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## **County Court, Nassau County, People v. Lacey**

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**County Court, Nassau County, People v. Lacey**

**Cover Page Footnote**

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Melillo, Search & Seizure

# COUNTY COURT OF NEW YORK

People v. Lacey<sup>1</sup>  
(decided May 6, 2004)

Richard Lacey was arrested on September 16, 2002 and charged with multiple counts of burglary, criminal possession of a weapon, and criminal possession of stolen property.<sup>2</sup> He moved to suppress various evidentiary items claiming that “all of the evidence upon which probable cause [had been] based was illegally obtained by the . . . use of a [Global Positioning System] device” that was attached to the undercarriage of his girlfriend’s car without a search warrant.<sup>3</sup> He contended that the Fourth Amendment of the United States Constitution and Article I, Section 12 of the New York Constitution protected his right to be free from warrantless searches and seizures, and that such conduct violated those rights.<sup>4</sup> Specifically, he argued that the protections of the United States and New York Constitutions extended to the attachment of a global positioning device; that such an attachment constituted a search under both constitutions.<sup>5</sup>

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<sup>1</sup> No. 2463N/02, 2004 WL 1040676, at \*1 (N.Y. County Ct. May 6, 2004).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at \*4.

<sup>4</sup> *Id.* See U.S. CONST. amend. IV, which provides in pertinent part: “The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, . . . but upon probable cause . . . .”; N.Y. CONST. art. I, § 12, which provides in pertinent part: “The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, . . . but upon probable cause . . . .”

<sup>5</sup> *Lacey*, 2004 WL 1040676, at \*4.

On the issue of whether the attachment of a Global Positioning System (GPS)<sup>6</sup> to the undercarriage of a vehicle, without first securing a search warrant or obtaining consent, violates a defendant's right against unreasonable searches and seizures, the court held that, absent exigent circumstances, such conduct violated a defendant's constitutional protections.<sup>7</sup> It recognized "that persons have diminished expectations of privacy in automobiles on public roads," but remained unwilling to permit the expanding use and availability of technology to "abrogate our constitutional protections."<sup>8</sup>

During its investigation of multiple burglaries, Nassau County Police, acting upon an identification made by one of the victims, located a car that was allegedly driven by the perpetrator of one of the crimes.<sup>9</sup> The officers decided to conduct surveillance of the vehicle and attached a self contained GPS device to the undercarriage of the vehicle.<sup>10</sup> The police conducted visual surveillance for three days, and observed another vehicle parked at

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<sup>6</sup> "This particular system locates the vehicle by giving the latitude and longitude of the GPS at any point in time, accomplishing through a computer/satellite link incorporating a cellular modem and software compatible with the tracking device." *Id.* at \*1. See N.Y. CONST. art. I, § 12 (specifically requiring a warrant for "interception of telephone and telegraph communications"). This is pertinent to the discussion at bar because the GPS used in tracking Lacey incorporated cellular technology.

<sup>7</sup> *Lacey*, 2004 WL 1040676, at \*8.

<sup>8</sup> *Id.* at \*7-8.

<sup>9</sup> *Id.* at \*1. During a burglary on July 8, 2002, a homeowner returned home and saw two black males at her back door. *Id.* She chased them until they entered a black Mitsubishi Eclipse bearing Tennessee license plate BER523. *Id.* The police subsequently checked the plates and located the car. *Id.*

<sup>10</sup> *Id.*

the premises where the suspect car was also located.<sup>11</sup> The license plates of the second vehicle were registered to a Richard Lacey of Lawrence, Nassau County, New York.<sup>12</sup> A background check revealed that he had prior arrests for burglary, and that he was currently on parole.<sup>13</sup> A police officer contacted Lacey's parole officer and spoke to him regarding the investigation.<sup>14</sup> During the conversation, the officer described a unique photo that had been stolen in one of the burglaries and the parole officer stated that he had seen a similar photo in Lacey's living room.<sup>15</sup> "At that time Lacey became the primary suspect in the investigation."<sup>16</sup>

Subsequently, the officers investigating the burglaries detected, with the assistance of the GPS device, that the suspect car had been moved to the vicinity of Lacey's address in Lawrence.<sup>17</sup> "A surveillance team was placed on the vehicle."<sup>18</sup> The vehicle, then being driven by Lacey, was followed both by visual means and by monitoring the GPS coordinates.<sup>19</sup> The vehicle eventually stopped at 3860 Arthur Avenue North in Seaford, Nassau County, and when police arrived Lacey was observed walking away from the residence toward the vehicle.<sup>20</sup> The police monitored the

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<sup>11</sup> *Id.* at \*2.

<sup>12</sup> *Lacey*, 2004 WL 1040676, at \*2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Lacey*, 2004 WL 1040676, at \*2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

vehicle through the GPS until it stopped several blocks away.<sup>21</sup> “At this time, [the officers] received a radio report that a burglary had occurred at 3860 Arthur Avenue North . . . .”<sup>22</sup> A description of the perpetrator, which ultimately matched Lacey, was given to the officers and he was apprehended as he walked down the driveway of another residence several blocks away.<sup>23</sup>

As this was a case of first impression,<sup>24</sup> the court discussed persuasive authority from other jurisdictions, including decisions from the federal circuits.<sup>25</sup> The questions presented in those cases hinged upon the determination of whether the installation of a GPS device is so intrusive as to render it a search, regardless of the fact that it has been held that individuals have no reasonable expectation of privacy in their movements on public thoroughfares. In *State v. Jackson*,<sup>26</sup> the Washington Supreme Court found that the “use of GPS tracking devices is a particularly intrusive method of surveillance” and that citizens had “a right to be free from the type of governmental intrusion that occurs when a GPS device is attached to a citizen’s vehicle regardless of reduced privacy expectations.”<sup>27</sup> However, the Washington Supreme Court was not presented with a Fourth Amendment issue; there was no claim by the defendant that his Fourth Amendment right had been violated. The court was concerned only with the issue of whether the use of

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<sup>21</sup> *Id.*

<sup>22</sup> *Lacey*, 2004 WL 1040676, at \*2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at \*1.

<sup>25</sup> *Id.* at \*4-7.

<sup>26</sup> 76 P.3d 217 (Wash. 2003).

a GPS device violated Washington's constitutional search provisions.<sup>28</sup> Similarly, in *State v. Campbell*,<sup>29</sup> the Oregon Supreme Court held that, under its constitution, "the use of [a] radio transmitter to locate . . . [an] automobile was a search."<sup>30</sup>

Meanwhile, in *United States v. Berry*,<sup>31</sup> although the court did not need to decide the issue as the GPS was installed pursuant to a warrant, the court noted a "GPS merely records electronically what the police could learn if they were willing to devote the personnel necessary to tail a car around the clock. The Supreme Court might conclude, however, that the new technology is so intrusive that the police must obtain a court order before using it."<sup>32</sup> Therefore, the *Berry* court recognized the potential problems of applying the existing "reasonable expectation test" to the attachment of GPS devices, while speculating that the intrusiveness of such conduct may bring it within the ambit of Fourth Amendment search and seizure protections.

Therefore, the *Lacey* court held that the attachment of a GPS device was a search within the meaning of both the Fourth Amendment and Article I, Section 12 of the New York Constitution.<sup>33</sup> It stated that:

Although it is acknowledged that persons have diminished expectations of privacy in automobiles

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<sup>27</sup> *Id.* at 224.

<sup>28</sup> *Id.* at 222, 222 n.1.

<sup>29</sup> 759 P.2d 1040 (Or. 1988).

<sup>30</sup> *Id.* at 1049.

<sup>31</sup> 300 F. Supp. 2d 366 (D.M.D. 2004).

<sup>32</sup> *Id.* at 368.

<sup>33</sup> *Lacey*, 2004 WL 1040676, at \*7.

on public roads and can be visually tracked by the police, it is clear that the mere act of parking a vehicle on a public street does not give law enforcement the unfettered right to tamper with the vehicle by surreptitiously attaching a tracking device without either the owner's consent or without a warrant issued by a Court.<sup>34</sup>

The decision clearly focused on the increasing necessity of protecting citizens from unfettered intrusions.<sup>35</sup> It stressed that “[t]echnology cannot abrogate our constitutional protections.”<sup>36</sup>

Yet, in *United States v. Moran*,<sup>37</sup> the *Lacey* decision was criticized for failing to consider the Supreme Court's holding in *United States v. Knotts*,<sup>38</sup> namely, that “ ‘[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.’ ”<sup>39</sup> Similar to *Lacey*, *Moran* sought the “suppression of any evidence obtained from a GPS device attached to his vehicle as well as any evidence derived from information obtained from the GPS tracking device, as violative of his Fourth Amendment rights.”<sup>40</sup> Although the pertinent facts of the two cases were basically identical,<sup>41</sup> the

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<sup>34</sup> *Id.* at \*8.

<sup>35</sup> *Id.* at \*7. “The citizens of New York have the right to be free in their property, especially in light of technological advances which have and continue to diminish this privacy.” *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 349 F. Supp. 2d 425 (N.D.N.Y. 2005).

<sup>38</sup> 460 U.S. 276 (1983).

<sup>39</sup> *Moran*, 349 F. Supp. 2d at 467 (citing *Knotts*, 460 U.S. at 281).

<sup>40</sup> *Id.*

<sup>41</sup> *See id.* at 433; *Lacey*, 2004 WL 1040676, at \*1. Both defendants were tracked with a GPS device that was attached to the undercarriage of their vehicles, without a search warrant.



district court held that the attachment of a GPS device was not a search and was therefore constitutional under the federal constitution.<sup>42</sup> The court, relying on *Knotts*, stated, “Moran had no expectation of privacy in the whereabouts of his vehicle on a public roadway”; therefore, there were “no Fourth Amendment implications in the use of the GPS device.”<sup>43</sup>

The cases clearly turn on whether the court views the attachment of a GPS device as a search in the constitutional context. On the one hand, the *Moran* court found that such conduct was not a search because of the lack of a reasonable expectation of privacy in one’s movements on public thoroughfares.<sup>44</sup> On the other hand, the court in *Lacey* found that such conduct was a physical intrusion which constituted a search regardless of the defendant’s diminished expectation of privacy in his automobile on public roads.<sup>45</sup> Thus, the *Moran* court criticized *Lacey* for failing to reconcile its reasoning with the Supreme Court’s decision in *Knotts*. It implied that the *Lacey* decision overlooked the fact that there is no expectation of privacy while traveling on public roads; consequently, the Fourth Amendment could not be implicated by the mere tracking of a vehicle’s movement from one place to another.

In conclusion, courts analyzing the issue have predominantly followed two lines of reasoning. On the one hand,

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<sup>42</sup> *Moran*, 349 F. Supp. 2d at 467.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Lacey*, 2004 WL 1040676, at \*8.

there are those courts that follow the existing “reasonable expectation of privacy” test and hold that the attachment of a GPS device is not a search under the Fourth Amendment and, therefore, does not require a warrant. Such courts base their reasoning on the defendants’ lack of a reasonable expectation of privacy in their movements from one place to another regardless of the increased level of intrusion due to advances in technology. On the other hand, other courts have held that advances in technology should not be permitted to abrogate the constitutional protections of the Fourth Amendment or their respective state constitutional search provisions. They reason that the intrusive nature of the attachment of the devices and electronic tracking methods has increased and is, therefore, properly within the ambit of the Fourth Amendment protections, regardless of the diminished expectations of privacy. Clearly, this area of constitutional jurisprudence is in desperate need of guidance.

*Nicholas Melillo*