IN THE SUPREME COURT OF WISCONSIN

Appeal No. 2008AP000658 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,

Defendant-Appellant-Petitioner.

NON-PARTY BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND ELECTRONIC FRONTIER FOUNDATION

On Review from the Wisconsin Court of Appeals, District IV

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ARGUMENT

THE STATE CONSTITUTION PROHIBITS LAW ENFORCEMENT FROM CONDUCTING REMOTE GPS SURVEILLANCE WITHOUT A WARRANT

For the first time, this Court is presented with the question of whether law enforcement can use GPS technology to track the location of citizens without a warrant. The highest courts in five states have already addressed this question. All but one concluded that law enforcement is required to first obtain a warrant based on probable cause before conducting GPS or similar surveillance. *Compare* ***State v. Jackson***, 150 Wash.2d 251, 76 P.3d 217 (2003) (installation of a GPS tracking device on defendant's car required a warrant), ***People v. Weaver***, 12 N.Y.3d 433, 909 N.E.2d 1195 (2009) (same), ***Commonwealth v. Connolly***, 454 Mass. 808, 913 N.E.2d

356 (2009) (installation and monitoring of a GPS tracking device on defendant's minivan was a seizure), and ***State v. Campbell***, 306 Or. 157, 759 P.2d 1040 (1988) (use of a beeper to locate defendant's car was a search and required a warrant or exigency) *with* ***Osburn v. State***, 118 Nev. 323, 44 P.3d 523 (2002) (attaching a GPS to the bumper of defendant's car was not an unreasonable search requiring a warrant). This Court should reach the same conclusion as the courts in Massachusetts, New York, Oregon and Washington and find that the state constitution requires law enforcement to obtain a warrant and show probable cause before subjecting people to this form of surveillance.

A. This Court Should Reach the State Constitutional Question

This case is appropriate for deciding the question of whether law enforcement's use of GPS tracking is a search or seizure under the state constitution. The state's arguments to the contrary are wrong. *See* State's Brief at 25-26. This Court would need to undertake a similar, though not identical, analysis to decide the federal question, judicial economy and clear guidance to law enforcement is served by reaching the state law question, and there are no obstacles to this Court's full and fair review of the issue.

This Court may consider the state constitutional argument analogous to the federal constitutional question where, as here, doing so does not require consideration of additional facts. ***State v. Knapp***, 2005 WI 127, ¶56, 285 Wis.2d 86, 700 N.W.2d 899. "This Court may nevertheless decide a constitutional question not raised below if

it appears in the interests of justice to do so and where there are no factual issues that need resolution." ***Bradley v. State***, 36 Wis.2d 345, 359-359a, 153 N.W.2d 38 (1967). There is no need to wait for another case before deciding this issue. *See* State's Brief at 25-26. Whether the lower courts decided the issue is irrelevant because this Court reviews the matter *de novo*. *See* ***State v. Edgeberg***, 188 Wis.2d 339, 344-45, 524 N.W.2d 911 (Ct. App. 1994).

Deciding the state constitutional question is a good approach to resolving this dispute. This case presents a clean legal issue that is equally amenable to resolution under the state and federal constitutions. Although *amici* believe that Sveum should prevail on his federal constitutional claim, there is little question that, if this Court finds for Sveum, addressing the state constitutional question first would allow this Court to avoid weighing in on an uncertain and novel federal question. Further, because this Court is the final arbiter of the meaning of the Wisconsin Constitution, deciding this case on state constitutional grounds would be an unappealable decision that would bring finality to a dispute that has been in litigation for many years. It would also allow this Court to join its sister states' highest courts in recognizing that state constitutional protections have a vital role to play in ensuring that fundamental privacy rights are not undermined merely because of technological developments. The state's arguments to the contrary are unavailing.

Although the state refers to "the myriad policy and technological issues presented," it never explains exactly what those issues are or why they would require supplemental fact-finding to

determine the state constitutional issue, but not the federal constitutional issue. State's Brief at 26. Here, the facts are undisputed and the only question that remains under the state constitution is a legal one: whether law enforcement's secret attachment of a GPS device to Sveum's car while it was parked in his driveway was a search or seizure. Because this Court's review is *de novo*, the question can and should be answered here. *See* ***State v. Edgeberg***, 188 Wis.2d at 344. Nor is the state constitutional claim meritless. State's Brief at 26. All but one of the state courts to have considered the issue have found that GPS tracking requires a warrant. *See* ***Connolly***, *supra;* ***Weaver***, *surpa;* ***Jackson***, *supra*; ***Campbell***, *surpa.*

Passing the buck to the legislature, as the state suggests, is not an answer. As Sveum points out, police agencies are using GPS tracking "quite routinely and often." Sveum's Brief at 11, *quoting* Detective Ricksecker (R116:41). Waiting to see if the legislature takes some action allows this invasive practice to continue without judicial supervision. Criminal defendants should not have to wait to find out what their rights are, particularly in light of the frequency with which police agencies are employing GPS tracking technology. Certainly, there is room for legislation on this issue. But waiting for the legislature to protect the privacy rights of Wisconsinites is not a solution to this prevalent practice, the consequence of which is the loss of liberty. *See* ***Weaver***, 909 N.E.2d at 1198 ("[c]ontrary to the dissenting views, the gross intrusion at issue is not less cognizable as a search by reason of what the Legislature has or has not done to regulate technological surveillance.") Because this Court will be

deciding whether law enforcement needs a warrant and probable cause to track the movement of Wisconsin citizens, opting to resolve this case on state, rather than federal, grounds is an eminently reasonable approach.

B. The State Constitution Provides Greater Rights than the Federal Constitution

The federal constitution spells out the minimum rights to which citizens are entitled. Individual states are free to expand upon those rights. Interpretations of the U.S. Constitution do not bind the state's highest courts from interpreting their own constitutions to provide greater protection for individual rights. ***Cooper v. California***, 386 U.S. 58, 62 (1967). Where the state constitution follows the language of the U.S. Constitution, the state is still free to interpret its constitution differently. ***McCauley v. Tropic of Cancer***, 20 Wis.2d 134, 139, 121 N.W.2d 545 (1963) ("[s]uch decisions are eminent and highly persuasive, but not controlling, authority...on the question of whether the proscription or suppression of a particular piece of material as obscene violates sec. 3, art. I of our state constitution.")

Although Wisconsin courts typically follow federal court interpretations of federal constitutional provisions that are identical or nearly identical to the Wisconsin constitution's provisions, *see, e.g.*, ***State v. Jennings***, 2002 WI 44, ¶39, 252 Wis.2d 228, 647 N.W.2d 142, this Court has rejected a "'lock-step' theory of interpreting the Wisconsin Constitution" that would require rote adherence to federal jurisprudence. ***Knapp*** at ¶59. "[T]his court 'will

not be bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection of citizens' liberties ought to be afforded.'" ***Id.*** *quoting* ***State v. Doe***, 78 Wis.2d 161, 171, 254 N.W.2d 210 (1977).

Although the language of ART. I, §11 closely tracks that of the Fourth Amendment, textual similarity, while important, "cannot be conclusive, lest this court forfeit its power to interpret its own constitution to the federal judiciary." ***Knapp*** at ¶60. For those reasons, this Court departed from federal law in interpreting Wisconsin's Due Process Clause in ART. I §8, in ***State v. Dubose***, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582. There, this Court noted that although the language of the Wisconsin Constitution is similar to the U.S. Constitution, "we retain the right to interpret our constitution to provide greater protections than its federal counterpart." ***Id.*** at ¶41. And, while this Court ordinarily follows the Fourth Amendment jurisprudence of the U.S. Supreme Court, *see, e.g.*, ***State v. Young***, 2006 WI 98, ¶19, 294 Wis. 2d 1, 717 N.W.2d 729, it has departed from federal Fourth Amendment law when necessary to protect the privacy rights guaranteed by the Wisconsin Constitution.

In ***State v. Eason***, for example, this Court required a showing by the government that a "significant investigation" and review by a government attorney or specially trained police officer had taken place before admitting evidence obtained based on an officer's "good faith" reliance on a defective warrant. 2001 WI 98, ¶63, 245

Wis. 2d 206, 629 N.W.2d 625. The U.S. Supreme Court did not require such a showing, ***id.***, but this Court noted that the federal courts "'could interpret the fourth amendment in a way that undermines the protection Wisconsin citizens have from unreasonable searches and seizures under article I, section 11, Wisconsin Constitution. This would necessitate that we require greater protection to be afforded under the state constitution than is recognized under the fourth amendment.'" ***Id.*** at ¶60 *quoting* ***State v. Fry***, 131 Wis. 2d 153, 174, 388 N.W.2d 565 (1986).

As with ***Eason***, this case demands that this Court exercise its authority – and fulfill its duty – to interpret the Wisconsin Constitution to protect this state's citizens from warrantless placement of GPS devices on vehicles – a "threat to privacy" that even those courts that have permitted it acknowledge is "more than a little troubl[ing]." ***United States v. Garcia***, 474 F.3d 994, 998 (7th Cir. 2007); ***State v. Sveum***, 2009 WI App 81, ¶20, 319 Wis.2d 498, 769 N.W.2d 53.

C. The Wisconsin Constitution Requires a Warrant

If the Court of Appeals' decision is permitted to stand, there will be nothing to prevent law enforcement officers in Wisconsin from engaging in continuous GPS surveillance of state residents without any judicial involvement whatsoever. Several states have addressed the issue of whether law enforcement's use of GPS tracking technology requires a warrant under their individual state constitution. Three of those states – Oregon, Washington and New York – interpreted state constitutional provisions that are either

identical or nearly identical to WIS. CONST. ART. I §11. All but one of the five states held that (1) their state constitutional counterpart to the Fourth Amendment should be interpreted more broadly, and (2) use of GPS technology is a search and seizure requiring a warrant. This Court should draw similar conclusions.

Perhaps most troubling to these state courts was that warrantless tracking of private citizens allows law enforcement unfettered access to private information for any reason or for no reason at all. Such threat of scrutiny impairs the freedom to be let alone as well as the freedom to associate, freedom of religion and of speech. When law enforcement can obtain such an enormous amount of personal information, every human endeavor is chilled. ***Campbell***, 759 P.2d. at 1047; ***Jackson***, 76 P.3d at 264. "What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations – political, religious, amicable and amorous, to name only a few – and of the pattern of our professional and avocational pursuits." ***Weaver***, 909 N.E.2d at 1199.

In this way, GPS tracking is far more invasive than ordinary physical surveillance. It does not, as flashlights and binoculars do, enhance viewing of something going on in the present. Rather, it replaces traditional surveillance methods, allowing law enforcement to see into the past. "We perceive a difference between the kind of uninterrupted, 24-hour a day surveillance possible through use of a GPS device, which does not depend upon whether an officer could in fact have maintained visual contact over the tracking period, and

an officer's use of binoculars or a flashlight to augment his or her senses." ***Jackson***, 76 P.3d at 223; *see also* ***Campbell***, 759 P.2d 15 171-72 ("use of a radio transmitter to locate an object…cannot be equated to visual tracking. Any device that enables the police quickly to locate a person or object anywhere within a 40-mile radius, day or night, over a period of several days, is a significant limitation on freedom from scrutiny.")

Nor does the fact that a person steps into a public space completely destroy any privacy interest he or she may have in his or her activities and possessions. Cell phone technology may propel conversations from private homes to public streets, but the ***Weaver*** Court said, such "change in venue has not been accompanied by any dramatic diminution in the socially reasonable expectation that our communications and transactions will remain to a large extent private." ***Weaver***, 909 N.E.2d at 1200. ***See also Delaware v. Prouse***, 440 U.S. 648, 663 (1979) ("...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.") It is certainly "socially reasonable" to expect that the government cannot physically trespass on one's personal vehicle to install a GPS device and effortlessly collect detailed information on one's comings and goings, without a warrant or probable cause to believe that one is engaged in unlawful activity. Finally, in the absence of judicial supervision, law enforcement has no disincentive to employ widespread mass location tracking. To the contrary, the technology is prevalent, cheap, and easy to use.

To suggest, as the state does here, that a person has no interest in the outside of his car parked in the driveway of his home, is to "seriously undervalue the privacy interests at stake." ***Weaver*** at 1201, *quoting* ***Arizona v. Gant***, __ U.S. __, 129 S.Ct. 1710, 1720 (2009). "Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home...the former interest is nevertheless important and deserving of constitutional protection." ***Gant***, 129 S.Ct. at 1720. It is one thing, the ***Weaver*** Court said, to suppose that some circumstances do not require a warrant, but entirely 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 authorities of all that GPS technology can and will reveal." ***Weaver***, 909 N.E.2d at 1200.

Given the variety and prevalence of the types of GPS devices in existence, it is no surprise that the cases from other jurisdictions involved multiple types of GPS devices. In ***Weaver*** and ***Campbell,*** as here, law enforcement attached a battery-operated device to the underside of the defendant's car. ***Weaver***, 909 N.E.2d at 1195-96; ***Campbell***, 759 P.2d at 1041. But in ***Jackson*** and ***Connolly***, law enforcement installed a GPS device into the vehicle itself so that the vehicle powered the GPS device. ***Jackson***, 76 P.3d at 223; ***Connolly***, 913 N.E.2d at 360. However, the question of whether a search occurred does not depend on the power source of the device or precisely where on the vehicle it was placed, but as the ***Campbell*** Court pointed out, "whether using the transmitter is an action that

can be characterized as a search" or seizure. ***Id.*** at 1045-46. "[B]oth laws and social conventions have long recognized the right to exclude others from certain places deemed to be private. If the government were able to enter such places without constitutional restraint, 'the people's' freedom from scrutiny would be substantially impaired." ***Campbell*** at 1048.

To decide this case any differently than the majority of states who have addressed this issue is to expose Wisconsin citizens to an unprecedented level of scrutiny that will only get worse as technology advances. "Technological advances have produced many valuable tools for law enforcement and, as the years go by, the technology available to aid in the detection of criminal conduct will only become more and more sophisticated. Without judicial oversight, the use of these powerful devices presents a significant and, to our minds, unacceptable risk of abuse." ***Weaver***, 909 N.E.2d at 1203.

CONCLUSION

For these reasons, as well as for those stated in Sveum's Briefs, the American Civil Liberties Union of Wisconsin Foundation, the American Civil Liberties Union Foundation and the Electronic Frontier Foundation ask this Court to consider the persuasive reasoning of the courts in Oregon, Washington, New York and Massachusetts and hold that the Wisconsin Constitution requires law enforcement to obtain a valid warrant prior to conducting GPS tracking of a person or vehicle.

Dated at Milwaukee, Wisconsin, February 4, 2010.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION *and* ELECTRONIC FRONTIER FOUNDATION, *Amici Curiae*

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,746 words.

Amelia L. Bizzaro

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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