STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2956-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING AN ORDER DENYING MOTION TO SUPPRESS EVIDENCE ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant-petitioner, Gary Monroe Scull, appeals a published opinion of the court of appeals, *State v. Scull*, 2014 WI App 17, ¶ 22, 352 Wis. 2d 733, 843 N.W.2d 859 (Pet-Ap. 7).[1] The court of appeals affirmed the Milwaukee County Circuit Court's decision denying Scull's motion to suppress drug evidence recovered during the execution of a search warrant for his residence in 2010. *Scull*, 352 Wis. 2d 733, ¶¶ 3-8 (Pet-Ap. 2-3).

The court of appeals held that although the United States Supreme Court's subsequent decision in *Florida v. Jardines*, 569 U.S. __, 133 S. Ct. 1409 (2013), established that the police violated Scull's Fourth Amendment rights when they brought a drug detection dog to his front door without a warrant or probable cause, the good-faith exception to the exclusionary rule applied to the related search warrant that the officers obtained based, in part, on the improper dog sniff. *Scull*, 352 Wis. 2d 733, ¶ 1 (Pet-Ap. 1-2).[2]

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[1]The court of appeals opinion is appended to the petitioner's brief (Pet-Ap. 1-10).

[2] The court noted that:

> Scull argues that the State forfeited its right to argue that the good-faith exception applies because it did not raise the issue before the circuit court. We disagree. First, we may affirm a circuit court's decision on any grounds. *See State v. Milashoski*, 159 Wis. 2d 99, 108-09, 464 N.W.2d 21 (Ct. App. 1990). Second, the good-faith exception never came up before the circuit court because the circuit court ruled on the issue prior to the United States Supreme Court's decision in *Jardines* and concluded that the dog sniff was not a search. Therefore, the circuit court did not need to explore the contours of the exclusionary rule in this case.

ARGUMENT

ALTHOUGH *JARDINES* NOW ESTABLISHES THAT THE DOG SNIFF AT SCULL'S DOOR WAS A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT, THE GOOD FAITH EXCEPTION APPLIES AND SUPPRESSION OF THE EVIDENCE RECOVERED IS NOT REQUIRED.

A. *Jardines.*

The relevant facts in *Jardines* are virtually identical to the facts in this case. In both cases, police received information from a confidential informant that the defendant was manufacturing/delivering illicit drugs. Based on the tip, officers went to the defendant's home with a trained drug detection dog and had the dog sniff around the front door area. Based on the dog's alert to the odor of drugs, the officers then obtained a search warrant for the residence and eventually discovered illegal drugs when they executed the warrant.

Under these circumstances, the Supreme Court held for the first time that the dog sniff was a "search" under the Fourth Amendment:

> At the [Fourth] Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.
>
> We therefore regard the area "immediately surrounding and associated with the home" – what

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Scull, 352 Wis. 2d 733, ¶ 13 n.3 (Pet-Ap. 5, 10). The court of appeals was correct, and Scull has chosen not to pursue his forfeiture argument in this court.

> our cases call the curtilage – as "part of the home itself for Fourth Amendment purposes."

Jardines, 133 S. Ct. at 1414 (citations omitted). The court recognized that police officers without a warrant, like private citizens, have an "implied license" to approach and knock on a suspect's door with the hope of speaking to the suspect. *Id*. at 1415-16. The court held, however, that deploying a drug detection dog was an "unlicensed physical intrusion" into the constitutionally protected area of the home and its curtilage. *Id*.

The Supreme Court also cited its decision in *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that law enforcement's use of a thermal-imaging device to detect heat emanations from a home believed to contain a marijuana-growing operation constituted a Fourth Amendment "search," which is presumptively unreasonable without a warrant), and noted that: "[S]urveillance of the home is a search where 'the Government uses a device that is not in general public use' to 'explore details of the home that would previously have been unknowable without *physical intrusion*.'" *Jardines*, 133 S. Ct. at 1417 (citation omitted) (emphasis in original). The court explicitly held that: "The government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Jardines*, 133 S. Ct. at 1417-18.

In light of *Jardines*, it is <u>now</u> clear that the dog sniff at Scull's front door was a Fourth Amendment "search." *Jardines*, however, was a significant and novel development in the law regarding the government's use of drug detection dogs. The dog sniff at issue in this case took place well before that decision came down, and the existing law at that time strongly indicated that it was permissible.

B. The Law Before *Jardines*.

Not only was *Jardines* the first controlling case to take up the issue of whether a dog sniff outside the front door to a house is a search under the Fourth Amendment, the decision was a significant and novel development in the law. Prior to *Jardines*, two lines of cases in particular supported the position that such dog sniffs were not searches. The first line held that dog sniffs were not searches; the second line established that people do not have a reasonable expectation of privacy in walkways and entryways to houses.

When the police conducted the dog sniff at Scull's front door, courts consistently had held that dog sniffs simply were not Fourth Amendment searches.

The United States Supreme Court first held that a dog sniff is not a search in *United States v. Place*, 462 U.S. 696 (1983). *Place* involved a dog sniff of luggage at an airport. The United States Supreme Court held that the dog sniff was not a search. It noted that dog sniffs were limited both in scope and what they revealed:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis.* We are aware of no other investigative

> procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.

Id. at 707.

The Supreme Court reached a similar conclusion in *Illinois v. Caballes*, 543 U.S. 405 (2005). *Caballes* involved a dog sniff around a vehicle. In that case, the court reaffirmed its decision in *Place* that dog sniffs by well-trained drug detection dogs do not generally "implicate legitimate privacy interests" because they only reveal contraband. *Caballes*, 543 U.S. at 408-09.

This court took up the issue of whether dog sniffs are searches in *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748. *Arias* involved a dog sniff around a vehicle in a public place just like *Caballes* did. This court held that the dog sniff was not a search. It discussed *Place* and *Caballes* and noted that it historically interpreted "Article I, Section 11 of the Wisconsin Constitution in accord with the [United States] Supreme Court's interpretation of the Fourth Amendment." *Arias*, 311 Wis. 2d 358, ¶¶ 14-16, 20. The court provided two reasons for continuing the practice for dog sniffs. First, it "note[d] that there is no constitutionally protected interest in possessing contraband" under either the United States or the Wisconsin Constitution. *Id.* ¶ 22. Second, it explained that "a dog sniff is much less intrusive than activities that have held to be searches" because "a dog sniff gives limited information that is relevant only to contraband for which there is no constitutional protection." *Id.* ¶ 23 (citation omitted).

In addition to the cases holding that dog sniffs were not searches under the Fourth Amendment, the law in Wisconsin indicated that individuals did not have a reasonable expectation of privacy in the walkways and entryways to their houses.

In *State v. Edgeberg*, 188 Wis. 2d 339, 524 N.W.2d 911 (Ct. App. 1994), our court of appeals held that police

do not conduct searches just by entering public access ways to private houses. The officer in *Edgeberg* went to a house in response to complaints of a barking dog. *Id.* at 342. He went through a screened door, and into a screened-in porch area, to get to a house's front door. *Id.* at 343. He saw marijuana plants in plain view inside the house as he knocked on the front door. *Id.* at 344. He got a search warrant based on his observations and recovered the marijuana. *Id.* The defendant moved to suppress the marijuana, arguing that the officer saw the marijuana plants during an illegal search. This court held that the officer was not searching when he saw the marijuana. It distinguished public entryways from curtilage:

> Regarding protected areas in residential premises, " '[a] sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy in regard to observations made there.' " 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.3(c) at 392-93 (2d ed. 1987). " '[P]olice with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public' " and in doing so " 'are free to keep their eyes open....' " [*Id.*] at 393. This means that if police use normal means of access to and from the house for some legitimate purpose, it is not a fourth amendment search for police to see from that vantage point something in the dwelling. *Id.* at 393–94.

Id. at 347 (citations omitted). Together with the dog sniff cases, *Edgeberg* strongly supported a good-faith,

reasonable belief that deploying a drug detection dog at the public entryway to Scull's residence was permissible.[3]

C. The Good-Faith Exception.

The good-faith exception applies when excluding evidence will not advance the purposes behind the exclusionary rule.

This court discussed the exclusionary rule at length in *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. The court emphasized that it is "a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." *Id*. ¶ 35 (citing *Herring v. United States*, 555 U.S. 135, 141 (2009)). "That means that just because a Fourth Amendment violation has occurred does not mean the exclusionary rule applies. [R]ather, exclusion is the last resort. The application of the exclusionary rule should focus on its efficacy in deterring future Fourth Amendment violations." *Id*. As a result, "the exclusionary rule should be applied as a remedy to deter police misconduct and most appropriately when the deterrent benefits outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system." *Id*. ¶ 38.

The *Dearborn* court also noted that "the exclusionary rule serves to deter deliberate, reckless, or

[3]At the time, the vast majority of courts in other jurisdictions agreed. Numerous courts—including the Seventh Circuit and Eastern District of Wisconsin—had held that dog sniffs at private residences were not searches, when conducted in public entryways or when conducted by an officer with authority to be inside a house. *See United States v. Brock*, 417 F.3d 692 (7th Cir. 2005); *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997); *United States v. Jones*, 2011 WL 294842 (E.D. Wis. Jan. 26, 2011); *United States v. Broadway*, 580 F. Supp. 2d 1179 (D. Colo. 2008); *United States v. Tarazon-Silva*, 960 F. Supp. 1152 (W.D. Tex. 1997); *People v. Jones*, 755 N.W.2d 224 (Mich. Ct. App. 2008); *Fitzgerald v. State*, 864 A.2d 1006 (Md. 2004); *Porter v. State*, 93 S.W.3d 342 (Tex. Ct. App. 2002); *but see United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988), *and United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985).

grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Dearborn*, 327 Wis. 2d 252, ¶ 36 (quoting *Herring*, 555 U.S. at 144). The court then explained that the test for determining whether an officer's reliance on current precedent was reasonable "is an objective one, querying 'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Id*. (quoting *Herring*, 555 U.S. at 145) (emphasis added). As the United States Supreme Court stated in *Herring*, "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Herring*, 555 U.S. at 143 (emphasis added).

Both the United States Supreme Court and this court have held that the good-faith exception applies in cases like this one, in which police objectively relied on a search warrant.

In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court held that the exclusionary rule should not be applied to suppress evidence police obtained while executing a later-invalidated search warrant, provided that their reliance on the search warrant was objectively reasonable. *Id.* at 922. The court reasoned that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.*

In addition, the *Leon* court explained that:

> "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness" for "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some

> circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Leon, 468 U.S. at 922-23 (citations omitted). The court then described a number of situations in which reliance on a warrant would not be objectively reasonable, none of which is analogous to this case. The list included: instances of falsehood on an affidavit, in which a magistrate judge wholly abandoned his role, in which an affidavit was '"so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,"' or in which a warrant fails to particularize "the place to be searched or the things to be seized." *Id.* at 923 (citation omitted).

In *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, this court adopted the good faith exception to the exclusionary rule, holding that "where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good-faith exception to the exclusionary rule applies." *Id.* ¶ 74. The court also held that two additional requirements must be met for the good faith exception to apply in Wisconsin:

> [I]n order for a good faith exception to apply, the burden is upon the State to show that the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney.

Eason, 245 Wis. 2d 206, ¶ 74. The court engaged in the same cost-benefit analysis performed in *Leon* and applied the good-faith exception:

> The police would not be deterred because they reasonably relied upon a warrant issued by an independent magistrate. Excluding evidence would punish the officers, and society, for an error of the magistrate. No deterrence would result. . . . [T]he exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law

> enforcement activity." *Leon*, 468 U.S. at 919, 104 S.Ct. 3405.

Eason, 245 Wis. 2d 206, ¶ 73. The same rationale applies here.

A court commissioner issued the warrant in this case based on his review of a supporting affidavit from a law enforcement officer with nineteen years' experience (32:1-4). That affidavit not only detailed the investigation of Scull's suspected drug dealing, including the drug dog's credentials and alert at Scull's residence, it was "reviewed and approved by ADA Christopher Ladwig" (32:4). Scull has never claimed that the court commissioner who issued the warrant was not "detached and neutral," nor has he argued that the prosecutor who reviewed and approved the warrant affidavit was not "a knowledgeable government attorney." *Eason*, 245 Wis. 2d 206, ¶ 74. Instead, he focuses exclusively on the propriety of the dog sniff, as determined by *Jardines*.

In doing so, Scull ignores the fact that, before *Jardines* was decided, the dog sniff at his front door would have been lawful according to the existing law in many jurisdictions, including Wisconsin. Given the state of law at the time of the investigation and dog sniff, Scull cannot fairly characterize law enforcement's actions as "misconduct" and a "willful violation of [his] Fourth Amendment rights" (*see* Scull Br. at 8). Nor can he impugn the court commissioner or prosecutor for their review and approval of the warrant affidavit and subsequent search warrant.

Under the circumstances, the court of appeals correctly applied precedent, including *Dearborn* and *Eason*, and held that:

> In light of the reliability of the process used to obtain the search warrant for Scull's home and the state of the law at the time the search warrant was issued, we conclude that the police '"acted in objectively reasonable belief that their conduct did

> not violate the Fourth Amendment'" when they executed the search warrant and searched Scull's home. *See Dearborn*, 327 Wis. 2d 252, ¶33 (citation omitted). As such, application of the exclusionary rule in this case would not act to "deter police misconduct" nor would the deterrent benefits of the rule "outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system." *See id.*, ¶38. Therefore, we conclude that the good-faith exception to the exclusionary rule applies in this case, and we must affirm the circuit court.

Scull, 352 Wis. 2d 733, ¶ 22 (Pet-Ap. 7).

This court should affirm that decision.

CONCLUSION

For the foregoing reasons, this court should affirm the court of appeals' decision affirming the circuit court's denial of Gary Monroe Scull's motion to suppress.

Dated this 8th day of July, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3199 words.

Dated this 8th day of July, 2014.

_____
Nancy A. Noet
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of July, 2014.

_____
Nancy A. Noet
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