



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



STATE v. JOSE S. GUILLEN
CR-09-0188-PR
222 Ariz. 81, 213 P. 3d 230 (App. 2009)

PARTIES AND COUNSEL:

Petitioner: The State of Arizona, represented by Joseph L. Parkhurst, Assistant Attorney General.

Respondent: Jose Salvador Guillen, represented by Emily Danies.

FACTS:

In March 2006, police received information that defendant stored marijuana in large freezers in the garage attached to his house. In November 2006, while surveilling defendant's residence, police watched defendant's wife drive away from the house and followed her. One of the officers contacted a canine officer and asked him to go to defendant's house to conduct a canine investigation. The officer went to the residence and walked his drug-sniffing dog up the driveway to the garage door. From outside the garage door, the dog alerted to the presence of narcotics. The officer took the dog back to the patrol car and notified the other investigating officers, who returned to defendant's house.

The officers observed defendant's wife return, go into the house, and then return to her vehicle parked in the driveway. One officer approached the vehicle, identified himself, and asked if he could speak with her. Defendant's wife agreed to let the officers come in the house to discuss the purpose of their visit. In a recorded conversation, the officer told defendant's wife that police had been informed that there were possibly drugs, specifically marijuana, at the house, and asked for her permission to search the premises. Defendant's wife consented to the search and led the officers through the house to the garage.

As the two officers entered the garage, they both detected a strong odor of marijuana. One officer saw three large freezers covered by tarps. Defendant's wife complied with the officers' request to open the outside garage door. The canine officers and his dog entered the garage, and the dog immediately alerted on the freezers. Two of the freezers were locked; the unlocked freezer was empty. At that point, the officers applied for and received a telephonic search warrant. During the execution of the warrant, the officers found bales of marijuana in the locked freezers.

A grand jury charged defendant and his wife with possession of more than four pounds of marijuana for sale and possession of drug paraphernalia. Their trials were severed.

Prior to trial, defendant moved to suppress the physical evidence secured from his home on

grounds that the evidence was acquired in violation of his rights under both the **Fourth Amendment to the U.S. Constitution** (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”) and **Article II, Sec. 8 of the Arizona Constitution** (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”).

The motion to suppress was denied on the grounds that the contraband was discovered pursuant to a consent search of the residence and the officers used no information gained from the dog sniff to secure that consent. After trial, the jury found defendant guilty of both charges.

The trial court sentenced appellant to a total of four years’ imprisonment. He appealed. Appellant’s Opening Brief included a reference to the alleged violation of his rights under the Arizona Constitution, in addition to extensive argumentation under the Fourth Amendment to the U.S. Constitution.

Following submission of the appellate briefs, the Arizona Court of Appeals ordered oral argument and, pursuant to its customary procedure, distributed a proposed draft decision, alerting the parties to the need to address the state constitutional question in addition to the issues arising under the Fourth Amendment to the U.S. Constitution. The State filed two supplemental pleadings in advance of oral argument addressing the state constitutional aspect of the case.

The Court of Appeals, in a split decision, reversed the decision of the trial court. It noted that neither the U.S. Supreme Court nor any Arizona state court had previously addressed the circumstances under which an officer may direct a narcotics detection dog to sniff along the seams of a residential structure.

After extensive discussion and analysis, a majority of the Court of Appeals held that the search, while not violative of the U.S. Constitution, violated the Arizona Constitution. It held that canine sniff searches of a residence, conducted from the threshold of the home, interfere with reasonable expectations of privacy, specifically, those of tranquility and repose in one’s home, and violate Art. II, Sec. 8 of the Arizona Constitution to the extent they are conducted in the absence of reasonable suspicion to believe contraband may be found.

The Court of Appeals majority concluded, however, that the intrusion represented by a dog sniff of the exterior of a house does not require a warrant issued upon a showing of “probable cause,” but instead is analogous to a brief investigatory detention, requiring only a “reasonable suspicion” that contraband may be found.

The Court of Appeals remanded the case to the trial court to determine whether the officers in this case had a “reasonable suspicion” that contraband would be found inside the home before the canine search was conducted, and if so, whether the marijuana should be suppressed as the “fruit of the poisonous tree.” The mandate further required the trial court to address whether the officers used the information acquired by the canine sniff to trigger the next step in their investigation – asking for

consent to search the home.

Judge Espinosa dissented from the majority's Opinion on the grounds that, in his view, the Court of Appeals should not have reached out to decide a case on a basis never argued below, *i.e.*, a new and unprecedented right of tranquility and repose, nor should it have addressed a state constitutional claim only raised through passing references in appellant's pleadings. Judge Espinosa also reasoned that dog sniffs are not searches, since air-borne odors perceptible by a dog are akin to items in plain view. While dogs have a superior olfactory sense, he would hold, that does not change the fact that the dog is sniffing an area surrounding the home, not the home itself. He would also have held that there is no expectation of privacy in the area around a garage exposed to public view and access.

The State of Arizona petitioned for review. The Arizona Supreme Court granted review on October 27, 2009.

ISSUES:

1. Did the Court of Appeals err in interpreting Art. 2, Sec. 8 of the Arizona Constitution to prohibit a canine sniff of the exterior of a person's home?
2. Did a valid consent to enter defendant's home render moot the Court of Appeals' novel reading of the Arizona Constitution?

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