No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2021

Christopher Payton May-Shaw,

Petitioner,

v.

United States of America,

Respondent.

_____

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

_____

PETITION FOR A WRIT OF CERTIORARI

_____

PATRICK J. HANLEY
214 E. Fourth Street
Covington, Kentucky 41011
859-431-7077 (Tele)
859-431-2194 (fax)
p.hanley@att.net

Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

No. 1 Was the warrantless long-term surveillance of the parking lot and carport adjacent to Petitioner's apartment building through the use of a pole camera attached to a telephone pole for twenty-three consecutive days an unreasonable search under the Fourth Amendment?

No. 2 Was the carport where Petitioner parked his automobile curtilage of his apartment?

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PETITION FOR WRIT OF CERTORARI
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Christopher May-Shaw asks that a writ of certiorari issue to review the Judgment and Opinion entered by the United States Court of Appeals for the Sixth Circuit on April 8, 2020 and recorded at 955 F.3d 563 (6th Cir. 2020).

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the Court below.

OPINIONS BELOW

The Court of Appeals Order denying Petitioner's Motion for Rehearing en banc is attached hereto as Appendix A.

The Opinion of the Court of Appeals, published at 955 F.3d 563 (6th Cir. 2020), is attached hereto as Appendix B.

The Judgment based upon the Opinion above is attached hereto as Exhibit B-1.

The Opinion of the District Court, a civil rights action, published at 2020 U.S. Dist. LEXIS 115116 is attached hereto as Appendix C.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Order of the Court of Appeals denying the Petition for rehearing en banc was entered on August 26, 2020. This Petition is filed within 150 days after entry of this order. *See Sup. Ct. Order dated March 19, 2020.* This Court has jurisdiction to grant certiorari under 28 U.S.C. Section 1254(1).

CONSTUTUIONAL PROVISION INVOLVED IN THIS CASE

The *Fourth Amendment* to the United States Constitution provides: 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.

STATEMENT OF THE CASE

On July 16, 2018, Petitioner Christopher Payton May-Shawn was sentenced in the United States District Court, Western District of Michigan, Southern Division, to 144 months incarceration (R. 111, Page ID ## 551-569) after he entered a conditional plea of guilty to a charge of conspiracy to distribute cocaine (R. 94, Page ID ## 379-385). The District Court had jurisdiction pursuant to 18 U.S.C. Section 3231.

On February 29, 2018, he filed a Motion to Suppress evidence obtained from a search of his apartment and his BMW automobile claiming that the warrant which authorized those searches was based upon illegally obtained evidence. If suppressed, the warrant would become insufficient as far as establishing probable cause. (R. 54, Page ID## 162-185). The illegally obtained evidence was primarily acquired from twenty-three consecutive days of surveillance of the parking lot and curtilage of the apartment complex at which Petitioner resided through the use of a pole camera (R.60, Page ID #219), and from a warrantless K-9 search or a dog-sniff of Petitioner BMW, which was parked in a covered carport adjacent to and associated with his apartment and constituted curtilage of the apartment. (R.54, Page ID# 169).

The District Court denied the Motion to Suppress finding that Petitioner did not have a reasonable expectation of privacy in the parking lot and the carport. (R. 109, Page ID ##497-503).

On March 6, 2018, pursuant to a plea agreement, Petitioner pleaded guilty to a Conspiracy charge. The plea was conditional in that Petitioner retained the right to appeal the decision of

the lower Court denying his Motion to Suppress. (R. 68, Page ID ## 257-264). The next day, the lower Court entered a Judgment In A Criminal Case. (R. 94, Page ID # 379-385).

Petitioner filed a Notice of Appeal from this Judgment on July 18, 2018. (R. 96, Page ID# 390). The United States Court of Appeals for the Sixth Circuit had jurisdiction 28 U.S.C. Section 1291.

April 8, 2020, after briefing and oral argument, the Court of Appeals entered an Opinion affirming the District Court's denial of Petitioner's Motion to Suppress. (955 F.3d 563, 6th Cir. 2020) (Appendix A) and a Judgment (Appendix A-1) based thereon.

Petitioner filed a Petition for en banc rehearing on April 30, 2020. (Ct. of Appeals R. 76). On August 26, 2020, the Court of Appeals entered an Order denying the Petition for en banc rehearing. (Ct. of Appeals R. 79, See Appendix B).

REASONS FOR GRANTING THE WRIT

NO. 1 THE COURT SHOULD GRANT CERTIORARI TO DETERMINE IF EVIDENCE OBTAINED BY USE OF A POLE CAMERA FOR 23 CONSECUTIVE DAYS TO SURVEIL A PARKING LOT AND CARPORT OUTSIDE OF AN APARTMENT WITHOUT A WARRANT WAS A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT.

Statement of Facts

In December, 2015, the Grand Rapids Police Department began an investigation of Petitioner for suspected drug trafficking based upon information from the Silent Observer, an organization that receives anonymous information from the public which it then forwards to police agencies. Based upon some general information regarding Petitioner, i.e., his "name, some associate's

vehicles that he was involved with, vehicles he utilized, locations he was frequently seen at." (R. 109, Page ID #439-440), Grand Rapids Police determined that Petitioner was "staying" at 4346 Norman Drive with a friend (R.60, Page ID #220), which is a multi-family apartment building complex (R. 54-2, Page ID #182, and R. 109, Page ID #442).

An aerial view of that complex reveals that it is situated on a triangular piece of real estate (R. 60-2, Page ID #234). The front of the complex is framed by Norman Drive. The complex itself is not visible from the street except through the driveway from the street. (R.60, Page ID #217). Visibility of the complex is blocked by carports which run along most of Norman Drive. (R. 109, Page ID #449). The second side of the property is on the right side as viewed from Norman Drive. All along this side there is a six-foot high privacy fence that runs perpendicular from Norman Drive. On the other side of the fence is a piece of commercial real estate owned by an individual named Simon. The third side of the complex is blocked entirely from public view by the backs of the apartment buildings. (R. 60-2, Page ID #234).

Inside the perimeter of the complex is a communal parking lot where cars could park in the open. In addition, there are a number of carports where tenants park their cars. During the period of surveillance, police testified that Petitioner would frequently park his BMW at the carport that was marked 4346, which was closest to Petitioner's apartment. (R. 109, Page ID ## 458-461).

The carport was not easily viewable from Norman Drive. The driveway from this street was the only point the public had access to the complex. The government photos of the carport in

question offered at the hearing on the Motion to Suppress (R. 60-2, Page ID #235) were "from the internet, from a mapping website", were taken at a higher point of view, and did not provide a picture from street level. R. 109, Page ID ##471-472).

Surveillance by the police was accomplished in three different ways: During the initial stages of the investigation, it consisted of actual surveillance by the police in unmarked cars parked in the parking lot. During this stage of the surveillance, the police observed the activities of Petitioner periodically but did not observe Petitioner engaged in any drug transactions in the parking lot. (R. 109, Page ID ##441-445).

The second form of surveillance was accomplished periodically using a camera from a surveillance vehicle stationed in the parking lot of the apartment complex. Police testified at the Motion to Suppress that "[m]ost of the surveillance of May-Shaw was done…from a police van parked in the parking lot." (R. 60-2, Page ID #236). However, no video of this surveillance or a log of still shots therefrom was presented in support of the motion to suppress. (R.109, Page ID #453). Only a few stills from the surveillance van were presented. See R. 114-1 and 2, Page ID ## 576-577).

The third method of surveillance employed, and the most prominent, was through the installation and operation of a pole camera. This was a permanent fixture installed on January 26, 2016 and operated continuously until February 18, 2016, the day police submitted an Affidavit For Search Warrant (with the incorrect date of November 18, 2016) (R. 60-4, Page ID ##242-247), and a Search Warrant (R.60-4, Page ID ##240-241) was issued for Petitioner's

apartment and the BMW automobile that belonged to Petitioner. This camera was installed approximately 20 feet high on a telephone pole situated on the public right-of-way near the entrance of Simon's property on Norman Drive. (R.109, Page ID #448). Because it was situated 20 feet high, it was able to shoot over a 6-foot-high privacy fence installed between where the camera was located and the apartment complex. (R. 109, Page ID #448). It was pointed at Unit 104 in the complex which was Petitioner's apartment and the carport he parked in regularly. The camera could pan from side to side and up and down. (R. 109, Page ID # 451). Still shots, some with an accompanying description of what is depicted therein, were created from the video from the pole camera and included in Defendant's Exhibit C. (R. 114-3, Page ID ##578-645 and R. 114-4, Page ID ##646-711). This video and the still shots and the accompanying summaries were used by the police to draft the affidavit that supported the search warrant. (R. 109, Page ID #455).

The pole camera operated continuously during its 23 days of operation without any officers having to be on the scene (R. 109, Page ID ##447-450), they did not watch the video from the camera when they were not available or review what they missed. (R. 109, Page ID #450). The police officers "would watch it if we were available. When we weren't available, when we became available again we would watch it live and then review historically what had been recorded." (R. 109, Page ID #450).

On the day the Search Warrant was issued, officers monitoring Appellant's activities from the camera observed him arrive in a Chevy Tahoe and stand outside the passenger door at the complex and reach back into the vehicle remove a large stack of currency and conceal it on his

person and enter the door to his apartment. A short time later, he was observed leaving his residence and placing bags into his BMW vehicle and left driving another vehicle. (R. 54-2, Page ID #183).

Based upon this observation, which the police testified came from the pole camera and from the surveillance vehicle parked in the parking lot, a K-9 dog was brought to the apartment complex and entered the carport and ran the dog around Petitioner's BMW. The dog had a positive alert on the vehicle. (R. 54-2, Page ID #183).

Supported by the Affidavit of the Police Officer heading the investigation (R. 54-2, Page ID ##180-185) of Petitioner based upon the above-described surveillance, a Search Warrant (R. 54-2, Page ID ##178-179) was issued to search, among other things, Petitioner's apartment and his BMW automobile. Execution of the Warrant revealed controlled substance and cash.

Argument

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searched and seizures." A "search", as that term is used in the Fourth Amendment, "occurs when the government invades an individual's reasonable expectation of privacy." *Smith v. Maryland*, 442 U.S. 735, 739-40, 99 S.Ct. 2577, 61 L. Ed.2d 220 (1979). A reasonable expectation of privacy is recognized when the individual has a subjective expectation of privacy in the item(s) in question that society recognizes as reasonable. *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001);

Smith, supra, at 740-741, *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). "An individual has a reasonable expectation of privacy in the 'curtilage", which is the area immediately surrounding a house that 'harbors the intimate activity associated with the sanctity of a man's home and the privacies of life.'" *United States v. Anderson-Bagshaw*, 509 Fed. Appx. 396, 403 (6th Cir. 2012).

Relying on *United States v.* Houston, 813 F.3d 282 (6th Cir. 2016), the Sixth Circuit held that, while there is some support that long-term surveillance of the curtilage of a home with a pole camera is problematic under the Fourth Amendment, citing *Anderson-Bagshaw* at 405, and *United States v. Jones,* 565 U.S. 400, 415, 429-430 (2012), it held that "this type of warrantless surveillance does not violate the Fourth Amendment." *United States v. May-Shaw,* 955 F.3d 563, 567 (6th Cir. 2020).

In this case, the Government installed a pole camera 20 foot high on a telephone pole on property adjacent to the Petitioner's apartment complex and on the other side of a 6-foot privacy fence that had a clear view of his parking lot and the carport nearest to his apartment. The camera recorded video for 23 twenty-three consecutive days. A pole camera log containing still photos of images taken the day of and the day before the search warrant was applied for and was admitted into evidence at the Motion to Suppress as Defendant's Exhibit C. (See pages 6-7 of the above). As noted by the Court, there were a few photos offered by the Government taken from the cameras in the van revealing what were described as

photos showing "suspected" drug activity. *May-Shaw at 569, footnote 1.* Officers used the pole camera to relieve them from being in the parking lot of the complex during surveillance. The overwhelming amount of evidence obtained to support the factual allegations in the affidavit came from the pole camera. (R. 109, Page ID ##450-456). However, the record reveals that the overwhelming amount of evidence came from the photos in the pole camera log. This is readily apparent from a review of the photos contained in the log; they reveal photos taken from a 20-foot height rather than from the ground. The claims of the testifying officer that the vantage point from the pole camera was the same as the vantage point on the street are in conflict with these photos. The pole camera was situated 20 foot high on the telephone pole so it could overcome the 6-foot privacy fence. Photos taken from that pole clearly reflect that they were taken from that height.

The few photos taken by the surveillance van did not establish probable cause for the search warrant. The paragraphs in the affidavit relating to the activities that occurred on February 17th and 18th of 2016 were the result of the photos from the pole camera contained in Defendant's Exhibit C admitted at the Motion to Suppress.

The long-term surveillance of Petitioner's carport or curtilage to his apartment was a violation of his Fourth Amendment right to privacy. As noted by the court in *May-Shaw*, "long-term video surveillance of a home's curtilage is problematic

under the Fourth Amendment. see *United States v. Anderson-Bagshaw,* 509 F. App'x 396, 405 (6th Cir. 2012). There is at least some support for that proposition, as this court and five Justices of the Supreme Court have noted concerns about the problems with long-term warrantless surveillance." At 567.

This was the view shared by the Court in *Anderson-Bagshaw* when it stated that:

> Nonetheless, we confess some misgivings about a rule that would allow the government to conduct long-term video surveillance of a person's backyard without a warrant. Few people, it seems, would expect that the government can constantly film their backyard for over three weeks using a secret camera that can pan and zoom and stream live image to the government agents. We are inclined to agree with the Fifth Circuit that '[t]his type of surveillance provokes an immediate visceral reaction.' *United States v. Cuevas-Sanchez,* 821 F.2d 248, 251 (5th Cir. 1987) (stating in dicta that using a pole camera to view curtilage over a 10-foot fence constitutes a Fourth Amendment search). We also note that *Ciraolo [California v. Ciraolo, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986)]* involved a brief flyover, not an extended period of constant and covert surveillance.
>
> At 405.

This concern was also echoed by the Supreme Court in concurring opinions of 5 Justices in *United States v. Jones* that involved long-term use of a GPS surveillance:

> GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations….(Disclosed in [GPS] data… will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and so on"). The government can store such records and efficiently mine them for information years into the future…And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility". At 565 U.S. 400, 415-16; 132 S. Ct. 945, 955-56, 181 L. Ed. 2d 911, 925.

Long-term surveillance generated from a stationary pole camera focused on someone's home has been seen as great a concern, or even greater concern, than a GPS system affixed to a car:

> Also, I find unconvincing the claim that, because this case involves a camera focused on Defendant's house, and not a monitor affixed to a car, the Government cannot gather a 'wealth of detail about [defendant's] familial, political, professional, religious, and sexual associations' 132 S. Ct. at 955. Here, familial relations with Defendant's brother and daughter were studied. Surely, in most cases, ten weeks of video surveillance of one's house could reveal considerable knowledge of one's coming and goings for professional and religious reasons, not to mention possible receptions of others for these and possibly political purposes…The privacy concerns implicated by a fixed point of surveillance was equal, if not greater, when it is one's home that is under surveillance.

Houston, supra. at 296.

The surveillance accomplished with the pole camera was a violation to Petitioner's constitutionally protected reasonable expectation of privacy and was a search as that term is used in the Fourth Amendment. Use of such technology to surveil citizens is capable of abuse by the Government and should be controlled by the courts through the use of warrants.

NO 2 THE COURT SHOULD GRANT CERTORARI TO DETERMINE IF THE CARPORT IN THIS CASE WAS WITHIN THE CURTILAGE OF PERTITIONER'S APARTMENT

On February 18, 2016, the police, without a warrant, entered the carport where Petitioner parked his BMW in the apartment complex he lived and had a K-9 handler run his K-9 around the BMW. The K-9 had a positive alert to the presence of drugs in the vehicle. Relying on the K-9 sniff of the BMW, the Government applied for and obtained a search warrant to search Petitioner's BMW and his apartment. (R. 54-2, Page ID #183). The search produced the drugs that resulted in the charge Petitioner entered his conditional plea to in this case. (R. 60, Page ID

#221).

In his Motion to Suppress, Petitioner claimed the search of the carport, with a drug detecting canine, constituted a search of curtilage to his apartment and was unconstitutional because it was executed without a warrant. *Florida v. Jardines,* 569 U.S. 1, 133 S. Ct 1409; 185 L. Ed. 2d 495 (2013), and *Collins v. Virginia,* 138 S. Ct. 1663, 1676, 201 L. Ed. 2d 9 (2018).

The area immediately "associated" with one's home is considered the "curtilage" and is encompassed within the term "house" in the Fourth Amendment. "Curtilage" is "part of the home itself for Fourth Amendment purposes." *Jardines* at 569 U.S. 6; and *Collins* at 138 S. Ct. at 1670-71. The warrantless search of curtilage with a drug-sniffing dog violated the Fourth Amendment.

The "curtilage" is the that area immediately surrounding and associated with one's apartment or home and is "defined by reference to facts indicating 'whether an individual may reasonably expect that an area immediately adjacent to his home will remain private.'" *United States v. Jones,* 2007 U.S. Dist. LEXIS 87221, *35, citing *Oliver v States,* 466 U.S. 170, 180, 104 S. Ct. 1735, 80 L. Ed. 2d 9 (2018). Whether the area associated with the apartment constitutes "curtilage" is generally dependent on four factors: 1) the proximity of the area to the involved to the apartment; 2) whether the area is included within an enclosure surrounding the apartment; 3) how the area is used; and, 4) what the apartment resident has done to protect the area from observation from others passing by. *United States v. Dunn,* 480 U.S. 294, 301; 107 S. Ct. 1134; 94 L. Ed. 2d 326 (1987). These factors are not part of a rigid test. "[E]very curtilage

determination is distinctive and stands or falls on its own unique set of facts." Daughenbaugh v. *City of Tiffin,* 150 F.3d 594, 598 (6th Cir. 1998).

The carport in question was certainly within the curtilage of his apartment. The apartment complex as a whole was not visible from three sides. The remaining side that ran along Norman Drive was bordered in large part by carports. The only entrance to the complex was through Norman Drive and the visibility of Petitioner's carport was impaired by trees. (R. 60-2, Page ID #234). The carport, which enclosed on two sides as well as from above, was the closest carport to Petitioner's apartment (R. 109, Page ID #458) so it was in close proximity to Petitioner's apartment and was partially enclosed. Petitioner frequently parked his BMW therein (R. 109, Page ID #460) and thus used the carport to park his car. Each carport in the complex was marked by an address and had identification, and, the carport was associated with Petitioner's apartment. (R. 109, Page ID #461, and Defendant's Exhibit B). Consequently, the carport was identified with Petitioner and his apartment.

While the carport was partially visible by residents of the complex, the above factors demonstrate Petitioner reasonable expected that his activities in the carport would remain private.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the Court of Appeals.

Respectfully submitted.

/s/ Patrick J. Hanley
Patrick J. Hanley

Counsel for Petitioner

Dated: January 4, 2021