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By **Daigle Law Group**

March 8, 2022

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Coming to us from the First Circuit, the facts of this case surround harassment, a knock and talk, and of course, the Fourth Amendment.

The major case used in the court's argument today is *Florida v. Jardines*. Decided in 2013, the Supreme Court recognized that the yard of a home is protected under the Fourth Amendment to the same degree as the interior of the home itself. However, the Court also recognized that an implicit social license or invitation to enter the curtilage of another's property exists by virtue of "the habits of the country." For example, the Court noted that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers, and peddlers of all kinds." Consequently, the Court explained that the implicit license "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." The Court added the simplicity of the implicit license "is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." This implicit license allows police officers to approach a home without a warrant and attempt to make contact with the homeowner as any private citizen might do.

Let's see how all of these things tie together by examining the facts of the case.

FACTS

Christopher French, a college student, was dating a fellow student, Samantha Nardone. On February 18, 2016, at approximately 1:00 a.m., police officers were dispatched to Nardone's residence in response to a call concerning a domestic dispute. Upon arrival, Nardone told the officers that she wanted French to leave her alone for the night. French agreed to leave; however, during the walk to his apartment, he sent Nardone several offensive text messages. Nardone showed the messages to officers, who caught up with French before he arrived home. The officers served French with a Cease Harassment Notice (CHN), which prohibited French from "engaging, without reasonable cause, in any course of action with the intent to harass, torment, or threaten" Nardone.

Later that day, Nardone reported that French had been calling her and sending her messages via text, email, and various social media platforms throughout the day. Nardone also told the officers that some of her friends had told her that French was looking for her on campus and that she had seen French

during a trip to a local store and assumed French was following her. Based on these facts, officers arrested French for harassment under a Maine statute^[1], but the charges were subsequently dismissed by the state.

On September 14, 2016, at approximately 3:19 a.m., the police received a report of a possible break-in at Nardone's residence. Officers Morse and Gray responded. Nardone told the officers that she and French had reconciled, but they were not dating. She also told the officers she suspected that French had stolen her cell phone while she had been sleeping that night. She told the officers that she suspected French because French had taken her keys the prior week and had not yet returned them.

After the officers left, they responded to a second call from Nardone at approximately 4:43 a.m., reporting that she and her roommate had seen French attempting to enter their home, but he ran off when the women screamed. As the officers approached Nardone's residence, they received another report that French had just been seen running down the street toward his house. Officers Morse and Gray immediately went to French's house.

Once at French's house, the officers saw lights on inside the home and decided to conduct a "knock and talk" rather than immediately apply for a warrant. The officers walked onto the front porch, knocked on the front door, and announced they were police officers seeking to speak with French. No one answered the door, and the officers left the property.

While Officer Morse went to speak to Nardone, Officer Gray stayed near French's home to watch the residence. While standing on a neighbor's driveway, Officer Gray thought he saw a young man peering out of the basement window. Officer Gray shined his flashlight through the window, which caused the young man to cover the window and turn off the basement lights. Officer Gray then returned to the front porch of French's home, and again knocked on the front door, but no one answered.

During this time, Officer Gray noticed that lights were quickly being turned off in the residence. Officer Gray left French's property.

A few minutes later, Officer Morse returned, along with two other police officers. Officer Morse walked back onto French's property and, peering through a window, saw that a light remained on in the kitchen. Officer Morse then rejoined the other officers and told them that he would return to the station to apply for a search warrant. One of the officers suggested that they should attempt another "knock and talk." Officer Morse replied that he and Officer Gray had already done that, and he did not think French would respond if the officers tried it again.

Nonetheless, Officer Morse and another officer went to the left side of house, walked through the curtilage along a narrow strip of grass and located what they believed was French's bedroom window. The officers knocked forcefully on the window frame and ordered French to come out and talk. At the same time, Officer Gray returned to the front porch, knocked on the front door, and told French to come outside.

Eventually, French reluctantly came to the door and spoke to the officers. French admitted that he had Nardone's cell phone but claimed he had found it on the ground outside Nardone's building and planned to return it the next day. The officers deemed French's story not credible and arrested him for burglary. The state subsequently dismissed the charge because Nardone refused to cooperate and was out of state.

French sued the officers under *42 U.S.C. § 1983* for: 1) arresting him without probable cause in February 2016; and 2) unlawfully entering the curtilage of his house in September 2016 to conduct several "knock and talks," in violation of the Fourth Amendment.

Regarding the February 2016 incident, the district court held that the officers had probable cause to arrest French for harassment. As to the September 2016 incident, the district court found that even if the officers' multiple attempts to persuade French to come to the door violated the "knock and talk" exception to the Fourth Amendment, the officers were entitled to qualified immunity because there was no clearly established law that made their conduct unlawful. French appealed.

FIRST CIRCUIT COURT OPINION

The First Circuit Court of Appeals agreed with the district court and held that the officers had probable cause to arrest French for harassment under Maine law. The court noted that the undisputed facts established that French used several different communications platforms to call and message Nardone repeatedly, despite receiving no response from her. In addition, content of the messages ranged from pleas to talk, to threats of suicide, to telling Nardone that he would "find" her. Finally, Nardone told officers that French had been looking for her on campus and that he had followed her to a local store, which was conduct that terrified her.

Using *Jardines*, the court held that the officers exceeded the scope of the implicit social license that authorized their presence on French's property. The court felt that it was obvious that the occupants of the home were aware of, and did not want to receive, visitors. This was evidenced by the refusal to answer the door during the officers' first and second entries onto the porch and the swift covering of windows and turning off lights in response to the knock on the door during the second entry onto the porch. Even after witnessing all of these signs, the officers continued to try to coax French out of the

house, even after Officer Morse expressed doubt that French would come to the door and that the officer should attempt to obtain a warrant. The court concluded that any reasonable officer would have understood that repeated, forceful knocking on the front door and a bedroom window frame, while urging French to come outside, during the officers' third and fourth entries, exceeded the limited scope of the customary social license to enter French's property. By doing so, the court concluded that the officers engaged in the kind of warrantless and unlicensed physical intrusion on French's property that *Jardines* clearly established as a Fourth Amendment violation. As a result, the court held that the officers were not entitled to qualified immunity.

TAKEAWAYS

Knock and talks have been around for a long, long time. And while they are a legal and reasonable investigative tool, they do not always stand up as well in court. Any warrantless entry into a residence by officers causes heightened concern and because knock and talks occur in private, there are no neutral observers. As the Ninth Circuit pointed out, "[T]he nonpublic setting substantially increase[s] the coercive nature of the encounter."^[i] Judges also may view knock and talks as an attempt to obtain the suspect's consent through the deliberate use of fear and surprise. So, while knock and talks can be a great first step, be sure to remain weary of Fourth Amendment rights when utilizing them.

French v. Merrill, 15 F.4th 116 (1st Cir. 2021)

^[i] *Me. Rev. Stat. tit. 17-A, § 15(1)(A)(12)*

^[ii] *State v. Ferrier* (Wash. 1998) 960 P.2d 927, 933.

Originally published at <https://dlglearningcenter.com/you-shall-not-pass-knock-talks-curtilage-and-the-fourth-amendment/>

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