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Fourth Amendment Search and Seizure, Qualified Immunity and the Technological Age

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This article examines two recent decisions, issued in January 2012, by the United States Supreme Court concerning the Fourth Amendment. The first, *Ryburn v. Huff* (2012) 132 S.Ct. 987, involves a civil rights action by homeowners against police officers from the City of Burbank, alleging that the officers' entry into their home violated the Fourth Amendment. The Supreme Court reversed the decision of the Court of Appeal and held that the officers had a reasonable basis for fearing violence was imminent, which entitled them to qualified immunity.

In the second case, *United States v. Jones* (2012) 132 S.Ct. 945, the Supreme Court ruled that the attachment of a Global-Positioning-System (GPS) tracking device to a vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, was a "search" within the meaning of the Fourth Amendment.

Officers' Qualified Immunity (*Ryburn*)

Sergeant Ryburn and Officer Zepeda, along with two other officers from the Burbank Police Department, responded to a call from a local high school in response to a report that a student, Vincent Huff, threatened to "shoot up" the school. The officers learned through their investigation that Huff had been absent from school for two days and that he was frequently subject to bullying.

The officers continued their investigation by contacting Vincent at his home. After no one answered their knocks at the door or calls to the residence, Ryburn tried calling Vincent's mother on her cell phone. Mrs. Huff answered her cell phone and informed Ryburn she was inside the house and that Vincent was inside with her. Mrs. Huff hung up the phone in response to Ryburn's request to speak with her outside. A few minutes later, Mrs. Huff and Vincent walked out of the house. Mrs. Huff did not inquire about the reason for the officers' visit, and refused their request to continue a private discussion inside the home.

Ryburn asked Mrs. Huff if there were any weapons inside the home. She responded by "immediately turning around, and running into the house." Ryburn, who was "scared because he did not know what was in that house" and had "seen too many officers killed," entered the house behind her, followed by Vincent and Officer Zepeda. The two

remaining officers entered the house under the assumption Huff had given consent to enter.

The Huffs brought a §1983 action against the City of Burbank and the officers, alleging that the officers violated their Fourth Amendment Rights by entering the home without a warrant. The District Court found that a constitutional violation occurred when the officers made a warrantless entry into the home, but entered judgment in favor of the officers after concluding that the officers were entitled to qualified immunity.

The Ninth Circuit Court of Appeals affirmed the District Court as to the two officers who entered the house on the assumption that Mrs. Huff had consented, but reversed as to Sergeant Ryburn and Officer Zepeda. The Ninth Circuit held that because the officers did not have a warrant or consent to search, their entry into the home was constitutionally impermissible because no exigent circumstances existed. The majority determined that "any belief that the officers or other family members were in serious, imminent harm would have been *objectively unreasonable*" given that "[Mrs. Huff] merely asserted her right to end the conversation with the officers and returned to her home."

Qualified immunity can shield government officials from individual civil liability where their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818. The Ninth Circuit recognized there are exigent circumstances that justify a warrantless entry by police officers into a home if the officers have a reasonable belief that their entry is "necessary to prevent physical harm to the officers or other persons, the destruction of evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *Fisher v. City of San Jose* 558 F.3d 1069, 1075 (9th Cir. 2009). The Ninth Circuit held that Ryburn and Zepeda committed a Fourth Amendment violation because there were no exigent circumstances justifying their entry into the home, and were thus not entitled to qualified immunity for their warrantless entry into the Huff residence.

Reversing in favor of Ryburn and Zepeda, the Supreme Court found the Ninth Circuit's conclusion flawed for numerous reasons. Most notable was the rejection of the Ninth Circuit's view that conduct cannot be regarded as a matter of concern so long as it is lawful. The Supreme Court reasoned that there are many circumstances "in which lawful conduct may portend imminent violence."

The Court explained that the Court of Appeal's method of analyzing the string of events that unfolded at the Huff residence, concluding that each event in isolation, in itself, did not give cause for concern, was "entirely unrealistic." The Court continued to say that "it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture." *Lastly, the decision provides that the courts should be "cautious about second-guessing a police officer's assessment, made at the scene, of the danger presented by a particular situation."*

The Court's holding in *Huff* clarifies that whether an officer's fear that violence was imminent is "objectively reasonable" must be judged from the "perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight," and that "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving."

Huff suggests that rather than a sanitized review of each step in an evolving situation, a totality-of-the-circumstances approach is required in determining whether a reasonable officer could have come to a conclusion that entry was necessary to avoid imminent injury to themselves or others. Here, the officers were investigating a rumor that a student threatened to "shoot up" the school; the parent did not initially answer the door or phone or inquire about the reason for the visit; the parent denied the request to conduct the interview inside; and immediately ran back into the house when the officers asked if there were any guns. Based on these facts, the Court concluded the officers had a reasonable basis for fearing violence was imminent, entitling them to qualified immunity.

The Court determined that reasonable police officers in Ryburn and Zepeda's position could have come to the conclusion that exigent circumstances existed based on the facts found by the District Court. It appears that one of the key factors that resulted in the favorable outcome in this matter was the involved officers' ability to clearly articulate in their reports and testimony the "exigency" that necessitated their entry into the home. *Therefore, remember to take into consideration the totality of the circumstances leading to the entry of a home, not just the critical seconds just prior to.* Carefully document every fact or circumstance that plays a role in raising officer safety concerns.

Attachment of a GPS Is a "Search" (*Jones*)

In *United States v. Jones* the Court decided that the attachment of a GPS device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constituted a search and seizure within the meaning of the Fourth Amendment.

Jones came under suspicion of trafficking narcotics in the District of Columbia and was the target of an investigation by a joint FBI and Metropolitan Police Department task force. A warrant for the use of a GPS device was issued, authorizing the installation of the device in the District of Columbia within ten days. Agents installed the device on the eleventh day, and not in the District of Columbia. The District Court granted a motion to suppress evidence obtained through the GPS device with respect to the data obtained while the vehicle was parked in Jones' residence, and held the remaining data admissible because "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movement from one place to another." *United States v. Knotts* (1983) 460 U.S. 276, 281.

The United States Court of Appeal reversed Jones' conviction because the admission of the evidence obtained by warrantless use of the GPS device violated the Fourth Amendment. See *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010). The Supreme Court affirmed.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." In *Jones,* Justice Scalia noted, "it is beyond dispute that a vehicle is an "effect" as the term is used in the Amendment." Citing *United States v. Chadwick* (1977) 433 U.S. 1, 12.

The Supreme Court has held that "the Fourth Amendment protects people, not places," in finding a violation in the attachment of an eavesdropping device to a public telephone booth. *Katz v. United States* (1967) 389 U.S. 347, 351. Later cases also held that a violation occurs when government officers violate a person's "reasonable expectation of privacy." *Katz*, at 360 (Harlan, J., concurring); *Bond v. United States* (2000) 529 U.S. 334; *California v. Ciraolo* (1986) 476 U.S. 207; *Smith v. Maryland* (1979) 442 U.S. 735.

In *Jones*, the government contended that no search occurred since Jones did not have a "reasonable expectation of privacy" in the area accessed by government agents (the vehicle's undercarriage) and while the vehicle was traveling on public roads (which were visible to all). In rejecting the government's argument, the Court held that Jones' Fourth Amendment rights do not "rise or fall" with the *Katz* expectation of privacy analysis, and that we must "assure preservation of that degree of privacy against government that existed *when the Fourth Amendment was adopted.*" *Kyllo v. United States* (2001) 533 U.S. 27, 34 (emphasis added).

What we see in *Jones* is that in our world of ever-increasing technology, the Court remains vigilant in assessing whether a physical intrusion would have been considered a "search" as contemplated by the framers of the Constitution. By attaching the GPS device on the undercarriage of Jones' vehicle, the government physically occupied private property for the purpose of obtaining information. The Court found such use would have been considered a search within the meaning of the Fourth Amendment at the time the Constitution was adopted.

The Court explained the holding in *Katz,* that the Fourth Amendment protects persons and their private conversations, does not withdraw any of the protection the Amendment extends to the home. Where the government physically intrudes into a constitutionally-protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.

In *Jones*, the Court clarifies for us that the *Katz* reasonable-expectation-of-privacy test has been *added to*, and not *substituted for*, the common-law trespassory test. The warrantless trespass upon any person's house, papers, and effects where a reasonable expectation of privacy exists constitutes an illegal search. *Jones* suggests, however, that where the government comes into contact with property before it belongs to the defendant, and the property is transferred to the defendant with the device, no Fourth Amendment violation would occur. See *United States v. Karo* (1984) 468 U.S. 705; *On Lee v. United States* (1952) 343 U.S. 747.

Lastly, the Court distinguished *Jones* from its previous holding in *New York v. Cass* (1986) 475 U.S. 106, that "the exterior of a car ...is thrust into the public eye, and thus to examine it does not constitute a 'search.'" 475 U.S. at 114. Here, the officers did more than conduct a visual inspection of the vehicle. By attaching the GPS device to the vehicle (undoubtedly a personal "effect"), the officers "encroached on a protected area" and seized information.

The obvious lesson from *Jones* is to adhere to the court's limitations on any warrant. Additionally, advancements in technology will present ever-expanding and more sophisticated means of surveillance, which will present vexing problems in cases that do not involve physical contact, such as transmission of electronic signals. Understand that nothing herein should be interpreted to mean that a Fourth Amendment violation requires both a showing of a physical encroachment on a protected area, and the application of the reasonable expectation of privacy test under *Katz*. The Court does not make trespass the exclusive test. In determining whether electronic surveillance in public places constitutes a "search," remember that situations involving merely the transmission of electronic signals without trespass would remain subject to the *Katz* "expectation of privacy" test.

Stay Safe!

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