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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2011AP002956CR

Circuit Court Case No. 2010CF003377

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant.

An Appeal From an Order Denying Motion to Suppress Evidence and a Judgment of Conviction entered by Branch 12 of the Milwaukee County Circuit Court, the Honorable David Borowski, Presiding

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Supplemental Brief of the Defendant-Appellant

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SUPPLEMENTAL ARGUMENT

Scull incorporates herein by reference all of the arguments made in his initial brief and his reply brief. He now provides this supplemental argument based on the court's written order dated September 3, 2013. This brief addresses the applicability of ***Jardines*** and whether the ***Jardines*** holding should be applied retroactively.

I. THE DOG SNIFF AT THE FRONT DOOR WAS AN UNREASONABLE SEARCH AS RULED BY THE U.S. SUPREME COURT IN JARDINES.

While this appeal was pending, the United States Supreme Court handed down its decision in ***Florida v. Jardines***, 133 S.Ct. 1409, 185 L.Ed. 495 (2013). A copy of the ***Jardines*** opinion was previously provided to the court. ***Jardines*** involved exactly the same issues as those presented in Scull's motion to suppress evidence.

Jardines involved a "dog sniff" of the front door of a suspect's home, without a warrant and without any pretext of going to the home to contact the suspect or anyone else at the property. The Florida Supreme Court held that this constituted a Fourth Amendment violation and the United States Supreme Court affirmed. The court held that although there is a customary invitation allowing visitors to approach a home and knock on the front door, this invitation does not permit law enforcement officers to physically invade the curtilage of a home solely to investigate suspicions of a marijuana grow operation. Therefore, the dog sniff on the defendant's front porch was an invasion of the defendant's curtilage for the purposes of obtaining information and was a trespass which violated the Fourth Amendment.

This court should apply an identical line of reasoning as the ***Jardines*** court. The front porch was within the curtilage of Scull's home. The police presence on Scull's front porch for the sole purpose of obtaining evidence to support a search warrant was a trespass. And because the trespass was for the purposes of obtaining information, it was a search within the meaning of the Fourth Amendment. And because the remedy in ***Jardines*** was suppression of the

evidence, this court must reach the same result and suppress the evidence of the dog's alert. And without the evidence of the drug sniffing dog's alert, law enforcement had no probable cause to support a warrant to search the inside of Scull's home. All evidence that resulted from that search must be suppressed and excluded from use at trial.

In ***U.S. v. Peter***, the prosecution acknowledged that the ***Jardines*** facts were nearly identical to the facts in ***Peter***. 2013 U.S. Dist. LEXIS 91874 (N.D. Ind. July 1, 2013). Scull hopes that the State in this case makes a similar acknowledgement. The State, in their response brief, did acknowledge that ***Jardines*** was on point and that if the U.S. Supreme Court ruled that the front-door dog sniff was not a search, this ruling would be dispositive of Scull's claim. (State Resp. Br. at 4). The same logic should apply even though the U.S. Supreme Court ruled that the dog sniff was a search (as opposed to not a search) requiring probable cause.

II. JARDINES SHOULD BE APPLIED RETROACTIVELY.

Whether Jardines should be applied retroactively is governed by ***Griffith v. Kentucky***, 107 S.Ct. 708 (1987). In ***Griffith***, the U.S. Supreme Court held that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final. Scull's case was pending on direct appeal at the time ***Jardines*** was decided. As such, ***Jardines*** applies retroactively to this court's analysis of the search.

III. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY.

Scull extensively responded to the State's prior argument regarding the applicability of the good faith exception to the exclusionary rule in his reply brief. Scull briefly touches on this issue now in light of the ***Jardines*** opinion and in light of ***Davis v. United States*** as outlined below.

In ***Davis v. United States***, 131 S. Ct. 2419 (2011), the Supreme Court considered what remedies are available when

appellate courts hand down Fourth Amendment rulings expanding Fourth Amendment rights beyond the state of prior case law. When that happens, the officer may have taken steps that were thought to be lawful at the time but later held to be unlawful. According to ***Davis***, the exclusionary rule does not apply to Fourth Amendment violations when the officer had acted "in objectively reasonable reliance on binding appellate precedent" that had allowed the officer's acts.

Davis established a bright-line rule pursuant to which the police were in strict compliance with then-binding law and not culpable in any way. In this case, the police officer could not have objectively relied on binding appellate precedent because there was no binding appellate precedent in place at the time of the search. The dog sniff cases outlined by the State in their response brief dealt with dog sniffs related to automobile searches. Those cases did not involve the police bringing a drug sniffing dog to the front door of an individual's residence. As this court knows, a person's expectation of privacy is heightened in one's home as opposed to one's automobile.

CONCLUSION

Based on the argument and authorities presented herein and in his initial briefs, the Defendant-Appellant respectfully requests this Court to reverse the circuit court's judgment and remand the case with directions to the circuit court to enter an order granting the suppression motion based on the unreasonable search.

Dated this ___ day of October, 2013.

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CERTIFICATION

I hereby certify that this supplemental brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b)&(c) for a brief

produced with a proportional serif font. The length of this supplemental brief is 890 words.

I hereby certify that an electronic copy of this supplemental brief was submitted, which conforms to the rules contained in Wis. Stat. § 809.19(12). I also certify that the text of the electronic copy of the supplemental brief is identical to the text of the paper copy of the supplemental brief.

Dated this ___ day of October, 2013.

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Basil M. Loeb