The Volokh Conspiracy

Does Fourth Amendment Standing Work Differently for *Jones* Trespass Searches, Traditional *Katz* Searches, and Long-term *Katz* Searches?

by Orin Kerr on February 14, 2012 10:30 pm in Fourth Amendment, GPS Surveillance, Standing

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Over the last forty years, the Supreme Court has worked out a series of principles for when a defendant has standing to object to the Fourth Amendment search of someone else's property. According to the those cases, the key issue is whether the government violated the defendant's own reasonable expectation of privacy under the framework introduced by Justice Harlan's concurring opinion in *Katz v. United States*. The owner, legitimate renter, or legitimate repeated borrower of a car generally has standing to object to a search of it. A person who steals a car or drives it in violation of a rental contract does not.

In the recent GPS decision of *United States v. Jones*, however, the Supreme Court introduced — or, depending on how you look at it, reintroduced — two new kinds of Fourth Amendment searches. First, the majority opinion introduced a trespass test for what is a search that supplements the *Katz* expectation-of-privacy test. Second, to the extent you think it proper to combine the votes of the concurring opinions and consider that an alternative holding, five Justices thought that the cumulative effect of 30 days of monitoring of the car also amounted to a search of the car because it revealed such invasive information about its public location over time.

So here's the question: Does the standing inquiry developed over the last forty years for *Katz* expectation–of-privacy searches apply in the same way for *Jones* trespass searches and *Jones* long-term expectation of privacy searches? Or is the standing test different?

That isssue arose in a case handed down just a week after *Jones*: *United States v. Hanna*, 2012 WL 279435, *1+ (S.D.Fla. Jan 30, 2012) (NO. 11-20678-CR). The police suspected that four men — Hanna, Ransfer, Middleton, and Davis — were involved in a conspiracy to commmit a series of robberies. Hanna was known to often drive the car of his co-conspirator Middleton. The police installed a GPS device without a warrant and monitored the location of the car. The combination of GPS and visual monitoring showed that Hanna and Ransfer drove together in Middleton's car (with the GPS on it) to meet up with Middleton and Davis. This particular case involves a prosecution against Hanna and Ransfer. The government wants to admit the GPS evidence at trial to help show the meeting occurred.

Defendants Hanna and Ransfer moved to suppress that evidence, but Magistrate Judge Edwin Torres denied the motion for lack of standing:

> In United States v. Jones, the Supreme Court concluded that a "search" under the Fourth Amendment is triggered when law enforcement attaches a GPS tracking device to a vehicle and uses that device to track the vehicle's movements. 565 U.S. ——, No. 10–2159, 2012 WL 171117 (Jan. 23, 2012). The Government invaded a person's effects when "[t]he Government physically occupied private property for the purpose of obtaining information." Slip Op. at 4. Justice Scalia's majority opinion expressly noted that Jones "was 'the exclusive driver' " of the vehicle, and that if he "was not the owner he had at least the property rights of a bailee." Id. at 3 n. 2. Jones—as the effective property owner or bailee of the vehicle—had standing to challenge an infringement on his property. Indeed, Justice Scalia emphasized that Jones "possessed the Jeep at the time the Government trespassorily inserted the information-gathering device," id. at 9, contrasting Jones's situation from earlier cases in which the Court had blessed the use of electronic beepers that had been placed inside packages before they were transferred to the defendant challenging their use. Id. at 9 (distinguishing Karo v. United States, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), because "Karo accepted the container as it came to him, beeper and all, and was therefore not entitled to object to the beeper's presence, even though it was used to monitor the container's location").
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> Indeed, the point of disagreement with the concurring opinion in Jones was the re-emergence of a trespass theory for Fourth Amendment searches rather than application of existing reasonable expectation of privacy doctrine. Id. at 4–6 (Alito, J., concurring). But the result of the case under the concurring opinion would have been that surreptitious long-term monitoring of the Defendant through the GPS device constituted a search because it "impinges on expectations of privacy." Id. at 13. In that case, the driver of the vehicle had an expectation of privacy that he would not be monitored for four weeks with agents "track[ing] every movement that respondent made in the vehicle he was driving." Id.
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> Under either approach recognized by Jones, an essential component of the Fourth Amendment claim requires that one's own personal "effects" have been trespassed (e.g., one's automobile when a GPS tracking device was secretly installed), or that one's own expectation of privacy was impinged (e.g., one's own movements were continuously monitored and tracked for a material period of time). That is principally where these Defendants' attempt to benefit from the Supreme Court's decision in Jones fails. Neither Ransfer nor Hanna was either the owner or exclusive user of the Ford Expedition. To the contrary, the record shows that members of the robbery crew consistently referred to the Expedition as co-Defendant Middleton's truck. It is undisputed, and the Court has found, that neither Ransfer nor Hanna was in possession of the Expedition at the time that the alleged trespass (the installation and subsequent use of the tracker) occurred. It is also undisputed that Middleton owned that vehicle at all relevant times. Thus, to the extent that Jones relies upon a theory of trespass upon private property, neither Ransfer nor Hanna has standing to challenge a trespass upon property as to which they had no rights.
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> Moreover, Defendants Ransfer and Hanna also lack standing to challenge the installation and use of the GPS device on the Ford Expedition because—under a traditional Katz analysis—they had no

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reasonable expectation of privacy in the vehicle. In Jones, five members of the Court concluded that Justice Scalia's trespass theory did not form a sufficiently comprehensive analysis of the Fourth Amendment implications of GPS monitoring and argued that GPS monitoring should also (in the case of Justice Sotomayor) or only (in the case of Justice Alito) be analyzed to determine whether it has invaded a reasonable expectation of privacy. Under this traditional test as well, neither defendant Ransfer nor Hanna had a reasonable expectation of privacy in the Ford Expedition or its movements, and thus neither has standing to challenge the installation and use of the GPS device.

Under traditional Katz analysis, the Fourth Amendment prohibits unreasonable searches and seizures, but only individuals bearing a legitimate expectation of privacy in the area invaded may invoke its protections. E.g., Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). A defendant seeking to suppress evidence bears the burden of establishing a legitimate expectation of privacy in the area searched. See, e.g., United States v. Harris, 526 F.3d 1334 (11th Cir.2008). A legitimate expectation of privacy cannot arise from mere possession, but instead exists only if both the person has a subjective expectation of privacy, and society is prepared to recognize that privacy as reasonable. See, e.g., United States v. Segura–Balthazar, 448 F.3d 1281, 1286 (11th Cir.2006).

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For purposes of this analysis under Jones, one must have an expectation of privacy as to the particular vehicle tracked, either from an ownership or possessory interest. One must either possess the vehicle when the tracker is installed, which did not occur here, or at least one must be inside the vehicle at the time the tracker is being used to monitor the vehicle. But it is undisputed that at the time this vehicle was being tracked on that day neither Hanna nor Ransfer were in possession of the vehicle. It was in fact not in possession of anyone. And by the time Hanna and Ransfer met up with the vehicle, traditional surveillance techniques were already in use—an officer's visual observations of the vehicle—rather than the GPS tracking device. The Court found credible the officer's testimony that he ceased using the tracking device software on his computer once Det. Thomas reached the vehicle and began following it himself.

Consequently, neither at the time of the installation of the device, nor at the relevant time it was being used, did Hanna or Ransfer own or possess the vehicle sufficient to claim that their own expectation of privacy was impinged. Jones, therefore, has no application here.

The Defendants' contrary argument, that the overarching unlawful activity through use of the warrantless GPS tracking device constitutes an "umbrella" of protection over any one or anything directly or indirectly obtained from the tracking of this vehicle, is highly unpersuasive. It is universally accepted that Fourth Amendment rights are "personal rights" that cannot be asserted vicariously. See Minnesota v. Carter, 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) ("[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable, i.e., one which has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."); United States v. Payner, 447 U.S. 727, 731, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980) ("Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged

practices. [A] court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights."); Rakas v. Illinois, 439 U.S. 128, 134, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) ("A person who is aggrieved by an illegal search and seizure only through introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule's protections."); Alderman v. United States, 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.").

*5 That principle clearly applies to searches of automobiles. See, e.g., United States v. Ramos–Soto, 304 Fed. Appx. 578 (9th Cir.2008) ("Defendant lacked standing to challenge search of vehicle … where defendant fled vehicle that he neither owned nor leased, and that he had been in only once."); United States v. Shareef, 100 F.3d 1491, 1499–1500 (10th Cir.1996) ("we have held that a defendant in sole possession and control of a car rented by a third party has no standing to challenge a search or seizure of the car."); United States v. Padilla, 111 F.3d 685, 688 (9th Cir.1997) ("conspirators must show that they personally have a property interest protected by the Fourth Amendment that was interfered with or a reasonable expectation of privacy that was invaded by the search.").

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Defendants do not convincingly show why the type of search recognized by Jones should be treated differently. Standing principles have always been applied for even greater intrusions into Fourth Amendment zones of privacy, so it naturally follows that the same principles apply to the intrusion created when law enforcement uses a GPS monitor to conduct a search. See, e.g., ACLU v. National Sec. Agency, 493 F.3d 644 (6th Cir.2007) (rejecting challenge to warrantless wiretap program to monitor terrorists where no personal rights were asserted; "it would be unprecedented for this court to find standing for plaintiffs to litigate a Fourth Amendment cause of action without any evidence that the plaintiffs themselves have been subjected to an illegal search or seizure."); United States v. SDI Future Health, Inc., 553 F.3d 1246 (9th Cir.2009) ("Absent such a personal connection or exclusive use, a defendant cannot establish standing for Fourth Amendment purposes to challenge the search of a workplace beyond his internal office."); Ferguson v. City of Charleston, 308 F.3d 380 (4th Cir.2002) ("Fourth Amendment rights are personal rights which, like other constitutional rights, may not be vicariously asserted. We are aware of no decision holding, or even suggesting, that a mother has a reasonable expectation of privacy in her newborn child's bodily fluids.").

We also need not speculate as to that because all of the Justices' opinions in Jones recognized the application of possessory or privacy interests that persons could invoke to claim protection GPS monitoring. Thus, we find that it is an essential element for a Fourth Amendment claim under Jones that personal property rights or personal zones of privacy must be infringed before GPS surveillance can be deemed to infringe on that person's Fourth Amendment rights.

Here, the undisputed facts show otherwise. These Defendants did not own or control the vehicle in question when the tracker was installed, and they did not control or possess the vehicle at the time that it was being tracked that led to their seizure. Therefore, no personal rights have been asserted in this case. Fourth Amendment standing is lacking. That dooms Defendants' arguments and we need not go any further.

Given the facts here, it sounds like Judge Torres is right on the *Jones* trespass standing issue. But I think the *Katz* expectation–of-privacy standing issue is a lot more complicated than Judge Torres suggests. When an owner of a car regularly lets a friend use it, the caselaw I'm familiar with concludes that the friend has standing to object to a *Katz* search of the car. See, e.g., United States v. Martinez, 808 F.2d 1050 (5th Cir. 1987). Under that approach, I would think that at least Hanna has Katz rights in the car he borrowed from Middleton (apparently with Middleton's full consent, unless I'm missing something).

Then there's the question of how the Katz expectation of privacy test applies to public monitoring under the Alito concurring long-term rationale. If the theory is about privacy rights in one's public physical location, not what is inside the car, I'm not sure that the standing analysis still focuses on rights to the inside of the car (as it traditionally does). Under the logic of the Alito rationale, shouldn't everyone inside the car — everyone whose location becomes known — have standing? Why should rights in the inside of the car matter under the long-term search inquiry?

Finally, it's worth noting the history of the standing inquiry pre- and post-*Katz*. In a pre-*Katz* standing case, *Jones v. United States*, 362 U. S. 257 (1960), Justice Frankfurter introduced the "legitimately on the premise" test for standing. In a post-*Katz* standing case, *Rakas v. Illinois*, 439 U.S. 128 (1978), Justice Rehnquist concluded that this language was too broad, but that the basic approach of *Jones* (the 1960 case, not the 2012 case) was co-extensive with standing under the *Katz* test.

It's possible to reconcile the *Jones* (1960), *Jones* (2012), and *Rakas* (1978) approaches in a number of ways, but one would be that they all have the same basic inquiry — with the catch that the Jones trespass standing is assessed at the time of the installation, while *Karo-Katz* short term monitoring standing would be assessed at the time of the short-term monitoring (if any monitoring records locations inside a Fourth Amendment protected space), and standing under a *Jones*-Alito-concurrence-lont-term monitoring test — the extent one reads Jones as adopting it — would be assessed over the time of the monitoring. But that last point raises some interesting sub-puzzles: What if the driver's relationship to the car changes over the time of the long-term monitoring? Do you evaluate standing at the beginning, or the end, or some sort of time-average? I suppose this could be dealt more easily by making standing solely about presence in the car, and you could just say that standing for a long-term-Alito serarch challenge would exist for any GPS monitoring when that particular person was in the car.

Either way, cool issues. And if any one is looking for a student note topic, this would make a terrific subject.

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