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PREVIEW; State v. Q. Smith: *How far does Montana's right against unwarranted search and seizure extend?*

Victoria Hill
victoria.hill@umontana.edu

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The Montana Supreme Court will hear oral argument in *State v. Q. Smith* on Wednesday, November 3, 2021 at 9:30am via Zoom.[1] Dwight J. Schulte is expected to appear on behalf of defendant and appellant, Quincy Smith. Austin Miles Knudsen, Brad Fjeldeim, and William E. Fulbright are expected to appear on behalf of plaintiff and appellee, the State of Montana.

I. INTRODUCTION

The main issue in *State v. Q. Smith* is whether Deputy Monaco violated Smith's rights under the Fourth Amendment of the United States Constitution and Article II, § 10 of the Montana Constitution when he followed Smith's vehicle onto a private driveway to complete a traffic stop, which was initiated on a public road.[2]

II. FACTUAL AND PROCEDURAL BACKGROUND

Quincy Smith was living with his longtime friends, Jacques Hennequin and Jacques' wife, Carlie, in their home on Hidden Valley Road, Florence, Montana.[3] The Hidden Valley Road property is a five-acre parcel in Ravalli County, Montana, with a fence around the property line and interior fence around the yard, house, and garage.[4] On May 15, 2019, Smith and Hennequin were returning home from looking at the house that Quincy and his family had just made an offer to purchase, about three-quarters of a mile away from his residence.[5] Smith and Hennequin drove eastbound on Hidden Valley Road to return to their residence.[6]

Ravalli County Sheriff Deputy Nicholas Monaco was driving westbound on Hidden Valley Road that night.[7] When Monaco observed Smith's vehicle traveling eastbound, he believed Smith's vehicle was travelling 57 mph in a 40-mph zone. Monaco then activated his lights,

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* J.D. Candidate, University of Montana School of Law Class of 2023.

[1] The argument will be live-streamed and can be accessed through the Court's website at http://strearn.vision.net/MT-JUD/.

[2] Brief of Appellee at 1, *State v. Q. Smith*, https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=357250 (Mont. June 25, 2021) (No. DA 20-0382).

[3] Brief of Appellant at 2, *State v. Q. Smith*, https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=345802 (Mont. Feb. 19, 2021) (No. DA 20-0382).

[4] *Id.* at 3.

[5] *Id.* at 7.

[6] *Id.*

[7] *Id.*

turned his vehicle around, attempted to catch up to Smith's vehicle, and observed it turn down a residential driveway.[8]

Smith and Hennequin pulled into their driveway and exited Smith's vehicle.[9] Smith and Hennequin waited outside the vehicle in the driveway for Monaco to exit his vehicle, informed Monaco that he was on their private property, and asked him to leave.[10] While Monaco was in his patrol vehicle behind them in the driveway, he called in a "blackout out at res," indicating a parked vehicle[11] with its lights off.[12] Monaco also requested backup in "code protocol," the highest protocol possible,[13] due to "two uncooperative males."[14]

Several minutes later, Ravalli County Sheriff Sergeant Jered Guisinger arrived at the scene.[15] During this time, Smith repeatedly asked Monaco to leave the private property and return with a warrant.[16] After Guisinger arrived, Monaco told Smith he was under arrest.[17] Smith turned around and raised his hands in the air.[18] Five seconds after exiting his vehicle, Guisinger then shot Smith in the back with his taser without warning.[19]

Smith was searched, seized, and cited[20] for speeding, obstructing a police officer, driving under the influence of alcohol or drugs (first offense), and resisting arrest.[21] Before Smith's trial in justice court, Smith filed a Motion to Suppress and Motion to Suppress Blood Test Results, arguing, "law enforcement entered private property, against the express instructions of [Smith] and the property owner, [Hennequin], and made an unlawful search and arrest."[22] Both motions were denied, and Smith was found guilty on all charges at his bench trial on February 19, 2020.[23]

Smith appealed to the District Court the same day.[24] The District Court denied Smith's motions on May 26, 2020, finding that Monaco "pursued [Smith] in furtherance of a lawful investigatory stop under

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[8] *Id.*
[9] Brief of Appellant, *supra* note 3, at 8.
[10] *Id.*
[11] *Id.*
[12] Brief of Appellant, *supra* note 3, at 4.
[13] Brief of Appellee, *supra* note 2, at 8.
[14] Brief of Appellant, *supra* note 3, at 4.
[15] *Id.*
[16] *Id.* at 10.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Brief of Appellee, *supra* note 2, at 1–2.
[22] *Id.* at 2.
[23] *Id.*
[24] *Id.*

[Mont. Code Ann. § 46-5-401]."[25] Smith then appealed to the Montana Supreme Court.[26]

The parties dispute whether Monaco's patrol lights were visible to Smith before Smith's vehicle entered the residential driveway. Smith maintains that he did not see Monaco's patrol lights until he parked at home and exited his vehicle.[27] Monaco testified that his lights were activated before Smith made a substantial turn around a corner on Hidden Valley Road.[28]

III. SUMMARY OF THE ARGUMENTS

A. Appellant's Arguments

Smith offers two arguments: (1) Smith had a reasonable right to privacy from Monaco's search because Smith was in the curtilage of his residence; and (2) no exigent circumstances existed that would allow Monaco's warrantless entry onto Smith's property.[29]

First, Smith argues that he had a reasonable right to privacy because he was a resident of the home and was within the curtilage of his residence at the time of the warrantless search.[30] Although Smith was not the owner of the home at Hidden Valley Road, Smith argues that he had an expectation of privacy even as a guest in Hennequin's home.[31] Under the precedent set in *Minnesota v. Olson*,[32] even an overnight guest has an expectation of privacy.[33]

Furthermore, Smith argues he had a reasonable expectation of privacy because he was within the curtilage of his residence.[34] Smith references that Montana extended the right to privacy on private land in *State v. Bullock*,[35] which held

> Where that expectation [of privacy] is evidenced by fencing, 'No Trespassing,' or similar signs, or 'by some other means [which] indicate[s] unmistakably that entry is not permitted' entry by law enforcement officers requires permission or a warrant.[36]

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[25] *Id.*
[26] Brief of Appellant, *supra* note 3, at 2.
[27] *Id.* at 7.
[28] Brief of Appellee, *supra* note 2, at 3.
[29] Brief of Appellant, *supra* note 3, at 12, 16.
[30] *Id.* at 12–16.
[31] *Id.* at 12–13.
[32] 495 U.S. 91 (1990).
[33] Brief of Appellant, *supra* note 3, at 12–13 (citing *Olson*, 495 U.S. at 96–97).
[34] *Id.* at 13.
[35] 901 P.2d 61 (Mont. 1995).
[36] Brief of Appellant, *supra* note 13, at 13 (citing *Bullock*, 901 P.2d at 76).

Here, Smith argues that he had a reasonable expectation of privacy because the Hidden Valley Road property is fenced and had other indicators that entry was not permitted.[37] At the time of the search, Smith was standing in front of the garage within the inner most of two fences, which he argues clearly delineated the curtilage of the residence.[38] Smith also notes that the five-acre property is surrounded by foliage and landscaping to block view, was not readily visible from the public road, and could only be accessed by driving up a 350-foot private driveway, and argues that these characteristics delineated the curtilage of the residence to indicate that entry was not permitted.[39] Thus, Smith concludes that the search was unlawful because Smith has a reasonable expectation of privacy within the curtilage of Smith's residence and Monaco did not have a warrant or permission to enter the curtilage of Smith's residence.[40]

Next, Smith argues that no exigent circumstances existed that would permit Monaco's warrantless entry by comparing the facts here with this Court's precedent in *State v. Saale*.[41] In *Saale*, the defendant was involved in a vehicle roll-over accident and fled the scene of the accident, returning to her home.[42] When officers arrived at Saale's house, Saale's husband denied them entry.[43] The officers determined that they could enter Saale's house without a warrant due to the exigent circumstances of Saale's potential intoxication and trying to elude officers.[44] However, the Court rejected the notion that possibly being intoxicated and trying to elude officers were exigent circumstances that allowed a warrantless entry into Saale's home.[45] Smith argues that the facts here are similar to *Saale*, and therefore the Court should find for Smith.[46]

Finally, Smith rebuts the State's argument that the hot pursuit warrant exception is applicable here.[47] Hot pursuit, or fresh pursuit, is the right of a police officer to make a warrantless search of a fleeing suspect or of the place to which the suspect has fled.[48] Smith cites *State v. Sorenson*[49] to support his argument that the theory of hot pursuit "is not available to peace officers unless a felony has been committed and the suspect is fleeing."[50] But here, Smith was never suspected of having committed a

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[37] Brief of Appellant, *supra* note 3, at 13.
[38] *Id.*
[39] *Id.* at 13–14.
[40] *Id.* at 16.
[41] 204 P.3d 1220; Brief of Appellant, *supra* note 3, at 16–20.
[42] *Id.* at 17–18; *Saale*, 204 P.3d at 1221.
[43] Brief of Appellant, *supra* note 3, at 18 (citing *Saale*, 204 P.3d at 1222).
[44] *Id.*
[45] *Id.* (citing *Saale*, 204 P.3d at 1221–1223).
[46] *Id.*
[47] *Id.* at 19.
[48] *Fresh Pursuit*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[49] 590 P.2d 136 (Mont. 1979).
[50] Brief of Appellant, *supra* note 3, at 19 (citing *Sorenson*, 590 P.2d at 139).

felony.[51] Rather, Smith argues that his investigation for a speeding violation exempts Monaco's warrantless search from the theory of hot pursuit.[52]

B. Appellee's Arguments

The State offers two arguments: (1) Smith could not have a reasonable expectation of privacy in this case; and (2) the theory of hot pursuit ought to apply here.[53]

First, the State argues Smith could not have a reasonable expectation of privacy by attempting to distinguish the facts in *Bullock* with the facts here.[54] First, the State distinguishes the temporal nature of the Fourth Amendment violations alleged between *Bullock* and *Smith*, noting that law enforcement in *Bullock* investigated a crime hours later, whereas Monaco investigated an immediate speeding violation.[55] Another distinction the State offers is that the layout of the property involved differs from *Bullock* because Smith did not have "no trespassing" signs posted, the exterior fence is not a "privacy fence," and there were no closed gates on the property.[56] The final distinction the State offers is Smith's assertion that Monaco leave the property was "more of an indication of not wanting to have any interaction with law enforcement than an exercise of [Smith and Hennequin's] privacy rights in the driveway."[57]

Next the State argues that its interest outweighs Smith's expectation of privacy in the driveway of his residence because the theory of hot pursuit ought to apply in this case.[58] While the State concedes that *Sorenson* states that the doctrine of hot pursuit is unavailable to peace officers until a felony has been committed and the suspect is fleeing,[59] the State argues that Montana law provides that the driver of a motor vehicle may be arrested without a warrant if the arresting officer is in uniform and displays the officer's badge of authority and observes the recording of the speed of the vehicle by radio microwaves or other electrical device.[60]

Furthermore, in opposition to Smith's comparison of the facts here with the facts in *Bullock*, the State argues that the facts here more closely mirror those in *Arizona v. Hernandez*,[61] an Arizona case.[62] As in

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[51] *Id.*
[52] *Id.*
[53] Brief of Appellee, *supra* note 2, at 10, 13, 22.
[54] *Id.* at 11–16.
[55] *Id.* at 13.
[56] *Id.* at 15.
[57] *Id.* at 15–16.
[58] *Id.* at 13.
[59] *Id.* at 17 (citing *Sorenson*, 590 P.2d at 139).
[60] *Id.* at 13–14 (citing MONT. CODE ANN. § 61-8-703(1)(A) (2019)).
[61] 413 P.3d 207 (Ariz. 2018).
[62] *Id.* at 19.

Hernandez, the State argues that Smith impliedly consented to Monaco's presence and interaction by choosing to lead the officer on the private property.[63] The *Hernandez* court used a reasonableness balancing test between an individual's expectation of privacy against the officer's reasons for being on the private property.[64]

IV. ANALYSIS

The Fourth Amendment of the United States Constitution guarantees the right of the people to be secure against unreasonable searches. Montana's Constitution grants specific privacy rights beyond those of the United States Constitution.[65] Article II, § 10 of the Montana Constitution states, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." In determining if a search violated the Montana Constitution, the Court will look to two factors: "(1) whether the person has an actual expectation of privacy that society is willing to recognize as objectively reasonable, and (2) the nature of the state's intrusion."[66]

A. The Court will likely find that Smith had an actual expectation of privacy that society is willing to recognize as objectively reasonable.

Warrantless searches and seizures conducted *inside* a home are per se unreasonable, subject to a few carefully drawn exceptions, such as exigent circumstances.[67] Smith argues that Montana's additional privacy rights under Article II, § 10 of the Montana Constitution and the Court's precedent in *Bullock* favor extending this per se rule beyond the actual "home" to the "curtilage" of the residence.[68] The Court here is unlikely to extend this per se rule because the Court has declined this invitation in favor of a circumstances test in numerous cases.[69]

However, if the Court extends the per se unreasonable rule from *State v. Wakeford*,[70] the question then becomes whether there were exigent circumstances that allowed for a warrantless search. This argument is difficult for the State to win, as the State bears the heavy burden of

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[63] *See* Brief of Appellee, *supra* note 2, at 20.
[64] 413 P.3d at 210.
[65] State v. Bullock, 901 P.2d 61, 75 (Mont. 1995) (citing State v. Sawyer, 571 P.2d 1131, 1133 (Mont. 1977)).
[66] State v. Dunn, 172 P.3d 110, 113 (Mont. 2007) (quoting City of Whitefish v. Large, 80 P.3d 427 (Mont. 2003)).
[67] State v. Wakeford, 953 P.2d 1065 (Mont. 1998) (citing State v. Rushton, 870 P.2d 1355 (Mont. 1994)).
[68] Brief of Appellant, *supra* note 2, at 16–17.
[69] *See generally* State v. Staker, 489 P.3d 489, 496 (Mont. 2021); State v. Myran, 289 P.3d 118, 123 (Mont. 2012); State v. Crites, 218 P.3d 500, 500 (Mont. 2009); State v. Goetz, 191 P.3d 489, 511 (Mont. 2008); *Dunn*, 172 P.3d at 113.
[70] 953 P.2d 1065 (Mont. 1998).

showing the existence of exigent circumstances.[71] While the State argues that Smith eluded law enforcement[72] and that Monaco's warrantless entry was justified under hot pursuit,[73] the precedent set by *Sorenson* is clear: "the theory of hot pursuit is unavailable to peace officers until a felony has been committed and the suspect is fleeing."[74] If the Court finds that the search was per se unreasonable under *Wakeford*, and that there were no exigent circumstances justifying the warrantless entry, then the Court must reverse Smith's conviction.

If the Court refuses to extend *Wakeford*, it will determine whether Smith had a reasonable expectation of privacy by weighing the circumstances of the case, including "the place of the investigation; the control exercised by the person over the property; and the extent to which the person took measures to shield the property from public view to communicate that entry is not permitted."[75] The latter factor is the biggest point of contention in this case. The Court will likely find that Smith had an actual expectation of privacy that Montana will recognize as reasonable. The facts here are positioned somewhere between *Bullock*, where an expectation of privacy was found,[76] and *State v. Hubbel*, where the defendant did not have an expectation of privacy on private land leading up and including the threshold of his residence.[77] In *Hubbel*, a case which goes unmentioned by the State,[78] the Court held that there was no reasonable expectation of privacy in property leading to the front door of the residence[79] because there was not a fence separating the property from the highway, no shrubs or bushes to shield the property from public view, and no posted signs indicating that entry was not permitted.[80] Smith distinguishes the facts here from those in *Hubbel*[81] by offering evidence of the shrubbery and fencing around the property that prevent visitors from observing what is in plain view.[82] While the State attempts to distinguish the curtilage in *Bullock* that was labeled with "No Trespassing" signs,[83] the Court in *Bullock* offers other alternatives to signage to delineate private property[84] that are appropriately raised by Smith.[85] Thus, *Q. Smith* is more

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[71] *Id.* at 1069 (citing Welsh v. Wisconsin, 466 U.S. 740, 749–50 (1984)).
[72] Brief of Appellee, *supra* note 2, at 14.
[73] *Id.* at 13.
[74] 590 P.2d 136, 139 (1979).
[75] State v. Hubbel, 951 P.2d 971, 977 (Mont. 1997) (referencing *Bullock*, 901 P.2d at 76).
[76] 901 P.2d at 76.
[77] 951 P.2d at 977.
[78] *See generally* Brief of Appellee, *supra* note 2.
[79] *Hubbel*, 951 P.2d at 977.
[80] *Id.*
[81] *Id.* at 978.
[82] *See* Brief of Appellee, *supra* note 2, at 3–6.
[83] *See* Brief of Appellee, *supra* note 2, at 15.
[84] *See* State v. Bullock, 901 P.2d 61, 76 (Mont. 1995) (citing People v. Scott, 593 N.E.2d 1328, 1338 (N.Y. 1992)).
[85] Brief of Appellant, *supra* note 3, at 13–14.

akin to *Bullock*, and the facts favor a finding of a reasonable expectation of privacy.

Furthermore, public policy favors finding that Smith had a reasonable expectation of privacy. On a balancing of interests and burdens, the State has a low interest in pursuing misdemeanants without a warrant, and a low burden in obtaining a warrant. Monaco had the ability to obtain a warrant and did obtain a warrant later to obtain a sample of Smith's blood.[86] Monaco testified:

> Q: Did you ever get a warrant?
>
> A: I obtained a telephonic search warrant for the Defendant's blood, but not a warrant with regard to any other aspect of the stop.
>
> Q: But you had the ability to get a warrant, as evidenced by the fact that you received one for the blood?
>
> A: Yes. [87]

In contrast to the low burden on the state, Montanans have a high interest in maintaining their Fourth Amendment rights, as the Montana Constitution explicitly requires the showing of a compelling state interest to justify infringements on an individual's privacy rights.[88]

As a matter of public policy, if the only reason that Smith does not have a privacy interest within the curtilage of his residence is because he failed to post "no trespassing signs,"[89] while offering several other means of delineating the curtilage of the residence,[90] Montanans privacy rights are not as strong as the State Constitution claims. Because *Q. Smith* is more akin to *Bullock*, and because there is a strong public policy in favor of finding a right to privacy, the Court will likely find that Smith had a reasonable expectation of privacy.

B. The Court will likely find that the nature of the State's intrusion was more than minimal.

Next, the Court will consider the nature of the State's intrusion.[91] Here, the Court must determine whether the state's method of investigation is so personally invasive that the Court recognizes the intrusion as a search that requires further justification, such as a warrant or other special circumstances.[92] In *Hubbel*, the Court considered the

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[86] Brief of Appellee, *supra* note 2, at 8–9.
[87] *Id.*
[88] MONT. CONST. art. II, § 10.
[89] *See* Brief of Appellee, *supra* note 2, at 15.
[90] *See* Brief of Appellant, *supra* note 3, at 13–14.
[91] *Dunn*, 172 P.3d at 114.
[92] State v. Scheetz, 950 P.2d 722, 727 (Mont. 1997) (referencing State v. Stubbs, 892 P.2d 547 (Mont. 1995)).

officers entry onto private property as minimal because they "did nothing other than what any other casual visitor to the residence would do."[93] The *Hubbel* Court referenced that the police officers "did not ignore posted warnings, hop fences, open gates, or slip through bushes intended to screen the home from view." While Smith attempts to maximize the importance of the bushes on the exterior of the home,[94] considering that there were not "No Trespassing" signs posted and no closed gates,[95] the facts here align more with the minimal intrusion found in *Hubbel* because the driveway at issue here is similar to the general parking area routinely used by other visitors in *Hubbel*. Similarly, in *City of Whitefish v. Large*,[96] the Court held that officers' entry through the common-area parking lot was not overly intrusive in the absence of no trespassing signs and gates.[97] However, in *Bullock*, the Court explained that "what an individual seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[98] Here, although the driveway was a publicly accessible area, Smith verbally indicated that the State's intrusion was not minimal by warning Monaco that he was on private property and requesting that Monaco leave immediately.[99]

V. CONCLUSION

The Court in *State v. Q. Smith* has an opportunity to return to *Bullock*'s principle and reaffirm that Montana continues to hold that its Constitution affords citizens broader protection to the right to privacy than the Fourth Amendment of the United States Constitution. The Court will likely follow a facts and circumstances test to determine whether Smith had an actual expectation of privacy that society is willing to recognize as objectively reasonable, and the nature of the state's intrusion. The Court will likely find that the facts in *Q. Smith* are similar to the facts in *Bullock*, and thus find that Smith had an actual expectation of privacy that society is willing to recognize as objectively reasonable, and that the nature of the state's intrusion was enough to violate Smith's rights against unwarranted search and seizure under the Fourth Amendment and Montana Constitution.

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[93] 951 P.2d 971, 977 (Mont. 1997).
[94] *See* Brief of Appellant, *supra* note 3, at 13.
[95] *Hubbel*, 951 P.2d at 977.
[96] 80 P.3d 427 (Mont. 2003).
[97] *Id*. at 431.
[98] 901 P.2d 61, 70 (citing Katz v. United States, 389 U.S. 347, 351 (1967)).
[99] *See* Brief of Appellant, *supra* note 3, at 8.