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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF CUNNINGHAM,

Appellant,

-against-

No. 123

NEW YORK STATE DEPARTMENT OF LABOR,

Respondent.

20 Eagle Street
Albany, New York 12207
May 29, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with 123, Matter of Cunningham. And counsel, would
3 you like any rebuttal time?

4 MS. STOUGHTON: Yes, may I reserve three
5 minutes, please?

6 THE COURT: Three minutes. Sure, go ahead.

7 MS. STOUGHTON: Thank you, Your Honor.
8 Good afternoon. In this case - - - my name is Corey
9 Stoughton from the New York Civil Liberties Union,
10 for the petitioner, Michael Cunningham.

11 In this case, Michael Cunningham asks the
12 court to reject the State's attempt to create an
13 exception to People v. Weaver and - - -

14 CHIEF JUDGE LIPPMAN: Well, counselor,
15 let's talk about this. What's - - - what's the
16 difference in context of this case versus Weaver?

17 MS. STOUGHTON: The only relevant or
18 material difference is that in this case, the search
19 was conducted for the purposes of investigating
20 workplace time theft.

21 JUDGE GRAFFEO: So why wouldn't the
22 O'Connor standard apply instead of the Weaver
23 standard?

24 MS. STOUGHTON: The O'Connor doesn't - - -
25 standard doesn't apply because this is not a

1 workplace search. The workplace search exception of
2 O'Connor, and this court's decision in Caruso, apply
3 only literally to the workplace. To extend the
4 workplace search exception out of the workplace - - -

5 CHIEF JUDGE LIPPMAN: So if the same - - -

6 MS. STOUGHTON: - - - and into - - -

7 CHIEF JUDGE LIPPMAN: - - - if the same
8 issues were relevant about the time abuses, or
9 whatever it was, and this had been done solely within
10 the workplace, that would have been - - - that's
11 okay?

12 MS. STOUGHTON: No, Your Honor. The
13 difference here was this was the employee's personal
14 family car.

15 JUDGE PIGOTT: Could they have subpoenaed
16 the E-ZPass, then on - - -

17 MS. STOUGHTON: They did subpoena the
18 E-ZPass.

19 JUDGE PIGOTT: I know. But on your
20 rationale, when you say it's confined only to the
21 workspace or workplace, were they right in seeking
22 the E-ZPass records?

23 MS. STOUGHTON: I think the issue with the
24 E-ZPass records is not whether the workplace search
25 exception applies, but whether or not the E-ZPass

1 records are protected under the Fourth Amendment.
2 And prior precedent has held that they're not, in the
3 same manner that a pen register - - -

4 CHIEF JUDGE LIPPMAN: So what's the - - -
5 so what's the abuse here in the way this was carried
6 out? That it was in the private car? Does it matter
7 what - - - work hours, outside the work hours? Okay
8 or not okay?

9 MS. STOUGHTON: I think - - -

10 CHIEF JUDGE LIPPMAN: Family vacation, okay
11 or not okay?

12 MS. STOUGHTON: - - - I think there are
13 five relevant factors that make this - - -

14 CHIEF JUDGE LIPPMAN: Go ahead.

15 MS. STOUGHTON: - - - case clearly fall
16 into the - - - into the warrant requirement. The
17 first is that it was GPS surveillance, and as this
18 court has held, the potential for the massive
19 invasion of privacy and the painting a broad picture
20 - - -

21 JUDGE SMITH: But that only - - - that only
22 gets to the point that it's a search. But I mean, I
23 think everyone's assuming that it's a search.

24 MS. STOUGHTON: It gets you to the point
25 that it's a search, as this court held in Weaver.

1 But it also is important to understand the character
2 and the scope of - - - and the invasion of the
3 search, that this was conducted over thirty days and
4 can paint that portrait of a person's life, that it's
5 inconsistent with, as this court said, any reasonable
6 expectation of privacy whatsoever. So that's the
7 first factor.

8 The second factor is the overbroad temporal
9 scope of this search - - -

10 JUDGE PIGOTT: Well, going back to - - -

11 MS. STOUGHTON: - - - that it was done
12 continuously - - -

13 JUDGE PIGOTT: - - - before you get too
14 far. Are you saying that a GPS is okay under certain
15 circumstances?

16 MS. STOUGHTON: Well, Your Honor, this case
17 doesn't - - - certainly doesn't call on the court to
18 decide that GPS surveillance is never okay. What
19 this court - - - this case is easy, because this case
20 is just like Weaver, except that it was conducted for
21 a different purpose.

22 JUDGE PIGOTT: Well, where would they get
23 the warrant?

24 MS. STOUGHTON: Where - - - in this case,
25 where would they get the warrant?

1 JUDGE PIGOTT: Yeah. I mean - - -

2 MS. STOUGHTON: Well, you know, that's - -
3 - that was an issue that was important to the Third
4 Department below. It - - - it's true, under current
5 statutory law, the Inspector General - - - the
6 Department of Labor could not have gotten a warrant
7 unless they wanted to investigate actual criminal
8 conduct, which maybe they could have done in this
9 case, but they didn't.

10 JUDGE PIGOTT: But are you - - - are you
11 making a distinction, also, then, between a private
12 employer and the State of New York as an employer?

13 MS. STOUGHTON: Well, we're not making that
14 distinction. That distinction arises because the
15 constitutional limitations - - -

16 JUDGE SMITH: So - - -

17 JUDGE GRAFFEO: Why - - - why can't a
18 public employer use - - - use the GPS under the work-
19 related search doctrine?

20 MS. STOUGHTON: They certainly could - - -

21 JUDGE GRAFFEO: You still have the
22 reasonableness test, right?

23 MS. STOUGHTON: Well, that's right. And -
24 - - but there - - - we have to separate out the
25 various levels of inquiry here.

1 JUDGE GRAFFEO: You have the same arguments
2 about the temporal and - - - and the overbreadth,
3 if you apply that standard.

4 MS. STOUGHTON: In this case, Your Honor,
5 the surveillance of Mr. Cunningham was conducted on
6 his personal family car. They provided no notice and
7 obtained no consent.

8 JUDGE GRAFFEO: But he traveled as part of
9 his job. Isn't that part of what he - - -

10 MS. STOUGHTON: But they tra - - -

11 JUDGE GRAFFEO: - - - argued?

12 MS. STOUGHTON: But they tracked him for
13 twenty-four hours a day, including in evenings, on
14 weekends and during a week-long period - - -

15 JUDGE READ: Would it have been okay if - -
16 -

17 MS. STOUGHTON: - - - of vacation.

18 JUDGE READ: - - - it were a state vehicle?

19 MS. STOUGHTON: I think it would be a
20 different case for a state vehicle. This is not that
21 case - - -

22 CHIEF JUDGE LIPPMAN: If it was a state
23 vehicle, and what about the hours?

24 MS. STOUGHTON: That could also possibly be
25 different. But here, the fundamental question the

1 court has to decide here is, what is a person's - - -
2 what is the reasonable expectation of privacy of the
3 200,000 New Yorkers who work for state and local
4 government - - -

5 JUDGE SMITH: Well, are you - - -

6 JUDGE READ: Let's go back to - - -

7 MS. STOUGHTON: - - - in their own personal
8 family car.

9 JUDGE READ: - - - let me go back to a
10 question, I think, that Judge Pigott - - - if this
11 were a private employer that was investigating work -
12 - - workplace infraction, there's no question that it
13 would be okay, right?

14 MS. STOUGHTON: I don't think that's true.
15 I think it would be illegal under New York tort law.
16 I think it would be an inva - - - an invasion - - -

17 JUDGE SMITH: But it would not - - - it
18 would not - - - the Fourth Amendment - - - no search
19 and seizure issue would be triggered, because there's
20 no state action.

21 MS. STOUGHTON: That's correct. But here
22 - - -

23 CHIEF JUDGE LIPPMAN: What is - - - but let
24 me get the distinctions clear. If it was a state
25 car, and they did exactly the same thing - - - let's

1 say that the employee had the use of a state car, and
2 they did exactly the same things, would that be okay?

3 MS. STOUGHTON: I - - - I think it would
4 matter, also, whether the employee was on notice that
5 his state car, if he used it for private purposes,
6 might - - -

7 CHIEF JUDGE LIPPMAN: Ah - - -

8 MS. STOUGHTON: - - - still be monitored.

9 CHIEF JUDGE LIPPMAN: - - - so if the - - -
10 if the employee - - - say it again? That the
11 employee was on notice that?

12 MS. STOUGHTON: Here are some facts that
13 make a difference. This was not a state car, and Mr.
14 Cunningham was not on notice that his vehicle could
15 be monitored during work hours or during any hours.

16 CHIEF JUDGE LIPPMAN: Well, that's what I
17 was just going to say. During any hours. Because
18 could it be, if you had a state car, and let's say
19 the employee had the right to use it on weekends or
20 nights or whatever it was, okay or not okay?

21 MS. STOUGHTON: Well, that would bring this
22 case - - - make this case look much more like People
23 v. - - - or sorry, or United States v. Kwan (ph.), a
24 case before the Supreme Court, about a government-
25 issued pager that was issued to a police officer with

1 notice that the content of that pager device could be
2 monitored by his employers.

3 CHIEF JUDGE LIPPMAN: But this is different
4 because - - -

5 MS. STOUGHTON: And this is different - - -

6 CHIEF JUDGE LIPPMAN: - - - it's a private
7 car and the employee has no idea that the private car
8 might be monitored, at the very least, during work
9 hours?

10 MS. STOUGHTON: That's absolutely right.

11 CHIEF JUDGE LIPPMAN: Is that the
12 difference?

13 MS. STOUGHTON: That is - - - that is a
14 crucial difference. Also to take into account the
15 scope of the surveillance, that it was done outside
16 of work hours on evenings, weekends, and during that
17 period of vacation.

18 JUDGE SMITH: You're - - - you're saying
19 that the employer on these - - - if it's his private
20 - - - and if it's private car, can never use the GPS
21 without a warrant, no matter how great the suspicion
22 is that there's a - - - or even no matter how strong
23 the probable cause is?

24 MS. STOUGHTON: That's right. A warrant is
25 required - - - and as far as the inability to get a

1 warrant, let me just say that that reflects the New
2 York legislature's judgment - - -

3 JUDGE SMITH: I know. Okay, but - - -

4 MS. STOUGHTON: - - - that they have not
5 given any - - -

6 JUDGE SMITH: - - - isn't it - - - isn't it
7 - - - but putting that aside, isn't - - - assume the
8 legislature passes the law - - - isn't that going to
9 put quite a burden on public employers that they have
10 to get a warrant every time they think an employee's
11 cheating on them?

12 MS. STOUGHTON: I think it would be a
13 burden. But it's well worth - - - remember, in
14 People v. Weaver, this court said that GPS
15 surveillance has such a potentially massive invasion
16 of privacy that it's inconsistent with any - - -

17 JUDGE SMITH: I - - - well, I - - -

18 MS. STOUGHTON: - - - reasonable
19 expectation of - - -

20 JUDGE SMITH: - - - but I thought - - -

21 JUDGE GRAFFEO: It's also inappropriate to
22 misuse taxpayer funding to be doing private business
23 on State time.

24 MS. STOUGHTON: Well, it - - - and - - -

25 JUDGE GRAFFEO: The public employer has a

1 right to investigate that, as well, don't they?

2 MS. STOUGHTON: Absolutely. They have the
3 right.

4 JUDGE GRAFFEO: There's different - - -
5 there's different rights and policies at work here.

6 MS. STOUGHTON: Absolutely. But the
7 question here is not whether the State has the
8 ability to investigate that, but whether they can
9 attach GPS devices to 200,000 State employees'
10 personal family cars - - -

11 CHIEF JUDGE LIPPMAN: Okay, but - - -

12 MS. STOUGHTON: - - - twenty-four hours a
13 day - - -

14 CHIEF JUDGE LIPPMAN: - - - okay, but let
15 me ask you specifically. It would be okay 9 to 5 - -
16 - let's assume those were the work hours - - - on a
17 state car? Good, right, without a warrant? Or is it
18 good?

19 MS. STOUGHTON: Well, Your Honor, I'm not
20 sure. But that would certainly be a different case.
21 And the court doesn't have to - - -

22 CHIEF JUDGE LIPPMAN: And it would be okay
23 - - -

24 MS. STOUGHTON: - - - decide that on that
25 kind of - - -

1 CHIEF JUDGE LIPPMAN: - - - no, let's try
2 and make the distinction. Where do we draw the lines
3 here? It would be okay in the workplace, the actual
4 workplace, if it wasn't a car, without a warrant, 9
5 to 5?

6 MS. STOUGHTON: Well, within the physical
7 workspace - - - I'm not sure I understand the
8 hypothetical - - - if we're talking about a car - - -

9 JUDGE SMITH: Let's say it's a desk not a
10 car?

11 MS. STOUGHTON: Absolutely, it would be
12 fine.

13 CHIEF JUDGE LIPPMAN: It's fine? It's
14 okay?

15 JUDGE SMITH: You're not asking us to rej -
16 - - I mean, to adopt the O'Connor dissent, which I
17 think says you would need a warrant even then?

18 MS. STOUGHTON: That's right, Your - - -
19 that's right. I think this court adopted O'Connor -
20 - -

21 CHIEF JUDGE LIPPMAN: So that's where
22 you're drawing the line. So the rule is - - - before
23 you sit down, what's the rule?

24 MS. STOUGHTON: The rule is - - -

25 CHIEF JUDGE LIPPMAN: In this kind of

1 situation, a variant of Weaver, what's the situation
2 in these circumstances?

3 MS. STOUGHTON: The rule is that when
4 you're dealing with a State employee's personal
5 family car, and he's been provided no notice of the
6 possibility of surveillance, then just like in
7 Weaver, the court - - - the State employer must get a
8 warrant to conduct GPS surveillance on that car. And
9 the reason - - -

10 JUDGE PIGOTT: Before you go - - -

11 MS. STOUGHTON: - - - for that is because
12 we - - - the reasonable expectation of privacy. The
13 State should not be able to appropriate people's
14 private cars and private property and violate that
15 expectation of privacy wholesale, merely because you
16 happen to work for the State - - -

17 CHIEF JUDGE LIPPMAN: Judge Pigott.

18 JUDGE PIGOTT: Are you putting a - - - are
19 you putting a higher burden on a State employee than
20 a private employee? In other words, if - - - if
21 you're working for a government, somehow that
22 employer - - - that - - - separate now from what - -
23 - you know, usual governmental functions are. But
24 that employer, because he's a - - - or she is a State
25 employee, that they are restricted in what they can

1 do in terms of supervising their employees?

2 MS. STOUGHTON: I don't think so, because I
3 think it would be illegal for an employer to place a
4 - - - trespass upon a person's private car and place
5 a tracker - - -

6 JUDGE PIGOTT: So whatever - - -

7 MS. STOUGHTON: - - - or a GPS - - -

8 JUDGE PIGOTT: - - - whatever decision we
9 make, it ought to be a decision that would apply to
10 Xerox and Kodak and General Motors and the State of
11 New York?

12 MS. STOUGHTON: Well, no, Your Honor. I
13 think the decision the Court should reach should
14 follow from the constitutional principle established
15 in People v. Weaver. If that resulted - - -

16 JUDGE SMITH: And - - -

17 MS. STOUGHTON: - - - in the - - -

18 JUDGE SMITH: - - - and the constitutional
19 principle has no application to Kodak or General
20 Electric?

21 MS. STOUGHTON: That's right. But to the
22 extent that that disturbs the court, I think it
23 should take solace in the fact that this kind of
24 trespass and invasion of privacy would likely violate
25 tort law.

1 JUDGE SMITH: I know we've taken you
2 overtime for a minute. But I'm still having trouble
3 seeing why is the invasion of privacy here so much
4 greater than it would be if they searched his desk at
5 the office?

6 MS. STOUGHTON: Well, the reason is because
7 it was his own personal family car.

8 JUDGE SMITH: Suppose - - - suppose it's
9 his own personal desk. A lot of people have their
10 own desks at the office.

11 MS. STOUGHTON: Well, as the decision in
12 O'Connor states, when you bring something into the
13 office, you do so voluntarily, knowing that you've
14 brought it into the workplace and exposed it to your
15 employer.

16 JUDGE SMITH: But what about when you use
17 your car - - - your personal car on what you - - -
18 what you claim, maybe falsely, is State business?

19 MS. STOUGHTON: Well, Your Honor, I think
20 we all - - - many members of this bench probably use
21 their own personal family cars on State business, to
22 the extent - - - the same extent that Mr. Cunningham
23 did. Your expectation - - -

24 JUDGE SMITH: There's nothing wrong with
25 it. I don't say there's anything wrong with it. But

1 if you're going to do it, why - - - why doesn't it -
2 - - why doesn't it become essentially part of the
3 workplace?

4 MS. STOUGHTON: Because of the picture that
5 twenty-four-a-day, seven-day-a-week - - -

6 CHIEF JUDGE LIPPMAN: Is it because it's -
7 - -

8 JUDGE GRAFFEO: Well, so what if they - - -

9 CHIEF JUDGE LIPPMAN: - - - not during the
10 work hours? Again, are we back to the work hours?

11 MS. STOUGHTON: I think that is a critical
12 fact in this case.

13 JUDGE SMITH: But was there any - - -

14 JUDGE RIVERA: Is there any reason that
15 someone couldn't follow him all that time, just park
16 outside his house and watch him, follow him wherever
17 the car went?

18 MS. STOUGHTON: I think there isn't any
19 reason why they couldn't. I think there's no
20 constitutional - - -

21 JUDGE RIVERA: So what's the difference
22 between that and the GPS - - -

23 MS. STOUGHTON: For the same - - -

24 JUDGE RIVERA: Other than it costs less?

25 MS. STOUGHTON: - - - reason - - - for the

1 same reason this court found in Weaver, that GPS
2 surveillance - - -

3 JUDGE RIVERA: Okay.

4 MS. STOUGHTON: - - - with the government's
5 ability to both collect, review, and later data mine
6 reams of information about us and our movements and
7 our cars - - -

8 CHIEF JUDGE LIPPMAN: But do you agree that
9 if it was a state car, if it was on notice, and the
10 GPS was programmed from 9 to 5, okay?

11 MS. STOUGHTON: I think that would be a
12 different case, and a harder question.

13 CHIEF JUDGE LIPPMAN: Okay. We'll - - -

14 MS. STOUGHTON: I'm not willing to say it
15 was okay - - -

16 CHIEF JUDGE LIPPMAN: - - - we'll give you
17 more - - - I'm sorry, Judge Smith.

18 JUDGE SMITH: I'm sorry - - -

19 CHIEF JUDGE LIPPMAN: Go ahead, Judge
20 Smith.

21 JUDGE SMITH: - - - just one more.

22 CHIEF JUDGE LIPPMAN: - - - Go ahead.

23 JUDGE SMITH: Is there any - - - was
24 anything obtained or used against your client as a
25 result of the surveillance that was not during a time

1 he was or was supposed to be using the car for
2 business?

3 MS. STOUGHTON: But, Your Honor, the
4 constitutional violation was the collecting of - - -

5 JUDGE SMITH: Well, but you're telling me -
6 - - you can explain, but tell me the answer first.

7 MS. STOUGHTON: No.

8 JUDGE SMITH: Okay, go ahead.

9 MS. STOUGHTON: But the constitutional
10 violation occurred when that data got collected. So
11 for example, even though it might be the case that
12 the information about what he was doing on that week-
13 long vacation in Massachusetts wasn't used to
14 terminate him, in this record, in this case, at pages
15 1,100 to 1,200, are - - - is the GPS information
16 about what the Cunningham family was doing for a week
17 on their family vacation.

18 JUDGE SMITH: Right, ordinar - - -

19 MS. STOUGHTON: That was the constitutional
20 violation and the invasion of his privacy.

21 JUDGE SMITH: I'm try - - - I'm going way -
22 - - I'm exceeding the valid scope of my warrant. But
23 the - - - ordinarily, when there's a warrant and you
24 - - - let's say you have a warrant and you - - - to
25 search the first floor, and you search the first and

1 second floors, but you don't find anything on the
2 second floor, you can't suppress the stuff found on
3 the first floor, can you?

4 MS. STOUGHTON: I'm sorry, say - - - you
5 have a warrant to search the first floor.

6 JUDGE SMITH: Ordinary warrant to search a
7 house. But the warrant only lets you go to the first
8 floor. You violate it and go upstairs. You find
9 nothing on the second floor. You can - - - the - - -
10 you can't suppress the stuff that was found on the
11 first floor, can you?

12 MS. STOUGHTON: No. I think, no. But
13 that's - - - I think this case is different, because
14 the violation of privacy was the collection of this
15 mass of information. And in this case, they did use
16 the information - - - there was no warrant, of
17 course, to even search the first floor - - - whatever
18 the analogy to that is - - - in this case.

19 JUDGE READ: Even if you screen the
20 information out that's outside the hours of 9 to 5?

21 MS. STOUGHTON: No, I think that would
22 still be a constitutional violation, because the
23 government has that information. They have the
24 ability to abuse it in the ways that concerned - - -

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 MS. STOUGHTON: - - - this court in Weaver
2 and the Supreme Court - - -

3 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
4 you.

5 MS. STOUGHTON: - - - in Jones. Thank you.

6 CHIEF JUDGE LIPPMAN: Counselor

7 MS. NEPVEU: Good afternoon - - - excuse me
8 - - - good afternoon, Your Honors. Kate Nepveu for
9 respondent.

10 CHIEF JUDGE LIPPMAN: Counselor - - -

11 MS. NEPVEU: Yes.

12 CHIEF JUDGE LIPPMAN: - - - what is the
13 difference in the practical effect between this and
14 Weaver in terms of violating someone's privacy rights
15 and following them twenty-four hours a day, and the
16 government or - - - in this case, literally the
17 government getting into the private lives of people
18 and what they're doing when they're not at the
19 workplace and when they're doing things that maybe
20 they don't want others - - - doesn't - - - don't want
21 the government to know about, and the government has
22 no right to know about? What's the difference, in
23 practical terms, when you've got twenty-four-hour-a-
24 day surveillance for a long period of time? How do
25 you distinguish Weaver and this case?

1 MS. NEPVEU: Your Honor, there are two - -
2 - two answers to that question. The first is that
3 unlike Weaver, this is, as the court's already noted,
4 a workplace-related search, and so the standard of
5 reasonableness applies.

6 CHIEF JUDGE LIPPMAN: Yeah, yeah, but how
7 is it a - - -

8 JUDGE ABDUS-SALAAM: But why is it
9 workplace-related?

10 CHIEF JUDGE LIPPMAN: - - - workplace-
11 related search?

12 MS. NEPVEU: Because - - -

13 CHIEF JUDGE LIPPMAN: That's what I'm
14 asking you.

15 MS. NEPVEU: I apologize for not fully
16 understanding the question, Your Honor. Because
17 petitioner was regularly stating that he was taking
18 his personal car to offsite meetings - - -

19 JUDGE ABDUS-SALAAM: Was he put on notice,
20 counsel, that his car would be outfitted with a GPS
21 device like the - - - you know, like the beeper in
22 the other case?

23 MS. NEPVEU: No, he was not. But he was
24 aware that his movements were under surveillance,
25 because not only did he say that he was going

1 offsite, and therefore put - - - diminished his
2 expectation of privacy in his location, but he also
3 knew that he was under investigation because the
4 Department of Labor - - -

5 JUDGE ABDUS-SALAAM: But how is that the
6 same as giving him notice that his car would - - -
7 there would be a GPS system attached to his car?

8 MS. NEPVEU: It's not notice about the GPS,
9 Your Honor, but it does indicate that he had a
10 diminished expectation of privacy - - -

11 CHIEF JUDGE LIPPMAN: Diminished
12 expectation - - -

13 JUDGE RIVERA: Of his own, but what about
14 his family?

15 CHIEF JUDGE LIPPMAN: - - - counsel, when
16 he's - - - when he's on vacation for a week, he still
17 has a diminished expectation of privacy?

18 JUDGE RIVERA: And of his family - - - his
19 individual expectation of privacy versus his
20 family's?

21 MS. NEPVEU: Your Honor, I'm trying to
22 separate the question does reasonableness apply to is
23 this search reasonable. The court might find that
24 the search was unreasonable, but it doesn't need to
25 create a different analysis, beyond what the court's

1 already adopted in Caruso, of reasonableness.

2 CHIEF JUDGE LIPPMAN: So we could find it's
3 unreasonable - - -

4 MS. NEPVEU: And that would be sufficient
5 protection, because again, it would be overturning
6 the charges that - - -

7 JUDGE PIGOTT: Who would make that - - -

8 MS. NEPVEU: - - - relied on the GPS.

9 JUDGE PIGOTT: - - - who would make that
10 determination in the first instance? The hearing
11 officer?

12 MS. NEPVEU: I'm sorry, Your Honor, I
13 didn't quite follow your question.

14 JUDGE PIGOTT: You were saying it gets down
15 to a question of reasonableness, right?

16 MS. NEPVEU: Oh.

17 JUDGE PIGOTT: Who makes that
18 determination? The hearing officer in the first
19 instance?

20 MS. NEPVEU: The hearing office - - - there
21 was a motion made - - - yes. Because the hearing
22 officer has to rule on the motions.

23 JUDGE PIGOTT: No, I understand in this
24 case. I'm thinking in the next case that comes up -
25 - -

1 MS. NEPVEU: Yes.

2 JUDGE PIGOTT: - - - you know, when you say
3 there's a reasonableness standard, that standard is
4 applied by the hearing officer?

5 MS. NEPVEU: Yes, Your Honor. Because
6 there was - - - there is and can be motions to
7 exclude evidence.

8 JUDGE PIGOTT: With respect to that issue
9 of reasonableness, is there any thought given to
10 whether or not it was necessary? And by that I mean,
11 when you have E-ZPass, when you have testimony, or
12 you have information that you can get from co-
13 employees - - - I think you got - - - you know, hotel
14 records and things like that - - - is there some
15 point at which, you know, you - - - you should not
16 use a GPS for all the reasons the People seem to be
17 concerned about - - - when you've got other family
18 members, when you've got other time - - - when a GPS
19 just isn't called for? I don't want to call it the
20 lazy man's way to track, but there can be ways you
21 can get this information short of doing a twenty-
22 four-hour-a-day surveillance electronically?

23 MS. NEPVEU: Yes, Your Honor. But in this
24 case, the - - - again, the - - - a number of efforts
25 had already been tried and failed. They a - - - they

1 tried having petitioner account for his own
2 movements, and he lied on his work calendar. They
3 tried following him, and he spotted the tail and
4 changed his course.

5 CHIEF JUDGE LIPPMAN: So the answer is to
6 do GPS twenty-four hours a day? That's - - -

7 MS. NEPVEU: No, Your Honor.

8 CHIEF JUDGE LIPPMAN: - - - that's re - - -
9 what's the rule? When can you do GPS twenty-four
10 hours a day in every facet of someone's life? What's
11 the rule? When is it okay?

12 MS. NEPVEU: Your Honor, the question is
13 reasonableness under all the circumstances. And I'm
14 sorry that that doesn't apply - - - provide a neat,
15 one-size-fits-all answer, but it's the nature of the
16 question.

17 CHIEF JUDGE LIPPMAN: Yeah, but take this
18 case. Forget one-size-fits-all.

19 MS. NEPVEU: There are four reasons - - -

20 CHIEF JUDGE LIPPMAN: It's reasonable under
21 the circumstances - - -

22 MS. NEPVEU: For four reasons.

23 CHIEF JUDGE LIPPMAN: - - - given whatever
24 - - -

25 MS. NEPVEU: Yes.

1 CHIEF JUDGE LIPPMAN: - - - frustrations
2 the employer had to moni - - - for how long a length
3 of time?

4 MS. NEPVEU: It was thirty days, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Thirty days, twenty-
7 four hours a day. By what standard of
8 reasonableness? How do you get there? Tell us how
9 you get there.

10 MS. NEPVEU: Yes. There are four - - -
11 four reasons why under these specific circumstances.
12 I've already mentioned one, that petitioner was - - -
13 was saying I am going, taking my car on work
14 meetings. And therefore he put the location of his
15 car - - - we're not talking about the contents, we're
16 talking about the location. He diminished his
17 expectation of privacy. Again, if - - -

18 JUDGE GRAFFEO: Did he claim mileage
19 reimbursement?

20 MS. NEPVEU: For some of the trips, yes,
21 Your Honor. Certainly the record reflects the trip
22 to Syracuse, which was also supported by E-ZPass
23 records and petitioner's own testimony. The charges
24 related to that.

25 JUDGE GRAFFEO: I didn't mean to interrupt

1 you. Go ahead to the other reasons.

2 MS. NEPVEU: Thank you. Diminished
3 expectation of privacy by putting his own movements -
4 - - affirmatively saying his own movements were
5 related to work. Again, failed - - - other efforts
6 failing. His lying on his work calendar; the tail
7 had failed.

8 Because of those, he had a diminished
9 expectation of privacy, again, because he knew that
10 he was being fo - - - that he was being investigated,
11 and because he had - - -

12 JUDGE ABDUS-SALAAM: Counsel, what about
13 the people who don't know they're being investigated?

14 MS. NEPVEU: Again, that's - - -

15 JUDGE ABDUS-SALAAM: Is it okay for the
16 employer to put a GPS system on their car?

17 MS. NEPVEU: Your Honor, I think there - -
18 - there are multiple factors, and that's only one of
19 them. The last factor is that this was an
20 investigation of a pattern of conduct, of attempting
21 to determine the full extent of this. It was - - -

22 CHIEF JUDGE LIPPMAN: So, counsel - - -

23 MS. NEPVEU: Yes, Your Honor?

24 CHIEF JUDGE LIPPMAN: - - - but my question
25 to you is, these are relatively routine workplace

1 abuses. Could it not appear that this is a nuclear
2 option for what you're dealing with, to track someone
3 for a month, twenty-four hours a day, based on these
4 kinds of - - - it certainly should be addressed, but
5 is this the way to do it? Is that a measured
6 response to what's involved here?

7 MS. NEPVEU: Your Honor, if it had been the
8 case that the GPS unit could be turned on and off or
9 scheduled, then it would have been unreasonable for
10 the inves - - - the Inspector General not to do so.
11 But that's not the case here. The only way - - -

12 CHIEF JUDGE LIPPMAN: The only alternative
13 is to track twenty-four hours a day for a month?

14 MS. NEPVEU: Under these circumstances,
15 what was avail - - - they could - - - the only other
16 option would have been to physically take the device
17 off and on, which would have been extremely
18 difficult, if not impossible - - -

19 CHIEF JUDGE LIPPMAN: So in nutshell,
20 what's the rule? I still don't get the rule. How do
21 we know when you can do it, when you can't?

22 MS. NEPVEU: Your Honor, this court's
23 already decided the rule is reasonableness under all
24 the circumstances. Here we have a combination of - -
25 -

1 CHIEF JUDGE LIPPMAN: And how does Weaver
2 play into that - - - that decision?

3 MS. NEPVEU: Weaver states that this is a
4 search and therefore the - - - it comes within the
5 Fourth Amendment's protection. But the Fourth
6 Amendment's reasonableness test is sufficiently
7 protective in this case - - -

8 JUDGE SMITH: Well, is it - - - as I - - -
9 as I understand it, everyone accepts that Ortega or
10 O'Connor against Ortega provides the basic framework,
11 so that if you were - - - and if you - - - so if
12 you're searching only the workplace, then reasonable
13 - - - then if you reasonable suspicion, that's all
14 you need, correct?

15 MS. NEPVEU: Reason - - - yes, Your Honor.

16 JUDGE SMITH: And so the - - - isn't the
17 question - - - yeah. And you would argue, I suppose,
18 that as long as it's busi - - - as long as the guy is
19 supposed to be using his car for business, the car is
20 part of the workplace?

21 MS. NEPVEU: Just the location. You're not
22 - - - Your Honor, we're not making an argument about
23 the contents of the vehicle. But, yes.

24 JUDGE SMITH: Yes, yeah, okay. And so that
25 the only problem then, is the fact that it, for

1 technological reasons, you can't limit the search to
2 the workplace. You extend it to his home. But
3 you're not - - - but you're saying you don't use the
4 fruits of the search to the extent that it got
5 extended beyond the workplace?

6 MS. NEPVEU: That's correct, Your Honor.
7 The hearing officer's decision makes no reliance on
8 any data that was gathered - - -

9 JUDGE SMITH: Suppose - - - suppose they
10 found - - - I can't think offhand of what it would
11 be. Suppose they found something really good against
12 him at a time when he was legitimately on his own
13 time. Would - - - would that be suppressible?

14 MS. NEPVEU: If - - - do you mean something
15 that would lead to a criminal charges, Your Honor?
16 Or something - - -

17 JUDGE SMITH: No, no.

18 MS. NEPVEU: - - - merely very - - -

19 JUDGE SMITH: Something - - - something
20 that would support the disciplinary charges?

21 MS. NEPVEU: I - - - I don't - - - I think
22 that - - -

23 JUDGE SMITH: You almost have to say no,
24 because you say what they did was reasonable. If
25 what they did was reasonable, what's the point of

1 suppressing anything?

2 MS. NEPVEU: I'm sorry, Your Honor, I'm
3 afraid I - - - I don't think I quite followed you
4 there. But again it - - - again, the question would
5 be under the circumstances. It would be - - -

6 JUDGE SMITH: It's a time when - - -

7 MS. NEPVEU: - - - much more likely - - -

8 JUDGE SMITH: - - - yeah, I mean - - -

9 MS. NEPVEU: - - - to suppress something -
10 - -

11 JUDGE SMITH: - - - assume - - - assume at
12 one of those times on a weekend, the location of his
13 car gives important evidence for - - - in the
14 disciplinary proceeding. I admit I can't think of
15 what it would be. But you put that aside for a
16 minute.

17 MS. NEPVEU: I accept the hypothetical,
18 Your Honor, yes.

19 JUDGE SMITH: Yeah. It's - - - presumably,
20 since you say what they did was reasonable, they
21 could use that evidence, even if - - - even if they
22 found it while the car was at his vacation house.

23 MS. NEPVEU: Oh, I follow you, Your Honor.
24 It may be the case - - - I don't think that the court
25 needs to reach that issue, because the - - - it was

1 not used against him. There was no question either
2 of any criminal charges, which is something that has
3 occasionally been brought up in this case, or of
4 evidence found outside the work - - - the work hours.

5 JUDGE PIGOTT: Does the family - - - does
6 the family have any recourse at all, in your view?
7 You know, thinking other people who may have used the
8 car, or in the future may find themselves caught up
9 in this - - -

10 MS. NEPVEU: I believe - - - petitioner, I
11 believe, has a court of claims case pending. I'm not
12 certain of the scope of the claims there. This of
13 course, is an Article 78 seeking to annul a
14 disciplinary determination.

15 JUDGE PIGOTT: No, no. I'm just asking,
16 you know, the question if somebody else in the family
17 was using the car, and their privacy was invaded. I
18 mean, do they have a cause of action or do you think
19 that because what you did was reasonable, they don't?

20 MS. NEPVEU: Your Honor, I genuinely do not
21 know the answer to that question. I'm sorry. I'd be
22 happy to submit a letter if the court would like.

23 CHIEF JUDGE LIPPMAN: Okay.

24 JUDGE GRAFFEO: If - - -

25 CHIEF JUDGE LIPPMAN: Go ahead, Judge

1 Graffeo.

2 JUDGE GRAFFEO: - - - if we disagree with
3 you and find that this was unreasonable, even if we
4 presume that the O'Connor standard applies here, is
5 it just Charges I, II, III and VI that would be
6 invalidated, or do - - - does there need to be a de
7 novo hearing - - -

8 MS. NEPVEU: There does not - - -

9 JUDGE GRAFFEO: - - - on the remaining
10 charges?

11 MS. NEPVEU: Yes, Your Honor. It would
12 only be those four charges, and there does not need
13 to be a new hearing.

14 JUDGE GRAFFEO: Why?

15 MS. NEPVEU: Because - - -

16 JUDGE GRAFFEO: Why aren't they
17 interconnected?

18 MS. NEPVEU: - - - because three of the
19 charges, everyone agrees, no GPS evidence was
20 offered. As for the other four, those all relate to
21 the business trip to Syracuse, for which there was
22 both E-ZPass records and petitioner's own evidence.
23 So there's no reasonable hearing officer who could
24 have been swayed by the introduction of GPS evidence.
25 This is not like the - - -

1 CHIEF JUDGE LIPPMAN: So you would do what?
2 Recalculate the penalty, or - - -

3 MS. NEPVEU: We - - - we would ask that,
4 should the court find it unreasonable, that it be
5 remitted for redetermination of the penalty, based
6 only those seven charges. Yes, Your Honor.

7 JUDGE READ: You'd probably ask for the
8 same penalty?

9 MS. NEPVEU: That's up to the commissioner,
10 Your Honor.

11 CHIEF JUDGE LIPPMAN: Okay. Thanks,
12 counselor.

13 MS. NEPVEU: Thank you very much.

14 CHIEF JUDGE LIPPMAN: Appreciate it.
15 Counselor, rebuttal?

16 MS. STOUGHTON: Your Honor, I first want to
17 address Judge Smith's point. We do not agree that
18 O'Connor v. Ortega provides the framework for this
19 case. As we argued in our brief, this is not a
20 workplace search. The workplace search applies in
21 the physical workplace and in - - - and in the
22 instance of - - -

23 JUDGE SMITH: So even if they had - - -

24 MS. STOUGHTON: - - - general - - -

25 JUDGE SMITH: - - - even if they - - -

1 somebody had invented - - - maybe they have - - - a
2 GPS that you can turn off in nonworking hours, you
3 say that doesn't change the case?

4 MS. STOUGHTON: It doesn't. This location-
5 based rule that the State is articulating here today
6 is a false one in this case, first of all, because
7 they did not limit the surveillance, and by their
8 admission, could not have limited the GPS
9 surveillance to the workplace location, i.e., like 9-
10 to-5 hours.

11 But the other reason why that's a bad rule
12 is like - - -

13 JUDGE SMITH: It would be okay if they - -
14 - presumably, if it's in the - - - if it's in the
15 State's garage, they're not - - - they're not - - -
16 he doesn't have a reasonable - - - well, that's the
17 workplace isn't it? If he parks his car at the - - -
18 at his employer's parking lot?

19 MS. STOUGHTON: Well, for instance, take
20 this as a hypothetical. Could the - - - can the
21 government search our vehicle - - - or your vehicles
22 because they're parked in a court of appeals parking
23 garage; search the interior contents of - - -

24 JUDGE SMITH: Well, that's not the
25 question. It's can they observe that it's there, not

1 cell phones are going to take care of that pretty
2 soon.

3 MS. STOUGHTON: And I'm sure this court
4 will one day consider a cell phone location case like
5 this. But the - - -

6 CHIEF JUDGE LIPPMAN: So what should we
7 simply hold now? You started to say, yes?

8 MS. STOUGHTON: The Court should hold that
9 the government cannot use GPS - - - slap a GPS device
10 on an employee's personal family car in order to
11 investigate workplace misconduct. They can't do it
12 without a warrant to investigate criminal activity.
13 There's no reason why they should be able to do it
14 without a warrant to investigate workplace
15 misconduct.

16 The government's interest in policing
17 workplace misconduct can be met in many other ways
18 that don't require such a massive invasion of New
19 Yorkers' privacy as a GPS surveillance on their
20 personal family car can provide. And that's simply
21 the calculus. It's a - - - it's a bright line rule.

22 JUDGE GRAFFEO: Can it be negotiated as a
23 condition of employment?

24 MS. STOUGHTON: You know, Your Honor, I
25 think that's a tougher question. I think there would

1 be real constitutional issues with that, just like
2 there are constitutional issues in requiring
3 government employees to waive their First Amendment
4 rights. But that's not this case, either.

5 In this case there was no even notice that
6 he could have been subjected to this surveillance.
7 And that makes this case - - - again, it's just
8 Weaver, in the context of a civil case, and a gov - -
9 - a different purpose.

10 And remember, the workplace ex - - - search
11 exception is not about what's the government's
12 purpose, it's about what's the person's reasonable
13 expectation of privacy in the object of the search.
14 And in that respect, this is not a workplace search.
15 It's the same as Weaver. Mr. Cunningham has the same
16 expectation of privacy in his car that Mr. Weaver
17 did. The question here, therefore, is whether the
18 Fourth Amendment - - - the full protections of the
19 Fourth Amendment apply to this case. And for the
20 reasons in our brief, we say they do.

21 CHIEF JUDGE LIPPMAN: Okay, thanks,
22 counselor. Thank you both. Appreciate it.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Cunningham v. New York State Department of Labor, No. 123 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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