

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LYNDON DALE ABERNATHY,

Defendant-Appellant.

UNPUBLISHED

March 21, 2013

No. 309961

Washtenaw Circuit Court

LC No. 10-002051-FH

Before: BORRELLO, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant Lyndon Dale Abernathy appeals by right his jury conviction of second-degree home invasion. MCL 750.110a(3). The trial court sentenced Abernathy as a fourth habitual offender, see MCL 769.12, to serve 8 to 15 years in prison. On appeal, Abernathy argues that the trial court erred when it refused to suppress the evidence discovered during a search of his car and he further argues that, without the evidence from his car, there was insufficient evidence to support his conviction. For that reason, he contends, this Court should reverse. We conclude that the trial court did not err when it denied Abernathy's motion and that there was sufficient evidence to support the conviction. For that reason, we affirm.

I. BASIC FACTS

In November 2010, police officers in Northfield Township investigated several home invasions that had occurred in rural areas during the day. An officer who was investigating pawn shop reports discovered that a local resident had driven to the Flint area to pawn items, despite the fact that Northfield Township had a pawn shop. The officer contacted the pawn shop and obtained records that identified Abernathy as the Northfield Township resident who pawned the items in Flint. At the time, Abernathy was on parole and had previous convictions for home invasion. Officers also verified that the items that Abernathy had pawned were stolen from one of the homes involved in their investigation. The officers decided to ask the Major Case Team to assist with their investigation and several officers from that team began to assist: Detective David Powell from Northfield Township's police department, Sergeant Kenneth Rochell of the Michigan State Police, and deputy Jeffrey Harvey of the Washtenaw County Sheriff's department.

On the basis of the evidence that Abernathy was involved in home invasions, the officers decided to monitor Abernathy's movements by attaching a Global Positioning System (GPS) tracking device to his car. They did not, however, get a warrant to place the tracking device. Powell met up with Rochell and Harvey at a business near Abernathy's residence on November 17, 2010. Powell testified at an evidentiary hearing that he and Harvey walked from the business to the parking lot where Abernathy's car was parked and he attached the device under a quarter-panel. Harvey testified that they knew which vehicle belonged to Abernathy from the plate and other identifying characteristics; he stated that it was maroon.

On November 22, 2010, an officer notified Rochell and Harvey that Abernathy was headed into a rural part of Washtenaw. They drove to the area and saw Abernathy's car parked in the driveway of a home on Tuttle Hill Road. They drove past and turned around. While on their way back toward the Tuttle Hill Road residence, Abernathy drove past them in the opposite direction. Harvey testified that he saw Abernathy was driving and appeared to be alone.

Rochell and Harvey stopped at the Tuttle Hill Road home to investigate. Although they did not find any signs of forced entry, Harvey discovered a single glove on the driveway next to the spot where Abernathy had parked. They heard from dispatch that there was an attempted home invasion on Martz Road, which was less than two miles away. The home owner reported that she saw a maroon car leaving her driveway at a rapid speed. The homeowner discovered the home invasion just ten minutes earlier.

Rochell and Harvey went in search of Abernathy and discovered him at a nearby party store. Harvey asked central dispatch to send an officer in a marked cruiser and have the officer pull Abernathy over. Harvey agreed at the evidentiary hearing that he had the officer pull Abernathy over because he had probable cause to do so "at least" because Abernathy likely attempted the home invasion on Martz Road. An officer pulled Abernathy over soon afterward. Harvey said that he and Rochell waited for the officer to put Abernathy in the back of his cruiser and then pulled up. Harvey saw a pillow case that appeared to have items in it on the passenger's side of Abernathy's car; he also saw jewelry boxes, a change purse, and a glove that matched the one found at the Tuttle Hill Road residence. Soon after that the owner of the home on Tuttle Hill Road reported that her home had been broken into and that she was missing items. The homeowner later identified the items found in Abernathy's car as the items stolen from her home.

The prosecutor charged Abernathy with second-degree home invasion.

In March 2011, Abernathy moved to suppress the evidence found in his car on the grounds that the officer who pulled him over did not have probable cause to do so. In April 2011, he submitted a supplemental brief challenging the legality of the officers' use of a GPS tracker. Specifically, he argued that the officers could not lawfully place a GPS tracking device on his car without a warrant. Because the GPS information was the only information linking him to the attempted home invasion on Martz Road, absent that information, the officer who pulled him over would not have had probable cause to pull him over. For these reasons, Abernathy asked the trial court to suppress the evidence found in his car.

In June 2011, the trial court issued an opinion and order denying Abernathy's motion to suppress. The trial court agreed that the officer who pulled Abernathy over would not have had probable cause to do so had it not been for the GPS information, but determined that the officers could legally place the GPS on Abernathy's car without a warrant. The trial court elected not to consider the prosecutor's alternative basis for denying Abernathy's motion—that the officers acted in good faith—because it was unnecessary given its ruling.

Abernathy's case then proceeded to trial and a jury convicted him of second-degree home invasion in November 2011. Abernathy now appeals.

II. MOTION TO SUPPRESS

A. STANDARD OF REVIEW

Abernathy argues that the trial court erred when it concluded that the officers' placement of a GPS tracking device on his car did not constitute an unlawful search. Abernathy further maintains that the officers would not have had probable cause to stop him had they not used the illegally obtained GPS tracking information and, accordingly, the trial court should have suppressed all the evidence taken from his car. This Court reviews de novo a trial court's ultimate ruling on a motion to suppress. *People v Reese*, 281 Mich App 290, 294; 761 NW2d 405 (2008). However, we review the trial court's factual findings at a suppression hearing for clear error. *Id.*

B. GPS DEVICES AND THE FOURTH AMENDMENT

The United States Supreme Court recently addressed whether the attachment of a GPS tracking device to a vehicle without a valid warrant violates the Fourth Amendment. See *United States v Jones*, 565 US ___; 132 S Ct 945; 181 L Ed 2d 911 (2012). In that case, officers obtained a warrant to place a tracking device on the defendant's vehicle, but did not install the device until after the warrant had expired and in an area other than that delineated in the warrant. *Id.* at 948. On appeal, the Supreme Court determined that the attachment and use of the device constituted a search: "We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Id.* at 949. It then affirmed the lower court's decision to reverse the defendant's conviction on the basis of the admission of evidence obtained by warrantless use of a GPS device in violation of the Fourth Amendment. *Id.* at 949, 954.

Although the Supreme Court addressed whether the attachment of a GPS device to a vehicle constituted a search when the device is used to gather location data, it specifically declined to address whether the defendant's status might have altered the Fourth Amendment considerations. See *id.* at 949 n 2. It also declined to consider whether such a search might be lawful where the officers have either a reasonable suspicion or probable cause to believe that the defendant is involved in criminal activity. See *id.* at 954. Finally, it did not address whether and to what extent the exclusionary rule and the good-faith exception should apply in the context of the warrantless use of a GPS tracking device.

Here, Abernathy was on parole and, as the United States Supreme Court has stated, the Fourth Amendment provides less protection against searches and seizures for parolees. See *Samson v California*, 547 US 843, 853; 126 S Ct 2193; 165 L Ed 2d 250 (2006) (stating that the State has an overwhelming interest in supervising parolees because parolees are more likely to commit crimes and that this interest warrants privacy intrusions that would not otherwise be tolerated under the Fourth Amendment); see also MCL 791.233(3) (giving the parole board the authority to promulgate rules with respect to the conditions of parole); 1999 AC, R 791.7735(2) (permitting warrantless searches of parolees and their property). Notwithstanding that, the prosecutor did not argue that the officers' use of a tracking device was constitutionally permissible because he was on parole and they otherwise had a reasonable suspicion that he was violating the terms of his parole. Moreover, although Abernathy's lawyer conceded below that the officers had probable cause to pull over and arrest Abernathy on the day at issue, given the evidence that he had pawned stolen goods from a different home invasion, the prosecutor did not contest Abernathy's position that the legality of the officers' decision to pull him over and arrest him depended solely on whether they had probable cause to believe that he had committed the attempted home invasion on Martz Road. See, e.g., *People v Glenn-Powers*, 296 Mich App 494, 499-501; 823 NW2d 127 (2012) (explaining that an officer's subjective understanding of the basis for arrest is irrelevant to determining the legality of the arrest). The prosecutor has apparently conceded that the use of the tracking device was improper and instead asks this Court to extend the good-faith exception to the exclusionary rule to the facts of this case. For these reasons, we shall assume—without deciding—that it was a violation of the Fourth Amendment to attach a GPS tracking device to Abernathy's car and shall assume—again without deciding—that whether the officers' had probable cause to stop and arrest Abernathy depended, at least in part, on the improperly obtained location evidence.

C. THE EXCLUSIONARY RULE

When officers obtain evidence through a search that violates the Fourth Amendment, the evidence may be subject to the exclusionary rule. *Reese*, 281 Mich App at 295. However, the exclusionary rule is a judicially created rule whose application to a particular Fourth Amendment violation depends in significant part on the circumstances attending the violation:

The exclusionary rule is a “judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule’s general deterrent effect.” *Arizona v Evans*, 514 US 1, 10; 115 S Ct 1185; 131 L Ed 2d 34 (1995). For that reason, its application has been restricted to “those instances where its remedial objectives are thought most efficaciously served.” *Id.* at 11. And whether application of the exclusionary rule is appropriate in a particular context is a separate inquiry from whether the police actually violated the Fourth Amendment rights of the person invoking the rule. *Id.* at 10. [*Id.*]

Whether the exclusionary rule applies must be determined on a case-by-case basis in light of the underlying purpose of the rule. *People v Goldston*, 470 Mich 523, 531; 682 NW2d 479 (2004), citing *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

In *Leon*, the United States Supreme Court adopted a good-faith exception to the application of the exclusionary rule as a remedy for a violation of the Fourth Amendment:

We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. “No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect” But even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity. [*Leon*, 468 US at 918-919 (internal citation omitted).]

Where the police officer’s conduct was objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule and it, therefore, should not be applied. *Id.* at 919-920. Since the decision in *Leon*, the United States Supreme Court has determined that the good-faith exception to the exclusionary rule applies when police officers conduct a search in objectively reasonable reliance on binding appellate precedent. See *Davis v United States*, 564 US ___; 131 S Ct 2423-2424; 180 L Ed 2d 285 (2011).

In *Davis*, the Supreme Court considered the application of the good-faith exception to vehicle searches incident to arrests that were conducted before its decision in *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009), and concluded that the exclusionary rule should not apply to searches done in good-faith reliance on prior precedent:

Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis’s claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield “meaningful” deterrence, and culpable enough to be “worth the price paid by the justice system.” The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis’s Fourth Amendment rights deliberately, recklessly, or with gross negligence. Nor does this case involve any “recurring or systemic negligence” on the part of law enforcement. The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case. [*Davis*, 131 S Ct at 2428-2429 (citations omitted).]

Before the decision in *Jones*, there was considerable precedent that had held that the use of tracking devices without a warrant did not violate the Fourth Amendment. In *United States v Knotts*, 460 US 276, 278; 103 S Ct 1081; 75 L Ed 2d 55 (1983), for example, officers placed a beeper inside a five-gallon container of chloroform with the seller’s permission. On appeal, the Court concluded that monitoring the beeper signals did not invade respondent’s legitimate expectation of privacy because the location of the container on public roads, as well its location in an open field near the respondent’s cabin, had been voluntarily conveyed to the public. *Id.* at

281-282. The Court left open, however, the question whether the installation of such a device constituted a search with the meaning of the Fourth Amendment. *Id.* at 279 n *.¹

In *United States v Garcia*, 474 F3d 994 (CA 7, 2007), the Seventh Circuit, relying on *Knotts*, held that the installation and subsequent use of a GPS tracking device on a suspect's vehicle did not implicate the Fourth Amendment warrant requirement:

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 imaging 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. [*Id.* at 997.]

The Ninth Circuit came to the same conclusion in *United States v Pineda-Moreno*, 591 F3d 1212, 1214 (CA 9, 2010). Relying on *Knotts*, the Court stated "that the police did not conduct an impermissible search of [the defendant's] car by monitoring its location with mobile tracking devices." *Id.* at 1217. The Court concluded that the installation of the mobile tracking device on defendant's vehicle did not constitute a search under the Fourth Amendment because "[t]he undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy." *Id.* at 1214 (citation omitted).

The Eighth Circuit also concluded that the use of a GPS device to monitor a vehicle used in a drug trafficking operation was not a search. *United States v Marquez*, 605 F3d 604 (CA 8, 2010). The Court explained that a "person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another." *Id.* at 609-610.

Likewise, before *Jones*, a number of federal district courts had concluded that the use of a GPS tracking device without a warrant did not violate the Fourth Amendment. See, e.g. *United States v Burton*, 698 F Supp 2d 1303 (ND Fla, 2010); *United States v Williams*, 650 F Supp 2d 633 (WD Ky, 2009); *United States v Moran*, 349 F Supp 2d 425, 467 (ND NY, 2005). The first significant authority contradicting the view that police officers could lawfully attach a GPS tracking device to a suspect's car without a warrant was *United States v Maynard*, 615 F3d 544 (CA DC, 2010), which was ultimately affirmed by the Supreme Court in *Jones*.

¹ The Court declined to pass on the issue because it was not before it; however, the Court cited numerous circuit opinions where the courts had approved warrantless installation of such devices. See *Knotts*, 460 US at 279 n *.

Thus, at the time the officers involved here installed and used the GPS device, the majority of federal courts addressing the issue had concluded that officers did not need a warrant to do so. And, although the District of Columbia Circuit reached a contrary conclusion in *Maynard*, that decision was issued only months before the installation and use of the GPS device in this case. Further, *Maynard* did not go so far as to say that all warrantless GPS monitoring violated the Fourth Amendment. Rather, the court focused on the duration of monitoring, stating that the extensive surveillance violated Jones's reasonable expectation of privacy because it was unlikely that a stranger would observe the whole of Jones' movements over the course of a month. *Maynard*, 615 F3d at 560. The surveillance in this case was just over four days, substantially less than the 28 days in *Maynard*. As such, it is questionable whether a warrant would have been required even under the analysis in *Maynard*. Finally, the United States Supreme Court had held that the use of electronic beeper to track a vehicle's movements did not implicate the Fourth Amendment because an individual has no reasonable expectation of privacy in his movements while traveling on public roads. *Knotts*, 460 US at 281-282. Given the weight and number of precedents holding that the use of GPS devices on vehicles without a warrant was lawful, we conclude that the officers in this case could reasonably rely on those precedents.

As the Court explained in *Davis*, the proper focus in determining whether the exclusionary rule should apply is a matter of weighing the rule's costs and benefits in light of the officers' culpable conduct:

[T]he deterrence benefits of exclusion “‘var[y] with the culpability of the law enforcement conduct’ at issue.” When the police exhibit “deliberate,” “reckless,” or “grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, or when their conduct involves only simple, “isolated” negligence, the “deterrence rationale loses much of its force,” and exclusion cannot “pay its way.” [*Davis*, 131 S Ct at 2427-2428 (internal citations omitted).]

Here, there is no indication the officers exhibited deliberate, reckless, or grossly negligent disregard for Abernathy's Fourth Amendment rights. And, given the state of law at the time, the officer's actions were objectively reasonable. The officers acted in good faith when they installed the GPS device on Abernathy's car and used it to track his location. Because they acted in good faith, the exclusionary rule does not apply. *Id.* at 2429.

Therefore, although the trial court's reasoning was different, it did not err when it denied Abernathy's motion to suppress. See *People v Mayhew*, 236 Mich App 112, 118 n 2; 600 NW2d 370 (1999).

III. PROBABLE CAUSE AND SUFFICIENCY OF THE EVIDENCE

Abernathy also argues that his stop and arrest was without probable cause in the absence of the evidence from the GPS device. However, we have concluded that the location evidence was not subject to the exclusionary rule and we further conclude that, when this evidence is considered in light of the other evidence adduced at the suppression hearing, the officers had probable cause to believe that Abernathy committed the attempted home invasion on Martz

Road. See *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996) (“Probable cause to arrest exists where the facts and circumstances within an officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.”). Accordingly, the officers lawfully stopped and arrested Abernathy for that crime. See *Reese*, 281 Mich App at 294-295 (stating that officers can arrest a defendant without a warrant if they have probable cause to believe that he committed an offense).

Finally, we conclude that, when the evidence lawfully adduced at trial—including the evidence discovered in Abernathy’s car—is considered in the light most favorable to the prosecution, there was sufficient to establish the elements of second-degree home invasion. See *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009); MCL 750.110a(3). Abernathy’s claim that there was insufficient evidence depends in significant part on his conclusion that the evidence taken from his car must be suppressed. As we have already noted, this evidence was lawfully seized after Abernathy’s arrest. As such, it was admissible. Abernathy also argues that the evidence was insufficient because the prosecutor’s witnesses were inconsistent and because the officers failed to search for and collect possible evidence from the home invasion.² However, those arguments go to the weight and credibility of the evidence presented at trial, which was a matter for the jury to decide. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

IV. CONCLUSION

Assuming that the officers violated Abernathy’s Fourth Amendment rights by placing a GPS tracking device on his vehicle, we nevertheless conclude that the officers acted in good-faith reliance on established precedent. Therefore, the location evidence from the tracking device was not subject to the exclusionary rule. Moreover, when considering the location information in light of the report of an attempted home invasion involving a car that matched the description of Abernathy’s car, the officers had probable cause to stop and arrest Abernathy. Finally, the prosecutor presented sufficient evidence to support Abernathy’s conviction at trial.

Affirmed.

/s/ Stephen L. Borrello

/s/ Michael J. Kelly

/s/ Mark T. Boonstra

² In discussing his sufficiency of the evidence claim, Abernathy suggests that the officers violated his right to a fair trial by failing to adequately conduct their investigation. To the extent that his analysis might be construed as an additional claim of error, we conclude that he abandoned that claim by failing to properly address it on appeal. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).