

April 2020

## State v. Edstrom: No Warrant Needed for Minnesota Police to Conduct a Dog Sniff Outside Your Apartment

Stephen Grego

Follow this and additional works at: <https://ir.stthomas.edu/ustlj>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), and  
the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Stephen Grego, *State v. Edstrom: No Warrant Needed for Minnesota Police to Conduct a Dog Sniff  
Outside Your Apartment*, 16 U. ST. THOMAS L.J. 297 (2020).  
Available at: <https://ir.stthomas.edu/ustlj/vol16/iss2/7>

This Comment is brought to you for free and open access by UST Research Online and the University of St. Thomas  
Law Journal. For more information, please contact [lawjournal@stthomas.edu](mailto:lawjournal@stthomas.edu).

COMMENT

**STATE V. EDSTROM: NO WARRANT  
NEEDED FOR MINNESOTA POLICE TO  
CONDUCT A DOG SNIFF OUTSIDE  
YOUR APARTMENT**

STEPHEN GREGO\*

INTRODUCTION.....	297
I. DOG-SNIFF CASE LAW IN MINNESOTA PRIOR TO EDSTROM ..	298
A. State v. Wiegand.....	299
B. State v. Carter .....	302
C. State v. Davis.....	305
II. THE <i>EDSTROM</i> CASE.....	309
A. Facts .....	309
B. Procedural History .....	311
C. The Court of Appeals' Decision .....	311
D. The Minnesota Supreme Court's Decision .....	314
III. AFTER <i>EDSTROM</i> .....	320
A. Analyzing Edstrom.....	320
B. Future Implications.....	323
CONCLUSION.....	327

INTRODUCTION

Historically, law enforcement has worked closely with dogs to investigate suspected criminal activity.<sup>1</sup> This close relationship has evolved into the use of drug-detection dogs to assist in narcotics investigations. Each year, state and federal law enforcement agencies conduct many dog sniffs in

---

\* Juris Doctor, 2019, University of St. Thomas School of Law. The views expressed are solely the author's and do not reflect his work as a law clerk or the views of the Minnesota Judicial Branch. Thank you to Scott Swanson, Matthew Hough, and the University of St. Thomas Law Journal for your assistance in preparing this comment.

1. Charles F. Sloane, *Dogs in War, Police Work and on Patrol*, 46 J. CRIM. L. & CRIMINOLOGY 385, 388–89 (1955–56); see also Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 BUFF. L. REV. 81, 124–28 (2013) (discussing humans' use of dogs in warfare and as law enforcement partners).

search of illegal drugs.<sup>2</sup> The longstanding pairing of law enforcement and their loyal canines has changed policing throughout the United States.<sup>3</sup> As the decriminalization of certain drug offenses garners increased national attention, the utility of this police practice will come under greater scrutiny.

In *State v. Edstrom*,<sup>4</sup> the Minnesota Supreme Court addressed the propriety of a warrantless dog sniff of an apartment door in a common hallway of a secured residential building. Considering the question in the wake of the United States Supreme Court's decision in *Florida v. Jardines*,<sup>5</sup> a divided Supreme Court declined to grant tenants either a property right or reasonable expectation of privacy in the area immediately next to their apartment door.<sup>6</sup> The court's reasoning has important implications for tenants, criminal lawyers, and law enforcement actors.

This comment discusses the importance of the Minnesota Supreme Court's *Edstrom* decision in the criminal procedure arena. Part I presents a survey of relevant Minnesota dog sniff case law before *Edstrom*. Part II analyzes *Edstrom* in detail, including the facts, procedural posture, and the opinions of both the Minnesota Court of Appeals and Minnesota Supreme Court. Part III analyzes the *Edstrom* decision and discusses its importance given current societal sentiment toward the policing of narcotics.

## I. DOG-SNIFF CASE LAW IN MINNESOTA PRIOR TO EDSTROM

Before the court of appeals' decision in *Edstrom*, Minnesota dog-sniff case law lacked clarity.<sup>7</sup> Was a dog sniff a search under either the Fourth Amendment of the United States Constitution or Article I, Section 10 of the Minnesota Constitution? What standard—reasonable suspicion or probable

---

2. Brief for Texas et al. as Amici Curiae Supporting Petitioner at 2–4, *Florida v. Jardines*, 569 U.S. 1 (2013) (No. 11-564), [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/12/11-564-Jardines\\_Amicus-Brief1.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/12/11-564-Jardines_Amicus-Brief1.pdf).

3. See Jane Yakowitz Bambauer, *How the War on Drugs Distorts Privacy Law*, 64 STAN. L. REV. ONLINE 131, 131 (May 9, 2012), <http://www.stanfordlawreview.org/online/war-on-drugs-privacy-law>.

4. 916 N.W.2d 512, 514 (Minn. 2018), *cert denied*, 139 S. Ct. 1262, 1262 (2019). One amicus brief—from the Fourth Amendment Scholars in support of *Edstrom*—was filed with the Minnesota Supreme Court.

5. 569 U.S. 1 (2013).

6. *Edstrom*, 916 N.W.2d at 524. Before the *Jardines* decision, a majority of federal courts interpreted past Supreme Court precedent to mean that a dog sniff was never a search. See *Jardines v. State*, 73 So. 3d 34, 66–68 & nn.15–16 (Fla. 2011) (Polston, J., dissenting) (collecting cases).

7. See *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002) (concluding that the use of a narcotics-detection dog to sniff the exterior of motor vehicle during a traffic stop was not a search, but required “reasonable, articulable suspicion of drug-related criminal activity”); see also *State v. Carter*, 697 N.W.2d 199, 211–12 (Minn. 2005) (finding that a dog sniff outside of a private storage unit was a search requiring reasonable suspicion); see also *State v. Davis*, 732 N.W.2d 173, 183 (Minn. 2007) (holding that police use of a drug-detection dog in the common hallway of an apartment building was a search requiring reasonable suspicion under the Minnesota Constitution).

cause—did police need before using a narcotics-detection dog?<sup>8</sup> The inquiry often turned on the specific area or item subjected to the dog sniff. This case-specific analysis created confusion, as evidenced by the various decisions before the supreme court’s decision in *Edstrom*. The most important of these decisions, *State v. Wiegand*, *State v. Carter*, and *State v. Davis*, are discussed immediately below. The Federal Court of Appeals circuit split following *Jardines* has also complicated the issue.<sup>9</sup>

### A. *State v. Wiegand*

The first chance for the Minnesota Supreme Court to address the level of suspicion necessary to conduct a dog sniff occurred in the 2002 case of *State v. Wiegand*. The facts of *Wiegand* are as follows.

At 12:20 a.m., a Cloquet police officer conducted a traffic stop on a vehicle with a burnt-out headlight.<sup>10</sup> The officer identified the vehicle’s occupants, and observed that Wiegand, who was driving, had slow and quiet speech, was somewhat nervous, had glossy eyes, and appeared to be shaking.<sup>11</sup> The two vehicle occupants denied possessing drugs in the vehicle, and the car’s owner refused a request to search the vehicle.<sup>12</sup>

After more officers arrived on scene, the stopping officer asked another officer to issue a warning for an equipment violation while he retrieved his narcotics-detection dog.<sup>13</sup> The stopping officer walked the dog around the vehicle three times.<sup>14</sup> Each time, the dog alerted to narcotics near the vehicle’s front passenger side.<sup>15</sup> During the search, the officer placed the drug dog inside the vehicle to pinpoint the contraband’s exact location.<sup>16</sup> But the dog did not alert to narcotics inside the vehicle and a later search within the vehicle recovered no narcotics.<sup>17</sup> The officer handling the dog then opened the vehicle’s hood and discovered a plastic bag containing about four ounces of marijuana.<sup>18</sup>

---

8. See Brief for Minnesota County Attorneys Association as Amicus Curiae supporting Appellant, *State v. Edstrom*, 916 N.W.2d 512 (Minn. 2018) (No. A16-1382), 2017 WL 8772617.

9. See Carol A. Chase, *Cops, Canines, and Curtilage: What Jardines Teaches and What It Leaves Unanswered*, 52 HOUS. L. REV. 1289, 1303–05 (2015) (explaining that most cases decided before *Jardines* rejected the notion that residents of multidwelling buildings could claim curtilage protection in common areas).

10. *Wiegand*, 645 N.W.2d at 128.

11. *Id.* At the later suppression hearing, the stopping officer testified that he did not believe Wiegand was using drugs but did believe he was acting suspiciously during the stop. *Id.* Additionally, the stopping officer testified at the suppression hearing that Wiegand was looking down and failed to talk in the officer’s direction when providing responses. *Id.*

12. *Id.* at 128–29.

13. *Id.* at 129.

14. *Id.*

15. *Id.*

16. The record is unclear about whether this occurred before or after the third exterior sniff. *Wiegand*, 645 N.W.2d at 129.

17. *Id.*

18. A pat down of Wiegand led to the recovery of additional marijuana and some cocaine. *Id.*

The State charged Wiegand with two counts of fifth-degree possession of a controlled substance.<sup>19</sup> The district court granted Wiegand's motion to suppress and dismissed the charges, reasoning that law enforcement lacked probable cause both to walk the drug dog around the vehicle and for the later pat search of Wiegand's person.<sup>20</sup> The Minnesota Court of Appeals reversed, determining that because a dog sniff was not a search, police did not need probable cause.<sup>21</sup>

The Minnesota Supreme Court in *Wiegand* framed the issue as "whether the Fourth Amendment to the United States Constitution or Article I, Section 10, of the Minnesota Constitution require probable cause or a reasonable, articulable suspicion of drug-related criminal activity before a narcotics-detection dog may be used around the exterior of a motor vehicle stopped for an equipment violation."<sup>22</sup> To begin answering the federal constitution question, the *Wiegand* court fleshed out the dog-sniff decision in *United States v. Place*, where the United States Supreme Court held that a dog sniff of luggage in an airport was not a search requiring probable cause.<sup>23</sup> The court next acknowledged that an automobile retained some Fourth Amendment protections but also emphasized that United States Supreme Court precedent afforded less protection to automobiles compared with homes or other privacy interests.<sup>24</sup> In holding that the dog sniff around the motor vehicle's exterior did not constitute a search under the Fourth Amendment, the *Wiegand* court relied on the United States Supreme Court's recent opinion in *City of Indianapolis v. Edmund*, which involved police use of drug-sniffing dogs at roadside checkpoints.<sup>25</sup> Based on *Place*,

---

19. *Id.* (citing MINN. STAT. § 152.025, subd. 2(1) (2000)).

20. *Id.*

21. *State v. Wiegand*, 621 N.W.2d 476, 478 (Minn. Ct. App. 2001), *rev'd*, 645 N.W.2d 125 (Minn. 2002).

22. *Wiegand*, 645 N.W.2d at 129. ("[W]hether the use of the narcotics-detection dog in this case was within the permissible scope of the limited investigation occasioned by a stop for a routine equipment violation.").

23. *Id.* at 129–30 (citing *United States v. Place*, 462 U.S. 696, 707 (1983)). The *Wiegand* court also examined the then recent decision of *Kyllo v. United States*. *Id.* at 130 (citing *Kyllo v. United States*, 533 U.S. 27 (2001)). In a remarkable stroke of foreshadowing, the Minnesota Supreme Court noted, "While *Kyllo* involved both the home and a piece of technical equipment much different from a dog, its reasoning suggests that a dog sniff of a home might lead a court to conclude that a search requiring probable cause took place." *Id.* The Supreme Court's opinion in *Jardines* would vindicate this line of dicta.

24. *Id.* at 131 (citations omitted).

25. *Id.* (citing *City of Indianapolis v. Edmund*, 531 U.S. 32, 40 (2000) (holding that police may not conduct roadblocks and use narcotics-detection dogs when the primary purpose of the roadblocks is to detect criminal wrongdoing)). The Minnesota Supreme Court also relied on federal case law from various circuit courts of appeals which reached the same conclusion. *Id.* at 132 (citing *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643, 647 (8th Cir. 1999); *United States v. Hunnicutt*, 135 F.3d 1345, 1350 (10th Cir. 1998); *United States v. Holloman*, 113 F.3d 192, 194 (11th Cir. 1997); *United States v. Jeffus*, 22 F.3d 554, 557 (4th Cir. 1994); *United States v. Seals*, 987 F.2d 1102, 1106 (5th Cir. 1993); *United States v. DiCesare*, 765 F.2d 890, 897, *opinion amended on other grounds*, 777 F.2d 543 (9th Cir. 1985)).

*Edmund*, and persuasive federal case law, the Minnesota Supreme Court held that the dog sniff of the vehicle's exterior was not a search requiring probable cause under the Fourth Amendment.<sup>26</sup>

The court next addressed Wiegand's argument that the Minnesota Constitution should be interpreted as requiring law enforcement to possess probable cause before conducting a warrantless dog sniff outside a motor vehicle.<sup>27</sup> Answering in the negative, the *Wiegand* court noted that the decision in *Place* did not constitute a radical departure from prior precedents, and more importantly, the *Place* analysis involved weighing the government's interest against the degree of intrusion against the citizen.<sup>28</sup> In determining what level of suspicion police needed to conduct a dog sniff of a motor vehicle's exterior, the *Wiegand* court employed the *Terry* balancing test to weigh the competing interests, just as the Supreme Court had done in *Place*.<sup>29</sup> While the Minnesota Supreme Court adhered to the United States Supreme Court's decisions in *Place* and *United States v. Jacobsen*,<sup>30</sup> which noted the limited intrusiveness of a dog sniff, it ultimately reasoned that the use of a dog to sniff an automobile's exterior involved some degree of intrusion into an individual's privacy interest.

Based on this analysis, the court held that law enforcement must possess reasonable suspicion of narcotics activity before using a drug-detection dog during a traffic stop.<sup>31</sup> Applying the reasonable suspicion standard to the facts of Wiegand's appeal, the Minnesota Supreme Court held that police lacked reasonable suspicion of drug activity to use a narcotics-detection dog.<sup>32</sup> Specifically, it noted that the stopping officer merely stated that Wiegand was acting nervously but articulated no basis to find that Wiegand was involved in drug-related activity.<sup>33</sup> Thus, the supreme court found that the dog sniff of the vehicle was unlawful.<sup>34</sup>

---

26. *Wiegand*, 645 N.W.2d at 132.

27. *Id.* ("We may construe a provision of the Minnesota Constitution to extend greater rights than a comparable provision in the U.S. Constitution, but we will not do so cavalierly.") (citing *State v. Carter*, 596 N.W.2d 654, 657 (Minn. 1999); *State v. Risk*, 598 N.W.2d 642, 649 (Minn. 1999)). The court noted that it had twice interpreted Article I, Section 10 of the Minnesota Constitution as providing greater protection for its citizens based on "sharp" or "radical departures" in case law from the United States Supreme Court. *Id.* (citing *California v. Hodari D.*, 499 U.S. 621 (1991); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990)).

28. *Wiegand*, 645 N.W.2d at 132–33 (citing *Place*, 462 U.S. at 707).

29. *Id.* at 134 (citing *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968)).

30. In *Jacobsen*, Drug Enforcement Agents responded to an airport to examine a partially damaged package containing several plastic baggies. 466 U.S. 109, 111 (1984). A DEA agent removed a plastic bag, took a small amount of white powder from the bag, and field tested the substance, which he recognized as cocaine. *Id.* The United States Supreme Court held that no Fourth Amendment search occurred because no expectation of privacy had been implicated. *Id.* at 120.

31. *Wiegand*, 645 N.W.2d at 135.

32. *Id.* at 137.

33. *Id.*

34. *Id.*

In a special brief concurrence, Justice Alan Page argued that the Minnesota Constitution should be read as affording greater protection to individuals against warrantless dog sniffs outside automobiles.<sup>35</sup> Acknowledging contrary case law, Justice Page contended that there was no “distinction between sense-enhancement-by-technology and sense-enhancement-by-canine.”<sup>36</sup> Justice Page believed that the majority’s approach essentially gutted the procedures established in *Terry* by concluding that a dog sniff is not intrusive and gives police permission to use this procedure when less intrusive means may be available to the investigating officer.<sup>37</sup> Justice Page would have held that police must possess probable cause of narcotics activity before they may lawfully use a narcotics-detection dog to sniff a vehicle.<sup>38</sup>

### B. *State v. Carter*

The Minnesota Supreme Court next addressed the propriety of a dog sniff in the 2005 case of *State v. Carter*. The *Carter* court addressed the constitutionality of a warrantless dog sniff outside a storage unit within a fenced-in, self-storage facility.<sup>39</sup> Police observed seemingly suspicious activity involving two vehicles at a storage unit.<sup>40</sup> After conducting a warrantless dog sniff of the appellant’s units, they were alerted to the presence of a controlled substance within one of the storage units.<sup>41</sup> One of the vehicles was registered to the appellant’s brother, who was the subject of a narcotics-related police investigation.<sup>42</sup> When applying for a search warrant of the storage units, police relied on the above information while also noting Carter’s and his brother’s criminal histories.<sup>43</sup> Execution of the search war-

---

35. *Id.* at 137–40 (Page, J., concurring specially).

36. *Id.* at 138.

37. *Wiegand*, 645 N.W.2d at 140 (citing *Terry v. Ohio*, 392 U.S. 1, 29 (1968)).

38. *Id.* at 139.

39. *State v. Carter*, 697 N.W.2d 199, 202–03 (Minn. 2005). For an in-depth discussion of the *Carter* decision, see Rachel Bond & Theodora Gaitas, *State v. Carter: The Minnesota Constitution Protects Against Random and Suspicionless Dog Sniffs of Storage Units*, 32 WM. MITCHELL L. REV. 1287 (2006).

40. *Carter*, 697 N.W.2d at 203.

41. *Id.*

42. *Id.* This “suspicious behavior” hardly seems worthy of police involvement. While a BCA agent observed two vehicles enter the storage facility, the record is silent on any other suspicious behavior, and police executed the dog sniff four weeks after they observed this “suspicious behavior.” *Id.*

43. *Id.* Later in the majority opinion, the *Carter* court noted that “[a] person’s criminal record is among the circumstances a judge may consider when determining whether probable cause exists for a search warrant.” *Id.* at 205 (citing *United States v. Conley*, 4 F.3d 1200, 1207 (3d Cir. 1993)). Other case law in Minnesota supports this proposition. *See, e.g.*, *State v. Cavegn*, 356 N.W.2d 671, 673 n.1 (Minn. 1984) (“[A] defendant’s prior convictions, if relevant, may be considered on the issue of probable cause”); *State v. McCloskey*, 453 N.W.2d 700, 704 (Minn. 1980) (noting that even a defendant’s “relatively minor trouble with the law” is of “some” probative value in making a probable cause determination).

rant at Carter's storage unit led to the recovery of two firearms and ammunition.<sup>44</sup>

Based on the recovery of this evidence, the State charged Carter with being a prohibited person in possession of a firearm.<sup>45</sup> Carter moved to suppress the evidence recovered from the storage unit, relying on *Wiegand* to argue that the police lacked reasonable suspicion to conduct the dog sniff outside the storage unit, and absent this positive alert, the search warrant was defective for want of probable cause.<sup>46</sup> The district court denied Carter's suppression motion, reasoning that the positive dog sniff alert, Carter's criminal history, and his frequent visits to the unit all supported a probable cause finding for the search warrant's issuance.<sup>47</sup> The Minnesota Court of Appeals affirmed the district court, concluding that the *Wiegand* decision did not apply to the present dog sniff of a storage unit's exterior.<sup>48</sup>

After granting review, the Minnesota Supreme Court first considered whether the dog sniff outside Carter's storage unit constituted a search under the Fourth Amendment.<sup>49</sup> To begin answering the question, the Minnesota Supreme Court surveyed prior dog sniff precedent from the United States Supreme Court.<sup>50</sup> The *Carter* majority rejected the argument that the dog-sniff in that case resembled the thermal imaging technology in *Kyllo v. United States*.<sup>51</sup> Noting that the United States Supreme Court had not addressed the precise question that Carter's appeal presented, the court cited cases from other states that involved similar circumstances: cases holding

---

44. *Carter*, 697 N.W.2d at 204. Oddly, police found no drugs inside the storage unit despite the positive alert from the trained narcotics-detection dog. See *infra* note 190 (exploring the pitfalls of assuming drug-dog infallibility).

45. *Carter*, 697 N.W.2d at 204 (citing MINN. STAT. § 624.713, subdvs. 1(b), (2) (2004)).

46. *Id.* (citing *State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002)).

47. The district court's order did not opine on whether the warrant would have contained sufficient probable cause without the dog sniff outside Carter's storage unit. *Id.*

48. *State v. Carter*, 682 N.W.2d 648, 652–53 (Minn. Ct. App. 2004), *rev'd*, 697 N.W.2d 199 (Minn. 2005).

49. *Carter*, 697 N.W.2d at 206. Before raising the question, the *Carter* court discussed whether the search warrant possessed probable cause without the positive alert from the drug-detection dog. *Id.* at 204–06. In doing so, the supreme court found that Carter's criminal record, his allegedly frequent visits to the storage unit, and his relationship with his brother, who also had connections to criminal activity, could not support a probable cause finding for issuing the search warrant for Carter's storage unit. *Id.* at 206.

50. *Id.* at 207–08 (citing *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmund*, 531 U.S. 32 (2000); *Illinois v. Caballes*, 543 U.S. 405 (2005)). In *Caballes*, the United States Supreme Court found that the use of a drug-sniffing dog around the exterior of a motor vehicle did not violate the Fourth Amendment because the dog could only detect the presence or absence of narcotics. 543 U.S. at 409–10.

51. *Carter*, 697 N.W.2d at 208 (“[A] thermal imager is ‘a piece of technical equipment much different from a dog.’”) (quoting *State v. Wiegand*, 645 N.W.2d 125, 130 (Minn. 2002)). In *Kyllo*, the United States Supreme Court held that police searched a home under the Fourth Amendment when they used a thermal-imaging device to detect heat emanation levels in a private home. *Kyllo v. United States*, 533 U.S. 27, 40 (2001). Yet the *Caballes* court explicitly declined to apply the reasoning from *Kyllo* in the context of a dog sniff, instead affirming the notion that a dog sniff is *sui generis*. *Caballes*, 543 U.S. at 409–10.



that dog sniffs conducted around the exterior of a storage unit did not constitute a search under the federal constitution.<sup>52</sup> Thus, the Minnesota Supreme Court held that the dog sniff outside Carter's storage unit was not a search under the Fourth Amendment.<sup>53</sup>

After disposing of Carter's Fourth Amendment claim, the court next examined whether the dog sniff outside the storage unit was a search under the Minnesota Constitution.<sup>54</sup> The *Carter* court relied on case law from other jurisdictions that held that a dog sniff outside a storage unit was a search for state constitutional purposes.<sup>55</sup> Based on this authority, the supreme court found that citizens retain a greater expectation of privacy in storage units under the Minnesota Constitution than the Fourth Amendment and thus held that the use of a drug-detection dog outside these units was a search for state constitutional purposes.<sup>56</sup> Because the police lacked reasonable suspicion about drugs in Carter's storage unit, the court held that the use of a narcotics-detection dog was an unreasonable search under the Minnesota Constitution.<sup>57</sup>

Justice Russell Anderson dissented, citing Justice Harlan's famous "reasonableness" test from *Katz v. United States*, and applying it to a dog sniff outside a storage unit.<sup>58</sup> Justice Anderson believed that while Carter certainly had a legitimate expectation of privacy within the storage unit, the same could not be true for the unit's exterior.<sup>59</sup> Lastly, Justice Anderson raised several opposing points to the majority's analysis, specifically: (1) determining whether a drug-dog is fallible requires a case-by-case analysis and should go to an issuing magistrate's probable cause determination; (2) relying on *Kyllo* for the proposition that drug-detection dogs reveal information "previously unknowable without physical intrusion" was improper; and (3) arguing that a storage unit conveys a heightened expectation of

---

52. *Carter*, 697 N.W.2d at 208–09 (citing *People v. Wieser*, 796 P.2d 982, 985 (Colo. 1990); *State v. Stanilowski*, 761 P.2d 1315, 1320 (Or. 1988)).

53. *Carter*, 697 N.W.2d at 209.

54. *Id.*

55. *Id.* at 210 (citing *Commonwealth v. Johnston*, 530 A.2d 74, 78–79 (Pa. 1987); *McGahan v. State*, 807 P.2d 506, 510 (Alaska Ct. App. 1991)). The *Carter* majority also noted the recent, growing recognition that drug dogs can provide "false alerts." *Id.* (citations omitted).

56. *Id.* at 211.

57. *Id.* at 212. Minnesota is not alone in granting greater protection under its own constitution. See Mark E. Smith, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, 46 HOUS. L. REV. 103, 105 n.7 (2009) (collecting cases).

58. *Carter*, 697 N.W.2d at 212–14 (Russell Anderson, J., dissenting) (citing *United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). In his famous *Katz* concurrence, Justice Harlan wrote that an expectation of privacy exists when a person exhibits an actual (subjective) expectation of privacy and when society recognizes that expectation as reasonable. *United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). As a side-note, Justice Page again concurred in the result in *Carter*, citing his concurrence in *Wiegand*. *Id.* at 212 (Page, J., concurring) (citing *State v. Wiegand*, 645 N.W.2d 125, 137–40 (Minn. 2002)).

59. *Carter*, 697 N.W.2d at 214 (Russell Anderson, J., dissenting). Justice Anderson noted that the dog sniff in question occurred on a "semi-public" walkway, an area where he believed Carter could not reasonably expect privacy. *Id.*

privacy lacks force when dog sniffs of luggage and automobiles, which serve the same function in holding personal items, have been considered nonintrusive.<sup>60</sup> Lastly, Justice Anderson contended that even under the majority's logic, police still possessed reasonable suspicion of drug activity to conduct a dog sniff outside the storage unit.<sup>61</sup>

### C. *State v. Davis*

In the 2007 case of *State v. Davis*, the Minnesota Supreme Court considered what level of suspicion was required under the Minnesota Constitution for law enforcement to conduct a warrantless dog sniff in the common hallway of an unsecured apartment building.<sup>62</sup> Like *Edstrom*, the facts in *Davis* involved police use of a narcotics-detection dog in the common hallway of an apartment building.<sup>63</sup> Before conducting the dog sniff, police received information from an employee at the apartment building that maintenance workers believed they had seen marijuana-growing lights in Davis's apartment.<sup>64</sup> Police also learned that Davis refused to allow the maintenance workers into his apartment to fix a potential water leak.<sup>65</sup>

Based on the above information, police conducted a warrantless dog sniff in the common hallway of Davis's apartment building.<sup>66</sup> Following a positive alert, police obtained and executed a search warrant for Davis's apartment, where they recovered various items of contraband.<sup>67</sup> After being charged with fifth-degree controlled substance possession and possession of drug paraphernalia, Davis moved the district court for suppression of the recovered evidence.<sup>68</sup> The district court denied Davis's suppression motion, and the court of appeals affirmed.<sup>69</sup>

---

60. *Id.* at 214–15 (citing *Illinois v. Caballes*, 543 U.S. 405 (2005); *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

61. *Id.* at 215.

62. Interestingly, Chief Justice Lorie Gildea, then an associate justice on the court, authored the *Davis* majority opinion. See *State v. Davis*, 732 N.W.2d 173, 175 (Minn. 2007). She would go on to write for the majority in *Edstrom*. See Section II, Part D. An examination of *Davis* is particularly useful in trying to analyze how the *Edstrom* court reached its decision. Detailed below, the key distinction between the apartment building in *Davis* and that in *Edstrom* was the building's security. Also different from *Edstrom*, Davis retracted his argument that a dog sniff was a search under the Fourth Amendment, instead challenging its propriety under only the Minnesota Constitution. *Davis*, 732 N.W.2d at 176 n.6.

63. *Davis*, 732 N.W.2d at 175.

64. *Id.*

65. *Id.*

66. *Id.* The supreme court noted that the record lacked any evidence showing how law enforcement could gain access to the apartment building when conducting the dog sniff. *Id.* at 175 n.3.

67. *Id.* at 175–76. Along with the information from the maintenance worker and the positive alert from the dog sniff, police relied on Davis's criminal history to obtain the search warrant. *Id.*

68. *Id.* at 176.

69. *Davis*, 732 N.W.2d at 176. *Davis* contains an odd procedural history. The parties offered no testimony at the district court. *Id.* Instead, they agreed to rely on the search warrant and accom-

The supreme court first addressed what level of suspicion was constitutionally required for police to conduct a warrantless dog sniff in the common hallway of an apartment building.<sup>70</sup> Based on Davis's argument—that *Wiegand* and *Carter* required the police to possess probable cause before conducting a dog sniff in an apartment hallway—the court fleshed out its recent dog sniff precedent and noted that both cases only required that police possess reasonable suspicion of drug activity.<sup>71</sup> The supreme court then cited the balancing principle before turning to the specific facts of Davis's appeal.<sup>72</sup>

The *Davis* court framed the issue as whether police use of a dog sniff in the common hallway of Davis's apartment building required probable cause under the Minnesota Constitution.<sup>73</sup> The court found that Davis had presented no evidence showing an expectation of privacy in the hallway outside his residence.<sup>74</sup> Equally unpersuasive to the court was Davis's contention that police use of the dog in the common hallway intruded upon the privacy interest inside his residence, like the thermal technology at issue in *Kyllo*.<sup>75</sup> Instead, the supreme court cited *Place* and its prior dog sniff precedents to affirm the proposition that a dog sniff is "*sui generis*" and thus constitutes only a minimal intrusion.<sup>76</sup> In determining that Davis lacked an expectation of privacy in the common hallway, the court relied on its decision in *Carter* and concluded that a tenant must expect that other people will lawfully be in the hallway and able to smell odors emanating from the unit.<sup>77</sup>

Finding that the invasion into Davis's privacy was minimal, the court then engaged in the same balancing test it employed in *Carter*, weighing the

---

panying affidavit, the police reports, and their respective legal memoranda. *Id.* This left the record underdeveloped on appeal.

70. *Id.* The supreme court noted that the state did not argue that the dog sniff amounted to a search under the state constitution. *Id.* Thus, the majority found its *Carter* analysis to be controlling. *Id.*

71. *Id.* at 177–78 (citing *State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002); *State v. Carter*, 697 N.W.2d 199 (Minn. 2005)); see also *supra* notes 9–50.

72. *Davis*, 732 N.W.2d at 178 ("Minnesota courts have balanced the nature and significance of the intrusion on the individual's privacy interests . . . against the gravity of the public concern it serves and the degree to which the conduct at issue advances the public interest.") (citing *State v. Larsen*, 650 N.W.2d 144, 148, 150 (Minn. 2002)) (internal quotation marks omitted).

73. *Id.*

74. *Id.* at 179. The court noted that Davis did not contend that the dog sniff intruded upon the curtilage of his apartment. *Id.* at 179 n.10 (citation omitted). This fact also distinguishes *Davis* from *Edstrom*.

75. *Id.* at 179 (citing *Kyllo v. United States*, 533 U.S. 27, 29–30, 34–35 (2001)). The court noted that "Davis makes no claim that the dog used outside his apartment was capable of detecting more than simply the odor of illegal narcotics emanating from the inside of his residence." *Id.*

76. In a footnote, the *Davis* court distinguished *Carter* because the dog in that case was sniffing for odor "emanating from the unit," while the dog sniff in the common hallway outside Davis's unit was less intrusive. *Id.* at 180 n.12 (citing *State v. Carter*, 697 N.W.2d 199, 211 (Minn. 2005)).

77. *Id.* (citing *State v. Carter*, 697 N.W.2d 199, 210–11 (Minn. 2005)).

state's interest against Davis's expectation of privacy.<sup>78</sup> In doing so, the *Davis* court affirmed the reasonable suspicion standard set forth in *Carter*.<sup>79</sup> Based on this standard, the Minnesota Supreme Court analyzed the record information to evaluate whether police possessed reasonable suspicion when they conducted the warrantless dog sniff.<sup>80</sup> Emphasizing the facts that a private citizen's tip<sup>81</sup> informed police that maintenance workers had seen marijuana-growing lights in Davis's apartment and that Davis had refused to let maintenance workers inside his unit to fix a water leak, the court found that police had reasonable suspicion to conduct the dog sniff.<sup>82</sup>

In his concurrence, Justice Paul Anderson noted that because Davis did not show whether the dog sniff outside his apartment could alert to anything besides the smell of illegal substances from within his apartment, the search was reasonable.<sup>83</sup> That said, if there had been evidence suggesting that the dog sniff could reveal legal activity from within an apartment, Justice Anderson conveyed he may have reached a different result.<sup>84</sup> Justice Anderson rebuked the adoption of the U.S. Supreme Court's analysis from *Place* that a dog sniff is "*sui generis*."<sup>85</sup>

Justice Alan Page dissented, arguing that the dog sniff was a search of Davis's apartment, rather than the hallway outside the apartment.<sup>86</sup> Justice Page analogized the dog sniff in *Davis* to the techniques that the govern-

---

78. *Davis*, 732 N.W.2d at 180–81; see also *supra* note 73. As support for its decision to consider the government's interest against Davis's privacy interest, the supreme court cited *Place* and case law from other jurisdictions that had used this analysis. *Id.* at 181 (citing *United States v. Place*, 462 U.S. 696, 703 (1983); *People v. Dunn*, 564 N.E.2d 1054, 1058 (N.Y. 1990); *Commonwealth v. Johnston*, 530 A.2d 74, 79 (Pa. 1987)) (footnote omitted). The court also cited its analysis in *Carter* that "the government has a significant interest" in using narcotics-detection dogs and that effective police investigations serve the public interest. *Id.* (quoting *State v. Carter*, 697 N.W.2d 199, 211–12 (Minn. 2005)).

79. *Id.* at 181–82.

80. *Id.* at 182.

81. Minnesota courts presume tips from private citizens are credible. *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). This is particularly so when an informant gives self-identifying information to police. *City of Minnetonka v. Shepherd*, 420 N.W.2d 887, 888, 890 (Minn. 1988).

82. *Davis*, 732 N.W.2d at 182–83 (citing *United States v. Williams*, 3 F.3d 69, 70–71 (3d Cir. 1993) (finding that probable cause existed for police to search hotel room when a private citizen hotel housekeeper reported seeing items associated with narcotics activity and was refused admission into the room until after the defendant removed a box with unknown contents)). The supreme court's opinion contrasted its finding in *Carter* that police did not have reasonable suspicion to conduct a dog sniff outside a private storage unit when the available information revealed that the defendant owned two storage units and sometimes visited them several times per day. *Id.* at 183 (citing *State v. Carter*, 697 N.W.2d 199, 203 (Minn. 2005)).

83. *Id.* at 184 (Paul Anderson, J., concurring).

84. *Id.* (citing *Kyllo v. United States*, 533 U.S. 27, 40 (2001)).

85. *Id.* (citing *United States v. Place*, 462 U.S. 696, 707 (1983)). Neither the *Edstrom* majority nor the dissent addressed Justice Anderson's concurrence from *Davis*, perhaps because *Edstrom* failed to show that the dog used for the sniff of his apartment door could not detect lawful activity. Compare *State v. Edstrom*, 916 N.W.2d 512 (Minn. 2018), with *Davis*, 732 N.W.2d at 184 (Paul Anderson, J., concurring).

86. *Davis*, 732 N.W.2d at 184–85 (Page, J., dissenting) (Justice Helen Meyer joined this dissent).

ment employed in *Katz* and *Kyllo*.<sup>87</sup> He further stressed that courts should classify police use of a dog sniff as sense-enhancing technology unavailable to the public.<sup>88</sup> Justice Page also disputed the majority's use of a balancing test to weigh the parties' interests, contending such an application was wrong in *Carter* and continued to be wrong in *Davis*.<sup>89</sup> Citing Justice Souter's dissent in *Caballes*, Justice Page argued that the continued classification of a dog sniff as "minimally intrusive" was improper, particularly because of potential pitfalls in their ability to detect narcotics accurately.<sup>90</sup> In conclusion, Justice Page classified the majority's opinion as a significant departure from prior constitutional jurisprudence because it authorized a warrantless search of a residence based on a standard less than probable cause and without any exigencies.<sup>91</sup>

*Wiegand*, *Carter*, and *Davis* reflect the Minnesota Supreme Court's difficulty with formulating a precise standard for classifying warrantless dog sniffs.<sup>92</sup> Rather than adopting a uniform standard for evaluating police use of a drug-detection dog, the supreme court scrutinized the location where the dog sniff occurred. From there, the court has analyzed whether this location is an area that holds a socially recognized expectation of privacy. With this backdrop in mind, it would seem apparent that *Davis*—a case involving a dog sniff in an apartment's common hallway—would control the facts of *Edstrom*'s case. But *Florida v. Jardines*, decided in 2013, presented a new wrinkle for dog sniff cases.<sup>93</sup>

---

87. *Id.* at 184–85 (citing *United States v. Katz*, 389 U.S. 347, 352–53 (1967) (“[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”)); *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001) (rejecting the government's contention that its use of a thermal-imaging device was not a search and noting that the device's capability to reveal various heat levels constituted information about the home's interior)). But the places searched in *Katz* and *Kyllo*—a telephone booth and a private residence—are distinguishable from the common hallway at issue in *Davis*.

88. *Davis*, 732 N.W.2d at 185 (Page, J., dissenting). This aspect of Justice Page's argument lacks support from any Minnesota or United States Supreme Court precedent. In fact, as noted above, the *Carter* majority explicitly rejected any comparison between the thermal-imaging technology employed in *Kyllo* and police use of a dog sniff outside a storage unit. *See supra* note 39.

89. *Davis*, 732 N.W.2d at 186 (Page, J., dissenting). Yet the majority's use of the balancing analysis stemmed from the court's prior decision in *Carter*. Justice Page argued that the circumstances at issue in *Carter* did not require “necessarily swift” police action, the threshold question in the *Terry* balancing test. *Id.* at 187 (citing *State v. Carter*, 697 N.W.2d 199, 211 (Minn. 2005)).

90. *Id.* at 188 (citing *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (Souter, J., dissenting)).

91. *Id.* at 189. Of course, to accept this argument, one must embrace Justice Page's premise that the dog sniff searched *Davis*'s residence, rather than the common hallway outside the apartment.

92. A final dog sniff precedent from the Minnesota Supreme Court is *State v. Eichers*. 853 N.W.2d 114 (Minn. 2014). This case is not analyzed because it involved the warrantless dog sniff of a package, rather than an apartment, an automobile, or the exterior of a storage unit. *Id.* at 116. Moreover, the sniff in *Eichers* is distinguishable because it occurred in a UPS airport mailroom, like the airport luggage sniff in *Place*. *Id.* at 125 (citing *United States v. Place*, 462 U.S. 696 (1983)). The *Eichers* court found that the expectation of privacy in a mailed package is far lower than the locations involved in *Davis* and *Carter*. *Id.* at 126.

93. *Florida v. Jardines*, 569 U.S. 1 (2013).

In *Jardines*, the United States Supreme Court held that police violate the Fourth Amendment's prohibition against unreasonable searches and seizures when they use a drug-sniffing dog on the front porch of a single-family home.<sup>94</sup> The Court limited its holding, finding only that the police action at issue violated the property-rights prong of the Fourth Amendment, but declining to opine whether the dog sniff violated the Fourth Amendment's expectation of privacy prong.<sup>95</sup>

## II. THE EDSTROM CASE

### A. Facts

In October 2015, police received information from a confidential informant that Courtney John Edstrom was selling methamphetamine from a Brooklyn Park apartment building.<sup>96</sup> This informant also told police that Edstrom lived on the third floor of this building, drove a black Cadillac sedan, and had been seen carrying a pistol within the last three months.<sup>97</sup> Police showed the informant a picture of Edstrom, and the informant affirmed that the man in the photo was the individual selling narcotics in Brooklyn Park.<sup>98</sup> Police used vehicle registration records to confirm that Edstrom did in fact drive a black Cadillac.<sup>99</sup>

Based on these facts, police conducted a warrantless dog sniff in Edstrom's apartment building.<sup>100</sup> Police gained access to the apartment build-

---

94. *Id.* at 11.

95. *Id.* at 5–8, 10. *Jardines* and *United States v. Jones*, 565 U.S. 400 (2012), represent the Supreme Court's "rediscovery" of the Fourth Amendment's property-rights prong. Before these decisions, the Court normally employed the two-prong *Katz* expectation of privacy test, without regard to the curtilage or property rights analysis, when analyzing unlawful Fourth Amendment search or seizure cases.

96. *State v. Edstrom*, 916 N.W.2d 512, 515 (Minn. 2018). Because the Minnesota Supreme Court decision reversed most aspects of the court of appeals' decision, I cite exclusively to its presentation of the district court's factual findings. *See id.* at 524.

97. *Id.* at 515.

98. *Id.* Edstrom did not challenge, and neither the court of appeals nor the supreme court discussed, the propriety of the informant's identification. In *State v. Smith*, the Minnesota Court of Appeals concluded that although an informant's identification of an individual was unnecessarily suggestive, there was a significant independent origin for that informant's identification. No. A10-1293, 2011 WL 3241624, at \*2–3 (Minn. Ct. App. Aug. 1, 2011). While it is likely that a similar result would have been reached here, the record lacked evidence on the factors courts normally consider in evaluating pretrial identifications.

99. *Edstrom*, 916 N.W.2d at 515.

100. *Id.* Interestingly, had police obtained a warrant before conducting the dog sniff, this case would have remained purely hypothetical. The facts suggest police could have received a warrant before conducting a dog sniff, especially considering the lower reasonable suspicion standard that Minnesota has adopted for conducting dog sniffs. That said, binding Minnesota appellate case law at that time reinforced the notion that law enforcement did not need to possess a warrant before conducting the dog sniff. *See State v. Luhm*, 880 N.W.2d 606, 609, 617 (Minn. Ct. App. 2016) (holding that a dog sniff in a secured condominium building was not a search); *see also State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (holding that a dog sniff in an unsecured apartment building was a search requiring reasonable suspicion under the Minnesota Constitution).

ing through a key that property management placed inside a Knox Box.<sup>101</sup> As police walked the dog down the common hallway, it sniffed other apartment doors but did not alert to narcotics until sniffing the door of apartment #305.<sup>102</sup> Following this positive alert, police applied for and received a search warrant.<sup>103</sup> Within the warrant affidavit, law enforcement presented details surrounding the dog sniff, including that the dog alerted after sniffing the seam of the apartment door.<sup>104</sup> Police executed the warrant for Edstrom's apartment and recovered firearms, ammunition, scales with methamphetamine residue, some marijuana, and about 226 grams of methamphetamine.<sup>105</sup>

---

101. *Edstrom*, 916 N.W.2d at 515–16. The Edstrom majority summarized the suppression hearing testimony about the Knox Box:

A Knox Box is a locked key box that an apartment building owner in Brooklyn Park may choose to have installed on the outside of a building. Anyone with a key to open the Knox Box can access a set of keys for a building. Building owners typically install a Knox Box to facilitate law enforcement access in cases of medical emergencies, criminal complaints, tenant disputes, foot patrols to become familiar with the layout of the building, and dog sniffs. Building owners are generally aware that police occasionally enter their buildings via these boxes.

*Id.*

102. *Id.* at 515. The parties disputed the exact location of the dog sniff. At oral argument, Justice Lillehaug questioned the attorney representing the State on the legality of the sniffs of other apartment doors. *Supreme Court Oral Arguments – State v. Edstrom A16-1382*, MINNESOTA SUPREME COURT, at 02:27, (April 11, 2018) <http://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/ArgumentDetail.aspx?vid=1201>. These sniffs seem dubious because the record lacked evidence of criminal activity from any apartment other than #305. Despite Justice Lillehaug's emphasis of this point, the majority did not address this issue.

103. *Edstrom*, 916 N.W.2d at 515.

104. *Id.*

105. *Id.* Law enforcement also recovered some personal items attributable to Edstrom. *Id.* The court likely included this fact because there was some confusion over whether Edstrom resided at the apartment. That said, the supreme court noted that the State never raised a standing argument. *Id.* at 515 n.2. Interestingly, the issue of "automatic standing" in the context of the Minnesota Constitution has not been fully fleshed out. *See* citations below. Edstrom clearly bore the burden of establishing a violation of his Fourth Amendment rights. It is equally clear that the federal constitution does not confer standing automatically to a defendant, even when he is charged with a possession offense, as Edstrom was here. *See* *United States v. Salvucci*, 448 U.S. 83, 85 (1980). Whether the Minnesota Constitution confers automatic standing on defendants charged with possession crimes is unresolved. *See, e.g., State v. Wilson*, 594 N.W.2d 268, 271 (Minn. Ct. App. 1999) (declining to consider an "automatic standing" argument for failure to raise it before the district court); *see also State v. Reynolds*, 578 N.W.2d 762, 765 (Minn. Ct. App. 1998) (declining to consider "automatic standing" because on the facts of the case, the defendant did not possess cocaine, making the question moot). Yet the Minnesota Court of Appeals has held that "[a] charge of possession no longer gives a defendant 'automatic standing.'" *State v. Robinson*, 458 N.W.2d 421, 423 (Minn. Ct. App. 1990) (citations omitted).

Had the State raised a standing argument, perhaps the supreme court would have decided this case on narrower grounds. *See State v. deLottinville*, 890 N.W.2d 116, 119 (Minn. 2017) ("Fourth Amendment rights are 'personal' and 'may not be vicariously asserted.'" (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)); *Rakas v. Illinois*, 439 U.S. 128, 134 (1978) ("[I]t is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [Exclusionary] [R]ule's protections.")) (footnote omitted) (citation omitted). While standing was ultimately not an issue for the *Edstrom* court, the lack of clarity in Minnesota case law could have made this an interesting issue, as both parties seemed to assume Edstrom's expectation of privacy in apartment #305.

### B. Procedural History

Following execution of the search warrant, the state charged Edstrom with two counts of first-degree controlled substances crimes, one count of prohibited person in possession of a firearm, and one count of fifth-degree controlled substance crime.<sup>106</sup> Edstrom moved to suppress the evidence obtained from the search of apartment #305, arguing the warrantless dog sniff violated his constitutional rights.<sup>107</sup> At a *Rasmussen*<sup>108</sup> hearing, the State offered officer testimony about the Knox Box in Edstrom's apartment building and the circumstances of the dog sniff.<sup>109</sup> The district court denied Edstrom's motion to suppress the recovered methamphetamine, marijuana, drug paraphernalia, and firearms.<sup>110</sup> The district court's reasoning was two-fold: (1) Edstrom lacked a reasonable expectation of privacy in the common hallway of the apartment building; and (2) Edstrom could not have a property right in the common hallway area because it was not within the curtilage of his apartment.<sup>111</sup>

### C. The Court of Appeals' Decision

In a unanimous published decision, authored by Judge Roger Klaphake, the Minnesota Court of Appeals reversed the district court's denial of suppression.<sup>112</sup> The court of appeals framed the issue as whether the district court erred in concluding that police use of a narcotics-detection dog at the door of an apartment within a secured, multiunit building was not a search under the United States or Minnesota Constitutions.<sup>113</sup> The court first considered Edstrom's assertion that the sniff of his apartment door violated the Fourth Amendment on a property rights theory.<sup>114</sup> Using the factors set out in *United States v. Dunn*,<sup>115</sup> the court of appeals rejected

---

106. *Edstrom*, 916 N.W.2d at 515 (citing MINN. STAT. §§ 152.021, subd. 1(1)–(2), 624.713, subd. 1(2), and 152.025, subd. 2(a)(1) (2014)).

107. *Id.* at 516.

108. *Rasmussen* hearings are Minnesota's colloquial name for suppression hearings. The name derives from the case *State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3 (Minn. 1965), in which the Minnesota Supreme Court established the procedure to be followed when a criminal defendant alleges police action has violated her constitutional rights.

109. *Edstrom*, 916 N.W.2d at 515–16. Although the *Edstrom* court never explicitly states this, the fact that police had access to the Knox Box may have determined the outcome. This can be read as a sign for prosecutors to introduce this evidence at *Rasmussen* hearings, which may also include testimony from a landlord or property management agent on the ability of law enforcement to enter a given multi-unit building with ownership's consent.

110. *Id.*

111. *Id.*

112. *State v. Edstrom*, 901 N.W.2d 455, 458 (Minn. Ct. App. 2017), *rev'd in part*, 916 N.W.2d 512 (Minn. 2018).

113. *Id.* at 459.

114. *Id.* at 460–61.

115. In *United States v. Dunn*, the United States Supreme Court outlined four relevant factors for determining whether a particular area constituted protected curtilage or was an unprotected "open field." 480 U.S. 294, 300 (1987). Interestingly, the majority in *Jardines*—the United States



Edstrom's claim, instead determining that the area immediately near his apartment door was not curtilage—the enclosed area immediately surrounding one's home which retains legal significance.<sup>116</sup>

After rejecting Edstrom's curtilage argument, the court of appeals considered whether police violated an area in which he had a reasonable expect-

---

Supreme Court's most recent dog-sniff case—did not mention the *Dunn* factors. *Florida v. Jardines*, 569 U.S. 1 (2013).

116. *Edstrom*, 901 N.W.2d at 460–61 (citing *Dunn*, 480 U.S. at 300). This definition of curtilage is in BLACK'S LAW DICTIONARY (10th ed. 2014). Additionally, the court of appeals relied on its prior published decision in *State v. Luhm*, a case involving a similar issue. 880 N.W.2d 606 (Minn. Ct. App. 2016). Using the *Dunn* factors in *Luhm*, the Minnesota Court of Appeals concluded “[t]he area immediately outside the door of a condominium unit in a secured, multiunit condominium building is not curtilage for purposes of the Fourth Amendment to the United States Constitution so as to preclude a law-enforcement officer from conducting a warrantless dog sniff in that area.” *Id.* at 609. While Edstrom argued that the case law was evolving on the curtilage issue, the court of appeals affirmed its decision in *Luhm*. *Edstrom*, 901 N.W.2d at 461 (citing *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016) (concluding that the combination of the *Dunn* factors and daily experience supports a finding of curtilage in the area immediately in front of an apartment door in a townhome complex); *People v. Burns*, 50 N.E.3d 610, 622 (Ill. 2016) (concluding that a police officer's entry into a “locked apartment building at 3:20 a.m. with a drug-detection dog” was unlawful because the “investigation took place in a constitutionally protected area”)).

Even after *Jardines*, the majority approach continues to reject the notion that common areas of multiunit dwellings are curtilage. See Brief for States of Utah, et al. as Amici Curiae Supporting Petitioner at 5, *People v. Bonilla*, 120 N.E.3d 930, 937 (Ill. 2018) (No. 18-1219) (citing *United States v. Jones*, 893 F.3d 66, 72 (2d Cir. 2018) (shared parking lot of a multiunit dwelling was not within the curtilage of the defendant's apartment); *United States v. Makell*, 721 F. App'x 307, 308 (4th Cir. 2018) (per curiam) (“[C]ommon hallway of the apartment building, including the area in front of Makell's door, was not within the curtilage of his apartment.”), *cert. denied*, No. 18-5509 (Dec. 10, 2018); *Seay v. United States*, No. 14-0614, 2018 WL 1583555, at \*4–5 (D. Md. Apr. 2, 2018) (common hallway in apartment not curtilage), *appeal dismissed*, 739 F. App'x 193 (4th Cir. 2018); *United States v. Bain*, 155 F. Supp. 3d 107, 118–20 (D. Mass. 2015) (area in front of door of apartment is not curtilage), *aff'd*, 874 F.3d 1 (1st Cir. 2017), *cert. denied*, No. 17-7494 (Apr. 23, 2018); *United States v. Sweeney*, 821 F.3d 893, 901 (7th Cir. 2016) (common area in basement was not curtilage); *Luhm*, 880 N.W.2d at 615–18 (interior hallway of condominium building not curtilage); *State v. Mouser*, 119 A.3d 870, 875 (N.H. 2015) (shared parking area behind multiunit dwelling not curtilage); *State v. Williams*, 862 N.W.2d 831, 837–38 (N.D. 2015) (common hallway in condominium building not curtilage); *Lindsey v. State*, 127 A.3d 627, 642–43 (Md. Ct. Spec. App. 2015) (common area outside door not curtilage); *State v. Dumstrey*, 859 N.W.2d 138, 142–46 (Wis. Ct. App. 2014) (secured shared parking garage not curtilage); *State v. Nguyen*, 841 N.W.2d 676, 682 (N.D. 2013) (“secured common hallway” not curtilage); *United States v. Jackson*, 728 F.3d 367, 373–74 (4th Cir. 2013) (two-to-three-foot strip of grass between private patio and common sidewalk, as well as sidewalk itself, were not curtilage)).

That said, a notable exception to the majority approach is found in *People v. Bonilla*, where the Illinois Supreme Court found that the common area immediately outside the appellant's apartment door was constitutionally protected curtilage. *Bonilla*, 120 N.E.3d at 937. Other post-*Jardines* cases have also taken the minority position that certain common areas in multi-residence dwellings constitute curtilage. See, e.g., *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016) (area “six to eight” inches from townhome-apartment front door on development's central courtyard walkway was curtilage); *United States v. Burston*, 806 F.3d 1123, 1126–28 (8th Cir. 2015) (area “six to ten inches” outside apartment window near shrubbery that partially covered window was curtilage); *State v. Rendon*, 477 S.W.3d 805, 810 (Tex. Crim. App. 2015) (“narrowly hold[ing] that the curtilage extended to appellee's front door threshold located in a[n] . . . upstairs landing” shared by two apartments).

tation of privacy.<sup>117</sup> First, the court cited hornbook Fourth Amendment law related to the ability to bring such challenges: “[the] ‘capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.’”<sup>118</sup> The court of appeals also noted “[a] subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable.”<sup>119</sup>

Though recognizing a concurrence does not constitute binding precedent,<sup>120</sup> the court of appeals agreed with Edstrom by relying on Justice Kagan’s analysis in *Jardines*.<sup>121</sup> Following Justice Kagan’s logic, the court distinguished the United States Supreme Court’s decision in *Caballes*, stating “in *Caballes*, the Court was considering the narrow issue of whether reasonable suspicion was required to use a narcotics-detection dog to sniff the exterior of a motor vehicle during a lawful traffic stop supported by probable cause.”<sup>122</sup> The court of appeals thus held that under the Fourth Amendment, police must obtain a warrant or possess a valid exception to the warrant requirement before conducting a dog sniff at an apartment door within a secured multiunit building.<sup>123</sup>

After concluding that the warrantless dog sniff violated Edstrom’s Fourth Amendment rights, the court of appeals analyzed the same issue under the Minnesota Constitution.<sup>124</sup> The court cited two familiar principles related to the interplay between its analysis of the state and federal constitutions: (1) that the Minnesota Constitution cannot afford less protection than the United States Constitution; and (2) that Minnesota courts have afforded citizens greater protection under the state constitution.<sup>125</sup> In summary, the

117. *Edstrom*, 901 N.W.2d at 461. In support of his expectation of privacy argument, Edstrom relied heavily on Justice Kagan’s concurrence from *Jardines*, 569 U.S. at 12–15 (2013) (Kagan, J., concurring). Edstrom argued this analysis effectively overruled the Minnesota Supreme Court’s decision in *State v. Davis*, 732 N.W.2d 173 (Minn. 2007). The court of appeals agreed. *See infra* note 122.

118. *Edstrom*, 901 N.W.2d at 461, *rev’d in part*, 916 N.W.2d 512 (Minn. 2018) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)); *accord* *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

119. *Edstrom*, 901 N.W.2d at 461 (quoting *Minnesota v. Olson*, 495 U.S. 91, 95–96 (1990)).

120. *Id.* at 462 (citing *Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997)).

121. *Id.* at 462–63. Justice Kagan premised her argument on the notion that a narcotics dog is a “super-sensitive instrument,” and the use of one on the porch of a home violated the defendant’s expectation of privacy. *See Jardines*, 569 U.S. at 12–13 (Kagan, J., concurring). But the Minnesota Supreme Court dispensed with this analysis in its *Edstrom* opinion, discussed *infra* notes 141–43.

122. *Edstrom*, 901 N.W.2d at 463 (citing *Illinois v. Caballes*, 543 U.S. 405, 406–07 (2005)). The court of appeals quoted Justice Kagan’s concurrence to distinguish *Caballes*. *See id.* (quoting *Jardines*, 569 U.S. at 14 n.1 (Kagan, J., concurring)) (“[P]eople’s expectations of privacy are much lower in their cars than in their homes.”).

123. *Id.*

124. *Id.*, *rev’d in part*, 916 N.W.2d 512 (Minn. 2018).

125. *Id.* at 463–64. (“While we may interpret the Minnesota Constitution to provide more protection than the [United States] Constitution, it may not afford less.”) (quoting *State v. Mc-*

court of appeals held that the use of a narcotics-detection dog from the common hallway within a secured apartment building constitutes a search under the Fourth Amendment and Article I, Section 10 of the Minnesota Constitution.<sup>126</sup> Thus, because police did not possess a warrant, and the State had not shown an exception to the warrant requirement, the court of appeals reversed the district court's denial of Edstrom's suppression motion.<sup>127</sup>

#### D. *The Minnesota Supreme Court's Decision*

The Minnesota Supreme Court granted the State's petition for review, and oral arguments were heard on April 14, 2018. The three-justice<sup>128</sup> ma-

---

Bride, 666 N.W.2d 351, 361 (Minn. 2003)). The Minnesota Court of Appeals also noted that Minnesota appellate courts have a history of affording greater protections under the state constitution than already provided under the federal constitution. *Id.* (citing *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002) (concluding that the use of a narcotics-detection dog to sniff the exterior of a motor vehicle during a traffic stop for routine equipment violation required "reasonable, articulable suspicion of drug-related criminal activity"); *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994) (addressing temporary roadblocks to discover evidence of alcohol-impaired driving); *In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (defining when a seizure has occurred)).

126. *Edstrom*, 901 N.W.2d at 465. Again, the court of appeals based its decision solely on the reasonable expectation of privacy analysis under the Fourth Amendment and Article I, Section 10 of the Minnesota Constitution. The result here may have been different if the State had relied on the good faith exception. *See id.* at 463 n.3 ("We do not address this argument because the State does not raise the good-faith exception."). While the Minnesota Supreme Court's jurisprudence on the good-faith exception is somewhat murky, its recent decision in *State v. Lindquist* adopted the exception from *Davis v. United States*, 564 U.S. 229 (2011). *State v. Lindquist*, 869 N.W.2d 863, 871 (Minn. 2015) (adopting exception when law enforcement has in good faith relied on existing binding appellate precedent) (citing *Davis*, 564 U.S. at 241). But Minnesota has not adopted the full-fledged *Leon* good-faith exception. *See Lindquist*, 869 N.W.2d at 876–77 (declining to decide whether the exception explained in *Leon* should apply in Minnesota).

Federal case law would have supported a potential good-faith argument about law enforcement's reliance on binding appellate precedent. In *United States v. Davis*, the Eighth Circuit declined application of the exclusionary rule in a case involving police conducting a dog sniff of an apartment door. 760 F.3d 901, 904–05 (8th Cir. 2014). In *Davis*, the defendant argued that it was unreasonable for police to rely on binding appellate precedent in conducting the warrantless dog sniff because the Supreme Court had heard oral argument in *Jardines*. *Id.* at 905; *see also* *United States v. Barraza-Maldonado*, 732 F.3d 865, 869 (8th Cir. 2013) (concluding that officers reasonably relied on binding circuit precedent when, without a warrant, they installed a GPS device to monitor the movements of a car prior to the United States Supreme Court's decision in *United States v. Jones*, 565 U.S. 400 (2012)).

127. *Edstrom*, 901 N.W.2d at 465.

128. Only five members of the Minnesota Supreme Court considered this case. *See State v. Edstrom*, 916 N.W.2d 512 (Minn. 2018). Chief Justice Lorie Gildea, Justice G. Barry Anderson, and Justice Anne McKeig joined the majority. Justices David Lillehaug and Margaret Chutich dissented. *See id.* Justice Natalie Hudson recused herself from the case, while Justice Paul Thissen had not yet assumed his duties on the supreme court following Justice David Stras's elevation to the Eighth Circuit Court of Appeals. *See id.* (explaining that Justices Hudson and Thissen took no part in considering *Edstrom*).

Based purely on ideology, the outcome would have likely differed had Justices Hudson and Thissen also factored into deciding this case. While one cannot precisely determine how those justices who did not hear the case would have voted, some key evidence allows one to make a

majority opinion, written by Chief Justice Gildea, framed the issue as “whether a warrantless narcotics-dog sniff in the hallway outside respondent’s apartment violated [Edstrom’s] right to be free from unreasonable searches under the United States or Minnesota Constitution.”<sup>129</sup>

The Minnesota Supreme Court began its Fourth Amendment analysis differently than the court of appeals. The court noted that a search can occur under the Fourth Amendment in two ways: “First, there can be a search when the government physically intrudes into a constitutionally protected area. Second, there can be a search when the government intrudes upon a person’s reasonable expectation of privacy.”<sup>130</sup> Examining the dog sniff under the property-rights prong of the Fourth Amendment, the Minnesota Supreme Court considered whether the dog sniffed the curtilage of Edstrom’s home.<sup>131</sup>

Noting that whether an area is curtilage requires a fact-specific inquiry,<sup>132</sup> the Minnesota Supreme Court mirrored the court of appeals’ analysis in applying the *Dunn* factors<sup>133</sup> to the area outside Edstrom’s apartment door.<sup>134</sup> The court opined that the first *Dunn* factor—the proximity of the area to the home—weighed in Edstrom’s favor because the common hallway and space beyond the apartment door were in close physical proximity to his home. Even so, the *Edstrom* court then concluded that the remaining *Dunn* factors weighed against finding the area immediately outside Edstrom’s apartment door to be curtilage.<sup>135</sup> The court noted that Edstrom failed to establish his exclusive use or possession of the common hallway

---

“best guess.” Then-Judge Hudson’s dissent in *State v. Eichers* provides strong evidence that she likely would have reached the opposite conclusion of the *Edstrom* majority. See *State v. Eichers*, 840 N.W.2d 210, 230–32 (Minn. Ct. App. 2013) (Hudson, J., dissenting), *aff’d*, 853 N.W.2d 114 (Minn. 2014).

129. *Edstrom*, 916 N.W.2d at 514.

130. *Id.* at 517 (citing *United States v. Jones*, 565 U.S. at 406–07 n.3 (2012); *Smith v. Maryland*, 442 U.S. 735, 739–40 (1979)).

131. *Id.* at 517–18. Like the court of appeals, the Minnesota Supreme Court recognized that an area outside a person’s home may be constitutionally protected curtilage. See *id.* (citing *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

132. *Id.* at 518 (citing *State v. Chute*, 908 N.W.2d 578, 584 (Minn. 2018) (noting that when Minnesota courts consider whether an area is curtilage, “we look to ‘whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection’”).

133. See *State v. Edstrom*, 901 N.W.2d 455, 460–61 (Minn. Ct. App. 2017), *rev’d in part*, 916 N.W.2d 512 (Minn. 2018).

134. *Edstrom*, 916 N.W.2d at 518 (citing *United States v. Dunn*, 480 U.S. 294, 300 (1987) (“[The] central component . . . [is] whether the area harbors the intimate activity associated with the sanctity of a [person’s] home and the privacies of life.”)).

135. *Id.* The Minnesota Supreme Court cited *Lindsey v. State*, 127 A.3d 627, 642–43 (Md. Ct. Spec. App. 2015), as an example of a case that applied the *Dunn* factors and held that a narcotic dog’s sniff in the hallway outside a defendant’s apartment did not implicate the curtilage of that apartment. The use of a non-binding, intermediate appellate court’s decision seems unusual. The supreme court noted that the *Lindsey* court reached its decision because “the area was observable by a passerby” and the intimacies of the home did not extend to the common hallway. See *Edstrom*, 916 N.W.2d at 518.

outside his apartment door.<sup>136</sup> Thus, the Minnesota Supreme Court affirmed the court of appeals' holding that the dog sniff did not implicate the curtilage of Edstrom's residence.<sup>137</sup>

After rejecting Edstrom's property rights Fourth Amendment claim, the Minnesota Supreme Court addressed whether the dog sniff violated Edstrom's reasonable expectation of privacy.<sup>138</sup> The court cited the familiar Justice Harlan concurrence from *Katz* as its baseline test<sup>139</sup> and noted that "even government activity that does not physically intrude upon the home can invade a reasonable expectation of privacy."<sup>140</sup> The court then cited *Kyllo* for the proposition that the use of "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion . . . is a 'search' and is presumptively unreasonable without a warrant."<sup>141</sup>

In the majority's opinion, the key inquiry in evaluating the government's actions is whether the device can detect both lawful and unlawful activity.<sup>142</sup> The court, citing *Place*, concluded that a dog sniff could only reveal illegal activity because the sniff "discloses only the presence or absence of narcotics, a contraband item."<sup>143</sup> From there, the majority reasoned that because one cannot possess a legitimate interest in possessing contraband,<sup>144</sup> "government conduct that only reveals the possession of contraband 'compromises no legitimate privacy interest.'"<sup>145</sup>

Concluding that Edstrom had no reasonable expectation of privacy, the majority addressed Edstrom and the court of appeals' contrary contention.<sup>146</sup> At the threshold, the *Edstrom* majority was not impressed by these arguments: "Against the weight of this precedent, Edstrom and the court of appeals rely on Justice Kagan's concurrence in *Jardines* to support the conclusion that the dog sniff was a search."<sup>147</sup> Diving deeper, the Minnesota

136. *Id.* at 519.

137. *Id.* at 521.

138. *Id.*

139. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). *See also Smith v. Maryland*, 442 U.S. 735, 740 (1979) (determining that Justice Harlan's concurrence in *Katz* represents the proper inquiry when evaluating governmental intrusions under the Fourth Amendment).

140. *Edstrom*, 916 N.W.2d at 521.

141. *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 40 (2001)).

142. *Id.* at 521–22 (citing *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005)).

143. *Id.* at 522 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)). The majority's reliance on *Place* is questionable based on the many factual distinctions between the two cases. *Place* involved the dog sniff of luggage in a public airport. *United States v. Place*, 462 U.S. 696, 698–99 (1983). Those actions differ greatly from what police did in entering the multiunit building and sniffing the area immediately outside Edstrom's door.

144. *Edstrom*, 916 N.W.2d at 522 (citing *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (quoting *United States v. Jacobson*, 466 U.S. 109, 123 (1984))).

145. *Id.*

146. *Id.*

147. *Id.*

Supreme Court declined to adopt Justice Kagan's concurrence from *Jardines*, instead criticizing her analysis for failing to recognize the difference between what a drug dog can detect and what the technology in cases like *Kyllo* reveals.<sup>148</sup>

Concluding that the dog sniff was not a search under either the property rights or reasonable expectation of privacy prongs of the Fourth Amendment, the Minnesota Supreme Court addressed whether a search occurred under the Minnesota Constitution.<sup>149</sup> Recognizing the principle that the Minnesota Constitution cannot afford less protection, and in some cases may afford more protection, than the Fourth Amendment,<sup>150</sup> the majority examined its decision in *Davis*.<sup>151</sup> Edstrom sought to distinguish *Davis* on two bases: (1) the court in *Davis* was dealing with a dog sniff which occurred in the common hallway of an apartment, markedly different from the sniff at the apartment door; and (2) the building where the search occurred in *Davis* was open to the public, while the building here was accessible only to residents.<sup>152</sup>

Addressing Edstrom's first attempt to distinguish *Davis*, the majority noted that the *Davis* court "acknowledged that the search warrant affidavit stated that the narcotics dog sniffed at the threshold of the door."<sup>153</sup> Because the sniff here occurred at the seam of the door, the majority found *Davis* to be akin: "Any distinction in this case between the seam of the door and the threshold of the door is one without difference. Both refer to areas in the hallway immediately adjacent to the door, and indisputably beyond the interior of the apartment."<sup>154</sup> While noting that Edstrom was correct about the difference in building access between his case and the facts in *Davis*, the court similarly rebuked Edstrom's second argument to distinguish *Davis*:

---

148. *Id.* The *Edstrom* majority described what it perceived as a key flaw in Justice Kagan's concurrence, specifically:

Focusing solely on the fact that drug-sniffing dogs are not in general public use, she made no distinction between the limited nature of what drug-sniffing dogs detect—contraband—and the indiscriminate nature of the thermal imager at issue in *Kyllo*, which detects information about a wide variety of lawful and highly personal conduct.

*Id.* (citing *Florida v. Jardines*, 569 U.S. 1, 12–13 (2013) (Kagan, J., concurring)).

149. *Id.* at 523. Article I, Section 10 of the Minnesota Constitution is textually identical to the Fourth Amendment and provides the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." MINN. CONST. art. 1, § 10; *State v. Carter*, 697 N.W.2d 199, 209 (Minn. 2005) (recognizing that this provision in Article I, Section 10 of the Minnesota Constitution is "textually identical" to the Fourth Amendment).

150. "Because of the textual similarity, '[Minnesota courts] will not construe our state constitution as providing more protection for individual rights than does the federal constitution unless there is a principled basis to do so.'" *Edstrom*, 916 N.W.2d at 523 (quoting *Kahn v. Griffin*, 701 N.W.2d 815, 824 (Minn. 2005)).

151. *Id.* (citing *State v. Davis*, 732 N.W.2d 173, 176 (Minn. 2007)).

152. *Id.* at 523–24.

153. *Id.* at 523 (citing *State v. Davis*, 732 N.W.2d 173, 175 (Minn. 2007)).

154. *Id.* at 524.

The fact remains, however, that anyone with keys, including the police, had access to this building. While Edstrom may reasonably expect that persons without keys will not access the building, he may not reasonably expect that police will not use the keys voluntarily provided to them by the building owner to access the building for law-enforcement-related purposes.<sup>155</sup>

In summary, the majority affirmed the court of appeals' decision related to the curtilage analysis of the common hallway but reversed the court of appeals' conclusion that the dog sniff violated Edstrom's expectation of privacy.<sup>156</sup> The majority relegated perhaps the most important part of its analysis to a footnote, asserting:

*Jardines* did not disturb this well-settled treatment of dog sniffs. It was not merely the presence of the dog sniffing for narcotics that constituted a search in *Jardines*; it was the government agents entering the curtilage of the home not simply to talk to the occupant—just as any person could do—but to search for evidence of a crime (citation omitted). The presence of the dog is immaterial if there is no entry into the curtilage, nor does the presence of a dog create curtilage where it would not otherwise be.<sup>157</sup>

In dissent, Justice Lillehaug asserted that the majority effectively read out the area “immediately surrounding” the home from the *Jardines* decision.<sup>158</sup> Unlike the court of appeals, Justice Lillehaug argued a search occurred based on the property rights analysis used by the *Jardines* majority.<sup>159</sup> In concluding that the dog sniff here occurred within the curtilage of Edstrom's home, Justice Lillehaug cast doubt on the majority's reliance on the *Dunn* factors.<sup>160</sup> But even if the *Dunn* factors were relevant, the dissent argued their application proved that the area outside Edstrom's apartment door was curtilage.<sup>161</sup>

155. *Id.*

156. *Edstrom*, 916 N.W.2d at 524.

157. *Id.* at 516 n.6. The distinction between the apartment hallway and the front porch in *Jardines* is perhaps the tipping point of the case. The supreme court did little to address this distinction, instead affirming its prior precedent from *Davis*.

158. *Id.* at 524 (Lillehaug, J., dissenting).

159. *Id.* at 525 (Lillehaug, J., dissenting). Interestingly, Justice Lillehaug declined to adopt the court of appeals' analysis, instead trying to comport his dissent with the *Jardines* majority opinion. As discussed in Part III, Section C, the court of appeals concluded a search occurred because police invaded an area where Edstrom had a reasonable expectation of privacy. *See State v. Edstrom*, 901 N.W.2d 455, 463–65 (Minn. Ct. App. 2017).

160. *Edstrom*, 916 N.W.2d at 526 (Lillehaug, J., dissenting). Noting that the *Jardines* majority did not use the *Dunn* factors in concluding that a search occurs when police take a drug dog to the front porch of a home, Justice Lillehaug would not have applied them to this case. *Id.* Instead, citing two recent Supreme Court decisions which resolved curtilage issues without employing the *Dunn* factors, Justice Lillehaug reasoned that their application was better suited for cases “that determine the boundaries between curtilage and ‘open fields.’” *Id.* (citing *Florida v. Jardines*, 569 U.S. 1, 6 (2013); *Collins v. Virginia*, 138 S. Ct. 1663, 1670–71 (2018)).

161. *Edstrom*, 916 N.W.2d at 526–27 (citing *United States v. Dunn*, 480 U.S. 294 (1987)).

Justice Lillehaug reasoned that all four *Dunn* factors favored Edstrom: (1) *Proximity*: the area where the dog sniff in Edstrom’s apartment building was within the “immediate surroundings” of the interior of the apartment, like *Jardines*.<sup>162</sup> (2) *Whether the area is enclosed*: Justice Lillehaug believed that this factor in the curtilage analysis supports his conclusion that the *Dunn* factors should only be applied to “open-fields” cases. Even if the factor should be applied, Justice Lillehaug found it favored Edstrom because the area just outside his apartment doorway was included within an enclosure—“a locked building, albeit one accessible to police via a Knox Box.”<sup>163</sup> (3) *The nature of the use to which the area is put*: Justice Lillehaug reasoned “[d]oors are obviously necessary for apartment life.”<sup>164</sup> In his view, it is this logic that led the Supreme Court to hold that the front porch in *Jardines* was curtilage, even though it was in open view and there was no evidence it was used for intimate purposes.<sup>165</sup> (4) *The steps taken to obscure activities from passerby*: Justice Lillehaug concluded that this factor cut both ways: As a tenant, Edstrom had no right to block persons from accessing the area just outside his hallway, yet because the apartment building contained a secured entrance, the public generally could not access the building.<sup>166</sup>

Justice Lillehaug also relied on *United States v. Hopkins*, a recent Eighth Circuit decision that addressed a dog sniff in a multiunit townhome complex.<sup>167</sup> His dissent opposed the majority’s two attempts to distinguish *Hopkins*. First, Justice Lillehaug argued that the majority’s classification of the door in *Hopkins* as “unshared” was misleading and downright inaccurate.<sup>168</sup> The townhouse area at issue in *Hopkins* was shared with at least one other residence.<sup>169</sup> Second, Justice Lillehaug disputed the majority’s classification of the *Hopkins* court’s treatment of a prior Eighth Circuit case, *United States v. Brooks*.<sup>170</sup> The *Edstrom* majority read *Hopkins* as being a limitation on the implied license for law enforcement to invoke when approaching a residence, something absent in Edstrom’s case because building management had allowed law enforcement to enter through the Knox

---

162. *Id.* at 526.

163. *Id.*

164. *Id.* at 527.

165. *Id.* at 526–27. Justice Lillehaug noted that the type of tool that police use is irrelevant under the *Jardines* analysis; once police have made a physical intrusion into constitutionally protected curtilage, a search has occurred. *See id.* at 527.

166. *Id.* at 527 (Lillehaug, J., dissenting).

167. *Edstrom*, 916 N.W.2d at 527 (citing *United States v. Hopkins*, 824 F.3d 726 (8th Cir. 2016)).

168. *Id.* (citing *United States v. Hopkins*, 824 F.3d 726, 729, 732 (8th Cir. 2016)).

169. *Id.* (citing *United States v. Hopkins*, 824 F.3d 726, 729 (8th Cir. 2016)).

170. *Id.* at 528 (citing *United States v. Brooks*, 645 F.3d 971 (8th Cir. 2011)).



Box key.<sup>171</sup> In contrast, Justice Lillehaug emphasized the fact that *Brooks* was decided before *Jardines* and that *Hopkins* accurately reflects the change in law that *Jardines* brought about.<sup>172</sup> Justice Lillehaug highlighted the fact that the hallway outside Edstrom's apartment was secured from members of the public, presenting a stronger case than the defendant in *Hopkins*.<sup>173</sup> In conclusion, Justice Lillehaug noted the troubling distinction between the Fourth Amendment rights of homeowners versus apartment renters evident in the majority's holding.<sup>174</sup> Put simply, Justice Lillehaug read *Jardines* as prohibiting police from employing a dog sniff at a home's threshold, no matter the type of the home.<sup>175</sup>

### III. AFTER *EDSTROM*

In analyzing the *Edstrom* decision, it seems evident that the Minnesota Supreme Court followed its existing precedent, yet perhaps failed to consider what changes *Jardines* brought to Fourth Amendment law. After analyzing *Edstrom*, the significant implications of the court's decision also bear mentioning. Last, a recent Minnesota Court of Appeals case involving a dog sniff provides an important illustration of how *Edstrom*'s analysis will be used in future dog-sniff cases.<sup>176</sup>

#### A. Analyzing *Edstrom*

It is difficult to call the Minnesota Supreme Court's decision "wrong." The wealth of state and federal case law support the majority's conclusions that (1) common areas in multi-resident buildings are not curtilage; and (2) there can be no reasonable expectation of privacy from searches—like dog sniffs—which only reveal the presence or absence of unlawful activity.<sup>177</sup> And the majority opinion in *Edstrom* can hardly be described as a radical shift from prior Minnesota Supreme Court dog sniff case law. Rather, it closely mirrors the court's prior decision in *Davis*, which dealt with similar facts.<sup>178</sup> Yet one major distinction in *Edstrom* is that the court dispensed with any notion that the nature of the item being sniffed is relevant to the

---

171. *Id.* at 520–21 n.9. The phrase "implied license" derives from *Jardines*, where the United States Supreme Court held that police exceeded the scope of any implied license when they sought to conduct a dog sniff on a home's front porch. *Florida v. Jardines*, 569 U.S. 1, 5–8 (2013).

172. *Edstrom*, 916 N.W.2d at 528 (Lillehaug, J., dissenting).

173. *Id.*

174. *Id.* (citing *United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016); *State v. Kono*, 152 A.3d 1, 26 (Conn. 2016) (discussing housing disparities based on race and income)).

175. *Id.*

176. The most glaring implication from *Edstrom* is that those who reside in multiunit dwellings receive less constitutional protection than those who own homes. Compare *Edstrom*, 916 N.W.2d at 523–24, with *Jardines*, 569 U.S. at 11–12.

177. See Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 831 n.7 (2010) (collecting cases); Chase, *supra* note 9, at 1303–05.

178. See *State v. Davis*, 732 N.W.2d 173 (Minn. 2007).

dog sniff analysis; instead it is the minimally intrusive nature of the sniff itself that courts should consider.<sup>179</sup>

The Knox Box may have also been a key factor in why the court affirmed the dog sniff. Although most of the discussion on this point was relegated to a footnote and absent from the court's substantive analysis, it bears mentioning given the Court's reemphasis on the Fourth Amendment's property rights concept in *Jardines*.<sup>180</sup> Without a warrant or other lawful right of access to the secured residence's common hallway, the dog sniff would have likely been unlawful. But the fact that building management at least impliedly consented to the dog sniff by installation of the Knox Box makes the conduct less objectionable under the *Jardines* property rights approach.

A major issue in cases with facts like *Edstrom* is the lack of guidance from the United States Supreme Court, which has yet to address what rights tenants should have in the space directly outside their homes. While Justice Lillehaug saw *Jardines* as implicitly embracing a property right for tenants in the area immediately next to their entry doors, his leap in logic from homeowners to renters lacks the support of United States Supreme Court precedent. Case law, such as *Place* and *Caballes*, is highly deferential to the police practice of using dogs to detect narcotics, particularly when police are lawfully present in the area where the dog sniff occurs.<sup>181</sup>

Yet the arguments within Justice Lillehaug's dissent are compelling. Particularly glaring is the disparity that current case law places between homeowners and renters. Is this something that makes sense? More troubling are the disparities in home ownership based on race and lower income, which themselves correlate with each other.<sup>182</sup> *Edstrom* highlights that

---

179. *Edstrom*, 916 N.W.2d at 522 n.10 (citations omitted). The court dispelled any notion that *Caballes* should not apply to the hallway sniff, asserting that *Place* makes clear that the nature of the sniff itself, rather than the character of the sniffed item, is the pertinent consideration for analytical purposes. *Id.* (citing *United States v. Place*, 462 U.S. 696, 707 (1983)). But before *Edstrom*, Minnesota's dog sniff precedent seemed to focus on the nature of the item being sniffed, for instance, the storage unit in *Carter*, the automobile's exterior in *Wiegand*, or the common hallway in *Davis*.

180. *Florida v. Jardines*, 569 U.S. 1 *passim* (2013).

181. *See Edstrom*, 916 N.W.2d at 523–24, 528 (Lillehaug, J., dissenting); *Jardines*, 569 U.S. at 11–12.

182. *Edstrom*, 916 N.W.2d at 528 (Lillehaug J., dissenting) (citing *State v. Kono*, 152 A.3d 1, 26 (Conn. 2016)). Certainly, one has to acknowledge that alternative arguments exist. For instance, the *Edstrom* logic still applies to condominium owners, *see State v. Luhm*, 880 N.W.2d 606 (Minn. Ct. App. 2016) (affirming dog-sniff searches in multiunit condominium building), and the disparities in condo ownership versus apartment and home ownership are likely less staggering. The crucial opposing argument still centers on the fact that society has declined to afford individuals a privacy interest in possessing contraband. *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (explaining that individuals do not retain a “legitimate” expectation of privacy in possessing contraband).

Yet the distinction that *Edstrom* draws from *Jardines* is far from unreasonable, at least when analyzed on a blank slate. Residents in multiunit dwellings do not usually exercise dominion or control in the common hallways outside their units. In fact, this is one of the key distinctions

homeowners, who are more likely to be in suburban or rural areas, enjoy a greater sense of privacy than urban apartment renters. In turn, this could further perpetrate disparities within the criminal justice system, something unlikely to garner or restore confidence in what many community members perceive to be an unfair process.<sup>183</sup>

Certainly, renters abandon some luxuries that accompany owning a home. Yet it seems dubious that police cannot conduct a dog sniff on a home's front porch, but the same conduct is permissible outside an apartment's door. Because the ultimate touchstone of the Fourth Amendment is "reasonableness,"<sup>184</sup> one has to question just how reasonable it is for police to use a drug-detection dog within apartment buildings without the need to obtain a search warrant. The answer to such a question turns on what we as a society are prepared to recognize as illicit contraband.<sup>185</sup> For decades, society has heavily criminalized narcotics possession and sale.<sup>186</sup> In turn, police have employed invasive detection tactics to combat narcotics activity, including the use of drug-detection dogs.<sup>187</sup> Despite the recent trend toward marijuana decriminalization,<sup>188</sup> the continued criminalization of other narcotics may allow police to keep employing narcotics interdiction

---

between single-family home ownership and ownership in a multiunit dwelling. Thus, the area sniffed in *Edstrom* would traditionally not be classified as curtilage. That said, when one analyzes the demographics of those who live in multiunit dwellings versus those who live in single-family homes, which receive curtilage protection, the practical effects of this curtilage distinction become larger. See *Edstrom*, 916 N.W.2d at 528 (Lillehaug, J., dissenting) (citing *State v. Kono*, 152 A.3d 1, 26 (Conn. 2016)) (discussing housing disparities based on race).

183. Radley Balko, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST (Apr. 9, 2019), <https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system>.

184. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citations omitted) (internal quotation marks omitted).

185. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

186. Minnesota's drug laws present an illuminating example of a conscious legislative shift to lessen the focus on criminalizing and punishing certain narcotics possession and sale crimes. See 2016 Minn. Laws 2–6 (known as the Drug Sentencing Reform Act or "DSRA"). For example, the DSRA increased the weight threshold necessary for first- and second-degree methamphetamine possession from twenty-five to fifty grams and six to twenty-five grams respectively. *Id.* Minnesota's drug mandatory minimums also changed under the DSRA, shifting from prior convictions to the presence of aggravating factors, including firearms possession or the substance's weight. *Id.* (although prior convictions can still serve as an aggravating factor).

187. Minnesota case law has noted that narcotics activity has an inherent connection to violence. *State v. Lemert*, 843 N.W.2d 227, 232 (Minn. 2014); *State v. Craig*, 826 N.W.2d 789, 797 (Minn. 2013); see also *United States v. Bustos-Torres*, 396 F.3d 935, 943 (8th Cir. 2005) ("Because weapons and violence are frequently associated with drug transactions, it is reasonable for an officer to believe a person may be armed and dangerous . . . when the person is suspected of being involved in a drug transaction.").

188. See *Legality of Cannabis by U.S. Jurisdiction*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Legality\\_of\\_cannabis\\_by\\_U.S.\\_jurisdiction](https://en.wikipedia.org/wiki/Legality_of_cannabis_by_U.S._jurisdiction) (last visited Sept. 17, 2019). Additionally, a majority of American citizens support legalizing marijuana. Hannah Hartig & A.W. Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Oct. 6, 2018), <https://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization>.

tactics. In turn, warrantless dog sniffs, like the one at issue in *Edstrom*, may become commonplace for apartment and condominium dwellers.

On a separate note, both sides in *Edstrom* debated the value and meaning of the Eighth Circuit's decision in *Hopkins*. Justice Lillehaug's own reliance on *Hopkins* seems misplaced. The Eighth Circuit did distinguish *Hopkins* from precedents based on the Supreme Court's decision in *Jardines*. Yet the *Hopkins* court noted another distinction in the case, stating "In our case, however, there is no 'common hallway' which all residents or guests must use to reach their units. Hopkins'[s] door faced outside, and the walkway leading up to it was 'common' only to Hopkins and his immediate neighbor."<sup>189</sup> In fact, *Hopkins* likely does not say what either side in the *Edstrom* decision cited it for, as the Eighth Circuit noted in a footnote: "In this case we need not consider how *Jardines* applies to interior hallways of an apartment complex."<sup>190</sup> *Hopkins* does hold that a dog sniff six to eight inches outside the door of a townhouse is improper under *Jardines* when the walkway outside this residence is not "common." But its applicability to Edstrom's appellate issue is somewhat dubious because the property management in Edstrom's apartment building allowed police to enter the building through the Knox Box.

### B. Future Implications

*Edstrom* can certainly be read as a continued endorsement of police's use of narcotics-detection dogs. Even so, narcotics-detection dogs are far from perfect.<sup>191</sup> The presence of the Knox Box, rather the precision or lack thereof of a dog sniff, may well have determined the outcome of *Edstrom* because it is a valid means for law enforcement to enter an otherwise secure

---

189. *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016).

190. *Id.* at 732 n.3 (citation omitted). In contrast, this was directly at issue in Edstrom's case.

191. Whatever one thinks about the utility of this police practice, it is hard to describe it as "fool-proof." See *Illinois v. Caballes*, 543 U.S. 405, 411 (2005) (Souter, J., dissenting) ("The infallible dog, however, is a creature of legal fiction."). In his dissent, Justice Souter collected many cases which discussed the varying degrees of police dog reliability. *Id.* at 412 (citing *United States v. Kennedy*, 131 F.3d 1371, 1378 (10th Cir. 1997) (describing a dog that had a 71% accuracy rate); *United States v. Scarborough*, 128 F.3d 1373, 1378 n.3 (10th Cir. 1997) (describing a dog that erroneously alerted four times out of nineteen while working for the postal service and 8 percent of the time over its entire career); *United States v. Limares*, 269 F.3d 794, 797 (7th Cir. 2001) (accepting as reliable a dog that gave false positives between 7 percent and 38 percent of the time); *Laime v. State*, 60 S.W.3d 464, 476 (Ark. 2001) (discussing a dog that made between ten and fifty errors)); see also Radley Balko, *The Supreme Court's 'Alternative Facts' About Drug-Sniffing Dogs*, WASH. POST (Feb. 5, 2019), <https://www.washingtonpost.com/opinions/2019/02/05/supreme-courts-alternative-facts-about-drug-sniffing-dogs> (criticizing current precedent for its failure to account for the unreliability of dog sniffs).

These figures suggest that dog sniffs may not be "*sui generis*." But the Minnesota Supreme Court has chosen a case by case approach when assessing the reliability of a dog sniff. See *State v. Davis*, 732 N.W.2d 173, 179 n.11 (Minn. 2007) (citing *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 529 (Minn. 2007) (explaining that Minnesota courts use a case by case analysis for the reliability of narcotics dogs)).

building.<sup>192</sup> Put differently, “but for” the Knox Box, which the building’s management installed, police could not have lawfully been in the common hallway, absent an emergency. Perhaps a Knox Box is something tenants will have to account for when making future living decisions, at least those tenants who have the luxury of choosing where they live. Alternatively, landlords may consciously choose to install similar devices to ensure police can access their buildings to combat drug activities. Either way, whether law enforcement personnel can lawfully access a multiunit building in non-emergency situations should be something that tenants are aware of.

Predicting the future in dog sniff jurisprudence is best labeled as a “guessing game.” The United States Supreme Court’s current composition seems unlikely to offer hope for those in opposition to the *Edstrom* decision.<sup>193</sup> The more tenable route to overturning *Edstrom* would be through the Minnesota Supreme Court, which is mostly liberal.<sup>194</sup> That said, the chance of the court taking a case with a similar issue is minimal absent presentation of distinct issues or a major shift in settled law.<sup>195</sup>

It is equally difficult to hypothesize where this subpart of criminal law will go. In Minnesota, support for the legalization of recreational marijuana has grown annually at the state legislature.<sup>196</sup> A noteworthy example highlighting the shifting tide of our society’s viewpoint of drugs comes from the

192. *Florida v. Jardines*, 569 U.S. 1, 10 (2013).

193. Chief Justice Roberts’s vote in *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (holding that the government’s acquisition of cell-site information is a search requiring a warrant or exception to the Fourth Amendment’s warrant requirement), may signal a willingness to side with the liberal bloc on certain Fourth Amendment issues. While *Carpenter* differs significantly on a factual level from *Edstrom*, bedrock principles of Fourth Amendment jurisprudence were relevant to the Chief Justice’s analysis. But Chief Justice Roberts was a dissenter in *Jardines*, making his vote in a case reaching the opposite decision of *Edstrom* doubtful. See *Jardines*, 569 U.S. at *passim*. Additionally, Justice Breyer, a member of the Court’s liberal bloc, dissented in *Jardines*. See *id.*

Lastly, Justice Gorsuch may be a focus for those who support extending *Jardines* to apartment owners. Justice Gorsuch shares a strikingly similar ideology and analytical methodology with the late Justice Scalia, the author of *Jardines*. See Erwin Chemerinsky, *Chemerinsky: Justice Gorsuch Fulfills Expectations from the Right and the Left*, ABA J. (Aug. 1, 2019, 6:00 AM), <http://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-fulfills-expectations-from-right-and-left>; David Oscar Markus, *Justice Gorsuch Channels his Inner-Scalia, and that’s Good for Criminal Defendants*, THE HILL (June 27, 2019, 12:30 PM), <https://thehill.com/opinion/judiciary/450600-justice-gorsuch-channels-his-inner-scalia-good-for-criminal-defendants>.

194. For instance, Governor Mark Dayton, a Democrat, appointed Justices Lillehaug, Hudson, Chutich, McKeig, and Thissen. See *Supreme Court Justices*, MINN. JUD. BRANCH, <http://www.mncourts.gov/SupremeCourt.aspx> (last visited Nov. 10, 2018) (listing biographical details, including appointment information, for the seven Minnesota Supreme Court Justices).

195. This is not to say that *Edstrom* will be good law for all eternity. Rather, as briefly noted in this section, the changing public sentiment toward recreational drug use may require reexamination of this decision. Perhaps the fact that *Edstrom* involved methamphetamine instead of marijuana renders the case less favorable for garnering sympathy.

196. In addition, current Governor Tim Walz supports the legalization of recreational marijuana in Minnesota. Ryan Faircloth, *Legalize Pot? Gov.-elect Tim Walz says Minnesota Should*, PIONEER PRESS (Nov. 25, 2018), <https://www.twincities.com/2018/11/25/legalize-pot-gov-elect-tim-walz-says-minnesota-should>.

Hennepin County Attorney's Office. Michael O. Freeman—the longtime chief prosecutor in Hennepin County—has implemented a policy that places less emphasis on marijuana possession or sale crimes that involve less than one hundred grams of marijuana.<sup>197</sup> This deemphasis on criminalizing marijuana possession and sale may create rippling effects on police practices that specifically aim to combat narcotics activity. If this holds true, perhaps *Edstrom* will not have the sweeping impacts noted above.

### C. Application of *Edstrom*

Lastly, based on the relative recency of the *Edstrom* decision, it remains unclear how Minnesota courts will apply the supreme court's analysis to future dog-sniff appellate challenges. Recently, the court of appeals analyzed the *Edstrom* decision in *State v. Vagle*, which involved a dog sniff in an apartment building.<sup>198</sup> A confidential informant told police that Vagle was selling methamphetamine out of an apartment in Edina.<sup>199</sup> A police investigator corroborated the informant's tip in several ways, including: (1) showing the informant a picture of Vagle and receiving the informant's confirmation that the pictured individual was the person the informant knew to be selling methamphetamine; (2) observing a vehicle registered to Vagle parked at the apartment building's underground garage; (3) seeing Vagle's name on the apartment building's rear-entrance directory; (4) speaking with the apartment manager, who relayed that Vagle had lived in a different unit within the building and that police had conducted a dog sniff at this prior unit; and (5) receiving information from the Drug Enforcement Agency that one of the agency's confidential informants had also reported that Brandon Scott Vagle was selling methamphetamine out of an Edina apartment.<sup>200</sup>

The apartment manager gave permission for police to enter the building to conduct a dog sniff and provided an access code to the investigating officer.<sup>201</sup> Officers conducted a dog sniff in the common hallway outside Vagle's apartment door, and the narcotics-detection dog alerted to

---

197. David Chanen, *Hennepin County Prosecutor Won't Charge People Caught with Small Amounts of Marijuana*, STAR TRIBUNE (Mar. 15, 2019), <http://www.startribune.com/hennepin-county-attorney-won-t-prosecute-people-caught-with-small-amounts-of-marijuana/507174002>.

This policy does include certain exceptions, for instance when a firearm is in close proximity, a person's case will not automatically go to diversion. *See id.* In comparison, it is a felony under Minnesota law to possess more than a small amount of marijuana. MINN. STAT. § 152.025, subd. 2 (2018) (defining a fifth-degree controlled substance possession crime). A "small amount" of marijuana is defined as 42.5 grams or less. MINN. STAT. § 152.01, subd. 16 (2018).

198. *State v. Vagle*, No. A18-0878, 2019 WL 1758004 (Minn. Ct. App. Apr. 22, 2019). Unpublished cases from the Minnesota Court of Appeals are nonprecedential. MINN. STAT. § 480A.08, subd. 3 (2018).

199. *Vagle*, 2019 WL 1758004, at \*1.

200. The parties did not dispute the facts on appeal. *Id.*

201. *Id.*

methamphetamine.<sup>202</sup> Upon receipt of a search warrant, officers executed it the next day at Vagle's apartment, where they recovered drugs, drug paraphernalia, and cash.<sup>203</sup> On appeal, Vagle challenged the constitutionality of the dog sniff outside his apartment and argued that without the sniff, the search warrant for his apartment lacked the requisite probable cause.<sup>204</sup> Vagle argued that *Edstrom* was wrongly decided and that Minnesota courts should follow the United States Supreme Court's reasoning in *Jardines*.<sup>205</sup> Noting that "[t]he court of appeals is bound by supreme court precedent," the *Vagle* court held that the dog sniff in the apartment hallway was not a search under the Fourth Amendment of the United States Constitution.<sup>206</sup>

The court of appeals then examined the dog sniff's propriety under the Minnesota Constitution and "consider[ed] whether the police were lawfully present in the hallway outside Vagle's apartment and whether they had a reasonable, articulable suspicion of criminal activity."<sup>207</sup> While Vagle disputed the informant's reliability, the court of appeals analogized the informant's tip, and law enforcement's later corroboration, to the facts in *Edstrom* and held that it supplied reasonable, articulable suspicion that Vagle was engaged in narcotics activity.<sup>208</sup> From there, the court of appeals held that the tip, its corroboration, and the positive alert from the narcotics-detection dog were sufficient to support a probable cause finding for the search warrant's issuance.<sup>209</sup>

*Vagle* makes two things clear: (1) Minnesota courts are unwilling to find that apartment residents possess Fourth Amendment rights in their hallways; and (2) The analysis of whether a dog sniff is permissible under the Minnesota Constitution continues to turn on the amount of reasonable suspicion that law enforcement possesses before conducting the sniff. *Vagle* shows that the only tenable route of overruling *Edstrom* is through the Minnesota Supreme Court or above. In essence, the Minnesota Court of Ap-

202. *Id.* at \*2. During the dog sniff, police also swabbed the door handle to Vagle's apartment using IonScan technology, which revealed methamphetamine. *Id.* After describing the mechanics of IonScan technology, the court of appeals ultimately did not reach this issue of whether the use of this technology constitutes a search under the Fourth Amendment. *Id.* at \*2 n.4, \*7 (citing *United States v. Williams*, 865 F.3d 1328, 1335 (11th Cir. 2017)).

203. *Id.*

204. *Vagle*, 2019 WL 1758004, at \*3.

205. *Id.* (citing *State v. Edstrom*, 916 N.W.2d 512 (Minn. 2018); *Florida v. Jardines*, 569 U.S. 1 (2013)).

206. *Vagle*, 2019 WL 1758004, at \*3 (citing *State v. Curtis*, 921 N.W.2d 342, 342 (Minn. 2018)). The court of appeals noted that the *Edstrom* court's distinction of *Jardines*: "The area immediately adjacent to Edstrom's apartment door is not analogous to the front porch in *Jardines* because it is located in an internal, common hallway that other tenants and the police jointly use and access with Edstrom. *Jardines*, therefore, does not control the curtilage question presented in this case." *Id.* (quoting *State v. Edstrom*, 916 N.W.2d 512, 520 (Minn. 2018)).

207. *Id.* (citing *State v. Edstrom*, 916 N.W.2d 512, 514 (Minn. 2018)).

208. *Id.* at \*5-6 (citing *State v. Edstrom*, 916 N.W.2d 512, 515 (Minn. 2018)).

209. *Id.* at \*6-7.

peals will not overrule higher court precedent, despite any contrary insistence that *Edstrom* was “wrongly decided.”<sup>210</sup>

#### CONCLUSION

While certainly not radical, the Minnesota Supreme Court’s decision in *State v. Edstrom* appears outdated when contextualized with our modern society. The luxury of owning a home is not something all Americans enjoy.<sup>211</sup> Additionally, the changing public sentiment about narcotics use—at least as it pertains to marijuana—serves as a basis to question the utility and practicality of the police practices employed in *Edstrom*.<sup>212</sup> As these two principles continue to play out, the reexamination of *Edstrom* and other dog sniff precedents in Minnesota may become necessary.

---

210. See generally *Vagle*, 2019 WL 1758004, at \*3

211. For instance, nearly thirty percent of Minnesotans resided in a rental living space (home or apartment) in 2018. Gabrielle Norton, *Out of Reach Minnesota 2018*, MINN. HOUSING PARTNERSHIP, <https://www.mhponline.org/publications/out-of-reach/2018> (last visited Sept. 17, 2019).

212. Hartig & Geiger, *supra* note 189.



