LEGAL EAGLE

May 2024

Surreptitious Recordings

A confidential informant and ATF undercover officers conducted a controlled purchase of a firearm from Christopher Esqueda in his motel room. The undercover agents, without a search warrant, entered the motel room with the consent of Esqueda and his co-defendant, Daniel Alvarado. The agents secretly recorded the encounter with Esqueda and Alvarado using audio-video equipment concealed on their persons. The video recordings depicted the interior of Esqueda's motel room during the encounter and showed Esqueda handing a .22 caliber revolver to an undercover officer.

Esqueda argued on appeal that the officers' secret recording of the encounter exceeded the scope of the "implied license" he granted when he consented to the officers' physical entry into his motel room. He claimed that the officers conducted a search in violation of his Fourth Amendment rights under the Supreme Court's ruling in *Florida v. Jardines*, (S.Ct.2013), and *United States v. Jones*, (S.Ct.2012). The trial court denied Esqueda's motion to suppress the video evidence and any evidence derived from the video recording. On appeal, that ruling was affirmed.

Issue:

Did the undercover officers who physically entered the motel room with the express consent of the target, and secretly recorded only what he could see and hear by virtue of his consented entry, trespass, physically intrude, or otherwise engage in a search violative of the Fourth Amendment? **No**.

Limits on Undercover Activity:

The Fourth Amendment provides, in relevant part, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It is undisputed that Esqueda's motel room is a constitutionally protected area that is entitled to Fourth Amendment protections. But if police conduct does not amount to a search or seizure, the Fourth Amendment does not regulate that conduct.

The Supreme Court has held that a Fourth Amendment search can occur in one of two ways. First, under *Katz v. United States* (S.Ct.1967), a search occurs when the "government violates a subjective expectation of privacy that society recognizes as reasonable." Second, under the "unlicensed physical intrusion" test, a search occurs when the government "physically occupies private property for the purpose of obtaining information," "engages in

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conduct not explicitly or implicitly permitted" by the property owner. See, *Florida v. Jardines*, (S.Ct.2013) where police brought a drug dog to Defendant's front porch to sniff for drugs. Each test is independent of the other and sufficient to determine whether government conduct amounts to a Fourth Amendment search.

The Ninth Circuit's prior case of *U.S. v. Wahchumwah*, (9th Cir. 2013), foreclosed any claim that Defendant had that a Fourth Amendment search occurred under *Katz*. The court ruled that "an undercover agent's warrantless use of a concealed audio-video device in a home into which he has been invited by a suspect" is not a Fourth Amendment search under the *Katz* framework. However, the *Wahchumwah* court declined to decide the question presented here: whether the same conduct is a search under the "unlicensed physical intrusion test" discussed by the Supreme Court in *Florida v. Jardines*, (2013), and *United States v. Jones*, (2012).

In *Jones* and *Jardines* the Supreme Court examined the history of the unlicensed physical intrusion test and evaluated its scope. As the Court summarized it: "The [Fourth] Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred."

Thus, the Supreme Court made clear that *Katz* has never been the exclusive method for evaluating whether a Fourth Amendment search occurs. It instead revitalized the traditional, unlicensed physical intrusion test that the Defendant relied on here. The Supreme Court in *Jones* and *Jardines*, then, did not purport to create a new Fourth Amendment framework or disturb any pre-*Katz* caselaw. Instead, the Court merely applied the property-based approach to Fourth Amendment search doctrine that had governed from the founding until the Supreme Court's decision in *Katz*. And that was the state of the law when the present case was decided on appeal.

Court's Ruling:

The Court of Appeals referenced two cases, *On Lee* and *Lopez,* to rule in the present case. In *On Lee v. U.S.* (S.Ct. 1952), the Supreme Court ruled that evidence obtained by having an undercover agent, whom defendant trusted, engage him in incriminating conversation which was transmitted by microphone hidden on the agent's person was not obtained by unlawful search and seizure and was admissible.

"Here, the Supreme Court's pre-*Katz* decisions in *On Lee* and *Lopez* directly apply and continue to control. As in *Lopez v. U.S.* (S.Ct.1963), the hidden recording device "was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself." Instead, "the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose."

"In turn, by consensually interacting with the officers in his motel room, Esqueda assumed 'the risk that the [encounter] would be accurately reproduced in court, whether by faultless memory or mechanical recording.' Esqueda's consent need not have explicitly extended to the officers' secret recording, because a Defendant does not have a 'constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment.' "

"In sum, *Jardines*, a 'straightforward' case in which the Court applied the property-based test that governed when *On Lee* and *Lopez* were decided, did not effectuate a sea change in over seventy years of precedent concerning undercover investigations. Instead, *On Lee* and *Lopez* establish that an *undercover officer who enters a space with express consent and secretly records* ***only what he can see and hear*** *does not conduct a trespass, an unlawful physical invasion, or otherwise engage in a search violative of the Fourth Amendment."*

"Finally, Esqueda argues that *On Lee* and *Lopez* do not control because the secret recording was made in Esqueda's living space—his motel room—whereas *On Lee* and *Lopez* involved secret recordings in a business. That argument also fails. Although 'the home is the first among equals' when it comes to the Fourth Amendment, the nature of the constitutionally protected area does not affect our analysis of the unlicensed physical intrusion test when the officers have an *express* license physically to enter it."

"Our holding today is a limited one. We express no view as to whether an undercover agent's use

of other, more advanced technologies during a consensual encounter—such as those that might allow the government to detect more than the agent's natural senses could detect—might constitute a Fourth Amendment search. [See *Kyllo v. United States*, (S.Ct.2001), where the Court found the use of thermal-imaging to detect areas of high heat in one's private home associated with marijuana cultivation was a 4th Amendment violation.] But where, as here, an officer enters a premises with express consent, and secretly uses recording equipment to capture only what he can see and hear by virtue of that consented entry, no Fourth Amendment search occurs under the trespassory, unlicensed physical intrusion framework as articulated in *Jones* and *Jardines.*"

"We therefore affirm the [trial] court's ruling. AFFIRMED."

Lessons Learned:

The key to the court's ruling is that even without the recording device the agents could still, with no constitutional impediment, testify to all that was said, and all that they saw, while lawfully in Defendant's motel room. "The [recording] device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose."

No Fourth Amendment violation had occurred because "the electronic device *was not ... planted by an unlawful physical invasion of a constitutionally protected area*." Instead, the device "was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself." As the Court put it, the recording "device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." See, *Lopez v. U.S.* (1963).

Moreover, the Supreme Court went on to rule: "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that *the agent could testify to from memory.* We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, *whether by faultless memory or mechanical recording.*"

United States v. Esqueda
U.S. Court of Appeals, 9th Cir.
(Dec. 12, 2023)

Teen Driving

Teen Drivers

2,608

PEOPLE KILLED IN CRASHES INVOLVING A TEEN DRIVER (15-18 YEARS OLD) IN 2021

Teen Drivers

51%

OF TEEN PASSENGER VEHICLE DRIVERS WHO DIED IN 2021 WERE UNBUCKLED

Source: https://www.nhtsa.gov/road-safety/teen-driving

Recent Case Law

Marijuana Odor in Vehicle

Officer observed the Defendant's vehicle blocking traffic. After the Defendant pulled off the road and into a shopping center, the officer initiated the stop. Upon approaching the vehicle, Officer immediately detected the odor of fresh marijuana. He also immediately observed, on the center console, a clear plastic bag containing a green leafy substance, which, based on his experience, knowledge, and training, was marijuana. Looking at the back passenger floorboard, he observed marijuana residue, referred to as "shake." After the occupants were asked to step out of the vehicle, Defendant was placed in a patrol car while another officer conducted the vehicle search and found a firearm.

The arresting officer testified that after the firearm was found the Defendant told him he had a medical marijuana card. On cross-examination, the officer testified he did not ask the defendant whether he had a medical marijuana card *before* the vehicle search because he knew the medical marijuana law required the patient to keep medical marijuana in the original container in which it was sold. The Officer did not testify to observing the Defendant to be under the influence of alcohol or drugs at the time of the traffic stop.

At the motion to suppress the Defendant argued the officer did not have probable cause to search based on the smell of fresh (not burnt) marijuana or his visual observations of the marijuana residue because of recent changes in Florida law pertaining to medical marijuana and the legal possession of hemp. Defendant argued that because of those changes in the law and the lack of any observation that he was impaired, the Officer should have first inquired whether he had a medical marijuana card before conducting the search. The trial court agreed and suppressed the search. On appeal, that ruling was reversed.

Issue:

Was the Officer's detecting the odor of fresh marijuana and the officer's visual observations of a baggie of marijuana as well as marijuana residue sufficient basis for the vehicle search? **Yes**.

Marijuana and Vehicle Search:

Under the "automobile exception" to the general warrant requirement, "police may search a vehicle without a warrant so long as they have probable cause to believe that it contains contraband or evidence of a crime." "Probable cause exists where the facts and circumstances within (the officers') knowledge ... [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *State v. Tigner*, (4DCA 2019) (quoting *State v. Betz*, (Fla. 2002)).

An officer may lawfully extend the traffic stop if he acquires an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring. In determining whether the extension of a stop is justified by reasonable suspicion of criminal activity, courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, (S.Ct.2002). If a stop is unlawfully prolonged without reasonable suspicion in violation of the Fourth Amendment, any evidence obtained as a result of that constitutional violation generally will be suppressed.

In determining whether probable cause exists to search a vehicle, courts must utilize a "totality of the circumstances" approach. That approach "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person."

Case law, both federal and Florida, has held that the odor of burnt marijuana provides an officer with probable cause that a crime is being committed. "Officer Turner testified that while he was getting Cheeks' driver's license, he smelled the odor of burnt marijuana and saw marijuana residue on the inside of the passenger door. *Our precedent makes clear that an officer's level of suspicion rises to the level of probable cause when he detects 'what he [knows] from his law enforcement experience to be the odor of marijua-*

na.' Accordingly, the smell of marijuana gave Officer Turner reasonable suspicion that additional criminal activity had occurred or was occurring, which justified extending the stop" *United States v. Cheeks*, (11th Cir. 2019). However, after amendments to the Florida Statutes authorized the use of medical marijuana and authorized the possession of hemp, the principle that the "smell of marijuana alone" provides probable cause to search has come under scrutiny. That is because both medical marijuana and hemp can now be legally possessed in Florida and, arguably, the smell of either is indistinguishable from illegally possessed marijuana.

Accordingly, under recently enacted Florida statutes, there may be circumstances where "an occupant of a vehicle may have a legitimate explanation for the presence of the smell of fresh (not burning or burnt) marijuana in the vehicle, such as where the individual has a lawful prescription for it, or that the substance is, in fact, hemp." The advent of medical marijuana and hemp laws has resulted in some defendants challenging the "plain smell" doctrine. Significantly, *Hatcher v. State*, (1DCA 2022), has a concurring opinion calling into question the continued validity of the "plain smell" alone doctrine in the context of fresh marijuana and hemp.

Court's Ruling:

"In the instant case, we do not need to decide whether the smell of fresh marijuana alone gives an officer probable cause to search a vehicle, because in addition to the plain smell of fresh marijuana, the officer saw in plain view, a clear bag containing what appeared to be fresh marijuana, and uncontained flakes of marijuana."

"Even if the defendant had advised the Officer he had a medical marijuana card *prior to the vehicle search*, we conclude the Officer had probable cause to conduct the search. Section 381.986(8)(e)11.e. and f., and (8)(e)13, F.S., requires medical marijuana treatment centers to dispense medical marijuana in distinct packaging. Section 381.986(14)(a), F.S., requires that medical marijuana must remain in its original packaging. The officer in this case was familiar with the statutory requirements concerning medical marijuana packaging and testified that he believed the marijuana he smelled and observed was not in a medical marijuana dispensing package."

"The trial court concluded that because section 381.986(14) does not have a statutory penalty attached to the failure to keep medical marijuana in its dispensary packaging, a medical marijuana patient who takes the prescribed substance out of the dispensary packaging and carries it in some other container is not engaging in criminal behavior. However, such analysis misses the point."

"Probable cause is a 'flexible, common-sense standard.' *Florida v. Harris*, (S.Ct.2013). It 'turns on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.' The probable cause standard is met if there is 'the kind of fair probability on which reasonable and prudent people, not legal technicians, act.' *Johnson v. State*, (1DCA 2019) (noting that 'the *possibility* that a driver might be a medical-marijuana user would not automatically defeat probable cause')."

"In approaching the vehicle in this case, the officer 1. smelled what his experience and training told him was fresh marijuana; 2. observed on the vehicle console a quantity of marijuana in a clear bag rather than in a medical marijuana dispensary package; and 3. observed flakes of marijuana in various locations inside the vehicle. A reasonably cautious person with the same information would believe a fair probability existed that the offense of illegal possession of marijuana had been or was being committed, regardless of the passenger's statement denying illegal activity. Therefore, based on the totality of circumstances known to the officer from his experience and training, the officer, as a matter of law, had probable cause to search the vehicle."

"Having determined as a matter of law that the officer had probable cause to search the vehicle based on his knowledge, training, and sensory perceptions that yielded a fair probability that the defendant illegally possessed marijuana, we reverse the trial court ..."

Lessons Learned:

The very extensive medical marijuana law is at F.S. 381.986. Also see the "State Hemp Program" in section 581.217, and the Florida Comprehensive Drug Abuse Prevention Control Act's definition of cannabis in section 893.02(3), which by its very terms excludes hemp and medical marijuana from the definition of "cannabis."

The 4th D.C.A. in the present opinion made reference to *Owens v. State*, (2DCA 2021), where the court ruled: "We are aware of the

decision of the Twentieth Judicial Circuit Court of Florida that held that the smell of marijuana in connection with a traffic stop cannot constitute the sole basis supporting probable cause for a search. See *State v. Nord*, (Aug. 8, 2020). With all due respect to the capable and experienced circuit judge who authored that opinion, we cannot agree. Instead, we hold that an officer smelling the odor of marijuana has probable cause to believe that the odor indicates the illegal use of marijuana."

The 2nd D.C.A. went on to adopt the opinion in *State v. Ruise*, (9th Cir. Ct. Mar. 20, 2020) (holding that an officer who smelled the odor of marijuana during a traffic stop had probable cause for a warrantless search of the vehicle, even though the odor of cannabis was found to be indistinguishable from the odor of now legal hemp).

The *Owens* decision concluded, "Finally, we note that even if marijuana was legalized for recreational use, such use while driving would still support the offense of driving while intoxicated; thus, regardless of whether marijuana becomes decriminalized for recreational use, the smell of the burning substance will continue to provide probable cause for a search of a vehicle. See *Johnson v. State*, (1DCA 2019) ('Even if smoking marijuana were legal altogether, the officers would have probable cause based on the fact that Johnson was operating a car.' (citing § 316.193(1)(a), F.S.) 'The probable cause standard, after all, is a 'practical and common sensical standard.' It is enough if there is the 'the kind of fair probability' on which 'reasonable and prudent people, not legal technicians, act.' (quoting *Florida v. Harris*, (S.Ct.2013))."

Lastly, as regards the plain smell / plain view concepts in a footnote the 4th D.C.A. explained, "*State v. Rabb*, (4DCA 2006) ('Just as evidence in the plain view of an officer may be searched without a warrant, evidence in the plain smell may be detected without a warrant.' (quoting *Nelson v. Florida*, (5DCA 2004))."

State v. Fortin
4th D.C.A.
(March 20, 2024)

Bolstering C.I.

The police used an informant to arrange a $100 crack cocaine purchase from the defendant. A controlled buy was arranged. The police outfitted the CI with a recording device, and provided him $100 for the transaction. After the transaction the informant gave the "good deal" signal. The CI immediately met with the police waiting nearby and gave them a bag containing crack cocaine. The police searched the informant, who no longer had the $100 provided to make the purchase.

The Defendant in making his escape crashed his vehicle and two passengers were killed. He was convicted of multiple felonies.

On appeal, Defendant argued that at trial the Detective improperly vouched for the CI's credibility. The officer testified the informant had worked for the police for three years, and the officer had served as the informant's handler. The State asked the officer: "If an informant is later determined to not be reliable, what happens to that informant?" The officer testified: "He is no longer going to be used." The State then asked: "During the time that [the informant] had been an ... informant while you were in the unit, was he determined to be credible and reliable with the information he would bring to you?" The officer testified: "Absolutely."

Defendant objected to this testimony as bolstering and moved for a mistrial. Defense counsel argued: "That is solely the jury's job, to determine the reliability of an [informant], not the officer to testify about that."

The State responded: "In the event such evidence crossed the line, the error was harmless since, in addition to the video and audio evidence of the transaction, [the defendant] admitted to selling cocaine to the informant and driving the vehicle into the canal, which led to the victims' deaths."

Issue:

Did the Detective's testimony improperly vouch for or bolstered the Informant's credibility? **Yes**. However, due to the other overwhelming evidence, the improper testimony was harmless.

Vouching for Witness:

"Improper vouching or bolstering of witness testimony occurs when the State places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness's testimony." *Jackson v. State*, (Fla. 2014). "It is elemental in our system of jurisprudence that the jury is the sole arbiter of the credibility of witnesses. Thus, *it is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness*." *Boatwright v. State*, (4DCA 1984).

Jennings v. State, (4DCA 2020), is also instructive. There the

D.C.A. ruled that during a delivery of cocaine trial the trial court had erred in overruling the defense counsel's objection to a detective's testimony that the detective had "found the informant to be reliable in the past." They ruled, "The jury may have dismissed any potential misgivings about the informant's credibility based on the lead detective's opinion that the informant has been reliable in the past." Further, the "improper vouching was especially harmful because it came from a police officer," and "the harm was enhanced when the informant whose credibility was bolstered was the only person within close proximity to the seller in the transaction."

Similarly, in *Page v. State*, (4DCA 1999), a police officer testified he had worked with an informant for a year-and-a-half before the drug buy at issue and "everything he did for us was very trustworthy and reliable." Defense counsel objected, arguing this testimony improperly bolstered the informant's credibility. The trial court overruled the objection. In concluding harmful error had occurred, the D.C.A. reasoned: "It is especially harmful for a police witness to give [an] opinion of a witness' credibility because of the great weight afforded an officer's testimony. This is all the more significant when the witness whose credibility is bolstered is the only eye witness to testify about the transaction."

Court's Ruling:

"Turning to the instant case, however, as we had noted in *Jennings*: 'Improper bolstering is subject to harmless error analysis.' And unlike the facts in *Jennings* and *Page*, the facts here indeed render the Circuit Court's error in overruling the bolstering objection as harmless. As the State's answer brief responds: 'Admittedly, [the officer's] isolated response that the informant was credible and reliable in the past appears improper in light of ... *Jennings* ... and *Page* ... upon which [the defendant] relies. However, those cases are distinguishable because any error that may have occurred in this case was harmless in the face of ... [the defendant's] admissions as well as video and audio evidence.'

In stark contrast, [the instant defendant] admitted to [police] selling the crack cocaine to the informant. He likewise admitted to driving the vehicle with the victims into the canal. Officers witnessed [the defendant] drive the vehicle into the canal. Audio and video recordings of the entire transaction…'

"Further, contrary to the Defendant's assertion here, the State did not 'improperly bolster the informant's credibility again during its rebuttal closing argument.' As the State's answer brief responds, its rebuttal closing reference to the officer's testimony 'that, ... if they get bad information from an ... informant, they don't use that informant anymore,' spoke directly to the evidence, i.e., the officer's testimony. As for the State's directive to the jury to 'trust what [the informant] did that day,' as the State's answer brief further responds: 'The jury did not have to consider the non-testifying informant's credibility because it had [the defendant's] own admission as well as the video and audio evidence. *See, e.g.*, *U.S. v. Granville*, (11th Cir. 1983) ('When the prosecutor voices a personal opinion but indicates this belief is based on evidence in the record, the comment does not require a new trial.')' Based on the foregoing conclusion of harmless error, we affirm the Circuit Court's [ruling]."

Lessons Learned:

It is clear from the present case ruling that an officer may not vouch for, or otherwise bolster, the credibility of the confidential informant. Here, the overwhelming supportive evidence saved the day.

All the information that the Court of Appeals utilized to uphold the conviction the came from the case agent. All contacts, surveillance, communications with informants, etc. must be documented and presented for the trial and then for the reviewing court.

Additionally, merely describing an informant as reliable is not legally sufficient. He must be characterized as "past reliable" by reference to past information provided, and the arrests and convictions resulting from that information.

While ultimately the informant's information here was accurate and verified with audio and video tapes, a viable prosecution requires more. Attention to detail, including efforts to corroborate as much of the informant's information as possible, in conjunction with research and surveillance is critical.

Goldsmith v. State
4th D.C.A.
(April 3, 2024)

A.L.P.R.

Automated License Plate Recognition

Three Mapson sisters conspired to kill Joshua Thornton over a child custody dispute. The sisters were unsuccessful. They were charged

with multiple interstate felonies and discharging a firearm in the furtherance of a felony.

The Government's case relied on ALPR evidence that captured a license plate matching one of the sister's vehicles traveling interstate at locations corresponding to times and locations related to the attempted homicide shooting.

Lieutenant Ted Davis testified that ALPRs are camera systems that capture still photographs of the license plate numbers of vehicles traveling on the road. He explained that private companies maintain the information, that police departments subscribe to their databases, and can look up cars by make and model or license plate number and determine which vehicles traveled on a particular road at a certain time. The reports used in the Government's case showed one sister's license plate at three locations on the day of the shooting. The reports therefore indicated that the vehicle traveled in the direction of the victim's home before the shooting and away from it after the shooting.

The Defendants argued that the ALPR evidence was not admissible because the acquisition of the data was a warrantless, and therefore, unconstitutional search. The trial court denied the motion concluding that the Defendants did not have an expectation of privacy as to their tag or the exterior of the vehicle—the things that were visually captured through the ALPR system. On appeal, the 11th Circuit agreed.

Issue:

Was the acquisition of the license plate data that was at all times exposed to the public an unlawful search under the Fourth Amendment? **No**.

ALPR and Fourth Amendment:

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ...." Save for some exceptions not relevant here (e.g., exigent circumstances, consent), a warrantless "search" under the Fourth Amendment is *per se* unreasonable.

However, Officers are permitted to conduct a warrantless seizure of an item in "plain view" if 1. the police see the item from a place they have a lawful right to be, 2. the incriminating nature of the item is "immediately apparent," and 3. the police have lawful access to the incriminating item.

"Open-view" is treated similarly to "plain-view," with the exception that some exigent circumstance is required to justify a warrantless entry into the protected area. Any confusion between the two views was dispelled in *Ensor v. State*, (Fla. 1981).

The Criminal and Juvenile Justice Information Systems Council published "Guidelines for the Use of Automated License Plate Readers." CJJIS-Council-ALPR-Guidelines (state.fl.us).

"In the interest of being good stewards and balancing policy and privacy, the Criminal and Juvenile Justice Information Systems (CJJIS) Council, acting pursuant to Section 943.08, Florida Statutes (2013), will issue and adopt uniform statewide guidelines to ensure that ALPRs are used in accordance with substantive procedural safeguards that balance public safety needs and privacy rights."

Court's Ruling:

"ALPR technology must be properly deployed and carefully managed to ensure effective operations that recognize and respect the privacy interests and the civil rights and civil liberties of citizens."

"Owners of motorized vehicles driven on public thoroughfares are required by law to annually register their vehicles with their state bureau or department of motor vehicles, and to attach license plates that are publicly and legibly displayed. Vehicle license plates generally consist of a series of alphanumeric characters that reference the license plate to the specific vehicle registered (including the make, model, year, and vehicle identification number (VIN)) and the registered owner and/or lien holder of the vehicle."

"ALPR systems capture a contextual photo of the vehicle, an image of the license plate, the geographic coordinates of where the image was captured, and the date and time of the recording. The ALPR system does not identify any individual or access any person's personal information through its analysis of license plate characters. The data captured by the ALPR unit itself is entirely anonymous. Officers can only identify the registered owner of a vehicle by querying a separate, secure state government database of vehicle license plate records, which is restricted, controlled, and audited. The federal Driver's Privacy Protection Act (DPPA) restricts access and prohibits the release of personal information from state motor vehicle records to ensure the privacy of citizens."

"Many jurisdictions are

actively developing or considering legislation that will authorize, limit, and/or restrict the use of ALPR systems and the data they generate. At least 14 states have enacted legislation on the use of ALPRs."

The Defendants also argued that the trial court abused its discretion in admitting the ALPR evidence because the Government did not qualify Lieutenant Davis as an expert. They argued that his testimony required technical and specialized knowledge. The 11th Circuit's response was, "We are unpersuaded."

"Under Federal Rule of Evidence a lay witness may offer opinion testimony if the testimony is (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge."

"We agree with the Government that the testimony here regarding ALPR data did not require expertise or specialized knowledge beyond that of a lay person. The ALPR reports simply contained pictures of [Defendant's] tag and vehicle as captured by the ALPR systems. Lieutenant Davis generally explained that an ALPR is a 'system that takes pictures of vehicle tags, recognizes the characters that are on the license plates, and takes basically a still photo of that car tag ....' He also emphasized that 'it's just a camera taking pictures.' …Having worked with ALPR systems for twelve years, the [trial] court could have fairly concluded that Lieutenant Davis gained his knowledge from his own personal experiences and not from any 'scientific, technical, or other specialized knowledge.' "

"We conclude that the [trial] court did not abuse its discretion in allowing the ALPR evidence and related testimony without the government qualifying Lieutenant Davis as an expert. AFFIRMED."

Lessons Learned:

The Defendants also argued on appeal that the Supreme Court, in *Carpenter v. U.S.*, (S.Ct.2018), held that the acquisition of a person's historical cell-site location information constituted a search under the Fourth Amendment and therefore required a warrant. Defendants argued that the ALPR data obtained in the present case is akin to cell-site location information and that, as a result, *Carpenter* required the Government to obtain a warrant before accessing the ALPR databases. Because the present case pre-dated the *Carpenter* decision the 11th Circuit did not address this issue.

However, the *Carpenter* decision was quite clear that the Court was limiting its ruling to cell-phone tracking: "This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as ***security cameras*; does not address other business records that might incidentally reveal location information**; and does not consider other collection techniques involving foreign affairs or national security."

Interestingly, two days before the present case the 10th Circuit decided *United States v. Hay*, (March 19, 2024), which analyzed the use of a pole camera focused on Defendant's front door. The court compared its facts with *Carpenter*.

"The *Carpenter* court distinguished the case from *United States v. Knotts*, where it found that planting a transmitter in a suspect's car to aid in tracking the vehicle did not constitute a search. There, the Court explained that '*a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another*."

"The Supreme Court's recognition of privacy interests in the home does not 'require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.' The Government executes a search when it 'uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion,' *Kyllo v. U.S.*, (S.Ct.2001), but 'now more than ever, cameras are ubiquitous, found in the hands and pockets of virtually all Americans, on the doorbells and entrances of homes, and on the walls and ceilings of businesses.' *United States v. Tuggle*, (7th Cir. 2021). Mr. Hay retains some privacy interests in the whole of his physical movements and in the interior of his home, but the pole camera at issue did not infringe upon either of those interests."

"In conclusion, Mr. Hay had no reasonable expectation of privacy in a view of the front of his house. The [trial] court did not err in denying suppression of that footage. Affirmed."

United States v. Mapson
U.S. Court of Appeals, 11th Cir.
(March 21, 2024)