



# Privacy Matters

Is accessing a spouse's cellphone without consent against the law?

BY PIERRE GROSDIDIER

May you track your spouse's whereabouts with a hidden and undisclosed car GPS device or rummage through his or her cellphone if you suspect cheating? In Texas, the answers are yes and no, respectively, based on the limited caselaw available.

Under Texas Penal Code § 16.06, a person commits a Class A misdemeanor "if the person knowingly installs an electronic or mechanical tracking device on a motor vehicle owned or leased by another person."<sup>1</sup> What if the car is community property? One Harris County judge has held that when a couple owned a vehicle jointly as community property, a spouse who placed a tracking device on the vehicle did not do so "upon a vehicle 'owned or leased by another person.'"<sup>2</sup> The spouse, therefore, did not violate Texas Penal Code § 16.06.

In *Ahmed v. City of Houston*, the plaintiff tracked his estranged wife for two years through two devices that he surreptitiously planted in her car. On counsel's advice, Ahmed pleaded guilty to a § 16.06 violation, paid a fine, and served probation. The charging instrument erroneously stated that Ahmed's wife was the car's "sole owner." In fact, the car was community property and the parties were still married when

Ahmed tracked his wife's whereabouts. Ahmed later obtained new counsel and filed an application for writ of habeas corpus. The county judge held that the writ had merit because Ahmed jointly owned the car when he tracked it. The judge set aside the conviction and sentence and held that Ahmed was "actually innocent of the offense that he pleaded guilty to."<sup>3</sup> The county judge's decision is consistent with the notion that spouses in a community property state have few privacy rights in jointly owned property.<sup>4</sup>

Texas also criminalizes unauthorized computer access in Penal Code § 33.02. It is a Class B misdemeanor or a state jail felony if a "person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner."<sup>5</sup> The 5th Court of Appeals in Dallas held that a wife could recover from her husband who accessed her cellphone without consent.<sup>6</sup>

In *Miller v. Talley Dunn Gallery, LLC*, Miller accessed his soon-to-be ex-wife Dunn's cellphone, captured screenshots of information within, and perused its log.<sup>7</sup> Dunn and her eponymous art gallery eventually sued Miller, alleging a claim, inter alia, under Texas' Harmful Access by Computer Act, or HACA, which grants a civil cause of action to

victims of computer crimes.<sup>8</sup> The court held that a cellphone qualified as a computer and that Miller accessed the phone without consent. The court specifically rejected Miller's claim that he had effective consent to access the phone because it was community property. Chapter 33 defines "Owner" as a person who, inter alia, "(A) has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor; [or] (B) has the right to restrict access to the property[.]"<sup>9</sup> The court found that the phone belonged to Dunn; she used it "on a daily basis" and "it was the only way to reach her." She had the right to password protect the phone and Miller accessed the phone while Dunn slept. The court held that Dunn had a greater right of access to the phone and it sustained the district court's injunctive relief order as to the information Miller obtained in violation of the HACA.<sup>10</sup> This case shows that spouses may enjoy statutory digital privacy rights in jointly owned property under Texas law. **TBJ**

## Notes

1. Tex. Penal Code § 16.06(b).
2. *Ahmed v. City of Houston*, No. H-12-1111, 2014 WL 5460590, at \*1 n.12 (S.D. Tex. Oct. 27, 2014) (mem. op.). The citations are from the Harris County Court's Agreed Order, Pacer Doc. No. 21-2 at 12.
3. *Id.*
4. See generally, Sally Brown Richardson, *Privacy and Community Property*, 95 N.C. L. Rev. 729 (2017). For a case of spousal car tracking under non-community property state, with the same result, see *State v. Hornmann*, 805 N.W.2d 883 (Minn. App. 2011).
5. Tex. Penal Code § 33.02(a).
6. *Miller v. Talley Dunn Gallery, LLC*, No. 05-15-00444-CV, 2016 WL 836775, at \*\*1, 11 (Tex. App.—Dallas Mar. 3, 2016, no pet.) (mem.op.).
7. *Id.* at \*1.
8. Tex. Civ. Prac. & Rem. Code Ch. 143.
9. Tex. Penal Code § 33.01(15).
10. *Miller*, 2016 WL 836775, at \*11.



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