

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

Senate Bill 116 (Senator Gladden)
Judicial Proceedings

**Criminal Procedure - Use of Tracking Device by Law Enforcement Officer -
Search Warrant**

This bill prohibits a law enforcement officer from using a “tracking device” to determine the location or movement of another individual without first obtaining a search warrant for the installation and use of the tracking device. The prohibition does not apply to a tracking device installed or used (1) with the knowledge and consent of the individual being tracked; or (2) in accordance with a sanction imposed or order issued by a court. The bill defines a “tracking device” as an electronic or mechanical device that, when placed or installed on an individual or object, permits one or more other individuals to remotely monitor the location and movement of the individual on whom, or the object on which, the device is placed or installed.

Fiscal Summary

State Effect: The bill’s requirements can be handled with existing budgeted State resources.

Local Effect: The bill’s requirements can be handled with existing budgeted local resources.

Small Business Effect: None.

Analysis

Current Law: A circuit court or District Court judge may issue a search warrant whenever it is made to appear to the judge that there is probable cause to believe that (1) a misdemeanor or felony is being committed by a person or in a building, apartment,

premises, place, or thing within the jurisdiction of the judge; or (2) property subject to seizure is on the person or in or on the building, apartment, premises, place, or thing.

An application for a search warrant must be (1) in writing; (2) signed and sworn to by the applicant; and (3) accompanied by an affidavit that sets forth the basis for probable cause and contains facts within the personal knowledge of the affiant that there is probable cause.

Background: A Global Positioning System (GPS) uses data obtained from multiple satellites to determine the location of an object at any given time. Recent growth in the use and availability of GPS technology is forcing courts to delve into uncharted waters about the compatibility of GPS with constitutional protections against unlawful searches and seizures.

In *United States v. Knotts*, 460 U.S. 276 (1983), the U.S. Supreme Court held that government agents did not violate the Fourth Amendment when they placed a beeper in a container of chloroform without obtaining a warrant to keep visual track of the vehicle transporting the chloroform. The court opined that the driver of the van did not have a legitimate expectation of privacy with respect to the visual movements of the van on public streets and highways, since anyone on the street would have been able to see the van.

While the U.S. Supreme Court has addressed the use of beepers without a warrant by law enforcement officers, it has not specifically addressed whether the installation of a GPS on a vehicle is a search under the Fourth Amendment. However, this issue has been addressed by some federal and state courts. In general, federal court decisions have extended the reasoning and analysis used in *Knotts* and similar cases or have focused on the location of the vehicle at the time the GPS was installed, including whether officers had to enter the vehicle to install the device.

On January 11, 2010, the U.S. Court of Appeals for the Ninth Circuit ruled that officers did not violate a suspect's Fourth Amendment rights by affixing a GPS tracking device to the undercarriage of his car while it was parked in various locations, including a driveway located within the curtilage of the suspect's home. The court's reasoning was primarily based on the fact that (1) the suspect did not have a reasonable expectation of privacy in his driveway because even though it was located within the curtilage of his home, he did not take steps to exclude passersby from the area (*e.g.*, an enclosure, gate, or "No Trespassing" sign); and (2) the undercarriage of a vehicle is not a location in which a person can claim to have a reasonable expectation of privacy.

In a 2006 opinion, the Maryland Court of Special Appeals stated that a GPS is the latest version of the beeper used in the *Knotts* decision and that State troopers did not violate

the Fourth Amendment when they used a GPS to track a suspect's pickup truck on public roads. See *Stone v. State*, 178 Md. App. 428, 448 (2008).

In May 2009, a Wisconsin court ruled that officers do not need to obtain a warrant before placing a GPS tracking device on a vehicle because attachment of the device does not qualify as a search or seizure. However, the court did note that this principle applies so long as the information obtained by the GPS could be obtained through other techniques that do not require a warrant.

However, the New York State Court of Appeals ruled in May 2009 that state police violated a criminal suspect's rights under that state's constitution when officers placed a GPS tracking device in the bumper of the suspect's van without obtaining a search warrant and used the technology to track the suspect's whereabouts over 65 days. The majority opinion distinguished this case from the *Knotts* case due to the technological superiority of GPS compared to a beeper and the manpower and resources it would take for law enforcement to obtain the same information available from one relatively inexpensive GPS.

In September 2009, the Supreme Judicial Court of Massachusetts held that the state constitution requires law enforcement officers to obtain a warrant prior to placing GPS tracking devices on vehicles. The court equated the installation of the GPS at issue in the case to a seizure under the Massachusetts Declaration of Rights.

Local Fiscal Effect: Charles and Somerset counties report that the bill has no fiscal impact. However, the Maryland-National Capital Park and Planning Commission estimates that the bill will increase personnel, equipment, and maintenance expenditures but cannot calculate or estimate the amount of fiscal impact since the use of GPS by park police officers is unforeseeable at this time. Given that the bill requires a law enforcement agency to obtain a warrant prior to installing a GPS tracking device and does not require a law enforcement agency to use GPS tracking devices for investigatory purposes, the bill is procedural in nature and is unlikely to have a fiscal impact on local governments.

Additional Information

Prior Introductions: None.

Cross File: HB 172 (Delegate Waldstreicher, *et al.*) - Judiciary.

Information Source(s): Charles and Somerset counties, Judiciary (Administrative Office of the Courts), Maryland-National Capital Parks and Planning Commission, Department of State Police, *New York Times*, *Chicago Tribune*, Electronic Frontier Foundation, Public Agency Training Council, Department of Legislative Services

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