



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1052-16

MARIO ALBERTO SILLER, Appellant

v.

THE STATE OF TEXAS

**ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE ELEVENTH COURT OF APPEALS
TAYLOR COUNTY**

Per curiam.

OPINION

The search warrant affidavit for appellant's residence alleged that appellant had committed the offense of improper photography or visual recording in violation of Texas Penal Code § 21.15(b)(1). In a search pursuant to the warrant, police found methamphetamine in addition to evidence of the alleged offense. Appellant was indicted for both improper visual recording and for possession of methamphetamine.

While the case was pending in the trial court, this Court held section 21.15(b)(1),

to the extent it proscribed the taking of photographs and the recording of visual images, facially unconstitutional. *Ex parte Thompson*, 442 S.W.3d 325, 350-51 (Tex. Crim. App. 2014). The State thereafter dropped the improper photography charge in appellant's case.

Appellant filed a motion to suppress, arguing that the search warrant was void because the statute on which it was based had been declared unconstitutional. The trial court denied the motion.

Appellant continued to argue on appeal that the search warrant affidavit failed to establish probable cause because the alleged conduct in violation of section 21.15(b)(1) did not constitute a crime given that the statute was subsequently declared unconstitutional. The State argued that the statutory good-faith exception in article 38.23(b) applied. *See* TEX. CODE CRIM. PROC. Art. 38.23(b). The court of appeals rejected the State's argument, and reasoned in part that the search warrant was not supported by probable cause because the penal code section upon which it was based was later declared unconstitutional. The court concluded that the absence of probable cause to support the warrant precluded the application of the good faith exception contained in Article 38.23(b). *Siller v. State*, No. 11-15-00016-CR slip op. (Tex. App.–Eastland August 11, 2016). The State filed a petition for discretionary review challenging that holding.

This 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 argument 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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