STATE OF WISCONSIN
IN SUPREME COURT

No. 2008AP658-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, HONORABLE STEVEN D. EBERT, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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BRIEF AND OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Did police violate the Fourth Amendment when they magnetically attached a battery-operated Global Positioning System (GPS) device to the undercarriage of Sveum's car pursuant to a warrant issued by a circuit judge while Sveum's car was parked in his driveway?

A circuit judge issued a warrant on probable cause authorizing the attachment of the battery-powered GPS device to the undercarriage of Sveum's car. The trial court

concluded at the pretrial suppression hearing that the attachment of the GPS device to the exterior of Sveum's car did not violate the Fourth Amendment because: (1) there was no "search or seizure" and Sveum did not have a reasonable expectation of privacy in the information provided by the GPS device, that being the location of his car on public roads; (2) in the alternative, attachment of the GPS device to the exterior of Sveum's car comported with the Fourth Amendment because it was authorized by a warrant issued by a judge on probable cause to believe Sveum was using his car to stalk his ex-girlfriend.

The court of appeals affirmed. It agreed with the circuit court that police attachment of the GPS device to the undercarriage of Sveum's car, and the information obtained from it as to the whereabouts of Sveum's car on the public roads, did not violate the Fourth Amendment because there was no "search or seizure." Having so concluded, the court of appeals did not reach the issue whether the warrant authorizing attachment of the GPS device to Sveum's car was valid.

POSITION OR ORAL ARGUMENT AND PUBLICATION

The state assumes that, in granting review, this court has determined the case is appropriate for both oral argument and publication. The state agrees.

STATEMENT OF THE CASE

Sveum and his sister, Renee Sveum, were both charged with stalking one Jamie Johnson between September 22, 1999 and May 27, 2003, as parties to the crime, in violation of Wis. Stat. §§ 940.32(3)(b) and 939.05 (9). Renee Sveum eventually entered into negotiations with the state and agreed to testify against her brother in exchange for having the stalking charge against her dismissed if she successfully completed a first of-

fender's program (120:107). After a trial held October 9 through 12, 2006, a Dane County jury returned a verdict finding Sveum guilty as charged of stalking his ex-girlfriend Johnson as party to the crime (68; 122:66-67).

Sveum was sentenced to the maximum 12 1/2-year term for this offense consisting of 7 1/2 years of initial confinement in prison, followed by 5 years of extended supervision, consecutive to any other time being served (123:25-26).

This is not Sveum's first stalking conviction. He was convicted in 1996 of stalking the same victim, Jamie Johnson. After a jury trial held October 8 and 9, 1996, Sveum was convicted of stalking Johnson in violation of Wis. Stat. § 940.32(2), (2m) (1:2). Sveum was also convicted at that time of related charges of harassment, violating a harassment injunction, and criminal damage to property, also involving Johnson. Sveum was sentenced November 5, 1996, to three consecutive, three-year prison terms for harassment, violating the harassment injunction order and criminal damage to property. With regard to the stalking conviction, the trial court imposed an eleven-year term of probation. Sveum remained in confinement for the first three offenses from November 5, 1996, until his mandatory release date of July 2, 2002 (1:2, 6). Sveum remained on probation for the stalking conviction after his release.[1]

The complaint in this case alleged that Sveum and his sister, Renee, acting as parties to the crime, began to stalk Johnson anew beginning in September of 1999 while Sveum was still in prison for his 1996 convictions and continued after his release until his arrest on May 27, 2003 (1:2-8). Because Sveum had been convicted of stalking Johnson in 1996, less than seven years before the stalking began anew in 1999, the state charged him for the aggra-

[1]Sveum was also convicted of felony bail jumping July 29, 1991, apparently involving another victim. *See State v. Sveum*, 2002 WI App 105, ¶ 1 n.2, 254 Wis. 2d 868, 648 N.W.2d 496.

vated form of stalking the same victim within seven years of the previous conviction, in violation of § 940.32(3)(b).

Sveum filed several pretrial suppression motions. They challenged the legality of the court order authorizing installation of a GPS device on his car, and the subsequent searches of two residences where police had reason to believe he was staying. The trial court held a pretrial evidentiary hearing November 4, 2005. The trial court denied the suppression motions at the close of that hearing (116:102-07; A-Ap. 107-12).

Sveum filed several motions for direct postconviction relief (93-96). Both Sveum and the state filed a number of briefs and memoranda in support of the motions (104-109). The trial court rejected all of the postconviction motions in a Decision and Order issued February 20, 2008 (113). The court specifically rejected Sveum's only argument concerning the GPS device: that it was not a "tracking device" and therefore came within the scope of the Wisconsin Electronic Surveillance Control Law (113:15-16).

Sveum appealed (114) from the judgment of conviction (81), as amended October 8, 2007 (101), and from the decision and order denying direct postconviction relief February 20, 2008, entered in the Circuit Court for Dane County, the Honorable Steven D. Ebert presiding (113). The court of appeals, District IV, affirmed in an opinion issued May 7, 2009. *State v. Sveum,* 2009 WI App 81, 319 Wis. 2d 498, 769 N.W.2d 53; R-Ap. 101-27. The court agreed with the state that the Fourth Amendment was not implicated because no search or seizure occurred when police attached the GPS device to the undercarriage of Sveum's car while it was parked in his driveway, thereby allowing police to monitor the car's movement on the public roads. 319 Wis. 2d 498, ¶¶ 6-15, 19; R-Ap. 105-09, 110, at ¶¶ 6-15, 19.

Sveum filed a *pro se* petition for review. In it, he challenged the attachment of the GPS device on both

Fourth Amendment grounds and under the Wisconsin Electronic Surveillance Control Law.[2] This court granted review October 13, 2009, and appointed counsel for Sveum.

Additional relevant facts will be developed and discussed in the Argument to follow.

ARGUMENT

SVEUM FAILED TO PROVE A FOURTH AMENDMENT VIOLATION BECAUSE ATTACHMENT OF THE GPS DEVICE TO THE UNDERCARRIAGE OF HIS CAR: (1) INVOLVED NEITHER A "SEIZURE" NOR A "SEARCH"; AND (2) IT WAS JUDICIALLY AUTHORIZED BY WARRANT BASED UPON PROBABLE CAUSE.

A. Statement of facts relevant to the Fourth Amendment challenge.

On April 22, 2003, Madison Police Detective Ricksecker applied for judicial authorization to install a Global Positioning System (GPS) device on Sveum's automobile for a period of time not to exceed sixty days (40:21-24; A-Ap. 1-4). The affidavit in support of the request for judicial authorization described in great detail the facts that provided probable cause to believe Sveum had been stalking Johnson at least since March 3, 2003, shortly after his release from prison, and that he had been using his automobile to assist in his stalking of her on

[2]Sveum's attorney has informed this court that he believes the challenge under the Electronic Surveillance Control Law lacks merit. He is, therefore, only pursuing the Fourth Amendment challenge. Sveum's brief at 31-32.

many of those occasions (40:21-23; A-Ap. 1-3). This, the detective alleged, necessitated the installation of a GPS device on Sveum's car to track its movements (40:23-24; A-Ap. 3-4). After detailing the probable cause to support installation of the tracking device on Sveum's car (40:21-22; A-Ap. 1-2), the affidavit alleged the following with regard to the GPS device:

> Your affiant states that the Global Positioning System (GPS) tracking device, which is covertly placed on a criminal suspect's automobile, is equipped with a radio satellite receiver, which, when programmed, periodically records, at specified times, the latitude, the longitude, date and time of readings and stores these readings until they are downloaded to a computer interface unit and overlaid on a computerized compact disc mapping program for analysis.

(40:23; A-Ap. 3.)

The affidavit went on to allege:

> Your affiant believes that the installation of the Global Positioning System (GPS) tracking device has been shown to be a successful supplement to visual surveillance of the vehicle due to the inherent risks of detection of manual, visual surveillance by the target of law enforcement personnel. The Global Positioning System (GPS) tracking device lessens the risk of visual detection by the suspect and is generally considered more reliable since visual surveillance often results in the loss of sight of the Target Vehicle.

(40:23-24; A-Ap. 3-4.)

Dane County Circuit Judge Callaway issued an order the same day, April 22, 2003, authorizing installation of the GPS device on Sveum's Chevy Beretta for not more than sixty days (116:31; 40:25-26; A-Ap. 5-6). Judge Callaway found, "there is probable cause to believe that the installation of a tracking device in the below listed vehicle is relevant to an on-going criminal investigation and that the vehicle is being used in the commission of a

crime of stalking, contrary to Chapter 940.32 of the Wisconsin Statutes" (40:25; A-Ap. 5).

Pursuant to that judicial authorization, police magnetically attached the GPS device to the undercarriage of Sveum's black 1990 Chevy Beretta parked in the driveway of his mother's home at 2426 Valley Street in Cross Plains, in the early morning hours of April 23, 2003 (116:42-43). The car was registered to Sveum, and it was parked at the Valley Street residence where he was believed to be staying (116:39-40, 86-87). The device was powered by its own battery and no power was taken from the car to run it. Nor did the car need to be moved or opened up to install the device (116:43-44). The device also did not intercept conversations of anyone inside or outside the car; it simply tracked the whereabouts of the car (116:44). Because the battery life is only 14-21 days, police attached a new device in the identical fashion at the same location two weeks later (116:45-46, 72, 74). Police then downloaded the information stored on the first GPS device into a computer program that was provided by the Wisconsin Department of Justice's Division of Criminal Investigation (116:46-47). The GPS device was replaced in the same fashion a second time, and that device was removed May 27, 2003 (116:47). So, a GPS device was attached to Sveum's car for a little more than one month – April 23 to May 27, 2003.

The GPS devices provided police with information that helped them establish probable cause to support search warrants for the Valley Street residence as well as for the computer police found there in Sveum's bedroom (116:48, 51-52, 57-62, 89).

At the close of the pretrial hearing held November 4, 2005, the trial court denied the suppression motions challenging both the attachment of the GPS device to Sveum's car, and the subsequent searches of his two residences (116:102-07). The court held as follows: (1) judicial authorization to attach the GPS device was supported by probable cause as alleged in the affidavit

(116:103-05); (2) attachment of the GPS device was, in any event, lawful because Sveum had no reasonable expectation of privacy in the location of his car on the public roads (116:105-06); and (3) the subsequent searches of the Cross Plains residence and the computer found therein pursuant to warrant were reasonable (116:107).

The trial court issued a written order denying the suppression motion April 16, 2006 (46).[3]

At the postconviction stage, Sveum filed another challenge to the attachment of the GPS device to his car as being in violation of the Wisconsin Electronic Surveillance Control Law (WESCL) (40:6-10). The state opposed the motion, arguing that there was no reasonable expectation of privacy in his car's whereabouts on public roads. In any event, the state argued, attachment of the GPS device was reasonable because it was judicially authorized on probable cause (41:1-14). The state argued that the subsequent warranted search of the Valley Street residence was reasonable (41:15-22). The trial court issued a decision and order denying postconviction relief February 20, 2008 (113). The court held that attachment of the GPS tracking device to Sveum's car did not violate the WESCL (113:15-16).

As noted above, the court of appeals affirmed May 7, 2009. It agreed with the state that the Fourth Amendment was not implicated because no search or seizure was occasioned by attaching the magnetic GPS tracking device to the undercarriage of Sveum's car while it was parked in his driveway.

> Accordingly, we conclude that no Fourth Amendment search or seizure occurs when police

[3]Sveum had also filed a petition in the court of appeals for leave to appeal the pretrial order denying his suppression motion. Leave to appeal was denied due to Sveum's failure to satisfy the criteria for a permissive appeal May 16, 2006 (50).

> attach a GPS device to the outside of a vehicle while it is in a place accessible to the public and then use that device to track the vehicle while it is in public view. Because this case does not involve tracking information on the movement of Sveum's car within a place protected by the Fourth Amendment, it follows that the circuit court correctly rejected Sveum's Fourth Amendment suppression argument.

State v. Sveum, 319 Wis. 2d 498, ¶ 19; R-Ap. 110, at ¶ 19.

Having concluded that the Fourth Amendment was not implicated, the court did not address the separate issue whether the warrant authorizing attachment of the GPS device to Sveum's car was valid and/or supported by probable cause. *See id.,* at ¶ 6 ("[Sveum] argues that the warrant authorizing police to place the GPS device on his car was overly broad. . . . Because we agree with the State that no Fourth Amendment search or seizure occurred, we do not address Sveum's warrant argument") (footnote omitted).

B. The applicable law and standard for review with respect to Sveum's Fourth Amendment challenge.

As the proponent of the suppression motion, Sveum bore the burden of proof in the trial court that his Fourth Amendment rights were violated. *State v. LaCount*, 2008 WI 59, ¶ 37, 310 Wis. 2d 85, 750 N.W.2d 780. This court reviews *de novo* the trial court's determination that there was no Fourth Amendment violation. *Id.* at ¶ 34. Although review is *de novo*, this court benefits from the trial court's analysis. *Id.*

The Fourth Amendment protects against unreasonable searches and seizures. Its applicability, however, depends on whether the person invoking its protection can claim a reasonable expectation of privacy "that has been invaded by government action." *Smith v. Maryland,* 442 U.S. 735, 740 (1979). Sveum bore the

burden of proving he had a reasonable expectation of privacy in the movement of his car on public thoroughfares. *See Rawlings v. Kentucky,* 448 U.S. 98, 104 (1980); *State v. Trecroci,* 2001 WI App 126, ¶ 26, 246 Wis. 2d 261, 630 N.W.2d 555.[4]

There is no "search" under the Fourth Amendment unless the individual manifests a subjective expectation of privacy in the object of the search that is also an expectation society is prepared to recognize as reasonable. *See Kyllo v. United States,* 533 U.S. 27, 33 (2001); *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz v. United States, 389 U.S. at 351.

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[4]Sveum argues that he should not have had the burden of proving at trial that his Fourth Amendment rights were implicated. Sveum's brief at 15. He is incorrect. Sveum must make the threshold showing that the Fourth Amendment was implicated. *See United States v. Villegas,* 495 F.3d 761, 767 (7th Cir. 2007), *cert. denied,* 128 S. Ct. 939 (2008) (defendant bears burden of proving legitimate expectation of privacy in the area searched). If he proved the Fourth Amendment was implicated, the burden would then have shifted to the state to prove the search and seizure was reasonable *had this been a warrantless search.*

Even assuming Sveum had proven in the trial court there was a "search" and "seizure" here, the burden of proof would have stayed with him because this search and seizure was conducted pursuant to a warrant issued by a circuit judge on probable cause (40:25-26; 116:31). *See* discussion at D., *infra.* The trial court ruled at the suppression hearing, in the alternative to its ruling that the Fourth Amendment was not implicated, that Sveum failed to prove the warrant was invalid as not being supported by probable cause (116:103-05). In any event, the state will now take it upon itself to prove that the Fourth Amendment was not implicated here.

> A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.

United States v. Knotts, 460 U.S. 276, 281 (1983).

> Of course the amendment cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth. *United States v. Knotts, supra,* 460 U.S. at 283-84, 103 S.Ct. 1081.

United States v. Garcia, 474 F.3d 994, 998 (7th Cir.), *cert. denied,* 552 U.S. 883 (2007).

C. Police attachment of the GPS device to the undercarriage of Sveum's car while it was parked in his mother's driveway involved neither a "seizure" of his car nor a "search" with regard to the movement of that car on public thoroughfares.

> But, of course the presumption in favor of requiring a warrant, or for that matter the overarching requirement of reasonableness, does not come into play unless there is a search or seizure within the meaning of the Fourth Amendment.

United States v. Garcia, 474 F.3d at 996.

> "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs where there is some meaningful interference with an individual's possessory interests in that property."

Soldal v. Cook County, 506 U.S. 56, 63 (1992) (quoted source omitted).

1. The GPS technology.

> GPS devices are powered by one of two methods. A GPS device containing its own internal batteries may be attached easily to the exterior of a vehicle, but the batteries in this type of device require replacement. Alternatively, as with the device at issue here, a GPS device may be installed in the engine compartment of a vehicle and attached to the vehicle's power source (battery). Although this type of device may take more than one hour to install and test, it runs on the vehicle's power, and thus can operate indefinitely without battery replacement. See *United States v. Garcia*, 474 F.3d 994, 995-996 (7th Cir.), cert. denied, 552 U.S. 883, 128 S.Ct. 291, 169 L.Ed.2d 140 (2007); *United States v. Berry*, 300 F.Supp.2d 366, 367-368 (D.Md.2004); *People v. Weaver*, 12 N.Y.3d 433, 436, 882 N.Y.S.2d 357, 909 N.E.2d 1195 (2009).

Commonwealth v. Connolly, 454 Mass. 808, 913 N.E.2d 356, 362 (2009).

This case involves the first type – a small battery-powered device easily attached to the exterior of the car.

> Such a device, pocket-sized, battery-operated, commercially available for a couple of hundred dollars … receives and stores satellite signals that indicate the device's location.

United States v. Garcia, 474 F.3d at 995.

The court of appeals explained how the GPS device worked here:

> The battery-powered GPS device used here periodically receives and stores location information from one or more satellites. To obtain tracking information, the device must be physically retrieved and its information downloaded to a computer. The result is a detailed history, including time

> information, of the device's location and, hence, the vehicle's location.

State v. Sveum, 319 Wis. 2d 498, ¶ 7; R-Ap. 105-06, at ¶ 7.

2. Attachment of the GPS device to the undercarriage of Sveum's car was not a "seizure."

The mere attachment of a GPS device of the type used here to the undercarriage of a car is not a "seizure" within the contemplation of the Fourth Amendment. It does not impede the operation of the car, does not interfere with the driver's dominion and control over the car, does not interfere with the owner's ownership or possessory interest in the car, does not reveal anything about its contents or its occupants (other than what direction he/she/they are headed), does not intercept conversations, and does not usurp the car's power or interfere with its operation.

> The defendant's contention that by attaching the memory tracking device the police seized his car is untenable. The device did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, did not even alter the car's appearance, and in short did not "seize" the car in any intelligible sense of the word.

United States v. Garcia, 474 F.3d at 996. *See United States v. McIver,* 186 F.3d 1119, 1126-27 (9th Cir. 1999), *cert. denied,* 528 U.S. 1177 (2000) (placement of a magnetic GPS device on undercarriage of a car parked in defendant's driveway neither a "search" nor a "seizure"); *United States v. Coulombe,* No. 1:06-CR-343, 2007 WL 4192005, *4 (N.D.N.Y. 2007) (no reasonable expectation of privacy in the exterior of a car). *Compare*

Commonwealth v. Connolly, 913 N.E.2d at 369 (warrantless installation of GPS device violated the state constitution where, "installation required not only entry by the police into the minivan for one hour, but also operation of the vehicle's electrical system, in order to attach the device to the vehicle's power source and to verify that it was operating properly. Moreover, operation of the device required power from the defendant's vehicle, an ongoing physical intrusion"); *Osburn v. State,* 118 Nev. 323, 44 P.3d 523, 525-26 (2002) (warrantless attachment of a monitor or beeper to the exterior of a car is neither a search nor a seizure under either the United States or Nevada Constitutions). *See generally New York v. Class,* 475 U.S. 106, 114 (1986); *Cardwell v. Lewis,* 417 U.S. 583, 589-92 (1974) (discussing the greatly diminished expectation of privacy in automobiles, especially in the car's exterior).

3. Police tracking the whereabouts of Sveum's car on the public highways aided by the GPS device was not a "search."

In *United States v. Knotts,* 460 U.S. 276, government agents surreptitiously placed a tracking device (a "beeper") into a five-gallon drum of chloroform which was then sold to the defendant's cohort, an individual suspected of manufacturing illicit drugs. The suspect loaded the container into his car. Police were able to follow the movements of the car both visually and aided by the beeper until it arrived at the defendant's cabin in northern Wisconsin. Police eventually obtained enough information to arrest the defendant. *Id.* at 277-78.

The Court held that the insertion by government agents of the beeper into the drum, and the use by them of that beeper to track the movements of the suspect's car, did not implicate the Fourth Amendment. The Court

reasoned there is no reasonable expectation of privacy in the movement of one's vehicle on public roadways; and insertion of the beeper into the container placed inside the car did not constitute an unreasonable seizure of the car. *Id.* at 281-83. The Court pointed out there was nothing to show government agents used the beeper signal to reveal information about the movement of the drum inside the cabin or about anything that would not have been otherwise visible to the naked eye. *Id.* at 285. *State v. Sveum,* 319 Wis. 2d 498, ¶ 9; R-Ap. 106-07, at ¶ 9.

In contrast, in *United States v. Karo,* 468 U.S. 705 (1984), the Court held that a warrantless search in violation of the Fourth Amendment occurred where police inserted a beeper into another drum but used information from that beeper to track the drum's movements once inside a storage facility. The Fourth Amendment was implicated because police were now using the beeper to obtain "information that it could not have obtained by observation from outside the curtilage of the house." 468 U.S. at 715-16. *State v. Sveum,* 319 Wis. 2d 498, ¶ 10; R-Ap. 107, at ¶ 10. Monitoring a beeper inside a private home violates the rights of those reasonably expecting privacy there. 468 U.S. at 714. *Also see New York v. Class,* 475 U.S. at 112-14 (no reasonable expectation of privacy in the publicly visible exterior of a vehicle, but the interior is subject to Fourth Amendment protection).

From these cases, the court of appeals concluded:

> ***Knotts*** and ***Karo*** teach that, to the extent a tracking device reveals vehicle travel information visible to the general public, and thus obtainable by warrantless visual surveillance, the use of the device does not normally implicate Fourth Amendment protections. It follows that no Fourth Amendment violation occurred here simply because the police used a GPS device to obtain information about Sveum's car that was visible to the general public.

State v. Sveum, 319 Wis. 2d 498, ¶ 11; R-Ap. 107, at ¶ 11.

All courts that have reviewed the Fourth Amendment issue have reached the same result as did the court of appeals here: the Fourth Amendment is not implicated because there is no "search" when police attach a GPS device to the exterior of a car and use it to enhance their ability to observe the movements of the car on public thoroughfares. *United States v. Garcia,* 474 F.3d at 996-97; *United States v. Gbemisola*, 225 F.3d 753, 758-59 (D.C. Cir. 2000); *United States v. McIver*, 186 F.3d at 1126-27; *United States v. Jones,* 451 F. Supp. 2d 71, 88 (D.D.C. 2006); *United States v. Moran*, 349 F. Supp. 2d 425, 467-68 (N.D.N.Y. 2005); *People v. Gant*, 802 N.Y.S.2d 839, 845-48 (Co. Ct. 2005); *Morton v. Nassau County Police Dept.*, No. 05-CV-4000, 2007 WL 4264569, at *3-4 (E.D.N.Y. Nov. 27, 2007); *Stone v. State,* 178 Md. App. 428, 941 A.2d 1238, 1250 (2008). *Also see United States v. Coleman*, No. 07-20357, 2008 WL 495323, at *2-3 (E.D. Mich. Feb. 20, 2008) (police use of a suspect vehicle's factory-installed "OnStar" system to track the vehicle's whereabouts did not violate the Fourth Amendment). *See* David Schuman, *Tracking Evidence with GPS Technology*, Wisconsin Lawyer, May 2004, at 9.[5]

The Seventh Circuit Court of Appeals succinctly explained why tracking a car on public thoroughfares is not a "search":

> If a listening device is attached to a person's phone, or to the phone line outside the premises on which the phone is located, and phone conversations are recorded, there is a search (and it is irrelevant that there is a trespass in the first case but not the second), and a warrant is required. But if police follow a car around, or observe its route by means of cameras mounted on lampposts or of satellite imag-

[5]One court has held that, while there is a "search" when police install a beeper onto a vehicle, they may do so without a warrant if they have reasonable suspicion of criminal activity. *United States. v. Michael,* 645 F.2d 252, 257 (5th Cir. 1981).

> ing as in Google Earth, there is no search. Well, but the tracking in this case *was* by satellite. Instead of transmitting images, the satellite transmitted geophysical coordinates. The only difference is that in the imaging case nothing touches the vehicle, while in the case at hand the tracking device does. But it is a distinction without any practical difference.
>
> There is a practical difference lurking here, however. It is the difference between, on the one hand, police trying to follow a car in their own car, and, on the other hand, using cameras (whether mounted on lampposts or in satellites) or GPS devices. In other words, it is the difference between the old technology—the technology of the internal combustion engine—and newer technologies (cameras are not new, of course, but coordinating the images recorded by thousands of such cameras is). But GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.
>
> This cannot be the end of the analysis, however, because the Supreme Court has insisted, ever since *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), that the meaning of a Fourth Amendment search must change to keep pace with the march of science. So the use of a thermal imager to reveal details of the interior of a home that could not otherwise be discovered without a physical entry was held in *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), to be a search within the meaning of the Fourth Amendment. But *Kyllo* does not help our defendant, because his case unlike *Kyllo* is not one in which technology provides a substitute for a form of search unequivocally governed by the Fourth Amendment. The substitute here is for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment.

United States v. Garcia, 474 F.3d at 996-97 (emphasis in original).

Sveum disputes the reasoning of *Garcia,* and by necessary implication, of *Knotts.* Yet, the rationale of those cases is merely consistent with that of precedent

recognizing that the Fourth Amendment is not implicated when police use a pen register to record numbers dialed on a suspect's phone, *Smith v. Maryland,* 442 U.S. at 745-46; or collect and examine trash left by a suspect for collection at the curb, *California v. Greenwood,* 486 U.S. 35, 39-41 (1988); *State v. Stevens,* 123 Wis. 2d 303, 316, 319, 367 N.W.2d 788 (1985). There is also no reasonable expectation of privacy in driveways and porches visible from a public street. *United States v. Evans,* 27 F.3d 1219, 1228-29 (7th Cir. 1994) (and cases cited therein); *United States v. Aguilera,* No. 06-CR-336, 2008 WL 375210, *1-2 (E.D. Wis. 2008) (installation of a camera on a pole outside defendant's driveway to observe "the comings and goings from his driveway" did not violate the Fourth Amendment. *Id.* at *2).

Madison Police could have obtained the identical information, at great expense of time and resources, with constant visual surveillance of Sveum's vehicle. The Constitution did not require them to do so when there existed a technological device that allowed them to conduct that surveillance far more efficiently. The conduct of police here was eminently reasonable because it is plain that, like their counterparts in Polk County, Madison Police "are not engaged in mass surveillance" of its citizens. *United States v. Garcia*, 474 F.3d at 998. The application for the search warrant bears that out here.

> They do GPS tracking only when they have a suspect in their sights. They had, of course, abundant grounds for suspecting the defendant.

Id. Like the Seventh Circuit in *Garcia,* by authorizing GPS surveillance of the movement of Sveum's car based on the ample information Madison police had, this court will not be condoning "dragnet type law enforcement practices." *United States v. Knotts,* 460 U.S. at 284.

Any operator of a motor vehicle on the public highways understands that his or her vehicle is subject to pervasive state regulation, inspection and substantial police surveillance. One cannot operate the vehicle

without a valid license. License plates must be properly displayed at all times to aid police when they need to obtain immediate information about the car or its registered owner. The speeding motorist is constantly looking out the corner of his eye for state troopers partially concealed in the brush up ahead because he knows they are constantly on the lookout for speeders, especially on holiday weekends on heavily-travelled roads. The speeding motorist might employ his own technology – a radar detector – to thwart police radar. Any motorist with an "I-Pass" understands that, while this device primarily allows him or her to sail through Illinois tolls and pay later, it might also be used by Illinois law enforcement to track the movement of the car should they suspect the driver of criminal activity. Surveillance cameras are now commonplace on public streets and highways allowing police to obtain information about anyone or anything that passes before the camera's lens. A driver might be surprised to find a ticket in the mail weeks after his running a red light was captured on a surveillance camera positioned on a pole at an intersection, enhancing the ability of police to catch violators without having to devote precious manpower to constant surveillance of a problem intersection. A car owner who purchases "On-Star" technology gladly embraces the ability of police to quickly track the car's movements when there is an emergency or if the car is stolen. A driver who uses his car to engage in criminal activity, such as stalking, should reasonably expect that police at the very least might engage in intensive surveillance of the movement of his car on public thoroughfares once they suspect criminal activity.

In short, the Fourth Amendment does not prevent police from "stalking the stalker" by following him and making naked-eye observations of him so long as their observations do not go beyond what any member of the public could observe. Police use of a GPS device to merely enhance their ability to observe the stalker's movements in public, while conserving precious time and

manpower in the investigation, does not run afoul of the Fourth Amendment.[6]

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[6]As one distinguished jurist explained:

> It is beyond any question that the police could, without a warrant and without any basis other than a hunch that defendant was up to no good, have assigned an officer, or a team of officers, to follow him everywhere he went, so long as he remained in public places. He could have been followed in a car or a helicopter; he could have been photographed, filmed or recorded on videotape; his movements could have been reported by a cellular telephone or two-way radio. These means could have been used to observe, record and report any trips he made to all the places the majority calls "indisputably private," from the psychiatrist's office to the gay bar (majority op. at 441-442, 882 N.Y.S.2d 361-62, 909 N.E.2d 1199-1200). One who travels on the public streets to such destinations takes the chance that he or she will be observed. The Supreme Court was saying no more than the obvious when it said that a person's movements on public thoroughfares are not subject to any reasonable expectation of privacy (*United States v. Knotts*, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 [1983], quoted in majority op. at 440, 882 N.Y.S.2d 360, 909 N.E.2d 1198). What, then, is the basis for saying that using a GPS device to obtain the same information requires a warrant?
>
> The majority's answer is that the GPS is new, and vastly more efficient than the investigative tools that preceded it. This is certainly true—but the same was true of the portable camera and the telephone in 1880, the automobile in 1910 and the video camera in 1950. Indeed, the majority distinguishes *Knotts* on the ground that it involved a beeper—"what we must now . . . recognize to have been a very primitive tracking device" (majority op. at 440, 882 N.Y.S.2d 361, 909 N.E.2d 1199). I suspect that the GPS used in this case will seem primitive a quarter of a century from now. Will that mean that police will then be allowed to use it without a warrant?
>
> The proposition that some devices are too modern and sophisticated to be used freely in police

(footnote continued)

> investigation is not a defensible rule of constitutional law. As technology improves, investigation becomes more efficient—and, as long as the investigation does not invade anyone's privacy, that may be a good thing. It bears remembering that criminals can, and will, use the most modern and efficient tools available to them, and will not get warrants before doing so. To limit police use of the same tools is to guarantee that the efficiency of law enforcement will increase more slowly than the efficiency of law breakers. If the people of our state think it worthwhile to impose such limits, that should be done through legislation, not through ad hoc constitutional adjudication, for reasons well explained in Judge Read's dissent (Read, J., dissenting at 457-459, 882 N.Y.S.2d 373-74, 909 N.E.2d 1211-12).
>
> The Federal and State Constitutions' prohibition of unreasonable searches should be enforced not by limiting the technology that investigators may use, but by limiting the places and things they may observe with it. If defendant had been in his home or some other private place, the police would, absent exigent circumstances, need a warrant to follow him there, whether by physical intrusion or by the use of sophisticated technology (*see Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 [2001] [use of thermal-imaging device to detect relative amounts of heat in the home an unlawful search]; *United States v. Karo*, 468 U.S. 705, 714, 104 S.Ct. 3296, 82 L.Ed.2d 530 [1984] [monitoring a beeper in a private home violates the rights of those justifiably expecting privacy there]). But the police were free, without a warrant, to use any means they chose to observe his car in the K-Mart parking lot.
>
> The theory that some investigative tools are simply too good to be used without a warrant finds no support in any authority interpreting the Federal or New York Constitution.

People v. Weaver, 12 N.Y.3d 433, 882 N.Y.S.2d 357, 366-67, 909 N.E.2d 1195, 1204-05 (2009) (Smith, J. dissenting).

4. Sveum's driveway was not part of the curtilage of his mother's home.

As the court of appeals noted, Sveum did not challenge on appeal the circuit court's factual determination that the driveway was not part of the house's curtilage. *State v. Sveum,* 319 Wis. 2d 498, ¶ 14; R-Ap. 108-09, at ¶ 14. The trial court found at the suppression hearing that there was insufficient evidence to establish that the driveway was within the curtilage of the home ("Nothing in the record suggests that this would be a violation of curtilage.") (116:106; A-Ap. 111).

Sveum now argues for the first time that his mother's driveway was included in the curtilage. Sveum contends that, even if police could have attached the GPS device to the exterior of his car if it was parked on the public street in front of his mother's home, they could not attach the device to the car while it was parked in the driveway alongside the home.

This claim is without merit. Because the driveway was not enclosed and was open to public observation from the street, Sveum had no legitimate expectation of privacy to prevent police from attaching the GPS device to the exterior of his car parked there. *United States v. McIver,* 186 F.3d at 1126. *Also see United States v. Aguilera,* 2008 WL 375210, at *2 (defendant had no reasonable expectation of privacy to prevent police from installing a camera on a pole to observe "the comings and goings from his driveway" so long as "the camera did not record activities within defendant's home or its curtilage obscured from public view").

The extent of a home's curtilage, "is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *United States v. Dunn,* 480 U.S. 294, 300 (1987). The constitutional issue is whether the area in question, "is so intimately tied to the home itself that it

should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* at 301.

The Court considers four factors in making this determination: (1) the proximity of the area claimed to be within the cartilage; (2) whether the area is within an enclosure surrounding the home; (3) the nature of uses to which the area is put; and (4) steps taken by the resident to protect the area from observation by passersby. *Id.*

As the trial court found, there is nothing in the trial court record to show that the driveway was within any enclosure surrounding the house, that it was put to any specific private use beyond parking vehicles on its apron, or that Sveum took particular steps to protect the driveway from observation by police or any other passersby.

Sveum argues that he took steps to protect the rear of his car from public observation by parking his car on the driveway with its rear facing away from the street (116:73; A-Ap. 78). Sveum's brief at 14. How that demonstrates a reasonable expectation of privacy protecting against observation of its exterior, including the undercarriage, is anyone's guess. Is Sveum arguing that, by parking his car this way, he was trying to prevent public observation of the rear undercarriage of his car, but not the front undercarriage? If Sveum had only one license plate, and it was on the rear, would police be prohibited from walking onto the apron of his driveway to read it because the plate could not be readily observed from the sidewalk?

Sveum apparently concedes his curtilage argument would not fly if police had attached the GPS device to the front undercarriage of his car because he knowingly exposed the front of his car to public view. Whatever subjective expectation of privacy in the rear undercarriage of his car Sveum might have demonstrated by parking this way, it most assuredly was not an expectation that society is prepared to recognize as a reasonable one.

Even assuming Sveum could prove the trial court erred, and could satisfy this court that his driveway was part of the curtilage, he still does not prevail.

> That the area is within the curtilage does not itself bar all police observation. 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 thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.

California v. Ciraolo, 476 U.S. 207, 213 (1986).

Again, Sveum has not demonstrated a reasonable expectation of privacy protecting the exterior of his car, including its undercarriage, from observation by passersby while it was parked on his unenclosed driveway. The mere fact that he parked his car facing the street does not create a reasonable expectation of privacy preventing a police officer from walking onto that driveway to look at the rear of the car for a license number, damage, a distinctive bumper sticker or, in this case, to attach a GPS device to the rear undercarriage to track the car's whereabouts. If Sveum wanted to prevent police from observing the exterior of his car, or from attaching a GPS device to it, he should have parked the car inside the garage and closed the door.

In conclusion, Sveum confuses a possible trespass onto his mother's property with an invasion of a legitimate privacy interest. Mere proof of a trespass, without more, does not necessarily prove an invasion of an area in which the individual had a reasonable expectation of privacy protected by the Fourth Amendment. *Oliver v. United States,* 466 U.S. 170, 182-84 (1984); *United States v. McIver,* 186 F.3d at 1126; *United States v. Berry,* 300 F. Supp. 2d 366, 368 n.2 (D. Md. 2004). Sveum failed to prove a reasonable expectation of privacy in the undercarriage of his car parked out in the open on his

mother's driveway, even assuming he did not expect police to walk behind the car and crawl under it to attach the GPS device to it.

5. This is not the appropriate case for considering the issue whether there was a "search or seizure" under the Wisconsin Constitution.

For a number of reasons, this is not the appropriate case for this court to consider whether Sveum proved there was a "search or seizure" under the Wisconsin Constitution.

Sveum relied only on the Fourth Amendment in his arguments to both the trial court and to the Wisconsin Court of Appeals. Sveum did not present a separate state constitutional challenge as a basis for review in this court, and he concedes he is constrained from raising that issue now. Sveum's brief at 11.

Not only has the separate state constitutional issue been unaddressed by any court below, there is no need for this court to address it here. Even if this court were to conclude as a matter of state constitutional law that attachment of the GPS device was a "search and seizure," it would likely hold that future police GPS surveillance activities will require judicial authorization. The GPS surveillance of Sveum's car *was*, however, judicially authorized here on probable cause. Resolution of the state constitutional question should await a case where: (1) the issue was raised by the defendant and addressed by the courts below; and (2) where there was no warrant. *See United States v. Berry,* 300 F. Supp. 2d at 368 (no need to decide Fourth Amendment issue regarding a warrantless GPS surveillance because the 60-day GPS surveillance in that case was judicially authorized).

Moreover, a state constitutional challenge would likely lack merit. This court has construed the identically-worded art. 1, § 11 of the Wisconsin Constitution to impose the same requirements as does the Fourth Amendment. *State v. Pallone,* 2000 WI 77, 236 Wis. 2d 162, ¶¶ 28, 81, 613 N.W.2d 568; *State v. McCray,* 220 Wis. 2d 705, 709, 583 N.W.2d 668 (Ct. App. 1998). If the Fourth Amendment is not implicated, neither should be art. I, § 11 of the Wisconsin Constitution. While Sveum correctly notes that a few state courts have gone beyond the federal courts and held, as a matter of state constitutional law, that attachment of a GPS device to a suspect's car is a "search and seizure," Sveum's brief at 11-12, at least one court construing its state constitution has held there is no reasonable expectation of privacy. *Osburn v. State,* 44 P.3d at 525-26.

Finally, in light of the myriad policy and technological issues presented, this is an area of law best left to the realm of the state legislature, subject of course to judicial review, as the court of appeals here suggested. *State v. Sveum,* 319 Wis. 2d 498, ¶¶ 20-22; R-Ap. 110-12, at ¶¶ 20-22. *See People v. Weaver,* 909 N.E.2d at 1211-12 (Read, J., dissenting) (discussing the wide variety of legislative approaches to this issue taken by a number of states). The Wisconsin legislature has shown itself quite capable of addressing this type of technological/legal/privacy issue when it enacted the Wisconsin Electronic Surveillance Control Law, Wis. Stat. §§ 968.27-32, and when it regulated the use of pen registers and trap-and-trace devices. Wis. Stat. §§ 968.34-37. It should now be given the opportunity, if there is a perceived need for it to do so, to act in this technological realm as well.

D. Assuming Sveum proved there was a "search and seizure" here, it was reasonable under the Fourth Amendment because it was conducted pursuant to a court order issued by a judge on probable cause.

This court could opt to avoid the constitutional questions presented by holding that attachment of the GPS device to Sveum's car and police use of that device to observe its movements complied with the Fourth Amendment because it was authorized by a warrant issued by a judge on probable cause to believe GPS surveillance would produce evidence of stalking by Sveum. *See State v. Holt,* 128 Wis. 2d 110, 123-26, 382 N.W.2d 679 (Ct. App. 1985) (the state may argue on appeal any valid ground supported by the record and the law to affirm the trial court's ruling).

The state argued in the alternative at both the trial and appellate levels that, if this was indeed a "search," it was authorized by judicial warrant on probable cause. The trial court ruled in the alternative at the close of the pretrial suppression hearing that any search was judicially-authorized based on probable cause as established in the affidavit provided by Detective Ricksecker (116:103-05).

1. The applicable law and standard for review of challenges to searches conducted pursuant to judicial warrant.

Reviewing courts are to give "great deference" to a magistrate's probable cause determination; it must stand unless the defendant shows the facts are "clearly insufficient" to support the probable cause finding. *State v. Marquardt*, 2005 WI 157, ¶ 23, 286 Wis. 2d 204,

705 N.W.2d 878 (citing *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)).

In *State v. Schaefer*, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760, the court explained the role of the magistrate when deciding whether to issue a search warrant and the role of the reviewing court in deciding whether the magistrate properly issued a search warrant.

> When considering an application for a search warrant, the issuing magistrate is
>
> > to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
>
> *Illinois v. Gates*, 462 U.S. 213, 238 (1983). We give great deference to the magistrate's determination that probable cause supports issuing a search warrant. *State v. Ward*, 2000 WI 3, ¶ 21, 231 Wis. 2d 723, 604 N.W.2d 517. We will uphold the determination of probable cause if there is a substantial basis for the warrant-issuing magistrate's decision. *Id.* This deferential standard of review "further[s] the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *State v. Kerr*, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994) (citations omitted).

266 Wis. 2d 719, ¶ 4. *See State v. Ward,* 231 Wis. 2d 723, ¶¶ 21-24; *State v. Lindgren*, 2004 WI App 159, ¶¶ 15-16, 19-20, 275 Wis. 2d 851, 687 N.W.2d 60.

The quantum of evidence needed to establish probable cause is less than that required for a bindover after a preliminary hearing. *State v. Lindgren*, 275 Wis. 2d 851, ¶ 20. The probable cause determination is made on a case-by-case basis after reviewing the totality of the circumstances. *State v. Schaefer*, 266 Wis. 2d 719, ¶ 17. The magistrate may draw reasonable inferences from the facts asserted in the affidavit. The inference drawn need

not be the only reasonable one. *See State v. Ward*, 231 Wis. 2d 723, ¶ 30; *State v. Jones*, 2002 WI App 196, ¶ 10, 257 Wis. 2d 319, 651 N.W.2d 305.

When giving deferential review in the close case, this court should resolve all doubts in favor of the magistrate's probable cause determination. *State v. Lindgren*, 275 Wis. 2d 851, ¶ 20.

2. The detailed search warrant affidavit provided firm support for the circuit judge's decision to issue a warrant authorizing attachment of the GPS device to Sveum's car.

The prosecutor argued at the suppression hearing that the document issued by Judge Callaway was not technically a "search warrant" that would have to meet the technical requirements of Wis. Stat. ch. 968, but was in the nature of a judicial order authorizing attachment of the GPS device based upon a finding of probable cause to believe Sveum was using his car to stalk Jamie Johnson (116:97-98; A-Ap. 102-03). In upholding the search, the trial court ruled that this judicial authorization was "most akin to a search warrant" (116:104-05; A-Ap. 109-110).

Regardless whether this document is technically considered a "search warrant," a court order, or something else, the state will now demonstrate that it fully complied with the Fourth Amendment because it was supported by probable cause as established in the affidavit in support thereof (*id.* at 103-05; A-Ap. 108-110).

Rather than repeat verbatim the detailed facts set forth in the affidavit prepared by Madison Police Detective Ricksecker April 22, 2003, the state refers this court to that affidavit to determine for itself whether those

facts as alleged add up to "probable cause" (40:21-24; A-Ap. 1-4). The state believes, as did the trial judge, that this affidavit presented evidence sufficient to show the issuing judge Callaway, there was at least a "fair probability" that the requested GPS surveillance would produce evidence of stalking by Sveum. Sveum cannot show the facts alleged are "clearly insufficient" to support Judge Callaway's probable cause determination. This court must, therefore, give great deference to that determination.

Other courts have found similar judicial orders to install GPS devices on probable cause sufficient to satisfy the Fourth Amendment. *United States v. Berry,* 300 F. Supp. 2d at 368 (judicial authorization to attach a GPS device to suspect's car for 60 days); *State v. Jackson,* 150 Wash. 2d 251, 76 P.3d 217 (2003) (although finding this to be a "search and seizure" under the state constitution, the court held attachment of a GPS device was judicially-authorized by a warrant for two separate, ten-day periods of GPS surveillance of defendant's truck, it was supported by probable cause and did not authorize a "fishing expedition"). Such judicial authorization for extended surveillance on probable cause is permissible. *See United States v. Karo,* 468 U.S. at 718.

Sveum may argue that this judicial authorization does not comply with Wis. Stat. §§ 968.15 and 968.17. To this, the state has two responses: (a) if this search was not conducted "[p]ursuant to a valid search warrant" issued under ch. 968, *see* Wis. Stat. § 968.10(3), it was issued by court order on probable cause "[a]s otherwise authorized by law," *i.e.,* the Fourth Amendment. Wis. Stat. § 968.10(6); or, (b) if this judicial authorization was governed by ch. 968, any deviation from its procedural requirements to fit this unusual situation is a "technical irregularit[y]" that does not call for suppression because, there being either no Fourth Amendment violation or full compliance with it by virtue of the judicial authorization on probable cause, any such irregularity did not adversely

affect "the substantial rights of the defendant." Wis. Stat. § 968.22.

In any event, suppression is not justified because the officers executing the warrant had every right to reasonably rely on that authorization issued by a neutral and detached circuit judge in objective good faith. *United States v. Leon,* 468 U.S. 897, 913 (1984); *State v. Marquardt,* 286 Wis. 2d 204, ¶¶ 24-26. The officers who attached the GPS device, "cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *United States v. Leon,* 468 U.S. at 921.

The affiant (Detective Ricksecker) did not mislead the judge with facts she knew to be false or were presented with reckless disregard for the truth. Circuit Judge Callaway did not abandon his judicial role by issuing this order. The affidavit was not so lacking in indicia of probable cause that it was entirely unreasonable for the executing officers to believe in its existence. The warrant was not so deficient on its face that the executing officers could not presume it to be valid. The process used in obtaining the warrant involved a sufficient investigation by authorities. Finally, there was sufficient review of the validity of the warrant by a trained investigator familiar with this area of the law. *State v. Marquardt,* 286 Wis. 2d 204, ¶¶ 25-26. *See State v. Eason,* 2001 WI 98, ¶ 63, 245 Wis. 2d 206, 629 N.W.2d 625.

Detective Ricksecker testified at the suppression hearing that she had spoken with an investigator at the Wisconsin Department of Justice, Department of Criminal Investigation about the use of GPS devices in criminal investigations and the ability to obtain a court order authorizing installation of such devices on suspect vehicles (116:40-41; A-Ap. 45-46). The experienced DCI Investigator (Gary Martine) advised her, "that they had in the past used court orders to authorize the application of the device and he subsequently supplied me with a copy

of the order that they had used in the past which I reviewed" (116:41; A-Ap. 46). *Also see United States v. Sager,* 743 F.2d 1261, 1265-67 (8th Cir. 1984) (upholding under the "good faith" exception to the exclusionary rule evidence obtained pursuant to installation of a transponder in an airplane because police reasonably relied on a search warrant whose affidavit turned out to be deficient).

Because the officers who attached the GPS device to the exterior of Sveum's car reasonably relied in objective good faith on a warrant issued by a neutral and detached circuit judge, a warrant that was based on a detailed affidavit sworn out by an experienced investigator who proceeded only after consulting other experienced investigators, and that contained strong indicia of probable cause, the exclusionary rule should not apply here even assuming the affidavit failed to establish probable cause or there were other technical deficiencies in the warrant application.[7]

[7]Sveum argues that the search was unlawful because it allowed police to obtain incriminating information while the car was parked in his mother's garage. Sveum's brief at 26. Not so. There is nothing to show that any useful information was obtained while the car was anywhere other than on public streets. The critical information obtained from the GPS device occurred April 25, 2003, when it showed that Sveum drove from a muffler shop to the victim's residence, parked a block away in a cul de sac for nearly an hour, then drove to a public pay phone in front of a business; the victim received a hang-up call at the same time his car was observed by the GPS device parked at that pay phone in front of that business; and the car then left as soon as the hang-up call ended (116:51-52; A-Ap. 56-57).

In any event, to the extent the warrant is overbroad, only that information obtained while the car was parked out of public view is to be suppressed. *See United States v. Karo,* 468 U.S. at 719-21; *State v. Petrone,* 161 Wis. 2d 530, 548, 468 N.W.2d 676 (1991); *State v. Noll,* 116 Wis. 2d 443, 451-52, 460, 343 N.W.2d 391 (1984).

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the decision of the court of appeals be AFFIRMED.

Dated at Madison, Wisconsin, this 26th day of January, 2010.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,763 words.

Dated this 26th day of January, 2010.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 26th day of January, 2010.

_____
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