STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JEFFREY JUANN JONES, Defendant-Appellee.	FOR PUBLICATION May 20, 2008 9:00 a.m. No. 275438 Wayne Circuit Court LC Nos. 06-011698-01 06-012320-01 Advance Sheets Version

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

FITZGERALD, P.J.

The prosecution appeals as of right from an order granting defendant's motion to suppress evidence and dismissing the charges against him. We reverse and remand.

I

The police received information from an informant regarding defendant's alleged possession and sale of marijuana. The informant indicated that defendant had been arrested several times in the past for possessing illegal narcotics, that defendant kept a small amount of marijuana for personal use at his 24975 South Sylbert residence in Redford Township, and that defendant kept larger amounts of illegal narcotics at his 15888 Southfield Road residence in Detroit. A Law Enforcement Information Network (LEIN) check revealed that defendant had a misdemeanor conviction for possession of marijuana and two felony convictions for delivery/manufacture of a controlled substance. Prompted by this information, the police arranged to have a trained narcotics-detection dog brought to the defendant's Southfield residence so that a canine sniff could be conducted. The dog gave a positive indication for narcotics at the front door of the residence. On the basis of the dog's reaction, as well as their prior information, the police obtained a search warrant to search both premises.

Defendant was charged in lower-court Docket Number 011698 as a fourth-offense habitual offender, MCL 769.12, with possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, as the result of a search of the South Sylbert premises. Defendant was charged in lower-court Docket Number 012320 as a fourth-offense habitual offender, MCL 769.12, with the manufacture of 5 to 45 kilograms of marijuana, MCL 333.7401(2)(d)(ii), felon-in possession,

MCL 750.224f, possession with intent to deliver less than 5 kilograms of marijuana, MCL 333.7401(2)(d)(*iii*), and felony-firearm, MCL 750.227b, as a result of a search of the Southfield Road premises.

Defendant moved to suppress all the items of evidence that had been seized during the two searches. Defendant argued that the canine sniff outside his front door, which alerted the officers to the presence of a controlled substance inside his house, was an illegal search. In support of his argument, defendant relied on *State v Rabb*, 920 So 2d 1175 (Fla App, 2006) (a canine sniff from outside a home to detect narcotics inside the home uses extra-sensory procedure that violates the firm line at the door of the home protected from intrusion by the Fourth Amendment).[1] The prosecution relied on *Illinois v Caballes*, 543 US 405, 408-409; 125 S Ct 834; 160 L Ed 2d 842 (2005), in arguing that the canine sniff was not a search at all because the police were lawfully present at the front door of defendant's residence and defendant possessed no reasonable expectation that his drugs would go undetected. Following a hearing on the motion, the trial court granted defendant's motion to suppress. In support of its decision, the trial court relied on *Kyllo v United States*, 533 US 27, 29; 121 S Ct 2038; 150 L Ed 2d 94 (2001). In *Kyllo*, the Court held that the use of a thermal-imaging device to detect relative amounts of heat within a private home was a Fourth Amendment search and must be supported by probable cause and a warrant. The *Kyllo* Court held that 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, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40. In the present case, the trial court found that a canine sniff is akin to the use of a thermal-imaging device. The trial court concluded that the canine sniff is a search that must be supported by probable cause and a warrant.

II

The sole issue on appeal is whether the trial court properly suppressed the evidence against defendant on the ground that the canine sniff, which provided the probable cause for the issuance of the search warrant, was obtained in violation of the rights guaranteed by the Fourth Amendment of the United States Constitution.[2] Resolution of this issue requires a determination whether the canine sniff of the front door of defendant's residence is a search under the Fourth Amendment. We review a trial court's factual findings at a suppression hearing for clear error, but review de novo the ultimate ruling on a motion to suppress. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

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[1] The prosecution noted that *Rabb* is a Florida state court decision not binding on Michigan courts. *Rabb* has not been cited in any subsequent decisions for the holding that a canine sniff at a residence's front door constitutes an illegal search. *Rabb* relied on *United States v Thomas*, 757 F2d 1359 (CA 2, 1985), a decision that has been criticized by other federal circuit courts and appears never to have been followed by any federal courts outside the second circuit.

[2] There is no dispute that a positive reaction by a properly trained narcotics dog can establish probable cause to believe that contraband is present. See, e.g., *United States v Berry*, 90 F3d 148, 153 (CA 6, 1996). The prosecution concedes in this case that probable cause is lacking absent the result of the canine sniff.

Both the United States Constitution and the Michigan Constitution guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; see *Illinois v McArthur,* 531 US 326; 121 S Ct 946; 148 L Ed 2d 838 (2001). The Michigan Constitution in this regard is generally construed to provide the same protection as the Fourth Amendment of the United States Constitution. *People v Levine,* 461 Mich 172, 178; 600 NW2d 622 (1999). A search within the meaning of the Fourth Amendment "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v Jacobsen,* 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984).

The United States Supreme Court has held that a "canine sniff" does not unreasonably intrude upon a person's reasonable expectation of privacy. See *United States v Place,* 462 US 696, 706-707; 103 S Ct 2637; 77 L Ed 2d 110 (1983). In *Place,* the Court held that a canine sniff of a traveler's luggage in an airport was not a search within the meaning of the Fourth Amendment because the information obtained through this investigative technique revealed only the presence of absence of narcotics. As the Court explained:

> [T]he 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 reaffirmed the *Place* Court's holding in *Jacobsen, supra.* In *Jacobsen, supra* at 123, the Court held that a chemical field test of a white substance found inside a package was not a Fourth Amendment search because the test "merely discloses whether or not a particular substance is cocaine . . . ." Because there is no legitimate interest in possessing cocaine, the field test did not compromise any legitimate privacy interest. *Id.* The Court further explained that "the *reason* [the *Place* canine sniff] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items." *Id.* at 124 n 24 (emphasis in original).

The Supreme Court later held in *Caballes, supra* at 407-408, that a canine sniff of a vehicle during a traffic stop, conducted absent reasonable suspicion of illegal drug activity, did not violate the Fourth Amendment because it did not implicate any legitimate privacy interest. The Court explained that, because there is no legitimate interest in possessing contraband, the use of a well-trained narcotics dog that "*only* reveals the possession of contraband 'compromises no legitimate privacy interest'" and does not violate the Fourth Amendment. *Id.* at 408 (quoting *Jacobsen, supra* at 123). The Court also noted:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States,* 533 U.S. 27 [121 S Ct 2038; 150 L Ed 2d 94] (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from

> respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. [*Caballes, supra* at 409-410.]

The majority of the federal circuit courts have viewed the *Place* Court's holding as a general categorization of canine sniffs as nonsearches. See, e.g., *United States v Reed*, 141 F3d 644, 648 (CA 6, 1998) (holding that a canine sniff of the inside of an apartment was not a search when the canine team was lawfully present in the building); see also *United States v Roby*, 122 F3d 1120 (CA 8, 1997); *United States v Brock*, 417 F3d 692 (CA 7, 2005); *United States v Vasquez*, 909 F2d 235 (CA 7, 1990).[3] Similarly, the vast majority of state courts considering canine sniffs have recognized that a canine sniff is not a Fourth Amendment search.[4] Binding and persuasive authority convinces us that a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused. *Reed, supra* at 649; see also *Place, supra* at 709 (noting that the sniffed luggage was located in a public place), and *United States v Diaz*, 25 F3d 392, 397 (CA 6, 1994).

The trial court rejected the holding in *Place* on the ground that an individual has a greater privacy interest with regard to his or her residence than one has in a public space. However, the holding in *Place* did not turn on the location of a canine sniff. Central to the holding in *Place* and its progeny is the fact that a canine sniff detects only contraband, in which there is no

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[3] But see *United States v Thomas*, n 1 *supra*. *Thomas* held that a canine sniff of an apartment is a search, distinguishing *Place* on the basis of the heightened expectation of privacy in homes. But Supreme Court precedent makes clear that the status of a canine sniff does not depend on the object sniffed. For this reason, a number of other courts have criticized *Thomas* as inconsistent with *Place* and its progeny. See *Reed, supra* at 650 (explaining that *Thomas'*s holding "ignores the Supreme Court's determination in *Place* that a person has no legitimate privacy interest in the possession of contraband, thus rendering the location of the contraband irrelevant to the Court's holding that a canine sniff does not constitute a search").

[4] See, e.g., *State v Box*, 205 Ariz 492, 496-497; 73 P3d 623 (Ariz App 2003); *Sims v State*, 356 Ark 507; 157 SW3d 530 (2004); *People v Ortega*, 34 P3d 986, 991 (Colo, 2001); *Bain v State*, 839 So 2d 739 (Fla App, 2003); *Cole v State*, 254 Ga App 424; 562 SE2d 720 (2002); *State v Parkinson*, 135 Idaho 357; 17 P3d 301 (Idaho App, 2000); *People v Cox*, 318 Ill App 3d 161; 739 NE2d 1066 (2000); *Bradshaw v State*, 759 NE2d 271 (Ind App, 2001); *State v Bergmann*, 633 NW2d 328 (Iowa, 2001); *State v Barker*, 252 Kan 949; 850 P2d 885 (1993); *State v Kalie*, 699 So 2d 879 (La, 1997); *State v Washington*, 687 So 2d 575 (La App, 1997); *Fitzgerald v State*, 384 Md 484; 864 A2d 1006 (2004); *Commonwealth v Feyenord*, 62 Mass App 200; 815 NE2d 628 (2004); *Millsap v State*, 767 So 2d 286 (Miss App, 2000); *State v LaFlamme*, 869 SW2d 183 (Mo App, 1993); *Gama v State*, 112 Nev 833; 920 P2d 1010 (1996); *State v VanCleave*, 131 NM 82; 33 P3d 633 (2001); *People v Offen*, 78 NY2d 1089; 578 NYS2d 121; 585 NE2d 370 (1991); *State v Fisher*, 141 NC App 448; 539 SE2d 677 (2000); *State v Kesler*, 396 NW2d 729 (ND, 1986); *State v Rusnak*, 120 Ohio App 3d 24; 696 NE2d 633 (1997); *Scott v State*, 927 P2d 1066 (Okla App, 1996); *State v Smith*, 327 Or 366; 963 P2d 642 (1998); *Commonwealth v Johnston*, 515 Pa 454; 530 A2d 74 (1987); *State v England*, 19 SW3d 762 (Tenn, 2000); *Rodriguez v State*, 106 SW3d 224 (Tex App, 2003); *State v Miller*, 256 Wis 2d 80; 647 NW2d 348 (Wis App, 2002); *Morgan v State*, 95 P3d 802 (Wy, 2004).

legitimate expectation of privacy. The heightened expectation of privacy that a person has in his residence is irrelevant under *Place*'s rationale. Whether or not a heightened expectation of privacy exists, the fact remains that a canine sniff reveals only evidence of contraband. *Place, supra* at 707; *Jacobsen, supra* at 122-124. The only relevant locational determination is whether the canine was lawfully at the location where the object was sniffed. The location or circumstance of the sniff is relevant only to determine whether the presence of the canine and the officer at the location was constitutional. See also *Reed, supra* at 396.

III

Here, the canine was lawfully present at the front door of defendant's residence when it detected the presence of contraband. There is no reasonable expectation of privacy at the entrance to property that is open to the public, including the front porch. See *People v Custer (On Remand),* 248 Mich App 552, 556, 561; 640 NW2d 576 (2001) (under Michigan law, the police can lawfully stand on a person's front porch and look through the windows into the person's home, as long as there is no evidence that the person expected the porch to remain private, such as by erecting a fence or gate). The record contains no evidence that the canine team crossed any obstructions, such as a gate or fence, in order to reach the front door, or that the property contained any signs forbidding people from entering the property. Any contraband sniffed by the canine while on defendant's front porch—an area open to public access—fell within the "canine sniff" rule. Consequently, there was no search in violation of the Fourth Amendment.

IV

We find it necessary to address some of the issues and points raised in our colleague's dissenting opinion. First, we wholeheartedly agree with the dissent that the United States Supreme Court has historically recognized the significant privacy interest that an individual has in his or her home and has guardedly protected that interest against governmental invasions and intrusions, i.e., searches, that offend the Fourth Amendment. See *Payton v New York*, 445 US 573, 590; 100 S Ct 1371; 63 L Ed 2d 639 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."). However, the dissent fails to grasp that a canine sniff is simply not a search or an intrusion on an expectation of privacy that implicates the Fourth Amendment under *Caballes*, *Place*, and their progeny, where the police and the canine are lawfully present at the location at issue, even if it is at the front door of a defendant's home.

Contrary to the assertions made by the dissent, *Place* and *Caballes* contain no language suggesting that the analysis would differ under the circumstances presented here in which the canine sniff occurred outside the home from a lawful vantage point. The high court's fleeting reference to a "public place" in *Place* simply indicated, at most, that the luggage containing contraband was in an area in which the police and the canine were lawfully present. *Place, supra* at 707. The *Place* Court recognized that a person "possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment." *Id.* However, the canine sniff was unique and disclosed "only the presence or absence of narcotics, a contraband item." *Id.* Therefore, there was no search within the meaning of the Fourth Amendment. *Id.* Here, defendant likewise possessed a general privacy expectation with respect to his home that

was absolutely protected by the Fourth Amendment, but the canine sniff from outside the home and from a lawful vantage point could only disclose the presence of narcotics and not lawful activity and thus did not constitute a search of the home under the Fourth Amendment because no legitimate privacy interest was implicated. Any intrusion on defendant's expectation of privacy was insufficient to find a Fourth Amendment infringement, given that the canine sniff could only intrude to the extent that illegal drugs or activities, for which there is no legitimate privacy interest, were detectable. A person has a legitimate expectation of privacy regarding his or her home, but there is no legitimate privacy interest in contraband that may be inside the home; however, this does not mean that the state has free reign to invade the person's general expectation of privacy without a warrant in order to obtain contraband on the basis that there is no legitimate privacy interest in the contraband. This is because, typically, such an invasion or search would compromise both illegitimate *and* legitimate interests or expectations and that is the danger against which the Fourth Amendment protects.

The dissent's discussion of *Caballes* and contention that it supports the proposition that a canine sniff at a home would be treated differently is even more misplaced than its attempt to distinguish *Place*. The dissent states, "Similarly, in *Caballes*, which relied on the reasoning of *Place*, the Court recognized that the expectation of privacy that an individual has regarding 'intimate details in a home' is 'categorically distinguishable from [a person's] hopes or expectations concerning the nondetection of contraband in the trunk of his car.'" *Post* at ___, quoting *Caballes, supra* at 409-410. The two quoted excerpts taken from *Caballes* in this passage are cited out of context, coming from two different sentences and then grafted together. As indicated earlier in this opinion, the *Caballes* Court actually stated:

> Accordingly, the use of a well-trained narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view,"—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.
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> This conclusion is entirely consistent with our recent decision [in *Kyllo*] that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment. [*Id.* (citations omitted).]

Thus, the Court did not state or suggest that police activity at a home is categorically distinguishable from police activity involving the trunk of a car for purposes of analyzing the constitutionality of a canine sniff. Rather, the categorical distinction of which the Court spoke

related to the difference between police activity that reveals lawful as well as unlawful conduct, thereby invading a zone of privacy and implicating Fourth Amendment protections, and a canine sniff that reveals only the presence of contraband (unlawful conduct) and does not intrude on legitimate privacy interests. Indeed, the Court distinguished *Kyllo* not because a home was involved there, but because lawful as well as unlawful activity could be detected in *Kyllo.* If the dissent were correct in its analysis, the Court in *Caballes* could have simply disregarded or distinguished *Kyllo* on the basis that the *Kyllo* search was of a home.

The dissent states, "If, as the majority suggests, a person never has an expectation of privacy in contraband, irrespective of the location of the contraband, then it would follow that a search of contraband would never be unreasonable and such evidence would therefore never be suppressed." *Post* at ___. The dissent misconstrues our holding. As reflected in the preceding few paragraphs, the principle that a person does not have a legitimate privacy interest in contraband does not equate to a conclusion that the seizure of the contraband does not violate the Fourth Amendment protection against an unreasonable search. Defendant certainly had legitimate privacy expectations or interests with respect to his home because we can safely assume that legal activities were also taking place in the home and that some of the home's contents were legal to possess. But the canine sniff did not invade these legitimate privacy interests or defendant's legitimate expectation of privacy because of the uniqueness of the canine sniff that focused only on contraband, for which there was no legitimate privacy interest. Had the police entered the front door of defendant's home without a warrant and located the narcotics, absent exigent circumstances, the entry would have been an unlawful intrusion on defendant's legitimate expectation of privacy, violating the Fourth Amendment, because, despite the presence of the illegal narcotics, the police could also observe and handle contents of the home that were lawfully possessed. Under such circumstances, it would be incorrect to conclude that the search was legal merely because defendant had no expectation of privacy in the contraband, nor does our opinion suggest that such a search would be lawful. The canine sniff here was constitutionally sound, not because defendant had no legitimate privacy interest in the contraband, which will always be the case in Fourth Amendment disputes over seized incriminating evidence, but because no legitimate privacy interests or expectations were intruded upon by the canine sniff. As indicated in *Place*, it is the uniqueness and attributes of a canine sniff that dictate a finding that the Fourth Amendment was not violated in the case at bar.

Reversed and remanded to the trial court for further proceedings. Jurisdiction is not retained.

Murphy, J., concurred.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy