

Court Majority Finds No Warrant Needed to Place GPS Device on Employee's Personal Car

Placing a global positioning system (GPS) tracking device on a state employee's personal car as part of an investigation does not require a warrant, but using the GPS to track the employee 24 hours a day for a month was unreasonable, a New York appeals court majority found. A concurring opinion would have required a warrant for the search.

The New York State Department of Labor used a GPS device as part of an investigation of its Director of Staff. The GPS information showed that the Director's times of arrival and departure from his office were inconsistent with the number of hours he claimed on his time records to have worked. The department filed 11 charges against him, four of which were based on the GPS reports. He was ultimately fired.

A majority of the appellate court found that the department did not need a warrant to place the GPS device on his personal car because "when an employee chooses to use his car during the business day, GPS tracking of the car may be considered a workplace search." However, the majority ruled that the search was unreasonable in its scope because it was "excessively intrusive."

The majority wrote that the GPS tracking device "examined much activity with which the State had no legitimate concern—i.e., it tracked petitioner on all evenings, on all weekends and on vacation. Perhaps it would be impossible, or unreasonably difficult, so to limit a GPS search of an employee's car as to eliminate all surveillance of private activity—especially when the employee chooses to go home in the middle of the day, and to conceal this from his employer. But surely it would have been possible to stop short of seven-day, twenty-four hour surveillance for a full month."

The majority found that in the past when a search exceeds its permissible scope, the use of information discovered during the permissible scope would be allowed. "But we hold that rule to be inapplicable to GPS searches like the present one, in light of the extraordinary capacity of a GPS device to permit '[c]onstant, relentless tracking of anything.' Where an employer conducts a GPS search without making a reasonable effort to avoid tracking an employee outside of business hours, the search as whole must be considered unreasonable."

Although the concurring opinion agreed with the outcome, it would have based the decision on the fact that the state "cannot, without a warrant, place a GPS on a personal, private car to investigate workplace misconduct.

"While government employers need to know whether their employees actually worked during the hours for which they were paid, public employees are entitled to at least some expectation of privacy concerning their movements throughout the workday. A search as intrusive as GPS

surveillance, which, as this case demonstrates, is highly susceptible to abuse without judicial oversight, requires a warrant,” the concurring opinion stated.

“The ramifications of the majority’s decision will extend far beyond this case,” the concurring opinion observed. “All government employees, at all levels, in all three branches of government, may now be subject to electronic surveillance based upon a mere ‘reasonableness’ standard, without any judicial oversight at the inception of the search. Given the majority’s imprimatur of warrantless GPS tracking, less intrusive methods for investigating government employees will almost certainly be replaced with electronic surveillance.”

In the Matter of Michael A. Cunningham v. New York State Department of Labor, New York Court of Appeals No. 123, decided June 27, 2013.