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# Brooklyn Judge's Ruling Raises Bar for Covert Cellphone Tracking

By BENJAMIN MUELLER and AL BAKER NOV. 15, 2017

A Brooklyn judge has ruled that the police need an eavesdropping warrant to covertly track the cellphones of criminal suspects, raising the bar in New York for the use of a surveillance device that is facing challenges across the United States.

Justice Martin P. Murphy said the New York Police Department had improperly homed in on an attempted murder suspect last year by intercepting the suspect's cellphone signals without a warrant based on probable cause that he committed a crime.

The Police Department denied it had tracked the suspect that way and disputed the judge's reasoning, saying that an eavesdropping warrant is only needed to capture the content of calls or messages and that the department's tracking devices do not allow them to record that information.

The ruling, made earlier this month and published this week, could complicate an untold number of ongoing investigations in New York that relied on the tracking device, and adds to the mounting pushback from judges and elected officials against its unfettered use.

Two months ago, a federal appeals court in Washington, D.C., overturned a sexual assault suspect's conviction on the basis that the government violated Fourth Amendment protections against unreasonable searches when it used the device, known as a cell-site simulator, without a probable-cause warrant. And last year a

federal judge in Manhattan threw out drug evidence discovered with the help of a cell-site simulator. “Absent a search warrant,” the judge wrote, “the government may not turn a citizen’s cellphone into a tracking device.”

The ruling in State Supreme Court in Brooklyn is believed to be the first seeking to limit the use of the devices by the nation’s largest local police department. Civil rights lawyers say it will put pressure on the police and prosecutors to meet a higher standard in tracking people’s cellphones and give judges new guidance to lean on.

Lawrence Byrne, the Police Department’s deputy commissioner of legal matters, denied the police had used a cell-site simulator to track the suspect in the Brooklyn case, though he acknowledged that they sought and received authorization to do so. Justice Murphy’s ruling said prosecutors had conceded that the police tracked the suspect’s phone.

“This decision stands for the principle that, in the criminal justice context, the technology has to be reviewable in a fair and open way by both the courts and the defense,” said Jerome D. Greco, a staff attorney in the Legal Aid Society’s Digital Forensics Unit, who, along with the defense attorney, Matthew Caretto, pressed prosecutors on the use of cell-site simulators in the Brooklyn case.

The New York Police Department’s use of cell-site simulators was almost entirely shrouded in secrecy until last year, when documents obtained by the New York Civil Liberties Union showed that the department used the devices on 1,016 occasions from 2008 to 2015. They were generally used for the most serious offenses, like murders, rapes, shootings and robberies, and sometimes for lesser crimes.

The technology, often known by the brand name StingRay, is a rectangular device about the size of a suitcase that essentially tricks nearby cellphones by acting like a cellphone tower and intercepting the phone’s signal. The devices can also capture texts, calls, emails and other data.

“Our cell-site simulator technology does not allow us to intercept what people are saying to each other,” Mr. Byrne said. He said that meant the police did not need an eavesdropping warrant to use the devices. And in any case, he said, the

department a couple years ago instituted a new policy under which it already shows probable cause on applications to use cell-site simulators, going beyond the usual requirements of the order.

Mr. Greco said based on applications the Legal Aid Society has reviewed, the department uses a lower standard of reasonable suspicion, rather than showing probable cause.

Because civil rights lawyers say prosecutors in New York almost never acknowledge using the devices, defendants are typically in the dark and defense lawyers are kept from raising challenges.

Some states, like California, have tried to force police agencies to seek approval from their city councils before using the devices. In Baltimore, where the police have used cell-site simulators thousands of times, defense lawyers have pressed for details about how the police found certain suspects, only to have prosecutors drop charges to avoid answering questions. And the Department of Justice now requires federal agents, with a few exceptions, to obtain a warrant from a judge before using the devices.

Their use is increasing. The American Civil Liberties Union has identified 72 law enforcement agencies, in 24 states and the District of Columbia, that use cell-site simulators.

In New York, the Legal Aid Society has trained lawyers to spot the signs that a cell-site simulator was used: a suspect's cellphone suddenly dying, or a sudden arrest in a place investigators had not previously identified as of interest. The Legal Aid Society said the Brooklyn case was the first it knew of in which prosecutors in New York City told defense attorneys about the approval to use a cell-site simulator, a fact that they said only emerged after much prodding.

In the Brooklyn case, the police had obtained a pen register and trap and trace order, which were designed in the era of landlines to document incoming and outgoing phone numbers from a targeted phone. Those orders are granted as long as the police can show reasonable suspicion of a crime.

But Justice Murphy said the police used those court orders to deploy cell-site simulators, which can give the police detailed information about a phone's whereabouts, down to an apartment within a building. Justice Murphy ruled that such information is constitutionally protected. He said the police can only use cell-site simulators if they receive an eavesdropping warrant, which requires them to justify a deeper level of intrusion by showing probable cause that a crime occurred.

As a result, though a shooting victim had picked the defendant, Shuquan Gordon, out of a police lineup, Justice Murphy threw out that evidence on the grounds that Mr. Gordon was arrested using improperly obtained information. The judge said prosecutors could still use evidence of Mr. Gordon's behavior at the time of his arrest.

"The use of a cell-site simulator intrudes upon an individual's reasonable expectation of privacy, acting as an instrument of eavesdropping, and requires a separate warrant supported by probable cause," the judge wrote.

The Brooklyn district attorney's office said it was considering its options and planned "to move forward with the prosecution."

Many questions still surround the use of the devices in New York. The Police Department, like other police agencies, signed a nondisclosure agreement with the Harris Corporation, which makes many of the devices, agreeing not to divulge any details about the devices. It is still not clear what the capabilities are of the cell-site simulators in New York, how the devices were paid for and who is trained to use them.

"Unless we create legal limits on these technologies, and real oversight, we face the prospect of comprehensive police monitoring and tracking of private, lawful activity," said Christopher T. Dunn, the associate legal director of the New York Civil Liberties Union, which is engaged in ongoing litigation to get more information about the department's capabilities.

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