# Sixth Circuit Holds that Chalking Vehicle Tires is a Fourth Amendment Search

**Author :** Shea Denning

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The Court of Appeals for the Sixth Circuit ruled last week that city parking enforcement officers' use of chalk to mark the tires of parked vehicles to track how long they have been parked is a Fourth Amendment search. And, on the facts before it, the court held that the city failed to show that the search was reasonable.

**Facts.** Alison Taylor was cited by the City of Saginaw, Michigan for unlawful parking on fifteen separate occasions over a three year period. Each time, the parking enforcement officer used chalk to mark Taylor's tires, returning to the car after the time for parking had passed and ascertaining from the chalk marks that the vehicle had not moved. Each citation listed the date and time the chalk was placed on Taylor car.

Taylor sued the city and the parking enforcement officer who issued the citations, alleging that chalking her tires without her consent or a search warrant violated the Fourth Amendment. The city moved to dismiss, arguing that chalking was not a Fourth Amendment search and that even if it was, it was reasonable under the community caretaker exception. The federal district court found that the chalking was a search, but deemed it reasonable because there is a lesser expectation of privacy in automobiles and because the search was subject to the community caretaker exceptions to the warrant requirement. Taylor appealed and the Sixth Circuit in reversed. *Taylor v. City of Saginaw*, No. 17-2126, 2019 WL 1757953, ___ F.3d. ___ (6th Cir. 2019).

**Analysis.** The Sixth Circuit relied on the Supreme Court's "property-based" approach in *United States v. Jones*, 565 U.S. 400 (2012) (discussed here), in determining that the chalking was a search. *Jones* held that the government's installation of a GPS tracking device on the undercarriage of a suspect's vehicle and its use of that device to track the vehicle's movements was a Fourth Amendment search. The *Jones* court explained that the "reasonable expectation of privacy" test established in *Katz v. United States*, 389 U.S. 347 (1967), for determining when a Fourth Amendment search occurred added to but did not supersede the traditional property rights test that was tied to common-law trespass. *Id.* at 405. Under that traditional approach, a Fourth Amendment search occurs when the government (1) obtains information by (2) physically intruding on a constitutionally protected area. *Id.* at 407 n.3.

**Trespass theory.** The *Taylor* court reasoned that the city's intentional physical contact with the tires of Taylor's vehicle, even though slight and non-damaging, was a trespass. That trespass was joined with an attempt to find information, namely to determine whether the vehicle was parked longer than was permitted. Thus, it was a Fourth Amendment search.

**No automobile exception.** The court then considered whether the search was reasonable, noting at the outset that searches generally must be conducted pursuant to a warrant subject to a few specific exceptions. The trial court had deemed the search reasonable in part because of the diminished expectation of privacy in automobiles, but the Sixth Circuit rejected that rationale. While the diminished privacy expectation in vehicles renders reasonable a warrantless vehicle search that is supported by probable cause to believe the vehicle will contain evidence of a crime, there was no probable cause at the time Taylor's car was chalked.

**Not community caretaking.** The city also argued that the warrantless chalking was permitted under the community caretaker exception to the warrant requirement, an exception that applies when government actors carry out seizures and searches for purposes of public safety rather than to detect and investigate crime. The Sixth Circuit also rejected this justification, reasoning that the city failed to show that Taylor's overtime parking created a traffic impediment amounting to a public safety concern. Moreover, the court determined that the city failed to demonstrate that the delay associated with obtaining a warrant would result in injury or ongoing harm to the community. The court concluded that "[b]ecause the purpose of chalking is to raise revenue, and not to mitigate public hazard" the city was not acting as a community caretaker. *Id.* at *5.

**Limiting language.** The *Taylor* court cautioned that its holding did not foreclose the application of the community caretaker exception to the warrantless search of a lawfully parked vehicle. Instead, the exception simply did not apply on the facts before the court at the pleading stage of the litigation. The court also recognized that it was possible that some other exception to the warrant requirement might apply. Thus, it noted that when the case moved beyond the pleading stage, the city was free to argue in favor of an exception.

**Other possible exceptions.** The city argued before the trial court that the administrative search exception applied to its chalking of Taylor's vehicle, but did not raise that on appeal. The administrative search exception applies to searches that advance a specific and legitimate non-criminal goal, are no more extensive or invasive than necessary, and do not have a collateral purpose of collecting criminal evidence. *See, e.g.*, *United States v. Kerr*, 300 F. Supp. 3d 1226, 1230 (E.D. Wash. 2018) (determining that a hand inspection of all items of a visitor to the Spokane Social Security Administration offices is reasonable and no more intrusive than necessary to further the Government's legitimate goal in preventing destruction and injury on federal property). Given the civil nature of the parking violation at issue in *Taylor*, the city may again proffer this exception as the litigation progresses.

The city also argued on appeal that because chalking was such a widespread and longstanding practice it had an implied license that negated the trespass. The city cited as support the Supreme Court's acknowledgement in *Florida v. Jardines*, 569 U.S. 1 (2013) (discussed here), of an officer's right to approach the front door of a private residence. The Sixth Circuit rejected that claim, noting that government actors have an implied license to approach a front door only because that is no more than what a private citizen might do – and there is no common practice of private citizens chalking vehicles.

**What's next?** I wonder whether a city that desired to continue chalking without the risk of a Fourth Amendment challenge might combine the doctrines mentioned above. Perhaps a city could invoke the administrative search exception and notify drivers through appropriate signage that parking in designated areas grants the city permission to chalk.

There also are technology-based solutions that can render the chalking debate moot. According to this news article, parking enforcement officers in Xenia, Ohio will soon start using "E-chalk," a handheld monitor that allows an officer to photograph a tire to determine how long the car has been parked in a particular spot. Once these devices hit the street, residents will need a new nickname for their parking enforcement officer. Now they call him Chalky.