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California Supreme Court Depublishes Ruling on Search of Car's Data Recorder

The California Supreme Court yesterday voted to depublish a lower court ruling that police violated the Fourth Amendment rights of a drunk driving/vehicular manslaughter suspect by downloading data from the car's sensing and diagnostic module without a warrant.

The justices, at their weekly conference in San Francisco, voted 5-1, with Justice Joyce L. Kennard in the minority, to deny review in *People v. Xinos*, H034305, decided by the Sixth District Court of Appeal in February. The court, however, unanimously voted to depublish the ruling on its own motion.

The high court's action means that George Xinos must either be retried for vehicular manslaughter in the 2006 death of Marcus Keppert, who was killed crossing a San Jose street, or resentenced on the remaining counts of failing to stop at the scene of an accident, driving under the influence with injury, and driving with an unlawful blood alcohol level with injury.

But the Court of Appeal's ruling to that effect now cannot be cited as precedent.

Witnesses testified that Keppert was struck by a white SUV that left the scene. One witness said he pursued the vehicle and called its license plate number in to 911, then saw Xinos exit the vehicle looking dazed and in shock.

The witness did not remain there, but returned to the scene of the collision. Xinos was arrested a short time later when a police officer, investigating a suspicious vehicle report, made contact with Xinos, who admitted that the car was his and that he had been drinking.

The officer, who was aware of the hit-and-run collision and saw that the vehicle was damaged and had blood on it, had it towed to a police warehouse for further inspection. Xinos was booked and had his blood drawn after refusing a breath test at the scene of the arrest, and had a blood alcohol contest of 0.18 about two hours after the crash, which an expert later testified meant it was about 0.22 when the collision occurred.

About a year after the crash, police—at the request of prosecutors—downloaded the data contained in the SUV's SDM, also known as an event data recorder. The data showed that the vehicle accelerated during the five seconds prior to the collision, and a prosecution expert estimated that the vehicle reached a speed of between 69 and 76 miles per hour right before the crash, and struck Keppert at a speed of about 60 or 61 mph.

The impact could have been avoided by swerving two feet to the left, the expert opined, or by going slower.

In denying the defense motion to suppress, Santa Clara Superior Court Judge Marc Poche held that no warrant was required because the defendant lacked a reasonable expectation of privacy in the SDM data, and that there was no search in the Fourth Amendment sense.

The judge also ruled that if there was a search, it fell within the automobile exception to the warrant requirement because the officers had probable cause.

Jurors found the defendant guilty on all counts. Poche sentenced him to two years in prison for manslaughter, plus a five-year enhancement under “Courtney’s Law” for fleeing the scene of that crime. Imposition of sentence on the other counts was stayed.

But Justice Franklin Elia, writing for the Court of Appeal, said Xinos had a reasonable expectation of privacy in the data contained within the module.

With the SDM, Elia explained, data is generated for the personal use of the motorist. “While a person’s driving on public roads is observable, that highly precise, digital data is not being exposed to public view or being conveyed to anyone else,” the justice said.

He went on to conclude that at the time of the download, long after the crime occurred and the investigation concluded, the officers lacked probable cause. He noted that before the data was downloaded, the officers believed that the defendant had not been speeding and could not have prevented the collision because the victim’s visibility was limited.