IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0111-16

THE STATE OF TEXAS

v.

BLAKE CHRISTOPHER DAVIS, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIFTH COURT OF APPEALS DALLAS COUNTY

***Per curiam*.**

O P I N I O N

The search warrant issued for appellee's residence was based upon an affidavit that alleged in part that there was probable cause to search appellee's residence based upon a canine alert. Specifically, the affidavit alleged that officers went to appellee's house and knocked on the front door, but received no answer. Another officer located at the rear door detected an odor of marijuana emitting from the rear door and from the east side of the residence. Officers called for a canine unit. The unit arrived and "[u]pon open

air search of the exterior of the residence, canine 'Reagan' indicated the presence of a controlled substance at the front door and at the east side of the structure."

Appellee filed a motion to suppress, arguing in part that the search warrant lacked probable cause because of the illegal dog-sniff, citing *Florida v. Jardines*, 133 S. Ct. 1409 (2013). The Supreme Court decided *Jardines* after the search warrant was executed, but before the motion to suppress. The trial court ultimately granted the motion to suppress, and the State appealed.

The court of appeals held that *Jardines* invalidated the dog-sniff portion of the search warrant affidavit, and that without its inclusion, the remaining allegations failed to provide probable cause. *State v. Davis*, No. 05-15-00232-CR slip op. (Tex. App.–Dallas January 5, 2016)(not designated for publication). The court also addressed and rejected the State's various arguments that our statutory good faith exception, article 38.23(b), should apply. *See* TEX. CODE CRIM. PROC. Art. 38.23(b). The court of appeals rejected the State's arguments and concluded that the State sought "to broaden the exception in article 38.23(b) in a way that is not supported by its plain text and would be contrary to the Texas Court of Criminal Appeals' refusal to adopt federal exceptions that are inconsistent with the text of our statutory exclusionary rule." *Davis*, slip op. at 16. The State filed a petition for discretionary review challenging that holding.

The Court has since held that

> the good-faith exception of Article 38.23(b) will apply when "the prior law enforcement conduct that uncovered evidence used in the affidavit for the

> warrant [was] 'close enough to the line of validity' that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct[.]"

McClintock v. State, PD-1641-15 slip op. at 18 (Tex. Crim. App. March 22, 2017) (quoting *United States v. Massi*, 761 F.3d 512, 528 (5th Cir. 2014)). The court of appeals did not have the benefit of our decision in *McClintock* when it addressed the State's arguments regarding the applicability of Article 38.23(b). The court of appeals should be given an opportunity to address in the first instance whether the facts in this case satisfy the test adopted in *McClintock*.

We grant the State's petition, vacate the judgment of the court of appeals, and remand the cause to that court for further consideration in light of *McClintock.*

Delivered October 4, 2017
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