



JAMILAH D. LECRUISE
JUDGE

FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

Received

MAY 16 2024

Public Defenders Office
Norfolk Virginia
150 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

COMMONWEALTH OF VIRGINIA,

v.

CASE NO: CR23001500-00; 01; 02

JAYVON ANTONIO BELL

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

This matter comes before the Court on the Defendant's Motion to Suppress pursuant to the Fourth and Fourteenth Amendments of the United States Constitution; Article I, Section Eight, Ten and Eleven of the Constitution of Virginia; and §19.2-266.2 of the Code of Virginia. Specifically, the Defendant moves the Court to suppress the photographs of the vehicle the Defendant was driving from the FLOCK Automated License Plate Reader (ALPR) system as well as the Defendant's incriminating statement as fruit of the poisonous tree because the Norfolk Police Department (NPD) did not seek a warrant to obtain the license plate information from FLOCK. The Court finds that inherent in the Defendant's argument is a foundation objection as well. Both counsel for the Commonwealth and the Defendant acknowledge that this is a matter of first impression. For the reasons stated herein, the Defendant's Motion is GRANTED.

The Commonwealth has charged the Defendant with one count of Robbery by Using of Displaying a Firearm in violation of Virginia Code §18.2-58, one count of Using a Firearm in the Commission of a Felony (First Offense) in violation of Virginia Code §18.2-53.1, and one count of Conspiracy to Commit Robbery by Using or Displaying a Firearm in violation of Virginia Code §18.2-58/18.2-22. On April 29, 2024, a suppression hearing was held in the Norfolk Circuit Court.

According to the Defendant's motion, and not contested by the Commonwealth, the Norfolk Police Department installed 172 license plate camera readers though out the city of Norfolk in 2023. Clanna Morales, *How Norfolk Police use 172 automatic license plate reading cameras*, The Virginian Pilot, June 19, 2023. The cameras are able to track the locations of vehicles within city limits by license plate number and other physical descriptions with the data being kept for 30 days. *Id.* Every officer from the Norfolk Police Department may access the FLOCK system, which shares its data with other police departments. *Id.*

Investigator Oyola testified on direct examination generally about the FLOCK system used in Norfolk and stated that a suspect vehicle in a robbery in the neighboring jurisdiction of Chesapeake was recorded on the Norfolk FLOCK. He said that FLOCK is no different from the redlight camera system Norfolk already utilizes and has utilized for years although FLOCK is a much newer system. Investigator Oyola describes it as "real time intelligence to combat crime." He further stated that all of Hampton Roads police departments have FLOCK systems and police departments can share information within the systems from neighboring jurisdictions. No special training is needed and all officers in the Norfolk Police Department have access to the FLOCK system. Investigator Oyola claimed that FLOCK does not provide any personal information about the owner of a vehicle but the license plate information only. The cameras of the system are motion activated and it provides still photographs to police but not video.

Oyola testified that there was a robbery in Chesapeake and an independent witness provided a license plate number to Chesapeake Police. More specifically, Detective Rocca from the Chesapeake Police Department stated to Oyola that the witness described a gray Dodge minivan leaving the video game store and the Norfolk Police Department was able to stop the minivan on South Military Highway in Norfolk after using the FLOCK system. Investigator Oyola stated that after communication with the Chesapeake detective, he ran the vehicle through the FLOCK system and discovered a "hit" with the Dodge minivan alleged to be used in the Chesapeake robbery. He testified that a robbery of a video game store occurred in Norfolk shortly after the one committed in Chesapeake. There was an additional description of two individuals who left the Chesapeake robbery in the minivan.

The Commonwealth's Attorney asked if Investigator Oyola obtained a search warrant for the FLOCK system and he emphatically replied that he did not need one. He believed the minivan in question that the Defendant was arrested from and during interrogation provided an incriminating statement was used in a video game store robbery in Chesapeake, Norfolk, and Portsmouth within a short timeframe.

On cross examination, Investigator Oyola stated he used the license plate information from the FLOCK system to access the Department of Motor Vehicles database and learned that it was linked to the Defendant's wife. On redirect examination, Oyola said that he did not know how many redlight cameras were located within the Norfolk city limits but that there are 172 FLOCK cameras installed.

ANALYSIS

The Fourth Amendment safeguards the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, providing no warrants shall issue, but upon probable cause. *U.S. Const. amend IV*. The basic purpose of this Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. *Id.* "[T]he exclusionary rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures: 'The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.'" *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974).

Here, the Court finds the collection and storage of license plate and location information by the FLOCK system constitutes a search within the meaning of the Fourth Amendment and should require a warrant.

The Defendant argues that vehicles in the current technology age are akin to cellular telephones as they reveal the continued location of civilians. The Court agrees. Courts have already determined that the government's acquisition of a defendant's historical cell-site location information (CLSI) from wireless carriers is a search under the Fourth Amendment. *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206 (2018). In such cases, a warrant is required except in exigent circumstances. *Id.* Furthermore, the Court found that an individual maintains a legitimate expectation of privacy in the record of his or her physical movements as captured through cell-site information. *Id.* The Commonwealth argues that vehicles are different because the Defendant did not have a privacy expectation in the public sphere. However, "a person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, what one seeks to preserve as private, even in an area accessible to the public may be constitutionally protected. Individuals have a reasonable expectation of privacy in the whole of their physical movements." *Id.* The FLOCK system collects and records a vehicle's movement data in the same manner as a CSLI.

Like the obtaining and storing of cell-site location data, installing a global positioning system (GPS) device on a vehicle to track a citizen's whereabouts is a search and requires a warrant. *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945 (2012). The Court finds that due to the breadth of FLOCK cameras covering the entire City of Norfolk and the storage component is also akin to a GPS device and requires a warrant.

The Fourth Circuit rejected an aerial surveillance program with data storage because it permitted law enforcement "to deduce from the whole individuals' movements, we hold that accessing its data is a search, and its warrantless operation violates the Fourth Amendment." *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330, 2021 U.S. App. LEXIS 18868 (2021). Like the aerial surveillance in Baltimore, the highway surveillance program in Norfolk must comply with the warrant requirement. Prolonged tracking of public movements with surveillance serves to invade the reasonable expectation citizens possess in their entire movements and thus requires a warrant. *Id.*

Moreover, the Court cannot overlook the foundational issue this type of system presents. Courts in Norfolk regularly hear testimony from custodians of records for emergency services 911 calls for assistance, the related event chronologies, cellular telephone data, social media information, red light cameras in traffic court matters, and the recently enacted PhotoSafe cameras utilized throughout the city. In each of these instances, the Defendant himself or herself or counsel may cross examine and challenge these witnesses in accordance with court procedural rules that safeguard the reliability of admitted evidence. The Commonwealth regularly presents such witness testimony from custodians of records to lay foundation as to the nature of and how these devices are utilized.

The Court emphasizes that it is perhaps most concerning for the Norfolk Police Department to make warrantless use of this FLOCK system about which the courts of the Commonwealth know so little is due in part to the many ways in which it could be abused. "Modern technology enables governments to acquire information on the population on an unprecedented scale.

National, state, and local governments can use that information for a variety of administrative purposes and to help apprehend dangerous criminals. But knowledge is power, and power can be abused.” *Neal v. Fairfax County Police Department*, 299 Va. 253, 263, 849 SE.2d 123, 127-8 (2020).

Unlike in other jurisdictions where special training is required in order for law enforcement officers to access an ALPR, the Norfolk Police Department does not require such training and all officers have unfettered access to the license plate and location data stored for 30 days. In addition, the neighboring jurisdictions can share FLOCK data with each other very easily. It would not be difficult for mistakes to be made tying law-abiding citizens to crime due to the nature of the FLOCK system and in the event a law enforcement officer would seek to create a suspect where one did not otherwise exist, it would be a simple task and no custodian of record would be presented to the Court for testimony or cross examination. The Court cannot ignore the possibility of a potential hacking incident either. For example, a team of computer scientists at the University of Arizona was able to find vulnerable ALPR cameras in Washington, California, Texas, Oklahoma, Louisiana, Mississippi, Alabama, Florida, *Virginia*, Ohio, and Pennsylvania. (Italics added for emphasis.) Cooper Quintin & Dave Maass, License Plate Readers Exposed! How Public Safety Agencies Responded to Major Vulnerabilities in Vehicle Surveillance Tech, Electronic Frontier Foundation, (Oct. 28, 2015), <https://www.eff.org/deeplinks/2015/10/license-plate-readers-exposed-how-public-safety-agencies-responded-massive/>. The citizens of Norfolk may be concerned to learn the extent to which the Norfolk Police Department is tracking and maintaining a database of their every movement for 30 days. The Defendant argues “what we have is a dragnet over the entire city” retained for a month and the Court agrees.

The Commonwealth presented the seminal case of *Katz v. United States*, arguing that “what a person knowing exposes to the public...is not subject of Fourth Amendment protection.” *Katz v. United States*, 389 U.S. 347, 353 (1967). The Court finds that times have undoubtedly changed since *Katz* and advances in technology will only continue to provide law enforcement with more avenues to combat crime. However, courts must not neglect the underpinning of the *Katz* decision that, “Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures,” *Id.*

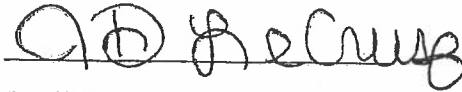
The Commonwealth also argued from *Commonwealth v. McCarthy*, a case from the Supreme Judicial Court of Massachusetts. *Commonwealth v. McCarthy*, 484 Mass. 493, 142 N.E.3d. 1090 (2020) In it, the Court concluded that the defendant’s expectation of privacy was not invaded because there were only four cameras on the ends of two bridges recording license plates with ALPRs and such surveillance was limited and not indicative of the Fourth Amendment. This is not the case in Norfolk with 172 ALPRs through out the jurisdiction.

Furthermore, the Court rejects the Commonwealth’s contention that without the FLOCK evidence, this would be a matter of inevitable discovery, citing *Knight v. Commonwealth*, 71 Va. App. 771, 839 S.E.2d 911 (2020). To establish an inevitable discovery exception, the Commonwealth must show “(1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct’ and ‘(2) that the leads making the discovery inevitable were possessed by the police at the time of the misconduct.” *Carlson v. Commonwealth*, 69 Va. App. 749, 763, 823 S.E.2d 28 (2019) (quoting *Commonwealth v. Jones*,

267 Va. 532, 536, 593 S.E.2d 204 (2004). Here, the Court is unconvinced that the Norfolk Police Department would have discovered the Defendant in the suspect vehicle in a way to immediately arrest him before obtaining an incriminatory statement from him without the FLOCK system.

The Defendant's motion to suppress is GRANTED and the Commonwealth's objection is noted for the record. The Clerk is DIRECTED to mail a copy of this Order to counsel of record.

ENTER: May 10, 2024

A handwritten signature in black ink, appearing to read "J.D. LeCruise", written over a horizontal line.

Jamilah D. LeCruise, Judge