IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

12-cv-566-bbc

v. 05-cr-155-bbc

BERNARDO GARCIA,

Defendant.

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In this motion for post conviction relief brought under 28 U.S.C. § 2255, defendant Bernardo Garcia is challenging his conviction on the ground that it was obtained on the basis of information gathered illegally by the government when it installed a global positioning system on his car without a warrant. Citing the Supreme Court's recent decision in United States v. Jones, 132 S. Ct. 945 (2012), defendant contends that his conviction must be overturned.

Defendant admits that his motion was not filed within one year of the date on which his conviction became final. 28 U.S.C. § 2255(f)(1). He argues that it is timely under subsection (f)(3) of § 2255, which extends the limitations period to a year after the Supreme Court has recognized the right asserted and the right has been made retroactive to cases on collateral review.

It is true that the Supreme Court held in Jones that placing a GPS device on a suspect's car constitutes a search requiring a warrant, thus recognizing the right that defendant is asserting. The problem for defendant is that the holding in Jones has no retroactive effect on

his 2006 conviction because the officers who installed the GPS device were acting legally at the time.

In 2005, no clearly established law in the Seventh Circuit held that placing such a device on a car was a violation of an individual's constitutional right to privacy. In fact, the Court of Appeals for the Seventh Circuit denied defendant's appeal from his conviction in which he challenged the GPS tracking as an unconstitutional invasion of privacy. United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007). The court held that the tracking of defendant's car by a GPS device did not raise a Fourth Amendment issue when it was limited to one car driven by a person whom police already "have in their sights."

The Supreme Court's 2012 decision to the contrary does not affect defendant's conviction. It is still the case that when the officers installed the device they did not know and had no reason to know that doing so would be declared unconstitutional sometime in the future. Therefore, the evidence obtained by their search was not subject to exclusion under the exclusionary rule developed by the courts to deter illegal police searches and seizures. Davis v. United States, 131 S. Ct. 2419, 2427 (2011). The idea behind the rule is that the government should not benefit from an unconstitutional act, even if it means that a criminal goes free. The rule is not a personal constitutional right or a means of redressing an injury, id. at 2426 (citing Stone v. Powell, 428 U.S. 465, 486 (1976), and United States v. Janis, 428 U.S. 433, 454 n.29 (1976)). Its sole purpose is to deter future Fourth Amendment violations. Id.

As the Court explained in Davis, 131 S. Ct. at 2427, because the consequence for an official error is so grave, courts must weigh the deterrence benefits of exclusion with the culpability of the law enforcement conduct. If the officers have acted in objective good faith,

the exclusionary rule will not apply; "the magnitude of the benefit [of the exclusionary rule] conferred on such guilty defendants offends basic concepts of the criminal justice system." United States v. Leon, 468 U.S. 897, 908 (1984). The Supreme Court distinguishes between cases in which "the police exhibit 'deliberate, 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights [and] the deterrent value of exclusion is strong," Davis, 131 S. Ct. at 2427, and cases in which "the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, . . . or when their conduct involves only simple, 'isolated' negligence," id. at 2427-28, and the deterrence value is minimal. These cases make it plain that defendant had no right to seek the exclusion of evidence in his case; the officers installing the GPS device acted in the good faith, reasonable belief that their actions were legal.

Under Leon and Davis, defendant has no viable claim for post conviction relief. He was subjected to a search that was constitutional at the time it was conducted and therefore, the evidence derived from the search was not subject to the exclusionary rule. The decision in Jones, 131 S. Ct. 945, changes nothing so far as defendant is concerned; it cannot make the officers' acts in 2005 unconstitutional in retrospect.

Because defendant has not shown that his claim for relief falls under subsection (f)(3) of § 2255, his motion must be denied as untimely, as well as on the merits.

ORDER

IT IS ORDERED that Bernardo Garcia's motion for post conviction relief under 28

U.S.C. § 2255 is DENIED on the merits and as untimely.

Entered this 24th day of September, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge