiously attached to the vehicle by the police without a warrant: 65 days. The Court was divided, however, over whether GPS surveillance may constitute an invasion of privacy subject to constitutional limitations, or whether it must be restricted - if at all - by the Legislature. A 4-3 majority held that, at least under the New York state constitution, the warrantless deployment of such a device to track a vehicle's movement constitutes an illegal search.

In Weaver, a state police investigator slipped under the defendant's van while it was parked on the street at night and attached a "Q-ball," a GPS device that continuously records the vehicle's location. When the device's battery needed to be replaced, the police again slipped under the van during the night to install a new battery. Investigators periodically drove past the vehicle to download the information recorded by the Q-ball onto a police computer. The record did not explain the reason for this surveillance.

Defendant later was charged with participating in separate burglaries of a K-Mart and the Latham Meat Market, and information obtained through the Q-ball was admitted into evidence

---

* Roy L. Reardon and Mary Elizabeth McGarry are partners at Simpson Thacher & Bartlett LLP.

over his objection. The recorded data established that defendant's van had traveled very slowly through the K-Mart parking lot several hours prior to the burglary, although the van was neither in use nor near the K-Mart at the time of the burglary itself.

The additional evidence against defendant came from Amber Roche, who had been charged as an accomplice in the Meat Market burglary. Ms. Roche initially implicated another individual, but a few weeks later she changed her statement to the police to implicate the defendant instead. She testified that she was present when the defendant drove through the K-Mart parking lot on the evening of the burglary to determine the best place to break into the store.

The Court, in an opinion by Chief Judge Jonathan Lippman, did not decide the case under the federal constitution, but considered U.S. Supreme Court jurisprudence. It distinguished United States v. Knotts, 460 U.S. 276 (1983), in which the Supreme Court found no Fourth Amendment violation when the police, without a warrant, attached a beeper to a container transported in the defendant's vehicle. There, the Weaver majority reasoned, the technology enhanced the police officers' visual surveillance of a vehicle that they followed on a single trip. In contrast, the "vastly different and exponentially more sophisticated and powerful [GPS] technology" used in Weaver goes far beyond merely enhancing human perception, and makes it possible to record in detail every movement of a vehicle over a practically unlimited period of time.

The Court held that the warrantless tracking of a vehicle's movements over a prolonged period of time using GPS technology constitutes an illegal search, in violation of article I, §12 of the state constitution, and ruled that the information derived from the device should have been excluded from evidence. This result made it unnecessary to decide whether the federal constitution was also violated.

The Court noted, however, that it had on "many occasions" interpreted the New York constitution's protections against unreasonable search and seizure more broadly than the Supreme Court has interpreted the Fourth Amendment. Chief Judge Lippman's opinion also noted that the highest courts of the states of Washington and Oregon have found the warrantless use of tracking devices to violate their respective states' constitutions.[1]

While the Court opinion characterized as "obvious" that the deployment of GPS technology is "not . . . compatible with any reasonable notion of personal privacy or ordered liberty," three judges of the Court held a different view.[2]

Judge Robert S. Smith authored a dissent in which Judges Victoria A. Graffeo and Susan Phillips Read joined. His opinion expressed discomfort with the police conduct, but on a different basis. Judge Smith considered the attachment of the GPS device to the van to be a violation of the defendant's property rights. However, an invasion of property rights has never been considered an illegal search. Nor was the search illegal as an unreasonable invasion of the right to privacy violative of the Fourth Amendment or article I, §12, Judge Smith argued. It is not the technological means of observation, but the "places and things" observed using those means, that should be determinative. According to this dissenting opinion, the police should be free to observe a vehicle in a parking lot without first obtaining a warrant.

Judge Read authored a separate dissent, in which Judge Graffeo also joined. This lengthy opinion attacked the majority's interpretation of the state constitution in a manner that was, according to Judge Read, inconsistent with the Supreme Court's application of the Fourth Amendment. Under People v. P.J. Video, 68 N.Y.2d 296 (1986),[3] there are two bases for finding a violation of the state constitution despite law establishing that the conduct would not run afoul of the U.S. constitution.

The first is an "interpretive" basis that flows from textual differences; Judge Read stated that there is no difference in the operative portions of the Fourth Amendment and article I, §12, foreclosing such a justification for the result here. The second is a "noninterpretive" basis that flows from state statutory law; Penal Law §250.00(5)(c) excludes tracking devices from the types of electronic communications for which warrants must be obtained, negating reliance on statutory law for the result. According to Judge Read, any limitations on the use of GPS devices by the police should be established by the Legislature - as has been done in several other states - and not by the courts, because the warrantless use of such devices is not a constitutional violation.

Optional Safety Equipment

Depending upon whether one accepts the view of the 4-3 majority or that of the minority in the Court's May 5 decision in Passante v. Agway Consumer Products Inc., the 10-year-old precedent established by the unanimous opinion of the Court in Scarangella v. Thomas Built Buses Inc., 93 N.Y.2d 655 (1999), has either been factually distinguished or impliedly reversed. Either way, the decision is likely to receive significant future attention in the courts, from product manufacturers that make optional product safety enhancements available to those who distribute or use the products.

In Scarangella, the Court held that a product without an optional safety feature is not defectively designed where (1) the buyer is knowledgeable about the product and its uses and aware of the optional feature, (2) there are normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment, and (3) the buyer is in the position to balance the benefits and risks of not having the feature in the buyer's specifically contemplated uses of the product and by those who insure them.

Samuel Passante was injured while operating a dock leveling device purchased by his employer, Agway Consumer Products Inc. ("Agway"). When not in use, the device lies flat on the floor of a loading dock. When activated, it swings up to form a "bridge" between the loading platform and the floor of the vehicle off of or onto which goods are being loaded. The operator of the dock leveler is required to "walk down" the device toward the vehicle so that a hinged lip engages with the floor of the vehicle. The dock leveler is designed to rotate back to its original position if the lip is not supported by the bed of the vehicle, in which case a person standing on the now-unsupported lip may fall into the space between the device and the vehicle.

Here, after Mr. Passante walked down the lip to the bed of a trailer, the driver moved the vehicle forward. The unsupported lip rotated, and Mr. Passante fell onto a cement and steel grate and was injured.

Mr. Passante and his wife sued the manufacturer, distributor and Agway (later dismissed from the case), claiming that the dock leveler was defectively designed because it lacked equipment that would either restrain the vehicle from moving forward or secure the dock leveler to the bed of the vehicle while the leveler was in use. Following discovery, the distributor made a motion for summary judgment, which the motion court denied. The Appellate Division, Fourth Department, reversed in a 3-2 opinion, and dismissed the amended complaint, relying principally on *Scarangella*. The Court of Appeals reversed.

At the core of the case was the fact that the manufacturer had offered to sell Agway a component called "Dok-Lok," that would fasten a vehicle to a loading dock and provide a warning system so that workers would know they could safely walk down the dock leveler to a vehicle and the driver would know when it was safe to pull away from the dock.

Agway declined to buy "Dok-Lok" because it would require a separate operator and because Agway believed that if a vehicle were driven away from the dock while "Dok-Lok" was in place, the bumper would tear from the vehicle.

It appears to have been key to the decision of the Court and to the view of the dissenters below, that the manufacturer's brochure for "Dok-Lok" rather elaborately described the "Danger Zone" between the dock and the bed of a vehicle and the "disastrous results" that could occur if a vehicle moved forward while the dock leveling system was in place without "Dok-Lok." Ironically, the brochure was submitted as an exhibit to the summary judgment motion.

In concluding that the defendants did not demonstrate the absence of material issues of fact as to the defective design claim, the Court relied on the brochure, together with the affidavit of Mr. Passante's mechanical engineer expressing the opinion that, because of its capacity to collapse as described above, the dock leveler created an unreasonable risk of harm.

The dissent in the Court of Appeals, written by Judge Smith and joined in by Judges Graffeo and Read, dismissed the brochure as an expression of the "enthusiasm" typical of such literature. It pointed out that the "Dok-Lok" system was costly and that the decision to purchase it should be left to the dock leveler's buyer. The dissenters accused the majority of overruling *Scarangella* without saying so.

It is likely that much will be written about whether the majority's conclusion that the defendants' showing here did not meet the second prong of *Scarangella*, i.e., that there were normal circumstances in which the dock leveler could be used without the "Dok-Lok" system and not be unreasonably dangerous. What appears to this writer is that *Scarangella* will not be seen as having been reversed. The opinion will, however, present a quandary to the manufacturers and distributors of accessory safety equipment as to how to market such an

optional feature and its benefits without creating an evidentiary showing that the basic product, without the additional safety equipment, is not defectively designed.

Supremacy Clause

Last month the U.S. Supreme Court, in a 5-4 decision, overruled the 4-3 decision of the Court of Appeals in Haywood v. Drown, 9 N.Y.3d 481 (2007).

The Court of Appeals had upheld Correction Law §24, which deprived New York state courts of jurisdiction to hear any claim for money damages against correction officers, and thus effectively made it impossible to bring a §1983 action[4] in state court. Judge Graffeo's opinion for the majority found no violation of the supremacy clause because the inability to entertain damages claims against corrections officers was a state rule regarding the administration of courts that was "neutral" in that it barred claims arising under either federal or state law. Judge Theodore T. Jones authored a dissent, in which Judges Smith and Eugene F. Pigott Jr. joined.

Justice John Paul Stevens' opinion for the majority acknowledged that the Supreme Court's prior decisions may have created a "misperception" that equal treatment of federal and state laws ensures that the "neutral rule" exception will excuse a state's refusal to entertain a federal cause of action. That is not the case. Equal treatment is necessary, but not sufficient.

The Court noted that New York permits its courts to hear §1983 actions against persons other than corrections officers, such as police officers, and to hear actions against corrections officers for declaratory and injunctive relief. The state's attempt to carve out damages claims against a certain class of persons against whom such claims may be brought under the federal statute is more than a rule of judicial administration. Under the supremacy clause, "having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy."

Endnotes:

1. See Washington v. Jackson, 150 Wash. 2d 251, 76 P.3d 217 (2003), and Oregon v. Campbell, 306 Or. 157, 759 P.2d 1040 (1988).

2. Although not mentioned in the opinion, some federal District Courts, including in New York, have held that warrantless deployment of a GPS device does not contravene the Fourth Amendment. See Morton v. Nassau County Police Dept., No. 05-CV-4000, 2077 WL 4264569 (EDNY Nov. 27, 2007); United States v. Coulombe, No. 1:06-CR-343, 2007 WL 4192005 (N.D.N.Y. Nov. 26, 2007); United States v. Moran, 349 F.Supp.2d 425 (N.D.N.Y. 2005).

3. Judge Read noted that the analytic method adopted in P.J. Video has been criticized, but stated that unless the Court "frankly embraces" another approach, P.J. Video should be applied.

4. See 42 U.S.C. §1983.