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Court of Appeals of New York - People v. Weaver

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COURT OF APPEALS OF NEW YORK

People v. Weaver[1]
(decided May 12, 2009)

Scott Weaver was arrested for two burglaries that took place in Latham, New York.[2] Prior to his arrest, Weaver was under electronic surveillance, and readings from a Global Positioning System ("GPS") placed on his vehicle were used as evidence against him during his trial.[3] Weaver moved to suppress the GPS information, but his motion was summarily denied.[4] Subsequently, a jury convicted Weaver of burglary.[5] Although divided on the issue, the Appellate Division, Third Department, affirmed his conviction.[6] On appeal to the New York Court of Appeals, Weaver alleged that the warrantless installation of a GPS device on the exterior of his van was an unreasonable search, and therefore violated his constitutional rights pursuant to the United States Constitution[7] and the New York Constitution.[8] The New York Court of Appeals in a four to three decision reversed Weaver's conviction and held that the warrantless installation of the GPS device on his vehicle infringed his constitutional rights.[9]

On the morning of December 21, 2005, a State Police Investigator attached a GPS tracking device to the bumper of Weaver's van,

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[1] 909 N.E.2d 1195 (N.Y. 2009).

[2] *Id.* at 1196.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Weaver*, 909 N.E.2d at 1196.

[7] 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 . . . ."

[8] 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 . . . ."

[9] *Weaver*, 909 N.E.2d at 1203 (granting Weaver's motion to suppress the evidence and ordering a new trial).

which was parked on a public street.[10] The GPS tracking device consistently monitored the van for sixty-five days, during which time, no warrant was obtained.[11] In order to retrieve information from the GPS device on Weaver's van, an investigator had to drive by the van, press a button on the receiver, and save the van's travel history to a computer.[12] Weaver was eventually arrested and charged with crimes in connection with "two separate burglaries—one committed [in] July 2005 at the Latham Meat Market and the other on Christmas Eve of the same year at the Latham K-Mart."[13] At trial, the government sought to introduce the tracking history of the GPS that revealed that at 7:26 p.m. on the night of the K-Mart burglary, Weaver's van passed through the K-Mart parking lot at a slow-moving "speed of six miles per hour."[14] Weaver moved to suppress the GPS readings, but was unsuccessful.[15] The trial proceeded with the admittance of such evidence and Weaver was subsequently found guilty of the K-Mart burglary.[16] Weaver appealed and the appellate division affirmed, but the New York Court of Appeals reversed his conviction.[17]

Although Weaver asserted that his constitutional protection against unreasonable searches was violated under both the United States Constitution and the New York Constitution, the New York Court of Appeals reversed his conviction based solely on New York constitutional principles.[18] In reaching this determination, the court noted that "the United States Supreme Court has not yet ruled upon whether the use of GPS by the state for the purpose of criminal investigation constitutes a search under the *Fourth Amendment*."[19] Nevertheless, in the past, the New York Court of Appeals "has not hesitated to interpret article I, [section] 12 [of the New York Constitution] independently of its Federal counterpart when the analysis adopted by

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[10] *Id.* at 1195. This GPS tracking device is also referred to as a "Q-ball," and is operated by the use of satellites, which spots the location of the vehicle and its speed. *Id.* at 1196.

[11] *Id.* at 1195-96.

[12] *Id.* at 1196.

[13] *Id.*

[14] *Weaver*, 909 N.E.2d at 1196.

[15] *Id.*

[16] *Id.* The jury acquitted Weaver "of the counts pertaining to the Meat Market burglary." *Id.*

[17] *Id.* at 1196, 1197.

[18] *Weaver*, 909 N.E. at 1202.

[19] *Id.* The *Weaver* court also noted that most federal circuit courts have not addressed this issue as well. *Id.*

the Supreme Court in a given area has threatened to undercut the right of [its] citizens to be free from unreasonable government intrusions."[20] The court noted that the New York Constitution has been interpreted to provide "greater protections when circumstances warrant," which has led New York courts to "develop[] an independent body of State law in the area of search and seizure."[21]

To determine whether a person has a privacy interest in the realm of Fourth Amendment protection, a person must show "a subjective expectation of privacy and whether that expectation would be accepted as reasonable by society."[22] The court found that the defendant had a reasonable expectation of privacy that was violated by the installation of the GPS device, which tracked the movement of his van for over two months, and thus constituted "a search under article I, [section] 12 of the State Constitution."[23] Consequently, the court concluded that "[u]nder our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause."[24] The court's findings are reflective of Justice White's opinion in *Delaware v. Prouse*,[25] in which he stated, "people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles."[26]

In reaching its conclusion, the *Weaver* court looked to other

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[20] People v. Dunn, 564 N.E.2d 1054, 1057 (N.Y. 1990).

[21] *Weaver*, 909 N.E.2d at 1202. *See also* People v. Scott, 593 N.E.2d 1328, 1342 (N.Y. 1992) ("An independent construction of our own State Constitution is particularly appropriate where a sharp or sudden change in direction by the United States Supreme Court dramatically narrows fundamental constitutional rights [of] of our citizens."); People v. Harris, 570 N.E.2d 1051, 1053 (N.Y. 1991) ("Our federalist system of government necessarily provides a double source of protection and State courts, when asked to do so, are bound to apply their own Constitutions notwithstanding the holdings of the United States Supreme Court."); People v. Torres, 543 N.E.2d 61, 63 (N.Y. 1989) ("[A]lthough the history and identical language of the State and Federal constitutional privacy guarantees . . . support a policy of uniformity, this court has demonstrated its willingness to adopt more protective standards under the State Constitution.") (internal quotations omitted).

[22] *Weaver*, 909 N.E.2d at 1198 (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

[23] *Id.* at 1202.

[24] *Id.* at 1203.

[25] 440 U.S. 648 (1979).

[26] *Id.* at 663.

state courts' holdings as persuasive authority on the novel matter and learned that other jurisdictions have held that the warrantless use of a GPS device violates several state constitutional safeguards against unreasonable searches and seizures.[27]

The majority further reasoned that surveillance of the defendant for sixty-five days without the use of the GPS would not have been feasible and that the use of such invasive technology by law enforcement to receive detailed information as to an individual's everyday life does not coincide with the basic tenets that lie at the heart of New York's constitutional protection against unreasonable searches.[28] According to the court, the privacy interest in the van may not have been significant, but it was enough to support Weaver's contention that his constitutional protection against unreasonable search and seizure had been violated; therefore, the invasion of his privacy through the use of the GPS device defied even an insignificant expectation of privacy.[29]

Judge Smith disagreed with the majority's assertion that certain technologies are "too modern and sophisticated" to be used by law enforcement.[30] Even though Judge Smith believed that the installation "of the GPS device . . . violated [the] defendant's property rights," he did not agree that it "invade[d] his privacy." [31]

The United States Supreme Court has yet to confront the specific issue of whether the installation of a GPS device "constitute[s] a search under the *Fourth Amendment*," but the Court has established a standard to determine whether a defendant has standing to contest a search under the Fourth Amendment.[32] In *Katz v. United States*, the

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[27] *Weaver*, 909 N.E.2d at 1203. *See also* State v. Jackson, 76 P.3d 217, 224 (Wash. 2003) (holding that people have a right to be free from governmental interference that occurs with the installation of a GPS device to one's vehicle; therefore, law enforcement was required to obtain a warrant before the device was installed); State v. Campbell, 759 P.2d 1040, 1049 (Or. 1988) (holding that a radio transmitter used to detect the location of a vehicle constituted a search according to the Oregon State Constitution, and absent exigent circumstances the use of the device was an infringement of the defendant's freedom against unreasonable searches and seizures).

[28] *Weaver*, 909 N.E.2d at 1203.

[29] *Id.* at 1201.

[30] *Id.* at 1204 (Smith, J., dissenting).

[31] *Id.* at 1206. *See also* People v. Natal, 553 N.E.2d 239, 240 (N.Y. 1990) ("[T]he existence of a *property* interest does not mean that [the] defendant also had a *privacy* interest protectable by the State and Federal guarantees against unreasonable searches and seizures.").

[32] *Weaver*, 909 N.E.2d at 1202.

Supreme Court found that the Fourth Amendment protection against unreasonable searches and seizures extends to conversations made in a telephone booth.[33] More specifically, the Court noted that the government violated the defendant's rights when agents wiretapped a phone booth and eavesdropped on his conversation.[34] Justice Harlan's concurring opinion sets out a two-prong test that has become the leading standard in subsequent cases. The two-fold rule notes that a person must have "an actual (subjective) expectation of privacy" in the place being searched and that that expectation is "one that society is prepared to recognize as reasonable."[35] Justice Harlan reasoned that although "the booth is accessible to the public," at the time that Katz was in the booth with the door closed behind him, the booth became "temporarily private," and therefore, any subjective expectation of privacy is reasonable.[36]

Although the Supreme Court has not specifically addressed GPS surveillance, the Court has faced the issue of surveillance technology in conjunction with Fourth Amendment protections in *United States v. Knotts*.[37] In *Knotts*, Minnesota law enforcement agents installed a beeper in a five-gallon drum of chloroform and tracked the movement of the drum to a remote cabin owned by the respondent.[38] The issue before the Court was whether the use of the beeper by law enforcement violated the respondent's rights under the Fourth Amendment.[39] Knotts unsuccessfully moved to suppress the evidence obtained as a result of law enforcement's warrantless use of the beeper, and he was subsequently convicted of conspiracy to manufacture methamphetamine and other controlled substances in violation of federal law.[40] The Eighth Circuit Court of Appeals reversed his conviction and held that such monitoring with a beeper was a violation of the Fourth Amendment because it infringed on the "respondent's reasonable expectation of privacy."[41]

In reversing the Eighth Circuit's decision, the *Knotts* Court re-

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[33] *Katz*, 389 U.S. at 353.

[34] *Id.* at 348.

[35] *Id.* at 361 (Harlan, J., concurring) (internal quotations omitted).

[36] *Id.* (internal quotations omitted).

[37] 460 U.S. 276 (1983).

[38] *Id.* at 277.

[39] *Id.*

[40] *Id.* at 279.

[41] *Id.*

lied on the well settled principle that individuals have a "diminished expectation of privacy in an automobile."[42] Employing this notion, the Court found that the respondent had a legitimate expectation of privacy in his own cabin where the beeper was ultimately found, but not in the vehicle that the beeper was transported in.[43] Since the Court held that the monitoring of the beeper did not infringe on any legitimate expectation of privacy of the respondent, the surveillance and tracking of the beeper signals did not constitute a "search nor a seizure" under the Fourth Amendment.[44] The Court further reasoned

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[42] *Knotts*, 460 U.S. at 281. *See also* Rakas v. Illinois, 439 U.S. 128, 154 n.2 (1978) (Powell, J., concurring) ("Automobiles operate on public streets; they are serviced in public places; . . . their interiors are highly visible; and they are subject to extensive regulation and inspection."); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thorough-fares where [both] its occupants and its contents are in plain view.").

[43] *Knotts*, 460 U.S. at 282. *Compare* Kyllo v. United States, 533 U.S. 27, 34 (2001) (the use of thermal-imaging technology to detect heat levels inside the home that could not have been obtained without actually entering the home was considered a search because the use of such technology "is not in general public use"), *with* California v. Ciraolo, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thorough-fares. . . . [Especially] where he has a right to be and which renders the activities clearly visible.").

[44] *Knotts*, 460 U.S. at 285 (internal quotations omitted). The federal courts of appeals have been split over whether installing a tracking beeper in a vehicle converts its monitoring into a search for purposes of the Fourth Amendment. *Compare* United States v. Garcia, 474 F.3d 994, 996-97 (7th Cir. 2007) (holding that the installation of a GPS tracking device to an individual's vehicle does not constitute a search nor a seizure for purposes of the Fourth Amendment), *and* United States v. McIver, 186 F.3d 1119, 1127 (9th Cir. 1999) (holding that there was no unreasonable search or seizure because the officers did not substantially interfere with the defendant's possessory interest in his vehicle), *and* United States v. Michael, 645 F.2d 252, 256 (5th Cir. 1981) (holding that the attachment of a tracking device to a vehicle "parked in a public place" is only a minimal intrusion, and thus not a violation of a defendant's Fourth Amendment protections), *and* United States v. Bernard, 625 F.2d 854, 860-61 (9th Cir. 1980) (noting that neither the installation of a tracking device nor the constant surveillance of a vehicle with a tracking device violates any reasonable expectation of privacy of the defendant), *and* United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976) (noting that because vehicles travel on public roadways, the installation of a tracking device on a defendant's vehicle is not a violation of "any reasonable expectation of privacy"), *with* United States v. Bailey, 628 F.2d 938, 944-45 (6th Cir. 1980) (noting that to satisfy Fourth Amendment protections, surveillance of a vehicle must be supported "by a warrant based on probable cause"), *and* United States v. Shovea, 580 F.2d 1382, 1387 (10th Cir. 1978) (noting that surveillance of a vehicle must be supported by "probable cause and exigent circumstances"), *and* United States v. Moore, 562 F.2d 106, 111, 112 (1st Cir. 1977) (holding that "the placing of beepers, without warrant, in contraband, stolen goods and the like on the theory that the possessors of such articles have no legitimate expectation of privacy in substances which they have no right to possess at all" does not violate the Fourth Amendment).

that the use of scientific enhancements was not unconstitutional, but an efficient means to observe what is already out in the open.[45] In justifying this assertion, the Court noted "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."[46] It can be presumed that the Court viewed such surveillance as a heightened sense of vision, which is not prohibited by the Constitution.

Subsequent to *Knotts*, the Supreme Court was once again called upon to address the issue of whether law enforcement is required to obtain a warrant in order to install and monitor a beeper.[47] In *United States v. Karo*, the government installed and monitored a beeper that was placed in a canister of ether.[48] The canister of ether was to be used by the defendants to remove "cocaine from clothing that had been imported into the United States."[49] Karo and other co-conspirators were charged with "conspiring to possess cocaine with [the] intent to distribute" after law enforcement legally searched a home based on information obtained through the use of the beeper.[50] The respondents moved to suppress the evidence discovered from the home on the basis that the initial installation and monitoring of the beeper was not authorized through a valid warrant.[51] The district court granted Karo's motion to suppress the evidence, and the court of appeals affirmed because the beeper was installed without a warrant and because law enforcement monitored the can of ether while it was in the confines of a private residence.[52] In sum, the lower courts found that Karo's Fourth Amendment rights were violated.[53]

The Supreme Court in *Karo* found that the transfer of a can that had an unmonitored beeper in it did not violate a privacy interest of the transferee (Karo), because it did not provide any information.[54]

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[45] *Knotts*, 460 U.S. at 284. The Court stated "[w]e have never equated police efficiency with unconstitutionality . . . ." *Id.*

[46] *Id.* at 282.

[47] United States v. Karo, 468 U.S. 705, 711 (1984).

[48] *Id.* at 708.

[49] *Id.*

[50] *Id.* at 710.

[51] *Id.*

[52] *Karo*, 468 U.S. at 710.

[53] *Id.* at 711.

[54] *Id.* at 712.

The unmonitored beeper may have created a potential invasion of privacy, but an actual invasion did not occur; if so, the installation of the beeper would have been considered a search under the Fourth Amendment.[55] According to the Court, "[i]t is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence."[56] Accordingly, the Court concluded that neither Karo's, nor the other respondents' Fourth Amendment protections were violated "by the installation of the beeper"; however, the use of a beeper inside a private home infringed upon the Fourth Amendment rights of those who had a legitimate expectation of privacy in the home.[57]

Although the Supreme Court has not addressed the issue of GPS surveillance in the context of the Fourth Amendment, at least one lower federal court has decided the issue. In *United States v. Moran*,[58] the United States District Court for the Northern District of New York specifically addressed whether the use of a GPS tracking device that was placed on an individual's vehicle violated the Fourth Amendment.[59] The defendant was charged with narcotics trafficking based in part on evidence discovered through the use of a GPS device that traced the location of his vehicle on July 29 and 30, 2003.[60] Moran moved to suppress the evidence obtained from the GPS device claiming that the GPS surveillance violated his Fourth Amendment rights.[61] The court denied his motion because it determined that GPS surveillance is akin to visual surveillance by law enforcement agents.[62]

The district court, relying on the conclusions set forth in *Knotts*, held that Moran did not have an expectation of privacy in the vehicle because his vehicle was traveling on a public highway, and

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[55] *Id.* The Court cautioned that equating an invasion of privacy with a Fourth Amendment search would suggest "that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on." *Id.*

[56] *Karo*, 468 U.S. at 712.

[57] *Id.* at 713. The Court noted that "private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." *Id.* at 714.

[58] 349 F. Supp. 2d 425 (N.D.N.Y. 2005).

[59] *Id.* at 467.

[60] *Id.* at 432, 467.

[61] *Id.* at 432-33.

[62] *Id.* at 467, 468.

therefore, "there was no search or seizure" that violated his Fourth Amendment rights.[63] Consequently, the court denied the defendant's motion to suppress the evidence.[64]

New York courts have also addressed GPS surveillance by law enforcement in the context of search and seizure. The constitutional issue concerning GPS surveillance was before the Nassau County Court in *People v. Lacey*.[65] On July 8, 2002, police officers investigated two residential burglaries, which became the first of approximately twenty five burglaries that occurred in Nassau County between July and August of that year.[66] The following month, another burglary took place and "[t]he license plate number" of the getaway car was checked by police and the owner was identified.[67] The lead detective attached a GPS device to the vehicle while it was parked on the side of the road allowing him to track the vehicle and ultimately the defendant, Lacey.[68] Based on the evidence obtained through the use of the GPS device, the police had probable cause to arrest Lacey for burglary.[69] Lacey asserted that the evidence discovered by using the GPS device was illegally obtained "without a search warrant," and therefore it should have been suppressed.[70] Lacey argued that his right against unreasonable searches and seizures under the Fourth Amendment of the United States Constitution and Article I, section 12 of the New York Constitution had been violated.[71] The court recognized that the constitutional safeguard against unreasonable searches and seizures pursuant to Article I, section 12 has been interpreted broadly.[72] As a case of first impression, the *Lacey* court examined whether the broad interpretation of Article

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[63] *Moran*, 349 F. Supp. 2d at 467.

[64] *Id.* at 468.

[65] No. 2463N/02, 2004 WL 1040676, at *1 (Nassau County Ct. May 6, 2004).

[66] *Id.*

[67] *Id.* at *2.

[68] *Id.* at *1.

[69] *Id.* at *4.

[70] *Lacey*, 2004 WL 1040676, at *4. The *Moran* Court found it worth mentioning that the *Lacey* court failed to not only uphold the reasoning of the United States Supreme Court in *Knotts*, but failed to even mention *Knotts* in its decision. *Moran*, 349 F. Supp. 2d at 467.

[71] *Lacey*, 2004 WL 1040676, at *4.

[72] *Id.* (search and seizure protections have been extended to "telephone and telegraph communications" as well). *See also* N.Y. CONST. art. I, § 12 which states, in pertinent part: "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated . . . ."

I, section 12 included the installation of GPS devices.[73]

The *Lacey* court held that "in the absence of exigent circumstances," law enforcement must obtain a warrant prior to attaching a GPS to an automobile.[74] However, the defendant did not have a legitimate expectation of privacy in the vehicle because he was not the rightful owner; therefore, he lacked standing to contest the search.[75] Nevertheless, the court found that even though "persons have [a] diminished expectation[] of privacy" in a vehicle because of its visible public use, simply parking a vehicle on the side of a public street does not give law enforcement the unfettered right to interfere with the vehicle by installing a GPS device without the consent of the owner or without a court ordered warrant.[76] According to the *Lacey* court, Article I, section 12 of the New York Constitution gives individuals the right to be free from the invasiveness of cellular technology; since a GPS requires such cellular technology, the court concluded that Lacey's constitutional right was violated.[77] Judge Calabrese further asserted that "[t]he citizens of New York have the right to be free in their property, especially in light of technological advances . . . . Technology cannot abrogate our constitutional protections."[78]

One year later, a Westchester County Court addressed the issue of GPS surveillance in conjunction with the Fourth Amendment and Article I, section 12 of the New York Constitution.[79] In *People v. Gant*, the defendant was indicted on several counts of possession of a controlled substance.[80] The defendant "move[d] to suppress any and all evidence obtained as a result of the use of . . . [the GPS] device" that was installed on a motor home.[81] He claimed that the warrantless use of such device violated Article I, section 12 of the New York Constitution and the Fourth and Fourteenth Amendments of the

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[73] *Lacey*, 2004 WL 1040676, at *4.

[74] *Id.* at *8.

[75] *Id.* at *10. *See also Rakas*, 439 U.S. at 143 (in order to claim Fourth Amendment protection, a person must have "a legitimate expectation of privacy" in the place being searched).

[76] *Lacey*, 2004 WL 1040676, at *8.

[77] *Id.* at *7.

[78] *Id.*

[79] 802 N.Y.S.2d 839 (Westchester County Ct. 2005).

[80] *Id.* at 840.

[81] *Id.* at 845.

United States Constitution.[82] The court denied Gant's motion to suppress because he failed to show a legitimate expectation of privacy in the place that was searched.[83] The defendant was unable to prove that he was either the owner or an authorized passenger with a "reasonable expectation of privacy in the *vehicle itself*."[84]

The *Gant* court relied on *Knotts* and *Moran*, which based their findings on the fact that the defendant did not have a legitimate expectation of privacy in the vehicle because of the public nature and public use of motor vehicles.[85] Moreover, the court found that the New York Constitution does not provide greater privacy protection than the United States Constitution, because New York courts and statutory regulations have diluted the expectation of privacy that one has in a motor vehicle based on the innate mobility and public operation of vehicles.[86] Therefore, the court found that law enforcement was not obligated to obtain a search warrant before they attached the GPS device to the defendant's vehicle.[87]

The majority in *Gant* found that its decision was consistent with that of *Lacey*.[88] However, this does not appear to be the case. According to the *Lacey* court, the owner of a vehicle has a right to be free from governmental intervention when it comes to tampering with the owner's property without a warrant; therefore, if the defendant is the rightful owner of the vehicle there is a contravention of his constitutional protection.[89] The *Gant* court was more focused on the inherent mobility of motor vehicles in general, whereas, the *Lacey* court justified its holding on the basis of the attenuated relationship that the defendant had with the vehicle, and not because of the vehicle's public mobility or its location on the side of the street. Although the *Lacey* court found that the defendant did not have a legitimate expectation of privacy in the vehicle that was installed with the GPS tracking

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[82] *Id.*

[83] *Id.* (noting that if there is no expectation of privacy, there is no Fourth Amendment search or seizure implications).

[84] *Gant*, 802 N.Y.S.2d at 845.

[85] *Id.* at 847. *See Knotts*, 460 U.S. at 281; *Moran*, 349 F. Supp. 2d at 467.

[86] *Gant*, 802 N.Y.S.2d at 847.

[87] *Id.* at 847-48.

[88] *Id.* at 848 ("The *Lacey* [c]ourt . . . held that defendant . . . had no standing to assert that the evidence resulting from GPS monitoring on the vehicle should be suppressed. Likewise, Defendant herein has failed to establish a reasonable expectation of privacy in the *vehicle,* or in the *vehicle's whereabouts* . . . .").

[89] *Lacey*, 2004 WL 1040676, at *8.

device, the justification for such a result was visibly different from that of the *Gant* court. The *Gant* court relied on the logic of *Knotts* and *Moran*, which reasoned that since a motor vehicle travels on public roadways and thoroughfares, law enforcement is not obligated to obtain a warrant in order to attach the GPS device to the vehicles.[90] On the other hand, the *Lacey* court came to the conclusion Lacey's right against unreasonable searches and seizures was not violated because of his *status*; he was not the rightful owner of the vehicle.[91]

The reasoning employed by the *Weaver* court coincides more with that of the *Lacey* court, because an opposite holding may be construed as support for the abuse and/or avoidance of a person's liberties by law enforcement officials.[92] As technology improves, *Weaver* suggests that the scope of searches and seizures should not remain stagnant, but alternatively, should broaden with such technological advances to secure the privacy interests of the public.

There are not only inconsistencies between the state court decisions themselves, but between New York and federal cases dealing with GPS and other tracking devices. In the past, the New York Court of Appeals has opted to use independent standards under the New York Constitution, "when doing so best promotes 'predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens.' "[93] But this aim has not been met considering the inconsistency between *Lacey* and *Gant*.

The majority in *Weaver* briefly discussed that the beeper used to track the chloroform in *Knotts* was considered more archaic than the advanced GPS device used in *Weaver*, but recognized that at an earlier point in history the beeper was cutting-edge technology.[94] Even though certain technology can one day be considered obsolete, constitutional protections are constant. The distinction between the beeper and the GPS device that the *Weaver* majority made was misguided. The difference between the two should not have been based on their respective capabilities because relative to their times, they

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[90] *Gant*, 802 N.Y.S.2d at 847. *See also Knotts*, 460 U.S. at 281; *Moran*, 349 F. Supp. 2d at 467.

[91] *Lacey*, 2004 WL 1040676, at *10.

[92] *Weaver*, 909 N.E.2d at 1203.

[93] People v. P.J. Video, Inc., 501 N.E.2d 556, 561 (N.Y. 1986) (quoting People v. Johnson, 488 N.E.2d 439, 445 (N.Y. 1985)).

[94] *Weaver*, 909 N.E.2d at 1199. *But see id.* at 1204 (Smith, J., dissenting).

were both progressive technology. Instead, *how* these devices are used should be the proper scrutiny.

There was a certain distinction that seemed to be overlooked in *Gant*—a distinction between the installation of a tracking device inside an object located inside an automobile and the actual installation of a tracking device on the vehicle *itself*. There is a difference between tracking the whereabouts of a particular good (e.g., a chemical) and tracking a vehicle, with the end goal to locate an individual. The tracking of an individual by attaching a GPS tracking device to the vehicle implicates a "big brother society" that the *Lacey* court sought to avoid.[95] The *Weaver* court came to a conclusion that seemed protects the privacy interests of the defendant, rather than advancing the investigatory function of the police; but like the *Lacey* court, *Weaver* overlooks the importance of distinguishing itself from *Knotts* by examining in what capacity the GPS was used.

In *Weaver*, Judge Smith's dissent points out that "[o]ne who travels on the public streets . . . takes the chance that he or she will be observed," but by traveling on public streets one does not take the chance of being monitored by a GPS device that was attached to his vehicle without his knowledge.[96] It has been repeatedly argued that one has a "*diminished* expectation of privacy in an automobile."[97] However, it seems as though the expectation of privacy has not been diminished, but instead has become non-existent. In what circumstance would the expectation of privacy only be diminished rather than compromised? The majority in *Weaver* declared:

> [I]t is one thing to suppose that the diminished expectation affords a police officer certain well-circumscribed options for which a warrant is not required and quite another to suppose that when we drive or ride in a vehicle our expectations of privacy are so utterly diminished that we effectively consent to the unsupervised disclosure to law enforcement au-

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[95] *Lacey*, 2004 WL 1040676, at *7 (internal quotations omitted).

[96] *Weaver*, 909 N.E.2d at 1204 (Smith, J., dissenting).

[97] *See Knotts*, 460 U.S. at 281 (emphasis added). *See also Cardwell*, 417 U.S. at 590 ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where [both] its occupants and its contents are in plain view."); *Rakas*, 439 U.S. at 153-54 (Powell, J., concurring).

> thorities of all that GPS technology can and will reveal.[98]

The *Weaver* decision complicates the progeny of *Knotts*, which has only exhibited an all or nothing situation with regards to this expectation of privacy.

Weaver appears to reconcile itself with the *Lacey* court, but many questions remain unanswered, such as—when is technology considered a tool of efficiency for law enforcement and when is it considered an abusive tool to intrude upon the lives of citizens? This has been a balancing act in all realms of the Fourth Amendment. The broad language of the Fourth Amendment and Article I, section 12 of the New York Constitution have posed difficult obstacles in the past and will continue to pose difficult obstacles in the future, as the terms "search" and "seizure" will be harder to define with the advent of more sophisticated technology.

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[98] *Weaver*, 909 N.E.2d at 1200.