



## DO POLICE NEED A SEARCH WARRANT TO TRACK A WANTED SUSPECT BY PINGING HIS CELL PHONE?

November 2017

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Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

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Article Source: [http://www.llrmi.com/articles/legal\\_update/2017\\_us\\_v\\_riley.shtml](http://www.llrmi.com/articles/legal_update/2017_us_v_riley.shtml)

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On June 5, 2017, the Sixth Circuit Court of Appeals of decided *the United States v. Riley*<sup>i</sup>, in which the court discussed whether the police violate the Fourth Amendment when, without a search warrant, they track a wanted person's cell phone GPS location data in order to locate and arrest him. The relevant facts of *Riley*, taken directly from the case, are as follows:

On June 23, 2015, a state court in Kent County, Michigan, issued an arrest warrant for Riley, having found probable cause to believe that he had committed armed robbery of a local Check 'n Go store on June 22. Riley had allegedly entered the store, pointed a gun at the clerk, instructed her to open the safe, and fled on foot with a "money box and money bags." On June 25, Riley purchased a cell phone serviced by AT&T. A member of Riley's family gave this phone's telephone number to Riley's girlfriend "so she could contact him while he was 'on the run.'" Riley's girlfriend in turn disclosed the number to Special Deputy Joel Bowman, a member of the United States Marshal Service Grand Rapids Apprehension Team. On June 26, Bowman applied for and received an order from the 17th Circuit Court of Kent County, Michigan, compelling AT&T to produce telecommunications records of Riley's cell phone under federal electronic-surveillance laws. See 18 U.S.C. §§ 2703, 3123, 3124.

The court order compelled disclosure of call metadata such as inbound and outbound phone numbers and cell-site location (CSL) data, as well as real-time tracking<sup>1</sup> or "pinging" of the latitude and longitude coordinates of Riley's phone. Specifically, the order required AT&T to disclose the following, potentially for two months, until August 26, 2015:

16. Precision location of mobile device (GPS Location) such that service provider shall initiate a signal to determine the location of the subject's mobile device on the service provider's network or with such other reference points as may be reasonable [sic] available and a [sic] such intervals and times as directed by State Task Force Investigators and Deputy Marshals of the United States Marshal Service.

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Within hours of the issuance of the surveillance order, U.S. Marshals received real-time GPS data revealing that Riley's phone was located at the Airport Inn in Memphis. Task-force deputies in the Marshals' Memphis office went to the motel, showed the front-desk clerk a picture of Riley, and determined that Riley had checked in under the name "Rico Shawn Lavender" and was in Room 314. The deputies went to Riley's room and knocked. Riley opened the door and immediately attempted to shut it, but the deputies entered the room and arrested Riley at some time between 8:50 and 9:00 p.m. A Smith & Wesson .22-caliber pistol was in plain view on the bed, and Riley was subsequently indicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).<sup>ii</sup>

Riley filed a motion to suppress the gun found during his arrest and argued that the police violated the Fourth Amendment when, without a warrant, they obtained the GPS location of his cell phone in order to locate him at the motel where he was staying. The district court denied the motion and Riley was convicted. He subsequently appealed the denial of his motion to suppress to the Sixth Circuit Court of Appeals.

The Sixth Circuit identified the issue as follows:

*[W]hether the district court erred in holding that the government did not violate Riley's Fourth Amendment rights by compelling AT&T to disclose, and then by subsequently using, the real-time GPS location of Riley's cell phone over the course of approximately seven hours.*<sup>iii</sup>

The court first examined constitutional law relevant to this issue. The court stated

**Law-enforcement officers conduct a "search" when they seek to obtain information in either of two ways: (1) by physically trespassing upon an individual's person, house, papers, or effects, see *United States v. Jones*, 565 U.S. 400, 406-07 (2012) (holding GPS tracking of a vehicle for twenty-eight days was a search when agents physically trespassed upon the vehicle to install the tracking device), or (2) by intruding upon an individual's reasonable expectation of privacy, see *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring) (holding eavesdropping on a payphone conversation by means of an electronic listening and recording device, when the payphone door was closed, was a search; noting "reasonable expectations of privacy may be defeated by electronic as well as physical invasion").**<sup>iv</sup> [emphasis added]

The court of appeals then noted that Riley argued his case under the second theory, particularly that the police intruded upon his reasonable expectation of privacy when they tracked his cell phone.

The court of appeals also discussed case law from the United States Supreme Court, particularly the *United States v. Knotts*<sup>v</sup>, in which the Supreme Court held that a person does not have a reasonable expectation of privacy in his location while moving through public thoroughfares. In this case, the Court held that it was not search under the Fourth Amendment when officers used a transmitter inside chemicals being transported by drug suspect to track a suspect on public roads but did not use the transmitter inside the cabin where the suspect stayed.

Further, the court of appeals noted their own Sixth Circuit case of the *United States v. Skinner*<sup>vi</sup>, in which police used cell phone GPS data to track a suspected drug trafficker for three days as he drove his motorhome on public roads. The court held that this was not a search within the meaning of the Fourth Amendment. Further, they held that this applied even though the suspect did not expect the cell phone service provider to disclose the location information to the police. The court also relied on the fact that the police only tracked the suspect's location in public areas and not inside a home.

The court also examined *Kyllo v. United States*<sup>vii</sup> in which police used a powerful thermal imaging device to monitor heat being produced inside a residence while growing marijuana. The device used was not available to the general public. The court held that observing activity inside the home did constitute a search under the Fourth Amendment.

Further, the court recognized that motel rooms received the same Fourth Amendment protection that traditional residences receive.

The court then analyzed the facts of Riley's case in light of the case law discussed above. The court noted that while the police tracked Riley's whereabouts for seven hours, they did not track him inside a particular residence or motel room. In fact, they were only able to ascertain in which motel Riley was located; the police went to the motel office and asked about Riley, displaying his photograph, in order to determine in which specific room he was staying. The court then held

Therefore, the government did not conduct a search under the Fourth Amendment when it tracked the real-time GPS coordinates of Riley's cell phone on the date of Riley's arrest. *Skinner* upheld tracking that spanned three days; here, approximately seven hours elapsed between the first ping and the time of Riley's arrest. **That Riley was arrested in a motel is of no moment, for the government learned no more about Riley's whereabouts from tracking his cell-phone GPS data than what Riley exposed to public view by traveling to the motel lobby "along public thoroughfares,"** *Skinner*, 690 F.3d at 774—even if Riley meant to keep his location a secret, one cannot expect privacy in one's *public* movements. And had Riley truly wished to avoid detection, he could have chosen not to carry a cell phone at all, or to *turn it off*.<sup>viii</sup>

The court of appeals then affirmed the denial of the motion to suppress.

It bears mention that Circuit Judge Boggs wrote an interesting concurring opinion in this case in which he offered the opinion that there was another ground on which the court could have based their decision in affirming the denial of the motion to suppress.

Particularly, Judge Boggs noted that since Riley was the subject of an arrest warrant, he had a lesser expectation of privacy inside his residence, whether a traditional home or a motel room. Supporting this opinion, he cited *Payton v. New York*<sup>ix</sup>, in which the Supreme Court held that where law enforcement officers have a valid arrest warrant and a reasonable belief that the suspect is inside his residence, the officers may enter the suspect's residence without consent or a search warrant.<sup>x</sup> Judge Boggs wrote

Surely, if the issuance of a valid arrest warrant may reasonably require an individual to open the doors of his *home*, which stands at the "very core" of Fourth Amendment

protection, *Silverman*, 365 U.S. at 511, then it may reasonably require the same individual to open the doors of his *phone*—at least so far as to disclose the longitude and latitude coordinates emitted by a phone that the individual chooses to carry and turn on. Allowing law-enforcement agents to track a fugitive's cell-phone location data, including GPS location data within the home, thus falls well within the logic of *Payton* without contravening *Kyllo* or *Karo*: so long as a valid arrest warrant has been issued, law-enforcement officers who reasonably suspect that a cell phone is in the possession of the subject of the warrant may track that cell phone's location in order to facilitate the execution of the warrant, without implicating the Fourth Amendment.<sup>xi</sup>

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<sup>i</sup> No. 16-6149 (6th Cir. Decided June 5, 2017)

<sup>ii</sup> *Id.* at 2-4

<sup>iii</sup> *Id.* at 5-6

<sup>iv</sup> *Id.* at 6

<sup>v</sup> 460 U.S. 276 (1983)

<sup>vi</sup> 690 F.3d 772 (6<sup>th</sup> Cir. 2012)

<sup>vii</sup> 533 U.S. 27 (2001)

<sup>viii</sup> *Riley* at 8

<sup>ix</sup> 445 U.S. 573 (1980)

<sup>x</sup> *Riley* at 12

<sup>xi</sup> *Id.* at 12-13