[DO NOT PUBLISH]

Pet. App. 1a

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10877
Non-Argument Calendar

D.C. Docket No. 1:19-cr-00054-WKW-WC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSHUA DRAKE HOWARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(May 27, 2021)

Before WILSON, ROSENBAUM, and EDMONDSON, Circuit Judges.

PER CURIAM:

Joshua Howard appeals his convictions after pleading guilty to possessing with intent to distribute methamphetamine, possessing a firearm in relation to a controlled substance offense, and to possessing a firearm with an obliterated serial number: violations of 21 U.S.C. § 841(a)(1), and 18 U.S.C. §§ 924(c)(1)(A), 922(k). On appeal, Howard challenges the district court's denial of his motion to suppress (1) physical evidence seized during a traffic stop and (2) incriminating statements Howard later made to police. No reversible error has been shown; we affirm.

I. Background

On 21 February 2018, officers with the City of Dothan, Alabama, Police Department learned from a confidential informant ("CI-1") that Howard planned to travel to Phenix City, Alabama, that night to pick up some methamphetamine. Officer Tye sought additional information about Howard from a second CI ("CI-2"): an informant who had begun working with Officer Tye the day before and

who had already provided "good information" about four other drug-trafficking cases.

CI-2 told Officer Tye that she knew Howard and knew that Howard sold methamphetamine. CI-2 agreed to contact Howard for more information. CI-2 later reported to Officer Tye that Howard planned to travel to the Phenix City area that day to pick up methamphetamine, needed to borrow a vehicle for his trip, and asked to borrow CI-2's truck.

With CI-2's consent, Officer Tye installed a GPS tracking device on CI-2's truck at about 2:30 p.m. The GPS tracking device was designed to send a signal when in motion, allowing officers to monitor remotely the real-time location of a moving vehicle. The device sent no signal when not in motion.

About two hours after installation of the GPS, Howard took possession of CI-2's truck. Officer Tye began tracking the truck using the GPS; he also confirmed visually that the GPS was reporting accurately the truck's location. Officers then ceased visual surveillance and monitored the truck's movement solely via GPS.

According to the GPS reporting, the truck left Dothan later that day, traveled along the main highway between Dothan and Phenix City, and stopped moving for the night in Seale, Alabama. The next day, the truck left Seale, stopped briefly at

an address in Phenix City, returned to Seale, and then headed back in the direction of Dothan.

As the truck approached Dothan, officers resumed visual surveillance on the truck and confirmed that Howard was driving. When the truck parked at a fast-food restaurant at about 2:00 p.m., Officer Tye pulled behind the truck and activated his emergency lights and siren.

Officer Tye ordered Howard to exit the truck and placed Howard in handcuffs. As he did so, Officer Tye saw a handgun in the driver's-side door pocket. Officer Tye searched Howard's person and found a small baggie of methamphetamine. During a search of the truck, officers also discovered a black tactical bag containing three bags of methamphetamine, drug paraphernalia, a second handgun, and ammunition.

Howard was transported to the police station. After being advised of his Miranda[1] rights and after signing a waiver form, Howard made incriminating statements to the police.

Howard later moved to suppress the evidence found during the traffic stop and to suppress his post-Miranda statements. Howard argued that the police violated his Fourth Amendment rights by monitoring his movements via GPS and

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

by stopping him without reasonable suspicion. Howard also argued that his incriminating statements constituted fruit of an illegal search and seizure.

Following a suppression hearing, the magistrate judge issued a report and recommendation ("R&R") recommending denying Howard's motion. Howard filed timely objections to the R&R, which the district court overruled. Then, in a 26-page order, the district court adopted the R&R with modifications and denied Howard's motion to suppress.

Howard entered a conditional guilty plea, reserving his right to appeal the district court's denial of his motion to suppress. The district court sentenced Howard to a total of 140 months' imprisonment and 5 years' supervised release.[2]

II. Discussion

"In reviewing a district court's denial of a motion to suppress, we review its findings of fact for clear error and its application of law to those facts de novo," construing the facts in the light most favorable to the prevailing party below. United States v. Ramirez, 476 F.3d 1231, 1235-36 (11th Cir. 2007). We review de

[2] Howard raises no challenge to his sentence on appeal.

novo a district court's determinations about reasonable suspicion. See Ornelas v. United States, 517 U.S. 690, 699 (1996).

A. GPS Monitoring[3]

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Generally speaking, whether "government-initiated electronic surveillance" constitutes a "search" triggering Fourth Amendment protection depends on whether a person has a reasonable expectation of privacy in the area searched. See Smith v. Maryland, 442 U.S. 735, 740 (1979) (citing Katz v. United States, 389 U.S. 347 (1967)).

The Supreme Court has concluded that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." See United States v. Knotts, 460 U.S. 276, 281 (1983). No expectation of privacy exists because a person driving on public streets conveys voluntarily "to anyone who wanted to look the fact that he was

[3] This appeal involves only the lawfulness of the officers' monitoring of the GPS device. Howard raises no challenge to the district court's determination that the installation of the GPS device on CI-2's truck -- with CI-2's consent -- constituted no Fourth Amendment search of Howard.

traveling 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." Id. at 281-82.

In Knotts, police monitored the movement of a vehicle using a combination of visual surveillance and a radio-transmitting beeper. The beeper was installed -- with the pertinent chemical company's consent -- inside a 5-gallon drum of chloroform that was later sold to a co-defendant and then transported by car from Minneapolis, Minnesota, to a remote cabin in Wisconsin. Id. at 278. The Supreme Court concluded that the officers' monitoring of the beeper signals along public streets and highways invaded no legitimate expectation of privacy and, thus, constituted no "search" or "seizure" within the meaning of the Fourth Amendment. Id. at 285. The Supreme Court noted that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancements as science and technology afforded them in this case." Id. at 282.

Like the beeper in Knotts, the GPS tracking device at issue in this case "augmented [the officers'] sensory faculties" by allowing the officers to gather remotely information about the truck's location and movement on public roads: information that could have been obtained by police through visual surveillance.

Howard's attempts to distinguish Knotts are unpersuasive. First, we can discern no material difference between the duration of the beeper monitoring involved in Knotts (which seems to have taken place over the course of one day) and the 22-hour GPS monitoring involved in this case.

Second, that the GPS tracker detected Howard's stops along his travel route -- stops that could have been observed via visual surveillance -- is no different than the circumstances in Knotts. The officers in Knotts followed the car in which the beeper-containing chloroform drum was first placed as the car drove to and stopped at a co-defendant's house. The container was then transferred to a second car, which officers followed on public roadways across state lines to the car's final destination. Id. at 278. The Supreme Court said expressly that a person lacked an expectation of privacy in "the fact of whatever stops he made" while traveling on public roads. Id. at 281-82.

We also reject Howard's assertion that this case is controlled by the Supreme Court's decision in Carpenter v. United States, 138 S. Ct. 2206 (2018). In Carpenter, the Supreme Court concluded that the government's warrantless acquisition of 127 days' worth of historical cell-site location information ("CSLI")[4] constituted a search under the Fourth Amendment. The Supreme Court

[4] Cell-site location information is the time-stamped data generated each time a cell phone connects to the nearest cell tower. See Carpenter, 138 S. Ct. at 2211.

stated that a person "maintains a reasonable expectation of privacy in the whole of his physical movements." Id. at 2219. The Supreme Court stressed that -- unlike the monitoring of a container or a vehicle, as in Knotts -- people "compulsively" carry cell phones on their person at all times. The tracking of a cell phone thus "achieves near perfect surveillance" of the phone's owner as the "cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." Id. at 2218. The Supreme Court also found significant the retrospective nature of the CSLI data, which allowed police to reconstruct a person's past movements without the police having decided in advance to investigate that person. Id.

We find the circumstances of this case -- involving the real-time GPS monitoring of a vehicle traveling on public roads -- easily distinguishable from the historical CSLI data at issue in Carpenter.

The district court concluded properly that this case is controlled by Knotts, which remains good law.[5] Under Knotts, Howard had no reasonable expectation

[5] The Supreme Court has discussed Knotts in deciding other electronic surveillance cases; these cases neither overrule nor limit the decision in Knotts. See Carpenter, 138 S. Ct. at 2215, 2218 (distinguishing the rudimentary tracking of a vehicle via beeper from the more sweeping and comprehensive tracking of a cell phone via CSLI); United States v. Jones, 565 U.S. 400, 408-09 (2012) (concluding that the installation of a GPS device on defendant's car constituted a Fourth

of privacy in his movements along public roads. The complained-of GPS monitoring thus constituted no "search" under the Fourth Amendment.

B. Traffic Stop

Consistent with the Fourth Amendment, a police officer may conduct a brief investigative stop when the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." Navarette v. California, 572 U.S. 393, 396 (2014). Reasonable suspicion is determined based on the totality of the circumstances, including "both the content of information possessed by police and its degree of reliability." Alabama v. White, 496 U.S. 325, 330 (1990). In deciding whether reasonable suspicion existed at the pertinent time, we consider whether reasonable suspicion existed objectively under the circumstances. See United States v. Nunez, 455 F.3d 1223, 1226 (11th Cir. 2006). An anonymous tip may give rise to reasonable suspicion justifying an investigatory stop if the tip contains "sufficient indicia of reliability." See White, 496 U.S. at 326-27, 332.

Amendment search based on the government's physical trespass; and rejecting the government's reliance on Knotts, a case that involved no government trespass).

The evidence in this case, viewed in the light most favorable to the government, supports the district court's determination that reasonable suspicion existed to justify an investigatory stop of Howard's truck. The officers received a tip from a known informant (CI-1) about Howard's future plans to travel to Phenix City that day to pick up methamphetamine. CI-1's tip was then corroborated by a second non-anonymous informant (CI-2).

That the informants in this case were each known to police -- thus allowing the officers to assess the informants' reputation and subjecting the informants to consequences for being untruthful -- supports the reliability of the information. See Fla. v. J.L., 529 U.S. 266, 270 (2000). Moreover, that CI-2 demonstrated a personal relationship with Howard (evidenced by Howard's sharing with CI-2 his travel plans and asking to borrow CI-2's truck) also weighs in favor of CI-2's reliability. See White, 496 U.S. at 332 (when a tipster has demonstrated "a special familiarity" with a suspect and with the suspect's future itinerary, it is reasonable to believe that the tipster also has "access to reliable information about [the suspect's] illegal activities.").

Through independent police work, the officers were able to confirm significant details of the informants' tips, including the approximate time of Howard's departure, the direction of Howard's travel, and the vehicle he would be

driving. Police corroboration of these kinds of future predictions is another indicator of reliability. See White, 496 U.S. at 332 (concluding an anonymous tip was sufficiently reliable to justify an investigatory stop when the police confirmed the tipster's predictions about the suspect's future actions, including the approximate departure time, the car the suspect would be driving, and the suspect's destination).

Given the totality of the circumstances, the two informants' tips bore sufficient indicia of reliability to give rise to reasonable suspicion that Howard was engaged in criminal activity. The district court committed no error in determining that the traffic stop was lawful.

Because this case involved no unlawful search or seizure, the "fruit of the poisonous tree" exclusionary rule is inapplicable. For background, see Wong Sun v. United States, 371 U.S. 471 (1963) (explaining that the "fruit of the poisonous tree" exclusionary rule bars the introduction of evidence obtained as a direct result of an unlawful search or seizure). The district court thus denied properly Howard's motion to suppress his incriminating statements.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 27, 2021

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-10877-BB
Case Style: USA v. Joshua Howard
District Court Docket No: 1:19-cr-00054-WKW-WC-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Tonya L.

Richardson, BB at (404) 335-6174.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO. 1:19-CR-54-WKW
	)	[WO]
JOSHUA DRAKE HOWARD	)	

MEMORANDUM OPINION AND ORDER

This motion asks whether the Government gets one free day to electronically track a borrowed truck with a GPS tracking device without a warrant. The Supreme Court's long-standing directive that the Fourth Amendment does not apply to a car's movements on public roads is in apparent conflict with its recent attempt to adapt the Amendment to twenty-first-century fears that Big Brother is watching. While courts are no doubt called to extend new protections to new technologies, established constitutional limits are binding so long as they remain the rule of law. Therefore, the motion to suppress is due to be denied.

On August 26, 2019, the Magistrate Judge filed a Recommendation (Doc. # 50) that the motion to suppress filed by Defendant Joshua Drake Howard (Doc. # 28) be denied. Defendant timely objected to the Recommendation. (Doc. # 61.) Upon a *de novo* review of the record and the Recommendation, Defendant's objections relating to the GPS tracking of his borrowed vehicle and relating to

reasonable suspicion for his February 22, 2018 stop (Doc. # 61, at 5–14) are due to be overruled and the Recommendation adopted with modifications. His objection relating to his July 13, 2018 stop (Doc. # 61, at 14–15) is due to be overruled and the Recommendation adopted without modification. The Recommendation's findings of fact and its conclusions of law regarding installation of the GPS device and probable cause to search the truck (Doc. # 50, at 2–6, 7–10, 19–20) are due to be adopted without modification.

I. STANDARD OF REVIEW

When a party objects to a Magistrate Judge's Report and Recommendation, the district court must review the disputed portions *de novo*. 28 U.S.C. § 636(b)(1). The district court "may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions." Fed. R. Crim. P. 59(b)(3). *De novo* review requires that the district court independently consider factual issues based on the record. *Jeffrey S. ex rel. Ernest S. v. State Bd. of Educ.*, 896 F.2d 507, 513 (11th Cir. 1990). If the Magistrate Judge made findings based on witness testimony, the district court must review the transcript or listen to a recording of the proceedings. *Id*. The district court cannot reject a credibility determination without rehearing live testimony. *United States v. Powell*, 628 F.3d 1254, 1257 (11th Cir. 2010). But the district court may, without a new hearing,

modify findings in a way consistent with the Magistrate Judge's credibility determination. *See Proffitt v. Wainwright*, 685 F.2d 1227, 1240–41 (11th Cir. 1982).

II. FACTUAL HISTORY

This case involves two automobile stops: one in a parking lot in Headland, Alabama (a suburb of Dothan, Alabama), on February 22, 2018, and one along a roadway in Dothan on July 13, 2018. The Recommendation adequately recites the facts, but some will be repeated or summarized here for clarity.

On February 20, 2018, Investigator Joshua Tye of the Dothan Police Department arrested a woman for possession of methamphetamine and secured her agreement to cooperate with the Department on other unspecified cases. On February 21, 2018, Investigator Tye's superior, Corporal Krabbe, informed Tye that he had received information from his own confidential informant ("CI") that Joshua Drake Howard was "possibly traveling to Phenix City that day or that night to pick up a large amount of methamphetamine." (Doc. # 42, at 4–6, 37); (Doc. # 38, Def. Ex. 2, at 1.) On the same day, Investigator Tye contacted his new informant, who confirmed that she knew Mr. Howard to be a meth distributor and agreed to contact Mr. Howard for more information. The CI soon contacted Investigator Tye and informed him that Mr. Howard "was going to the Phenix City area to pick up methamphetamine" that day and that he asked to borrow her truck. (Doc. # 42, at 7–8.)

At Investigator Tye's request, the CI consented to the Dothan Police Department placing a GPS tracker on her truck on February 21, at 2:37 p.m. (Doc. # 42, at 8–9); (Doc. # 38, Gov. Ex. # 4.) Mr. Howard took possession of the truck roughly two hours later, at which point Investigator Tye began monitoring the GPS device. The GPS device transmitted the truck's location every five seconds while the truck was in motion. (Doc. # 42, at 11–12); (Doc. # 38, Def. Ex. # 3.) Around 7:30 p.m., Investigator Tye personally confirmed that the truck was parked at the first location where it stopped, but he did not see Mr. Howard. (Doc. # 42, at 12–14, 28–29.) Investigator Tye monitored the GPS device's movements—but conducted no visual surveillance—over the next (roughly) nineteen hours as the truck made several stops, including in Phenix City, and then began driving back toward Dothan. (Doc. # 42, at 13–16.)

As Mr. Howard neared Dothan around 2:00 p.m. on February 22, 2018, Investigator Tye decided to intercept the truck in Headland. His fellow officers confirmed that Mr. Howard was driving the CI's truck at this time. Mr. Howard stopped and ate in a Hardee's parking lot, at which time Investigator Tye approached the truck, told Mr. Howard to step out, and saw a handgun in the driver's door map pocket. Investigator Tye then patted Mr. Howard down; found meth on his person; and found a larger bag containing meth, paraphernalia, ammunition, and another gun in the bed of the truck. (Doc. # 42, at 15–21.) Mr. Howard was transported to the

police station, where he waived his *Miranda* rights and made incriminating statements. (Doc. # 38, Def. Ex. # 2, at 3.)

Less than five months later, on July 13, 2018, Corporal Clifton Overstreet of the Dothan Police Department stopped Mr. Howard for crossing over "a solid yellow line into the beginning of a turn lane for oncoming traffic" and for "failing to signal before getting into the turn lane or before getting within 100 feet of making a left turn." (Doc. # 50, at 5); (Doc. # 42, at 44–45.) "A computer search revealed that Mr. Howard had active arrest warrants. As a result, he was arrested, and the contents of his vehicle were inventoried. The inventory search of the vehicle revealed a firearm with an obliterated serial number." (Doc. # 61, at 4.)

Mr. Howard challenges one of the Recommendation's findings of fact—that Mr. Howard committed a traffic violation before being stopped on July 13, 2018. Because this finding is closely entwined with the Recommendation's legal conclusion relating to that stop, it is discussed in Section III.C. The Magistrate Judge's findings of fact with respect to that traffic violation are due to be adopted.

III. DISCUSSION

Mr. Howard objects to the Magistrate Judge's conclusions that (1) he lacked a reasonable expectation of privacy in his movements while operating the borrowed truck, (2) Investigator Tye had reasonable suspicion to stop his vehicle on February 22, 2018, and (3) Corporal Overstreet had reasonable suspicion to stop his vehicle

on July 13, 2018. (Doc. # 61.) Concluding that the GPS monitoring and related stop were lawful, the court need not reach Mr. Howard's fourth objection that his incriminating statements on February 22, 2018, should be excluded as the fruit of an illegal search and/or seizure. (Doc. # 61, at 14.) Additionally, this opinion will only address those portions of the Recommendation to which Mr. Howard has objected. All unobjected-to portions of the Recommendation—namely its legal conclusions relating to the February 21 installation of the GPS device and probable cause to search the truck (Doc. # 50, at 7–10, 19–20)—are due to be adopted without further discussion.

A. The Dothan Police Department's monitoring of the GPS tracker attached to Mr. Howard's borrowed truck was not a search.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. Thus, there must be a "search" or a "seizure" to trigger the Fourth Amendment's protections. Mr. Howard argues that he was searched because he had a reasonable expectation of privacy in his movements while operating the borrowed truck. (Doc. # 61, at 6.) Under the principles set forth in *United States v. Knotts*, 460 U.S. 276 (1983), Mr. Howard did not have a reasonable expectation of privacy, so no search occurred. The simplicity of that conclusion fails to capture the complexity of getting there.

1.

As the Recommendation noted, a Fourth Amendment quandary awaits the reader. Seven years ago, the United States Supreme Court in *United States v. Jones* declared 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" for twenty-eight days, "constitutes a 'search.'" 565 U.S. 400, 404 (2012). This would be a closed case if that Court had found that all GPS vehicle monitoring violated a suspect's reasonable expectation of privacy, a doctrine which has ostensibly been the "lodestar" test of Fourth Amendment analysis for the past fifty-two years. *See Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (suggesting that government intrusion into an area where an individual has a reasonable expectation of privacy is a search); *Smith v. Maryland*, 442 U.S. 735, 739 (1979) (declaring *Katz* to be the "lodestar" when "determining whether a particular form of government-initiated electronic surveillance is a 'search'").

Instead, Justice Scalia's majority opinion in *Jones* revived the Fourth Amendment's traditional roots in property law and reasoned that Mr. Jones had been searched because the Government physically trespassed on his bailment interest in his wife's vehicle for the purpose of obtaining information. *Jones*, 565 U.S. at 404 & n.2, 405. The length of the surveillance, twenty-eight days, played no part in the holding. *See id.* at 412–13. As a result, district courts still possess scant and

contradictory guidance as to whether *non-trespassory* GPS vehicle monitoring, as in this case of a borrowed truck, is an unreasonable search under the Fourth Amendment.

2.

To understand this quandary, it is helpful to first look to the history and original meaning of the Fourth Amendment, then to recent developments. The Fourth Amendment was drafted and ratified to prevent threats to individual liberty that were well-known at the founding: intrusions by government officers into private property. In the late-eighteenth century, these intrusions included general warrants and writs of assistance. *Carpenter v. United States*, 138 S. Ct. 2206, 2264 (2018) (Gorsuch, J., dissenting). General warrants failed to identify the person or place to be searched or the evidence that was being sought, and writs of assistance gave customs officials "carte blanche to access ships, warehouses, and homes, and all persons, papers, and effects contained therein" with the forced assistance of nearby laymen. Laura K. Donahue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1207–08, 1242–44 (2016).

With these evils in mind, the Fourth Amendment's drafters protected Americans from unreasonable searches in particular classes of property. "When the Fourth Amendment was adopted, as now, to 'search' meant 'to look over or through for the purpose of finding something; to explore; to examine by inspection; as, to

search the house for a book; to *search* the wood for a thief.'" *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (emphasis in original) (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (reprint 6th ed. 1989) (1828)); *see also Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting) (collecting other founding-era definitions). "By connecting the right to be secure to these four specific objects,"—persons, houses, papers, and effects—"[t]he text of the Fourth Amendment reflects its close connection to property." *Carpenter*, 138 S. Ct. at 2239 (Thomas, J., dissenting) (internal quotation marks omitted) (quoting *Jones*, 565 U.S. at 405).

This history motivated the *Jones* majority in 2012. *See Jones*, 565 U.S. at 404–405. If property rights were the only Fourth Amendment yardstick, this motion to suppress could be easily dismissed. The police did not commit a trespass to chattel because they attached the GPS device to the truck with the owner's consent before Mr. Howard borrowed it. *See id.* at 425 (Alito, J., dissenting) ("[A] bailee may sue for a trespass to chattel only if the injury occurs during the term of the bailment. So if the GPS device had been installed before [the owner] gave him the keys, respondent would have no claim for trespass—and, presumably, no Fourth Amendment claim either." (internal citation omitted)).

However, in 1967, the Court pivoted away from notions of property and toward notions of privacy. When confronted with the thorny issue of how to apply

the Fourth Amendment to wiretapping accomplished without physical intrusion into the target's person, house, papers, or effects, the Court declared that the "reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz*, 389 U.S. at 353. Justice Harlan's concurrence in *Katz* suggested a new "twofold requirement" to establish Fourth Amendment protection: "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.'" *Id*. at 361 (Harlan, J., concurring). That test became the "lodestar" of Fourth Amendment analysis. *Smith*, 442 U.S. at 749. "Over time, the Court minimized the subjective prong of Justice Harlan's test. That left the objective prong—the 'reasonable expectation of privacy' test that the Court still applies today." *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting) (citing Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113 (2015)). "[R]ecent Fourth Amendment cases have clarified that the [*Katz*] test . . . supplements, rather than displaces, 'the traditional property-based understanding of the Fourth Amendment.'" *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (internal citation omitted) (quoting *Florida v. Jardines*, 569 U. S. 1, 11 (2013)). Thus, beginning with *Jones* in 2012 and continuing through *Carpenter* in

2018, the property notion of trespass has been quickened. It is getting harder and harder to tell the quick from the dead.[1]

3.

> This court is not the only one left in the lurch by the present state of the law.
>
> > Jurists and commentators tasked with deciphering [the Supreme Court's] jurisprudence have described the *Katz* regime as "an unpredictable jumble," "a mass of contradictions and obscurities," "all over the map," "riddled with inconsistency and incoherence," "a series of inconsistent and bizarre results that [the Court] has left entirely undefended," "unstable," "chameleon-like," "'notoriously unhelpful,'" "a conclusion rather than a starting point for analysis," "distressingly unmanageable," "a dismal failure," "flawed to the core," "unadorned fiat," and "inspired by the kind of logic that produced Rube Goldberg's bizarre contraptions."

Carpenter, 138 S. Ct. at 2244 (Thomas, J., dissenting) (internal citations omitted).

Lest one thinks this lack of guidance is by accident, the Supreme Court noted last year in *Carpenter* that "no single rubric definitively resolves which expectations of privacy are entitled to protection." *Id.* at 2213–14 (majority opinion). "But then it offer[ed] a twist. Lower courts should be sure to add two special principles to their *Katz* calculus: the need to avoid 'arbitrary power' and the importance of "plac[ing] obstacles in the way of a too permeating police surveillance.'" *Id.* at 2266 (Gorsuch, J., dissenting) (internal quotation marks omitted) (quoting *id.* at 2214 (majority

[1] This phrase was coined by Circuit Judge (Ret.) Truman M. Hobbs, Jr., of Montgomery, Alabama.

opinion)). According to Justice Gorsuch at least, *Katz* is now burdened with the revival of traditional trespass analysis *plus* these two special principles.

"While surely laudable, these principles don't offer" a court "much guidance." *Id.* The Supreme Court has not provided instruction as to "how far to carry either principle or how to weigh them against the legitimate needs of law enforcement." *Id.* One does not know at what point "access to electronic data amount[s] to 'arbitrary' authority" or when "police surveillance become[s] 'too permeating.'" *Id.* "And what sort of 'obstacles' should judges 'place' in law enforcement's path when it does?" *Id*. Answers evade analysis. Consequently, one is "left with two amorphous balancing tests, a series of weighty and incommensurable principles to consider in them, and a few illustrative examples that seem little more than the product of judicial intuition." *Id.* at 2267.

4.

With this "guidance" in mind, some specific illustrative examples inform this case. On the one hand, the Court's holding in *United States v. Knotts* permits the use of a beeper to follow a vehicle because "'[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." 460 U.S. 276, 281 (1983).

> Police officers in that case planted a beeper in a container of chloroform before it was purchased by one of Knotts's co-conspirators. The officers (with intermittent aerial assistance) then followed the automobile carrying the container from Minneapolis to Knotts's cabin

> in Wisconsin, relying on the beeper's signal to help keep the vehicle in view. The Court concluded that the "augment[ed]" visual surveillance did not constitute a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Since the movements of the vehicle and its final destination had been "voluntarily conveyed to anyone who wanted to look," Knotts could not assert a privacy interest in the information obtained.

Carpenter, 138 S. Ct. at 2215 (quoting *Knotts*, 460 U.S. at 281–82) (internal citations omitted). On the other hand, the Court's recent holding in *Carpenter v. United States* forbids the Government from warrantlessly accessing seven days of historical cell-site location information ("CSLI") from a target's wireless carriers because a person has a "reasonable expectation of privacy in the whole of his physical movements."[2] *Id*. at 2219.

Each case attempted to limit its own construction. The *Knotts* Court noted the "limited use which the government made of the signals from this particular beeper" during a discrete "automotive journey" and reserved the question of whether "different constitutional principles may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible." *Knotts*, 460 U.S. at 283–85 (internal quotation marks omitted). In *Carpenter*, the Court explicitly refused to

[2] The majority in *Carpenter* attempted a curious sort-of rewrite of *Jones* by stating, "Three decades later, the Court considered more sophisticated surveillance of the sort envisioned in *Knotts* and found that different principles did indeed apply. In *United States v. Jones*, . . . five Justices agreed that related privacy concerns would be raised by, for example, 'surreptitiously activating a stolen vehicle detection system' in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone." *Id*. at 2215 (quoting *Jones*, 565 U.S. at 426 (Alito, J., concurring)). However, this dictum does not rewrite the reasoning on which *Jones* actually rests.

answer whether one's "reasonable expectation of privacy in the whole of his physical movements" extends to shorter periods of time or to other location tracking devices. *Carpenter*, 138 S. Ct. at 2217 n.3, 2220. Courts like this one are left to decide just how long is a piece of string.

5.

Four Supreme Court justices, the D.C. Circuit, and the Sixth Circuit have endorsed an idea that could reconcile these disparate holdings under a mosaic theory of electronic location tracking. "Under this approach, relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. But the use of longer term GPS monitoring," thus enabling the creation of a detailed mosaic of a person's life, "in the investigations of most offenses impinges on expectations of privacy." *Jones*, 565 U.S. at 430 (Alito, J., concurring) (internal citation omitted); *see also* Orin S. Kerr, *Implementing* Carpenter 35 (discussion draft excerpted from THE DIGITAL FOURTH AMENDMENT (forthcoming), 2018), https://ssrn.com/abstract=3301257 ("The idea of the mosaic theory is to treat short-term or limited records collection differently than long-term or broad records collection. Limited collection is not a search, but surveillance that goes on too long crosses a line and triggers the Fourth Amendment.").

This departure from the long-standing sequential approach to analyzing searches is purportedly justified because long-term surveillance uncovers "types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. . . . Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit . . . ." *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff'd sub nom. United States v. Jones*, 565 U.S. 400 (2012); *see also United States v. Skinner*, 690 F.3d 772, 780–81 (6th Cir. 2012) (holding that three days of real-time, non-trespassory cell phone tracking did not "present the concern raised by Justice Alito's concurrence in *Jones*"), *superseded by sentencing guidelines on other grounds*, U.S. Sentencing Guidelines Manual App. C, amend. 794, at 116-18 (Nov. 2015); *United States v. Diggs*, 385 F. Supp. 3d 648, 652, 654–55 (N.D. Ill. 2019) (relying on *Carpenter* and the *Jones* concurrences to find that warrantless acquisition of one month of *historical* GPS vehicle data violated the target's "reasonable expectation of privacy in the GPS data [that] arises from the story that data tells about his movements over the course of a month"); *State v. Zahn*, 812 N.W.2d 490, 497–98 (S.D. 2012) (adopting the mosaic theory and holding that twenty-six days of warrantless GPS vehicle tracking violated reasonable expectations of privacy).

The idea that constitutionality could hinge on the duration of a "search" has puzzled a Supreme Court justice,[3] several circuit judges,[4] three district courts,[5] two state

[3] *Carpenter*, 138 S. Ct. at 2266–67 (Gorsuch, J., dissenting) ("The Court declines to say whether there is any sufficiently limited period of time 'for which the Government may obtain an individual's historical [location information] free from Fourth Amendment scrutiny.' But then it tells us that access to seven days' worth of information *does* trigger Fourth Amendment scrutiny—even though here the carrier 'produced only two days of records.' Why is the relevant fact the seven days of information the government *asked for* instead of the two days of information the government *actually saw*? Why seven days instead of ten or three or one?" (emphasis in original) (internal citations omitted)).

[4] *United States v. Cuevas-Perez*, 640 F.3d 272, 279, 283–84 (7th Cir. 2011) (Flaum, J., concurring) (stating, in a case involving sixty hours of trespassory GPS vehicle monitoring, "It is difficult to see—based on the case law we have—how aggregating a nullity over a longer time period, or for more trips, yields an expectation of privacy. . . . [T]he fact that law enforcement are able to take information that is revealed publicly and piece together an intimate picture of someone's life does not raise constitutional concerns under current doctrine. . . . Moreover, the mosaic approach . . . would prove unworkable. Law enforcement—at some point—would have to stop looking at that which is publicly exposed. But how can one discern the point before the fact? I do not see how . . . ."), *vacated*, 565 U.S. 1189 (2012) (vacating the case because it involved physical trespass); *United States v. Jones*, 625 F.3d 766, 769 (2010) (Sentelle, J., dissenting) ("The reasonable expectation of privacy as to a person's movements on the highway is, as concluded in *Knotts*, zero. The sum of an infinite number of zero-value parts is also zero."), *denying reh'g en banc sub nom. United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010). *But see Cuevas-Perez*, 640 F.3d at 294–95 (Wood, J., dissenting) (arguing that the underlying rationale for the mosaic theory justifies requiring a warrant for *any amount* of location data).

[5] *United States v. Mazzara*, No. 16 CR. 576 (KBF), 2017 WL 4862793, at *27–28 (S.D.N.Y. Oct. 27, 2017) (rejecting the application of the mosaic theory to twenty-one months of pole camera surveillance because "there is no controlling case law that suggests the quantum or type of information collected during otherwise lawful surveillance somehow renders that surveillance unconstitutional"), *aff'd on other grounds sub nom. United States v. Kerrigan*, No. 18-1022-cr, 2019 U.S. App. LEXIS 27705 (2d. Cir. Sept. 12, 2019); *United States v. Graham*, 846 F. Supp. 2d 384, 401, 403 (D. Md. 2012) (noting that "the law as it now stands simply does not contemplate a situation whereby traditional surveillance becomes a Fourth Amendment 'search' only after some specified period of time—discrete acts of law enforcement are either constitutional or they are not," and finding that CSLI is not protected pre-*Carpenter* due to the third-party doctrine), *aff'd*, 824 F.3d 421 (4th Cir. 2016) (en banc); *United States v. Sparks*, 750 F. Supp. 2d 384, 391–93 (D. Mass. 2010) (rejecting mosaic theory in a trespassory GPS vehicle tracking case post-*Maynard* but pre-*Jones*, and finding that *Knotts* controls the question of GPS monitoring), *aff'd on other grounds*, 711 F.3d 58 (1st Cir. 2013).

supreme courts,[6] and one of the nation's leading Fourth Amendment scholars.[7] They have suggested that mosaic theory lacks a doctrinal foundation, is unworkable in practice, requires arbitrary line-drawing best left to legislatures, and fails to provide clear guidance to law enforcement agencies.

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[6] *State v. Jean*, 407 P.3d 524, 532–33 (Ariz. 2018) (concluding that "[n]ot only is there no analytical basis to distinguish between longer and shorter-term GPS monitoring for purposes of determining if a search has occurred, but such a distinction would also fail to provide clear guidance to law enforcement for when a warrant is required," and distinguishing *Knotts* to find that GPS vehicle tracking is always a search), *cert. denied*, 138 S. Ct. 2626 (2018); *Tracey v. State*, 152 So. 3d 504, 520, 526 (Fla. 2014) (holding that "basing the determination as to whether warrantless real-time cell site location tracking violates the Fourth Amendment on the length of the time the cell phone is monitored is not a workable analysis," and finding that probable cause is required to access such information).

[7] Professor Orin Kerr has repeatedly argued that the mosaic theory is a dramatic departure from traditional Fourth Amendment doctrine, is unworkable in practice, requires judges to make arbitrary distinctions that "seem embarrassingly legislative," and fails to provide clear guidance to law enforcement agencies. Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012); Orin S. Kerr, *Implementing* Carpenter 37–39 (discussion draft excerpted from THE DIGITAL FOURTH AMENDMENT (forthcoming), 2018), https://ssrn.com/abstract=3301257. Proponents of the mosaic theory generally respond that the theory reflects the reality that aggregated data is more than the sum of its parts, that big data has reset the balance between state and citizenry, and that courts are capable of seemingly arbitrary line-drawing. Paul Rosenzweig, *In Defense of the Mosaic Theory*, LAWFARE (Nov. 29, 2017, 3:18 PM), https://www.lawfareblog.com/defense-mosaic-theory [https://perma.cc/RYX5-DUVS]; *see also* Priscilla J. Smith et al., *When Machines Are Watching: How Warrantless Use of GPS Surveillance Technology Violates the Fourth Amendment Right Against Unreasonable Searches*, 121 YALE L.J. ONLINE 177, 201 (2011), https://www.yalelawjournal.org/forum/when-machines-are-watching-how-warrantless-use-of-gps-surveillance-technology-violates-the-fourth-amendment-right-against-unreasonable-searches [https://perma.cc/7937-NVHE] ("There may indeed be tough decisions for courts to make about whether limited use of GPS surveillance (e.g., tracking a suspect for a single day) triggers the Fourth Amendment warrant requirement. But this is why we have judges, and they will use all the criteria they apply to other surveillance situations . . . here."); Brief for Yale Law School Information Society Project Scholars and Other Experts in the Law of Privacy and Technology as Amici Curiae Supporting Respondent at 25–27, *Jones*, 565 U.S. 400 (No. 10-1259), 2011 WL 4614429 (arguing that a "rule requiring judges to decide when GPS surveillance is 'prolonged' would not lead to judicial confusion and inconsistency").

6.

In the end, the GPS monitoring in this case was not a search, a conclusion that does not rest on the mosaic theory. Instead, the finding is grounded in the fundamentals of the relevant facts and applicable law. First, there was no trespass; the truck was borrowed, and it came equipped with an owner-approved option: GPS tracking. Second, the surveillance was not for an "extended period of time." *Jones*, 565 U.S. at 418 (Alito, J., concurring). Mr. Howard was monitored during a discreet trip over a twenty-two-hour period with a two-way distance of approximately two-hundred miles. The officers had a short, same-day window to decide whether to install the GPS device, secure the owner's consent, install the device, and ensure Mr. Howard received the truck. They had to do all of this without arousing suspicion, and all for a single out-and-back journey. These trip characteristics fall easily within the province of *Knotts*.

Third, GPS is not the technological equivalent of CSLI. A GPS is a "grown up" beeper, both of which can be distinguished technologically from CSLI. While one is satellite based and one is radio based, both provide real-time location monitoring.[8] As acknowledged in *Carpenter*, CSLI is more intrusive than GPS vehicle monitoring because it is retrospective and can track cell phone holders into

[8] As do older technological advances such as field glasses (binoculars) and marine search lights. *See United States v. Lee*, 274 U.S. 559, 563 (1927).

constitutionally protected places. The retrospective quality of CSLI divides what could be done by traditional, visual surveillance from what could not because "[i]n the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection." *Carpenter*, 138 S. Ct. at 2218. Both today and at the founding, police could track an identified suspect in real time. They could even do so without keeping constant eyes on their suspect. If a constable in 1789 received consent to exchange the wheels on a stagecoach with ones that leave a distinctive marking on the road before the coach was to be borrowed by a smuggler, he or she could wait hours before following the tracks to his target. However, no constable could discover his or her target's name, and then "travel back in time to retrace [that] person's whereabouts." *See id.* "Unlike with the GPS device in *Jones*," with CSLI, "police need not even know in advance whether they want to follow a particular individual, or when." *Id.*; *see also Diggs*, 385 F. Supp. at 652 (noting that the retrospective quality of historical GPS vehicle data "impinges even further on privacy concerns than did the live data in *Jones*").

Cell phones also differ from vehicles in their capacity to "track[] nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time." *Id.* Cell phones also follow their owners into homes and other constitutionally protected spaces, wherein monitoring them violates Supreme Court precedent. *See United*

States v. Karo, 468 U.S. 705, 714 (1984) (holding that "the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence"); *see also Carpenter*, 138 S. Ct. at 2218 ("A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales.").

While not a perfect fit, this case is more factually analogous to *Knotts*. Even though Mr. Howard made several stops, he has not argued that the truck was ever located where the police could not have legally observed it. *Compare Knotts*, 460 U.S. at 281–82 (holding that monitoring a beeper sitting in a car that is in public view is constitutional), *with Karo*, 468 U.S. at 714 (holding that monitoring a beeper that has been taken into a home is unconstitutional). That Investigator Tye chose not to observe the truck is presently irrelevant. "It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy," *Jones*, 565 U.S. at 412, but neither the Supreme Court nor the Eleventh Circuit has yet held as much. So long as *Knotts* is the law, the court declines to answer that question in the affirmative.

Finally, this conclusion is grounded in the much older principles of *stare decisis*. *Carpenter*'s seemingly sweeping language and its two new principles, *Carpenter*, 138 S. Ct. at 2214, may signal the Supreme Court's willingness to revisit

Knotts, but the Court has not explicitly overruled *Knotts*. Its "decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252–53 (1998). If a Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," the lower court "should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). "The problem with lower courts basing decisions on predictions that the Supreme Court will overturn one of its own decisions is that the Supreme Court has repeatedly told us not to do it." *United States v. Greer*, 440 F.3d 1267, 1275 (11th Cir. 2006) (collecting cases relaying this command). The court "take[s] that admonition seriously." *Id.* at 1276. Because *Knotts* is more factually analogous than *Carpenter*, *Knotts* controls this finding.

Considering these distinctions, a full-scale *Katz* evaluation of these facts is not warranted. Their import has already been decided. While different facts may someday call for a different analytical lens, "the fact" here "is that the 'reality hardly suggests abuse.'" *Knotts*, 460 U.S. at 284 (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978)). Until a higher court dictates that "achieving the same result" as extended visual observation "through electronic means, without an accompanying

trespass, is an unconstitutional invasion of privacy," *see id.*, this court is bound to follow *Knotts* and hold that no search occurred within the meaning of the Fourth Amendment.[9]

B. Investigator Tye had reasonable suspicion to stop Mr. Howard on February 22, 2018.

Mr. Howard has objected to the Recommendation's finding that the vehicle stop by Investigator Tye on February 22, 2018, was supported by reasonable suspicion of criminal activity. That objection is due to be overruled, and the Recommendation is due to be adopted with modification.

The Recommendation's legal and factual analysis of Investigator Tye's basis for reasonable suspicion is sound and will be briefly summarized for clarity. (Doc. # 50, at 15–19.) Under *Terry v. Ohio*, a law enforcement agent may conduct a traffic stop if he or she has reasonable suspicion of criminal activity. 392 U.S. 1, 30 (1968). When determining whether the totality of the circumstances establishes reasonable suspicion, a court considers the following factors: corroboration of the details of the tip through independent police work; whether the informant has made a statement against his penal interests; whether the informant had personal knowledge; and

[9] That this search is presently found to be permissible, does not make it advisable. Law enforcement would be well-advised to avoid the risk illustrated in this case by getting a warrant before it engages in GPS vehicle tracking.

whether there is a past history between the informant and the police department that supports his reliability. *Ortega v. Christian*, 85 F.3d 1521, 1525 (11th Cir. 1996).

The Recommendation analogized this case to the facts of *Alabama v. White*, 496 U.S. 325 (1990). In that case, "police received an anonymous telephone tip that the defendant would be leaving an apartment complex at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would have one ounce of cocaine in a brown attache case." (Doc. # 50, at 17 (citing *White*, 496 U.S. at 327).) Police watched the defendant leave that apartment complex with nothing in her hands and drive the described vehicle toward the motel. *White*, 496 U.S. at 327. Police stopped the defendant near the motel. *Id.* The Court concluded that the officers had reasonable suspicion because the caller correctly predicted the time and direction of the defendant's travel and because the officers independently confirmed those facts. *Id.* at 331–32.

"As in *White*, the CI predicted the approximate time Howard would be leaving, the vehicle he would be driving, and his destination." (Doc. # 50, at 18.) These details and the fact that Howard was borrowing the CI's own vehicle indicate that she had personal knowledge about the purpose of his trip. "Additionally, police were able to investigate the tip and independently corroborate that Howard was driving the CI's vehicle to Phenix City through the use of GPS surveillance and

visual surveillance once Howard returned to town." (Doc. # 50, at 18.) This suffices as a basis for reasonable suspicion. (*See* Doc. # 50, at 18–19 (collecting additional supportive cases).)

But the analysis is modified to acknowledge the presence of a second confidential informant. (Doc. # 50, at 2.) This investigation began when Corporal Krabbe, Investigator Tye's superior, received a tip from his own confidential informant that Mr. Howard "was possibly traveling to Phenix City that day or that night to pick up a large amount of methamphetamine." (Doc. # 42, at 4–5, 37); (Doc. # 38, Def. Ex. 2, at 1.) This tip prompted Investigator Tye's call to the other CI who loaned Mr. Howard the truck. (Doc. # 42, at 4–5, 37.) While the record does not provide any information as to Corporal Krabbe's CI's history with law enforcement or his or her motivations, that CI's tip does add to the foundation for reasonable suspicion. For the reasons stated here and in the Recommendation, Investigator Tye had a reasonable suspicion of criminal activity when he stopped Mr. Howard's truck.

Additionally, Mr. Howard's objections raise some factually unsupported claims that are worth correcting. First, Mr. Howard asserts that "it appears that the alleged agreement for Mr. Howard to travel to Phenix City was orchestrated by the C[I]." (Doc. # 61, at 11.) Mr. Howard cites no evidence in the record that supports this assertion, and the evidence that is in the record suggests that Mr. Howard made this plan before he asked Investigator Tye's CI for her truck. (Doc. # 42, at 4–5, 8,

27, 37–38.) Second, Mr. Howard asserts that "[t]here is no evidence on the record that supports that the C[I] had personal knowledge that Mr. Howard was distributing methamphetamine." (Doc. # 61, at 12.) The record belies this assertion. According to Investigator Tye, his CI "stated she was familiar with [Mr. Howard] and that he did sell methamphetamine. The amount that Corporal [Krabbe] had been told was a lot larger than what she knew him to be dealing with." (Doc. # 42, at 8–9.) Thus, this objection fails.

C. Corporal Overstreet had probable cause to believe that Mr. Howard committed a traffic violation on July 13, 2018.

Mr. Howard objects to the Magistrate Judge's finding that he committed a traffic violation that would justify his July 13, 2018 stop. (Doc. # 61, at 14–15.) Upon review of the dashboard camera video (Doc. # 38, Def. Ex. # 5), the court finds that Mr. Howard did cross a double-yellow line in violation of Code of Alabama § 32-5A-88(2) ("Upon a roadway which is divided into three lanes and provides for two-way movement of traffic, a vehicle shall not be driven in the center lane except . . . in preparation for making a left turn or where such center lane is at the time allocated exclusively to traffic moving in the same direction that the vehicle is proceeding and such allocation is designated by official traffic-control devices."). Corporal Overstreet had probable cause to believe a traffic violation had occurred.[10]

[10] The Recommendation imprecisely relays the state of the law on this issue. (Doc. # 50, at 6) ("Investigative stops that fall short of arrests . . . are 'constitutional if [they are] *either* based

Therefore, the Recommendation's findings of fact and conclusions of law relating to the July 13, 2018 traffic stop (Doc. # 50, at 5–7) are due to be adopted.

IV. CONCLUSION

For these reasons, the GPS tracking of Mr. Howard's borrowed vehicle was not a search and did not violate his Fourth Amendment rights. Mr. Howard's Fourth Amendment rights were not violated during his February 22, and July 13, 2018 traffic stops. The Recommendation is therefore adopted with modifications, and Defendant's motion to suppress is denied.

It is ORDERED as follows:

1. The Magistrate Judge's Recommendation (Doc. # 50) is ADOPTED as MODIFIED herein;

2. Defendant's objections (Doc. # 61) are OVERRULED; and

3. Defendant's motion to suppress (Doc. # 28) is DENIED.

DONE this 15th day of November, 2019.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE

upon probable cause to believe a traffic violation has occurred *or* justified by reasonable suspicion as set forth in *Terry*.' Even a minor traffic violation can constitute the criminal activity required for reasonable suspicion." (internal citations omitted) (quoting *United States v. Harris*, 526 F.3d 1334, 1337 (11th Cir. 2008) (per curiam)).). However, "the Supreme Court has since made it plain that reasonable suspicion [to believe that a traffic violation has occurred] is all that is required." *United States v. Meko*, 912 F.3d 1340, 1349 n.9 (11th Cir. 2019), *cert. denied*, No. 18-9631, 2019 WL 4922214 (Oct. 7, 2019).

Pet. App. 1c

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 1:19cr54-WKW-WC
	)	
JOSHUA DRAKE HOWARD	)	

RECOMMENDATION OF THE MAGISTRATE JUDGE

Defendant Joshua Drake Howard ("Howard" or "Defendant") is charged with violations of 21 U.S.C. § 841(a)(1), possession with intent to distribute methamphetamine; 18 U.S.C. § 924(c)(1)(A), possession of a firearm in furtherance of a controlled substance crime; 18 U.S.C. § 922(g)(1), possession of a firearm by a convicted felon (two counts); and 18 U.S.C. § 922(k), possession of a firearm with an obliterated serial number. Doc. 39. Evidence of those alleged crimes was seized following a search of Defendant's vehicle after law enforcement received a tip from a confidential informant and as part of a second unrelated routine traffic stop. Defendant filed a Motion to Suppress (Doc. 28), which is currently pending before the Court. In the motion, Defendant argues that his Fourth Amendment rights were violated by the installation and monitoring of a GPS tracking device on a vehicle he borrowed; by the stop and search of that vehicle on February 22, 2018; and by the stop and search of his vehicle on July 13, 2018. He further argues that this Court should suppress all evidence obtained from the searches and statements made to law enforcement after his arrests. Upon consideration of the Defendant's motion, the Government's response, and the evidence and testimony adduced at the suppression

hearing, the undersigned Magistrate Judge RECOMMENDS that Defendant's Motion to Suppress be DENIED.

I. FINDINGS OF FACT[1]

A. The First Stop

At the suppression hearing, Investigator Joshua Tye of the Dothan Police Department testified that he began investigating Howard when another investigator, Corporal Crabby, said he had received a tip that Howard may be traveling to Phenix City that day or night to pick up a large amount of methamphetamine. Supp. Hr'g. Tr. (Doc. 42) at 5, 7, 37. Investigator Tye contacted one of his confidential informants to inquire about Howard. *Id.* at 7. The confidential informant ("CI") stated that she knew Howard and knew that he sold methamphetamine, and she could contact Howard to find out if he would be making the trip.[2] *Id.* at 8. She later reported that Howard was in fact going to the Phenix City area to pick up one-and-a-half ounces of methamphetamine and that he wanted to borrow her truck to make the trip. *Id.* at 8, 38. She then consented to the installation of a GPS tracking device on her vehicle, which Investigator Tye installed that same day after searching the vehicle. *Id.* at 8–10.

The device allowed Investigator Tye to set parameters for how often it would send him a signal. *Id.* at 11. If the vehicle was not moving, no signal was sent, but a signal was

[1] The court reaches findings of fact at a suppression hearing based on a preponderance of the evidence. *United States v. Beechum*, 582 F.2d 898, 913 n.16 (5th Cir. 1978) (citing *Lego v. Twomey*, 404 U.S. 477, 489 (1972)).

[2] This occurred on February 21, 2018, and at that point Tye had been working with the CI for only one day. *Id.* at 5, 25. She had been arrested and found to be in possession of methamphetamine the day before when police had received a similar tip about her. *Id.* at 6, 25. After her arrest, she agreed to provide information leading to four trafficking cases. *Id.* at 6.

sent immediately when the vehicle started moving again. *Id.* The device could be monitored on a web site or from a smartphone. *Id.* It has an approximate five-second delay in sending information, but otherwise the information is sent in real-time. *Id.* After the device was installed and the CI left the police station, she contacted Investigator Tye to let him know when Howard took her vehicle, and at that point Investigator Tye began his real-time monitoring of the device. *Id.* at 11–12. The Court has reviewed the GPS tracking information submitted into evidence at the hearing, and it appears that the device signaled Howard's location several times per minute while the car was moving. *See* Def. Ex. 3.

After Howard took possession of the CI's vehicle, it stopped at a residence on Hilltop Drive, so Investigator Tye and Corporal Crabby went to that location to confirm the vehicle was there. *Id.* at 12. They saw the vehicle but did not see Howard in the vehicle at that time. *Id.* at 29. When the vehicle left the Hilltop Drive, it traveled toward the Phenix City area. *Id.* at 13–14. Investigator Tye and Corporal Crabby did not follow the vehicle, as they could get information from the target source in Phenix City from the GPS tracking information. *Id.* at 13. The plan was simply to monitor the device until the vehicle was on its way back from Phenix City. *Id.* at 13.

The tracking information showed that the vehicle traveled on Highway 431 to the Bakerhill area, stayed briefly at a residence, and then continued north on Highway 431 to Seale, Alabama. *Id.* at 14. Highway 431 is the main highway between Dothan and Phenix City. *Id.* at 15. The device then "went asleep," indicating that the vehicle was no longer moving. *Id.* at 14. Around 1:00 a.m., Investigator Tye decided that Howard must be spending the night in Seale, so he stopped monitoring the device for the night. *Id.*

The next morning, the vehicle was in the same location. *Id.* at 14. When Investigator Tye received notification that the vehicle was moving again, it was leaving Seale and traveling to a house on Laurel Avenue in Phenix City, where it stayed for almost an hour before returning to the residence in Seale and then traveling back toward Dothan on Highway 431. *Id.* at 15.

Knowing that Howard was on his way back to Dothan, Investigator Tye and other officers disbursed to various locations along the anticipated route. *Id.* at 16. Investigator Tye first saw Howard in Abbeville, but he kept his distance and updated Howard's location to the other officers, who were able to confirm that Howard was driving the vehicle. *Id.* In Headland, Howard stopped at a fast food restaurant, went through the drive-through, and pulled into a parking spot. *Id.* at 16–17. When Howard parked, Investigator Tye decided it was safe to activate emergency lights and sirens. *Id.* at 17. Investigator Tye got out of his car without having his weapon drawn, approached the driver's door, and advised Howard to show his hands. *Id.* at 17, 33. There were seven officers in all, but Investigator Tye does not recall if they had weapons drawn. *Id.* at 34. After Howard showed his hands, Investigator Tye opened the door and told him to step out. *Id.* at 17. After Howard exited the vehicle and was handcuffed, Investigator Tye noticed a 9-millimeter handgun in the driver's door map pocket. *Id.* at 17–19, 34. Before beginning the investigation of Howard, Investigator Tye had researched Howard's criminal background and knew he was a convicted felon. *Id.* at 17–18.

After finding the gun, Investigator Tye searched Howard's person and found a small bag containing residue that Investigator Tye identified as methamphetamine. *Id.* at 19, 34.

Investigator Tye then passed Howard off to another investigator so he could begin a search of the vehicle. *Id.* at 19. Officers found a black tactical bag in the bed of the pickup containing three bags of methamphetamine, small unused jewelry bags, 65 rounds of 9-millimeter ammunition, and another handgun with one round in the chamber. *Id.* at 20–21. None of these items was in the vehicle when Investigator Tye searched it before installing the GPS tracking device. *Id.* at 21. After searching the vehicle, Investigator Tye called for a transport unit to take Howard to his office. *Id.* at 23. The truck was returned to the CI and was not taken to the police department for an inventory or impoundment. *Id.* at 36.

B. The Second Stop

Defendant was stopped again on July 13, 2018, by Corporal Clifton Overstreet of the Dothan Police Department. *Id.* at 40–41. Corporal Overstreet was three vehicles behind Howard at the intersection of South Park and Fortner Streets in Dothan. *Id.* at 41, 60. Fortner Street is a two-lane road with a center turn lane at certain spots. *Id.* Corporal Overstreet testified that Howard's accelerated from the intersection at a high rate of speed and that he was weaving back and forth within his lane, but the undersigned does not find that testimony to be credible. *Id.* at 42–44. However, Corporal Overstreet also testified that Howard crossed over a solid yellow line into the beginning of a turn lane for oncoming traffic and that he failed to signal before getting into the turn lane or before getting within 100 feet of making a left turn, and his dash camera video played in court supports this

testimony. *Id.* at 44–45, 47–49, 65. As Howard was making the left turn, Corporal Overstreet activated his lights and initiated a traffic stop.[3] *Id.* at 45.

II. DISCUSSION

A. The Traffic Stop of July 13, 2018

Before delving into the more complex issues related to the GPS tracking that led to the first stop in this case, the undersigned will address the stop on July 13, 2018. Investigative stops that fall short of arrests—including traffic stops—are governed by *Terry v. Ohio* and are subject to limited Fourth Amendment scrutiny requiring only a reasonable suspicion of criminal wrongdoing. 392 U.S. 1, 30 (1968); *see also Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). While such stops are "seizure[s] within the meaning of the Fourth Amendment," *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001), they are "constitutional if [they are] *either* based upon probable cause to believe a traffic violation has occurred *or* justified by reasonable suspicion as set forth in *Terry*." *United States v. Harris*, 526 F.3d 1334, 1337 (11th Cir. 2008) (per curiam) (citing *United States v. Chanthasouxat,* 342 F.3d 1271, 1275 (11th Cir. 2003) (emphasis added)). Even a minor traffic violation can constitute the criminal activity required for reasonable suspicion. *United States v. Campbell*, 912 F.3d 1340, 1349 (11th Cir. 2019) (citation omitted). In this

[3] This traffic stop resulted in a search of Howard's vehicle in which police found a bag with four pills, methamphetamine, a digital scale, shotgun shells, .38-caliber shells, and a Rossi .38-caliber firearm with some of the serial numbers rubbed off. Doc. 42 at 57–58. At the suppression hearing, Defendant's attorney conceded that Howard had outstanding warrants at the time of the stop that would have resulted in his arrest and an inventory search of the vehicle regardless of whether probable cause otherwise existed. *Id.* at 68. Thus, the only issue for the Court to determine with respect to this stop is whether the officer had reasonable suspicion to justify the stop. *Id.* Accordingly, this Recommendation sets forth only those facts bearing on the officer's reasonable suspicion to initiate the stop and does not set forth the facts relating to probable cause to search the vehicle.

case, the police officer's dash cam video, which was admitted into evidence at the suppression hearing, shows Howard crossing the solid double line in the center of the road and traveling in the turning lane for oncoming traffic, albeit very briefly. Because even this minor traffic violation alone is sufficient to provide law enforcement with reasonable suspicion to stop a vehicle, and, further, because Defendant conceded that outstanding warrants would have resulted in a lawful arrest and an inevitable inventory search of his vehicle, the undersigned recommends that Howard's motion to suppress with respect to the stop on July 13, 2018, be denied.

B. The Traffic Stop of February 22, 2018

(1) Installation and Monitoring of the GPS Tracking Device

Defendant argues that he has "standing" to challenge the installation and monitoring of the GPS tracking device on the CI's vehicle. To answer that question, the Court must essentially determine whether Howard's Fourth Amendment rights were infringed when law enforcement installed and monitored the GPS tracking device.[4] To determine whether

[4] The Supreme Court has instructed that Fourth Amendment challenges are "more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *United States v. Chaves*, 169 F.3d 687, 690 (11th Cir. 1999) (quoting *Minnesota v. Carter,* 525 U.S. 83 (1998) (quoting *Rakas v. Illinois,* 439 U.S. 128, 139–40, (1978)) ("Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of "standing," will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing…. [This requires a] determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect."). Nonetheless, the Eleventh Circuit continues to analyze Fourth Amendment challenges under the concept of standing. *See, e.g., United States v. Gibson*, 708 F.3d 1256 (11th Cir. 2013) (concluding that defendant lacked standing to complain about tracking device when he was neither in possession nor a passenger in a vehicle) (citing *United States v. Miller*, 821 F.2d 546 (11th Cir. 1987) for the proposition that defendant had standing to challenge search of car borrowed from friend); *United States v. Guerrero-Torres*, 762 Fed. App'x 873 (11th Cir. 2019) (finding that defendant lacked

an individual's Fourth Amendment rights have been infringed by a search or seizure, a court must determine whether the defendant had a "legitimate expectation of privacy in the premises" searched. *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). Additionally, recent Fourth Amendment cases have clarified that the legitimate-expectation-of-privacy test, derived from *Katz v. United States*, 389 U.S. 347 (1967), *supplements* rather than *replaces* the property-based concepts of the Fourth Amendment. *Id.* (citing *Florida v. Jardines*, 569 U.S. 1, 11 (2013)). The property-based analysis, grounded on principles of common law trespass, was revived with *United States v. Jones*, 565 U.S. 400 (2012).[5]

In *Jones*, the Government applied for a warrant authorizing the use of an electronic tracking device on a vehicle registered to the defendant's wife. *Id.* at 402–03. The warrant authorized installation of the device within ten days in the District of Columbia; however, the device was installed while the vehicle was in a public parking lot outside the District of Columbia on the eleventh day, making it a warrantless installation of the tracking device. *Id.* at 403. The Government then monitored the tracking device for 28 days. *Id.* at 403.

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standing to contest a search in the absence of a subjective expectation of privacy); *United States v. Rodriguez*, 762 Fed. App'x 712, 715 (11th Cir. 2019); (holding that defendant lacked standing to challenge search of codefendant's home because he lacked legitimate expectation of privacy); *United States v. Dixon*, 901 F.3d 1322 (11th Cir. 2018) (finding that defendant lacked standing to challenge search of girlfriend's car because he was a passenger with no possessory interest); and *United States v. Campbell*, 434 Fed. App'x 805, 809 (11th Cir. 2011) (concluding that defendants lacked standing to challenge search of package).

[5]The *Jones* Court noted that *Katz's* reasonable-expectation-of-privacy test includes both property law concepts and understandings permitted by society. *Jones*, 565 U.S. at 408 (citing *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). In other words, *Katz* did not "erode" the principle that a physical intrusion by government may constitute a Fourth Amendment violation. *Id.* at 407; *see also United States v. Figueroa-Cruz*, 914 F. Supp. 2d 1250, 1260 (N.D. Ala. Dec. 11, 2012) ("In rediscovering the trespassory origins of the Fourth Amendment the *Jones* majority observed that the more recently adopted 'reasonable-expectation-of-privacy test has been added to, not substituted for, the common law-trespassory test.'").

Although the defendant's wife was the owner of the vehicle, there was no dispute that the defendant was the exclusive driver when the tracking device was installed and during the time it was monitored. *Id.* at 404 n.2. The Government argued that no search occurred because Jones did not have a reasonable expectation of privacy in the underbody of the vehicle (where the device was placed) or its locations on public roads. *Id.* at 406. However, the Court did not address Jones's expectations of privacy; instead, because the Government physically occupied private property for the purpose of obtaining information and that physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted, the Court stated that principles of common law trespass applied. *Id.* at 404. Therefore, the majority held 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 constituted a search. *Id.* at 404. However, the Court made clear that its trespass analysis would not apply to cases involving transmission of electronic signals without physical contact. *Id.* at 411 ("Situations involving merely the transmission of signals without trespass would *remain* subject to *Katz* analysis….") (emphasis in original).

Unlike the defendant in *Jones*, Howard cannot claim that he had exclusive possession of the vehicle when the GPS tracking device was installed. Moreover, the owner in this case consented to the installation of the tracking device and had possession of the vehicle at the time it was installed. Thus, no trespass (and consequently no search) occurred when the tracking device was installed. Further, for these same reasons, Howard cannot claim that he had a reasonable expectation of privacy in the vehicle when the tracking device was installed. *See United States v. Gibson*, 708 F.3d 1256, 1277 (11th Cir.

2013) (discussing *United States v. Hernandez*, 647 F.3d 216, 219–20 (5th Cir. 2011), where the court held that defendant who borrowed brother's truck lacked standing to challenge installation of tracking device because he had no possessory interest in vehicle when device was installed, but he did have standing to challenge use of device to locate truck on the day he borrowed it.) Thus, because there was no trespass and Howard had no expectation of privacy with respect to the vehicle at the time the device was installed, Howard's Fourth Amendment rights were not infringed when the GPS tracking device was installed on the vehicle with the owner's consent.

The next question is whether Howard's Fourth Amendment rights were infringed when the device was used to monitor the vehicle while he was driving it. In *United States v. Miller*, 821 F.2d 546 (11th Cir. 1987), the Eleventh Circuit held that a defendant has standing to challenge the search of a car that he borrowed with permission (or, to state it in terms of a substantive violation instead of "standing," that the defendant had a legitimate expectation of privacy in the borrowed car). *Id.* at 547. However, in this case, the Government argues that Howard had no reasonable expectation of privacy in his movements on public roads pursuant to *United States v. Knotts*, 460 U.S. 276 (1983) and that, under *United States v. Karo*, 468 U.S. 705 (1984), the CI's consent validated installation of the tracking device on the vehicle, which Howard accepted as it came to him. The Defendant, on the other hand, argues that *Jones* "flipped *Karo*" and that *Karo* cannot be "read in the same light post-*Jones*." Doc. 42 at 71.

Justice Scalia wrote the majority opinion in *Jones*, and he addressed both the *Knotts* and *Karo* cases. In *Knotts*, the Supreme Court upheld a Fourth Amendment challenge to a

beeper placed in a container of chloroform (with the owner's permission) before it was sold to the defendant. *Jones,* 565 U.S. at 408–09. The defendant in *Knotts* challenged only the monitoring of the beeper, not its installation. *Id.* at 408. The Court held that the beeper augmented visual surveillance and did not infringe on Knotts' "reasonable expectation of privacy since the information obtained – the location of the automobile carrying the container on public roads and the location of the off-loaded container in open fields near Knotts' cabin – had been voluntary conveyed to the public." *Jones,* 565 U.S. at 408–09 (citing *Knotts*, 460 U.S. at 281–82). Although Justice Scalia stated that *Knotts* was irrelevant to *Jones* because *Jones* involved a trespass (*id.* at 409), he recognized that the Court "has to date not deviated from the understanding that *mere visual observation* does not constitute a search. We accordingly held in *Knotts* that '[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.'"[6] *Id.* at 409, 412 (internal citations omitted) (emphasis added); *see also United States v. Woods*, No. 17-CR-399, 2019 WL 1353949, at *2–3 (N.D. Ala. Mar. 26, 2019) (recognizing that *Jones* placed limits on but did not abrogate the general rule announced in *Knotts*).

[6] The opinion in *Jones*, at least as it relates to approval of *Knotts*, does not provide a clear path for analyzing all searches involving monitoring of GPS tracking devices. Although the *Jones* majority approved of *Knotts* with regard to "mere visual surveillance" and travel on public roads, it stated that *Knotts* had noted the "limited use which the government made of the signals from this particular beeper" and reserved the question of whether "different constitutional principles might be applicable" to "dragnet-type law enforcement practices" made possible by GPS tracking. *Jones*, 565 U.S. at 431 n.6. The court went on to state that, although visual surveillance of Jones for the same time period would be constitutionally permitted, *Jones* does not answer the question of whether obtaining the same results electronically is constitutional ("It may be that achieving the same results through electronic means without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question."). *Id.* at 412.

In examining *United States v. Karo*, 468 U.S. 705 (1984), Justice Scalia wrote that it "addressed the question left open by *Knotts*, whether the installation of a beeper in a container amounted to a search or seizure." *Jones*, 565 U.S. at 409. As in *Knotts*, the beeper in *Karo* was installed on a third party's container with the owner's consent before the defendant took possession. *Id.* at 409. Accordingly, the "specific question [the *Karo* Court] considered was whether installation '*with the consent of the original owner* constitute[d] a search or seizure … when the container is delivered to a buyer having no knowledge of the presence of the beeper.'" *Id.* (emphasis in original) (citation omitted). *Karo* held that it was not, and Justice Scalia said this was "perfectly consistent" with *Jones*: "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, who possessed the Jeep at the time the Government trespassorily inserted the information-gathering device, is on much different footing." *Id.* at 409–10.

Thus, *Jones* did not abrogate the general holding in *Knotts* and Justice Scalia said the *Jones* holding was consistent with *Karo*. Still, several factors in this case provide cause for concern. First, most of the GPS tracking information received by Investigator Tye did not augment visual surveillance by the police. Instead, law enforcement relied solely on the device to track the vehicle after it left for Phenix City, and police did not observe him or the vehicle again until it returned to the Dothan area. Thus, it could be argued that law enforcement went beyond the "mere visual surveillance" sanctioned by *Knotts*, *Karo*, and *Jones* to achieving the same results electronically, the constitutionality of which was expressly left unanswered in *Jones*. In Justice Sotomayor's concurrence in *Jones*, she

wrote: "[T]he same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations. Under that rubric, I agree with Justice Alito that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'" *Jones*, 565 U.S. at 415. Of course, there is no bright line test for what constitutes "longer term" monitoring or what would qualify under "most offenses." Justice Sotomayor also noted: "In addition, the bugged container in *Karo* lacked the close relationship with the target that a car shares with its owner. The bugged container in *Karo* was stationary for much of the Government's surveillance. A car's movements, by contrast, are its owner's movements." *Id.* at 416 (internal citations omitted). The same is true here: the vehicle's movements were Howard's movements, so the GPS tracking in this case was more detailed than the GPS tracking in *Karo*.

Second, in *Carpenter v. United States*, 138 S. Ct. 2206, 2215 (2018), decided six years after *Jones*, the Court held that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through cell site location information ("CSLI").[7] *Carpenter* at 2217. In this case, the GPS tracking information received by law enforcement is closer to the CSLI information in *Carpenter* than the rudimentary beeper information addressed in *Karo* or *Knotts*, and the majority in *Carpenter*

[7] *Carpenter* addressed (1) the expectation of privacy in physical location and movements and (2) the expectation of privacy in information voluntarily disclosed to a third party. 138 S. Ct. 2215–16. The discussion of the former issue is instructive in this case because, *although* Carpenter involved CSLI, the Court recognized the similarities between GPS tracking and CSLI: "Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled." *Id.* at 2216.

recognized that five Justices in *Jones* agreed that privacy concerns would be raised by GPS cell phone tracking or "surreptitiously activating a stolen vehicle detection system" (which, as in the instant case where the owner gave consent, could be accomplished without a trespass). *Carpenter*, 138 S. Ct. at 2215 (citations omitted). The *Carpenter* Court further noted that, because GPS monitoring tracks every move a person makes, the concurring Justices in *Jones* agreed that "longer term" monitoring would impinge on expectations of privacy "regardless whether those movements were disclosed to the public at large" and that "a majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements." *Id.* at 2215, 2217 (citing *Jones,* 565 U.S. at 430 (Alito, J. concurring in judgment) and at 415 (Sotomayor, J., concurring)). "[S]ociety's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's care for a very long period of time." *Id*. (quoting *Jones,* 565 U.S. at 430). Finally, while acknowledging *Knotts*, the *Carpenter* majority stated that *Knotts* had reserved the question of whether different principles would apply if 24-hour surveillance on anyone were possible and that different principles "did indeed apply" in *Jones* when faced with more sophisticated tracking. *Carpenter* at 2220 (citing *Knotts*, 460 U.S. at 283–84 and *Jones* generally). "[W]hen confronted with more pervasive tracking, five Justices agreed that longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search." *Id.* at 2220 (citing *Jones,* 565 U.S. at 430).

Thus, *Carpenter* and the concurring opinions in *Jones* make it clear that GPS tracking can be so pervasive as to constitute a Fourth Amendment search because

individuals have a reasonable expectation of privacy in the whole of their physical movements, even when those physical movements are revealed to the public. Further, it is clear that the GPS monitoring used in this case is more like the detailed tracking in *Carpenter* than the beeper tracking in *Knotts* or *Karo*. Despite these concerns and the lack of clear guidance on what constitutes "longer term" monitoring for "most offenses," the undersigned cannot say that the GPS monitoring in this case rose to the level of *Jones* or *Carpenter*. To be sure, the monitoring provided law enforcement with very detailed information about Howard's movements as a whole when the vehicle was moving, but he was tracked during one "discrete automotive journey" for approximately twenty-four hours, as opposed to twenty-eight days in *Jones* and four months in *Carpenter*. Further, as recognized even by Justice Alito in his concurring opinion in *Jones*, "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." *Jones* at 430 (Alito, J., concurring) (citation omitted). Here, police tracked Howard in order to confirm that he traveled to Phenix City, as the CI predicted, and then to determine his location when he returned to the Dothan area so they could stop him. For these reasons, the undersigned concludes that the short-term GPS monitoring of Howard's travel on public roads was not a search that infringed on Howard's Fourth Amendment rights.

(2) Reasonable Suspicion for the Stop

Having concluded that Howard's Fourth Amendment rights were not violated by installation or monitoring of the GPS tracker on the vehicle he borrowed from the CI, the undersigned must next address whether those rights were violated when Investigator Tye

stopped his vehicle when he returned from Phenix City. As set forth above, traffic stops are governed by *Terry* and require that an officer have a reasonable suspicion of criminal activity in order to comply with the Fourth Amendment. Additionally, the fact that an officer handcuffs a suspect does not alone cause a *Terry* stop to become an arrest. *United States v. Acosta*, 363 F.3d 1141, 1146–47 (11th Cir. 2004); *United States v. Hastamorir*, 881 F.2d 1551, 1557 (11th Cir. 1989) (finding that handcuffing the defendant constituted a *Terry* stop and was reasonable to provide for safety of agents); *United States v. Kapperman*, 764 F.2d 786, 790 n.4 (1985) (explaining that handcuffing or restraining a detainee does not automatically convert a *Terry* stop into an arrest and that police may take reasonable action to protect themselves).

With respect to confidential informants, the Supreme Court has adopted a "totality of circumstances" approach to determine if a tip establishes probable cause. *Alabama v. White*, 496 U.S. 325, 328 (1990) (citing *Illinois v. Gates*, 462 U.S. 213 (1983)). The factors used in analyzing the totality of circumstances are also relevant in the reasonable suspicion context, although allowance must be made for the lesser standard of reasonable suspicion. *Id.* at 328. Reasonable suspicion is a less demanding standard than probable cause; it can be established with information that is different in quantity and content and can arise from information that is less reliable than what is required for probable cause. *Id.* at 330.

The factors a court examines in reviewing a confidential source's statements include corroboration of the details of the tip through independent police work; whether the informant has made a statement against his penal interests; whether the informant had personal knowledge; whether there is a past history between the informant and the police

department that supports his reliability; and whether the police took independent steps to investigate the tip. *United States v. Rojas-Coyotl*, No. 1:13-CR-0128-AT-AJB, 2014 WL 1908674, at *7 (N.D. Ga. May 13, 2014) (citing *Ortega v. Christian,* 85 F.3d 1521, 1525 (11th Cir. 1996)). No one factor is determinative, and the credibility determination is made by weighing each factor after applying the facts of the case. *United States v. Ohoro*, 724 F. Supp. 2d 1191, 1202–03 (M.D. Ala. 2010) (citing *Illinois v. Gates*, 462 U.S. 213, 233 (1983)).

In *White*, *supra*, police received an anonymous telephone tip that the defendant would be leaving an apartment complex at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would have one ounce of cocaine in a brown attache case. 496 U.S. at 327. Two officers went to the apartment complex, watched her leave in the described vehicle with nothing in her hands, and followed her as she drove toward the motel. *Id.* Police stopped her just before she reached the hotel and told her that she had been stopped on suspicion of carrying cocaine. *Id.* When the defendant consented to a search, they found marijuana in a brown attache in her vehicle and then found cocaine during processing at the police station. *Id.* The Court concluded that the tip to police officers provided reasonable suspicion because, even though the tip was anonymous and officers did not verify every detail of the tip, they did verify that the defendant left a particular building in the vehicle described by the caller. *Id.* at 331–32. The caller correctly predicted the time and direction the defendant would be traveling, which police were able to confirm shortly after the call. *Id.* The Court also stated that, when an informant is right about some things, he is probably

right about other facts, so being able to corroborate some of the predictions imparted reliability to the other allegations. *Id.* at 332.

In the instant case, the CI was not anonymous, making her inherently more reliable than an anonymous CI in that she would undoubtedly face negative repercussions if she lied. As in *White*, the CI predicted the approximate time Howard would be leaving, the vehicle he would be driving, and his destination. These are details not normally known to someone without personal knowledge, and the fact that Howard was borrowing the CI's own vehicle further supports that she had personal information about the purpose of his trip. Without the CI's personal knowledge, the police could not have predicted that Howard would make a trip to Phenix City on the day in question. Additionally, police were able to investigate the tip and independently corroborate that Howard was driving the CI's vehicle to Phenix City through the use of GPS surveillance and visual surveillance once Howard returned to town. Accordingly, the undersigned finds that law enforcement had a reasonable suspicion of criminal activity, and Howard's Fourth Amendment rights were not violated when he was stopped. *See Riley v. City of Montgomery*, 104 F.3d 1247 (11th Cir. 1997) (finding that reasonable suspicion was established by anonymous tip describing defendant's physical appearance and identifying the location and vehicle of defendant, including the license plate); *United States v. Woods*, 385 Fed. App'x 914 (11th Cir. 2010) (holding that officers had reasonable suspicion to stop defendant after confidential informant called police and advised that defendant would be carrying illegal drugs and driving a particular vehicle in the Georgia Dome area around noon); *United States v. Sakapala*, 2019 WL 1398902, at *3 (N.D. Ga. Mar. 28, 2019) (concluding that

law enforcement had reasonable suspicion when anonymous informant's tip advised that defendant would travel from California to Atlanta, that he had a warehouse on Patterson Avenue, and that he would send two trucks); *United States v. Baptiste*, 388 Fed. App'x 876, 880 (11th Cir. 2010) (per curiam) (finding a tip about drug delivery sufficiently reliable even though the truck was a different color than predicted).

(3) Probable Cause to Search the Vehicle

Finally, the undersigned addresses whether law enforcement had probable cause to search the vehicle Howard was driving. Ordinarily, a warrant based on probable cause must issue prior to a search taking place; however, there is an exception for automobiles. *Maryland v. Dyson*, 527 U.S. 465, 466 (1999). Under the automobile exception, an officer is permitted to conduct a warrantless search of a vehicle when "(1) there is probable cause to believe the vehicle contains contraband or other evidence which is subject to seizure under the law, and (2) exigent circumstances necessitate a search or seizure." *United States v. Talley*, 108 F.3d 277, 281 (11th Cir. 1997). Probable cause exists when there is "a fair probability that contraband or evidence of a crime will be found." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). "While probable cause requires only a probability or substantial chance of criminal activity, mere suspicion is not enough." *United States v. Allison*, 953 F.2d 1346, 1350 (11th Cir. 1992). A separate showing of exigency is not required when a vehicle is readily movable. *Dyson*, 527 U.S. at 467.

In this case, after Howard exited the car was handcuffed, Investigator Tye saw a gun in the map pocket of the driver's door. Because Investigator Tye knew Howard was a convicted felon, the gun was clear evidence of a crime and was sufficient to establish

probable cause for a search of the vehicle under the automobile exception. Furthermore, under *Terry*, an officer may frisk or pat-down an individual in order to conduct a limited search for weapons when the officer has reason to believe that the individual is armed and dangerous. *United States v. Salter*, 255 Fed. App'x 355 (11th Cir. 2007) (citing *Terry*, 392 U.S. at 27). Seeing a gun in the driver's door certainly gave Investigator Tye reason to believe that Howard was armed and dangerous and that he may have had additional weapons. Thus, the pat-down of Howard was justified under *Terry*, and the small bag with drug residue found during the pat-down further established probable cause to search the vehicle under the automobile exception. Therefore, the undersigned finds that Howard's Fourth Amendment rights were not violated when he was stopped and his vehicle searched on February 22, 2018.[8]

III. CONCLUSION

For all of the foregoing reasons, the undersigned concludes that the installation and monitoring of the GPS tracking device in this case did not constitute a search under the Fourth Amendment. Further, police had a reasonable suspicion to stop Howard in both

[8] Howard argued in his Motion to Suppress, before the evidentiary hearing and before the Government made known the basis of the search in question, that searching the bed of the truck violated his Fourth Amendment rights pursuant to *Arizona v. Gant*, 556 U.S. 332, 351 (2009), which authorizes a search incident to a recent arrest only if the arrestee is within reaching distance of the passenger compartment or it is reasonable to believe the vehicle contains evidence of the offense of arrest. However, the search in this case was proper under the automobile exception, not as a search incident to arrest. As a result, because officers had probable cause to believe the truck, which was readily movable, contained contraband or other evidence of a crime, a search of the bed of the truck was proper. *See, e.g., United States v. Stotler*, 591 F.3d 935, 940 (7th Cir. 2010) (finding that search of truck cab and bed was authorized under automobile exception because probable cause existed) and *United States v. Dooley*, No. 09-CR-00016, 2011 WL 2162687, at *3 (N.D. Ga. June 2, 2011) (finding that search of truck's bed was lawful under automobile exception); *see also Gant*, 556 U.S. at 347 (stating that law enforcement may search any area of a vehicle where evidence may be found if there is probable cause to believe vehicle contains evidence of criminal activity) (citing *United States v. Ross*, 456 U.S. 798, 820–21 (1982)).

instances described above, and the firearm and bag containing drug residue provided probable cause to search the vehicle under the automobile exception on February 22, 2018. Accordingly, the undersigned RECOMMENDS that Defendant's Motion to Suppress be DENIED.

It is further ORDERED that the parties are DIRECTED to file any objections to this Recommendation **on or before September 9, 2019.** Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation to which the party is objecting. Frivolous, conclusive, or general objections will not be considered by the District Court. The Plaintiff is advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file a written objection to the proposed findings and recommendations in the Magistrate Judge's report shall bar a party from a *de novo* determination by the District Court of factual findings and legal issues covered in the report and shall "waive the right to challenge on appeal the District Court's order based on unobjected-to factual and legal conclusions" except upon grounds of plain error if necessary in the interests of justice. 11th Cir. R. 3-1; *see Resolution Trust Co. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993) ("When the magistrate provides such notice and a party still fails to object to the findings of fact and those findings are adopted by the district court the party may not challenge them on appeal in the absence of plain error or manifest injustice."); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989).

DONE this 26th day of August, 2019.

/s/ Wallace Capel, Jr.
WALLACE CAPEL, JR.
CHIEF UNITED STATES MAGISTRATE JUDGE