



USE OF GPS AND CANINE IN DRUG INVESTIGATIONS

March 2017

For duplication & redistribution of this article, please contact Law Enforcement Risk Management Group by phone at 317-386-8325.
Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

Article Source: http://www.llrmi.com/articles/legal_update/2017_united_states_v_berry.shtml

©2017 [Brian S. Batterton](#), J.D., Legal & Liability Risk Management Institute

On December 1, 2016, the Fifth Circuit Court of Appeals of decided *the United States v. Berry*, which serves as an excellent review of Fourth Amendment law pertaining to use of GPS devices on vehicles and the use of a narcotics canine to establish probable cause to search a vehicle. The relevant facts of *Berry*, taken directly from the case, are as follows:

Beginning in 2010, DEA agents in New Orleans began investigating Berry for his suspected involvement in a narcotics trafficking ring. As part of their investigation, the DEA agents obtained a warrant to monitor Berry's cell phone from approximately May 27, 2011 to July 31, 2011.¹ The wiretap gave agents the ability to monitor Berry's phone calls and track the location of his cell phone. On June 9, 2011, DEA agents also installed a GPS tracking device on Berry's car without a warrant while it was located in the parking garage of a hospital. The tracker was on the vehicle until Berry's arrest on August 20, 2011—a total of seventy-three days. Although the tracker was capable of constant monitoring, agents had only set the tracker to send an e-mail alert when the vehicle travelled past a certain location, called a "geofence." The Government contends that "agents did not monitor Berry's movements 24 hours per day" and the tracker simply served as a "back-up" to the wiretap on Berry's cell phone. But the DEA acknowledged that the GPS tracker was used to track Berry's movements between July 31 and his arrest on August 20—a period during which Berry's calls were not being monitored.

Over the course of their investigation, DEA agents observed Berry travel to Houston at least three times to meet with co-conspirators. During at least two of these trips, agents observed Berry visit an apartment that they later discovered was a "stash location" for Berry and several co-conspirators. After at least two of the trips to Houston, DEA agents observed Berry or a co-conspirator throw away materials "consistent with the packaging material of drug traffickers," and these materials tested positive for heroin residue.

On August 20, 2011, DEA agents received an alert that Berry's vehicle had passed a geofence, indicating that he was making another trip to Houston. DEA agents in New

©2017 Article published in the free LLRMI E-Newsletter

Link to article online: http://www.llrmi.com/articles/legal_update/2017_united_states_v_berry.shtml
<http://www.llrmi.com> | <http://www.patctech.com>

Orleans then alerted agents in Houston of Berry's impending arrival and requested surveillance. Suspecting he would be travelling back to New Orleans with a sizeable amount of heroin, DEA agents met with LSP troopers to brief them on Berry's suspected involvement with narcotics trafficking. Several troopers set up surveillance along Interstate 10 and Berry was pulled over for a traffic violation by Trooper Jason St. Romain.

During the traffic stop, Berry gave Trooper St. Romain his license and registration, which Trooper St. Romain used to conduct a record and background check. The records search revealed that Berry had a criminal history but that there were no outstanding warrants for his arrest. After the records search was complete and Berry refused to consent to a search of his vehicle, Trooper St. Romain deployed a police dog, Niko, to conduct a sniff search.

At a suppression hearing, Trooper St. Romain testified that Niko alerted to or indicated the presence of narcotics at several locations around the vehicle, which prompted Trooper St. Romain and his partner to search the vehicle. Their search included a search of the truck bed and its contents, which lasted about forty-five minutes. Trooper St. Romain testified that when Niko was redeployed to the interior of the vehicle, "she went immediately to the speaker box" and indicated narcotics were present. Inside the speaker box, Trooper St. Romain found 2.5 pounds of heroin.ⁱⁱ

Berry was charged with various drug related offenses under federal law. He filed a motion to suppress the drugs and alleged that the warrantless use of a GPS device on his vehicle without a warrant and the extended detention for the use of the canine violated his rights under the Fourth Amendment. The district court denied the motion to suppress, and Berry pled guilty with the right to appeal. He then filed a timely appeal with the Fifth Circuit Court of Appeals.

On appeal, Berry first argued that the warrantless GPS surveillance of his vehicle for 73 days was objectively unreasonable under the Fourth Amendment. Second, Berry argued that the trooper impermissibly expanded the scope of the traffic stop by the use of the canine.

The court first examined the issue of whether the warrantless use of the GPS tracking device violated the Fourth Amendment.

Berry argued that, in the *United States v. Jones*,ⁱⁱⁱ in which the United States Supreme Court held the attachment of a GPS tracker to a vehicle and the use of the tracker to monitor the vehicle's movements constituted a search under the Fourth Amendment. This means that, unless exigent circumstances exist, the use of a GPS device would require probable cause and search warrant.

The government argued that, in 2010 when the agents used the GPS on Berry's vehicle, court precedent upon which they relied allowed the warrantless use of the GPS if reasonable suspicion existed to believe Berry was involved in criminal activity. Further, the government argued that the Supreme Court in *Davis v. United States*^v, held that

[E]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule" even if that precedent is later overturned. *Id.* at 241.^v [emphasis added]

Thus, as long as court precedent supported the warrantless use of the GPS in 2010, the Supreme Court's holding in *Jones* would not require suppression of the evidence obtained via the use of the GPS. Regarding existing precedent in 2010, the court noted that, in the *United States v. Michael^M*, they previously held that

[T]he warrantless attachment and monitoring of a beeper on a defendant's car was justified as long as there was reasonable suspicion that the defendant was engaging in criminal activity, 645 F.2d at 255, 257.^{vii}

In light of the above prior precedent, the Fifth Circuit held that agents would have had no reason to believe that a warrant was required to use a GPS tracker on Berry's vehicle. As such, they affirmed the denial of the motion to suppress based on this issue. [Note: After 2012, based on *U.S. v. Jones*, a warrant may be needed, absent exigent circumstance.]

The court next examined the issue of whether the trooper unreasonably expanded the scope of the traffic stop in violation of the Fourth Amendment when he used canine to conduct a sniff of Berry's vehicle. Berry argued two separate Fourth Amendment violations regarding the use of the canine and the search. First, he argued that after the driver's license and record check was completed, the trooper unreasonably expanded the scope of the stop by continuing to detain him while he used the canine to sniff the exterior of his vehicle. Second, he argued that the second use of the canine in his vehicle and the search of the interior of his vehicle violated the Fourth Amendment. Particularly, he argued that after the troopers searched the bed of his truck for 45 minutes and did not locate any contraband, the probable cause from the first sniff dissipated.

Regarding whether the trooper impermissibly extended the stop after the background check was completed, the court first examined the law related to this issue. The court stated

In this situation, "[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). For instance, "[i]f all computer checks come back clean, then as a general matter reasonable suspicion disappears, and there is no legitimate reason for extending the stop." *United States v. Jenson*, 462 F.3d 399, 404 (5th Cir. 2006). Therefore, without additional reasonable suspicion, "waiting for or conducting a dog sniff cannot prolong a stop justified by only a traffic violation beyond the amount of time reasonably required to complete the mission of issuing a traffic ticket and attending to related safety concerns." *United States v. Spears*, 636 F. App'x 893, 901 (5th Cir. 2016) ("A dog sniff is not part of the mission of issuing a traffic ticket."). A stop may only be further extended if law enforcement "develops reasonable suspicion of additional criminal activity in the meantime." *Pack*, 612 F.3d at 350.

Reasonable suspicion requires an examination of the totality of the circumstances. *Ohio v. Robinette*, 519 U.S. 33, 38-39 (1996). "We traditionally give due deference to the experience of officers . . . in identifying a number of factors that, although insufficient by themselves to suggest illegal activity, taken together are indicia of

certain types of illicit acts." *United States v. Sanchez-Pena*, 336 F.3d 431, 437 (5th Cir. 2003).^{viii}

In Berry's case, the court noted that there were three different circumstances that gave rise to reasonable suspicion for the trooper to continue to detain Berry after the completion of the background check. First, the court observed that Berry provided the false information to the trooper during the stop. Particularly, he told the trooper that he was going to Lake Charles to his aunt's house to do construction work but had not called her on the phone. This seemed implausible to the trooper because of the distance he would be driving if it were true and because Berry was not dressed for construction work. Second, the court observed that Berry was very nervous during the traffic stop, and according to the trooper, was "shaking" and "wouldn't make eye contact." Lastly, the court considered the briefing about Berry and the drug investigation that the trooper received from the DEA.

The court held that, in light of the above factors, the trooper had sufficient reasonable suspicion that Berry was involved in drug activity to continue to briefly detain him for a canine sniff of the exterior of his vehicle after the background check was completed. Of course, once the canine alerted to the presence of drugs in the vehicle, probable cause existed to search the vehicle.

Next, the court considered whether the second canine sniff of the interior of the vehicle and subsequent search violated the Fourth Amendment. Berry argued that the probable cause from the first canine sniff dissipated after the troopers searched for 45 minutes and did not locate contraband.

The court first examined the law related to this issue and stated

A warrantless search is permissible under the automobile exception if (1) the officer conducting the search had 'probable cause to believe that the vehicle in question contain[ed] property that the government may properly seize'; and (2) exigent circumstances justified the search." *United States v. Castelo*, 415 F.3d 407, 412 (5th Cir. 2005) (alteration in original) (quoting *United States v. Reyes*, 792 F.2d 536, 538 (5th Cir. 1986)); see also *United States v. Machuca-Barrera*, 261 F.3d 425, 432 (5th Cir. 2001) ("To determine the lawfulness of a stop, we ask whether the seizure exceeded its permissible duration."). Driving along an interstate highway provides the "requisite exigent circumstances." *Castelo*, 415 F.3d at 412. But officers "may not disregard facts tending to dissipate probable cause." *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988).

Although Berry argues that the length of the stop was unreasonable because the first forty-five minutes of the search did not recover evidence of wrongdoing, he fails to present any cases to support a finding that the length of a search alone would dissipate probable cause. In fact, this Court has rejected that very argument at least once before. See, e.g., *United States v. Hernandez*, 518 F. App'x 270 (5th Cir. 2013) (per curiam). In *Hernandez*, the defendant argued that probable cause dissipated after officers searched his vehicle for approximately three hours. *Id.* at 271. In rejecting that argument, this Court noted that the defendant cited no "case law suggesting that an unsuccessful three- to four-hour search would itself dissipate existing probable cause" and held there was sufficient probable cause to continue searching the vehicle based on a "wiretap investigation, [defendant] and

his passenger's answers to police questions, and the two dog alerts."^{ix} [emphasis added]

In Berry's case, the court noted that probable cause was supported by (1) the briefing from the DEA regarding Berry's involvement in drug trafficking, (2) Berry's suspicious answers during the stop, and (3) the canine alert on the vehicle. The court stated that the original canine alert provided probable cause for the search of the vehicle and that probable cause did not dissipate after 45 minutes of meticulous searching items in the truck bed. Further, the court noted that the troopers were diligently pursuing the search the entire time. The court then held

Given the nature of the object for which officers were searching—illegal narcotics—and the fact that probable cause permits officers to search "every part of a vehicle which may conceal the object of the search," *United States v. Zucco*, 71 F.3d 188, 191-92 (5th Cir. 1995), probable cause did not dissipate in the first forty-five minutes. Thus, extension of the search past that period did not violate Berry's Fourth Amendment rights, and we conclude the district court properly denied Berry's motion to suppress on these grounds.^x [emphasis added]

Thus, the Fifth Circuit affirmed the denial of Berry's motion to suppress.

Practice Pointer

- Regarding GPS tracking of vehicles, in light of *U.S. v. Jones*, officers should ordinarily obtain a search warrant if they intend to track a vehicle especially long term, using a GPS. The court did leave open the possibility of exigent circumstances being an exception to the warrant requirement. However, if this exception is used, officers should obtain a warrant as soon as practical after the exigency.

ⁱ No. 15-30196 (5th Cir. Decided December 1, 2016)

ⁱⁱ *Id.* at 2-3

ⁱⁱⁱ 132 S. Ct. 945 (2012)

^{iv} 564 U.S. 229 (2011)

^v *Berry* at 5

^{vi} 645 F.2d 252 (5th Cir. 1981)

^{vii} *Berry* at 5-6

^{viii} *Id.* 8-9

^{ix} *Id.* at 11-12

^x *Id.*