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Legal Advisor's Update

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A summary of laws that may be of interest to you. More information is available in the Legal Advisor's Office at 645-4530. This is not an inspectional item.

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The scope of the automobile exception to the Fourth Amendment extends no further than the automobile itself. The automobile exception permits police to search the vehicle. Nothing in the U.S. Supreme Court's case law suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant.

II. Legislative Update

A. New Columbus City Code Gun Laws Pgs 5-11

New City code sections allow more weapons to be seized/forfeited when weapons are used during the commission of certain crimes. Jail time will be mandatory for using a weapon while committing certain crimes. There are new Domestic Violence and Intimate Partner Violence City Code sections. There are new sections prohibiting the selling/furnishing of imitation firearms to minors, and which prohibit altering/display of imitation firearms by anyone. There is a new City Code WUD section, which includes many more offenses than are currently in the State Code.

B. Changes to the City of Columbus Parking Code Pgs 12-13

The City has created new parking sections that address chronic parking problems. For example, (CCC 2151.09) no person... shall permit such vehicle to remain parked, standing, or abandoned upon any street for longer than 72 consecutive hours without moving such vehicle at least 75 feet. We have gotten a lot of questions about continuous on street-parking over the years.

I. New Supreme Court Case on Search and Seizure, Curtilage and the Automobile Exception

Collins v. Virginia, 2018 U.S. LEXIS 3210

Critical Points of the Case:

- We have had a number of questions about this case since it came out last week. We have also seen this case portrayed as a major shift in the law. It is not and the holding is not different than what Ohio Courts have said for some time, nor is it different than the advice we have given in the past. Stated simply, the automobile exception permits an officer to search a vehicle without a warrant when the officer has PC to search, *and* the vehicle is constitutionally accessible to the officer, which usually means stopped/parked in a place open to the public such as roadside. However, if the vehicle is within the curtilage of a home, the officer cannot trespass into/onto the curtilage to search anything, including a vehicle parked/stored there, without a search warrant or an exigent circumstance. FYI – curtilage is the space right around the house that is seen as being similar to and protected like the house.
- This case didn't deal with the tougher curtilage questions: What if the vehicle isn't as close to the house, is closer to the street, or is not in any sort of enclosure? How far up the driveway is now considered curtilage? As stated, we don't think this case really changed much. In *United States v. Galaviz*, 645 F.3d 347 (6th Cir. 2011), our federal court ruled as follows on a vehicle/curtilage question: Officers observed a white car parked in the driveway and saw what looked like a handgun under the front seat. They later seized a revolver from the car located under the seat. The driveway was about two car-lengths long. The court decided the driveway was not part of the residence/curtilage after considering three factors. First, the court considered the proximity of the driveway to the home. There was a distance of one car-length from the sidewalk to the corner of the house and the driveway extended another car-length along the side of the house. This was a close proximity and thus made it possible that the driveway was curtilage. Second, the court examined whether the area was "within an enclosure that surrounded the house." Because the driveway was not enclosed by a fence or barrier and because the area where the car was parked directly met with the sidewalk this indicated the driveway was not curtilage. Third the court looked at whether there were "any steps taken by the resident to protect the area from observation by people passing by." There were no steps taken by the residents to protect the area, no bushes or hedges were obstructing the view of the driveway from the sidewalk or street. Given these last two factors, the court decided the driveway was not within the curtilage of the home despite its close proximity. We think this is still the way to look at these situations.

- The scope of the automobile exception to the Fourth Amendment extends no further than the automobile itself. The automobile exception permits police to search the vehicle. Nothing in the U.S. Supreme Court's case law suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant.
- For Fourth Amendment purposes, the conception defining the curtilage is familiar enough that it is easily understood from one's daily experience. Just like the front porch, side garden, or area outside the front window, a driveway enclosure that constitutes an area adjacent to the home and to which the activity of home life extends is properly considered curtilage.
- Under the plain-view doctrine, any valid warrantless seizure of incriminating evidence requires that the officer have a lawful right of access to the object itself. Even where the object is contraband, the Supreme Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. It is one thing to seize without a warrant property resting in an open area, and it is quite another thing to effect a warrantless seizure of property situated on private premises to which access is not otherwise available for the seizing officer. A plain-view seizure thus cannot be justified if it is effectuated by unlawful trespass.
- It is a settled rule that warrantless arrests in public places are valid, but, absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause. That is because being arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. Likewise, searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage.

Facts: On two separate occasions, Officers Rhodes and Officer McCall independently saw the driver of an orange and black motorcycle commit traffic violations. Both times, the driver eluded the officers' attempts to stop the motorcycle. The officers investigated further and learned that the motorcycle was likely stolen and in the possession of Ryan Collins. Officer Rhodes tracked down the address of the house where the motorcycle was located, drove there and parked on the street. The house was later established as Collins' girlfriend's house and that Collins slept there a few nights per week.

From his car, Officer Rhodes could see what appeared to be a motorcycle covered with a tarp parked at the top of the driveway where there was a partial enclosure—the motorcycle was in this partial enclosure—it appears to have been about 30 feet up the driveway. Officers Rhodes, who did not have a warrant, walked onto the residential property, and up to the top of the driveway where the motorcycle was parked. A visitor endeavoring to reach the front door of the house would have to walk partway up the driveway, but would turn off before entering the

enclosure and instead proceed up a set of steps leading to the front porch. Once at the enclosure, the officer pulled off the tarp covering the motorcycle, to reveal an orange and black motorcycle. Officer Rhodes ran a search of the license plate and vehicle identification numbers, which confirmed that the motorcycle was stolen. He took a photo of the uncovered motorcycle, put the tarp back on and returned to his car parked on the street where he waited for Collins. When Collins returned home he agreed to speak with Officer Rhodes and admitted that he bought the motorcycle without title. Officer Rhodes then arrested Collins.

Collins filed a pretrial motion to suppress the evidence that Officer Rhodes had obtained from his warrantless search of the motorcycle. Collins claimed that Officer Rhodes had trespassed on the curtilage of the house to conduct the investigation of the motorcycle, in violation of the Fourth Amendment.

Issue #1: Was the top of the driveway where Officer Rhodes conducted the search considered curtilage?

Holding: Yes, the top of the driveway where Officer Rhodes entered to inspect the motorcycle was curtilage. That portion of the driveway was enclosed on two sides by a brick wall and on a third side by the house. A side door provided direct access between this section of the driveway and the house. The driveway enclosure where Officer Rhodes conducted the search was “an area adjacent to the home and ‘to which the activity of home life extends,’” thus making it curtilage.

Issue #2: Does the automobile exception to the Fourth Amendment permit a police officer, uninvited and without a warrant to enter the curtilage of a home in order to search a vehicle parked therein?

Holding: No, the automobile exception to the Fourth Amendment does not permit a police officer to enter the curtilage of a home in order to search a vehicle without a warrant. The scope of the automobile exception extends no further than the automobile itself. A plain-view seizure is not justified if it is done by an unlawful trespass. “The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person’s separate and substantial Fourth Amendment interest in his home and curtilage.”

The Court found that in physically intruding on the curtilage of Collins’ home to search the motorcycle, Officer Rhodes not only invaded Collins’ Fourth Amendment interest in the item searched, *i.e.*, the motorcycle, but also invaded Collins’ Fourth Amendment interest in the curtilage of his home. The Court said that applying the relevant legal principles to a slightly different factual scenario confirmed that this was an easy case. Imagine a motorcycle parked inside the living room of a house, visible through a window to a passerby on the street. Imagine further that an officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Could an officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? The Court said “surely not.”

II. Columbus City Code Changes

A. New Columbus City Code Gun Laws

CCC Ord. 1328-2018: Effective date 6/13/18

This new section allows for increased penalties for offenders who possess or use weapons when committing certain crimes and allows officers to seize more weapons at the time of arrest in those instances, as well as making jail time mandatory when offender is convicted. Also, it increases the ability to seek forfeiture of weapons at conviction in certain offenses. New code sections are created for Domestic Violence, **Intimate Partner Violence**, and Violation of a Protection Order.

Specifically, here is what has changed:

1. **Allows for weapons to be seized and forfeited** if they are used during the commission of one of the following criminal offenses:
 - a. Negligent Homicide (2303.05)
 - b. Negligent Assault (2303.14)
 - c. Aggravated Menacing (2303.21)
 - d. Menacing (2303.22)
 - e. Domestic Violence (2319.25(A), (B) or (C))
 - f. Intimate Partner Violence (2319.25(D), (E) or (F))
 - g. Violation of a Protection Order (2319.27)
2. **Adds mandatory jail time** to the sentencing penalties if offender possessed a firearm or dangerous ordnance when committing one of the following criminal offenses:
 - a. Assault (2303.13)
 - b. Aggravated Menacing (2303.21)
 - c. Menacing (2303.22)
 - d. Domestic Violence (2319.25(A), (B) or (C))
 - e. Intimate Partner Violence (2319.25(D), (E) or (F))
 - f. Violation of Protection Order (2319.27)
3. **Creates new City Code sections** for the following offenses:
 - a. Domestic Violence (2319.25(A), (B), (C))
 - b. Intimate Partner Violence (2319.25 (D), (E), (F))
 - c. Violation of Protection Order (2319.27)

4. Changes the element language of the following City Code sections to match the language in the same ORC sections. **However, City code sections will have increased penalties as listed above.**
 - a. Negligent Homicide (2303.05)
 - b. Assault (2303.13)
 - c. Negligent Assault (2303.14)
 - d. Aggravated Menacing (2303.21)
 - e. Menacing (2303.22)

Why is this important?

First, with these new City code sections, more weapons may be seized at time of arrest from offenders who commit certain types of crimes (listed above) and, since jail time will be mandatory (and work release is prohibited), there is an increased punishment just solely for using the weapon while committing the crime. Also, more of these weapons, which have been used in the commission of the listed crimes, may now be forfeited at time of conviction.

Second, with the new Domestic Violence and Intimate Partner Violence sections, more relationships are included and more victims are protected by including their relationship and creating a charge for the offenders which doesn't necessarily exist under state code. **Charges for Intimate Partner Violence will be charged under the DV code section (2319.25 – subsections D, E, or F).** The definition of “intimate partner” for purposes of 2319.25 is a person in a dating relationship with the offender who does not meet the definition of family of household member. 2319.25(K)(3). “Dating relationship” is defined in 2319.25(K)(4). Practically, and legally speaking, the new City Code DV and VPO charge should only be used if the offender does not have a prior DV or VPO conviction respectively. If the offender has a prior DV or VPO conviction, they shall be charged with the State Code DV or VPO respectively.

Third, with the new DV, IPV, and VPO sections, seizure and forfeiture of weapons used during the commission of these crimes AND mandatory jail time are added to the penalties upon conviction.

Fourth, it eliminates confusion between City code sections and State code sections that had different wording.

1547-2018: Effective Date 6/07/18

NEW CRIMINAL CODE LAWS DEALING WITH IMITATION FIREARMS

The primary purpose of these new code sections is to prohibit the selling and furnishing of imitation firearms to minors, and to prohibit the altering/display of imitation firearms by anyone, as many of these weapons look identical to real weapons and present danger to officer and citizen safety. Violations are M1s.

Imitation Firearm (2323.51) is essentially: any BB device or firearm replica that would lead a reasonable person to believe that the device is a firearm. It does not include a non-firing, collector replica of an antique firearm developed prior to 1898.

1. **2323.52(B)**: Prohibits the giving/selling/furnishing of imitation firearms to minors (under the age of 18)

a. EXCEPTIONS:

1. Lawful use during a theatrical production
 2. At a public/private shooting range or paintball facility
 3. If the entire exterior surface of device is either a bright color OR device is see-through
2. **2323.53(A)**: Prohibits the alteration of an imitation firearm in any way that makes the device look more like a real firearm
 3. **2323.53(B)**: Prohibits the possession of an imitation firearm which has had the blaze orange tip or other markings either removed or obscured
 - a. **EXCEPTION TO BOTH (A) AND (B)** → Lawful use during a theatrical production
 4. **2323.54(A)**: Prohibits open display of an imitation firearm in a public place
 5. **2323.54(B)**: Prohibits possession of an imitation firearm in a school safety zone, if the person indicates that he possesses the object AND that it's a firearm, **OR** the person displays or brandishes the object AND indicates that it's a firearm

a. EXCEPTIONS TO BOTH (A) AND (B) SECTIONS ARE LISTED IN SECTION (D)

CCC Ord. 1116-2018: Effective date 6/13/18

NEW CRIMINAL CODE LAWS DEALING WITH FIREARMS AND FIREARM ACCESSORIES

Why is this important and how is it different from current law?

First, the new City Code sections bring the City Code in line with already established State and/or Federal law provisions criminalizing possession or use of firearms. This expands officers' ability to charge violations which they previously could not.

Second, with the new City Code WUD section, there are many more offenses included than are currently in the State Code, so officers will be able to charge more offenders with WUD accordingly. In addition to having convictions for one of several felony offenses (F4 or above – listed below), being subject to a valid protection order or having a conviction for a “misdemeanor crime of domestic violence” (federal definition) are now disabilities under the

City Code! Convictions for WUD also carry **mandatory jail time** of at least 180 days (*not eligible for work release*).

Third, more weapons may be seized and forfeited from offenders who commit certain types of crimes (listed below).

Fourth, rate-of-fire acceleration firearm accessories (like bump stocks) are now illegal and there is mandatory jail time as a penalty.

Fifth, practically speaking, if officers want weapons forfeited which have been used in the commissions of the crimes as outlined below, officers should file those charges under the City Code and need to include language in the complaint itself requesting forfeiture (this will be included in the CCM). **However**, keep in mind that violations under the City Code are misdemeanors, not felonies.

1. **Allows for weapons to be seized and forfeited** when they are used in the commission of any of the following new City Code Offenses:

- a. WUD (2323.13)
- b. Weapons while intoxicated (2323.15)
- c. Defacing identification marks of firearm (2323.201)
- d. Underage purchase of firearm or handgun (2323.211)
- e. Possessing criminal tools (2323.24)
- f. Failure to secure dangerous ordnance (2323.19)
- g. Unlawful transaction in weapons (2323.20)
- h. Failure to report loss (2323.20)
- i. Discharging weapons (2323.30)

2. **2323.13 – Having Weapons Under Disability**

a. Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, **if any of the following apply:**

- i. The person is under indictment for, has been convicted of, or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been any of the following felonies

punishable by imprisonment for a term exceeding one year:

1. Homicide and Assault
 - a. 2903.041, 2903.06, or 2903.08
2. Sex offenses

- a. 2907.04, 2907.07, 2907.19, 2907.21, 2907.22, 2907.23, 2907.24, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, or 2907.323
3. Terrorism offenses
 - a. 2909.04, 2909.22, 2909.23, 2909.26, 2909.27, 2909.28, or 2909.29
4. Offenses against the public peace
 - a. 2917.33 or 2917.47
5. Offense against justice and public administration
 - a. 2921.02, 2921.05, 2921.11, 2921.12, 2921.13, 2921.31, 2921.321, 2921.33, 2921.331, 2921.35, 2921.36, 2921.38, 2921.41, 2921.42, 2921.51, or 2921.52
6. Weapons Control offenses
 - a. 2923.12, 2923.122, 2923.123, 2923.13, 2923.131, 2923.16, 2923.162, 2923.17, 2923.20, 2923.201, 2923.241, 2923.32, or 2923.42
7. Ethnic intimidation and desecration of places of worship offenses
 - a. 2927.11 or 2927.12
- ii. The person is subject to a court order (i.e. protection order) that:
 1. Was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
 2. Restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child;
AND
 - a. Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child;
OR
 - b. By its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner

or child that would reasonably be expected to cause bodily injury.

- iii. The person has been convicted of a misdemeanor crime of domestic violence (as defined in 18 USC 921(a))

3. Creates the following new code sections:

- a. **2323.15:** Using weapons while intoxicated → M1 offense
- b. **2323.163:** Procedure for storing and returning surrendered firearms (*Terry*/traffic stops)
 - a. Allows officers to seize weapons which have been ordered turned over to the Division of Police pursuant to the terms of a Protection Order issued pursuant to the ORC, as well as weapons that are contraband out of a domestic violence incident, and turn them into the property room.
 - b. There is also a provision for awarding reasonable attorney's fees if officers improperly seize a firearm and don't return it timely to the person from whom it was seized. (This part is already in the State Code). This section does not prohibit the police from retaining a weapon while a protection order is pending.
- c. **2323.171:** Unlawful possession of firearm accessory
 - i. Prohibits possession of illegal rate-of-fire acceleration firearm accessories including:
 - ii. Any trigger crank, a bump-fire device, or any part, combination of parts, component, device, attachment, or accessory that is designed or functions to accelerate the rate of fire of a semi-automatic firearm but not convert the semi-automatic firearm into an automatic firearm. These include, but are not limited to, firearm accessories described or marketed as **bump stocks**, bump-fire stocks, slide fires, and accelerators.
 - iii. Misdemeanor offense with a mandatory minimum jail term of at least 180 consecutive days during which defendant is not eligible for work release

- d. **2323.201(A)(1)**: Prohibits altering/defacing identification marks on a firearm
→ M1 offense
- e. **2323.201(B)**: Prohibits possessing a firearm with an altered/defaced identification mark → M1 offense
 - i. EXCEPTION: Does not apply to any firearm on which no manufacturer's serial number was inscribed at the time of manufacture
- f. **2323.211(B)**: Prohibits underage (under 21) purchase of firearms/handguns
→ M2 offense
 - i. EXCEPTIONS:
 - 1. The person is a law enforcement officer who is properly appointed or employed as a law enforcement officer and has received firearms training approved by the Ohio peace officer training council or equivalent firearms training.
 - 2. The person is an active or reserve member of the armed services of the United States or the Ohio national guard, or was honorably discharged from military service in the active or reserve armed services of the United States or the Ohio national guard, and the person has received firearms training from the armed services or the national guard or equivalent firearms training.
- g. **2323.23**: Provides for immunity from prosecution if a person voluntarily surrenders a firearm/dangerous ordnance to the division of Police if they would be in violation of the WUD section by possessing the item. It is not considered "voluntary surrender" if it occurs when the person is being taken into custody or during a pursuit or attempt to take the person into custody...
- h. **2323.24**: Possession of Criminal Tools → M1 offense
 - i. EXCEPTION: This section shall not apply if the circumstances indicate that the substance, device, instrument, or article involved in the offense was intended for use in the commission of a felony, violation of which would be prosecuted under state law.

B. Changes to the City of Columbus Parking Code

CCC Ord. 1189-2018: Effective Date 6/20/18

CHANGES TO THE PARKING CODE – NEW SECTIONS ARE CONSIDERED PARKING INFRACTIONS

Why is this important to officers?

We get a LOT of questions about parking, towing, people leaving cars on the street and not moving them, etc. and these new sections include additional charges which officers can use to cite offenders and help ease the frustration of citizens.

Enacts CCC 2151.25 – Parking in dedicated car-sharing space

- No person shall park a vehicle in a designated car-sharing vehicle parking space, except for vehicles with a valid dedicated car-sharing permit

Enacts CCC 2151.26 – Overtime Parking

- No vehicle shall remain parked in a parking space in excess of the posted time restriction
- Vehicles shall be considered in violation if the vehicle has not been moved at least **75 feet** from the original parking space within the posted time restricted area

Amends CCC 2105.16 – Individual parking spaces

- Each vehicle shall be parked entirely within an individual parking space and only one vehicle shall be parked within an individual parking space

Amends CCC 2150.02 – Impoundment and immobilization

- Changes from 5 to 3 the number of minimum parking infraction judgements allowed before vehicle can be impounded/immobilized
- A vehicle involved in **3 or more** parking infractions in which judgments or default judgments have been filed with the Clerk of the Municipal Court pursuant to CCC 2150.07(C) is subject to impoundment or immobilization by law enforcement officers of the City of Columbus or their agents.
- A vehicle parked, stopped or standing on a public street or highway in commission of a parking offense is subject to impoundment by division of Police or PVB personnel

Amends CCC 2151.09 – Maximum continuous street parking in same location

- No person who is the owner, agent, operator, or other person in charge of any vehicle shall permit such vehicle to remain parked, standing, or abandoned upon any street for **longer than 72 consecutive hours without moving such vehicle at least 75 feet.**

Amends **CCC 2151.21 – Failure to register or display**

- Makes it a **secondary offense** to cite for failure to display a front license plate on a parked motor vehicle. Similar provision listed in ORC 4503.21.
- “A law enforcement officer shall only issue a ticket, citation, or summons, or cause the arrest or commence a prosecution, for the failure to display a license plate in plain view on the front of a parked motor vehicle if the officer first determines that another offense has occurred and either places the operator or vehicle owner under arrest or issues a ticket, citation, or summons to the operator or vehicle owner for the other offense.”