LEGAL UPDATE

City of Madison Police Department

Spring 2013 Captain Victor Wahl

4th Amendment Searches—K9's

***Florida v. Jardines*, 133 S.Ct. 1409 (2013); Decided March 26, 2013 by the United States Supreme Court.**

In *Florida v. Jardines*, the U.S. Supreme Court ruled on the appropriateness of bringing a drug-sniffing K9 onto the front porch of a residence to detect the odor of narcotics. The court's ruling on this very narrow question continues a recent trend of refining how a "search" is defined under the Fourth Amendment.

In *Jardines*, police received a tip about a marijuana grow in a private residence. Officers eventually walked to the front door of the residence with a drug-sniffing dog. The dog alerted to the odor of narcotics, and the officers left (having remained on the porch for less than two minutes). The dog's alert was used to obtain a search warrant for the residence, and the subsequent search yielded a number of marijuana plants. The resident (Jardines) was criminally charged for the plants. He challenged the search of his residence, arguing that the dog sniff on which the search warrant was based was itself a search.

The case eventually reached the U.S. Supreme Court. The Court, in a 5-4 vote, ruled that the dog sniff had been a search under the Fourth Amendment. In doing so, the Court relied on a Fourth Amendment theory—trespass—that it also relied on in last year's GPS tracking case (*U.S. v. Jones*, 132 S.Ct. 945 (2012)).

The most prevalent and frequently utilized test to assess whether a Fourth Amendment "search" occurred has been the reasonable expectation of privacy test. Under this analysis, law enforcement actions only implicate the Fourth Amendment if they intrude upon a place or thing that someone has a reasonable expectation of privacy in. The test is both objective and subjective: the person must have an actual, subjective expectation of privacy, and that expectation must be objectively reasonable (one that society is willing to recognize).

Recently, however, the U.S. Supreme Court has also focused on physical property rights as a measure of Fourth Amendment intrusions:

> When the Government obtains information by physically intruding on persons, houses, papers or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred.

This physical intrusion test has been in place since the origin of the Fourth Amendment. In a 1967 case (*Katz v. United States*, 389 U.S. 347), the Court recognized that the protection of the Fourth Amendment extended beyond physical intrusions, and articulated the reasonable expectation of privacy test. While this test has been the more familiar standard for Fourth Amendment intrusions, it is a supplement to—rather than a replacement for—the physical intrusion test:

> Fourth Amendment rights do not rise or fall with the *Katz* formulation…The *Katz* reasonable-expectations test has been added to, not substituted for, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.

The Fourth Amendment provides the greatest level of protection to the home, and the area immediately surrounding and associated with the home is considered curtilage, subject to Fourth Amendment protection. The *Jardines* court was clear that the area the officers and K9 had been present—the front porch of a single-family residence—is part of the curtilage.

The Court then turned to the question of whether the officers' presence was "accomplished through an unlicensed physical intrusion." The Court pointed out that while walking up to the front door of a residence is technically trespassing on private property, it is generally permitted as part of an "implicit license:"

> This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do."

So while that might seem to resolve the case, the Court continued:

> But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*…The scope of a license—express or

> implied—is limited not only to a particular area but also to a specific purpose…the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

As a result, the *Jardines* court concluded that the officers' actions should be considered a search under the Fourth Amendment, and that obtaining a search warrant based on the dog alert was improper.

The main impact of the *Jardines* case (and last year's *Jones* case) is a need to re-orient our Fourth Amendment analysis away from a pure reasonable-expectation-of-privacy theory, and to include the physical intrusion/trespass theory. The *Jardines* court made it clear that a physical intrusion/ trespass can be a Fourth Amendment search, even if the aggrieved party has no reasonable expectation of privacy in the area intruded on:

> We need not decide whether the officer's investigation of Jardines' home violated his expectation of privacy…that the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.

The *Jardines* decision also did not clearly articulate how the "implied license" to enter the curtilage and knock on a residential front door applies in other situations. Some situations are clear (approaching the home to knock on the front door in hopes of speaking with a resident: permissible; approaching the door with a K9 for purposes of doing a drug sniff: not permissible). The only guidance the court provided was to focus on the purpose of the officer in approaching the residence. This suggests that if an officer approaches a single-family residence with the purpose to knock on the door and make contact, but happens to see evidence while doing so, it would fall within the "implied license" and be permissible. However, walking to the front door (even without a K9) for the purpose of obtaining physical evidence would likely not. While this certainly seems to conflict with the general proposition that officers' subjective intent is not relevant to Fourth Amendment analysis, in this limited circumstance is appears as if an officer's purpose will be important. It is also unclear how the *Jardines* decision and the physical intrusion/trespass theory will apply to other contexts.

Finally, the *Jardines* court simply stated that the actions here constituted a search, not that they were never permissible. As with any action considered a Fourth Amendment search, officers simply need a warrant or some exception to the warrant requirement (consent, exigent circumstances, community caretaker, etc.) in order to proceed. And, approaching the front door of a residence without a K9 to simply knock on the door and attempt to contact a resident/occupant, will generally not be considered a search and remains permissible.

K9's—Reliability & Probable Cause

***Florida v. Harris*, 133 S.Ct. 1050 (2013); Decided February 19, 2013 by the United States Supreme Court.**

In *Harris*, a deputy in Florida made a routine traffic stop. The driver's behavior was suspicious, and the deputy walked his K9 around the exterior of the vehicle. The dog alerted on the vehicle, and the resulting search yielded drug evidence. The driver was criminally charged; he challenged the search, claiming that the K9's reliability had not been sufficiently established, and that as a result the positive alert was insufficient to support probable cause.

The Florida Supreme Court agreed with Harris, and set forth a fairly rigid test for demonstrating a K9's reliability. They also specifically articulated that the dog's performance in the field was a key component to demonstrating reliability. The Florida court concluded that the K9 was not sufficiently reliable to establish probable cause.

The U.S. Supreme Court unanimously reversed the Florida court. The *Harris* court pointed out that a probable cause determination—in any context—is a flexible standard based on the totality of the circumstances, and should not be based on "rigid rules, bright-line tests (or) mechanistic inquiries." The court rejected the specific, check-list style test that the Florida Supreme Court had articulated, and specifically rejected the notion that K9 field performance was the best indicator of a dog's reliability. Instead, the Harris court confirmed that a probable cause determination should be based on the totality of all the relevant circumstances:

> The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

Search Warrants—Detentions

***Bailey v. United States*, 133 S.Ct. 1031 (2013); Decided February 19, 2013 by the United States Supreme Court.**

In *Bailey*, officers were about to execute a search warrant at an apartment for illegal possession of a firearm. Prior to the warrant's execution, officers performing surveillance of the apartment observed two people leave the apartment, get in a car and drive away. The officers followed the two, while other officers made entry to execute the warrant. The surveillance officers followed the suspects for about five

minutes, travelling about a mile. They stopped the car, and frisked both occupants. The frisk did not yield any weapons, but a ring of keys was located on one of the subjects. As the two were being handcuffed and returned to the residence, the subject made several statements to the officers. Officers later discovered that one of the keys they had seized opened the door to the apartment.

Drugs and a handgun were located in the apartment, and one of the vehicle occupants was criminally charged. He sought to suppress his statements made to officers at the scene of the traffic stop, and the fact that the key opened the apartment door, arguing that the stop had been unreasonable. The case worked its way to the U.S. Supreme Court; the issue being what authority police have to detain occupants of a dwelling pursuant to the execution of a valid search warrant.

In *Michigan v. Summers*, 452 U.S. 692 (1981), the court ruled that officers executing a search warrant have the authority to detain the occupants of the premises while the search is conducted, even if there is no particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers. Lower courts have reached different conclusions as to whether the *Summers* decision authorizes the detention of occupants beyond the immediate vicinity of the premises named in the warrant.

In *Bailey*, the officers stopped the suspects about a mile away from the location of the warrant. The court concluded that this could not be justified under *Summers*:

> Once an individual has left the immediate vicinity of a premises to be searched…detentions must be justified by some other rationale.

The *Bailey* court did not clearly articulate what qualifies as "immediate vicinity." However, the decision strongly suggests that anything beyond detaining subjects on foot on or immediately adjacent to the property that is being searched will probably be beyond the scope of *Summers*. The court particularly pointed out the differences between detaining subjects inside a residence and performing a traffic stop, so it is likely that following a vehicle and performing a stop will be beyond the scope of *Summers*.

Note that the *Bailey* decision was limited to applying the *Summers* rule—allowing for a detention without any individualized suspicion—to this set of facts. Where officers can articulate individualized reasonable suspicion or probable cause, they are of course permitted to perform a stop and/or arrest. So, officers seeking to detain a subject leaving the scene of an impending search warrant (but outside of the immediate vicinity) will need to articulate individualized suspicion justifying the stop.

Vehicle Searches

***State v. Jackson*, 2012AP1692-CR (Ct. App. 2013); Decided April 9, 2013 by the Wisconsin Court of Appeals.**

In *Jackson*, an officer stopped a vehicle for several traffic violations. The officer smelled fresh marijuana coming from the vehicle, and asked the driver (Jackson) to exit the vehicle. The officer then searched Jackson, and searched the passenger compartment of the vehicle. The search yielded a digital scale covered in marijuana residue, and about $2,000 in cash.

The officer continued the search by opening the vehicle's trunk, where he recovered more than a half-pound of marijuana. Jackson sought to suppress the evidence, arguing that the search of the trunk was unreasonable. The trial court agreed, and ruled that the marijuana found in the trunk be suppressed.

The Court of Appeals reversed, holding that the officer clearly had probable cause—based on the evidence of drug dealing located in the passenger compartment—to believe that contraband was in the trunk.

While it was not an issue in the appeal, the officer's search of the passenger compartment was also reasonable, based on probable cause provided by the odor of fresh marijuana.

Firearm Possession by Felon

***State v. Henning*, 346 Wis. 2d 246 (Ct. App. 2013); Decided January 31, 2013 by the Wisconsin Court of Appeals.**

In *Henning*, two individuals were involved in a domestic argument. Later that day, the male individual (Henning) called his girlfriend and threatened to kill her. He also called a co-worker, and asked if she could get him a pistol. Henning, a convicted felon, was subsequently charged with attempted possession of a firearm by a felon. He argued that no such crime exists.

Henning's argument was that since being a felon in possession of a firearm does not have an element of intent, it is not possible to attempt to commit it. The Court of Appeals disagreed, pointing out that being a felon in possession of a firearm does have a mental state as an element (that the firearm was "knowingly" possessed), and that the attempt statute (§939.32) provides that it is illegal to attempt to commit any felony in Wisconsin (unless expressly excluded by state or case law). So, it is illegal in Wisconsin for a felon to attempt to possess a firearm. This likely applies to other individuals prohibited from possessing a firearm under §941.29 as well.

OMVWI Blood Draws

***Missouri v. McNeely*, 133 S.Ct. 1552 (2013); Decided April 17, 2013 by the United States Supreme Court.**

The *McNeely* case involved a fairly common occurrence for police officers—a warrantless blood draw from a suspect arrested for OMVWI. The officer in *McNeely* made a traffic stop shortly after 2am, and subsequently arrested the driver for OMVWI. The driver refused to submit to a P.B.T., and while being driven to the station indicated that he would refuse to provide any breath sample. The officer then elected to transport the driver (McNeely) to a hospital for a blood draw. McNeely did not consent to the blood draw, though he did not physically resist when the blood sample was obtained. Subsequent analysis of the blood showed a B.A.C. of .154. McNeely challenged the results of the blood draw, arguing that taking his blood without a warrant had been unreasonable.

The U.S. Supreme Court first addressed the issue of warrantless blood draws in *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, a driver had been injured in an accident and conveyed to a hospital. An officer responded and arrested the driver in the hospital, then ordered his blood drawn without a warrant. The *Schmerber* court concluded that the warrantless blood draw was reasonable, based on the facts of that case (particularly the fact that time had been taken to convey the driver to the hospital, and that there was no time to "seek out a magistrate and secure a warrant.").

In the years after *Schmerber*, many courts—including the Wisconsin Supreme Court—have concluded that the dissipation of alcohol from the bloodstream constituted exigency in every OMVWI case and therefore permitted a warrantless blood draw (as long as there was probable cause the blood contained evidence and the blood draw was performed in a reasonable manner).

This was the issue in *McNeely*. The case reached the U.S. Supreme Court, with the court addressing one question: "whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations."

The court first pointed out that the exigent circumstances analysis is based on the totality of the circumstances, and must be assessed on a case-by-case basis. While the court has articulated a number of factual scenarios where exigency was present, those determinations have been made on based on the facts in those particular cases, rather than on a bright-line rule applying to all similar situations.

The *McNeely* court also pointed out that a key component of the destruction of evidence/exigent circumstances analysis is whether police could have obtained a warrant in time to prevent the evidence from being destroyed. In the time since *Schmerber* was decided, a number of advances—both technological and legal—have allowed for warrants to be obtained in a greatly expedited fashion. Indeed, prior to the *McNeely* decision many states already had expedited procedures in place for OMVWI cases and did not permit any nonconsensual blood draws without a warrant.

So, the *McNeely* decision did not say that warrants are required for every OMVWI blood draw, it simply ruled that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." However, the court did not provide much guidance on what factors might lead to a finding of exigency, allowing a warrantless blood draw. The main issue the court focused on was the technological advances in recent years allowing warrants to be obtained (electronically or telephonically) in an expedited fashion, suggesting that the key issue bearing on exigency in these cases will be whether police could have obtained a warrant in a reasonable time period. The court also suggested that future cases will provide more guidance on this issue.

Wisconsin has a statute (§968.12(3)) allowing for telephonic search warrants. Given the availability of this process, it seems likely that a warrant will be required prior to just about any nonconsensual OMVWI blood draw. If it is simply not possible to obtain a warrant (due to no judge being available, for example) then a warrantless blood draw might be permissible. And, future cases may outline other instances where a warrantless blood draw may be permitted. In the meantime, however, a safe assumption is that a warrant should be obtained for any nonconsensual blood draw.

A few other points:

- Remember that we are never permitted to draw blood "incident to arrest." *Schmerber* made it clear that physical intrusions to the body are beyond the scope of a search incident to arrest.
- The reasoning in *McNeely* applies to other circumstances where a nonconsensual blood draw would be considered (intoxicated use of a firearm; heroin overdose cases; etc.). A telephonic warrant should generally be obtained in these cases as well.
- A suspect can always consent to a blood draw, in both OMVWI and non-OMVWI cases.
- An initial process and template for obtaining these warrants has been released by the DA's office. Expect some further refinement to this process, as well as some additional guidance and training on these cases.