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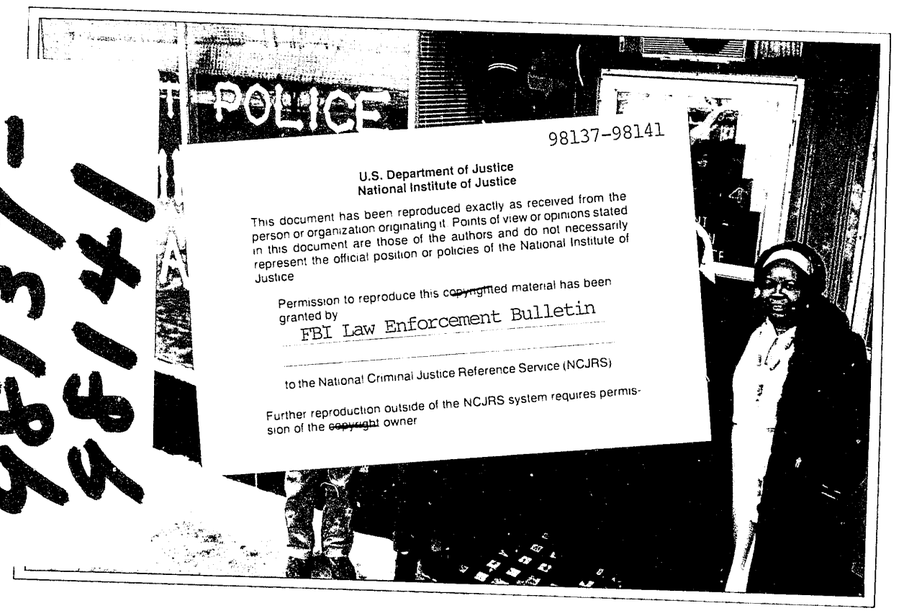

Electronic Tracking Devices

Following the Fourth Amendment (Part I)

". . . the formula for determining whether a fourth amendment search or seizure has occurred hinges on privacy expectations rather than property concepts. . . ."

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

"Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case. . . . We have never equated police efficiency with unconstitutionality, and we decline to do so now."[1]

* * *

"Although the augmentation in this case was unobjectionable, it by no means follows that the use of electronic detection techniques does not implicate especially sensitive concerns."[2]

These statements appear in the same U.S. Supreme Court case and were written by two different Justices who agreed on the final judgment. They typify the dilemma which increasingly confronts the courts in the age of technology as they struggle to maintain a balance between the citizen's fourth amendment protections against unreasonable searches and seizures and society's legitimate interest in effective law enforcement.

Until recent years, the Supreme Court viewed the fourth amendment as providing protection to "constitutionally protected areas" against unreasonable government intrusions. This formula was derived from the literal language of the amendment,[3] as interpreted in light of traditional property concepts. The Court had held that the protections of the amendment applied only to tangible property and then only when there was a physical trespass by the government.[4]

However, 20th-century technology has raised issues not foreseen by the 18th-century authors of the fourth amendment and thus compelled a change in the way the Court views the scope and application of the amendment. The first significant change came in 1961 when the Court concluded that the "Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements. . . ."[5] In addition, the Court moved away from the requirement that an actual physical *trespass* must occur to trigger the fourth amendment, but retained the notion that there must be in any event "an actual *intrusion* into a constitutionally protected area."[6]

Six years later, a more significant change came about in *Katz* v. *United States*.[7] Government agents had placed a microphone on the top of a public telephone booth and intercepted the defendant's incriminating conversation. The Court was asked to

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decide two questions: (1) Whether a public telephone booth is a constitutionally protected area; and (2) whether an actual intrusion into such an area is necessary to trigger the fourth amendment. Choosing instead to frame a new standard of fourth amendment analysis, the Court stated:

". . . the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. [cites omitted] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[8]

As a result of the *Katz* decision, the formula for determining whether a fourth amendment search or seizure has occurred hinges on privacy expectations rather than property concepts and is summed up in the concurring opinion of Justice Harlan:

". . . there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[9]

One of the greatest challenges to the Court in recent years has been to apply the *Katz* standard to the myriad fact situations which confront law enforcement officers daily and to devise principles which provide some guidance to the police, the prosecutors, and the courts.

This article analyzes the application of the fourth amendment to one area of law enforcement activity—the use of electronic tracking devices, commonly referred to as "beepers." The article will address three questions: (1) Does either the installation or monitoring of a beeper constitute a fourth amendment "search"? (2) if either is a search, is a warrant required? and (3) where required, what kind of a warrant is necessary to satisfy the fourth amendment? Part I reviews two recent Supreme Court cases in which the Court resolved some of these issues. Part II examines some of the major issues that remain and endeavors to provide some guidance to the law enforcement community regarding the proper use of this investigative technique.

RECENT SUPREME COURT DECISIONS

United States v. *Knotts*[10]

The Facts

Three men were convicted of conspiracy to manufacture controlled substances based on evidence recovered from Knotts' cabin during the execution of a search warrant. The search warrant, in turn, was based largely upon the use of a beeper placed inside a 5-gallon container of chloroform which enabled the narcotics officers to trace the container from the point where one of the defendants purchased it in St. Paul, MN, to its ultimate destination, Knotts' cabin, near Shell Lake, WI.

Two additional facts are of interest. First, the tracking device was installed with the consent of the original owner and before the container was purchased by the defendants. Second, the monitoring of the beeper occurred while the container and the vehicle in which it was transported were outside private dwellings. During execution of the search warrant, the

". . . monitoring beepers in *public places,* or places open to visual observation, does not implicate the fourth amendment."

officers located the chloroform container under a barrel outside the cabin.

Issue

Inasmuch as the defendants did not challenge the warrantless installation of the beeper inside the container of chloroform, the Supreme Court limited its consideration to the issue whether the monitoring of the beeper in areas open to visual surveillance invaded any reasonable expectation of privacy.

Decision

Noting that the beeper surveillance by the officers "amounted principally to the following of an automobile on public streets and highways," [11] the Court stated:

> "A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [defendant] travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property." [12]

With regard to the monitoring of the beeper which occurred after the container had been taken onto private property, the Court observed that Knotts, the owner of the cabin and surrounding premises, undoubtedly had the traditional expectation of privacy within the dwelling. However, "no such expectation of privacy extended to the visual observation of [the] automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields.' " [13]

Hypothetically, visual surveillance from public places along Knotts' route or adjoining his premises could have revealed the destination of the chloroform container to the police. Such surveillance would not have infringed any reasonable expectation of privacy and would not have been a fourth amendment search. Likewise, the Court believed the use of a beeper to augment the surveillance did not require a different result. In the absence of any infringement by the officers into Knotts' reasonable expectation of privacy, there was "neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment." [14]

All nine Justices supported the judgment of the Court that monitoring beepers *in public places*, or places open to visual observation, does not implicate the fourth amendment. Other questions remained. Specifically, would the *installation* of a beeper or *monitoring* its signal *inside a private dwelling* constitute a fourth amendment search or seizure? If so, is a warrant required. The answers to these questions were not long in coming.

United States v. *Karo* [15]

The Facts

In facts generally similar to those in *Knotts*, Drug Enforcement Administration (DEA) agents installed a beeper in a can of ether that was to be delivered to an unsuspecting buyer. The agents then monitored the beeper in order to locate the site of illegal drug activities. From that point, however, the details and the issues are sufficiently distinct to warrant further exposition. DEA agents learned that James Karo, Richard Horton, and William Harley had ordered 50 gallons of ether from a government informant in Albuquerque, NM. They planned to use the ether to extract cocaine from clothing that had been imported into the United States. Based on that information, the agents obtained a court order authorizing the installation and monitoring of a beeper in one of the cans of ether. They then obtained the informant's consent to place that can in the shipment to be sold to the defendants.

The agents tracked the container from the point of purchase to Karo's home, where its presence inside the residence was confirmed later that day by continued monitoring of the beeper. Some time thereafter, it was determined—presumably because of the absence of the beeper signal—that the ether was no longer inside Karo's residence. The agents were able to again pick up the beeper's signal and then locate the ether inside Horton's house. (One of the agents was also able to detect the odor of ether by standing on a public sidewalk near the residence.)

Over an additional period of about 5 months, the beeper was monitored to locate the can of ether inside the residence of Horton's father, two different commercial storage facilities, and finally, a house in Taos, NM, rented by Horton and another individual. Beeper surveillance confirmed that the ether was still inside the Taos residence the day following its arrival. When the agents observed the windows of the house were wide open despite cold, windy weather, they concluded that the ether was being used.

A search warrant for the residence, based partly on information acquired through use of the beeper, uncovered cocaine and laboratory equipment. The trial court suppressed the evidence on the grounds that the initial warrant to install the beeper was based on deliberate misrepresentations by the government in the supporting affidavits and that the search warrant for the residence was tainted by the initial illegality. The government, for reasons not explained in the case, did not appeal the trial court's ruling on the installation order. Instead, the government argued that no warrant was necessary for installation since the defendants had no reasonable expectation of privacy in the contraband ether. In addition, any intrusion from the installation and monitoring of the beeper, even within private premises, was too minimal to implicate the warrant requirement.

The U.S. Court of Appeals for the 10th Circuit held that although some courts had concluded that a person has no reasonable expectation of privacy in contraband, ether is not contraband and suspicion that noncontraband material might be used in criminal activity does not transform it into contraband. Therefore, the court said, the defendants had a legitimate expectation of privacy in the can of ether.

However, the court found that the fourth amendment was not implicated by the *installation* of the beeper, which occurred while the property was lawfully possessed by the government, but by the *transfer* of the property to the defendants. The court stated:

> "All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken. . . ." [16]

Accordingly, the court held that before the agents could transfer the can of ether containing the beeper to the defendants, they required a valid warrant. In addition, the court noted that the beeper was monitored by the agents while it was located inside private residences and storage lockers, and "the warrantless use of a beeper to monitor the location of noncontraband withdrawn from public view inside private residences or similarly protected places is an unconstitutional search or seizure." [17]

Finally, the court affirmed the trial court's ruling that the search warrant for the Taos residence was invalid inasmuch as the information acquired through illegal monitoring of the beeper was essential to the finding of probable cause.[18]

The Issues

The government appeal to the Supreme Court raised the following questions which had not been resolved in Knotts:

1) Whether installation of a beeper in a container of chemicals with the consent of the original owner constitutes a search or seizure within the meaning of the fourth amendment when the container is then transferred to an unsuspecting buyer; and
2) Whether monitoring the beeper is a fourth amendment search when it reveals information that could not have been obtained through visual surveillance.

The Decision

Installation

With regard to the installation of the beeper inside the can of ether, the Supreme Court held that there was no violation of anyone's fourth amendment rights. The Court stated:

> "The can into which the beeper was placed belonged at the time to the DEA, and by no stretch of the imagination could it be said that [defendants] then had any legitimate expectation of privacy in it." [19]

The Court added that even if the can had belonged to, and was in the possession of, a third party (the government informant) at the time of installation, the consent of that party would be sufficient to validate the beeper's installation.

Transfer

The Supreme Court disagreed with the appellate court's holding that the fourth amendment violation occurred at the time the beeper-laden can was transferred to the unsuspecting defendant. The Court reasoned that no privacy interest was infringed and hence no "search" took place because no information was conveyed to the government at the time of the transfer. The Court stated:

> "To be sure, it created a *potential* for an invasion of privacy, but we have never held that potential, as opposed to actual, invasions of privacy constitute searches for

"In the absence of an emergency, the monitoring of a beeper inside private areas must be authorized by a warrant."

purposes of the Fourth Amendment."[20]

Likewise, the Court found that there was no fourth amendment "seizure" occasioned by the transfer. Defining a fourth amendment seizure as a "meaningful interference with an individual's possessory interests in property,"[21] the Court concluded:

> "Although the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way. At most, there was a technical trespass on the space occupied by the beeper . . . however, . . . an actual trespass is neither necessary nor sufficient to establish a constitutional violation."[22]

The Court next considered the question whether any fourth amendment interests were infringed by the monitoring of the beeper.

Monitoring

Karo presented the Court with a clear instance of monitoring a beeper in a private residence—a location not open to visual surveillance. These facts were unlike the *Knotts* case where the monitoring of the beeper occurred while the can of chloroform which contained it and the automobile which transported it were in open areas which could have been visually observed. The Court determined that monitoring in a private residence constituted a search within the meaning of the fourth amendment because it conveyed to the agents critical information about the interior of the residence which could not have been lawfully obtained by visual observation from outside the curtilage[23] of the house.

The Court then emphasized that "private residences are places in which the individual normally expects privacy free from governmental intrusion . . . and that expectation is plainly one that society is prepared to recognize as justifiable."[24] An entry by the agents into the premises to verify the presence of the ether would clearly have been a search; the result is the same when an electronic device is used to obtain the same information.[25]

Having concluded that monitoring a beeper inside private premises constitutes a search, the Court proceeded to consider whether the warrant requirement should be applied. The government contended that it should not, because the degree of intrusion is less than that of searches to which the warrant requirement has traditionally been applied. The Court rejected the suggestion that "the beeper constitutes only a miniscule intrusion on protected privacy interests"[26] and added that "requiring a warrant will have the salutary effect of ensuring that use of beepers is not abused, by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search."[27] The Court concluded:

> "In sum, we discern no reason for deviating from the general rule that a search of a house should be conducted pursuant to a warrant."[28]

Ironically, the defendants in *Karo* did not benefit by the holding in the case. The Supreme Court upheld the search of the Taos residence on the ground that there was sufficient untainted information in the search warrant affidavit—after striking the facts acquired through beeper surveillance inside the residence—to support a finding of probable cause. The Court found no reason to strike the information concerning the two storage lockers for the reason that in neither case was the beeper used to pinpoint the specific locker in which the container had been placed. Having located the general areas to which the can had been taken, the agents pinpointed the specific lockers in both instances by detecting the odor of ether as they walked through areas accessible to the public. The Court noted that if the monitoring of the beeper had disclosed the presence of the ether in a particular locker, that would have constituted an intrusion into an area where some of the defendants had a reasonable expectation of privacy.[29]

Summary of the Case

Reviewing the *Knotts* and *Karo* decisions, the following points are clear:

1) Installation of a beeper in or on property which is in the lawful possession of the government, or with the consent of the lawful possessor, is not a search or seizure under the fourth amendment and does not require either a warrant, probable cause, or reasonable suspicion.
2) Merely transferring a beeper-laden container to a suspect is neither a search nor a seizure.
3) Monitoring a beeper in areas where visual surveillance could disclose the same information is not a search.
4) Monitoring a beeper inside private areas, i.e., areas not normally open to visual surveillance, is a search.
5) In the absence of an emergency, the monitoring of a beeper inside private areas must be authorized by a warrant.

Several questions remain which are not clearly resolved by these two cases. For example, in *Knotts* and *Karo* the government either had lawful possession of the containers in which the beepers were placed or had the consent of a lawful possessor. Could there be other circumstances where the *installation* of a beeper would constitute a search or seizure? If so, would a warrant be required to justify the installation? And, what would be the essential ingredients of such a warrant?

Part II of this article considers these additional issues.

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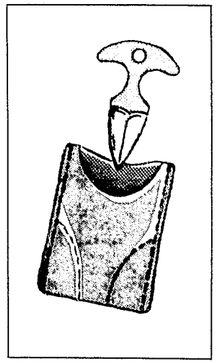
Footnotes

[1] *United States* v. *Knotts*, 75 L.Ed. 2d 55, at 63 and 64 (1983).
[2] Id. at 66 (Justice Stevens concurring).
[3] The fourth amendment states in pertinent 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. . . ."
[4] *Olmstead* v. *United States*, 277 U.S. 438 (1928); *Goldman* v. *United States*, 316 U.S. 129 (1942).
[5] *Silverman* v. *United States*, 365 U.S. 505 (1961).
[6] Id. at 512.
[7] 389 U.S. 347 (1967).
[8] Id. at 351 and 352.
[9] Id. at 361.
[10] 75 L.Ed.2d 55 (1983).
[11] Id. at 62.
[12] Id.
[13] Id.
[14] Id. at 64.
[15] 82 L.Ed.2d 530 (1984).
[16] Id. at 539.
[17] 710 F.2d 1433, at 1439 (10th Cir. 1983).
[18] Id. at 1440.
[19] *Supra* note 15, at 539.
[20] Id.
[21] Id. at 540. *Cf. United States* v. *Jacobsen*, 80 L.Ed.2d 85, 104 S.Ct. 1652 (1984).
[22] Id.
[23] "Curtilage" has been described by the Court as "the land immediately surrounding and associated with the home" and "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' " *Oliver* v. *United States*, 80 L.Ed.2d 214, at 225 (1984).
[24] *Karo, supra* note 15, at 541.
[25] Id. at 542.
[26] Id. at 543.
[27] Id.
[28] Id. at 543-544.
[29] Id. at 545, n.6.

Wallet Knife



While mail-order advertisements for this unusual weapon claim it to be the most modern and strongest pocket knife in the world, the threat of physical danger it poses to law enforcement officers is unquestionable. With an overall length of 3 inches, the knife is forged from solid stainless steel and comes complete with a leather credit card case. This wallet knife is being offered for sale to the general public, and while in its carrying case, appears to be a harmless item which can be carried and concealed easily in a pocket or purse.

(Submitted by the Freeburg, IL, Police Department)

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