IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JEREMY LEE KOONS,
Appellant.

No. 2 CA-CR 2016-0270
Filed August 7, 2017

Appeal from the Superior Court in Pima County
No. CR20143960002
The Honorable Scott Rash, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly[1] concurred.

E C K E R S T R O M, Chief Judge:

¶1 After a jury trial, appellant Jeremy Koons was convicted of nine counts of third-degree burglary and one count each of theft and criminal damage. The trial court sentenced him to a combination of consecutive and concurrent, enhanced terms of imprisonment totaling 19.25 years. On appeal, Koons argues the court abused its discretion in denying his motion to suppress evidence resulting from a search warrant that authorized placement of a global positioning system (GPS) device on his vehicle. He also contends the court erred in awarding restitution to a victim who was dismissed from the indictment before trial. For the following reasons, we affirm Koons's convictions and sentences, including the court's restitution order.

Factual and Procedural Background

¶2 On August 26, 2014, a Tucson police detective requested a telephonic search warrant from Pima County Superior Court Judge Deborah Bernini to authorize the placement of a GPS device on Koons's vehicle. In the tape-recorded portion of the conversation attached to Koons's motion to suppress, the detective identified himself as the "affiant," the time and date, and another detective who was "standing by as a witness." When the detective offered to describe his special training and experience, the judge informed him, "You are qualified, you can go on with your affidavit."

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

¶3 The detective then related his investigation of over sixty burglaries of businesses committed between March 1 and August 22, 2014, resulting in financial losses of "over one hundred thousand dollars." He said all the burglaries had been committed with "the same M-O" of cutting through a roof or door to gain entry and then "cut[ting] through the safe to gain cash." According to the detective, on one occasion, the back door and freezer of a fast food restaurant had been cut in order to reach a safe, and crime scene investigators recovered DNA that was later linked, "through CODIS," to Koons.[2] The detective "verified Koons was not an employee" of the restaurant, "nor had they had any outside contractors work on the freezer" in recent months. The detective then reported Koons had "been convicted of burglaries in the past and due to the fact that these burglaries happened late at night or in the early morning hours, I am requesting . . . a warrant to place a tracking device on Koons' vehicle to allow laser surveillance on the vehicle." He told the judge Koons recently had been observed driving the vehicle, and he assured her the only purpose of the device was to "assist with the criminal investigation" of the recent burglaries. He then requested a telephonic warrant, asking that the judge "consider this affidavit and incorporate it in the warrant itself."

¶4 Judge Bernini responded, "On probable cause, I'll authorize the warrant." She then authorized the detective to sign her name to a statement that she was satisfied probable cause existed for placement of the device, based on "proof of affidavit hav[ing] been made this date before me." The GPS device was placed on Koons's vehicle that day.

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[2]The Combined DNA Index System. *See* 42 U.S.C. § 14132(a) (establishing national database); *see also Mario W. v. Kaipio*, 230 Ariz. 122, ¶ 5, n.4, 281 P.3d 476, 478, 479 n.4 (2012) ("The CODIS system enables federal, state, and local crime labs to exchange and compare DNA profiles electronically, thereby linking crimes to each other and to convicted offenders."), *quoting* Tracey Maclin, *Is Obtaining an Arrestee's DNA A Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. Med. & Ethics 165, 166 (2006).

¶5 In the early morning hours of September 5, 2014, law enforcement officers tracked Koons's vehicle to a strip mall and entered a store they suspected was being burglarized. They found cash near the store's safe, which had been cut, and located Koons standing in the dead space between two walls.

¶6 Koons filed a motion to suppress all evidence obtained by tracking his vehicle, alleging, inter alia, that the warrant authorizing placement of the GPS device had been based on an unsworn statement, in violation of A.R.S. § 13-3914(C), and that it "lacked probable cause." In support of the motion, Koons's counsel "transcribed the [recorded statement] that represented the telephonic warrant and attached it as an exhibit." No other evidence was presented at the hearing, and the trial court denied Koons's motion.

¶7 Before trial, the state moved to dismiss, without prejudice, Tucson Coffee Roasters and two other victims named in four counts of the indictment, and the trial court granted that motion. After trial, but before sentencing, the parties stipulated that Koons would pay restitution to a list of victims, including Tucson Coffee Roasters, "in exchange for the State dismissing, and/or not refiling" charges related to those named. At sentencing, the court ordered Koons to pay restitution to twenty-six victims, including $1400 to Tucson Coffee Roasters.

Motion to Suppress

¶8 Koons argues the warrant authorizing placement of the GPS device on his vehicle was invalid because it was based on an unsworn affidavit and lacked probable cause. Relying on *United States v. Jones*, 565 U.S. 400, 404 (2012), and *State v. Mitchell*, 234 Ariz. 410, ¶ 26, 323 P.3d 69, 77 (App. 2014), he then asserts, "[a]ny evidence subsequently seized as a result of the illegally authorized search warrant should have been suppressed." We review the court's denial of a motion to suppress for an abuse of discretion. *State v. Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d 618, 621 (App. 2002). We find none here.

¶9 The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV.[3] A search warrant protects this interest by "plac[ing] a neutral magistrate between an 'officer engaged in the often competitive enterprise of ferreting out crime' and the constitutional safeguards on an individual's freedom from undue governmental intrusion." *State v. Hyde*, 186 Ariz. 252, 268, 921 P.2d 655, 671 (1996), *quoting Steagald v. United States*, 451 U.S. 204, 213 (1981). The issuing magistrate must "make a practical common-sense decision" based on "all the circumstances set forth in the affidavit," supported by a "substantial basis" for finding probable cause. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).

¶10 We presume the validity of a search warrant, granting deference to the decision of the issuing magistrate. *Hyde*, 186 Ariz. at 272, 921 P.2d at 675. This reflects the "strong preference" for searches conducted pursuant to warrants, and "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Leon*, 468 U.S. 897, 914 (1984), *quoting United States v. Ventresca*, 380 U.S. 102, 106 (1965); *see also* Ariz. R. Crim. P. 16.2(b) (at hearing on motion to suppress evidence obtained pursuant to warrant, state has no burden unless defendant presents "specific circumstances which establish a prima facie case" for suppression). "[S]ufficient evidence to dispel the warrant's presumption of regularity . . . will usually require a showing that the magistrate's procedures in determining whether there was probable cause did not adequately safeguard the defendant's constitutional rights," and "[c]lose cases should be resolved by giving preference to

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[3]The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

the validity of warrants." *Hyde*, 186 Ariz. at 269, 272, 921 P.2d at 672, 675. Moreover, suppression is not warranted for "evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant." *Leon*, 468 U.S. at 922.

Sworn Statement

¶11 A magistrate is authorized by statute to issue a search warrant upon an affidavit that "set[s] forth the facts tending to establish the grounds of the application, or probable cause for believing the grounds exist."[4] A.R.S. § 13-3914(A), (B). In lieu of a written affidavit,

> the magistrate may take an oral statement under oath which shall be recorded on tape, wire or other comparable method. This statement may be given in person to the magistrate or by telephone, radio or other means of electronic communication. This statement is deemed to be an affidavit for the purposes of issuance of a search warrant.

§ 13-3914(C). The statute further provides, "If a recording of the sworn statement is made, the statement shall be transcribed at the request of the court or either party and certified by the magistrate and filed with the court." *Id.*

¶12 Koons argues evidence at the suppression hearing "established the [detective] was not sworn" and, "therefore, the presumption that the warrant is valid was overcome." He bases this assertion on the transcript he had made of the detective's recorded statement, the only evidence he presented at the suppression hearing,

[4]"'Magistrate' . . . includes the chief justice and justices of the supreme court, judges of the superior court, judges of the court of appeals, justices of the peace and judges of a municipal court." A.R.S. § 1-215(18).

which does not include the administration of an oath.[5] As the trial court observed, the transcript also reflected Judge Bernini's agreement to have her signature attached to a declaration that the detective's "proof of affidavit" had been made to her, suggesting an oath had been administered before the recording began. We find no error in the court's implicit determination that Koons failed to overcome the presumption that the warrant was valid. *See Hyde*, 186 Ariz. at 270, 921 P.2d at 673 (no prima facie showing, as required by Rule 16.2, when "defendant's evidence established little more than an empty record.")

Probable Cause

¶13 Koons also contends the warrant was invalid, and resulting evidence should have been suppressed, because the detective's statement was insufficient to establish probable cause. At the suppression hearing, Koons argued the detective's statement did not set forth any evidence that Koons's vehicle had been used in the commission of a crime. But the trial court noted the detective was "not asking to search [Koons's] vehicle," but "asking to track it." Distinguishing between "probable cause to place a tracking warrant for further investigation and probable cause to search a residence and/or a particular vehicle," the court was not persuaded the detective was required to establish a specific nexus between the vehicle and the crime. The court acknowledged it was "working with limited direction because tracker warrants are somewhat new," but it found, based on a totality of the circumstances, that "probable cause existed to issue the warrant for ongoing investigation purposes . . . to track the vehicle's movements."[6]

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[5]The state points out that the transcript attached to Koons's motion was not certified by the issuing magistrate, as required by § 13-3914(C). Nor does it include any certification by the transcriber, who is not identified. The record does not support Koons's assertion on appeal that the "transcript was provided by the State to the defense as part of its disclosure."

[6]The court further found there was no evidence "the affiant knowingly, intentionally, or recklessly included a false statement in

¶14 On appeal, Koons cites the trial court's distinctions between tracker device warrants and search warrants to suggest the court erred in finding "something less than probable cause was acceptable" for the warrant's issuance. Relying on *United States v. Powell*, 943 F. Supp. 2d 759 (E.D. Mich. 2013) and *United States v. Robinson*, 903 F. Supp. 2d 766 (E.D. Mo. 2012), Koons argues a GPS tracking device may not be installed without consent absent "probable cause to believe the defendant is engaged in a crime and that he has used the vehicle in committing such crimes." We agree with the state that these cases are inapposite.

¶15 Koons refers to a portion of the *Powell* decision addressing law enforcement's use of "a cell phone monitoring device," which he argues is "akin to a GPS tracking device." But the court in *Powell* specifically distinguished cell phone monitoring from GPS tracking devices, citing "significant technological differences" between the two. 943 F. Supp. 2d at 777. And, in proposing new probable cause standards "when the government seeks a warrant for long-term real-time tracking of an individual via a cell phone," it recognized that "other courts usually do not require the showing discussed here and no authoritative court has stated plainly that such a showing is required." *Id.* at 779-80.[7] Addressing the warrantless, nonconsensual attachment of GPS tracking devices to a vehicle, also at issue in the case, the court in *Powell* acknowledged the Supreme Court's holding in *Jones* that the nonconsensual installation of a GPS device on a vehicle was a "search" under the Fourth Amendment. *Id.* at 786, *citing Jones*, 565 U.S. at 404. But, like the Supreme Court in *Jones*, the court in *Powell* declined to consider whether such a

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the affidavit" to warrant a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978), and Koons has not challenged that finding.

[7]According to the court in *Powell*, "to establish probable cause for long-term, real-time, cell-site tracking, the government should have to demonstrate a nexus between a suspect and the phone, the phone and the criminal activity, as well as the criminal activity and suspect's location in protected areas, rather than merely probable cause that the person is engaged in criminal activity." *Powell*, 943 F. Supp. 2d at 779.

warrantless search was unreasonable, and therefore a violation of the Fourth Amendment. *Id.*, *see also Jones*, 565 U.S. at 413. And *Robinson*, the other case Koons cites, provides no support for his position, as it held the warrantless, nonconsensual installation of a GPS tracking device, when supported by reasonable suspicion, does not violate the Fourth Amendment. 903 F. Supp. 2d at 785-86.

¶16 We appreciate the trial court's candor in addressing the lack of guidance on the quantum of evidence needed to support an order authorizing the nonconsensual placement of a GPS tracking device on a target's vehicle. As some jurists and commentators have recognized, Fourth Amendment jurisprudence does not provide a neat fit for the state's use of surveillance technology. *See United States v. Karo*, 468 U.S. 705, 718-19, n.5 (1984) (despite difficulty of satisfying particularity requirement of Warrant Clause to obtain warrant for monitoring beeper in private spaces, suggesting it "will suffice" "to describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested"; declining to decide whether tracking warrant may issue based on reasonable suspicion or requires probable cause); *Katz v. United States*, 389 U.S. 347, 365 (1967) (Black, J., dissenting) (noting difficulty in applying Fourth Amendment to intangible conversations and in satisfying particularity requirement of Warrant Clause to eavesdropping of future conversations); Clifford S. Fishman, *Electronic Tracking Devices and the Fourth Amendment: Knotts, Karo, and the Questions Still Unanswered*, 34 Cath. U. L. Rev. 277, 370-95 (1985) (suggesting the Supreme Court may, in the future, "acknowledge that the references in *Karo* to 'warrant' should henceforth be read to mean 'court order similar in many respects to a search warrant'" in light of Warrant Clause); *cf. California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (Supreme Court's Fourth Amendment jurisprudence has "lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone"; warrant requirement "riddled with exceptions" and "basically unrecognizable"). Although the Supreme Court's decision in *Jones* recognized the nonconsensual placement of a GPS tracking device as a Fourth Amendment search, 565 U.S. at 404, it omitted reference to

the Warrant Clause and provided little additional guidance for lower courts on the issue of when such searches are reasonable.[8]

¶17 "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness,'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006), and a magistrate is free to draw "reasonable inferences" from information in a warrant application. *Gates*, 462 U.S. at 240. All of the circumstances here, including the trend of early morning break-ins using construction tools, Koon's history of burglaries, and the unexplained discovery of his DNA at one of the burglarized businesses, gave rise to a reasonable inference that Koons would use his vehicle for ongoing criminal activity. We find no error or abuse of discretion in the trial court's determination that probable cause existed to track the vehicle's movement "for ongoing investigation purposes."

¶18 Moreover, we agree with the state that, in any event, suppression was not warranted because law enforcement obtained the evidence against Koons "in objectively reasonable reliance" on an apparently valid search warrant. *Leon*, 468 U.S. at 922; *see also* A.R.S. § 13–3925(C) (statutory good faith exception to exclusionary rule). Koons has not responded to this argument or identified any reason to conclude the officers could not reasonably have relied on the issued warrant. *See id.* at 922-23.[9]

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[8]Since this case was decided, the Arizona State Legislature has enacted A.R.S. §§ 13-4291 through 13-4294, pertaining to Tracking and Cell Site Simulator Device Search Warrants, which will provide needed guidance in this area. *See* 2017 Ariz. Sess. Laws Ch. 187, § 2; *see also Jones*, 565 U.S. at 429 (Alito, J., concurring) (because "[a] legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way," "best solution to privacy concerns" posed by GPS tracking devices "may be legislative").

[9]An officer's reliance on a search warrant must be objectively reasonable, and suppression may still be warranted, under four circumstances: (1) a warrant is issued based on a deliberately or recklessly false affidavit; (2) a judicial officer fails to act in a neutral

Restitution to Dismissed Party

¶19 Koons also asserts the trial court erred in awarding restitution to Tucson Coffee Roasters, a dismissed party, and the state has conceded error. Both parties appear to have overlooked a post-trial stipulation in which the state agreed to forbear further prosecution related to this victim in exchange for Koons's payment of restitution. We find no error in the court abiding by that stipulation in its restitution order.

Disposition

¶20 For the foregoing reasons, we affirm Koons's convictions and sentences.

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manner in issuing a warrant; (3) a warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" or (4) a warrant is so facially deficient that no officer could believe it to be valid. *Leon*, 468 U.S. at 922-23.