LEGAL UPDATE

City of Madison Police Department

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Auto Exception & Curtilage

***Collins v. Virginia*, 138 S.Ct. 1663 (2018); Decided May 29, 2018 by the United States Supreme Court.**

The *Collins* case addressed the scope of the automobile exception (or *Carroll* doctrine). An officer attempted to stop a motorcycle for a traffic violation but the driver fled and eluded the officer. A few weeks later, another officer saw a similar motorcycle traveling at a high rate of speed, but was unable to catch or stop it. The motorcycle was somewhat distinctive, and the officers concluded that the same one had been involved in both incidents.

Further investigation identified a suspect (Collins) and indicated that the motorcycle was stolen. Officers looked at the suspect's Facebook profile and observed a similar motorcycle parked in the driveway of a residence. The location of the residence was determined, and an officer later went to the address in search of the motorcycle and driver. The officer observed a motorcycle, covered by a tarp, at the top of the driveway (in a partially enclosed area). The officer walked up the driveway to the motorcycle, pulled off the tarp and visually confirmed that it appeared to have been involved in the prior incidents. The officer also ran the license and VIN, confirming that the motorcycle was stolen. The officer returned the tarp and waited in his vehicle for the suspect (Collins) to return; Collins was subsequently arrested.

Collins argued that the officer's actions had required a warrant, and that the results of his actions should be suppressed. The case required examination of two legal concepts: the auto exception and the curtilage doctrine.

The automobile exception to the warrant requirement allows officers to search a vehicle—without obtaining a warrant—if probable cause exists to believe it contains evidence or contraband. There is no exigency requirement; the ready mobility of a vehicle and diminished expectation of privacy in a vehicle justify the exception. A vehicle search under the automobile exception is no narrower (or broader) than one authorized by a warrant. It applies to any type of vehicle used for transportation (trucks, RV's, etc.), but the vehicle itself must be in a location accessible to the public.

Courts have also recognized enhanced protections for the curtilage of a residence. The curtilage—the area immediately surrounding and associated with the home—generally is viewed as having Fourth Amendment protection similar to the home itself. The *Collins* court made it clear that the automobile exception does not allow an officer to intrude on the curtilage to search a vehicle:

> Just as an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant, and just as an officer must have a lawful right of access in order to arrest a person in his home, so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception. The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage.

So the issue for the *Collins* court was whether the area where the motorcycle had been located was within the curtilage of the home. There are four general factors courts will look at when determining whether an area constitutes curtilage:

- The proximity of the area to the home
- Whether the area is included within an enclosure surrounding the home
- How the area is used
- Steps taken by the resident to protect the area from observation by people passing by

These determinations are very fact-specific, and the *Collins* court concluded that the area in question qualified as curtilage. The motorcycle had been in a partially enclosed area at the top of the driveway (brick walls on two sides and the house itself on the third side). Also, someone walking to the front door of the residence would have turned off the driveway (onto a set of steps leading to the front door) before reaching the enclosure.

Since the officer entered the curtilage of the home to inspect the motorcycle, the court ruled that his actions required a warrant or some other exception to the warrant requirement (like exigency):

> We conclude that the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle.

The *Collins* case simply reinforces the principle that the automobile exception only applies to vehicles located in areas that are accessible to the public.

Cell Phone Records

***Carpenter v. United States*, 138 S.Ct. 2206 (2018); Decided June 22, 2018 by the United State Supreme Court.**

In *Carpenter*, police were investigating a series of robberies. Officers identified a number of suspects, and obtained cell phone records as part of the investigation. The records were obtained pursuant to a court order (but not a search a warrant).

The cell phone records provided cell-site location information (CSLI). Cell phones are continually searching for the closest or best signal (from a tower or other cell site). Each time the cell phone detects the best signal (typically several times a minute), a record is created. This record—CSLI—provides a location history of each cell phone (and of whomever is carrying the phone). The precision of the location history varies based on the system and geographic area covered by the tower/site.

Officers obtained CSLI for a number of suspects, including Timothy Carpenter. The CSLI for Carpenter included data for two separate phones (with different carriers). The first yielded 127 days of CSLI ; the second yielded 2 days. The data showed almost 13,000 locations points for Carpenter's phones (about 100 per day). These locations closely corresponded to the series of robberies and were used at trial against Carpenter (who was convicted on multiple counts of robbery). Carpenter challenged his conviction, arguing that obtaining his CSLI was a search, requiring a warrant.

The *Carpenter* case reached the Supreme Court, and the court struggled to apply existing legal doctrines to the relatively new technology of CSLI . Courts have consistently ruled that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" (the third-party doctrine). However, in *Carpenter* the court recognized that the information obtainable through CSLI was far different than that usually subject to the third-party doctrine (like phone numbers or bank records): "cell phone location information is detailed, encyclopedic, and effortlessly compiled." The court continued:

> [W]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user. Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable…With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years…Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years…Only the few without cell phones could escape this tireless and absolute surveillance.

The court concluded, "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." So, obtaining CSLI is considered a 4th Amendment search. The court went on to rule that a subpoena or similar court order was insufficient, and that a search warrant is required to obtain CSLI .

While the *Carpenter* decision concluded that obtaining CSLI under these circumstances was a search, the police actions did not neatly fit into any existing definitions of a search. The court referenced its prior decision in *United States v. Jones*, 565 U.S. 400 (2012), involving GPS tracking. While *Jones* was decided on a slightly different basis (the physical intrusion needed to install the GPS device), both cases involved police obtaining longer term, exhaustive location information. This emphasis—on the duration and depth of the information yielded—was clearly the focus of the court, raising the question of whether other means of obtaining information might be considered a search in the future based simply on the duration and depth of the data yielded.

The *Carpenter* decision recognized this possibility, and clearly stated, "our decision today is a narrow one," focused only on long-term, historical CSLI (and not on real-time CSLI or tower dumps). The court made it clear that the traditional third-party doctrine remains intact, and that use of "conventional surveillance techniques and tools, such as security cameras" are not affected. The court also made it clear that obtaining records in other contexts pursuant to a subpoena (rather than a warrant) remains permissible: "a warrant is required (only) in the rare case where the suspect has a legitimate expectation of privacy interest in records held by a third party." So far, only CSLI meets that standard.

The *Carpenter* court also made it clear that warrantless collection of CSLI may be permitted under certain circumstances:

> [I]f law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances.

So, collection of CSLI is considered a search, and a search warrant (not a subpoena) is required to obtain it from a wireless carrier. However, short-term collection of CSLI without a warrant may be appropriate if exigent circumstances are present.

Use of Force—Medical Emergencies

***Hill v. Miracle*, 853. F.3d 306 (6th Cir. 2017); Decided April 4, 2017 by the 6th Circuit Court of Appeals.**

In *Hill*, paramedics responded to a report of an individual (Hill) suffering from a diabetic emergency. A deputy (Miracle) also responded to the scene. Paramedics were able to prick Hill's finger to test his blood sugar, and determined that it was extremely low. As paramedics attempted to insert an IV catheter, Hill became combative. He pulled the IV from his arm while kicking and swinging at the paramedics (who were attempting to hold him down). Miracle attempted to get Hill to calm down, without success, and ultimately deployed a Taser to control Hill.

Hill calmed down long enough for the IV to be reestablished, allowing for dextrose to be administered. A short time later Hill's behavior changed, and he apologized for his actions. He was conveyed to a hospital for treatment and was not charged or cited. He subsequently sued Deputy Miracle, alleging the use of excessive force.

The U.S. Supreme Court, in *Graham v. Connor*, 490 U.S. 386 (1989) established that the test for evaluating an officer's use of force is objective reasonableness. The *Graham* court outlined three factors for consideration when making this assessment: the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

The *Hill* court recognized that the *Graham* factors do not adequately address situations like the one in this case: "applying the *Graham* factors to the situation that Miracle faced is equivalent to a baseball player entering the batter's box with two strikes already against him…because Hill had not committed a crime and was not resisting arrest two of the three *Graham* factors automatically weighed against Miracle."

The court went on to conclude that the *Graham* factors are sometimes not adequate for analyzing incidents in the context of medical emergencies:

> Where a situation does not fit within the Graham test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:
>
> 1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
> 2) Was some degree of force reasonably necessary to ameliorate the immediate threat?
> 3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?
>
> If the answers to the first two questions are "yes," and the answer to the third question is "no," then the officer is entitled to qualified immunity.

The court applied these factors and determined that Miracle's use of force to control Hill had been reasonable. Hill was clearly incapable of making a rational decision, and his actions threatened the safety of the paramedics (by kicking and swinging at them) as well as his own safety (his condition, if untreated, could have resulted in his death). Some degree of force was necessary to control Hill, and the force used was reasonable:

> We are not holding that a law enforcement officer is always justified in using a taser to gain control over a person suffering from a medical emergency. But under the circumstances, Miracle's use of force was objectively reasonable. Four paramedics were unable to physically restrain Hill, whose health was rapidly deteriorating and who was unresponsive to Miracle's command to "relax." We conclude that a reasonable officer on the scene, without the "20/20 vision of hindsight," would be justified in taking the same actions as Miracle.

The *Hill* case is from the 6th Circuit, which is not binding on Wisconsin. However, the principles of the case are consistent with Wisconsin law and MPD SOP.

Internet Investigations

***State v. Baric*, 2017AP185-CR; Decided September 18, 2018 by the Wisconsin Court of Appeals.**

In *Baric*, an officer utilized a software program to search peer-to-peer file sharing networks for child pornography. The officer discovered ten files of child pornography tied to a specific IP address. A subpoena was served on the internet service provider for the IP address, and the physical address of the subscriber was determined. Officers later responded to the address, contacted the resident (Baric), and discovered child pornography on his devices.

Baric argued that the officer's viewing of the files located on the peer-to-peer file sharing network was a search. The court rejected this, concluding that there is no expectation of privacy in files that are publicly shared on a file sharing network. Once the files were made available for public download, Baric could not prevent anyone—including law enforcement—from accessing them.