

The Fourth Amendment Protects Your Home from the Drug-Sniffing Dog

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The Supreme Court's 5-4 decision in *Florida v. Jardines* (No. 11-564), announced March 26, provides another interesting data point in the Court's attempts to harmonize law enforcement use of technology and the Fourth Amendment's limitations on warrantless searches. The three opinions illustrate the continuing disagreement among the Justices on how such privacy issues should be analyzed, as well as an unusual alignment in how the Justices came out on the merits.

Facts and Proceedings Below

This case arose from police use of a dog "trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, indicating the presence of any of these substances through particular behavioral changes recognizable by his handler." As understood by the Court, the police brought the dog and its police detective handler to the home of defendant Jardines. The dog was brought on a leash into Jardines' front yard and up onto the porch near the front door. The dog "apparently sensed one of the odors he had been trained to detect," and after "sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point." The handler then removed the dog from the property and advised another detective that there had been "a positive alert for narcotics." The police then obtained a search warrant based on that information, and a subsequent search of the house "revealed marijuana plants." Jardines was charged with "trafficking in cannabis."

The trial court suppressed "the marijuana plants on the ground that the canine investigation was an unreasonable search." The intermediate court of appeals reversed, and then the Florida

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Supreme Court reversed, restoring the suppression order. The U.S. Supreme Court granted *certiorari*.

Justice Scalia's Opinion of the Court

Justice Scalia authored the majority opinion, in which Justices Thomas, Ginsburg, Sotomayor and Kagan joined, holding that the canine investigation constituted a Fourth Amendment search requiring a warrant. His opinion employed a trespass analysis similar to that in his opinion of the court in *U.S. v. Jones*, 132 S.Ct. 945 (2012), where the majority found that when the police, without permission, attached a GPS tracking device to the suspect's car and monitored his movements, a Fourth Amendment search had occurred. That opinion was cited here for the proposition that 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.’”

Here the officers were “gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house,” which area “enjoys protection as part of the house itself.” The question then became whether the information gathering “was accomplished through an unlicensed physical intrusion.” Justice Scalia found that, based on custom and usage, a homeowner grants an implied license for people to walk in from the street and knock on the front door (or deliver mail or solicitation materials), which implied license extends to the police. However, Justice Scalia found there “is no customary invitation” to introduce “a trained police dog to explore the area around the home in hopes of discovering incriminating evidence.” Thus, there was no license, and because the “officers learned what they learned only by physically intruding on Jardines' property to gather evidence,” a Fourth Amendment search occurred.

The Three-Justice Concurrence

Justice Kagan wrote a concurring opinion in which Justices Ginsburg and Sotomayor joined. While joining in Justice Scalia's opinion, they would have preferred to analyze the police activity using the “reasonable expectation of privacy” standard described in *Katz v. United States*, 389 U.S. 347, 360 (1967). That test considers whether the individual had a subjective expectation of privacy and whether society is prepared to recognize that expectation as reasonable.

Justice Kagan saw the trained dog as a “supersensitive instrument” and the home as where shared “privacy expectations are most heightened.” She felt “police officers invade those shared expectations when they use trained canine assistants to reveal within the confines of a house what they could not otherwise have found there.” She thought the case was “resolved” by the Court's decision in *Kyllo v. United States*, 533 U.S. 27 (2001), where the court held that “police officers conducted a search when they used a thermal-imaging device to detect heat emanating from a private home, even though they committed no trespass.”

The Four Dissenters' Views

Justice Alito, joined by Chief Justice Roberts and Justices Kennedy and Breyer, felt that the police conduct “did not constitute a trespass and did not violate respondent's reasonable expectations of privacy” and thus “was not a search.”

Their analysis did not accept the proposition that the trained dog was something special. Rather, they stressed that dogs “have been domesticated for about 12,000 years” and “their acute sense of smell has been used in law enforcement for centuries.” They criticized the majority’s limit on the implied license to enter the property as “unfounded” and noted that “the Court has not found a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog on a leash.”

Under the *Katz* standard, they saw “no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where numbers of the public may lawfully stand.” They would “not draw a line between odors that can be smelled by humans and those that are detectable only by dogs.” They distinguish *Kyllo* “as a decision about the use of new technology,” stressing that a dog is “not a new form of ‘technology or a device.’”

So Where Are We?

By the slimmest of margins, one is protected by the Fourth Amendment from police use of trained dogs to sniff for narcotics outside the front door of one’s home. However, the Justices do not appear to share an analytical approach that suggests the outcome in future scenarios.

It is not clear that Justices Scalia and Thomas would have found a search in the absence of a trespass. It is not clear whether or under the circumstances a majority would find Fourth Amendment protection applying the “reasonable expectation of privacy” standard. Some readers of these opinions may well conclude that the result turned on whether a Justice chose to label a trained dog as “technology,” and that whether or not to assign such a label turned on gut feelings rather than articulated reasoning. Perhaps future decisions will yield greater clarity.