Prosecuting Attorneys' Council of Georgia

State Prosecution Support Division

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FYI: PARK v. STATE

The Georgia Supreme Court holds as unconstitutional OCGA § 42-1-14(e), to the extent that it requires that a person who is classified as a sexually dangerous predator – but who is no longer in State custody or on probation or parole – wear and pay for a GPS monitoring device that allows the State to monitor that individual's location.

In *Park v. State*, Case No. S18A1211 (Mar. 4, 2019), Park was convicted in 2003 of child molestation and nine counts of sexual exploitation of a minor. In 2011, he was classified as a "sexually dangerous predator" under OCGA § 42-1-14 (a) (1), which was a designation that required Park to wear and pay for an electronic monitoring system for the remainder of his natural life. After he completed his sentence and was released from custody, he registered as a sex offender and was fitted with a GPS monitoring device pursuant to OCGA § 42-1-14 (e). In February of 2016, he was indicted for tampering with his ankle monitor, in violation of OCGA § 16-7-29 (b) (5). Park filed a general demurrer, arguing that he could not be prosecuted under OCGA § 16-7-29 (b) (5) because the predicate statute, OCGA § 42-1-14, was unconstitutional. Specifically, that OCGA § 42-1-14 (e) is unconstitutional on its face because it authorizes an unreasonable lifelong warrantless search of sex offenders who are classified as sexually dangerous predators by requiring such offenders to wear and be monitored at all times through a GPS monitoring device. The Court agreed.

The Court noted that OCGA § 42-1-14 (e) requires all sex offenders classified as sexually dangerous predators to wear a GPS monitoring device that locates, records, and reports their location to State authorities, even after they have completed their criminal sentences. But, the Court stated, in *Grady v. North Carolina*, – U.S. – (135 SCt 1368, 1370, 191 LEd2d 459) (2015), the United States Supreme Court held that such requirements imposed by the State constitute a search for purposes of the Fourth Amendment. To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. Thus, the Court stated, pursuant to *Grady*, there are two relevant issues that must be addressed in order to determine whether the warrantless searches authorized by OCGA § 42-1-14 (e) may be permissible: (1) whether the searches involved may be reasonable under the Fourth Amendment due to the individuals being searched having a diminished expectation of privacy, and (2) whether the warrantless searches authorized by the statute may be permissible based on "special needs."

As to diminished expectation of privacy, an individual who is still serving a criminal sentence, either on probation or parole may have a diminished expectation of privacy. However, the same is not true of an individual who has completed the entirety of his or her criminal sentence, including his or her parole and/or probation requirements. Also, the permanent application of a monitoring device and the collection of data

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by the State about an individual's whereabouts twenty-four hours a day, seven days a week, through warrantless GPS monitoring for the rest of that individual's life, even after that person has served the entirety of his or her criminal sentence, constitutes a significant intrusion upon the privacy of the individual being monitored. Therefore, the Court concluded, individuals who have completed their sentences do not have a diminished expectation of privacy that would render their search by a GPS monitoring device reasonable.

Next, the Court addressed whether the GPS monitoring requirements of OCGA § 42-1-14 (e) may be proper as a reasonable "special needs" search. Search regimes where no warrant is ever required may be reasonable where special needs make the warrant and probable cause requirement impracticable, and where the "primary purpose" of the searches is distinguishable from the general interest in crime control, (e.g., road blocks). Thus, in order for the special needs exception to apply, the purpose advanced to justify the warrantless search must be "divorced from the State's general interest in law enforcement."
And here, the Court found, the plain language of OCGA § 42-1-14 (e) reveals that this purpose is not divorced from the State's general interest in law enforcement. Instead, the statute requires that the monitoring system involved be capable of timely reporting or recording a sexually dangerous predator's presence near or within a crime scene without limitation to any type of crime. Furthermore, the location information collected is immediately reported to law enforcement, and the statute does not restrict law enforcement's use of that information as evidence that the monitored person committed a crime of any specific kind. And, the Court added, the information collected through the use of worn GPS monitoring devices does not only collect evidence that could be later used in a criminal prosecution, the devices are designed to immediately report evidence of possible criminal activity to State authorities at all times without the need for a search warrant based on probable cause. Therefore, the Court held, because the privacy interests involved with respect to Fourth Amendment searches of the individuals covered by OCGA § 42-1-14 (e) who are no longer serving any portion of their sentences is by no means minimal, the search authorized by the statute cannot be classified as a *reasonable* "special needs" search.

Accordingly, the Court concluded, OCGA § 42-1-14 (e) is unconstitutional on its face to the extent that it authorizes such searches of individuals, like Park, who are no longer serving any part of their sentences in order to find evidence of possible criminal conduct. Nevertheless, in so holding, four Justices joined in a concurring opinion that the decision "does not foreclose other means by which the General Assembly might put the same policy into practice." See e.g., *People v. Hallak*, 310 Mich. App. 555 (873 NW2d 811) (2015), rev'd in part on other grounds, 499 Mich. 879 (876 NW2d 523) (2016) (Upholding Michigan statutes at issue because it specifically included lifetime GPS monitoring as part of the sex offender's *actual sentence for the crime or crimes committed*); N.C. Gen. Stat. § 14-208.43 (a) (North Carolina statute allowing sexual offenders to "file a request for termination of [the] monitoring requirement . . . one year after the offender: (i) has served his or her sentence for the offense for which the satellite-based monitoring requirement was imposed, and (ii) has also completed any period of probation, parole, or post-release supervision imposed as part of the sentence").