Florida v. Jardines

(March 28, 2013) __ U.S. __ [2013 WL 1196577]

Issues

(1) An officer walked a K9 to the front door of a suspect's home to see if the dog could detect drugs. Was this a "search"? (2) If so, was the search lawful under the implied consent rule?

Facts

A detective with the Miami-Dade Police Department received a tip that Joelis Jardines was growing marijuana inside his home. About one month later, the detective and a K9 handler walked a marijuana-detecting dog named Franky up to the front porch, at which point Franky began "energetically exploring the area for the strongest point source of that odor." After sniffing the base of the front door, Franky sat down "which is the trained behavior upon discovering the odor's strongest point." Having been on Jardines' property for one to two minutes, the officers left and obtained a search warrant which resulted in the seizure of marijuana plants. Jardines was charged with trafficking in cannabis.

On appeal, the Florida Supreme Court ruled that the marijuana plants should have been suppressed. Specifically, it ruled that the officers had conducted an unlawful "search" of the house when they and Franky entered Jardines' property. The State appealed to the U.S. Supreme Court.

Discussion

In a 5-4 decision, the Supreme Court ruled that whenever officers enter the front yard or other private property immediately surrounding a home (i.e., the "curtilage"), their conduct constitutes a "search" under the Fourth Amendment if their purpose was to "obtain information." And because that was the officers' purpose here, the Court ruled their entry constituted a search.

The question, then, was whether the search was permitted under some exception to the warrant requirement. The only exception that arguably applied here was implied consent. That is because it is settled that officers, like other uninvited callers, are impliedly authorized by the residents of homes to walk up to the front door for the purpose of speaking with them or delivering something. As the Court observed, "[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."

Thus, if the officers here had walked up to Jardines' door, knocked, and asked to speak with him, their "search" (i.e., their presence at the front door) would have been lawful because they were impliedly invited. As the Court explained:

> 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.

On the other hand, the Court observed that the residents of homes do not impliedly consent to having officers stay on their property for an extended period of time or engage in the kinds of activities that are not impliedly consented to. And one such activity, said

the Court, is "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." According to the Court:

> An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker [on the door]. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.

For these reasons, the Court ruled that, because Jardines did not impliedly consent to the officers' entry for the purpose of sniffing the air for marijuana, their entry constituted an unlawful search, and the evidence was properly suppressed.

Comment

As the result of this decision, a "search" now results if an officer walks up to the front door of a home to, lets say, sell a ticket to the Policeman's Ball. That is because the purpose of the officer's visit was to "gather information"; i.e., determine whether the occupants wanted to buy a ticket. The "search" would, of course, be legal under the implied consent rule, but it seems silly that such conduct would be classified by the Supreme Court as an intrusion of constitutional magnitude.

It is noteworthy that the writer of this opinion, Justice Antonin Scalia, based his ruling on an opinion he wrote in 2012 in which he concluded that, regardless of whether a person had a reasonable expectation of privacy in a place or thing, a search would result if officers "trespassed" upon it for the purpose of obtaining information. Most of our readers are familiar with the case: it was *U.S. v. Jones* in which the Court ruled that an officer's act of sticking a GPS tracker to the undercarriage of a car constituted a "search," even if the car was parked in a public place.

In *Jones*, Justice Scalia claimed that, before the concept of "search" became tied to reasonable privacy expectations—which occurred in 1967 in the landmark case of *Katz v. U.S.*[1]—the cases held that a "search" would result if officers committed a common-law "trespass."[2] And he expressly based his decision in *Jones* on these pre-*Katz* "trespassing" cases. But no such cases exist.

That was the finding of Orin Kerr, who is an expert on the Fourth Amendment and a respected law professor at George Washington University. As Prof. Kerr was reading *Jones* (and its 19 references to "trespassing") it occurred to him that he could not remember a single pre-*Katz* case that was based on a trespassing theory. So he reexamined all the relevant cases and found that none of them—none—supported Justice Scalia's claim.[3] In other words, the Court's decision in *Jones* was without legal foundation.

It appears that Justice Scalia became aware of this little problem after he wrote *Jones* because, in writing *Jardines,* he entirely eliminated the word "trespass" and replaced it with the more inexact word "intrusion" or a variant. Why does this matter? Because

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[1] (1967) 389 U.S. 347.

[2] *United States v. Jones* (2012) 565 U.S. __ [132 S.Ct. 945, 949] ["Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."].

[3] See Kerr, Orin, "The Curious History of Fourth Amendment Searches" in the 2013 edition of *Supreme Court Review*, University of Chicago School of Law.

Jardines was based on *Jones*, and *Jones* was based on cases that never existed. Thus, although both decisions purport to be based on preexisting law, they are not.

But despite its dubious pedigree, *Jardines* is not irrational and, in any event, it is now the law of the land. So officers need to know how it will affect them. Of particular importance is its impact on "knock and talks." Although the Court acknowledged that officers, like any other callers, have implied consent to walk to the front door to speak with the residents, *Jardines* would likely render a "knock and talk" unlawful if they engaged in conduct on the property that was beyond the degree of intrusiveness that residents normally expect from uninvited callers. That might occur, for example, if the officers remained standing at the front door for an extended period of time without knocking, or if the residents indicated they did not want to talk to the officers but they stayed nevertheless and tried to convince them to change their minds. In addition, as the dissent observed, officers "must stick to the path that is typically used to approach a front door, such as a paved walkway." Accordingly, they "cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use."

Finally, it is possible that *Jardines* would not apply if the suspect lived in an apartment or condominium, and the officers and K9 simply walked to the front door on a walkway that could be used freely and without restriction by visitors, including Girl Scouts and trick-or-treaters. This is because their presence there would constitute neither an "intrusion" nor a "trespass." POV

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