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FITZGERALD v. STATE:

A Drug-Dog Sniff of Exterior Portions of a Residence Does Not Constitute a Search Under the Fourth Amendment of the U.S. Constitution

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In a case of first impression, the Court of Appeals of Maryland held that a drug-dog sniff of exterior portions of a residence does not constitute a search under the Fourth Amendment of the U.S. Constitution. *Fitzgerald v. State*, 384 Md. 484, 487, 864 A.2d 1006, 1007 (2004). The Court declined to revisit whether Article 26 of the Maryland Declaration of Rights contains an exclusionary rule separate from the Fourth Amendment of the U.S. Constitution. *Id.* at 509, 864 A.2d at 1020.

In February 2002, Detective Leeza Grim ("Grim") of the Howard County Police Department ("HCPD") learned that petitioner Matthew Thomas Fitzgerald ("Fitzgerald") and his girlfriend, Allison Mancini ("Mancini"), were selling high grade marijuana. Grim made arrangements with Officer Larry Brian ("Brian") of HCPD's K-9 Unit to visit Fitzgerald's apartment building with his drug-detecting dog, Alex. The apartment building was accessible to the public through unlocked glass doors. Brian and Alex performed a scan of all four apartment doors in the building, and Alex twice indicated the presence of narcotics outside of Fitzgerald's residence. After obtaining a search and seizure warrant, Grim seized substantial amounts of marijuana from the apartment. Fitzgerald and Mancini were arrested and charged with possession of marijuana with intent to distribute, among other offenses.

Fitzgerald filed a motion to suppress the evidence seized pursuant to the search and seizure warrant in the Circuit Court of Howard County, claiming the dog sniff of his apartment constituted a warrantless search. The motion was denied based on past decisions holding that dog sniffs of public places were not searches under the Fourth Amendment. Fitzgerald was found guilty, and the Court of Special Appeals of Maryland affirmed. The Court of Appeals granted certiorari in order to evaluate whether the dog sniff constituted a

search under the Fourth Amendment or Article 26, and if so, if it was lawful.

The Court relied on two Supreme Court cases in determining that a warrantless dog sniff is constitutional under the Fourth Amendment. *Fitzgerald*, 384 Md. at 490-492, 884 A.2d at 1009-1011. In *United States v. Place*, 462 U.S. 696, 707 (1983), the Supreme Court held that a dog sniff is not a search under the Fourth Amendment because "the manner in which information is obtained through this investigative technique is much less intrusive than a typical search." *Id.* at 491, 884 A.2d at 1010.

Subsequent Supreme Court decisions have made clear that the decision in *Place* was to be applied as a general categorization, rather than a narrow holding applying only to dog searches of airplane luggage. *Fitzgerald*, 384 Md. at 491, 884 A.2d at 1010. Specifically, *United States v. Jacobson*, 466 U.S. 109, 123, affirmed the *Place* holding, relying on the reasoning of the limited scope of dog sniffs, and finding that the test "does not compromise any legitimate interest in privacy." *Fitzgerald*, 384 Md. at 492, 884 A.2d at 1011.

Place and *Jacobson* establish the current standard regarding dog sniffs, namely, that a sniff is not a search under the Fourth Amendment because it is used in a narrow scope like drug detection and because it is conducted in government authorized locations, such as a public place. *Id.* at 493, 884 A.2d at 1011. A "crucial component...is the focus on the scope and nature of the sniff... rather than on the object sniffed, in determining whether a legitimate privacy interest exists." *Id.* A dog sniff is narrow in scope because it does not involve an intrusion and no non-contraband items are revealed. *Id.* at 494, 884 A.2d at 1011-12.

The Court of Appeals found that Maryland has applied this precedent in *Wilkes v. State*, 364 Md. 554, 581, 774 A.2d 420, 436 (2001), holding that a dog sniff of a car is a not a search under the Fourth Amendment. *Fitzgerald*, 384 Md. at 495, 884 A.2d at 1012. The Court stated that a dog sniff alone does not constitute an intrusive search, and found *Place* to be "applicable to dog sniffs in general, independent of the object searched, because of the sniff's narrow scope." *Id.* at 495, 884 A.2d at 1012 (quoting Wilkes, 364 Md. 544, 581, 774 A.2d 420).

The instant case is one of first impression in Maryland because the Court has not ruled on the constitutionality of a dog sniff performed on the outside of a residence. *Id.* at 495, 884 A.2d at 1012. The Court rejected Fitzgerald's argument that the outside of a

residence should be differentiated from other dog sniffs because this type of search "intrudes upon the privacy of the home," and is, therefore, unconstitutional under the Fourth Amendment. *Id.* at 496, 884 A.2d at 1013. The Court concluded that the cases he relied upon, *United States v. Karo*, 468 U.S. 705 (1984), and *Kyllo v. United States*, 533 U.S. 27 (2001), are not relevant to the dog sniff doctrine. *Fitzgerald,* 384 Md. at 496, 884 A.2d at 1013. The Court determined that, in *Karo*, the broad utility of an electronic beeper used to monitor a can of ether, the intent to detect non-contraband material, and the electronic aspect were all important factors that distinguished those facts from the present case. *Fitzgerald*, 384 Md. at 497, 884 A.2d at 1013-14.

In *Kyllo,* the Supreme Court held that the use of thermal imaging to detect heat inside a residence for the purpose of establishing the presence of marijuana constituted a search under the Fourth Amendment. *Fitzgerald*, 384 Md. at 498, 884 A.2d at 1014. Fitzgerald claims that the "general public use" standard elaborated in *Kyllo* should also apply to dog sniffs. *Fitzgerald,* 384 Md. at 499, 884 A.2d at 1014-1015. This standard relates to information obtained from the interior of a home through the use of sense-enhancing technology that could not have otherwise been obtained without a physical intrusion into a constitutionally protected area. *Id.* at 499, 844 A.2d at 1014. The Court of Appeals saw no connection between thermal imaging technology and dog sniffs, stating that "a dog is not technology-- he or she is a dog." *Id.* at 500, 884 A.2d at 1015. The Court further explained that a dog is not an advancing technology because dogs have achieved all limitations and advances, in comparison to technology, which is forever advancing. *Id.* at 501, 884 A.2d at 1016.

Lastly, the Court rejected the argument that dog sniffs have the potential for revealing intimate details of one's home, unlike thermal imaging, reasoning that "[a] person does not have a legitimate expectation of privacy in contraband, but does in bath water." *Id.* at 501, 884 A.2d at 1016. Accordingly, the Court of Appeals held that a dog sniff of the exterior of a residence was not a search under the Fourth Amendment, provided that the dog and police are lawfully present at the site of the sniff. *Id.* at 503-504, 884 A.2d at 1017.

The Court next addressed the argument that even if a dog sniff was considered a non-search under the Fourth Amendment, it would constitute a search under Article 26 of the Maryland Declaration of Rights. *Id.* at 506, 884 A.2d at 1019. Article 26 provides that "all

warrants, without oath or affirmation ... to search suspected places ... are grievous and oppressive; and all general warrants to search suspected places ... without naming or describing the place ... are illegal, and ought not to be granted." *Id.* Fitzgerald supports his argument by noting that Article 26 "was designed to protect the sanctity of the home, thus, creating stronger protection than the Fourth Amendment for sniffs outside a residence." *Id.* at 507, 884 A.2d at 1019.

The Court found that Maryland is notably absent from the current trend of states adopting exclusionary rules for their state constitutions. *Id.* at 508, 884 A.2d at 1020. Maryland currently construes Article 26 *in pari materia* with the Fourth Amendment. *Id.* at 508, 884 A.2d at 1020. The Court saw no need to revisit whether Article 26 contains an exclusionary rule, because even if it accepted Fitzgerald's argument that a dog sniff did constitute a search, the sniff would remain valid under a reasonable suspicion standard, which is adopted by the majority of state constitutions. *Id.* at 511, 884 A.2d at 1022. Provided that the police had a reasonable suspicion that a residence contained illegal contraband, the validity of the dog sniff would be upheld. *Id.* at 510, 884 A.2d at 1021.

In *Fitzgerald v. State*, the Court of Appeals of Maryland has broadened the validity of dog sniffs, when used to detect illegal contraband, to include exterior portions of residences accessible to the public. This ruling will have far reaching consequences, giving greater protection to places of residence that are in gated or secured communities. It may also be interpreted as giving greater protections under the law to individuals that can afford to reside in wealthier communities that are less accessible to the general public.