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Fourth Circuit Case Summaries: November 5 and 13, 2020

Aerial surveillance program does not violate First and Fourth Amendments; denial of preliminary injunction affirmed

Leaders of a Beautiful Struggle v. Baltimore Police Dept., 979 F.3d 219 (Nov. 5, 2020). The City of Baltimore has recently seen very high rates of homicides, and police cleared only around 32% of the cases in 2019. In response, the Baltimore Police Department developed the Aerial Investigative Research program ("AIR"). In partnership with a private entity, three surveillance planes are flown around the city, which can record approximately 90% of the city's area at once. The cameras record people on the ground as "pixilated dot[s]," and thus obscures the identity of any person observed. The pictures are then sent to a team of analysts. Only when specific violent crimes occur are agents allowed to access the data. When viewing the data, the analysts can track the "dots" coming and going from the scene the crime being investigated. The information is then used in conjunction with traditional surveillance (such as security cameras, license-plate readers, etc.) to locate potential suspects or witnesses to the crime of investigation.

The program was initially launched in 2016 in secrecy but was shut down in the wake of media attention. In 2020, the program was publicly reinstated, and limitations designed to address privacy concerns were imposed. The surveillance planes only fly during the daytime; individuals observed by the cameras cannot be identified by race, gender, clothing, or vehicle; the cameras do not zoom or utilize infrared vision; the data is only accessible when certain serious violent crimes occur; any data used to effectuate an arrest is provided in criminal discovery; and, where no arrest is made, the data is destroyed after 45 days.

The plaintiffs sued under 42 U.S.C. § 1983, alleging First and Fourth Amendment violations and seeking injunctive relief prohibiting continued use of the program. The trial court denied the injunction and the plaintiff appealed. Reviewing for abuse of discretion, a divided Fourth Circuit affirmed.

That the plaintiffs were subject to being photographed by the surveillance planes was sufficient to confer standing to sue on the plaintiffs. As to the Fourth Amendment claim, a majority of the court found that the program did not implicate a reasonable expectation of privacy. "A cardinal rule that emerges from the Supreme Court's caselaw is that an individual has a limited expectation of privacy in his or her public movements." Slip op. at 10. While long-term tracking can implicate a reasonable expectation of privacy, the program here was limited to short-term, public observations. The cameras only observe the outdoors; they cannot tell if someone entering a building is the same person that leaves it; they do not record at night or in poor weather; and they cannot track a person over the span of multiple days. Police may be able to supplement the data with traditional surveillance tools to effectively track a person, but those more traditional forms of surveillance were not challenged here. The planes fly "within public navigable airspace" . . . "in a physically unobstructive manner" and reveal *less* information that other forms of aerial surveillance previously approved by the Supreme Court. *Id*. at

12 (citing *California v. Ciraolo*, 476 U.S. 207 (1986)). In the words of the court: "AIR involves no surveillance of an individual's home or curtilage, and its aerial planes do not harass individual homeowners by hovering closely above their homes." *Leaders* Slip op. at 13. The data generated from the AIR program is also far less invasive that the long-term tracking by cell-site location information ("CSLI") at issue in *U.S. v. Carpenter*, 138 S. Ct. 2206 (2018). "Whereas CSLI could be used to reliably track an individual's movement from day to day, AIR can only be used to track someone's outdoor movements for twelve hours at most." *Id*. at 14. Unlike CSLI, the AIR process also takes more significant time and effort to produce useful information and requires a greater expenditure of resources due to its use of airplanes.

The program was also reasonable under the balancing test for programmatic searches, whereby the government interest is weighed against the burden on constitutional rights. *See Samson v. California*, 547 U.S. 843, 848 (2006). The surveillance program serves "critical government purposes" in combatting an epidemic of violent crime in the city. The data produced cannot be used to track specific individuals at all, and what recordings it does produce are only of unidentifiable "dots" of people at or near the scene of a violent crime. "On the one hand, the BPD has a clearly demonstrated need for this surveillance. . .On the other hand, the program has been carefully designed to impose a minimal burden on constitutional rights." *Leaders* Slip op. at 18. The program is far less intrusive than traditional security cameras (a type of surveillance presumed to be constitutional) and is, on balance, reasonable. While some other forms of aerial surveillance may violate Fourth Amendment protections, this "limited investigative tool" passes Fourth Amendment muster.

The court also rejected the argument that the AIR programs violated the First Amendment by interfering with the plaintiffs' rights to free association. They argued that city residents would be deterred from meeting in public out of fear of being surveilled. Rejecting this argument, the court stated: "The basic problem with plaintiffs' argument is that people do not have a right to avoid being seen in public places. And even if that were not so, it is a stretch to suggest people are deterred from associating with each other because they may show up as a dot under the AIR program." *Id*. at 21.

The plaintiffs failed to demonstrate a likelihood of success on the merits and the district court therefore did err in denying the injunctive relief. In conclusion, the court observed:

> When hundreds of Baltimore residents are killed on their streets each year, their rights to life are not protected. When murders remain unsolved, their rights to liberty are not protected. When criminals can rob Baltimoreans at gunpoint with apparent impunity, their rights to property are not protected. All these rights are denied without due process, nothing remotely resembling the protections an accused will receive, rightly and deservedly, from the Bill of Rights. It is all so sad. Now and then the gunshots pause, leaving only the silence of loved ones lost long before their time. The AIR program just might help reduce this most aching of silences—giving it a chance to succeed is in the public interest. *Id*. at 24.

Chief Judge Gregory dissented at length. He found the AIR program unconstitutional under the Fourth Amendment under both tests and would have granted the preliminary injunction on that basis. "No crime rate can justify warrantless aerial surveillance of an entire city, wholly unchecked by the judiciary." *Id*. at 50 (Gregory, C.J., dissenting).

Arrest warrant did not authorize entry into a third-party's residence where officers lacked probable cause to believe that the residence was the defendant's and that he was present inside; denial of motion to suppress reversed

U.S. v. Brinkley, 980 F.3d 377 (Nov. 13, 2020). A task force in the Western District of North Carolina sought to serve an arrest warrant on the defendant. Agents obtained several potential addresses for the defendant, including a residence where the water account for the property was in the defendant's name and another residence belonging to a woman (the suspected girlfriend of the defendant). Agents were not sure which residence belonged to the defendant but went to the girlfriend's apartment to perform a knock and talk. Five police officers arrived and knocked on the door at 8:30 a.m. The woman opened the door and denied that the defendant was present in the home. The officers heard movement in the back of the apartment and believed that the woman was acting nervously. She refused consent to allow the officers inside. The officers nonetheless entered the apartment and found the defendant in a back bedroom. Cocaine and firearms were also found, and the defendant was charged with various offenses. He moved to suppress, arguing that officers had no reason to believe he lived in the apartment or that he would be located inside. The district court denied the motion and the defendant pled guilty, reserving his right to appeal the denial of the motion. A divided Fourth Circuit reversed.

Under *Payton v. New York*, 445 U.S. 573 (1980), a valid arrest warrants gives officers "limited authority" to enter a defendant's residence to serve the warrant when police have reason to believe he will be found inside. That limited authority does not extend to the entry of the homes of third parties. *See Steagald v. U.S.,* 451 U.S. 204 (1981). Without consent or exigent circumstances, police must obtain a search warrant to enter a residence not belonging to the subject of the arrest warrant. Circuits are divided on the requisite standard of proof for officers to believe that a residence belongs to the defendant and that the defendant will be present inside. Examining the split of authority, the court determined that "reason to believe" was equivalent to probable cause and that the probable cause standard was necessary to protect the privacy interests of third parties in their homes. In the words of the court:

> [W]hen police seek to enter a home and are uncertain whether the suspect resides there, interpreting reasonable belief to require less than probable cause 'would effect an end-run around . . . *Steagald* and render all private homes . . . susceptible to search by dint of mere suspicion or uncorroborated information and without the benefit of any judicial determination.' Slip op. at 12 (citation omitted).

Applying that standard, officers here lacked probable cause to believe that the apartment was the defendant's residence. The information known to officers showed the defendant likely resided at multiple locations, including one where he had a utility account in his name. That location, and multiple other potential residences, were not investigated. "Had the officers ruled out any of these alternatives, it could have bolstered their theory that [the defendant] resided in the [woman's] . . . apartment." *Id*. at 15. While there was evidence to assume the defendant might be staying at the apartment, it failed to establish the defendant was residing there.

Even assuming officers had probable cause to believe that the apartment was the defendant's residence, they lacked grounds to suspect that the defendant would be present at the time. The express intention of the officers in visiting the apartment was to gather more information on the defendant's residence. The government argued that the early morning hour, the two-minute delay in the door being

answered, the woman's nervousness, her glances towards the back of the apartment, and sounds heard inside by officers during the encounter with the woman all supported a reasonable belief that the defendant was present. Rejecting these factors, the court observed:

> [P]olice here conducted no independent investigation or observation of the . . . apartment to determine whether [the defendant] was within. They stacked a hunch about [the girlfriend's] nervousness atop a hunch about [the defendant's] residence. *Id*. at 24.

The district court's denial of the motion to suppress was therefore reversed, the convictions vacated, and the matter remanded for further proceedings.

Judge Richardson dissented. He faulted the majority for substituting probable cause for the "reason to believe" standard from *Payton*, and in any event would have found either standard met here.