DOES THE AUTOMOBILE EXCEPTION APPLY WHEN THE AUTO IS ON CURTILAGE-PART ONE

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The automobile exception to the search warrant requirement allows officers to search a vehicle without a warrant when they have probable cause to believe evidence of a crime is located within the vehicle. This rule was first established by the United States Supreme Court in *Carroll v. United States*[i] in 1925, and has been reiterated by that court in a long line of cases.

However, despite the longstanding support of warrantless searches of automobiles based on the automobile exception, it is important to remember that states can be more restrictive than the Supreme Court, based upon the individual state's own constitution. Additionally, the precedent from the Supreme Court does leave open some "gray area" for states and federal courts of appeal to differ on opinions.

This article series will focus on one such area of differing opinion. Particularly, whether the automobile exception to the search warrant requirement applies when the vehicle is parked on curtilage, or in a residential location.

On November 1, 2016, the Court of Appeals of Georgia decided the *State v. Vickers*[ii], in which the court examined the issue of whether a police officer violated the Fourth Amendment when he conducted a warrantless search of a vehicle that was located on the curtilage of the defendant's residence based upon the automobile exception to the search warrant requirement. The relevant facts of *Vickers*, taken directly from the case, are as follows:

> [T]he evidence shows that Gwinnett County police officers were executing an unrelated arrest warrant when they noticed a car parked in the driveway of the house next door. The car was wholly inside the boundaries of the private property, "fairly closely parked to the actual garage of the home" as shown in a photograph identified by a police witness. A plainclothes officer testified that as he walked through the side yard of the neighboring house, about 10 or 15 feet from the car, he smelled a strong odor of marijuana and observed heavy smoke inside the vehicle. He also testified that he saw individuals in the car passing "something" back and forth, but that he did not know what it was. Asked, "You never saw them passing a marijuana cigarette or joint?" he responded, "No," and that "as

> far as what they were passing, I don't know." He testified that he "*assumed* that it was marijuana," (emphasis supplied), and the trial court so found. And the trial court also found that, other than the odor of marijuana, even after approaching the vehicle "the officers still could not see any contraband in plain view to seize within the car."
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> The plainclothes officer informed other officers via radio of the occupants of the car and that he "believe[d] they were smoking marijuana. They needed to come and make contact with them." A police sergeant testified that he observed the car for over an hour. As he walked up the driveway, he could smell the odor of marijuana, but did not see anyone in the vehicle smoking and did not see any marijuana in plain view. He further testified that he did not observe any traffic offense and did not "witness any criminal activity out of the car or the occupants of the car prior to approaching the driveway." He could not even see how many people were inside until he was "actually right at the vehicle" and "could actually touch it."
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> The sergeant determined that four individuals were in the car and "decided to just detain the individuals in the car until I could get my officers back. Because at that point we were outnumbered, and it became a safety issue for me." He testified, "I didn't do an investigation. I decided to detain and hold what I've got." Police removed the four occupants of the vehicle but saw no illegal substances or other evidence "in plain view." No search warrant was ever obtained, as the officers testified that they relied upon the "automobile exception." Once the occupants were removed, officers searched the vehicle and found 1.4 grams of suspected marijuana and alprazolam under the front passenger seat. No evidence of burnt marijuana was found. The State did not elicit and the officers did not testify to any exigent circumstances or consent to search, and the trial court found that neither existed.[iii]

The defendants were arrested and filed a motion to suppress the evidence obtained as a result of the warrantless search of the automobile. The trial court granted the motion and the State appealed the grant of the motion to the Court of Appeals of Georgia.

The court of appeals, in *Vickers,* discussed the automobile exception as follows:

> **The automobile exception is justified on two grounds: the ready mobility of automobiles and the diminished expectation of privacy that citizens have in them.** See *California v*. *Carney*, 471 U. S. 386, 391-392 (II) (105 SCt 2066, 85 LE2d 406) (1985). **And "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes -- temporary or otherwise -- the two justifications for the vehicle exception come into play**." (Footnote omitted.) Id. at 392-393 (II). **Hence, the automobile exception applies even if the car is not stopped along a highway, but is stationary in a place *not regularly used for residential purposes*, as in the present case, where Sarden's car was in a parking space outside a commercial establishment**.[iv] [emphasis added]

In support of the grant of the motion to suppress, the defendants cited *State v*. *O'Bryant*[v], in which officer when to the defendant's residence to conduct a knock and talk. After receiving no response at

the door, as they were leaving, one of the officers looked through the closed, tinted windows of a truck parked at the defendant's residence. The officer saw a bag of marijuana in the truck and entered and seized the marijuana without a warrant. The court stated

> We held that the officers "had finished their official business" and "had no valid reason to look into the truck." Id. at 863-864. "At the point where [the agent] elected to peer inside the truck, his actions became investigative in nature. Furthermore, the vehicle was within the curtilage of the home, and O'Bryant had a reasonable expectation of privacy in his driveway. [Cit.]" Id. at 864.[vi]

In *O'Bryant*, the court held that the search therefore violated the defendant's Fourth Amendment reasonable expectation of privacy.

The state, in support of it's contention that the motion to suppress should not have been granted argued that the *State v. Sarden* supported the search in Vickers' case. In *Sarden*, police arrest the defendant on outstanding warrants. His car was parked in a parking space at a convenience store. An officer looked in his car window and saw illegal drugs in plain view. They entered his vehicle without a warrant and seized the drugs. The court upheld the warrantless search based on the automobile exception and stated

> **[T]he automobile exception applies even if the car is not stopped along a highway, but is stationary in a place *not regularly used for residential purposes*, as in the present case, where Sarden's car was in a parking space outside a commercial establishment.[vii]**

The court then applied the facts of Vickers' case to the relevant case law discussed above in *O'Bryant* and *Sarden*. They noted that this case was much more akin to *O'Bryant* as the car in Vickers was on the curtilage of the defendant's residence. Since there was no other exception to the warrant requirement applicable in this case, the court affirmed the grant of motion to suppress in this case because the search of the defendant's vehicle was conducted on protected curtilage without consent, exigent circumstance or a warrant.

Part Two of this series will cover the opposing viewpoint.

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[i] 267 U.S. 132 (1925)
[ii] A16A0792 (Ga. App. Decided November 1, 2016)
[iii] Id.
[iv] Vickers, A16A0792 (quoting *State v. Sarden*, 305 Ga. App. 587, 589 (699 SE2d 880) (2010).
[v] 219 Ga. App. 862, 864 (467 SE2d 342) (1996)
[vi] Vickers, A16A0792 (citing O'Bryant, 219 Ga. App. at 864)
[vii] Id.