

The Use of GPS Tracking Devices for Criminal Investigations in Contemporary Japan

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Introduction

The Global Positioning System (GPS) is a space-based radio-navigation system owned by the United States government and operated by the Air Force. It is a common feature on individual communication devices such as Smart Phones and Iphones. Users are able to track their location, and that of friends and others. Recently this amazing technology has been used by the police in their efforts to investigate and prevent crimes. However, the issue of individual privacy and the constitutionality of such investigative techniques have come into question in both the U.S and Japan.

The Japanese High Courts have split on the issue of the need for a warrant when conducting a GPS investigation.² This article will present the current law on the matter and will introduce a recent Supreme Court of Japan Grand Bench decision. But, first some basic background information regarding criminal investigations is needed.

I. Voluntary Measures³ and Compulsory Measures⁴

In Japan there is a distinction between voluntary measure and compulsory measures. Regarding former, the police may conduct an investigation without the need for a warrant and without any time restraints; provided that the target of the investigation voluntarily cooperates.⁵ As to the latter, the authorities must obtain a warrant from a judge before compulsory measures can be undertaken.⁶

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2 Nagoya High Court Decision, June 29, 2016.

3 *Nin-I Sosa*

4 *Kyousei Sosa*

5 Code of Criminal Procedure: Article 198. A public prosecutor, a secretary of the public prosecutor's office or a police officer may, when necessary for conducting an investigation of an offense, call upon the suspect to appear and examine him//her: provided that the suspect may, except in the cases of arrest or detainment, refuse to appear, or leave at any time after appearance.

6 Article 197: With regard to an investigation, a necessary examination may be made in order to attain the object thereof: Provided, that compulsory measures may not be taken unless otherwise stipulated in this Code.

II. Is the Use of a GPS Tracking Device a Compulsory Measure that Requires a Warrant?

This question was answered by the Supreme Court of Japan on March 15, 2017, in a Grand Bench decisions.⁷ In this case a GPS investigation was undertaken whereby the locations of vehicles were track and their movements monitored by keeping GPS terminals attached for a period of six and half months, from around May 2013 to around December 4, 2013, to a total of nineteen cars and other vehicles which were likely to be used not only by the accused and his accomplices, but also by the accused's female friends, without their consent and without obtaining a warrant, i.e. a voluntary measures investigation. The accused and his accomplices were suspected in a string of thefts. The GPS tracking devices were used to elucidate a full picture of their criminal activities.

The defendant, 45-year old Katsushi Iwakiri, was involved in a string of thefts in the Kansai region committed between February 2012 and September 2013.

The District Court concluded that the GPS Investigation constituted a compulsory measure having the nature of an inspection and a warrant should have been obtained pursuant to Article 197.⁸ This Court held that the investigation was illegal in that no warrant was sought.

Nevertheless, the accused was sentenced to five years and six months because there was sufficient other evidence that proved his guilt, including his confession. In other words, the Court held that it was harmless error to conduct the GPS investigation.

The Osaka High Court rendered a decision similar to the District Court, but with language more favorable to the police.⁹ It did not find the GPS investigation to be seriously illegal on the grounds that the level of privacy invasions was not necessarily high under the circumstances. The information that could be obtained by the GPS investigation was limited to the locations of the vehicles to which GPS terminals were attached. Under the circumstances it was necessary to conduct the GPS investigation in combination with shadowing and stakeouts to monitor the activities of the accused and his accomplices. The Court held that even if there might be room for considering that the GPS investigation constituted a compulsory measure and was illegal in that it was conducted without a warrant, the GPS

2. In regard to an investigation, a report on necessary matters may be requested of public offices, public or private organizations.

7 The Supreme Court of Japan is comprised of three petty benches, with five justices sitting in each bench. When a case involves a serious constitutional issue, a Grand Bench, comprised of all fifteen justices, is held to decide the matter.

8 Osaka District Court Judgment of July 10, 2015.

9 Osaka High Court Decision of March 2, 2016.

investigation was considered to have satisfied the substantive requirements for obtaining a warrant. At the time of GPS investigation there was no judicial precedent addressing the validity of such practices, and it could not be said that the police intentionally broke the law. In fact the National Police Agency in June of 2006, issued a manual on GPS investigations instructing police offices throughout the country that such investigations could be considered a voluntary measure and that warrants were not required. However, after the Grand Bench decision it order all police stations to stop using GPS tracking devices.

The Grand Bench of the Supreme Court ruled on March 15, 2017, that Article 35 of the Constitution provides for the “right ...to be secure in their homes, papers and effects against entries, searches and seizures.” It held that it is reasonable to understand that target of the protection is not limited to just “homes, papers, and effects,” but includes the right not to be “invaded” into the private sphere that is equivalent to these.

The Supreme Court held a GPS investigation requires a warrant since such an investigation invades the privacy of the accused and violates material legal interests guaranteed by the Constitution.¹⁰ It further held that the matter of a GPS device was different from the use of cameras and stakeouts.

The Concurring opinion of Justices Kiyoko Okabe, Takehiko Otani, and Masayuki Ikegami added some further insight into the matter. These Justices recognized that it would take time for the legislature to enact relevant legislation to deal with the issues involved. In the meantime, judges should only issue warrants in the most serious of cases and for extremely serious offenses. Judges should carefully examine the situation and only issue warrants for GPS investigations under very limited special circumstances. The Court urged the lawmakers to enact legislation dealing the matter.

III. Conclusion

It is difficult to say with any certainty what affect the US Supreme Court’s judgment in *United States v. Jones* (132 S.Ct.945; 2012) had on the Supreme Court of Japan in this case. However, one could reasonable compare the two cases and conclude that the Supreme Court of Japan, while holding that GPS investigations are wrong if conducted without a warrant, it still agreed with the guilt of the accused and the sentenced was imposed. Contrast that decision with the *U.S. v. Jones*, where in a 5/4 split decision regarding the conviction of a drug kingpin, Antoine Jones was reversed.

¹⁰ Supreme Court Judgment of March 15, 2017.