United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America

v.

Melvin SKINNER

Aug. 14, 2012.

ROGERS, Circuit Judge.

When criminals use modern technological devices to carry out criminal acts and to reduce the possibility of detection, they can hardly complain when the police take advantage of the inherent characteristics of those very devices to catch them. This is not a case in which the government secretly placed a tracking device in someone's car. The drug runners in this case used pay-as-you-go (and thus presumably more difficult to trace) cell phones to communicate during the cross-country shipment of drugs. Unfortunately for the drug runners, the phones were trackable in a way they may not have suspected. The Constitution, however, does not protect their erroneous expectations regarding the undetectability of their modern tools.

The government used data emanating from Melvin Skinner's pay-as-you-go cell phone to determine its real-time location. This information was used to establish Skinner's location as he transported drugs along public thoroughfares between Arizona and Tennessee. As a result of tracking the cell phone, DEA agents located Skinner and his son at a rest stop near Abilene, Texas, with a motorhome filled with over 1,100 pounds of marijuana. The district court denied Skinner's motion to suppress all evidence obtained as a result of the search of his vehicle, and Skinner was later convicted of two counts related to drug trafficking and one count of conspiracy to commit money laundering. The convictions must be upheld as there was no Fourth Amendment violation, and Skinner's other arguments on appeal lack merit. In short, Skinner did not have a reasonable expectation of privacy in the data emanating from his cell phone that showed its location.

I.

The events leading up to Skinner's arrest and conviction began in January 2006, when Christopher S. Shearer, a participant in West's marijuana-trafficking conspiracy, was stopped in Flagstaff, Arizona with $362,000. Police stopped Shearer on his way to deliver money to West's marijuana supplier, Philip Apodaca, who lived in Tucson, Arizona.

Drug Enforcement Administration ("DEA") authorities learned from Shearer how West operated his drug conspiracy. Between 2001 and 2006, Apodaca would send marijuana that he obtained from Mexico to West in Tennessee via couriers. Apodaca purchased pay-as-you-go cell phones that he programmed with contact information and then gave to the couriers to maintain communication. When buying the phones, Apodaca provided false names and addresses for the phone subscriber information. After some time, West and his affiliates would discard their pay-as-you-go phones and get new ones with different telephone numbers and fictitious names. Apodaca was unaware that these phones were equipped with GPS technology.

In May and June 2006, authorities obtained orders authorizing the interception of wire communications from two phones that were not pay-as-you-go, but rather phones subscribed in West's name. Through these calls between West and Shearer, agents learned that West used as a courier an over-the-road truck driver referred to as "Big Foot" (later identified as the defendant in this case, Melvin Skinner).

From Shearer and the phone calls, agents determined that, on many occasions beginning in 2001, Big Foot delivered money to Apodaca in Arizona and then returned to Tennessee with hundreds of pounds of marijuana for West. Big Foot's courier activities temporarily ceased between 2002–2004, but thereafter he resumed transporting drugs and money for West. In late 2005, West advanced Big Foot money to purchase a pickup truck for transporting drugs.

In June 2006, authorities determined that West was using one secret phone to communicate with Apodaca and a second secret phone to communicate with Big Foot. Authorities thought that Big Foot was using a phone with the number (520) 869–6447 ("6447 phone").

Based on calls intercepted in late June and early July 2006, authorities learned that Big Foot had recently delivered between $150,000 and $300,000 to Apodaca to pay off existing drug debt and purchase additional drugs. In later calls between West and Apodaca, the agents also determined that Big Foot would meet Apodaca in Tucson, Arizona on July 11, 2006, to pick up approximately 900 pounds of marijuana. Big Foot would be driving a "nice [RV] with a diesel engine," while Big Foot's son would be driving an F–250 pickup truck, both with Southern license plates. Big Foot would then leave for West's home in Mooresburg, Tennessee, on or about Thursday, July 13, 2006. Believing that Big Foot was carrying the 6447 phone, authorities obtained an order from a federal magistrate judge on July 12, 2006, authorizing the phone company to release subscriber information, cell site information, GPS real-time location, and "ping" data for the 6447 phone in order to learn Big Foot's location while he was en route to deliver the drugs.

That same day, agents "pinged" the 6447 phone and discovered that it was currently located in Candler, North Carolina, the location of West's primary residence. Based upon intercepted calls as well as the 6447 phone's records, agents determined that West was using the 6447 phone to communicate with Big Foot on a phone with a (520) 869–6820 number ("6820 phone"). Authorities then obtained a second order from the magistrate judge authorizing release of the same information for the 6820 phone, which revealed that the phone was located near Flagstaff, Arizona.

By continuously "pinging" the 6820 phone, authorities learned that Big Foot left Tucson, Arizona on Friday, July 14, 2006, and was traveling on Interstate 40 across Texas. At no point did agents follow the vehicle or conduct any type of visual surveillance. At around 2:00 a.m. on Sunday, July 16, 2006, the GPS indicated that the 6820 phone had stopped somewhere near Abilene, Texas. Authorities coordinated with agents in the Lubbock, Texas office of the DEA, who were quickly dispatched to a truck stop. At the truck stop, agents discovered a motorhome and a truck with Georgia license plates. An officer approached the motorhome, knocked on the door, and introduced himself to the man, later identified as Skinner, who answered the door. After Skinner denied the officer's request to search the vehicle, a K–9 officer and his dog who were at the scene conducted a perimeter dog sniff around the motorhome that alerted officers to the presence of narcotics. The officers then entered the motorhome, where they discovered sixty-one bales of marijuana, over 1,100 pounds, as well as two cellular phones and two semi-automatic handguns. Skinner and his son, Samuel, were placed under arrest.

Prior to trial, Skinner sought to suppress the search of the motorhome, alleging that the agents' use of GPS location information emitted from his cell phone was a warrantless search that violated the Fourth Amendment. The district court denied Skinner's motion to suppress.

II.

There is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay-as-you-go cell phone. If a tool used to transport contraband gives off a signal that can be tracked for location, certainly the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools.[FN1] Otherwise, dogs could not be used to track a fugitive if the fugitive did not know that the dog hounds had his scent. A getaway car could not be identified and followed based on the license plate number if the driver reasonably thought he had gotten away unseen. The recent nature of cell phone location technology

does not change this. If it did, then technology would help criminals but not the police. It follows that Skinner had no expectation of privacy in the context of this case, just as the driver of a getaway car has no expectation of privacy in the particular combination of colors of the car's paint.

> FN1. We do not mean to suggest that there was no reasonable expectation of privacy *because* Skinner's phone was used in the commission of a crime, or that the cell phone was illegally possessed. On the contrary, an innocent actor would similarly lack a reasonable expectation of privacy in the inherent external locatability of a tool that he or she bought.

This conclusion is directly supported by *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). In *Knotts,* the police, with the consent of a chemical company, placed a beeper in a five-gallon drum of chloroform in order to track the movements of a defendant and *778 discover the location of a clandestine drug laboratory. Using visual surveillance, as well as the signal emitted from the beeper when police lost visual contact, law enforcement officials traced the car to a secluded cabin, where the defendant and others had been manufacturing illicit drugs. The Supreme Court held that this monitoring did not violate the Constitution because "[t]he governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways.... A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281, 103 S.Ct. 1081. The Court noted that, in Knott's case, "[a] police car following [a defendant] at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin.... [T]here is no indication that the beeper was used in any way to reveal information ... that would not have been visible to the naked eye." *Id.* at 285, 103 S.Ct. 1081. Similar to the circumstances in *Knotts,* Skinner was traveling on a public road before he stopped at a public rest stop. While the cell site information aided the police in determining Skinner's location, that same information could have been obtained through visual surveillance.

There is no inherent constitutional difference between trailing a defendant and tracking him via such technology. Law enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system. The Supreme Court said as much in *Knotts,* noting that, "[i]nsofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now." *Id.* at 284, 103 S.Ct. 1081. In drawing this conclusion, the Court discussed *Smith v. Maryland,* 442 U.S. 735, 744–45, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), where a defendant was found to have no reasonable expectation of privacy in the numbers he dialed on his phone, even after that information was automated by the phone company. The Court compared this technology to giving the numbers to a telephone operator, where they would not be confidential: "We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate." *Knotts,* 460 U.S. at 283, 103 S.Ct. 1081. Similar reasoning compels the conclusion here that Skinner did not have a reasonable expectation of privacy in the location of his cell phone while traveling on public thoroughfares.

Skinner's case also falls squarely within this court's precedent in *United States v. Forest,* 355 F.3d 942 (6th Cir.2004). In *Forest,* DEA agents had lost visual contact of the defendant as he traveled on public roads to meet two suspected drug couriers. To reestablish contact, agents called the defendant's cell phone, hanging up before it rang, in order to "ping" or gather data on the phone's physical location. Using this information, agents were able to determine the defendant's movements along a public roadway, and ultimately to arrest the defendant at a gas station the following day. We held that such monitoring did not violate the Fourth Amendment because, as in *Knotts,* "the DEA agents could have obtained the same information by following [the defendant's] car." *Id.* at 951. "Although the DEA agents were not able to maintain visual contact with [the defendant's] car at all times, visual observation was *possible* by any member of the public. The DEA agents simply used the cell-site data to 'augment[ ] the sensory faculties bestowed upon them at birth,' which is permissible under *Knotts*." *Id.* (quoting *Knotts,* 460 U.S. at 282,

103 S.Ct. 1081). The same is true in Skinner's case.

In *Forest,* we also rejected the argument that even if a defendant does not have a legitimate expectation of privacy regarding his location, he does have a legitimate expectation of privacy in the cell site data itself. *Forest,* 355 F.3d at 951–52. Because "the cell-site data is simply a proxy for [the defendant's] visually observable location," and a defendant has "no legitimate expectation of privacy in his movements along public highways," we concluded, as we do here, that "the Supreme Court's decision in *Knotts* is controlling, and [thus] the DEA agents did not conduct a search within the meaning of the Fourth Amendment." *Id.*

Skinner counters that, unlike *Knotts* and *Forest,* the DEA agents in his case had never established visual surveillance of his movements, did not know his identity, and did not know the make or model of the vehicle he was driving (although they did know it was a motorhome that was accompanied by a pickup truck). Skinner argues that, in this instance, technology was used to supplement, not "augment," the "sensory faculties" of the agents. But even if the agents in *Knotts* and *Forest* momentarily had visual contact of the defendant, and then relied on technology either to reestablish contact or to learn where to initiate visual observation, this was not critical to our analysis. Therefore, no real distinction exists in Skinner's case. In all three instances the defendant's movements could have been observed by any member of the public, a crucial fact for this court in *Forest.* As for not knowing his identity, this is irrelevant because the agents knew the identity of Skinner's co-conspirators and could have simply monitored their whereabouts to discover Skinner's identity. Using a more efficient means of discovering this information does not amount to a Fourth Amendment violation. In any event, we determine whether a defendant's reasonable expectation of privacy has been violated by looking at what the defendant is disclosing to the public, and not what information is known to the police.

This case is different from the recent Supreme Court decision in *United States v. Jones,* —— U.S. ——, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). That case involved the secret placement of a tracking device on the defendant's car, *id.* at 948, and the Court's opinion explicitly relied on the trespassory nature of the police action. *Id.* at 949. Although Fourth Amendment jurisprudence includes an assessment of the defendant's reasonable expectation of privacy, that "d[oes] not erode the principle 'that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute *780 a violation of the Fourth Amendment.' " *Id.* at 951 (quoting *Knotts,* 460 U.S. at 286, 103 S.Ct. 1081 (Brennan, J., concurring)). No such physical intrusion occurred in Skinner's case. Skinner himself obtained the cell phone for the purpose of communication, and that phone included the GPS technology used to track the phone's whereabouts. The majority in *Jones* based its decision on the fact that the police had to "physically occup[y] private property for the purpose of obtaining information." 132 S.Ct. at 949. That did not occur in this case. Indeed, the *Jones* opinion explicitly distinguished *Knotts* on this ground—that trespass was not an issue in *Knotts*—and in no way purported to limit or overrule the Court's earlier holding in *Knotts. Id.* at 951–52. Moreover, *Jones* does not apply to Skinner's case because, as Justice Sotomayor stated in her concurrence, "the majority opinion's trespassory test" provides little guidance on "cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property." *Id.* at 955 (Sotomayor, J., concurring).

Skinner's case also does not present the concern raised by Justice Alito's concurrence in *Jones,* 132 S.Ct. at 957–64. There may be situations where police, using otherwise legal methods, so comprehensively track a person's activities that the very comprehensiveness of the tracking is unreasonable for Fourth Amendment purposes. As Justice Alito recognized, prior to certain advances in technology, "practical" considerations often offered "the greatest protections of privacy." *Id.* at 963. For instance, in the situation presented in *Jones,* "constant monitoring of the location of a vehicle for four weeks ... would have required a large team of agents, multiple vehicles, and perhaps aerial assistance." *Id.* Technology, however, has made it possible to conduct a level of extreme comprehensive tracking, "secretly monitor[ing] and catalogu[ing] every single movement" that the defendant made over four weeks, that previously would have been impossible. *Id.* at 964.

No such extreme comprehensive tracking is present in this case. Justice Alito's concurrence and the

majority in *Jones* both recognized that there is little precedent for what constitutes a level of comprehensive tracking that would violate the Fourth Amendment. *Id.* at 954, 964. Skinner's case, however, comes nowhere near that line. While *Jones* involved intensive monitoring over a 28–day period, here the DEA agents only tracked Skinner's cell phone for three days. Such "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." *Id.* at 964 (Alito, J., concurring) (citing *Knotts,* 460 U.S. at 281–82, 103 S.Ct. 1081). Here, the monitoring of the location of the contraband-carrying vehicle as it crossed the country is no more of a comprehensively invasive search than if instead the car was identified in Arizona and then tracked visually and the search handed off from one local authority to another as the vehicles progressed. That the officers were able to use less expensive and more efficient means to track the vehicles is only to their credit.

The Supreme Court in *Jones* also distinguished its previous holding in *United States v. Karo,* 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), that the installation of a beeper in a container did not constitute a search or seizure, as follows:

> The Government, we said [in *Karo*], came into physical contact with the container only before it belonged to the defendant Karo; and the transfer of the container with the unmonitored beeper inside did not convey any information and thus did not invade Karo's privacy. That conclusion is perfectly consistent with the one we reach here. 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.

Jones, 132 S.Ct. at 952 (internal citation omitted). The same distinction applies even more strongly here: the Government never had physical contact with Skinner's cell phone; he obtained it, GPS technology and all, and could not object to its presence.

Because authorities tracked a known number that was voluntarily used while traveling on public thoroughfares, Skinner did not have a reasonable expectation of privacy in the GPS data and location of his cell phone. Therefore, suppression is not warranted and the district court correctly denied Skinner's motion to suppress.

The judgment of the district court is affirmed.

DONALD, Circuit Judge, concurring in part and concurring in the judgment.

I do not agree that Skinner lacked a reasonable expectation of privacy in the GPS data emitted from his cellular phone. In my view, acquisition of this information constitutes a search within the meaning of the Fourth Amendment, and, consequently, the officers were required to either obtain a warrant supported by probable cause or establish the applicability of an exception to the warrant requirement. However, because the officers had probable cause to effect the search in this case and because the purposes of the exclusionary rule would not be served by suppression, I believe some extension of the good faith exception enunciated in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), is appropriate. Accordingly, I would also affirm the district court's denial of Skinner's motion to suppress, but for reasons other than those announced by the majority.

A. Reasonable expectation of privacy

Though the majority does not discuss the first prong of [the *Katz*] test, Skinner's use of the phone arguably manifests his subjective expectation of privacy in his GPS location information. In fact, the majority aptly points out that the phone was trackable in a way that Skinner most likely did not anticipate. Skinner's erroneous belief that the phone was untrackable, or even his general ignorance of the phone's GPS capabilities, supports the conclusion that Skinner had a subjective expectation of privacy in this information.

The critical question, then, is whether society is prepared to recognize Skinner's expectation of priva-

cy as legitimate. The majority implicitly answers this question in the negative, focusing on the criminal conduct in which Skinner was engaged and declaring that "[t]he law cannot be that a criminal is entitled to rely on the expected untrackability of his tools." This seems to suggest that, assuming Skinner has a subjective expectation of privacy in the cell phone, it is not one that society is prepared to recognize as legitimate because he used the phone in the commission of a crime. While this circuit's law is not well developed on this point, numerous courts have held that privacy expectations are not diminished by the criminality of a defendant's activities.

In support of its conclusion, the majority relies on *United States v. Knotts,* wherein the Supreme Court found that the government's use of a beeper to track the whereabouts of a suspect "amounted principally to the following of an automobile on public streets and highways." 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). According to the majority, there is no meaningful distinction between this case and *Knotts* because "[w]hile the cell site information aided the police in determining Skinner's location, that same information could have been procured through visual surveillance." It is not accurate, however, to say that police in this case acquired only information that they could have otherwise seen with the naked eye. While it is true that visual observation of Skinner was possible by any member of the public, the public would first have to know that it was Skinner they ought to observe. This case is thus distinguishable from both *Knotts* and *United States v. Forest,* 355 F.3d 942 (6th Cir.2004), in which officers had already identified and undertaken visual surveillance of a particular suspect. Authorities' use of electronic surveillance in those cases was used to *aid* surveillance already initiated. In this case, police had not and could not establish visual contact with Skinner without utilizing electronic surveillance *because they had not yet identified the target of their search.* Authorities did not know the identity of their suspect, the specific make and model of the vehicle he would be driving, or the particular route by which he would be traveling. Moreover, officers could not have divined any of this information without the GPS data emitted from Skinner's phone; therefore, they cannot be said to have merely "augmented the sensory faculties bestowed upon them at birth." *Knotts,* 460 U.S. at 282, 103 S.Ct. 1081.

I would not characterize the question before us as whether society is prepared to recognize a legitimate expectation of privacy in the GPS data emitted from a cell phone used to effectuate drug trafficking. Rather, in keeping with the principle that the law affords the same constitutional protections to criminals and law-abiding citizens alike, the question is simply whether society is prepared to recognize a legitimate expectation of privacy in the GPS data emitted from any cell phone. Because I would answer this question in the affirmative, I cannot join Part II.A of the majority opinion.

B. Good faith exception

While I believe that authorities were required to get a warrant before effecting the search in this case, I nevertheless agree that Skinner's motion to suppress was properly denied. Therefore, I agree with the majority's conclusion that the district court should be affirmed.

As *Leon* and its progeny make clear, the applicability of the exclusionary rule in a particular case often depends upon the presence of deliberate police misconduct. In the present case, officers should have obtained a warrant authorizing them to collect GPS real-time location information for the 6820 phone; instead, they applied for and were issued an order. But this error does not necessarily mean that application of the exclusionary rule is warranted. The good faith exception enunciated in *Leon,* though not expressly applicable to the kinds of orders at issue in the present case, could be extended if the purposes of the exclusionary rule would not be served by its application. Because there is no indication of police misconduct and officers clearly had probable cause, if not a warrant, to conduct the challenged search, I would affirm on this ground.