The Legal Intelligencer

Supreme Court Considers Fourth Amendment Challenges

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Stephen A. Miller and Jordan S. Fox

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The Nose Knows

Acting on a tip, Miami police officers went to the home of Joelis Jardines with Franky, a chocolate Labrador retriever trained to detect the scent of marijuana. Franky was put on an extended leash and allowed to walk up to Jardines' porch, where he alerted to the presence of marijuana inside the house. The police officers presented this evidence to a magistrate judge, who promptly granted a search warrant. Police executed the warrant and discovered several marijuana plants growing within the house.

The use of drug-sniffing dogs is a common police tool that the court has consistently condoned. As recently as 2005, in *Caballes v. Illinois*, the Supreme Court reaffirmed its precedent that use of a drug-sniffing dog does not in itself constitute an invasion of a suspect's reasonable expectation of privacy because "any interest in possessing contraband cannot be deemed legitimate, and thus governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest." To the extent that drug-sniffing dogs are trained only to alert police officers as to the presence or absence of narcotics, the court has held that their use does not constitute a search such that the Fourth Amendment protections would be triggered.

The court has only applied this rationale, however, in the context of searches in public spaces. The *Florida v. Jardines*court will, for the first time, consider whether this rationale is controlling for searches of a defendant's home. There is good reason to think that the court will again vindicate the sanctity of a defendant's home, even for an unintrusive search like a dog sniff.

For example, in *Kyllo v. United States* (2001), the court held that the Fourth Amendment barred the

warrantless use of heat-sensing infrared cameras to scan a home for indoor marijuana cultivation. Faced with the argument that such cameras disclose only the presence or absence of contraband, Justice Antonin Scalia issued the retort that such cameras could indeed disclose "at what hour each night the lady of the house takes her daily sauna and bath — a detail that many would consider intimate." Drug-sniffing dogs would seem to raise the same sort of concerns.

The heightened privacy interest in the home was plainly on the justices' minds at oral arguments. The justices peppered both sides' lawyers with questions concerning curtilage, implied consent and "no dog" signs. Perhaps most revealing to the court's thinking on this question was Scalia's statement: "It seems to me crucial that this officer went onto the portion of the house as to which there is privacy, and used a means of discerning what was in the house that should not have been available in that space." This last phrase — "in that space" — will likely prove dispositive.

Support for that notion is found in the fractured reasoning of the court's holding in *United States v. Jones* (2011). In that case, the court unanimously agreed that the police required a warrant to track a defendant's car with a GPS device, but the justices splintered 5-4 in their answers to why this was so. In his majority opinion, Scalia stressed the common-law trespass that occurred when the police installed the GPS device on the defendant's car without permission. By the same token, in *Jardines*, those same five justices may reapply this reasoning to impose a limit on the use of dog searches.

Search and Detain

The court also recently heard arguments in *Bailey v. United States*. In this case, police arrived at a house after obtaining a search warrant. Before they executed the warrant, they observed two men, both of whom matched a tipster's description, leaving the house. The police followed the men almost a mile before they pulled them over and detained them, eventually placing both in handcuffs, searching them and bringing them back to the home. Police discovered a key in one of the men's pockets that was later confirmed to match the door of the home to be searched; further evidence discovered at the home confirmed the identity of the man as the owner of the home described in the warrant. Police subsequently arrested both men. One of these men, Chunon Bailey, challenged his eventual conviction on the grounds that his detention was unreasonable in violation of the Fourth Amendment.

The lower courts upheld the detention, relying on *Michigan v. Summers* (1981), in which the court held that police were permitted to detain someone they discover at a house when executing a search warrant. Bailey argued that the rationales underlying *Summers* — to protect the officers' safety, to facilitate the orderly completion of the search, and to prevent flight of the suspect — were inapplicable once the suspect was no longer within the immediate vicinity of the place to be searched.

In this regard, the petitioner pressed the court to analogize *Bailey* to *Arizona v. Gant* (2009). In that case, a narrowly divided court held that, when an officer handcuffs and detains an individual in a squad car, a search requires a warrant or other indicia of reasonableness; in that situation, the normal justifications that permit a search-incident-to-arrest of the individual's vehicle (namely, officer safety) are not present. In his concurring opinion in *Gant*, Scalia reluctantly gave the majority its deciding vote, and he stressed the undesirability of granting police automatic approval to search a vehicle whenever an arrest is made.

Scalia picked up that same theme at oral argument in *Bailey*. He criticized the government's argument as "so contrary to what seems to me the theory of the Fourth Amendment" and characterized its position as calling for a "special rule which says once you have a warrant that this place can be searched, you can seize anybody — you can seize not only anybody there in order to protect the police, but anybody connected to the place." As in *Gant*, the breadth of the government's position may prove to be its undoing in *Bailey*.

The court appears poised this term to enforce limits on searches of a defendant's home and seizures of defendants leaving their homes prior to a lawful search. In so doing, the court would be relying on principles articulated in its opinions from recent terms. It will be interesting to see what new seeds the justices plant in this term's opinions for future harvest. •

Stephen A. Miller *practices in the commercial litigation group at Cozen O'Connor's Philadelphia office. Prior to joining Cozen O'Connor, he clerked for Justice Antonin Scalia on the Supreme Court and served as a federal prosecutor for nine years in the Southern District of New York and the Eastern District of Pennsylvania.*

Jordan S. Fox *also practices in the commercial litigation group at the firm in Philadelphia. He is a graduate of Harvard University and the University of Virginia School of Law.*
