Circuit Court for Garrett County
Case No.: C-11-CR-22-000009

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1538

September Term, 2022

STATE OF MARYLAND

v.

BRETT W. FRATZ

Kehoe,
Arthur,
Woodward, Patrick L.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: April 14, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Brett Wayne Fratz, appellee, was charged in the Circuit Court for Garrett County with eight counts of narcotics-related offenses arising from the seizure of fentanyl, methamphetamine, and drug paraphernalia following a traffic stop on December 10, 2021. Appellee subsequently moved to suppress the evidence seized during and following the traffic stop, arguing that the warrantless use of a Global Positioning System ("GPS") device by police officers to monitor appellee's location as a part of a narcotics-related investigation violated appellee's rights under the Fourth Amendment. A hearing on the motion was held, at the conclusion of which the trial judge granted appellee's motion to suppress. The State filed this timely appeal.

The State raises one question for our review: "Did the circuit court err in granting [appellee]'s motion to suppress drug contraband recovered during and subsequent to a traffic stop?"

For the reasons set forth below, we conclude that the circuit court erred in granting appellee's motion to suppress the evidence recovered during and subsequent to the traffic stop. Accordingly, we shall reverse the judgment of the circuit court and remand for further proceedings.

BACKGROUND

A hearing on appellee's motion to suppress was held on October 26, 2022. The following evidence was adduced at that hearing.

Sometime prior December 4, 2021, a confidential informant approached the Garrett County police and offered to provide information regarding the narcotics-related

activities of appellee in exchange for leniency in a pending probation matter. The confidential informant advised Corporal Timothy Sanders, an investigator in the Garrett County Sherriff's Office narcotics unit, that appellee purchases drugs in Morgantown, West Virginia, transports said drugs across state lines into Maryland, and then sells the drugs in Maryland.

On December 4, 2021, the confidential informant advised Corporal Sanders that appellee asked the confidential informant to drive appellee to Morgantown, West Virginia that day so that appellee could purchase drugs. Corporal Sanders' partner, Lieutenant Mark Pfaff, outfitted the confidential informant with two monitoring devices: (1) a cellphone, with a battery life of approximately four hours, that could record and transmit live audio to the investigators; and (2) a wristwatch, with a battery life of approximately one hour, that could record, but not transmit, video and audio. The confidential informant then drove to a residence in Oakland, Maryland owned by the person with whom appellee was residing. Rather than traveling to Morgantown that day, appellee and the confidential informant instead "hung out" at the residence in Oakland, Maryland. While at the residence, the confidential informant used his cellphone to take and send photographs to the investigators, including photographs of a woman counting money and several people using drugs.

On December 10, 2021, the confidential informant notified the investigators that appellee had again requested that the confidential informant drive him to Morgantown, West Virginia so that appellee could purchase drugs. Around 8:00 a.m., the investigators

met with the confidential informant and outfitted him with the same cellphone and wristwatch used on December 4, 2021. Additionally, with the confidential informant's consent, Lieutenant Mark Pfaff placed a GPS device on the confidential informant's vehicle. The GPS tracking system would send text messages to Corporal Sanders and Lieutenant Pfaff when the vehicle would move, with a time delay of at least thirty seconds. The purpose of the GPS device was for "officer safety" and "as a backup" in the event that the investigators lost contact with the confidential informant. The GPS device was also used to monitor appellee's movements into and out of West Virginia.

When the confidential informant arrived at the Oakland, Maryland residence where appellee was residing, he spoke with appellee for roughly an hour before he, appellee, and appellee's girlfriend, Krista Ridder, left for Morgantown. Through the cellphone device, investigators could hear appellee talking to the confidential informant and Ridder about buying drugs in Morgantown for a frequent customer.

At 12:06 p.m., the battery in the cellphone device ran out and stopped working. At 12:37 p.m., while the confidential informant, appellee, and Ridder were stopped at a convenience store, the confidential informant called the investigators and told them that appellee had bought the drugs as planned and that they were headed back into Maryland. The confidential informant sent a photograph to Corporal Sanders of the drugs in the confidential informant's lap, which included two bags of suspected Fentanyl or heroin and a bag of methamphetamine.

Thereafter, the police set up a surveillance point along Interstate 68 near the border of Maryland and West Virginia in an effort to locate the confidential informant's vehicle as it crossed the state line back into Garrett County, Maryland. At about 1:11 p.m., the police at the surveillance point spotted the confidential informant's vehicle on Interstate 68 as it crossed the state line into Maryland. The officers executed a pretextual traffic stop based on the vehicle traveling over the speed limit. At the time that the vehicle was stopped, appellee was seated in the front passenger seat, while the confidential informant was driving the vehicle and Ridder was in the right-side passenger seat behind appellee. During the time that appellee was in West Virginia that day, police officers monitored appellee's location and movements in real time (except for the thirty-second time delay) through periodic text messages received from the GPS device.

Once the vehicle stopped, the occupants exited the vehicle upon the officers' request and were separated from one another. Soon thereafter, a K-9 unit arrived at the scene, and the dog alerted positively to the presence of controlled substances in the vehicle. Lieutenant Pfaff then *Mirandized* the confidential informant, appellee, and Ridder. At this point, Ridder informed Lieutenant Pfaff that there was "some foil with burnt Fentanyl" in her purse, which was in the vehicle. Ridder further admitted to Lieutenant Pfaff that illegal drugs were hidden inside her bra, and handed over the drugs to Lieutenant Pfaff. Ridder told the police that when the vehicle was being stopped, appellee passed the drugs to her and instructed her to hide them. The drugs recovered from Ridder appeared consistent with the drugs in the photograph sent by the confidential

informant to Corporal Sanders earlier that day, but were a smaller quantity than what was pictured in the photograph. Once at the detention center, appellee told a correctional officer that he was concealing drugs in his pants. When appellee was strip searched, a bag of CDS was recovered.

Appellee was charged with one count of importing a controlled dangerous substance into Maryland, four counts of possession of a controlled dangerous substance with the intent to distribute the same, two counts of possession of a controlled dangerous substance, and one count of possession of paraphernalia.

On April 1, 2022, appellee filed a motion to suppress all direct and derivative evidence seized as a result of the GPS monitoring by the police. In the motion, appellee argued that "U.S. v. Jones, 132 S. Ct. 945 (2012)[] establishes that use of a GPS device to track individuals implicates the Fourth Amendment and requires an application and issuance of a warrant supported by probable cause." Because there was no "[w]arrant issued authorizing the GPS tracking of [appellee] who was the target of the investigation," appellee concluded that all evidence seized as a result of the GPS tracking device that "implicate[d appellee] in any CDS related activities must be excluded under the 'fruit of the poisonous tree doctrine.'"

The State filed a response to appellee's motion in which it conceded that the "[GPS] device was used in this case to monitor the movements of the vehicle in which [appellee] was traveling and that no warrant was sought in this matter." Nevertheless, the State argued that the confidential informant, who was "the owner/driver of the vehicle in

question," gave consent to the officers and that "the consent by the owner and occupant of a locus (in this case the movable locus of a vehicle) is a recognized exception to the warrant requirement." In the alternative, the State contended that "[t]he source of information about [appellee]'s activity and immediate possession of drugs did not come from the GPS but rather from other lawful sources."

At the beginning of the suppression hearing, and prior to the taking of evidence, appellee reiterated his argument that he was challenging the constitutionality of "the use of the GPS device to track [appellee] during this investigation," because under the Fourth Amendment, "law enforcement is required to obtain a search and seizure warrant prior to using a GPS device in any investigation to track a defendant and that was not done[.]" Also, prior to the taking of evidence at the suppression hearing, appellee agreed that the confidential informant consented to the placement "of any and all devices" used in the investigation and that it was the confidential informant who was driving his vehicle "during this process."

After evidence was received at the suppression hearing, the parties presented closing arguments to the trial court. The State argued that *Jones* was distinguishable from the instant case because *Jones* involved the placement of a GPS monitoring device "on a suspect's vehicle" and thus did not "address the owner or driver of the vehicle he[re] that person, which was the confidential informant, . . . providing consent." The State also argued that, even if "*Jones* [was] not modified by . . . the consent of the owner of the vehicle," there was independent information that gave the police sufficient

probable cause to stop and search the vehicle. Appellee responded by repeating his contention that *Jones* "says that people have a Fourth Amendment privacy interest in their location and that a warrant is required to track their location." According to appellee, the police used the GPS "to track [appellee's] movements," but "they did not obtain a warrant, that *Jones* requires that they do." Appellee also argued that the independent source rule did not apply to the instant case because the police relied on the GPS device in conjunction with the audio monitoring device and thus there was no "truly independent, untainted legal source."

At the conclusion of the suppression hearing, the circuit court granted appellee's motion to suppress the evidence seized during and subsequent to the traffic stop. The court stated, in relevant part:

> A lot of talk about a lot of different moving pieces in the course of this day and the events and, frankly, prior to that day in terms of anticipation and expectations and sprinkled with some history that is consistent with those expectations. The crux of the Defense motion is that the search required, whether you talk about the GPS, the stop, the search required a search warrant. That is the crux of the motion.
>
> This is, you know, not just one event, hey, we suspect this guy in the car was -- we suspect he's got drugs. We're going to stop him and search. Tie together all of these pieces, and the Court finds that there was probable cause that existed. In terms of whether, when it was immediate or timely might be a good way to put it, it had been, in the Court's estimation, simmering out there for a week or so without a specific date-oriented plan to engage in the law enforcement action.
>
> The Court finds that given the existence of probable cause well before the date of this event, but with, again, the ball of information that's had at that point, that the GPS, the stop, the search required a search warrant.

> The Fourth Amendment provides that warrantless search warrants are per se is the quote, unless one of the few narrow exceptions applies. For instance, there could be exigency which doesn't quite exist, doesn't exist here. I mean there was in the day of hey, now's the day; now's the day this is going to go down, that the Court does not find to be an exigent circumstance on that date because it was so well anticipated.
>
> Clearly, here the target in the investigation was [appellee], although he was the passenger in the CI's car, he was the, like I said, the target. The Court finds that the CI consenting, particularly as an agent of law enforcement, does not undo [appellee]'s privacy rights and expectations, constitutionally, under the Fourth Amendment and does not preclude the necessity for an issuance of a search warrant in this case. Because of that the Court will grant the Motion to Suppress.

The State filed this timely appeal. Additional facts shall be provided as necessary to our resolution of the question presented.

STANDARD OF REVIEW

The standard of review for motions to suppress is as follows:

> "Our review of a circuit court's denial of a motion to suppress evidence under the Fourth Amendment, ordinarily, is limited to the information contained in the record of the suppression hearing and not the record of the trial. . . . [W]e review legal questions *de novo*, and where, as here, a party has raised a constitutional challenge to a search or seizure, we must make an independent constitutional evaluation by reviewing the relevant law and applying it to the unique facts and circumstances of the case. We will not disturb the [circuit] court's factual findings unless they are clearly erroneous."

Grant v. State, 449 Md. 1, 14-15 (2016) (quoting *State v. Wallace*, 372 Md. 137, 144 (2002)).

DISCUSSION

A. Parties' Contentions

The State first[1] argues that the GPS surveillance did not constitute a "search" under the Fourth Amendment, and therefore, suppression of the evidence seized during and subsequent to the traffic stop was improper. The State cites to *State v. Andrews*, in which this Court held that "'[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[.]'" 227 Md. App. 350, 373 (2016) (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). The State then points to the case of *United States v. Knotts*, in which the Supreme Court held that a person travelling in an automobile on public roads has no reasonable expectation of privacy in his or her movements. 460 U.S. 276, 281 (1983). The State argues that *Knotts* is similar to this case because the surveillance devices in both cases were placed with the property owner's consent and used to track the defendant's movements in real time along public roadways. Further, the State contends that the purpose of the GPS device was to confirm the vehicle's course of travel along public roads, and "like the beeper surveillance used in

[1] The State's second argument on appeal is that, "even if the GPS surveillance violated the Fourth Amendment, the investigators in this case had lawful, independent sources that led to the discovery of the drug contraband." According to the State, the exclusionary rule for a Fourth Amendment violation does not apply when "the government actually obtained the evidence by reliance on an untainted, legal source." In light of our holding *infra* that the use by the police of a GPS device to monitor appellee's location under the circumstances of the instant case does not constitute a "search" within the meaning of the Fourth Amendment, we need not address the State's second argument on appeal.

Knotts, the GPS tracking only supplemented more critical forms of surveillance, including audio surveillance through a body wire device, visual surveillance of the vehicle, and direct communication with the informant."

The State also argues that *United States v. Jones*, 565 U.S. 400 (2012), which appellee relied on in the lower court, is "irrelevant" because "there [was] no physical trespass at issue here." According to the State, the Supreme Court held in *Jones* that the placement of the GPS device on Jones's vehicle without a warrant amounted to a physical trespass by police into a constitutionally protected area, and therefore was a search within the meaning of the Fourth Amendment. *See id.* at 406-07. The State points out that the Supreme Court in *Jones* expressly distinguishes its facts from those in *Knotts*, noting that a physical trespass was not at issue in *Knotts*. The State concludes that the instant case is not a trespass case, and therefore, the use of the GPS device was not a "search" under the Fourth Amendment.

In response, appellee argues that the "critical flaw in the State's primary position is that it was not raised in the lower court." Specifically, appellee asserts that in the lower court, "the State never argued: (1) that [appellee] lacked an expectation of privacy in his locational data; or (2) that the use of GPS surveillance to monitor his location was not a 'search' under the Fourth Amendment." Appellee contends that the State has the burden of proof to justify the warrantless police action, and because it failed to argue the aforementioned points, the State is "estopped from debuting these contentions on appeal." In support of his argument, appellee cites to *Epps v. State* for the proposition

that once a "'defendant establishes initially that the police proceeded warrantlessly, the burden shifts to the State to establish that strong justification existed for proceeding under one of the . . . exceptions to the warrant requirement.'" 193 Md. App. 687, 704 (2010) (quoting *Duncan v. State*, 27 Md. App. 302, 305 (1975)). Appellee also asserts that "[t]he State justified solely the *placement* of the GPS tracker, and never defended the analytically separate *use* of the GPS tracker to monitor [appellee]'s location or movements." For these reasons, appellee contends that arguments relating to the use of the GPS device—including the State's reliance on *Knotts*—are not properly before this Court.

In its reply brief, the State responds to appellee's preservation argument. The State begins by observing that, "[a]s the moving party in a Fourth Amendment motion to suppress, [appellee] set the scope of the issues in this case, not the State." The State points out that the burden never shifted from appellee to the State because "the State argued that *Jones* did not apply to the GPS surveillance here. Put differently, the State contended that [appellee] did not meet his initial burden of alleging a Fourth Amendment search in relation to the GPS surveillance." The State further asserts that, even though *Knotts* was not mentioned by the State in the lower court, the State's citation to and reliance on *Knotts* in this Court is proper because "[c]iting a case not mentioned below is different from raising an issue that was not considered below[,]" and "any reading of *Jones* includes an acknowledgment of *Knotts*." Therefore, according to the State, any argument based on *Jones* in the trial court necessarily involved an analysis of whether a

governmental intrusion is a Fourth Amendment search under the common law trespass test, as applied in *Jones*, or the reasonable expectation of privacy test, as applied in *Knotts*.

B. Preservation of the State's Arguments

In *Epps*, this Court stated:

> As the proponent of the motion to suppress the physical evidence, it was, of course, the appellant who bore the initial burdens of both production and persuasion. It was the appellant who, *per* his motion, chose the Fourth Amendment as the field on which to do battle. **It was the appellant, moreover, who had then to show that he enjoyed a Fourth Amendment coverage in the first instance and that a search and/or seizure occurred in ostensible violation of that protection**.

193 Md. App. at 701-02 (emphasis added).

In the lower court, it was appellee, as the proponent of the motion to suppress, who bore the initial burdens of both production and persuasion. It was appellee who chose the field on which to do battle. In his motion to suppress, it was appellee who defined the issue as being one of GPS tracking under *Jones*. Specifically, as indicated previously, appellee stated in his motion to suppress "[t]hat, U.S. v. Jones, 132 S. Ct. 945 (2012), establishes that use of a GPS device to track individuals implicates the Fourth Amendment and requires an application and issuance of a warrant supported by probable cause." In other words, appellee asserted that the use by the police of a GPS device to track appellee's movements while riding in the confidential informant's vehicle constituted a "search" within the meaning of the Fourth Amendment.

Further, at the hearing on the motion, appellee reiterated the issue that he was raising:

> [I]t came to Defense's knowledge, uh, through a preliminary hearing that a GPS device was utilized in this investigation. **Defense has presented that** -- wishes to challenge the constitutionality of that, indicating that the tracking, **the use of the GPS device to track [appellee] during this investigation violates his Fourth Amendment privacy interests** and, in particular, that in order to do that, law enforcement is required to obtain a search and seizure warrant prior to using a GPS device in any investigation to track a defendant and that that was not done and the State -- and the **Defense would be motioning** at, uh, at the end -- at the conclusion of this hearing **to suppress any and all direct or indirect evidence obtained during the time in tracking and use of the GPS device as it, uh, as a Fourth Amendment violation of [appellee]'s privacy interests**.

(Emphasis added.)

The State argued in response that *Jones* is not applicable to the instant case because *Jones* "essentially says a search warrant is needed to plant a GPS monitoring device *on a suspect's vehicle*[,]" and unlike *Jones*, the GPS surveillance in this case did not stem from a trespass on appellee's vehicle. (Emphasis added.) The State further explained:

> *Jones* doesn't contemplate or address the owner or driver of the vehicle he[re] that person, which was the confidential informant, . . . providing consent.
>
> The owner of a vehicle, forgetting the GPS issue at this point in time, may consent to its search despite the presence of other occupants in the vehicle. The logic of what is private property dictates the occupant's rights are subordinate to the owner's rights and allow access to what belongs to him or her, and that is, generally, *U.S. vs. Matlock*[, 415 U.S. 164 (1974)].

Under Maryland Rule 8-131(a), the appellate court will not ordinarily decide any issue "unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." The primary purpose of this rule is "'to ensure fairness for all parties and to promote the orderly administration of law.'" *In re J.R.*, 246 Md. App. 707, 754-55 (2020) (quoting *Jones v. State*, 379 Md. 704, 713-14 (2004)). In our view, the State's arguments on appeal are the same as before the trial court: *Jones* is not applicable, and the use by the police of the GPS device, with the vehicle owner's consent, to track appellee's movements while riding in the vehicle does not constitute a search within the meaning of the Fourth Amendment.

Appellee argues, nevertheless:

> The State's contention in the lower court, therefore, was solely that the GPS tracker was validly placed on the vehicle with the informant's consent. . . . The State never contended that the use of the GPS tracker was permissible under *Knotts*. Indeed, it never cited *Knotts*. It never contended that [appellee] lacked a privacy interest in his travels. . . . It never argued the use of that GPS tracker to monitor [appellee]'s location did not constitute a search under the Fourth Amendment. . . . It did not contest [appellee]'s position that a warrant was needed to monitor his location. The State justified solely the *placement* of the GPS tracker, and never defended the analytically separate *use* of the GPS tracker to monitor [appellee]'s location or movements.

Contrary to appellee's argument above, the State's contention in the lower court was not limited solely to the placement of the GPS device on the confidential informant's vehicle. Indeed, appellee, as the proponent of the motion, never raised the issue of the constitutionality of the *placement* of the GPS device. Appellee challenged only the use

of the GPS device "to track" appellee. Moreover, by arguing the inapplicability of *Jones*, the State necessarily argued: (1) the inapplicability of its holding—"the Government's installation of a GPS device on a target's vehicle, and *its use of that device to monitor the vehicle's movements*, constitutes a 'search[,]'" 565 U.S. at 404 (emphasis added); and (2) the lack of a reasonable expectation of privacy in a defendant's location under *Knotts*, because the Supreme Court expressly distinguished *Knotts* in the *Jones* opinion.

Further, the fact that the State presented authority in this Court that was not advanced in the trial court does not equate to the State raising a new argument. Specifically, appellee argues that the State's failure to cite to *Knotts* in the lower court precludes them from citing to *Knotts* in this Court. Appellee is incorrect. The fact that the State is now citing to *Knotts* as additional authority to support its original argument in the lower court does not amount to the creation of a new argument. As this Court explained in *State v. Purvey*, 129 Md. App. 1, 12 (1999):

> The State's "new" arguments are merely a fleshing-out, usually with information from the record, of the skeletal theories raised at the hearing. As such, they are not new. In both the post-conviction hearing and the briefs, the State has argued that defense counsel's performance was not constitutionally deficient because, even had he advanced Purvey's current theory in the trial court, the facts would not present adequate grounds for suppression of his statement to the police. Although presenting more detailed arguments might have been desirable, the State addressed the ultimate issue of whether Purvey had suffered ineffective assistance of counsel, at least in the general sense, at the post-conviction hearing.

Similarly, here, the State's use of *Knotts* is merely a fleshing-out of its original response that the use of the GPS device did not amount to a Fourth Amendment search. For these reasons, the State's arguments regarding the issue of whether the use of the

GPS device to track appellee's movements under the circumstances of this case constitutes a search within the meaning of the Fourth Amendment are properly before us.

C. Merits on the Fourth Amendment Argument

1. Applicability of Jones to the Present Case

The central argument of appellee both in the trial court and before this Court is that under *Jones*, a GPS device placed on a vehicle to track the movements of an individual constitutes a search within the meaning of the Fourth Amendment, and thus, a warrant supported by probable cause is required. We disagree with appellee's overly broad statement of the holding of *Jones* and conclude that *Jones* is inapplicable to the instant case.

In *Jones*, the Supreme Court reviewed the installation of a GPS tracking device on a suspect's vehicle to track the movements of the suspect.[2] 565 U.S. at 402-03. Under a common-law trespass rationale, Justice Scalia's majority opinion held that a Fourth Amendment search had occurred. *Id.* at 404. The Court stated: "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Id.* (footnote omitted). The Court explained:

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of

[2] Despite the vehicle being registered in the name of the suspect's wife, the Court concluded that the suspect had a possessory interest in the vehicle because the officers installed the GPS device after the suspect's wife turned the vehicle's keys over to the suspect for his exclusive use. *Jones*, 565 U.S. at 404, n 2.

> obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.

Id. at 404-05. The Court then quoted from the case of *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765), wherein Lord Camden wrote:

> "[O]ur law holds the property of every man so sacred, that **no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser**, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."

Jones, 565 U.S. at 405 (emphasis added).

The holding in *Jones* is based upon a trespassory intrusion by police into an ownership or possessory property interest of the defendant. Here, there was no trespass into an ownership or possessory property interest of appellee. Appellee conceded that the vehicle in which he was riding was the confidential informant's vehicle, and that the confidential informant was driving the vehicle. As a result, appellee had no ownership or possessory right in the confidential informant's vehicle. Appellee also conceded that the confidential informant, as owner of the vehicle, gave the police permission to install the GPS device for the purpose of monitoring appellee's movements while riding in the vehicle as part of an investigation into appellee's narcotics-related activities. Under these circumstances, we conclude that there was no trespass by the government into an ownership or possessory right of appellee, and thus, there was no search within the meaning of the Fourth Amendment under the authority of *Jones*.

2. Applicability of Knotts to the Present Case

As the trial court correctly observed, the granting of consent by the confidential informant did not undo appellee's privacy rights and expectations. In other words, appellee is claiming that, even with the consent of the confidential informant, the use of a GPS device to track the movements of appellee constitutes a governmental intrusion into an area where appellee has a reasonable expectation of privacy. Under the circumstances of this case, appellee did not have any reasonable expectation of privacy in the GPS monitoring of his movements while riding in a vehicle on the public roads. We shall explain.

In *Knotts*, police officers installed a beeper inside a five-gallon container of chloroform with the consent of the seller of the chloroform. *Knotts*, 460 U.S. at 278. It was suspected that the chloroform was being purchased to make illegal drugs. *Id.* After the chloroform was purchased by one of the respondent's co-defendants, the container of chloroform was placed in a vehicle. *Id.* The police officers followed the vehicle containing the chloroform with the assistance of both visual surveillance of the vehicle and a monitor that received signals from the beeper in the container. *Id.* They were able to trace the location of the container to a secluded cabin owned by the respondent. *Id.* The officers later obtained a search warrant for the cabin and during the execution of the warrant, discovered a drug-making laboratory. *Id.* at 279.

The Supreme Court held that the monitoring by police of the beeper signals from the container in the vehicle did not invade any legitimate expectation of privacy on the

respondent's part, and thus "there was neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment." *Id.* at 285. The Court noted that "[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." *Id.* at 281. According to the Court, there is a diminished expectation of privacy in an automobile, because "[a] car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Id.* (quotation marks and citation omitted). Consequently, the Court held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.*

The use of the beeper to monitor the vehicle did not affect the Court's analysis. The Court explained:

> The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. 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.

Id. at 282.

Similar to *Knotts*, appellee did not have a reasonable expectation of privacy in his movements while traveling in the confidential informant's vehicle. By riding in a vehicle on the public roads, appellee was in plain view and subject to public scrutiny. The use of the GPS device by police to monitor appellee's location in real time was nothing more

than a technological augmentation of what could be done by visual surveillance under the Fourth Amendment.

3. United States v. Dewilfond

A recent case from the Eighth Circuit is directly on point both factually and legally with the instant case. In *United States v. Dewilfond*, 54 F.4th 578, 579 (8th Cir. 2022), a confidential source ("CS") advised the police that the appellant[3] was involved in distributing methamphetamine and that the appellant wanted to borrow the CS's vehicle to purchase a large quantity of methamphetamine. With the CS's consent, the police placed a GPS tracking device on the CS's vehicle. *Id.* Later that day the CS informed the police that he had loaned his vehicle to the appellant. *Id.* Thereafter, for a period of two days, the police monitored the vehicle's movements. *Id.* When the vehicle arrived at an inn on the second day, the police surrounded the vehicle, removed the appellant and his girlfriend, and arrested them. *Id.* at 579-80. After waiving his *Miranda* rights, the appellant told the police that methamphetamine was in the vehicle. *Id.* at 580. A subsequent warrantless search revealed 1,000 grams of methamphetamine and other contraband. *Id.*

Before the district court, the appellant moved to suppress all direct and derivative evidence seized as a result of the warrantless surveillance of his location through use of GPS monitoring. *Id.* In denying the motion to dismiss, the district court concluded that

[3] Although the case is styled as *United States v. Dewilfond*, the opinion names Joshua Andrew Dewilfond as "Appellant" and the United States of America as "Appellee." 54 F.4th at 578.

"'any expectation of privacy that [the appellant] had in the vehicle was eviscerated by [the CS's] consent to the installation of the GPS.'" *Id.*

On appeal to the Eighth Circuit, the appellant argued that he had a reasonable expectation of privacy in his location and movements in the borrowed vehicle under *Jones*, and therefore, law enforcement's warrantless surveillance was an illegal Fourth Amendment search. *Id.* The Eighth Circuit rejected the appellant's argument, holding that *Jones* did not control for two reasons. *Id.* First, the CS consented to the installation of the GPS device before the appellant borrowed the vehicle. *Id.*

> Unlike the investigative target in *Jones*, whose wife owned the vehicle to which law enforcement attached a tracking device while it was parked in public, [the appellant] had no property interest or expectation of privacy in the vehicle when CS consented to the installation of a GPS tracking device before [the appellant] borrowed the car.

Id. Second, the appellant did not challenge the placement of the GPS device, but instead challenged only the surveillance of his location using a GPS device, which the *Jones* Court expressly declined to address where a classic trespassory search was not involved. *Id.*; *see Jones*, 565 U.S. at 412-13 (explaining that the Court declined "to grapple with the 'vexing problems' [posed by GPS monitoring] where a classic trespassory search is not involved").

The appellant further argued that despite the CS's consent, he had a reasonable expectation of privacy in his public movements and location in the borrowed vehicle. *Dewilfond*, 54 F.4th at 581. The Eighth Circuit rejected such argument, stating that "[t]his contention ignores the well-established Fourth Amendment principle that a person

'has a lesser expectation of privacy in a motor vehicle because its function is transportation.'" *Id.* (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974)). The Eighth Circuit also cited to *Knotts* for the proposition that a person has no reasonable expectation of privacy in his movements while traveling in an automobile on public roads. *Id.*

Lastly, the appellant argued that *Carpenter v. United States*, 585 U.S. ____, 138 S. Ct. 2206 (2018) controlled rather than *Knotts*. *Id.* The Eighth Circuit rejected such argument because "[a]t issue in *Carpenter* was a search of historical cell phone location data stored by third parties, *not* real-time tracking of a vehicle operating on public roadways." *Id.* Further, the Court said that the *Carpenter* Court emphasized that its holding was narrow, noting that "[w]e do not express a view on matters not before us [such as] real-time [cell phone location data]." *Carpenter*, 138 S. Ct. at 2220. The Eighth Circuit also distinguished *Carpenter* from the facts of its own case, explaining that "officers with reason to suspect a vehicle was being used for drug trafficking briefly used real-time GPS data 'to find [the appellant's] location in public, not to peer into the intricacies of his private life.'" *Dewilfond*, 54 F.4th at 581 (quoting *United States v. Hammond*, 996 F.3d 374, 389 (7th Cir. 2021)).

For the same reasons as set forth by the Eighth Circuit in *Dewilfond*, we reject appellee's argument that *Jones* required a warrant before the police could use a GPS device to monitor appellee's location under the circumstances of the instant case, and reject appellee's argument that he "had a reasonable expectation of privacy in the whole of his physical movements."

CONCLUSION

In the instant case, a confidential informant advised the police that appellee wanted the confidential informant to drive him to West Virginia to purchase illegal drugs and return to Maryland to sell the same. With the consent of the confidential informant, the police placed a GPS device on the confidential informant's vehicle for the purpose of monitoring appellee's movements into and out of West Virginia. Thereafter, the police used the GPS device to monitor appellee's movements in real time while appellee was riding in the confidential informant's vehicle on the public roads. Under these circumstances, (1) the placement by the police of the GPS device on the confidential informant's vehicle, with the confidential informant's consent, and the use of the device to monitor appellee's movements as a passenger in said vehicle was not a trespassory intrusion into an ownership or possessory right of appellee; and (2) appellee had no reasonable expectation of privacy in the real-time monitoring of his movements while riding in a vehicle on the public roads. Therefore, we hold that the use of a GPS device by the police to monitor appellee's movements in real time while appellee was riding in the confidential informant's vehicle on the public roads did not constitute a search within the meaning of the Fourth Amendment. Accordingly, we shall reverse the judgment of the circuit court and remand for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR GARRETT COUNTY REVERSED. THE CASE IS REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.