Can a Chalk Mark on a Car's Tires Constitute a Search for Purposes of the Fourth Amendment?

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Can a chalk mark on a car's tires constitute a search for purposes of the Fourth Amendment? That was the question presented in Taylor v. City of Saginaw, ___ F.3d ___, 2019 WL 1757953 (6th Cir. Apr. 25 2019). The United States Court of Appeals for the Sixth Circuit answer that question with a "Yes." The relevant facts are as follows.

The City of Saginaw, Michigan (the "City"), uses a common parking enforcement practice known as "chalking," whereby City parking enforcement officers use chalk to mark the tires of parked vehicles to track how long the cars have been parked. Parking enforcement officers return to the car after the posted time for parking has passed, and if the chalk marks are still there—a sign that the vehicle has not moved—the officer issues a citation.

Between 2014 and 2017, Tabitha Hoskins, one of the City's parking enforcement officers, chalked Alison Taylor's tires (a frequent occurrence) on fifteen separate occasions and issued her a citation on each occasion. Each citation included the date and time that the chalk was placed on Taylor's vehicle's tires. The cost of a citation started at $ 15 and increased from there.

On April 5, 2017, Taylor filed this suit under 42 U.S.C. 1983 against the City, alleging that the City had violated her Fourth Amendment right to be free from unreasonable searches by placing chalk marks on her tires without her consent or a valid search warrant. Taylor also sued parking enforcement officer Hoskins in her individual capacity. The Defendants filed a motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), asserting that chalking was not a search within the meaning of the Fourth Amendment. Alternatively, the Defendants argued that, if it was a search, it was reasonable under the community caretaker exception to the warrant requirement.

The United States District Court for the Eastern District of Michigan granted the Defendants' motion to dismiss. In its order, the District Court agreed with Taylor that the City had engaged in a search—as defined by the Fourth Amendment—by placing chalk marks on Taylor's tire to gather evidence of a parking violation. However, the District Court also agreed with the Defendants that the search was reasonable because: (1) there is a lesser expectation of privacy in automobiles and (2) the search was subject to the community caretaker exception to the warrant requirement. Taylor timely appealed the District Court's dismissal order.

On appeal, the Sixth Circuit explained that the basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth

Amendment gives concrete expression to a right of the people which is basic to a free society. To determine whether a Fourth Amendment violation has occurred, courts must ask two primary questions: (1) whether the alleged government conduct constituted a search within the meaning of the Fourth Amendment; and (2) whether the search was reasonable.

As for the first question, the Sixth Circuit found that chalking a parked vehicle's tires is a search for Fourth Amendment purposes. The Sixth Circuit explained that the United States Supreme Court has articulated two distinct approaches to determine when conduct by a governmental agent constitutes a search. Under the most prevalent and widely-used search analysis articulated in Katz v. United States, 389 U.S. 347 (1967), a search occurs when a government official invades an area in which "a person has a constitutionally protected reasonable expectation of privacy." Id. at 360. Under Katz, a search is analyzed in two parts: "first that a person exhibit an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Id. at 361. A "physical intrusion" is not necessary for a search to occur under Katz. Id. at 360.

The Supreme Court set forth the second search analysis in United States v. Jones, 565 U.S. 400 (2012). Under Jones, when governmental invasions are accompanied by physical intrusions, a search occurs when the government: (1) trespasses upon a constitutionally protected area (2) to obtain information. Id. at 404-05.

The Sixth Circuit determined that the Jones test was the applicable analysis in this case. As such, the Sixth Circuit stated that the threshold question was whether chalking constituted a common-law trespass upon a constitutionally protected area. Because Jones did not provide a clear answer, the Sixth Circuit turned to the Restatement (Second) of Torts that defines a "common-law trespass" as an act that brings about intended physical contact with a chattel in the possession of another. Adopting this definition, the Sixth Circuit found that there was a trespass in this case because the City made intentional physical contact with Taylor's vehicle, i.e., the car's tires.

The Sixth Circuit then turned to the issue of whether the trespass was conjoined with an attempt to find something or to obtain information. The Sixth Circuit found that it was because it was undisputed that the City used the chalk marks for the purpose of identifying vehicles that have been parked in the same location for a certain period of time. That information was then used by the City to issue citations. The Sixth Circuit held that this practice amounts to an attempt to obtain information under Jones.

Upon finding that a search occurred, the Sixth Circuit addressed the issue of whether the City's search was reasonable. The Sixth Circuit began by noting that the Fourth Amendment does not proscribe all searches, only those that are unreasonable. As such, courts are to begin their analysis of whether a search is reasonable with the basic rule that searches conducted outside the judicial process, i.e., without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

The District Court found that the City's warrantless search of Taylor's vehicle was reasonable because there is a lesser expectation of privacy with automobiles, but the Sixth Circuit disagreed. Though an automobile enjoys a reduced expectation of privacy due to its ready mobility, this diminished expectation of privacy is what justifies the automobile exception to the warrant requirement. The automobile exception permits officers to search a vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of a crime. The Sixth Circuit found that no such probable cause existed in this case, and therefore, the automobile exception was inapplicable.

Likewise, the Sixth Circuit found that, contrary to the District Court's conclusion, the community caretaker exception did not apply. This exception applies when government actors are performing "community-

caretaker" functions rather than traditional law-enforcement functions. This exception requires courts to look at the function performed by a government agent when a search occurs. To apply this exception to the warrant requirement, the function must be totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. Generally, courts apply this exception in narrow instances when public safety is at risk.

Here, the Sixth Circuit held that the City did not demonstrate, in law or logic, that the need to deter drivers from exceeding the time permitted for parking—before they have even done so—was sufficient to justify a warrantless search under the community caretaker rationale. However, the Sixth Circuit noted that it was not to saying that this exception could never apply to the warrantless search of a lawfully parked vehicle. Nor did the Sixth Circuit mean to suggest that no other exceptions to the warrant requirement might apply in this case. But, on these facts and on the arguments that the City proffered, the Sixth Circuit found that the City had failed to meet its burden in establishing an exception to the warrant requirement. Accordingly, the Sixth Circuit reversed the District Court's order dismissing this case at the pleading stage and remanded for further proceedings.