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**SUPREME COURT OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT**

People v. Mabeus¹
(decided June 25, 2009)

Pursuant to a plea agreement, David Mabeus was convicted of robbery in the first degree in Schenectady County.² On appeal, Mabeus claimed that the installation of a global positioning system (“GPS”) underneath his vehicle violated his right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution.³ The Appellate Division, Third Department held that the installation of a GPS device underneath the vehicle constituted a search within the meaning of the Fourth Amendment and required a search warrant.⁴

In the later part of 2002 and in July of 2003 four robberies were committed “at two McDonald’s restaurants located in Saratoga County.”⁵ After an initial investigation, David Mabeus was named a suspect in each of the four robberies.⁶ To further investigate, law enforcement obtained a sealed order and search warrant authorizing the installation of a GPS tracking device underneath Mabeus’ vehicle.⁷ Unbeknownst to Mabeus, the GPS tracking device remained attached to his vehicle for approximately two weeks.⁸

¹ (*Mabeus II*), 885 N.Y.S.2d 363 (App. Div. 3d Dep’t 2009).

² *Id.* at 364.

³ U.S. CONST. amend. IV, states, in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” Although the defendant did not claim that the installation of the GPS violated his rights pursuant to the New York Constitution, this article will discuss the claim in light of New York’s relevant constitutional provisions. N.Y. CONST. art. I, § 12, states, in pertinent part: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated”

⁴ *Id.* at 366.

⁵ People v. Mabeus (*Mabeus I*), 850 N.Y.S.2d 664, 665 (App. Div. 3d Dep’t 2008).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

On August 9, 2003, a “robbery occurred at a McDonald’s restaurant” in Schenectady County.⁹ The GPS tracking device indicated that Mabeus’ vehicle was in the vicinity of the McDonald’s “at the time of the robbery,” as well as earlier that same day.¹⁰ Additionally, the location data stored in the GPS indicated that after the robbery occurred the defendant proceeded to his place of employment and then to his apartment that he shared with his girlfriend.¹¹ On the night of the robbery the defendant returned home at approximately 11:55 p.m.¹² Law enforcement greeted him at gunpoint and immediately arrested him.¹³ At the time of the arrest, the police seized “an axe, a black ski mask and four wrapped packets of currency . . . from his vehicle.”¹⁴ Mabeus was later interviewed at the police station and a McDonald’s employee identified him in a show-up.¹⁵ The police officers subsequently obtained two court ordered warrants to search Mabeus’ “pick-up truck, his place of employment and his residence.”¹⁶ As a result of the search, more inculpatory evidence was discovered and later presented at trial.¹⁷

Mabeus was charged with various crimes in connection with the robbery of the McDonald’s restaurant.¹⁸ Prior to trial, Mabeus moved to suppress the evidence obtained from the GPS tracking device.¹⁹ The court refused to grant a *Mapp/Dunaway* hearing²⁰ and upheld the validity of the search warrant and sealed order.²¹ Mabeus pleaded guilty to first degree robbery, but did not waive his right to appeal.²² He was “sentenced to [twenty] years in prison and five

⁹ *Id.*

¹⁰ *Mabeus I*, 850 N.Y.S.2d at 665.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Mabeus I*, 850 N.Y.S.2d at 665.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ A *Mapp/Dunaway* hearing determines whether evidence seized by law enforcement officials was in violation of the Fourth Amendment based on a lack of probable cause and should therefore be suppressed. *Dunaway v. New York*, 442 U.S. 200, 216 (1979); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

²¹ *Mabeus I*, 850 N.Y.S.2d at 665.

²² *Id.*

years of postrelease supervision.”²³

On appeal, Mabeus argued that “the only basis for the police officers’ actions was the information obtained through the GPS tracking device that was installed under a purportedly illegal sealed order.”²⁴ Moreover, Mabeus claimed there were several deficiencies in the application “for the sealed order and search warrants,” particularly lack of probable cause.²⁵ Finding for Mabeus on this issue, the appellate division remitted the matter to the county court to conduct a *Mapp/Dunaway* hearing to examine the issuance of the sealed order and search warrant.²⁶ On remittal, the county court concluded that based on the “four corners of the search warrant and supporting documentation, [the application] was supported by probable cause and that no hearing was necessary.”²⁷

In his final appeal, Mabeus argued that the placement of the GPS tracking device underneath his vehicle violated his Fourth Amendment rights afforded under the United States Constitution.²⁸ The threshold issue presented on appeal was whether the installation of a GPS tracking device is a search within the meaning of the Fourth Amendment.²⁹ After considering the facts of the case, the court held that the installation of the GPS underneath his vehicle constituted a search within the parameters of the Fourth Amendment and required a search warrant.³⁰ To secure the placement of the GPS tracking device underneath the vehicle, police investigators obtained “a duplicate key for [the] defendant’s vehicle” that was used to remove the vehicle from the parking lot while the defendant was inside the parole office.³¹ The GPS was then hardwired “under the hood of the vehicle.”³² The officers “not only gained access to the interior of defendant’s vehicle to install the device, but actually moved the vehicle to a location where the device could be more easily installed.”³³ The

²³ *Id.*

²⁴ *Id.* at 666.

²⁵ *Id.*

²⁶ *Mabeus I*, 850 N.Y.S.2d at 666.

²⁷ *Mabeus II*, 885 N.Y.S.2d at 364.

²⁸ *Id.* at 365.

²⁹ *Id.*

³⁰ *Id.* at 366.

³¹ *Mabeus II*, 885 N.Y.S.2d at 365.

³² *Id.*

³³ *Id.* at 366.

installation of the GPS tracking device greatly infringed upon Mabeus' legitimate expectation of privacy.³⁴ To be sure, police officers must obtain a search warrant before employing the use of a GPS to track the whereabouts of an individual.³⁵

The United States Supreme Court has yet to address whether the use of GPS tracking devices by law enforcement is a search within the meaning of the Fourth Amendment.³⁶ However, in *United States v. Knotts* the Court held that the installation of an electronic beeper in a container of chloroform to track its whereabouts was not a search.³⁷ In *Knotts*, law enforcement learned that one of the defendants, a former employee of the 3M Chemical Company, was stealing chemicals commonly used to manufacture illegal drugs.³⁸ The defendant also purchased large quantities of similar drugs at the Hawkins Chemical Company.³⁹ To further monitor the situation, the "officers installed [an electronic] beeper inside a five gallon container of chloroform" that was later purchased by the defendant.⁴⁰ Following the purchase, officers followed the defendant to a cabin where he, along with others, operated a drug laboratory.⁴¹

In writing for the Court, Justice Rehnquist asserted that one does not have a reasonable expectation of privacy while driving on public roadways, and that the defendant "voluntarily conveyed to anyone who wanted to look the fact that he was travelling 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."⁴² The Court further clarified that

scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise. A police car following [the defendant] at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Mabeus II*, 885 N.Y.S.2d at 365.

³⁷ *United States v. Knotts*, 460 U.S. 276, 285 (1983).

³⁸ *Id.* at 278.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Knotts*, 460 U.S. at 281-82.

owned by [the] respondent, with the drum of chloroform still in the car.⁴³

In essence, the electronic beeper was merely a tool used by law enforcement to aid them in tracking the movement of the chloroform container.⁴⁴

Bound by the Supreme Court's decision in *Knotts*, several federal circuit courts of appeals have held that the warrantless use of an electronic beeper to monitor the movement of contraband does not fall under the umbrella of the Fourth Amendment.⁴⁵ Specifically, in *United States v. Pretzinger*, the Ninth Circuit Court of Appeals held that the attachment of an electronic device to the outside of an airplane did not constitute a search.⁴⁶ In *Pretzinger*, an electronic beeper was placed on an airplane that was suspected of transporting significant quantities of marijuana.⁴⁷ After installing the beeper, agents from the Drug Enforcement Administration continued to follow and survey the airplane.⁴⁸ The defendant argued that the warrantless placement of the beeper on the airplane constituted an illegal search.⁴⁹ The court, however, reasoned that the

attachment of an electronic location device to a vehicle moving about on public thoroughfares (or through the public airspace) does not infringe upon any reasonable expectation of privacy and therefore does not constitute a search. Consequently, no warrant is needed to justify installation of an electronic

⁴³ *Id.* at 285.

⁴⁴ *Id.* But see *United States v. Karo*, 468 U.S. 705, 714 (1984) (holding that the warrantless "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"). In *Karo*, law enforcement agents installed an electronic tracking device in a can of ether and monitored its movement on public roads as well as in the defendant's house. *Id.* at 708-09. In its decision, the Supreme Court clarified that the use of an electronic beeper for surveillance purposes can only be used to monitor activity that could otherwise be visually observed in public. See *id.* at 714-15.

⁴⁵ See *United States v. Shovea*, 580 F.2d 1382, 1388 (10th Cir. 1978); *United States v. Moore*, 562 F.2d 106, 111 (1st Cir. 1977); *United States v. Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976).

⁴⁶ *Pretzinger*, 542 F.2d at 520.

⁴⁷ *Id.* at 519.

⁴⁸ *Id.*

⁴⁹ *Id.* at 520.

beeper unless [F]ourth [A]mendment rights necessarily would have to be violated in order to initially install the device.⁵⁰

Individuals have a diminished expectation of privacy on public roadways because they can be easily observed and monitored.⁵¹

Similarly, in *United States v. Moore*, the First Circuit Court of Appeals held that the placement of an electronic beeper in a quantity of chemicals likely to be used to manufacture drugs did not constitute a search under the Fourth Amendment.⁵² In *Moore*, DEA agents were alerted that the defendants ordered roughly seven hundred dollars worth of chemicals.⁵³ Since there was probable cause to believe the defendants were purchasing this large amount of chemicals to manufacture illegal drugs, the agents placed an electronic beeper in the package of chemicals that was later picked up by the defendants.⁵⁴ The officers also placed a beeper underneath the vehicles the defendants used to transport the chemicals.⁵⁵ The court reasoned that the defendants

had no reason to believe that their movements on the public highway would remain private [or] that their route . . . would be their secret. . . . Moreover, [the] defendants had no right to assume that law enforcement officers would not enhance their ability to see or track them by use of various artificial means such as binoculars or even radar, or by observing them from the air.⁵⁶

Similar to the reasoning in *Knotts*, an individual has a diminished expectation of privacy in public places.⁵⁷

Since the Supreme Court has yet to rule on this specific issue, *Knotts* remains binding on lower federal courts. For example, the

⁵⁰ *Id.*

⁵¹ *Pretzinger*, 542 F.2d at 520.

⁵² *Moore*, 562 F.2d at 111.

⁵³ *Id.* at 108.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 112.

⁵⁷ *See Moore*, 562 F.2d at 112.

United States District Court for the Northern District of New York clarified its continued support of *Knotts* by asserting that “[l]aw enforcement personnel could have conducted a visual surveillance of the vehicle as it traveled on the public highways. . . . [And that one] ha[s] no expectation of privacy in the whereabouts of his vehicle on a public roadway.”⁵⁸ Based on the current state of federal law, the use of electronic tracking devices to monitor the movements of individuals in public areas by law enforcement fails to raise any Fourth Amendment issues with respect to warrantless searches.⁵⁹

Unlike the United States Supreme Court, the New York Court of Appeals has held that the installation of GPS tracking device is a search, and therefore, requires a warrant.⁶⁰ In *People v. Weaver*, a state police investigator attached a GPS to the bumper of the defendant’s vehicle.⁶¹ The GPS remained under the defendant’s bumper for sixty-five days and monitored the position and location of the vehicle within thirty feet.⁶² Police officers regularly drove past the vehicle to download the location information stored in the GPS.⁶³

The defendant was later tried for the burglaries of the Latham Meat Market in July 2005 and a K-Mart department store on December 24 of the same year.⁶⁴ At trial, the prosecution moved to introduce the GPS recordings, which indicated that the defendant’s vehicle slowly passed through the K-Mart parking lot in the early evening hours of December 24.⁶⁵ The court denied the defendant’s motion to suppress and admitted the GPS tracking device recordings.⁶⁶ After a jury trial, the defendant was convicted of third degree

⁵⁸ *United States v. Moran*, 349 F. Supp. 2d 425, 467 (N.D.N.Y. 2005).

⁵⁹ See *Shovea*, 580 F.2d at 1388; *Moore*, 562 F.2d at 111; *Pretzinger*, 542 F.2d at 520 (holding that the use of an electronic beeper to aid in visual surveillance is not a search under the Fourth Amendment and does not require a warrant).

⁶⁰ *People v. Weaver*, 909 N.E.2d 1195, 1202 (N.Y. 2009).

⁶¹ *Id.* at 1195-96.

⁶² *Id.*

⁶³ *Id.* at 1196.

⁶⁴ *Id.*

⁶⁵ *Weaver*, 909 N.E.2d at 1196.

⁶⁶ *Id.* In addition to the evidence obtained from the GPS, an accomplice to the burglary testified that she drove through the K-Mart parking lot with the defendant on the date of the crime. *Id.* She further testified that the defendant wore dark clothing and was casing the store. *Id.* Moreover, after the robbery the accomplice’s hand was bleeding. *Id.* Evidence later confirmed that the accomplice’s blood matched the blood found on the jewelry case broken into during the burglary. *Weaver*, 909 N.E.2d at 1196.

burglary.⁶⁷ The Appellate Division, Third Department, affirmed the conviction and held that the installation of the GPS tracking device without a warrant did not violate the defendant's rights under the New York Constitution.⁶⁸ Consistent with the several federal circuit courts of appeals that have entertained this issue, the appellate division reasoned that one has a "reduced expectation of privacy in the exterior of [the] vehicle."⁶⁹

The New York Court of Appeals held that the installation of a GPS tracking device violated Weaver's legitimate expectation of privacy, as well as his constitutional right to be free from unreasonable searches.⁷⁰ The New York Constitution is protective of an individual's expectation of privacy in that:

The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof.⁷¹

Arguably, with respect to Fourth Amendment jurisprudence, the New York Constitution provides individuals greater protection than the United States Constitution.

While arguably the facts of *Weaver* are analogous to *Knotts*, the New York Court of Appeals distinguished between an electronic beeper and a GPS tracking device. The court characterized the electronic beeper inserted in the container of chloroform in *Knotts* as a "primitive tracking device" that was merely a tool utilized by law enforcement to enhance their investigation.⁷² Moreover, the majority recognized that unlike a beeper, a GPS tracking device "is a vastly

⁶⁷ *Id.* The jury acquitted Mabeus "of the counts pertaining to the Meat Market burglary."

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Weaver*, 909 N.E.2d at 1201.

⁷¹ *Id.* (quoting N.Y. CONST. art. I, §12).

⁷² *Id.* at 1199.

different and exponentially more sophisticated and powerful technology that is easily and cheaply deployed, and [one that] has virtually unlimited and remarkably precise tracking capability.”⁷³ Furthermore, while the electronic beeper employed in *Knotts* was used more for visual enhancement, the use of a GPS lends itself to “twenty-four hour surveillance.”⁷⁴ Lastly, the “dragnet use of [this type of] technology at the sole discretion of law enforcement authorities to pry into the details of people’s daily lives is not consistent with the values at the core of our State Constitution’s prohibition against unreasonable searches.”⁷⁵

While an individual does in fact have a diminished expectation of privacy on public roadways, “a vehicle upon a public way does not affect a complete surrender of any objectively reasonable, socially acceptable privacy expectation.”⁷⁶ To be sure, one’s legitimate expectation of privacy in his home does not entirely disappear when traveling in public.⁷⁷ Furthermore, “[t]he residual privacy expectation [that the] defendant retained in his vehicle, while perhaps small, was at least adequate to support his claim of a violation of his constitutional right to be free of unreasonable searches and seizures.”⁷⁸ In the opinion of the majority, tracking the defendant’s vehicle for sixty-five days was not only an abuse of police discretion, but an abuse of his right to privacy under the Fourth Amendment.⁷⁹

Weaver adopted a new standard with respect to the warrantless use of GPS tracking devices by law enforcement.⁸⁰ Compared to the United States Constitution, the New York Constitution provides “greater protections when circumstances warrant,” which has allowed for the development of “an independent body of state law in the area of search and seizure.”⁸¹ Therefore, the warrantless installation and prolonged use of a GPS device to monitor a defendant’s whereabouts interferes with his legitimate expectation of privacy and violates his

⁷³ *Id.*

⁷⁴ *Id.* at 1200 (quoting *Knotts*, 460 U.S. at 283).

⁷⁵ *Weaver*, 909 N.E.2d at 1203.

⁷⁶ *Id.* at 1201.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Weaver*, 909 N.E.2d at 1202.

⁸¹ *Id.*

rights afforded under the New York Constitution.⁸²

While the majority in *Weaver* focused on how the rapid advancement of new technology threatens individual rights to privacy, the dissent characterized the GPS tracking device as a technological tool that merely aids in law enforcement investigation.⁸³ The dissent noted that with available resources “the police could, without a warrant and without any basis other than a hunch that [the] defendant was up to no good, have assigned an officer, or team of officers, to follow him everywhere he went, so long as he remained in public places.”⁸⁴ Arguably, the majority’s decision in *Weaver* unjustifiably impedes law enforcement’s ability to investigate and curb criminal activity.⁸⁵ In expressing its concern with leveling the playing field with respect to technological advancements, the dissent stated that criminals will undeniably make use of the “modern and efficient tools available to them, and will not get warrants before doing so.”⁸⁶ Unlike the majority opinion, the dissent is not as much concerned with an individual’s right to privacy under the Fourth Amendment, but the security and welfare of society as a whole. While individual privacy rights must be weighed against protecting society, arguably the majority’s opinion tips too far in favor of the individual.

The dissenting opinion in *Weaver* did, however, focus on the indisputable trespass that occurred when the officers installed the GPS underneath the defendant’s vehicle without his consent.⁸⁷ “The idea of a police officer—or anyone else—sneaking under someone’s car in the middle of the night to attach a tracking device” is an illegal trespass.⁸⁸ While the police officers unlawfully trespassed upon Weaver’s vehicle, they did not violate any of his constitutional rights afforded under the New York Constitution.⁸⁹ Furthermore, “[n]o authority . . . holds that a trespass on private property, without more, is an unlawful search when the property is in a public place.”⁹⁰ To be sure, a careful distinction must be made between property and priva-

⁸² *Id.*

⁸³ *Id.* at 1204 (Smith, J., dissenting).

⁸⁴ *Id.*

⁸⁵ *Weaver*, 909 N.E.2d at 1204.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1205.

⁸⁹ *Id.* at 1206.

⁹⁰ *Weaver*, 909 N.E.2d at 1206.

cy interests with respect to Fourth Amendment jurisprudence.

The dissent in *Weaver* correctly refocused the issue by discussing property rights in the context of trespass. In *Mabeus*, the police officers violated the defendant's expectation of respect for his property by making a duplicate key, physically removing his vehicle, hardwiring the GPS under the hood, and then returning the vehicle back to its original location.⁹¹ While Mabeus had a property interest in his vehicle, he did not have a legitimate expectation of privacy in the constitutional sense.⁹²

The court in *Mabeus* was bound by the New York Court of Appeal's decision in *Weaver*. Thus, the landmark case worthy of analysis is *Weaver*, as it is a clear departure from both federal and state law precedent. The question then becomes at what point do technological advancements become "so good" that they threaten to infringe upon one's right to privacy? While the GPS device is certainly more technologically advanced than the electronic beeper utilized in *Knotts*, is it so dramatically different that it warrants a different kind of treatment? The short answer is no; it does not warrant any special treatment. The dissent in *Weaver* clarified that "[t]he proposition that some devices are too modern and sophisticated to be used freely in police investigation is not a defensible rule of constitutional law."⁹³ Thus, while the GPS tracking device is more technologically advanced than an electronic beeper, it should not be treated any differently.

While the New York Court of Appeal's decision in *Weaver* protects individual privacy interests, it does so at the expense of society. Police officers keep our streets safe and curb criminal activity. Much like a flashlight or binoculars, technological advancements like the GPS tracking devices aid and enhance law enforcement investigations. To accomplish this goal, police officers could have placed a squad car in the parking lot for twenty-four hours or followed the defendant around in a helicopter. Making use of the GPS was simply a more resourceful and efficient way to track the movements of the defendant.

Arguably, unfettered use of a GPS tracking device resembles

⁹¹ *Mabeus II*, 885 N.Y.S.2d at 365-66.

⁹² *Weaver*, 909 N.E.2d at 1206 (Smith, J., dissenting) (quoting *People v. Natal*, 553 N.E.2d 239, 240 (1990)).

⁹³ *Id.* at 1204.

the overreaching hand of the government in the lives of its citizens. However, law enforcement has the responsibility to protect and promote the welfare of its citizens. In each of the cases examined, law enforcement had reasonable suspicion to believe that criminal activity was afoot. In *Moore*, for example, the DEA learned that the defendant and others ordered several hundred dollars worth of chemicals commonly used to manufacture illicit drugs.⁹⁴ A similar situation presented itself in *Knotts*, in which the defendants purchased large quantities of chloroform to produce methamphetamine.⁹⁵ In *Pretzinger*, law enforcement suspected an airplane was transporting significant quantities of marijuana and felt that the installation of an electronic beeper would aid in tracking its whereabouts.⁹⁶ In each of these cases, police officers had reasonable suspicion to believe criminal conduct was imminent. To be sure, the decision to use a GPS was not arbitrary or capricious, but instead based on each officer's training and expertise in the field. The New York Court of Appeals decision in *Weaver* and subsequent decisions by lower courts, particularly *Mabeus*, have stripped police officers of their ability to use discretion. It is hopeful, however, that based on the several federal circuit court decisions and the precedent set forth in *Knotts*, that the United States Supreme Court will find GPS tracking devices to be innovative tools that may be utilized by law enforcement without judicial intervention.

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⁹⁴ *Moore*, 562 F.2d at 108.

⁹⁵ *Knotts*, 460 U.S. at 278.

⁹⁶ *Pretzinger*, 542 F.2d at 519.