

CAUGHT HOLDING THE BAG: CONSTITUTIONAL LIMITS ON LIVE VIDEO SURVEILLANCE

Joseph Lanuti*

INTRODUCTION

With the advent of new technology, a novel Fourth Amendment issue will likely arise: can law enforcement legally inspect your bag (or other personal belongings) with live surveillance technology, in a public area, particularly when no one else is nearby? New technologies have led to the emergence of complex surveillance programs throughout the country. For example, in 2005, the Baltimore Police Department implemented a program called CitiWatch which is “a network of approximately 700 CCTV cameras located throughout the city” that are monitored by civilian employees, most of whom are “retired or former law enforcement officers.”¹ In 2014, CitiWatch expanded by allowing private businesses to volunteer their surveillance systems to the program.² Further, Baltimore also teamed up with Persistent Surveillance Systems (PSS), a private surveillance company, to run a pilot program that used aircraft flying over Baltimore to gather aerial surveillance information in 2016.³ The information gained from the aerial surveillance, in combination with the CitiWatch program, is intended to assist law enforcement in “identifying and locating suspects and witnesses, and in eliminating unrelated movement tracks.”⁴

Baltimore is not alone in its endeavor to use live surveillance technology to more quickly and efficiently solve crime. Both Dayton and Compton have begun to implement PSS in its jurisdictions;⁵ and Las Vegas, instead of using contractors, has built its own surveillance network. The Southern Nevada Counter Terrorism Center (SNCTC) operates a 24/7 monitoring system that surveils the Las Vegas Strip and “is responsible for providing Southern Nevada law enforcement and homeland security entities with intelligence regarding critical incidents and significant public

* Joseph Lanuti a juris doctor candidate at the Georgetown University Law Center, with expected graduation in 2019. He is a Featured Online Contributor for Volume 55 of the American Criminal Law Review.

¹ POLICE FOUND., A REVIEW OF THE BALTIMORE POLICE DEPARTMENT’S USE OF PERSISTENT SURVEILLANCE 7, (2017), http://docs.wixstatic.com/ugd/9845f4_f7fd26e764374fcaa45115fd32edc22a.pdf.

² *Id.*

³ *Id.* at 9.

⁴ *Id.*

⁵ Kelsey Campbell-Dollaghan, *Police Are Testing a "Live Google Earth" To Watch Crime As It Happens*, GIZMODO, April 14, 2014, <https://gizmodo.com/police-are-testing-a-live-google-earth-to-watch-crime-1563010340>.

safety events in real time.”⁶ Additionally, in Los Angeles, a civilian oversight board recently approved the use of drones or unmanned aerial vehicles (UAVs) by the Los Angeles Police Department.⁷

This article addresses the novel situation that has arisen with the advent of new technology: whether law enforcement may legally inspect your bag (or other personal belongings) with live surveillance technology in a public area, particularly when no one else is nearby. The United States Supreme Court (Supreme Court) has clearly held that police may not physically open and examine the contents of a container absent a particularized warrant.⁸ But what are the privacy expectations for the visual examination of the effects we carry, such as purses, backpacks, briefcases, duffel bags, etcetera? How might these expectations be changing with the advent of new technology and methods of surveillance?

For example, imagine that a person sitting on a park bench peeks inside of his backpack, which contains illegal narcotics. The contents of the backpack are not visible to anyone around him as he is the only one in the park. Suppose, however, that the police see the “contraband” inside of the man’s bag via live surveillance technology, such as a surveillance camera on a street corner,⁹ a camera on the top of a building with high magnification,¹⁰ or an aerial drone flying overhead.¹¹ Could the police act on this information? Or, would the footage be constitutionally barred by the exclusionary rule, thereby causing any investigative actions thereafter to be fruits of the poisonous tree? Put another way: does the government always have the right to look over your shoulder (in a public area) to ferret out evidence of criminal activity?

Looking to the Supreme Court’s current jurisprudence, the answer is probably yes, depending on the technology used. The police will likely be able to act on this information and prosecutors will likely be able to admit the footage as evidence in a court proceeding. Since its holding in *Katz*, the Court has yet to set any clear limit on public visual surveillance. For now, it appears that virtually any conduct in a public area may be constitutionally within the police’s gaze.

PART I. CONSTITUTIONAL LANDSCAPE OF AERIAL SURVEILLANCE

⁶ *Analytical Section*, LAS VEGAS METRO. POLICE DEP’T, <https://www.lvmpd.com/en-us/Pages/AnalyticalSection.aspx> (last visited Oct. 24, 2017).

⁷ Kate Mather, *LAPD becomes nation’s largest police department to test drones after oversight panel signs off on controversial program*, LA TIMES, Oct. 17, 2017, <http://www.latimes.com/local/lanow/la-me-ln-lapd-drones-20171017-story.html>.

⁸ See *United States v. Chadwick*, 433 U.S. 1, 11 (1977), *overruled on other grounds* by *California v. Acevedo*, 500 U.S. 565, 111 (1991).

⁹ Such as Citiwatch in Baltimore or the Watch Center in Las Vegas mentioned above.

¹⁰ See Jackie Valley, *Inside Las Vegas’ Surveillance Culture*, LAS VEGAS SUN, Oct. 5, 2014, <https://lasvegassun.com/youre-being-watched/> (“The overt, pan-tilt-zoom cameras attach to traffic poles and casino roofs and provide law enforcement with surprisingly clear footage of tourists traipsing up and down the boulevard.”).

¹¹ See LAS VEGAS METRO. POLICE DEP’T, *supra* note at 6.

The Court held in *Katz v. United States* that the Fourth Amendment requires police to have a warrant to conduct a search when the person being searched: (1) has exhibited an actual (subjective) expectation of privacy; and (2) that expectation is one that society is prepared to recognize as reasonable.¹² In the hypothetical discussed above, our suspect would likely meet the first prong. By keeping his contraband concealed in an opaque bag, and by surreptitiously peeking in to check on its contents, he is in effect demonstrating a subjective belief that the contents of his backpack are private.¹³

However, based on the Court's current precedent, his expectation of privacy is *probably not* one that society is prepared to recognize as reasonable. This conclusion stems from three main Supreme Court decisions that address the reasonable expectation of privacy in the context of visual/aerial surveillance: *California v. Ciraolo*,¹⁴ *Dow Chemical Co. v. United States*,¹⁵ and *Florida v. Riley*.¹⁶ Although these cases deal with the visual surveillance of the curtilage of one's home or private commercial property,¹⁷ the Court performs similar constitutional analysis to private real property as they do personal effects because both are enumerated in the Fourth Amendment.¹⁸

In *Ciraolo*, the police used a plane to fly over the defendant's house at an altitude of 1,000 feet, within navigable airspace, and from the overflight, the officers spotted marijuana plants in Ciraolo's backyard and photographed the area with a standard 35mm camera.¹⁹ The Court held

¹² *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citing *Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring)).

¹³ *See California v. Greenwood*, 486 U.S. 35, 39–40 (1988) (holding that defendants may not have expected the contents of opaque trash bags to be inspected, thus meeting the first *Katz* prong, but this expectation was not one that society deems as reasonable). However, one could imagine an extremely narrow reading of *Katz* that would prevent someone from claiming a subjective expectation of privacy anytime he opens a closed container in a public space.

¹⁴ 476 U.S. 207 (1986).

¹⁵ 476 U.S. 227 (1986).

¹⁶ 488 U.S. 445 (1989).

¹⁷ Note that private commercial property has 4th Amendment protections against unreasonable, warrantless searches, but some warrantless legislative schemes are permissible in certain highly regulated industries. *Donovan v. Dewey*, 452 U.S. 594, 598 (1981).

¹⁸ U.S. Const. amend. IV (“persons, houses, papers, and effects”); *See Bond v. United States*, 529 U.S. 334, 337 (addressing how the government relied on *Ciraolo* and *Riley* to defend a tactile search of a container, but the Court disagreed and stated that they apply to visual surveillance cases; *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (“By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.”).

¹⁹ *Ciraolo*, 476 U.S. at 209.

that *Ciraolo*'s expectation of privacy was not one that society was prepared to recognize as reasonable because the "fact that an individual has taken measures to restrict some views of his activities" does not "preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."²⁰ The court went on to state that "[i]n an age where private and commercial flight in the public airways is routine, it is unreasonable for [*Ciraolo*] to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet."²¹

On the same day that it decided *Ciraolo*, the Court decided *Dow Chemical Co.* In *Dow*, the EPA employed a commercial aerial photographer to take photographs of Dow Chemical's facility from within lawfully navigable airspace.²² The Court again held that Dow's expectation of privacy was not reasonable both because the EPA was in lawfully navigable airspace and because, although the cameras were using some magnification technology (read: not naked eye), the photographs were "not so revealing of intimate details as to raise constitutional concerns."²³ The Court noted, however, that "highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."²⁴

Three years later, in *Florida v. Riley*, the Court looked once more at the tension between privacy expectations and aerial surveillance. The question in *Riley* was "[w]hether surveillance of the interior of a partially covered greenhouse in a residential backyard from the vantage point of a helicopter located 400 feet above the greenhouse" was constitutional.²⁵ A plurality of the Court followed *Ciraolo*, asserting that "[a]s a general proposition, the police may see what may be seen "from a public vantage point where [they have] a right to be . . . They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was."²⁶ Justice O'Connor, concurring in the judgment, did not agree that the test was merely whether the police were within navigable airspace, but "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity."²⁷

PART II. POLICE CAN LOOK IN THE BAG

²⁰ *Id.* at 213–14.

²¹ *Id.* at 215.

²² *Dow Chemical Co.*, 476 U.S. at 229.

²³ *Id.* at 239.

²⁴ *Id.*

²⁵ *Florida v. Riley*, 488 U.S. 445, 447–448 (1989).

²⁶ *Id.* at 449–50.

²⁷ *Id.* at 454 (O'Connor, J., concurring).

Looking to the holdings in *Ciraolo*, *Dow Chemical*, and *Riley*, the Court appears to be primarily concerned with whether a normal civilian could view the suspicious activity with technology generally available to the public. If so, then the police may legally conduct a search absent a warrant. Accordingly, in our hypothetical, the type of technology used and its vantage point is critical.

A. Surveillance Camera

If the police are using a standard surveillance camera commonly used by commercial and government entities, and the camera is viewing a public area, then our suspect is likely out of luck. In an age where there is a surveillance camera on practically every corner, a court is unlikely to find it reasonable for our suspect to assume that no one will be glancing into his backpack from above. Conversely, the Court has emphasized the significance of viewing the suspicious activity with a “naked eye,”²⁸ and may find the footage too intrusive if the camera is sophisticated, has high zoom capabilities, or is not “generally available to the public.”²⁹ In a case like this, it would be prudent for defense counsel to raise these technological factors to encourage a court to distinguish from Supreme Court precedent. However, if the question came before the Court, it would likely admit the camera footage in favor of an easily administrable rule that states that surveillance cameras in public areas do not violate the constitution even when they happen to see into suspect’s private effects.³⁰ Such a rule would be far simpler for lower courts and law enforcement to follow and would avoid forcing courts to assess the technical features of different cameras.

B. Unmanned Aerial Vehicle (UAV) or Drone

It is a more difficult question if, in our hypothetical, the government is using a drone to look into the suspect’s bag. Following the Court’s emphasis on “legally navigable airspace” and “technology generally available to the public”³¹ courts will likely look to federal, state, and local laws regulating drone use, as well as the general prevalence of drones in society. If an average citizen can use a drone to view his fellow citizens from above, the police will likely be able to do so as well. This means that legislatures that plan on using drones for law enforcement surveillance may have to carefully consider how they regulate drone use for civilians.

Still, given the current stigma about drones and their infamous connection with military applications, courts may be hesitant to grant police carte blanche with respect to drone surveillance. There is likely

²⁸ *Ciraolo*, 476 U.S. at 215.

²⁹ *Dow Chemical Co.*, 476 U.S. at 238.

³⁰ See *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (“In determining what is reasonable under the Fourth Amendment, we have given great weight to the ‘essential interest in readily administrable rules.’”) (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001)).

³¹ *Dow Chemical Co.*, 476 U.S. at 239.

little discernable privacy difference between a surveillance camera and a drone, except for the drone's mobility.

CONCLUSION

Katz has not always provided enough guidance to courts because it is difficult to gauge what our rapidly changing society views as unreasonable intrusions of privacy, especially outside the home.³² The test the Supreme Court used in the cases outlined above is whether a normal civilian could view the suspicious activity with technology generally available to the public. As of yet, the Court has not drawn a line showing when visual surveillance, in a public area, has become too intrusive.

Courts will likely not prevent police from using public surveillance cameras, even when they happen to see the contents of someone's belongings. These cameras are not only widely prevalent in governmental and commercial settings, but are frequently used by homeowners as well. Similarly, courts will likely not prevent the police from using surveillance drones in public places, insofar as they happen to see into people's belongings, as long as civilians are legally able to do the same. Because the only difference between surveillance cameras and drones are their mobility, it is difficult to argue that this mobility implicates a greater privacy concern. An aerial drone patrolling a crowded event is in reality simply a more effective surveillance camera. However, an aerial drone used to follow a suspect in the hopes that he will open a bag filled with illegal narcotics may be found to go too far.³³

Since courts have yet to decide the constitutionality of surveillance drones, cautious governments should continue to use traditional surveillance cameras. Ambitious governments that want to use drones for law enforcement purposes should emphasize the similarities between drones to surveillance cameras so they can not only catch criminals holding the bag, but also prosecute them for doing so.

³² See *United States v. Jones*, 565 U.S. 400 (2012) (Alito, J., concurring).

³³ See *id.*