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7th Circuit stretches *Jardines* beyond the single-family house

Cars, clothes and food cost money.

But why should the privacy protected by the Fourth Amendment?

The 7th U.S. Circuit Court of Appeals recently confronted this question in *U.S. v Lonnie Whitaker* (Nos. 14-3290 and 14-3506, decided April 12, 2016). And it responded by making Fourth Amendment privacy a little more affordable to those of us in the bottom 99 percent of the income scale.

Acting on a tip that drugs were being sold from an apartment, Madison, Wis., police brought Hunter, a drug-sniffing dog, to the building where the apartment was located. Since the tip concerned Apartment 204, the officers took Hunter into the building's locked hallway and up to the second floor.

Hunter eventually alerted on Apartment 204, a search warrant was obtained and the officers recovered a variety of contraband drugs and weapons. They then brought charges against the occupant, Lonnie Whitaker. He was subsequently convicted of drug and firearm crimes.

On appeal, Whitaker asked the 7th Circuit to review the denial of his pretrial suppression motion, contending the U.S. District Court erred by finding he had no expectation of privacy in the apartment building's common hallway.

The issue centered upon the Supreme Court's recent decision in *Florida v. Jardines*, 133 S.Ct. 1409 (2013). There the police used a drug-sniffing dog within a single-family home's curtilage.

The court began by noting there are two discrete ways government activity can constitute a search. One way is for the government to impinge in some way on a person's reasonable expectation of privacy. *Katz v. U.S.*, 389 U.S. 347 (1967). But a second, separate way is for the government to engage in an "unlicensed physical intrusion" into a "constitutionally protected area."

Jardines held the government's act of bringing the drug-sniffing dog into the curtilage of the home with the purpose of discovering whether the home contained contraband drugs constituted an "unlicensed physical intrusion." The fact that the police did this without a warrant made this an unreasonable search.

But three members of the majority — in an opinion written by Justice Elena Kagan and joined by Ruth Bader Ginsburg and Sonia M. Sotomayor — filed a concurring opinion in which they said the case could also have been resolved solely through the *Katz* approach.

In 2001, the court held the government's use of a thermal imager pointed at a house to measure whether escaping heat indicated evidence of a marijuana-growing operation inside constituted a search that would require a warrant. *Kyllo v. U.S.*, 533 U.S. 27 (2001). So too, the use of the dog in *Jardines* was a *Katz* search because it could discover information from inside the house that was otherwise unknowable without a physical intrusion.

The government in *Whitaker* argued it did not need a warrant for its drug-sniffing dog. It distinguished *Jardines* by noting that while *Jardines* had rights in his home's curtilage, Lonnie Whitaker did not have a reasonable expectation of complete privacy in his apartment hallway. Thus, the government argued, the warrantless dog sniff of Whitaker's apartment was no different from the warrantless dog sniffs in public places approved by the court in *U.S. v. Place*, 462 U.S. 696 (1983) (luggage at airport) and *Illinois v. Caballes*, 543 U.S. 405 (2005) (traffic stop).

The 7th Circuit dodged the "hallway" issue. It conceded Whitaker did not have a "reasonable expectation of complete privacy" in the hallway but asserted this "does not also mean that he had no reasonable expectation of privacy against persons in the hallway snooping into his apartment" through the use of sensitive devices like the dog.

It is refreshing to see a court acknowledge that Fourth Amendment "privacy" is not something possessed equally by everyone.

But *Whitaker* ultimately rejected the government's position by relying on Kagan's concurring opinion in *Jardines* that focused on analogizing the use of the drug-sniffing dog with the use of the thermal imager in *Kyllo*. It held the dog is a "sophisticated sensing device" used to detect information inside the apartment that would not otherwise be knowable without a physical intrusion into the apartment.

And by basing its decision on *Kyllo*, it also rejected the government's alternative argument that it had acted in good faith.

What is particularly significant is the court's assertion that, if it did not extend *Jardines* to apartment-dwellers, it would be discriminating against a large group of Americans. The *Whitaker* court noted:

"A strict apartment versus single-family house distinction is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race and ethnicity. For example, according to the census's American Housing Survey for 2013, 67.8 percent of households composed solely of whites live in one-unit detached houses. For houses solely composed of blacks, that number dropped to 47.2 percent. And for Hispanic households, that number was 52.1 percent. The percentage of households that live in single-unit, detached houses consistently rises with income. At the low end, 40.9 percent of households that earned less than $10,000 live in single-unit, detached houses, and, at the high end, 84 percent of households that earned more than $120,000 did so. (Cite omitted)"

It is refreshing to see a court acknowledge that Fourth Amendment "privacy" is not something possessed equally by everyone. The late William Stuntz once said that "privacy, as Fourth Amendment law defines it, is something people tend to have a lot of only when they also have a lot of other things." William J. Stuntz, "The Distribution of Fourth Amendment Privacy," 67 Geo. Wash. L. Rev. 1265, 1267 (1999). Privacy is related to class.

Stuntz argued that an overemphasis on privacy too often raised the cost of investigating the crimes of the upper and middle classes and thus encouraged overenforcement of crimes of the lower classes. If a strict warrant requirement makes it difficult to search upper- and middle-class homes, then the police will have an incentive to concentrate on open-air drug markets in poor neighborhoods.

It is significant that the 7th Circuit has acknowledged the resolution of legal issues often cannot be artificially divorced from class and economic issues in America.

CRIMINAL PROCEDURE

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