

NEW YORK COURT OF APPEALS ROUNDUP

ADDING CLARITY TO CONSTITUTIONAL LIMITS ON GPS TRACKING DEVICES

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In this month's column, we address a criminal appeal in which the Court of Appeals set aside a conviction because of the trial court's failure to consider the defendant's youthful offender status and, in so doing, determined that one of its own precedents had been wrongly decided 36 years earlier. We also discuss a decision adding more clarity to constitutional limits on the use of GPS tracking devices. Finally, we deal with the recurring issue of whether tortious conduct of government agencies is proprietary, and therefore held to the general negligence standard of private parties, or part of a government function and immune from liability in the absence of a special relationship between the injured party and the government, giving rise to a special duty.

Precedent Overruled

In an unusual development, the court determined that one of its own decisions from 1977 had been wrongly decided when in [*People v. Rudolf*](#) it overturned a criminal conviction because of the trial court's failure to consider the defendant's youthful offender status.

Section 720.10 of the Criminal Procedure Law (CPL) provides that a defendant is eligible for youthful offender status, subject to certain exceptions, if he or she was younger than 19 at the time of the crime. If the defendant is convicted of a felony, the trial court has discretion whether or not to grant youthful offender status. If youthful offender status is granted, the defendant's conviction is deemed vacated and is replaced by a youthful offender finding which means that a sentence greater than four years cannot be imposed, the records of the prosecution are sealed, and the defendant does not incur the disabilities that would otherwise flow from a criminal conviction such as

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disqualification from public office and public employment. The *Rudolf* case turned on the interpretation of CPL Section 720.20(1) which provides that "[u]pon conviction of an eligible youth...at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender."

Defendant Reece Rudolf was 17 years old when he was arrested and charged with five counts of criminal possession of a controlled substance in Warren County. At the time of his arrest, Rudolf was found with 40 bags of heroin in his truck, and 330 bags of heroin were found in his apartment along with a quantity of cocaine and \$5,500 in alleged drug proceeds. Rudolf subsequently entered into a plea agreement with prosecutors and pleaded guilty to a single count of criminal possession of a controlled substance and waived his right to appeal. He was sentenced to five years in prison and two years of post-release supervision.

At the sentencing, there was no mention of Rudolf's eligibility for youthful offender status. He appealed to the Appellate Division, Third Department, arguing that the trial court erred by failing to consider his youthful offender status. The Third Department found that he had waived his right to be considered for youthful offender status by failing to request such consideration and affirmed his conviction. The court granted leave to appeal.

In a decision written by Judge Robert S. Smith in which Chief Judge Jonathan Lippman and Judges Jenny Rivera and Sheila Abdus-Salaam concurred, the court reversed the conviction and remanded the case to the trial court for consideration of Rudolf's youthful offender status. The court focused on the Legislature's use of the word "must" in CPL Section 720.20(1) and found that it requires a trial court to consider an eligible defendant's youthful offender status even if he or she fails to request it or affirmatively agrees to forgo it as part of a plea bargain.

The court acknowledged that the Third Department's affirmance was in accord with *People v. McGowen*, 42 N.Y.2d 905 (1977), but the court expressly overruled *McGowen* and found that it had misinterpreted the statute. The court determined that the policy goals of the youthful offender statute—giving the trial court the opportunity to determine whether young people have a real likelihood of turning their lives around and accordingly deserve a fresh start—are too important to be sacrificed in the plea bargaining process. The court noted that it did not make the decision to overrule a 36-year-old precedent lightly and determined that its holding in *Rudolf* should not be applied retroactively so as to permit collateral attacks on existing sentences.

Judge Victoria Graffeo issued a concurring opinion in which she agreed with the majority decision that *McGowen* should be overruled, but disagreed with the majority in that she found that a defendant should be able to waive youthful offender consideration

as part of a plea bargain. Judge Susan Read issued a dissenting opinion, joined by Judge Eugene Pigott, in which she found that there was not a sufficient basis to go to the extraordinary step of reversing an existing precedent. The majority disagreed and found that the policy of providing deserving youthful offenders with the opportunity to become law-abiding, productive members of society was compelling enough to justify overruling *McGowen*.

Use of GPS Tracking Device

Global positioning system (GPS) technology has developed to the point where it is possible to place a device on an individual's car to remotely track his or her movements, and the law is now developing to clarify the ability of the government to use this technology consistent with constitutional protections.

Michael Cunningham was a senior employee at the state Department of Labor. In 2008, the Labor Department began an investigation into Cunningham's alleged unauthorized absences from work and falsification of records to conceal his absences. As part of the investigation, the Labor Department's Inspector General's office attached a GPS device to Cunningham's personal vehicle which tracked all of Cunningham's movements for an entire month—including time outside business hours and when he was on a family vacation. The inspector general did not obtain a warrant before installing the GPS tracking device.

Based on the results of this GPS tracking, among other forms of surveillance, the Labor Department brought charges against Cunningham, 11 of which were sustained by a hearing officer and affirmed by the Commissioner of Labor, and Cunningham was terminated. Cunningham then commenced an Article 78 proceeding to challenge that ruling. Upon transfer from the Supreme Court, the Third Department confirmed the ruling and dismissed Cunningham's petition. Two justices dissented from that portion of the majority's opinion that confirmed the four charges that were based on the results of the GPS monitoring.

In an opinion by Judge Smith in [*Matter of Cunningham v. New York State Department of Labor*](#), the court found that the initial installation of the GPS device on Cunningham's car without a warrant was reasonable but that the scope and extent of the monitoring was excessive and unconstitutional. The court accordingly reversed the Appellate Division, dismissed the four charges based on the GPS evidence and remitted the case to the Appellate Division for remand to the Commissioner of Labor for redetermination of the penalty in light of this dismissal.

The court noted that its decision in *People v. Weaver*, 12 N.Y.3d 433, (2009), and the Supreme Court's ruling in *United States v. Jones*, 132 S. Ct. 945 (2012), held that the installation of a GPS tracking device constituted a search within the meaning of the state and federal constitutions. Neither of those cases, however, addressed whether and in what circumstances a GPS device could be employed without the issuance of a search warrant.

The court in *Cunningham* found that a warrant was not required because the surveillance fell within the workplace exception established in *O'Connor v. Ortega*, 480 U.S. 709 (1987), and its progeny. Accordingly, the initial installation of the GPS device on Cunningham's car without a warrant was permissible under the state and federal constitutions. The court went on to find, however, that the Labor Department's search nevertheless was not reasonable and was therefore unconstitutional because of its excessive scope. The Labor Department's monitoring was not limited to Cunningham's movements during business hours, but rather was 24 hours per day and thus examined activity outside the work day in which the department had no legitimate interest.

The court noted that it may be difficult or impossible to limit the GPS monitoring to eliminate all surveillance of private activities, but assumed that there must be some measure short of 24-hour surveillance for an entire month. In support of this assumption, the court pointed out that the Labor Department was able to remove the GPS from Cunningham's vehicle three times without detection—twice to replace the device with a new device and a third time when the surveillance was concluded. Even though none of the evidence regarding Cunningham's activities outside of work hours was used against him, the court nevertheless determined that the unreasonable scope of the Labor Department's surveillance required the dismissal of all charges based on the GPS evidence.

Graffeo, Read and Pigott joined the decision. Abdus-Salaam issued a concurring decision joined by Lippman and Rivera agreeing with the majority that the scope of the Labor Department's search was unreasonable but also arguing that any installation of a GPS device without a warrant is unconstitutional. We expect that this area of the law will continue to develop as increasingly sophisticated forms of surveillance become available to law enforcement.

Municipal Liability

The court's decision in [*Applewhite v. Accuhealth and City of New York*](#) provides, through the majority opinion and two opinions concurring in the result, a comprehensive review of the much litigated issues involved in cases asserting municipal liability for tortious acts. The issue boils down to whether the action of the government is proprietary in

nature, rendering the government subject to the same principles of tort law as a private party, or whether the action represents the government's performance of a ministerial act for which liability would not lie in the absence of a special relationship between the injured party and the government entity that creates a special duty of the government to protect the injured party. The majority opinion by Graffeo essentially affirmed the Appellate Division, First Department's determination and was accompanied by the opinion of Smith concurring in the result (joined in by Pigott) and a separate concurrence in the result by Abdus-Salaam.

At the end of the day, the majority held that under the facts in the case, the provision of ambulance service by the city's Emergency Medical Technicians (EMTs) in response to a 911 call represented the performance of a governmental function and required the existence of a "special duty" owed to the injured party in order to establish liability. The court found that plaintiffs had raised issues of fact with respect to whether a special duty existed and remanded the case for trial.

The facts were critical to the positions taken by the majority and the concurrences. They were: In 1998 plaintiff Tiffany Applewhite, age 12, suffered from uveitis, an eye condition that required medicine administered intravenously. After having received an injection at her home by a nurse, she experienced an anaphylactic shock, and when she began having breathing difficulties, her mother called 911 for help. The nurse at the home performed the emergency care she could provide, but Tiffany had a seizure followed by cardiac arrest.

Within minutes after the call to 911, two EMTs, employed by the New York City Fire Department arrived at the apartment in a basic life support ambulance. The EMTs had been sent to respond because no advanced life support ambulance, with paramedics, was then available. One of the EMTs immediately began performing cardio-pulmonary resuscitation (CPR) on Tiffany, while the other called for an ALS ambulance and retrieved equipment from it when it arrived.

During this period, Tiffany's mother requested that the EMTs transport her daughter to Montefiore Hospital, just minutes away from their apartment, but the EMTs continued to conduct CPR on-site until paramedics arrived in an ALS ambulance from a private hospital. The paramedics injected Tiffany with epinephrine to counter the effects of the shock, intubated her, administered oxygen and transported her to Montefiore. Tiffany survived but suffered serious brain damage.

In the ensuing lawsuit, the city moved for summary judgment claiming immunity from liability since it owed no special duty to plaintiffs and because the actions of the city personnel were not the proximate cause of Tiffany's injuries—that it was rather the drug administered by the nurse that caused the injury.

The Supreme Court granted the city's motion for summary judgment; the Appellate Division reversed and determined that the city's actions were governmental in nature, but issues of fact were raised as to whether the city owed the plaintiffs a special duty and whether the city was the proximate cause of Tiffany's injury. The Appellate Division sent the case back for trial and later certified a question to the court asking if its decision was correct.

On the threshold question of whether the city acted in a proprietary or governmental role in assisting Tiffany, the majority of the court found that the city was acting in a governmental role and liability could only be found if a special duty existed between the city and the plaintiffs. However, the majority also found that there were issues of fact as to whether a special duty existed, and the case should be sent back for trial. In doing so, the majority reviewed the four circumstances under which a special duty may arise, stated that it is the plaintiff's obligation to prove the existence of the special duty since it is an essential element of a negligence claim, and recited the conflicting positions of the city and the plaintiffs on the special duty issue and the reasons why summary judgment should or should not be granted.

The court also placed great reliance on *Larato v. City of New York*, 8 NY.3d 79 (2006), and additional support upon non-New York cases, to which the concurring opinions took exception, as they did with the majority's reliance upon public policy reasons—some economic—for the majority's view that the city response system through FDNY EMTs should be viewed as "a classic governmental, rather than proprietary, function."

Finally, the majority highlighted the elements that must be proven to determine whether a special relationship exists between a governmental agency and an injured person. It will be these issues that the jury on remand will have to consider.

In terms of the "concurring in the result" opinions, Smith and Pigott would have found the city's role to be a proprietary one to which a regular negligence standard would apply and expressed the view that if they were to agree with the majority that the city was fulfilling a governmental role, they would dismiss the complaint. Abdus-Salaam appears to have found that the city was functioning in a proprietary manner that would also fully support a finding of an existing special duty relationship leaving proximate cause an issue for the jury.

It is good to see the court operating at full strength again.

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