

## FOURTH AMENDMENT: DRUG DOGS ON A DRIVEWAY

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Police departments commonly use drug dogs to detect the presence of illegal narcotics.<sup>1</sup> In a recent case, *United States v. Beene*, the Fifth Circuit held that the use of a dog to find narcotics within a car parked in the defendant's driveway was not a search.<sup>2</sup> The Fifth Circuit erred in its reasoning. The scenario in *Beene* constituted a search, and the Supreme Court should evaluate the Fifth Circuit's decision.

In *Beene*, the police received an anonymous tip that defendant Rickey Beene had pointed a gun at people on a street.<sup>3</sup> Police went to Beene's residence and watched him pull into his driveway and get out of the car.<sup>4</sup> The officers arrested him because they believed they had probable cause based on the anonymous tip.<sup>5</sup> Upon seeing her husband handcuffed and placed in the back of a police vehicle, Beene's wife came running outside, yelling at the officers.<sup>6</sup> An officer asked if they could check her husband's car for a gun, at which point she demanded a warrant.<sup>7</sup> Another officer then arrived at the scene with a drug dog, which detected narcotics in the vehicle.<sup>8</sup> Using the dog's alert as justification, the police searched Beene's car and found marijuana, a substantial amount of cash, and a handgun.<sup>9</sup>

The Fifth Circuit Court of Appeals held that the driveway was an "open field" rather than part of the home's "curtilage," or the area immediately surrounding a home.<sup>10</sup> As an open field, the driveway constituted a public space.<sup>11</sup> The court found that because the use of drug

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<sup>1</sup> Jennifer Oldham, *Drug-Sniffing Dogs Pose a Problem in States that Legalized Marijuana*, BLOOMBERG BUSINESSWEEK (Aug. 22, 2013), <http://www.bloomberg.com/news/articles/2013-08-22/drug-sniffing-dogs-pose-a-problem-in-states-that-legalized-marijuana>.

<sup>2</sup> *United States v. Beene*, No. 14-30476, 2016 WL 890127, at \*5 (5th Cir. 2016).

<sup>3</sup> *Id.* at \*1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*4; *United States v. Dunn*, 480 U.S. 294, 300 (1987). The curtilage enjoys additional protections because it is "intimately linked to the home, both physically and psychologically" and is where "privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

<sup>11</sup> *Beene*, 2016 WL 890127, at \*5.

dogs in public spaces is typically not a search under the Fourth Amendment, the officer's use of the dog in the driveway was not a search either.<sup>12</sup>

The Supreme Court has held that whether the use of a dog constitutes a search depends on where it is used. In *United States v. Place*, the Court held that if law enforcement officers use a drug dog in a public space, such as an airport, it generally does not comprise a search under the Fourth Amendment because an individual has a lower expectation of privacy in a public space.<sup>13</sup> In contrast, the Court held in *Florida v. Jardines* that the use of a drug dog on the front porch of a home—part of the home's curtilage—constitutes a search because an individual has a greater expectation of privacy in the curtilage of one's home.<sup>14</sup> In *Beene*, the Fifth Circuit should have considered the driveway part of the home's curtilage, rendering the use of a drug dog a search. The car parked in the driveway was merely five to seven feet from the home itself, not much farther from the main structure of the home than the porch in *Jardines*.<sup>15</sup> Furthermore, the driveway can hardly be analogized to the airport in *Place*, a public place open to hundreds of other travelers; *Beene* had a greater expectation of privacy on his driveway, which was never open to the public in that manner.

What makes the police officer's actions in *Beene* egregious is that a drug dog meets the definition of a sensory enhancing device—a tool which allows law enforcement to learn information they could not using ordinary human senses—which the Supreme Court has found to be an indicator of a Fourth Amendment search.<sup>16</sup> In *Kyllo v. U.S.*, the Supreme Court held that police officers' use of a sensory enhancing device, specifically a thermal imaging device, to detect the presence or absence of heat was an indicator of a search.<sup>17</sup> According to Alexandra Horowitz, a researcher at Barnard College, a drug dog is capable of detecting a teaspoon of sugar in a million gallons—or two Olympic sized swimming pools—of water, and can be trained to detect the presence or absence of many substances.<sup>18</sup> A drug dog's powerful sense of smell, like the

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<sup>12</sup> *Id.* at \*5.

<sup>13</sup> *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that agents' use of a trained canine on defendant's luggage, exposed to the public in an airport, did not constitute a search).

<sup>14</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013).

<sup>15</sup> *Louisiana: Federal Judge Oks Drug Dog Search in Driveway*, THE NEWSPAPER (Oct. 25, 2013), <http://www.thenewspaper.com/news/42/4239.asp>.

<sup>16</sup> *See Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that the use of a thermal imaging device to measure heat emanating from a home was a search); *see also Jardines*, 133 S. Ct. at 1418 (Kagan, J., dissenting) (“drug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information to their human partners”).

<sup>17</sup> *Id.*

<sup>18</sup> Peter Tyson, *Dogs' Dazzling Sense of Smell*, PBS: NOVA (Oct. 4, 2012),

thermal imaging device in *Kyllo*, allows a police officer to get much more information than he could relying on his own senses, and thus justifies labeling the police actions in *Beene* a search.

Dissenting Judge Graves in *Beene* voiced his concerns about the consequences of the decision. He argued that the Fifth Circuit's ruling, which brought residential driveways under the definition of a public space, would allow police officers to indiscriminately sweep residential driveways, yards, and common areas in apartments.<sup>19</sup> By ruling that there was no search, the court pushed the scenario of a drug dog on a homeowner's driveway outside the purview of the Fourth Amendment.

The Fifth Circuit's decision also has second order consequences for what a police officer may do. For instance, in *Beene*, police initially had no justification to search Mr. Beene's car. In fact, they asked his wife's permission to search.<sup>20</sup> After the drug dog reacted to the car, it likely furnished the police with reasonable suspicion that there was evidence of a crime in the car, which the Supreme Court has held justifies a stop and limited search under the Fourth Amendment.<sup>21</sup> From Judge Graves' perspective, the suspicion was based on a search lacking justification and thus contravened the Fourth Amendment.<sup>22</sup>

By not finding the use of a drug dog on a residential driveway a search, the Fifth Circuit has furnished police officers with more freedom than Fourth Amendment precedent provides; the Supreme Court should grant certiorari to examine the Fifth Circuit's decision.

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<http://www.pbs.org/wgbh/nova/nature/dogs-sense-of-smell.html>.

<sup>19</sup> *United States v. Beene*, No. 14-30476, 2016 WL 890127, at \*17 (5th Cir. 2016) (Graves, J., dissenting).

<sup>20</sup> *Id.* at \*16.

<sup>21</sup> *See Illinois v. Wardlow*, 528 U.S. 119, 124 (holding that defendant's unprovoked flight upon noticing police officers warranted a stop and limited search).

<sup>22</sup> *Id.*