Parking Enforcement Case May Reverberate Beyond 6th Circ.

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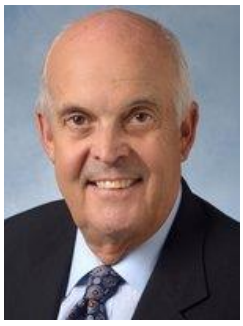

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Like many cities across the nation, the city of Saginaw, Michigan, has used tire chalking — the technique of marking a parked car's tire with chalk to determine how long it has been stationary. When an officer returns to a car he or she knows was chalked outside the time limit permitted for parking, and sees chalk on the tire indicating the car has likely not moved, a citation is issued.

A Saginaw resident who received a host of parking tickets sued the city, arguing that chalking her tires violated her Fourth Amendment right to be free from unreasonable government searches. The U.S. Court of Appeals for the Sixth Circuit found that chalking is a search under the Fourth Amendment, and that the city had failed to meet its burden as to the reasonableness of the practice without a warrant. But the court stopped short of deciding whether the practice violated the rights guaranteed by the Fourth Amendment.

As described in the district court's decision in Taylor v. Saginaw, et al.,[1] which was reversed by the Sixth Circuit, "chalking is a widespread and long-standing feature of parking enforcement" throughout the United States. This means that the implications of the Sixth Circuit's decision regarding the constitutionality of the practice could reverberate nationwide.

The Sixth Circuit held that chalking constituted a search under the Fourth Amendment, and that the city had failed in its defense of the practice to establish a sufficient rationale for why a search warrant would not be required. The Sixth Circuit relied on a 2012 U.S. Supreme Court decision that involved a far more technologically advanced practice, but which the appeals court held raised the same constitutional concern.

In that 2012 case, United States v. Jones,[2] federal law enforcement agents had attached a GPS tracking device to the defendant's car and monitored its travels for weeks before arresting him. Writing for a majority of the court, the late Justice Antonin Scalia held that the government's actions constituted a "search" under the Fourth Amendment, because a physical intrusion resulted in a "trespass" upon Jones' property — his car — coupled with an attempt to obtain information — specifically, the car's whereabouts.

As described by the Sixth Circuit in Taylor, its reliance on Jones reflected a natural application of the Supreme Court's Fourth Amendment jurisprudence which resurrected the "seldom used 'property-based' approach to the Fourth Amendment search inquiry," For 45 years, the prevailing search analysis was that articulated in the seminal Fourth Amendment case, Katz v. United States.[3] Under Katz, the analysis regarding whether a search

occurred was through the lens of whether an individual had a subjective expectation of privacy in the constitutionally protected area, and, if so, whether that expectation of privacy was objectively "reasonable."

Instead of relying on any privacy interest, and using the Jones decision as a roadmap, the Sixth Circuit found that marking a car's tire with chalk constituted a search because, regardless of how slight the physical intrusion, it was a trespass on an individual's property for the purpose of obtaining information. For the city of Saginaw, that information was whether a vehicle was parked in the same location for a sufficiently long enough time period for the city to issue a punitive citation to the owner of the vehicle.

The city argued, in both the district and circuit courts, that chalking did not constitute a "search" under the Fourth Amendment. Alternatively, the city argued that, if the practice did constitute a search, it was reasonable, because there is a reduced expectation of privacy in an automobile parked on a city street — the so-called "automobile exception" to the Fourth Amendment warrant requirement — and because the search was also subject to the "community caretaker" exception to the warrant requirement.

The community caretaker exception applies to an instance of police conduct that would otherwise be considered a search or seizure, but is not for the purpose of detecting, investigating or acquiring evidence relating to a criminal violation. A common example is when police conduct a protective search of an impounded automobile to secure any property in the automobile pending its storage and eventual release to the owner. The Sixth Circuit disagreed with the city, and found that neither exception applied to the city's chalking practice.

First, the Sixth Circuit held that, while there is a reduced expectation of privacy in an automobile, that could not justify the government search under the circumstances, because the probable cause to justify the search in the first instance was lacking. At the time the city chalks a vehicle, the Sixth Circuit reasoned, its search is "on vehicles that are parked legally," with no probable cause or individualized suspicion of wrongdoing. In other words, chalking does not denote unlawfulness at the time physical intrusion occurs; only later does the trespass yield evidence of a violation of local law for which a parking citation can be issued.

Second, the Sixth Circuit refused to expand the narrow community caretaker exception to chalking vehicles. The court found that the city had failed to show that there was a sufficient nexus between the practice and the protection of public safety. As the petitioner's vehicle was parked lawfully at the time the chalking occurred, the Sixth Circuit failed to see any "safety risk whatsoever" to the city. The court also pointed to the fact that the purpose of chalking is not to mitigate a public hazard, but to raise revenue for the city.

After it delivered its decision, the court issued an amended opinion to emphasize its decision's limited scope. The amended opinion took pains to explain that the chalking practice itself is not unconstitutional but that, in this case, the city failed to meet its burden to show that any exception to the Fourth Amendment's warrant requirements applied.

After the Sixth Circuit's decision, the city filed a petition for rehearing, claiming the decision conflicts with Supreme Court precedent. The city claimed the Sixth Circuit misapplied Jones, which it argued is a factually distinguishable case because a GPS system is far more invasive than the chalking of tires. The city also relied upon the high court's decision in South Dakota v. Opperman,[4] claiming that the "community caretaker" exception applies, because, as here, the city's parking enforcement officers follow standard procedures that

are limited in scope and that reveal no criminal activity to the enforcer.

The Sixth Circuit remained unconvinced by the city's arguments, and denied the petition. The case is once again before the district court, and the city will likely advance different theories for why an exception to the warrant requirement should be recognized.

In the wake of the decision, attorneys for cities and other local jurisdictions outside the four states in the Sixth Circuit — Michigan, Ohio, Kentucky and Tennessee — have been left wondering what impact, if any, this decision has or will have on their parking enforcement practices. Almost immediately, talk has turned to alternative regulation methods, such as chalking the street next to the tire, thus avoiding the "trespass" to the vehicle, or using cameras that read the license plate and relative position of the tire valve stem, as some cities already do.

But those cities still employing the old-fashioned tire chalking method have to ask whether the practice could land them in federal court facing a Section 1983 civil rights lawsuit — like the one Alison Taylor brought against the city of Saginaw. In large part, the answer to this question depends on whether the Taylor decision, if unaltered on further review or in the continuing litigation, makes tire chalking a "clearly established" violation of the Fourth Amendment, depriving local officers of a "qualified immunity" defense to federal civil rights liability.

The doctrine of qualified immunity protects governmental officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights."[5] To determine whether a defendant violated an individual's clearly established rights, courts must determine "'whether the state of the law' at the time of an incident provided 'fair warning' to the defendant 'that their alleged [conduct] was unconstitutional.'"[6]

The Ninth Circuit has observed that some courts "look to unpublished decisions and the law of other circuits in addition to [their own] precedent."[7] However, the court further found "[t]he absence of 'any cases of controlling authority' or a 'consensus of cases of persuasive authority' on the constitutional question compels the conclusion that the law was not clearly established at the time of the incident."[8]

Does the Taylor decision make "clearly established law" outside the Sixth Circuit? Not yet. In fact, this appears to be a first-of-its kind decision assessing the constitutionality of tire chalking, and, as to that, reaching only a tentative decision.

Although the Sixth Circuit was dismissive of arguments the city of Saginaw raised in Taylor that chalking did more than serve as a way to raise revenue, many local agencies nationwide rely on chalking to enforce parking restrictions that ensure the orderly flow of traffic and access to parking opportunities. In so doing, they protect the public safety and provide parking access to more people, serving their interests and those of businesses relying on access to parking on city streets.

Local government and associated agencies are rightfully concerned about the fallout if the Taylor decision stands, or if its reach extends to other jurisdictions. Cities, counties, universities, business improvement districts and a myriad of other agencies often work in concert with private industry to process parking and moving violations.

In light of the holding in Taylor, a number of these local agencies are looking to move away from chalking to avoid constitutional challenge, even if the decision may not stand as

binding precedent. There are a number of alternative options that remain viable for legitimate parking enforcement that are unlikely to draw the same scrutiny.

First, for those agencies that can afford to use more high-tech methods to enforce parking restrictions, still photography, closed-caption television or even the use of action cameras or drones could all track how long a vehicle is parked in one location, and provide evidence that would accomplish the same goal as tire chalking.

Alternatively, for those agencies where such technology is cost prohibitive, tire chalking could be modified in a manner to avoid a physical trespass. An agency could chalk the public street or thoroughfare adjacent to where the vehicle is parked to the same effect.

Finally, agencies could provide notice to vehicle owners that, by parking in designated zones on public streets or lots, their car's tires will be chalked, thereby signaling consent to the minor trespass associated with tire chalking. Such notice could be made in the same manner as the underlying parking time limitation, on posted signage. Agencies contemplating this final option should ensure compliance with any applicable state or local law, as some states preempt local parking regulation or dictate the degree of notice required under such circumstances.

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[1] Taylor v. Saginaw et al., No. 17-CV-11067, 2017 WL 4098862, at *5 (E.D. Mich. Sept. 15, 2017), revised and remanded, 922 F.3d 328 (6th Cir. 2019).

[2] United States v. Jones, 565 U.S. 400 (2012).

[3] Katz v. United States, 389 U.S. 347 (1967).

[4] South Dakota v. Opperman, 428 US 364 (1976).

[5] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[6] Tolan v. Cotton, 572 U.S. 650, 656 (2014), quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002).

[7] Prison Legal News v. Lehman, 397 F.3d 692, 702 (9th Cir. 2005).

[8] Jessop v. City of Fresno, 918 F.3d 1031, 1036 (2019), quoting Wilson v. Layne, 526 U.S. 603, 617 (1999).