

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

House Bill 599
Judiciary

(Delegates Waldstreicher and Rosenberg)

**Courts and Judicial Proceedings - Use of Tracking Device by Law Enforcement
Officer - Court Order**

This bill prohibits an investigative or law enforcement officer from using a “tracking device” to determine the location or movement of another individual or an object for more than 48 hours unless there are exigent circumstances or a court order authorizing the installation and use of the tracking device has been issued. The prohibition does not apply to a tracking device installed or used (1) with the knowledge and consent of the individual being tracked; (2) in accordance with a sanction imposed or order issued by a court; (3) as part of a law enforcement investigation of a law enforcement officer; or (4) on a stolen vehicle. The bill also extends application of current statutory restrictions on the installation and use of a pen register or a trap and trace device to apply to tracking devices.

The bill defines a “tracking device” as an electronic or mechanical device that, when placed or installed on an individual or object, allows one or more other individuals to remotely determine or track the location and movement of the individual on whom, or the object on which, the device is placed or installed.

Fiscal Summary

State Effect: None. The bill is procedural in nature and does not have a material effect on State finances.

Local Effect: None. The bill is procedural in nature and does not have a material effect on local finances.

Small Business Effect: None.

Analysis

Current Law: A “pen register” is a device or process that records and decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted. It does not include a device used by a provider or customer of a wire or electronic communication service for specified billing-related functions. A “trap and trace device” means a device or process that captures the incoming electronic or other impulses that identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication. Neither a pen register nor a trap and trace device include a device or process used to obtain the content of a communication.

With the exception of certain functions of a wire or electronic communication service provider, a person is prohibited from installing or using a pen register or a trap and trace device without first obtaining a court order. Violators are subject to maximum penalties of imprisonment for one year and/or a \$5,000 fine.

An investigative or law enforcement officer may make application for a court order authorizing or approving the installation and use of a pen register or a trap and trace device, to a court of competent jurisdiction of this State. The application must include (1) the identities of the officer applying for the order and the law enforcement agency conducting the investigation; and (2) a statement under oath by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency.

If the court finds that the information likely to be obtained by the installation and use is relevant to an ongoing criminal investigation, the court must enter an *ex parte* order authorizing the installation and use of a pen register or a trap and trace device within the jurisdiction of the court. The order must contain specific information and may only authorize the installation and use of a pen register or a trap and trace device for up to 60 days. An extension for no more than 60 days may be granted upon the filing of a new application and a new finding by the court.

Specified service providers and individuals relevant to the installation and use of the pen register or trap and trace device are required to provide, upon request of an authorized law enforcement officer, assistance in the installation of the devices and additional information and assistance relevant to the unobtrusively installing and using the devices and minimizing interference.

Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished to the officer of a law enforcement agency, designated in the court order, at reasonable intervals during regular business hours for the duration of the order.

The requirements under the pen register and trap and trace device statute do not create a cause of action against any provider of a wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a pen register/trap and trace device court order. A good faith reliance on a court order, a legislative authorization, or a statutory authorization is a complete defense against any civil or criminal action brought under the pen register/trap and trace device statute.

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: Baltimore City advises that the bill will not result in a fiscal impact. Howard, Montgomery, and Prince George’s counties also advise that the bill will not result in a fiscal impact.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore City; Howard, Montgomery, and Prince George's counties; Town of Belair; Town of Leonardtown; Department of Natural Resources; Department of General Services; Judiciary (Administrative Office of the Courts); Department of State Police; Governor's Office of Crime Control and Prevention; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - February 18, 2011
mc/kdm

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