

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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July 18, 2016

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Re: Commonwealth of Virginia v. William Blacker
Case No. MI-2016-802

Dear Counsel:

This case presents a matter of first impression: *Is it illegal for one parent to surreptitiously place an electronic tracking device on a vehicle owned by and driven by the other parent, where the vehicle is periodically used to transport the child of the parents?* The Court finds, for the reasons stated in this letter opinion, that the conduct in question is illegal. While Virginia Code § 18.2-60.5(B)(2) does provide parents a safe harbor in certain limited situations, the language is not so broad as to encompass the conduct in the instant case. Therefore, the Court finds the defendant GUILTY of violating Virginia Code § 18.2-60.5.

OPINION LETTER

BACKGROUND

This matter was tried before the Court on June 30, 2016, and the Court took the matter under advisement. The matter is now ripe for decision.

The facts are largely undisputed. Olga Yurievna Hubard (hereafter “Ms. Hubard”) and William Loyon Blacker (hereafter “Mr. Blacker” or “the defendant”), have a child in common. They are not married and do not live together and, at all times pertinent to this proceeding, were involved in a contentious custody dispute. On April 27, 2015, a temporary custody and visitation order was issued by a judge of the Fairfax County Juvenile and Domestic Relations Court. (Defendant’s Exhibit 1.) In pertinent part, that order provided: (1) except in emergencies involving their child, the parties were to have no intentional contact with each other of any nature, except for text messages and email in connection with visitation schedules and exchanges and the child’s physical welfare; (2) Mr. Blacker was provided visitation with the parties’ child, in accordance with a set schedule set out in the order, with additional visitation to be provided by mutual agreement; and (3) each party had the right of “first refusal” in the event a party could not exercise his or her custodial time.

In July and August 2015, Ms. Hubard became concerned that Mr. Blacker appeared to know where Ms. Hubard was at particular times, even though she had not told Mr. Blacker where she would be. She testified that on a few occasions during that time frame Mr. Blacker stated that he knew Ms. Hubard was not at home. On one occasion, on August 19, 2015, Mr. Blacker texted Ms. Hubard that he knew she was not at home and he would therefore not return their child to her residence. Ms. Hubard suspected she was being tracked and, on August 31, 2015, asked a friend to have her car inspected. This was done, and a GPS tracking device was found on the vehicle. (Commonwealth’s Exhibit 1.) It is undisputed that the vehicle was owned by Ms. Hubard. Upon learning of the fact that such a device was found on her car, Ms. Hubard called the police.

Fairfax County Police Department Officer Peter Gagliardo testified that he met with Ms. Hubard, recovered the GPS tracking device from the bumper of her vehicle, and subsequently interviewed the defendant. The defendant admitted that he had placed the GPS tracking device on her vehicle “some time” a “while back.” He said he did so because he was concerned that Ms. Hubard would leave the area with her son.

Mr. Blacker testified on his own behalf. He testified that:

- (1) On August 19, 2015, when he texted Ms. Hubbard indicating his knowledge that she was not at home, it was not based on his use of the GPS tracking device but, rather, based on his observation that her vehicle was not in her garage, whose door had been left open;
- (2) The vehicle on which he placed the device was the vehicle Ms. Hubbard used to transport their child;
- (3) He placed the GPS tracking device on Ms. Hubbard's vehicle sometime in August 2015 and it was only on the car for a few weeks;
- (4) The GPS tracking device worked for about five days, and stopped working when its battery failed;
- (5) His concern in placing the device on Ms. Hubbard's vehicle was to locate their child and it was not his purpose to locate Ms. Hubbard; and
- (6) He was concerned about his child's whereabouts because Ms. Hubbard and her mother were from Uzbekistan and the defendant was concerned that the child might be removed to Uzbekistan.

In the course of his testimony, Mr. Blacker also acknowledged the following:

- (1) He knew that the vehicle upon which he placed the tracking device was owned by Ms. Hubbard;
- (2) He knew that it was Ms. Hubbard's "primary vehicle" and that she was the primary driver of the vehicle;
- (3) He knew that the temporary custody and visitation order did not permit him to place a GPS tracking device on Ms. Hubbard's vehicle;
- (4) He understood that the device he placed on Ms. Hubbard's vehicle would permit the remote tracking of the movement of her vehicle;
- (5) He did, in fact, use the program associated with the GPS tracking device to remotely track the location of the vehicle on his computer;
- (6) He placed the device on Ms. Hubbard's vehicle while it was unattended and parked in a public parking lot of a shopping center¹; and
- (7) At the time he did this, he was involved in a contentious custody dispute with Ms. Hubbard, and believed that the "right of first refusal" was not being "respected" by Ms. Hubbard.

¹ Mr. Blacker asserts that he had not been searching for the vehicle or awaiting an opportune moment to place the device on Ms. Hubbard's vehicle. Nevertheless, he acknowledged that he had been carrying the device in his backpack.

Analysis

In pertinent part, Virginia Code § 18.2-60.5 reads as follows:

- A. Any person who installs or places an electronic tracking device through intentionally deceptive means and without consent, or causes an electronic tracking device to be installed or placed through intentionally deceptive means and without consent, and uses such device to track the location of any person is guilty of a Class 3 misdemeanor.
- B. The provisions of this section shall not apply to the installation placement, or use of an electronic tracking device by:
 - * * *
 2. The parent or legal guardian of a minor when tracking (i) the minor or (ii) any person authorized by the parent or legal guardian as a caretaker of the minor at any time when the minor is under the person's sole care.

Id. Thus, under the statute, and as applied to the instant case, the Commonwealth must prove the following elements beyond a reasonable doubt:

1. That the defendant installed or placed an electronic tracking device;
2. That the device meets the statutory definition of an electronic tracking device, i.e., an electronic or mechanical device that permits a person to remotely determine or track the position and movement of another person;
3. That the installation or placement was accomplished through intentionally deceptive means;
4. That the installation or placement was without consent;
5. That the device was used to track the location of any person;
6. That the defendant does not meet any of the six statutory exceptions, the only one of which might possibly apply in the instant case being the exception that permits a parent to track a minor or a person authorized by the parent to be a caretaker for the minor at any time when the minor was under the person's sole care.

With regard to the **first** element, it is undisputed that the defendant installed the device in question.

With regard to the **second** element, it is also undisputed that the device fit the statutory definition. Once installed, it permitted the defendant to remotely access on his computer the location of the vehicle.²

With regard to the **third** element, there is no question that the installation or placement of the device was surreptitious. The defendant observed Ms. Hubbard's vehicle parked in a shopping center and had the device in a backpack on his person. He availed himself of the opportunity to hide the device on the bumper of the vehicle, where it was attached by magnet. This constitutes "intentionally deceptive means" in that it was done at a time and place and in a manner where the defendant would not be observed by Ms. Hubbard engaging in the installation or placement of the device and Ms. Hubbard would be unaware that the device had been installed or placed on her vehicle.

With regard to the **fourth** element, Ms. Hubbard testified, without contradiction, that she did not consent to the installation or placement of the device on her vehicle.

With regard to the **fifth** element, the defendant did in fact use the device to track the location of a person, that person being Ms. Hubbard. With respect to this element of the statute, the defendant offers various defenses: First, he asserts that the device only worked for about five days before the battery died. There is not, however, any particular length of activation required by the statute. Second, he asserts that the tracking device was not the source of knowledge leading to the August 19th text message. That is of no significance. The Commonwealth is not required to prove that a defendant has productively employed the knowledge acquired through the electronic tracking device. The word "uses" as it appears in the statute means no more than that the defendant remotely accessed the location information provided by the tracking device. It is irrelevant whether or not that information was of any value. Third, he asserts that the person he was tracking was his child, not Mrs. Hubbard. This element, however, only requires that the Commonwealth prove that the defendant was tracking "any person," which would

² The defendant stated that the device did not access the location of the vehicle in "real time" but only "sporadically." The Court does not read the statute to require that the tracking device and its associated software be such as to provide instantaneous location with no lag time; rather, the statute only requires that the device be sufficient to permit a person to remotely determine or track the position and movement of another person. The Court finds that the device in question meets that criteria.

include either Ms. Hubbard or their child. More significantly, as discussed below, the Court finds that the person actually being tracked was Ms. Hubbard, not the child.

The **sixth** element that the Commonwealth must prove is that the device was not installed or placed by the defendant to track his child.³ The defendant asserts that he fits this exception. He does not. The tracking device was not placed on the child's vehicle, or the child's bicycle, or the child's stroller, or the child's backpack, or laced into the child's sneakers, or placed into the child's coat pocket. Rather, it was placed on Ms. Hubbard's vehicle. In other words, the person being tracked by this electronic device was not the defendant's child, but the mother of the defendant's child.

That Ms. Hubbard periodically transported the child in her vehicle was no more a justification for the defendant to surreptitiously track that vehicle than it would justify placing a tracking device on a child's school bus or on a vehicle that participates in a child's carpool. Even if Mr. Hubbard's ultimate goal was to locate his child in order to prevent that child's removal from the jurisdiction, the means he took to achieve that goal were illegal.⁴ There is simply no doubt that the defendant knew that by placing a tracking device on Ms. Hubbard's primary vehicle, he would be tracking Ms. Hubbard both when she had their child in the car and when she did not.

A parent cannot exempt himself from the reach of the statute merely because the vehicle he is tracking is also used occasionally – or even routinely – to transport

³ The second parental exception involves the tracking of the child's authorized caretaker when the child was under that person's sole care. That exception does not apply to the instant case. Ms. Hubbard, the owner of the vehicle, was not a caretaker authorized by the defendant to care for his child but, rather, was the child's other parent.

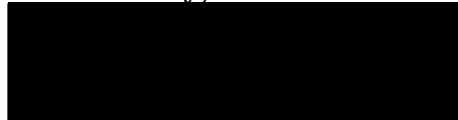
⁴ While not necessary to the resolution of this case, it is worth noting that there are a variety of legal means by which a parent can address concerns regarding the possibility that one parent may remove a child from the jurisdiction of the court. This is particularly the case when the parties are already engaged in litigation over custody and visitation. For example, a court order may prohibit removal of a child from the Commonwealth, or may prohibit taking the child outside the country, or may prohibit a parent from obtaining a passport for the child during the pendency of the litigation. While Mr. Blacker indicated that his chief concern in tracking the vehicle was that Ms. Hubbard or Ms. Hubbard's mother would take the child to Uzbekistan, the temporary custody and visitation order submitted as Defendant's Exhibit 1 – which was an agreed order – does not address any of these issues.

Re: Commonwealth of Virginia v. William Blacker
Case No. MI-2016-802
July 18, 2016
Page 7 of 7

a child. Had the General Assembly intended to create an exception this expansive, it would have said so. Instead, it created a narrow exception. The conduct of the defendant falls outside it.

Therefore, the Court finds the defendant GUILTY of violating Virginia Code § 18.2-60.5. Sentencing shall take place in accordance with the attached ORDER.

Sincerely,



Randy I. Bellows
Circuit Court Judge

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

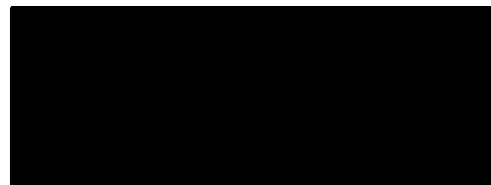
COMMONWEALTH OF VIRGINIA)	CRIMINAL NUMBER MI-2016-802
)	
VERSUS)	
)	APPEAL – UNAUTHORIZED USE OF
WILLIAM BLACKER)	ELECTRONIC TRACKING DEVICE

ORDER

For the reasons stated in the Court’s Letter Opinion issued in this case on this date, the Court hereby finds WILLIAM BLACKER, the Defendant, guilty of the unauthorized use of an electronic tracking device in violation of Va. Code § 18.2-60.5.

The Court **ORDERS** that this case be set on **August 26, 2016 at 10:00 a.m.**, for imposition of sentence.

ENTERED this 18 day of July, 2016.



Judge Randy I. Bellows