

HOUSE BILL REPORT

ESSB 6136

As Reported by House Committee On:
Judiciary

Title: An act relating to authorization of electronic tracking devices for law enforcement purposes.

Brief Description: Authorizing use of electronic tracking devices for law enforcement purposes.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators McCaslin and Roach).

Brief History:

Committee Activity:

Judiciary: 2/26/04, 2/27/04 [DPA].

Brief Summary of Engrossed Substitute Bill
(As Amended by House Committee)

- Establishes requirements and procedures for law enforcement to install and use tracking equipment, such as a GPS device, in a criminal investigation.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 8 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; Campbell, Flannigan, Kirby, Lovick and Newhouse.

Minority Report: Do not pass. Signed by 1 member: Representative McMahan, Assistant Ranking Minority Member.

Staff: Edie Adams (786-7180).

Background:

Article 1, Section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." As stated by the state supreme court, the focus of Article 1, Section 7 is on privacy interests that citizens have held, and should be entitled to hold, safe from governmental trespass.

The privacy protection embodied in Article 1, Section 7 limits the government's authority to conduct searches and seizures. Generally, a search or seizure may be conducted only if there is a warrant based upon probable cause issued by a detached and neutral magistrate. A warrant must be based on an affidavit stating particular facts and circumstances sufficient to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity and that evidence of the crime may be found in the place to be searched. In addition, a warrant must contain a particular description of the place to be searched and the property to be seized.

Warrantless searches based on probable cause are also possible under specific circumstances. One of the exceptions to the warrant requirement is in cases where exigent circumstances exist. The exigent circumstances exception applies when police have established probable cause, but the need for an immediate search or seizure to avoid loss of evidence, escape of the suspect, or harm to the public or police, makes it impractical to obtain a warrant.

Issuance of a search warrant is also governed by court rules. (See CR 2.3 and CrRLJ 2.3). These rules provide that a warrant may be issued to search for and seize: (1) evidence of a crime; (2) contraband, the fruits of crime, or things otherwise criminally possessed; (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or (4) a person for whose arrest there is probable cause, or who is unlawfully restrained. An application for a warrant must be supported by an affidavit, a certified unsworn statement, or sworn testimony establishing the grounds for issuance of the warrant. Sworn testimony may be an electronically recorded telephonic statement. In addition, the rules provide that a search warrant must be executed within a specific period of time not to exceed 10 days.

In a 2003 Washington Supreme Court case, *State v. Jackson*, the Court held that police use of a global positioning system (GPS) device on a vehicle to track that vehicle's movements is an intrusion into a person's private affairs for which a warrant is required under Article 1, Section 7, unless a recognized exception to the warrant requirement applies. In *Jackson*, the police obtained a warrant to attach a GPS device on Jackson's car, and as a result of tracking his movements, were able to locate the body of his daughter.

The Court in *Jackson* characterized the GPS device as a technological substitute for traditional visual tracking, noting that use of a GPS device enables a continuous long-term surveillance that would not be possible by following the vehicle. In addition, in determining that use of a GPS device is an invasion of private affairs, the Court found as significant the fact that a GPS device allows for the discovery of an extensive amount of personal information which can reveal a detailed picture of a person's life.

Summary of Amended Bill:

The chapter of law governing search and seizure is amended to authorize and establish procedures for the issuance of warrants to install tracking equipment and the circumstances under which tracking equipment may be installed without a warrant. "Tracking equipment" is defined to mean all electronic or mechanical devices used to determine the location, status, movement, or direction of travel of the object onto which it is placed, without direct visual observation of the object.

Tracking equipment may be installed, maintained, and monitored without a warrant for a period of up to 48 hours if exigent circumstances exist at the time the equipment is installed.

To obtain a warrant for the installation of tracking equipment, a law enforcement officer or a prosecuting attorney must apply to a court. The court may issue a warrant to install tracking equipment if the following conditions are met:

- the application describes the object onto which the tracking equipment will be installed;
- the application is supported by an affidavit, a certified unsworn statement, or sworn testimony establishing the grounds for issuance of the warrant; and
- probable cause exists to believe that use of the equipment will lead to evidence of a crime, contraband, fruits of crime, things criminally possessed, weapons, other things by means of which a crime was committed or reasonably appears about to be committed, or will lead to learning the location of a person who is unlawfully restrained or reasonably believed to be a victim of a crime, or for whose arrest there is probable cause.

The tracking equipment must be installed within 10 days of issuance of the warrant, and may be maintained and monitored for a period not to exceed 30 days. The warrant must state the time period or number of days the equipment may be used. Issuance of the warrant authorizes any law enforcement officer of the county to install, maintain, service, and monitor the equipment. At the conclusion of the warrant authority, the law enforcement officer is authorized to remove the equipment and must report the results of the use of the equipment to the magistrate who issued the warrant or to another magistrate or court that has jurisdiction.

Sworn testimony provided in support of an application for a warrant may be an electronically recorded telephonic statement, or a combination of written material and an electronically recorded telephonic statement. Any evidence in support of probable cause for the warrant must be preserved, is subject to constitutional limitations for such determinations, and may be hearsay in whole or in part.

The peace officer or prosecuting attorney who requested the tracking warrant must serve an inventory on the person named in the warrant within 30 days after the termination of the investigation. The inventory must include:

- Notice of the issuance of the warrant;
- The date of the installation of the tracking device;
- The identity of the object into or onto which the device was installed; and
- The period of time authorized for the use of the tracking device.

The court may postpone or dispense with the serving of the inventory for good cause. Upon the filing of a motion, the issuing court may allow the person to inspect portions of the applications, warrants, and results reported to the court, as the court determines to be in the interests of justice.

A magistrate of a municipal or district court may issue a warrant to install tracking equipment only within the court's jurisdiction, but the tracking equipment may be maintained, used, and monitored anywhere within the state.

Amended Bill Compared to Engrossed Substitute Bill:

The amended bill added the provision requiring the officer or prosecutor who requested the warrant to provide to the person named in the warrant an inventory that consists of notice that the warrant was issued, date of installation of the tracking device, object onto which the device was installed and the period authorized for use of the device.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: The bill takes effect on July 1, 2004.

Testimony For: The prosecutor's association was involved in the warrant issue in the *Jackson* case. We didn't know whether a warrant was needed to install a GPS device, but decided it was a good course of action to seek one. The current search warrant statutes and court rule don't really deal with this type of search they envision going to a place, conducting a search, and then leaving. The bill does not create new authority. The state supreme court said law enforcement can do this with a warrant. This bill is pretty straightforward and makes it clear how to do this. This is important so that we have some sort of uniformity across the state. In the *Jackson* case, we made this up as we went along. Let's make it clear in statute how to do it so that every jurisdiction does it the same way that is a better protection for the public. The exigent circumstance provision in the bill is actually a restriction on law enforcement. Since a GPS tracking can be ongoing, it makes sense to require law enforcement to go to court to continue the monitoring beyond 48 hours.

Testimony Against: What government does in the area of secret surveillance is an area

of concern. The *Jackson* case was properly investigated and handled and is evidence that this legislation is not needed. Law enforcement is able to do this now; it has been validated by the state supreme court. This bill is not needed and creates a flawed special warrant process for secret tracking devices. There are three areas of concern in the bill that go beyond the *Jackson* decision. First, it allows a longer period of monitoring than took place in the *Jackson* case. The original bill allowed for 2 months of surveillance, now it allows surveillance for up to one month. Second, the bill does not provide after-the-fact notification to the person that he or she was the subject of secret surveillance. Finally, in regard to the exigent warrant circumstance, the government should be required to go to court and seek a warrant after the device is installed, and if they do not, any evidence obtained should be inadmissible.

Persons Testifying: (In support) Tom McBride, Washington Association of Prosecuting Attorneys; and Pat Sainsbury, Office of the King County Prosecuting Attorney.

(Opposed) Jerry Sheehan, American Civil Liberties Union of Washington.

Persons Signed In To Testify But Not Testifying: None.