



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON WAYS, )  
 )  
 Defendant Below, )  
 Appellant, )  
 )  
 v. ) No. 547, 2017  
 )  
 STATE OF DELAWARE, )  
 )  
 Plaintiff Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
DELAWARE IN AND FOR SUSSEX COUNTY

APPELLANT'S OPENING BRIEF

JEROME M. CAPONE  
Assistant Public Defender  
14 The Circle, 2<sup>nd</sup> Floor  
Georgetown, Delaware 19947  
(302) 752-3362  
I.D. No. 0742

Attorney for Appellant

Dated: May 1, 2018

**TABLE OF CONTENTS**

TABLE OF CITATIONS ..... ii

NATURE OF THE PROCEEDINGS ..... 1

SUMMARY OF THE ARGUMENT ..... 2

STATEMENT OF FACTS ..... 3

ARGUMENT

    I.    The GPS evidence, and all derivative evidence, should have been suppressed since the use of the GPS tracker outside of the State of Delaware exceeded the terms of the Court Order and also violated the Constitutional privacy rights of the Defendant. ....11

    II.   The State failed to prove the predicate element of venue prior to resting its case. The trial judge abused her discretion in denying the Defendants’ Motion for Judgment of Acquittal which was based on the venue issue. ....28

CONCLUSION ..... 31

EXHIBITS:

    SENTENCE ORDER December 8, 2017 ..... A

    SENTENCE ORDER (Corrected) December 19, 2017 .....B

## TABLE OF CITATIONS

### Cases

<i>Barbieri v. News Journal Co.</i> , 189 A2d 773 (Del. 1963) .....	13
<i>Bryan v. State</i> , 571 A2d 170 (Del. 1990) .....	13
<i>Buckham v. State</i> , Del.Supr., 2018 Del. LEXIS 166 (Del. Apr.17,2018) ...	14
<i>Capano v. State</i> , 781 A2d 556 (Del. 1999).....	12
<i>Claudio v. State</i> , 5855 A2d 1278 (Del. 1991) .....	13
<i>Commonwealth v. Edmunds</i> , 586 A2d 887 (Pa. 1991).....	13
<i>Dorsey v. State</i> , 761 A2d 807 (Del. 2000) .....	12,25,26
<i>Flonnory v. State</i> , 893 A.2d 507, 537 (Del. 2006) .....	28
<i>Hammond v. State</i> , 569 A2d 81, 87 (Del. 1989) .....	13
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983) .....	14
<i>Jones v. State</i> , 745 A2d 856, 866 (Del. 1999) .....	12
<i>Katz v. United States</i> , 389 U.S. 347 (1967) .....	13
<i>Kelsch v. State</i> , 2016 Del. Super, LEXIS 305 .....	29
<i>Lewis v. State</i> , 2018 Del. LEXIS 48 (Del. Jan.29, 2018) .....	18
<i>Lopez-Vazquez v. State</i> , 956 A2d 1280 (Del. 2008).....	12
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961) .....	25
<i>McDonald v. State</i> , 947 A2d 1073 (Del. 2006) .....	26
<i>Naylor v. State</i> , 2013 Del. Super. LEXIS 186 .....	29
<i>People v. Weaver</i> , 909 NE2d 1195 (N.Y. 2009) .....	19
<i>Pierson v. State</i> , 338 A2d 571 (Del. 1975) .....	26
<i>State v. Baker</i> , 679 A.2d 1002, 1007 (Del. 1996) .....	28
<i>State v. Campbell</i> , 759 P2d 1040 (Or. 1988) .....	19
<i>State v. Davey</i> , 47 Del. 221, 227 (Del. Super. 1952) .....	20

<i>State v. Diaz</i> , 2013 Del.Super. LEXIS 5530 .....	26
<i>State v. Flowers</i> , 316 A2d 564 (Del. Super. 1973).....	6
<i>State v. Holden</i> , 54 A3d 1123 (Del. Super. 2010) .....	13,14,19
<i>State v. Jacob</i> , 924 NE2d 410,415,416 (Ohio Ct. App. 2009) .....	22
<i>Stroik v. State</i> , 671 A2d 1335 (Del. 1994) .....	21
<i>Thornton v. State</i> , 712 A2d 476 (Del. 1998) .....	29
<i>U.S. v. Jones</i> , 132 S.Ct. 945, 948 (2012) .....	14,22
<i>United States v. Lynn</i> , 2014 U.S. Dist. LEXIS 64797 (U.S.D.C. Oregon 2014) .....	22
<i>VanArsdall v. State</i> , 534 A2d 3 (Del. 1990) .....	13
<i>Wheeler v. State</i> , 135 A3d 282 (Del. 2015).....	12,14
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963) .....	25

**Statutes**

11 <i>Del.C.</i> Section 2304 .....	20
11 <i>Del.C.</i> Section 232 .....	28,30
11 <i>Del.C.</i> Section 301(b).....	30

**Rules**

Super. Ct. Crim. Rule 18.....	30
-------------------------------	----

**Other**

<i>R.J. Holland, The Delaware Constitution, A Reference Guide</i> , Greenwood Press, 2002, page 36. ....	12
---	----

Southerland, Statutes and Statutory Construction, 7<sup>th</sup> Ed., Vol 2, Section  
36.6 ..... 30

*Wiretapping and Evesdropping: Surveillance in the Internet Age*, Fishman  
and McKenna (Third Edition 2012), Section 29:27 Warrant Requirements;  
Geography and Jurisdiction ..... 22

## Nature of the Proceedings

This is a direct appeal from a criminal conviction for Drug Dealing Tier 4, Drug Possession Tier 5, and Conspiracy 2<sup>nd</sup> Degree. The case went to trial by jury on October 10, 2017. The jury returned a guilty verdict on October 17, 2017. The Defendant was sentenced on December 8, 2017. He filed a timely notice of appeal to this Court. This is his Opening Brief.

In this appeal, the Defendant seeks review of two decisions made by the trial court: a) the trial court's denial of the Defense motion to suppress Global Positioning System (GPS) evidence, and b) the trial court's denial of the Defense motion for judgment of acquittal.

The Defendant was tried with a Codefendant, Angeline Metelus, who was also convicted of the same charges. She too has an appeal pending in this Court. (*Metelus v. State*, 531, 2017)

## Summary of Argument

1. The trial judge abused her discretion when she rejected the Defendant's Motion to Suppress the State's Global Positioning System (GPS) evidence. Another Superior Court Judge had issued an order authorizing placement of a GPS monitor on Blue Jeep Cherokee. Using that GPS monitor, police followed the car into New Jersey. While it was in New Jersey, police obtained a search warrant for the Jeep. The police followed the car back into Delaware and stopped it in Dover. They searched the car in Dover and found over 75,000 bags of heroin. The Defendant argued that police did not have authority to use the GPS to track the car outside of Delaware because a) The Court's GPS order did not extend tracking jurisdiction outside the state of Delaware, and b) The use of the GPS monitor outside Delaware violated the Defendant's Constitutional privacy rights. The Defense sought to suppress the GPS evidence and all evidence derived therefrom, which included the evidence seized in the search of the Jeep.
2. The trial court abused her discretion when she rejected the Defense motion for judgment of acquittal. The motion was based on the fact that the heroin was seized in Kent County and therefore, the State failed to prove the element of venue in Sussex County.

## Statement of Facts

This case started out as a six defendant, large quantity heroin dealing case. The original six defendants were Brandon Ways, Torontay Mann, Angeline Metelus, Norquetta Heath, Vanity Corea and Tateyana Rideout. The police conducted a lengthy investigation which began in 2015 and led up to arrest of the defendants on the night of November 4, 2016 into the early morning hours of November 5<sup>th</sup>.

On the night of November 4th, police followed a Jeep Cherokee driven by Angeline Metelus from Sussex County, Delaware to northern New Jersey. (A-21 thru A-73) The police were aided in their surveillance of the Jeep Cherokee by a GPS tracking device which they had secretly placed on the vehicle several weeks earlier pursuant to a court order. (A-74) When Metelus returned to Delaware during the early morning hours of November 5, 2016, she was stopped by the police in Dover. The police searched the car in Dover and found over 75,000 bags of heroin hidden in a secret compartment in the vehicle.<sup>1</sup> Metelus was arrested at that time. (A-75 thru A-84)

During their investigation leading up to the stop of the Jeep Cherokee, the

---

<sup>1</sup> The police had obtained a search warrant for the Jeep Cherokee on November 4, 2016 at 9:48 PM.



police investigators obtained numerous search warrants, which included warrants to place a GPS tracking device on the blue Jeep Cherokee and on another vehicle, a black Nissan Maxima. These GPS warrants were obtained on September 23, 2016. (The two GPS warrants are found in the Appendix at A-85 thru A-118)

The police application for the GPS order for the Jeep Cherokee revealed that a confidential informant had tipped them off about an after market secret compartment installed in the car. The secret compartment in this car was a mechanically sophisticated device. The police knew that the secret compartment involved a hydraulic lift which, when activated, lifted the rear floor of the Jeep Cherokee to provide access to a large storage space. (A-119 thru A-121)

The police placed the GPS tracking device on the Jeep Cherokee sometime in October, 2016. (A-122) The GPS tracking device began producing data on October 14, 2017. This evidence was contained in Joint Exhibit 1, which was a log of all the GPS data. The data indicates that the GPS data collection for the jeep started on October 14, 2016 and ended on November 5, 2017.

The police later obtained a number of additional search warrants, all issued and executed on November 4<sup>th</sup> and 5<sup>th</sup>, 2016. The police obtained search warrants for the Jeep Cherokee and the Nissan Maxima on November 4, 2016 at 9:48 PM and 9:52 PM, respectively. These two search warrants are found in the Appendix

at A-123 thru A-160 and A-161 thru A-193.

Three search warrants were used to conduct night time searches at three homes: 801 Clementine Court, Unit 821, Chandler Heights 2, Seaford, Delaware; 101 Woodland Mills, Seaford, Delaware; and 46 Seaford Meadows, Seaford, Delaware. The police obtained these three search warrants at 1:33 AM on November 5, 2016. The police must have had three search teams in place and ready to go once the warrants were issued, because the search warrant returns for all three apartments indicate the searches took place seconds after the search warrants were approved.

The Defendants filed motions to suppress the searches of the three apartments at night because the search warrants did not specify that they were night time search warrants. The motions to suppress these night time searches were granted, and the trial judge's decision on those motions, and how it related to the Defense GPS suppression motion, will be discussed later in this brief. (The trial judge's decision granting the motion to suppress the searches of the three apartments is found at Appendix pages A-194 thru A-201.)

Defendant Ways was arrested at 12:45 AM on November 5, 2016, while driving a Jeep Patriot in Seaford, Delaware. No drugs, weapons, or other contraband were found in the car. (A-202 thru A-209)

## Pre-Trial Litigation

The Defendants filed several pretrial motions in this case. The motions included a motion for a *Flowers* hearing<sup>2</sup>; motions to suppress the various search warrants; and a motion to suppress the evidence derived from the use of the GPS devices. Defendant Ways filed an Omnibus Motion to Suppress and To Request a *Flowers* Hearing (Omnibus Motion) which contained copies of all the search warrants in this case. (The thinking of undersigned counsel in filing an Omnibus Motion was to present all the search warrants to the Court in chronological order in one pleading for convenience and ready reference.) (Defendant's Omnibus Motion is at Appendix pages A-210 thru A-226)

The various defendants joined in the motions filed by their co-defendants.

In regard to the searches of the three apartments, the police applied for night time search warrants. The Defendants filed motions to suppress these search warrants, arguing that the warrants issued by the court did not contain explicit language authorizing a night time search. The trial judge, in a written opinion, agreed with the Defense arguments:

[T]he focus of the Court must ultimately fall on the authorization given by the Magistrate. Clearly, no issuing magistrate *must* grant an application for a nighttime search warrant. So, even if the intent of

---

<sup>2</sup> *State v. Flowers*, 316 A2d 564 (Del. Super. 1973).

the parties seeking a warrant is to search at night, **what the issuing authority grants is the authority that governs.** Here the clear language of the warrants [do] not permit the search at night. . . . (emphasis added)

The evidence in the apartments was therefore suppressed. (The trial judge’s opinion is found in the Appendix at A-194 thru A-201) As a result of that decision, the State nolle prossed the cases against Norquetta Heath, Vanity Correa and Tateyana Rideout.

### **Use of the GPS Tacking Device in New Jersey**

On the night of November 4, 2016 as the Jeep Cherokee headed north through Delaware and into New Jersey, the police were following the car using a “belt and suspenders” approach – they used “eye-on” surveillance vehicles to follow the car as well as GPS tracking. The GPS data was being monitored by Detective Callaway, who was based in Delaware, as well as by the police officers who were actually following the car in New Jersey who were accessing the data via in-car laptop computers. (A-227 thru A-229)

The GPS component of this dual approach was crucial when, at one point in northern New Jersey, the police lost sight of the car at the same time the GPS temporarily stopped providing data. After 20 – 30 minutes in the dark, the GPS resumed operating (A-67). With the GPS the data back on line, police were able to locate the car and resume tailing it. (A-49 thru A-71)

After the GPS motions were filed, the parties submitted additional correspondence to the trial judge on the subject. On May 11, 2017, the trial judge ordered the prosecutor to provide the defense with the data generated by the GPS tracking device. (Trial Judge's letter of May 11, 2016 at Appendix pages A-230,231) (Letter of Deputy Attorney General Haley King, Esq. addressed to the trial judge, dated September 22, 2017, made part of the Appendix at A-227,228; Letter of Jerome M. Capone, Esq., addressed to the trial judge, dated September 26, 2017, Appendix at A-232,233; letter of Haley King, Esq. to the trial judge dated September 28, 2017, Appendix at A-234)

On September 29, 2017, the trial judge, in a bench ruling, rejected the Defendants' GPS suppression motion:

[H]aving the authority to order the attachment of the GPS within the State of Delaware is sufficient to authorize the police to follow the vehicle, whether it is in the jurisdictional boundaries of the perimeter of the State of Delaware or outside of it, I am satisfied.”

(A-235 thru A-240)

### The Trial

The only two defendants to go to trial were Brandon Ways and Angeline Metelus. Torontay Mann pled guilty to Drug Dealing Tier 4 and Conspiracy 2nd on October 4, 2017. The State's case against Ways was largely circumstantial.

Torontay Mann was not called to testify. Brandon Ways did not testify. Angeline Metelus did testify.

At trial, the State introduced witness testimony and surveillance video showing the Jeep Cherokee parked during the day of November 4, 2016 in the Walmart parking lot in Seaford. The video shows a pick-up truck operated by Torontay Mann pulling into the parking lot and parking alongside the Jeep Cherokee. Brandon Ways is seen getting out of the passenger side of the pick-up truck and entering the Jeep Cherokee on the driver's side. The video shows him going in and out of the front and back seat on the driver's side, at times leaning in as if he were cleaning the floor or the seats of the vehicle. This activity took several minutes. (A – 241 thru A-243)

There was police testimony that Ways then drove the Jeep Cherokee out of the Walmart parking lot to another parking lot (Food Lion) where he exited the car and walked away from it. (A-244 thru A-246) Later that day, Angeline Metelus was seen driving a car into the Food Lion parking lot. She exited her car, got in the Jeep Cherokee and drove out of the parking lot and headed north into New Jersey. (A-21 thru A31) There was no dispute during trial that Ms. Metelus was stopped and arrested in Kent County. At the conclusion of the State's case, the Defendants moved for judgment of acquittal arguing that the State had failed to prove the

element of venue – the drugs were found in Kent County while the indictment alleged that the crime was committed in Sussex County. This motion was denied by the trial judge. (A-247 thru A-265)

Metelus testified during the defense case that she made arrangements with Torontay Mann to drive the Jeep Cherokee to New Jersey. She testified that she planned to meet a man for a dinner date in northern New Jersey. She said she met the man at a restaurant and that he left her at the restaurant while he used the Jeep Cherokee for 20-30 minutes. When he returned to the restaurant, she drove the vehicle back to Delaware. She was stopped in Dover by the police. Ms. Metelus did not connect Brandon Ways to her activities on November 4<sup>th</sup> and 5<sup>th</sup> in any way. (A-269 thru A-291)

After the trial concluded, the jury retired for deliberations. The next day they returned with guilty verdicts against both defendants on all charges. The Defendant was sentenced to twelve years in jail on December 8, 2017. Ms. Metelus was sentenced to five years in jail on the same day.

**Argument 1. The GPS evidence, and all derivative evidence, should have been suppressed since the use of the GPS tracker outside of the State of Delaware exceeded the terms of the Court Order and also violated the Constitutional privacy rights of the Defendant.**

### **Questions Presented**

Did the police exceed the scope of their authority by using the GPS tracking device to track the Jeep Cherokee out of state? Did the use of the GPS tracking device out of state violate the Constitutional privacy rights of the Defendant? These questions were preserved in the motions to suppress filed by the parties, in office conferences with the trial judge, in correspondence between the parties and the trial judge, and in a bench ruling made by the trial judge on September 29, 2017. (Trial judge's opinion is attached to this brief at Appendix pages A-235 thru A-240; Omnibus Motion to Suppress at Appendix pages A-210 thru A-226; Transcript of Office Conference of September 12, 2017 pages 3-26 at Appendix pages A-292 thru A-315; King letter of 9/22 at Appendix pages A-227,228; Capone letter of 9/26 at Appendix pages A-232, 233; King letter of 9/28 at Appendix pages A-234)

### **Scope of Review**

The scope of review is *de novo*. Claims alleging the infringement of a Constitutionally protected right are subject to *de novo* review as are claims



addressing denials of motions to suppress. *Capano v. State*, 781 A2d 556 (Del. 1999); *Lopez-Vazquez v. State*, 956 A2d 1280 (Del. 2008).

### **Merits of the Argument**

The 4<sup>th</sup> Amendment to the United States Constitution protects against unreasonable searches and seizures and requires that search warrants be issued only on a showing of probable cause. It also requires the place to be searched be “particularly” described.

Article 1, Section 6 of the Delaware Constitution also contains similar language relating to police searches. However, this provision of the Delaware Constitution has been held to provide *different* and *broader* protections than the Fourth Amendment. *Jones v. State*, 745 A2d 856, 866 (Del. 1999); *Dorsey v. State*, 761 A2d 807 (Del. 2000); *Wheeler v. State*, 135 A3d 282 (Del. 2015); *R.J. Holland, The Delaware Constitution, A Reference Guide*, Greenwood Press, 2002, page 36.

The Delaware Supreme Court has concluded that the search and seizure provision in the Delaware Constitution is based on “its historical convergence for more than 200 years with the same provision in the Pennsylvania Constitution.” *Holland, The Delaware State Constitution, A Reference Guide*, Greenwood Press, 2002, page 36; *Jones* at p. 866.

As such, Pennsylvania case law is instructive in interpreting the Delaware Constitution. In *Commonwealth v. Edmunds*, 586 A2d 887 (Pa. 1991), the Pennsylvania Supreme Court has recognized that “the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth.”

*State v. Holden*, 54 A3d 1123 (Del. Super. 2010) was premised on Article 1, Section 6 of the Delaware Constitution, and recognized that the Delaware Constitution affords greater protection than the United States Constitution.<sup>3</sup> *Holden* also examined Delaware Constitutional history and Delaware statutory law and concluded that the Delaware Constitution “demonstrates paramount concern” for the protection of individual privacy.<sup>4</sup>

The use of GPS technology without adequate judicial supervision infringes upon the reasonable expectation of privacy and absent exigent circumstances or a warrant issued upon probable cause, violates Article I, Section 6 of the Delaware Constitution.

A warrant is required before every search or seizure, subject to only a few exceptions. *Katz v. United States*, 389 U.S. 347 (1967). The task of a magistrate

---

<sup>3</sup> Citing: *Hammond v. State*, 569 A2d 81, 87 (Del. 1989) (preservation of evidence used against a defendant); *VanArsdall v. State*, 534 A2d 3 (Del. 1990) (the right to confrontation); *Bryan v. State*, 571 A2d 170 (Del. 1990) (the right to counsel); and *Claudio v. State*, 5855 A2d 1278 (Del. 1991) (the right to trial by jury).

<sup>4</sup> *Barbieri v. News Journal Co.*, 189 A2d 773 (Del. 1963) (recognizing invasion of privacy as an actionable tort.)

asked to issue a search warrant is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, that there is a fair probability that contraband or evidence of a crime will be found *in a particular place*. *Illinois v. Gates*, 462 U.S. 213 (1983).

Installation of a GPS tracking device on a vehicle constitutes a search and requires a warrant supported by probable cause. *U.S. v. Jones*, 132 S.Ct. 945, 948, (2012); *State v. Holden*, 54 A3d 1123 (Del. Super. 2010).

The warrant requirement of the Delaware Constitution ensures that searches are “as limited as possible.” *Wheeler* at p. 288

By limiting the authorization to search to *the specific areas* and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide ranging exploratory searched the Framers intended to prohibit.

*Id.* At 299.

In the recent case *Buckham v. State*, 2018 Del. LEXIS 166 (Del. Apr. 17, 2018), this Court had the opportunity to expound on *Wheeler* as it applies to electronic device searches:

In *Wheeler v. State*, we recognized that a warrant – no matter its target – must both “describe the things to be searched with sufficient particularity and be no broader than the probable cause on which it is

based.” Those requirements serve to achieve the twin objectives of the warrant requirement: ensuring that “those searched deemed necessary [are] as limited as possible” and eliminating “exploratory rummaging in a person’s belongings.” But we also recognize that warrants issued to search electronic devices call for particular sensitivity given the “enormous potential for privacy violations” that “unconstrained searches of cell phones” pose. Modern smartphones store an “unprecedented volume of private information” and a top-to-bottom search of one can “permit the government access to “far more than the most exhaustive search of a house.” (citations deleted)

Instead of showing “particular sensitivity” for any privacy considerations of the Defendants, the trial judge’s GPS decision in this case essentially approves police use of a GPS tracking device any time and any place.

Moreover, in order to reach her decision, the trial judge had to abandon the reasoning she used to suppress the night time search warrant.

The GPS suppression issue in this case was very similar to the night time search warrant suppression issue. While police clearly applied for a night time search warrant, the language of the court order did not explicitly grant authority for a night time search. The defense argued that the night time search warrants should be suppressed because the police exceeded their authority under the terms of the warrant. The trial judge agreed and suppressed the evidence seized pursuant to those warrants for the following reasons:

[T]he focus of the Court must ultimately fall on the authorization given by the Magistrate. Clearly, no issuing magistrate *must* grant an application for a nighttime search warrant. So, even if the intent of

the parties seeking a warrant is to search at night, **what the issuing authority grants is the authority that governs.** Here the clear language of the warrants [do] not permit the search at night. . . .<sup>5</sup> (emphasis added)

The Defense argued that this same reasoning should have applied to the GPS warrant. The defense further argued that even if out of State authority was granted by the issuing court, the court did not have authority under the Delaware Constitution or United States Constitution to authorize a search out of state.

Despite the fact that the Court's GPS Order did not contain out-of-state authorization, the trial judge denied the GPS suppression motion in a bench ruling on September 29, 2017 for the following reasons:

[H]aving the authority to order the attachment of the GPS within the State of Delaware is sufficient to authorize the police to follow the vehicle, whether it is in the jurisdictional boundaries of the perimeter of the State of Delaware or outside of it, I am satisfied." (A-235 thru A-240)

Frankly, the trial judge's GPS decision was surprising to counsel, since a) it ran contra to the court's reasons for denying the night time search warrant, and b) during an office conference on September 12, 2017, the trial judge had seemingly previewed her anticipated ruling on the subject:

[M]y expectation is that using the GPS in New Jersey is going to be outside the scope of what was authorized by the warrant. That's my expectation. I haven't ruled, but that's what I expect will be the ruling

---

<sup>5</sup> Order of Trial Judge, decided June 20, 2017, found in Appendix at pages 194-201.

of the Court under all the circumstances as I now know them to be, but that visual surveillance is permitted, especially when they are in a public place.

And to the extent that they posted or waited or looked for them at the same re-entry point as the exited, I don't know the answer to that factually, but if they were looking for them at the bridge waiting to see if they came back, then that would be what they would do in the old days whether they knew what happened on GPS or not.

And I can tell you what they did in the old days because I've had cases where that's what they did in the old days. I think I need to hear more information about how they recaptured and if they did it visually or only because of GPS. And that might be something you could provide. . .

[S]o anything that is charged related to their conduct in New Jersey, like if they did something in New Jersey, they saw or observed them do something in New Jersey would be excluded because I think any information that they learned as a result of the ping is going to be out.

(A-301, 302)

The parties left the September 12, 2017 office conference thinking that the trial judge was pointing toward an inevitable discovery analysis. The prosecutor sent a letter to the trial judge on September 22, 2017 making a case for inevitable discovery. (Appendix at pages A-227, 228).

The Defense responded in a letter dated September 26, 2017 asserting that any consideration of an inevitable discovery argument was going to require an evidentiary hearing. (Appendix at pages A-232, 233). The State then followed up with a letter to the court dated September 28, 2017 which conceded that a

“suppression hearing may be warranted in this matter.” (Appendix at page 234)

A nearly identical GPS tracking issue was before the court in *Lewis v. State*, 2018 Del. LEXIS 48 (Del. Jan. 29, 2018). The Court in *Lewis* concluded that the issue “was not properly raised on appeal” and therefore affirmed the defendant’s conviction without addressing the merits. But the Court did express interest in the issue and even went so far as to articulate three specific inquiries to be addressed in any future case concerning GPS tracking out of state. This would appear to be the case to address those three inquiries.

#### The Three *Lewis* Inquiries

First inquiry: Does a GPS search occur simply by placing the GPS device on the car, or whether it is ongoing, through the continuous emission of data from the GPS as it travels?

Second inquiry: What should police do when the subject of a validly issued and executed GPS warrant leaves the state?

Third inquiry: Assuming arguendo that the out-of-state tracking violates the Fourth Amendment, how should courts treat evidence arguably derived from such tracking when such evidence is arguably attenuated from the GPS tracking or may be said to have an independent source?

## Response to First *Lewis* Inquiry.

Jurisdictions throughout the United States have found that citizens have a reasonable expectation of privacy in their prolonged travels on public thoroughfares. . . . the monitoring of a single trip is far different than constant prolonged surveillance. *State v. Holden*, 54 A3d 1123 (Del. Super. 2010).

Thus, in *State v. Campbell*, 759 P2d 1040 (Or. 1988) the court found that the ability to constantly monitor a vehicle's movements within a 40 mile radius at any time "is a significant limitation on freedom from scrutiny" and is "nothing short of a staggering limitation on personal freedom."

And to give full and frightening scope of the potential intrusion of this technology into personal privacy, here are the words of *People v. Weaver*, 909 NE2d 1195 (N.Y. 2009) which were also set out fully by Judge Jurden in her *Holden* decision:

The whole of a person's progress through the world through the world, into both public and private spatial spheres, can be charged and recorded over lengthy periods possibly limited only by the need to change the transmitting unit's batteries. Disclosed in the date retrieved from the transmitting unit, nearly instantaneous with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue, or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity



is a highly detailed profile, not simply where we go, but by easy inference, of our associations – political, religious, amicable and amorous, to name a few – and of the pattern of our professional and advocational pursuits. *Id.* at 1199.

Like the typical search warrant, the police use GPS warrants to obtain evidence. But unlike the typical search warrant, this evidence comes in the form of information which can be used to prove guilt, as opposed to a tangible object which can be used to prove guilt.

So, as to the question of whether the search occurred simply by placing the GPS tracker on the car, or in the near constant monitoring of information (some incriminating and some not) let us consider the following hypothetical: Suppose this case involved coins stolen from a coin dealer in Sussex County, and the police believed that information relating to the theft of the coins could be found at a house in New Jersey. Could any Delaware judge issue a lawful warrant to search the house in New Jersey?

Under Delaware law, any Delaware judge authorized to issue warrants in criminal cases may, within the limits of their respective territorial jurisdiction, issue a warrant. *State v. Davey*, 47 Del. 221, 227 (Del. Super. 1952). A Delaware judge does not have authority to issue a warrant for a search to occur in another state. 11 Del.C. Section 2304 provides that “Any judge . . . authorized to issue

warrants in criminal cases may, *within the limits of their territorial jurisdictions*, issue a warrant to search any person, house, building, conveyance, place or any other thing . . .” (emphasis added) *Stroik v. State*, 671 A2d 1335 (Del. 1994) (“The Justice of the Peace does have *territorial* jurisdiction to issue search warrants *anywhere in the State of Delaware*”). (emphasis added)

In the GPS applications in this case, the police sought permission to monitor “signals produced in the event that the subject vehicle leaves the State of Delaware but remains within the United States.” However, such extra-jurisdictional authority was not included in the GPS Orders signed by the judge in this case, presumably because the Court could not exceed its territorial authority.

There is good reason that search warrants are limited to the jurisdiction from which they issued. A recent Ohio case discussed the use of an Ohio search warrant to search for stolen Hummel figurines which were believed to be in California. A search warrant issued by an Ohio judge was used as authority to search a home in California. The Ohio Court of Appeals suppressed the evidence seized in California and explained: “Allowing one State’s court to determine when property, residences, and residents of another state may be subject to search and seizure would trample the sovereignty of states to determine the procedures by which a warrant may be issued and executed and of their courts to determine the

consequences of failure to follow those laws.” The Ohio appellate court further explained that “a violation of statutory provisions that a judge can issue a valid search warrant only within his or her court’s jurisdiction is a fundamental violation of Fourth Amendment principles.” Thus, the police could not rely on the good faith exception to avoid suppression of the evidence. *State v. Jacob*, 924 NE2d 410, 415, 416 (Ohio Ct. App. 2009).

The same “outside the jurisdiction” issue, this time involving out of state GPS tracking, was before the court in *United States v. Lynn*, 2014 U.S. Dist. LEXIS 64797 (U.S.D.C. Oregon 2014), in which the Court held:

The use of a GPS monitoring device while Defendant was in the State of Washington plainly exceeded the provisions of the warrant, which permitted the officers only to “use the mobile tracking device anywhere in the State of Oregon. . . .

Thus, Defendant is correct that each “use of [the GPS] device to monitor the vehicle’s movements” in Washington “constitutes a search” See, *Jones*, 132 S.Ct. at 949.

Accordingly, the Court concludes that the officers’ GPS monitoring while Defendant was in Washington violated the Fourth Amendment.

Commentators agree. “Matters of geography and jurisdiction still present acute problems with regard to warrants issued by state judges; *such a warrant would be without effect once the tracking device crossed into a different state.*” (emphasis added) *Wiretapping and Evesdropping: Surveillance in the Internet*

*Age, Fishman and McKenna (Third Edition 2012), Section 29:27 Warrant Requirements; Geography and Jurisdiction.*

By utilizing the GPS order in this case as justification to locate the blue Jeep Cherokee in New Jersey, the police infringed upon the sovereignty of New Jersey. Without a valid New Jersey GPS tracking order, the Delaware police engaged in a warrantless search by monitoring a GPS device in the State of New Jersey. Accordingly, the fruits of the warrantless search – all the heroin and contraband seized in this case – should be suppressed.

#### Response to Second *Lewis* Inquiry

In the context of the instant case, the defense response to the second inquiry (“what are the police to do in cases like this?”) is easy. According to the GPS warrant applications in this case, the police claim to have known for months that the Defendant was obtaining his drugs from New Jersey. (See GPS warrants, Appendix at A-85 thru A-122) They were prepared to, and in fact did, follow the Jeep Cherokee there. And they had plenty of time to work on this. The GPS court order was obtained weeks before the GPS tracker was installed. The police should have coordinated with law enforcement in New Jersey to obtain GPS warrants in that state at, or near, the same time they sought the order in Delaware if they believed they were probably going to have to track the car into New Jersey (as they

did in this case).

There is no doubt that law enforcement is finding new and innovative ways to use technological advances. But, at the same time, law enforcement needs to find new and innovative ways to use new technology without infringing on the Constitutional rights of citizens. It shouldn't be the responsibility of the courts or defense attorneys to do this for them.

Are we to believe that the law enforcement officers in this case were firmly convinced that they had legal authority to use the GPS outside of Delaware? The few court cases on the subject could not possibly provide any real confidence about the constitutionality of their activities.

Are we to believe that law enforcement made a strenuous effort to consider ways to avoid this issue? Or, did they keep their fingers crossed and hope that the Court would solve their problem by expanding the reach and scope of law enforcement surveillance anywhere outside of Delaware, while at the same time diminishing the "paramount concern" for privacy rights contained in the Delaware Constitution?

As noted above, this issue didn't just come into view on September 23, 2016 when the court order was signed. Law enforcement has had time to deal with this issue, not only in this case and not only in this state. One solution to this law

enforcement dilemma would have been to develop and enter into an interstate compact to allow GPS warrant reciprocity for a limited amount of time. The concept of interstate compacts is not new. Delaware is already party to over twenty interstate compacts on issues such as probation, detainers, placement of children, mental health, etc.

According to the National Council for Interstate Compacts (NCIC) website, “State governments often prefer to direct themselves collaboratively when addressing problems that span boundaries, and compacts have proved to be an effective mechanism for states to jointly problem-solve.” (NCIC website documents, in Appendix at A-316 thru A-320)

#### Response to Third *Lewis* Inquiry

How should courts treat evidence arguably derived from such tracking when such evidence is arguably attenuated from the GPS tracking or may be said to have an independent source?

If we assume the GPS evidence is to be suppressed, then all the evidence derived from the GPS data should also be suppressed. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Dorsey v. State*, 761 A2d 807 (Del. 2000).

In the instant case, that would have left two routes for the evidence seized

during the search of the Jeep Cherokee to be admissible: a) the trial court should have held an evidentiary hearing to determine whether the inevitable discovery exception applied, or b) the trial court should have conducted a four corners test on the Jeep Cherokee search warrant, after excluding all out of state evidence obtained or generated via GPS surveillance. *McDonald v. State*, 947 A2d 1073 (Del. 2006); *Dorsey v. State*, 761 A2d 807 (Del. 2000); *Pierson v. State*, 338 A2d 571 (Del. 1975).

For example, *State v. Diaz*, 2013 Del. Super. LEXIS 5530, also concerned the police use of a GPS tracking device outside the State of Delaware. In that case, ***the State conceded that the extra-jurisdictional information obtained from the GPS device was beyond the scope of the warrant*** which authorized placement of a GPS tracking device on the Defendant's car. The GPS data was excluded. The Court then conducted an evidentiary hearing and determined that the police had other lawful reasons, independent of the GPS data, to stop the car when it returned to Delaware.

As noted above, the parties in the instant case suggested that an evidentiary hearing was needed on this issue. (Prosecutor's letter of September 22 , 2017, Appendix at A-227,228; Letter of Jerome M. Capone to the Court on September 26, 2017, Appendix at A-232,233; Prosecutor's letter of September 28, 2017,

Appendix at A-234).

During the September 12, 2017 office conference in which the trial judge seemingly indicated her intent to suppress the GPS evidence, the prosecutor began to make a four corners argument on the Jeep Cherokee search warrant in anticipation of a ruling suppressing the GPS evidence. The defense responded. (A-302 thru A-310). The trial judge recognized that the Jeep Cherokee search warrant would have to “stand on its own four corners.” (A-309) However, the need for further development of a four corners argument became moot on September 29<sup>th</sup>, when the trial judge reversed course and ruled from the bench that the GPS warrant gave police legal authority to track the car out of state.

The bottom line is that there are well recognized procedures available trial courts can use to determine the impact of evidence “arguably derived from such tracking when such evidence is arguable attenuated from the GPS tracking or may be said to have an independent source.”



- II. The State failed to prove the predicate element of venue prior to resting its case. The trial judge abuse her discretion in denying the Defendants' Motion for Judgment of Acquittal which was based on the venue issue.**

### **Question Presented**

Did the state fail to prove venue in its case in chief? Did the trial judge abuse her discretion in not granting the Defendants' Motion for Judgment of Acquittal based on the failure of proof on the element of venue?

This question was preserved in argument to the trial judge at the conclusion of the State's case. (A-247 thru A-268)

### **Scope of Review**

This Court reviews *de novo* a trial judge's denial of a motion for judgment of acquittal to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of a crime. *Flonnory v. State*, 893 A. 2d 507, 537 (Del. 2006). Facts establishing jurisdiction and venue must be proved as elements of the offense. 11 Del. C. § 232; *State v. Baker*, 679 A. 2d 1002, 1007 (Del. 1996).

## Merits of the Argument

There is no dispute that Ms. Metelus was arrested in Dover. The drugs were seized in Dover. The indictment charged that the crimes of Aggravated Drug Possession and Drug Dealing occurred in Sussex County, Delaware. (Indictment can be found in the Appendix at pages A-321 thru A-323)

At the conclusion of the State's case, the Defense moved for a Judgment of acquittal arguing that the State failed to prove the element of venue as contained in the indictment. The trial judge denied the motion and ordered that the indictment not be provided to the jury during their deliberations. (A-247 thru A-265) The trial judge then amended the indictment to change venue in Counts 1 and 2 (Drug Dealing and Aggravated Possession counts) to Kent County. She then read the amended indictments to the jury in her charge to the jury. (A-324 thru A-330)

Facts establishing jurisdiction and venue must be proved as an element of the offense. *Kelsch v. State*, 2016 Del. Super, LEXIS 305., citing 11 Del. C. Section 232; *Naylor v. State*, 2013 Del. Super. LEXIS 186; *Cf. Thornton v. State*, 712 A2d 476 (Del. 1998) ("The venue for trial in the Superior Court is generally determined by the county in which the crime was committed, however, 'when two or more offenses that may be charged in the same indictment . . . are alleged to have been committed in more than one county, the prosecution may be had in any

county in which one or more of the offenses is alleged to have been committed’, citing Super. Ct. Crim. Rule 18)

The terms of 11 *Del.C.* Section 232 are clear – “[F]acts establishing jurisdiction and venue . . . must also be proved as elements of the offense.” These elements of an offense must be proved beyond a reasonable doubt. 11 *Del.C.* Section 301(b). Facts establishing jurisdiction and venue are typically the first questions asked by a prosecutor of the first police witness in any trial. These are the first two questions every new prosecutor is taught to ask in a criminal trial.

Despite the language of Section 232 requiring proof of venue, Super. Ct. Crim. Rule 18 expands the statutory venue requirement by allowing cases from one county to be tried in another county if one or more of the offenses is alleged to have been committed in that second county.

The Defense submits that the Court does not have the authority to expand by rule what is clearly limited by statute. “In cases of conflict between rules of court and state statutes, the statutes prevail.” *Southerland, Statutes and Statutory Construction*, 7<sup>th</sup> Ed., Vol 2, Section 36.6.

The Defendants’ motion for judgment of acquittal should have been granted.

## Conclusion

The GPS/privacy issue raised by the Defendant here is significant. The Defense submits that the trial judge committed an error of law in deciding that the Delaware law permits police to use GPS tracking out of state as long as the GPS tracking device is installed in Delaware.

The trial judge should have conducted an evidentiary hearing to flesh out whether the State's case could have gone forward had she suppressed the GPS evidence and the evidence derived therefrom.

Based on the facts of this case, the arguments advanced in this brief, and the law cited herein, the Defendant respectfully asks the Court to reverse his conviction.

/s/JEROME M. CAPONE, Esq.  
Jerome M. Capone, Esq.  
Assistant Public Defender  
14 The Circle, 2<sup>nd</sup> Floor  
Georgetown, Delaware 19947  
(302) 752-3362  
ID. No. 742

Date: May 1, 2018