COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

OSVALDO MIGUEL PEREZ,	§	
		No. 08-13-00024-CR
Appellant,	§	
		Appeal from the
v.	§	
		Criminal District Court No. 1
	§	
THE STATE OF TEXAS,		of El Paso County, Texas
	§	
Appellee.		(TC# 20120D01211)
	§	

O P I N I O N

This appeal returns to us on remand from the Texas Court of Criminal Appeals to address in the first instance whether the facts in this case satisfy the test adopted in *McClintock v. State*, 541 S.W.3d 63 (Tex. Crim. App. 2017).[1] The State charged Appellant Osvaldo Miguel Perez with one count of possession of cocaine with intent to deliver, one count of unlawful possession of a firearm by a felon, and one count of unlawful possession of body armor by a felon. Perez moved to suppress evidence that was seized from his home following a search authorized by a search warrant issued by a magistrate. The trial court denied the motion. After preserving his right to appeal the court's ruling, Perez pleaded guilty to all three charges. In a single issue, Perez challenges his conviction arguing that article 38.23(b) of the Texas Code of Criminal Procedure—

[1] *See Perez v. State*, 2017 WL 4401882, at *2 (Tex. Crim. App. Oct. 4, 2017).

the good-faith exception to Texas' statutory exclusionary rule—is inapplicable to this case. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(b). Finding no error, we affirm.

BACKGROUND

On October 4, 2011, an officer presented a search warrant affidavit to a magistrate which stated that the officer had received information from a confidential informant reporting that Perez was trafficking in narcotics from his residence located at 5817 Macaw Avenue, El Paso, Texas. The officer further described that, on that date, he and several other officers had walked up to the front door of Perez's home to make contact, but they were met with "negative results." While there, the officers deployed a narcotics-sniffing dog named "Kim," certified in the detection of marijuana, cocaine, heroin, and methamphetamine, outside the front door. At the door, Kim alerted to the odor of narcotics coming from within the home. After requesting a no-knock warrant, the officer described that he had previously "purchased small plastic baggies containing marijuana from the suspected place, [and] any delay of entry into the suspected place would allow the opportunity for . . . disposal and/or the destruction of the narcotics, marijuana, by the listed suspected party." Following presentment of the affidavit, the magistrate issued a search warrant authorizing officers to search Perez's home. Upon execution of the search warrant, officers located and seized tangible evidence from Perez's home.

After being indicted, Perez filed a motion to suppress the evidence seized from his home arguing that the warrant was illegally issued because the supporting affidavit did not establish sufficient probable cause to justify the issuance of a search warrant by the magistrate. After examining the affidavit and hearing argument, the trial court denied Perez's motion to suppress. Perez subsequently pleaded guilty to all three felonies alleged by indictment and received three-

and-a-half years' imprisonment on each charge.

On initial review, we affirmed the trial court's denial of Perez's motion to suppress in *Perez v. State*, No. 08-13-00024-CR, 2014 WL 7237732 (Tex. App.—El Paso Dec. 19, 2014), *vacated*, No. PD-0231-15, 2015 WL 4040810 (Tex. Crim. App. July 1, 2015) (not designated for publication). Subsequently, the Court of Criminal Appeals granted Perez's petition for discretionary review, vacated this Court's judgment, and remanded for us to consider the application of *Florida v. Jardines*, 569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013), to the facts of the case. *See Perez*, 2015 WL 4040810, at *1. After applying *Jardines* to the officers' search with a drug-detection dog at the curtilage of Perez's home, we reversed Perez's conviction and remanded to the trial court in *Perez v. State*, No. 08-13-00024-CR, 2016 WL 323761 (Tex. App.—El Paso Jan. 27, 2016) (not designated for publication), *vacated*, No. PD-0213-16, 2017 WL 4401882 (Tex. Crim. App. Oct. 4, 2017) (not designated for publication). During our review, we also rejected the State's argument that the exception to the exclusionary rule provided in article 38.23(b) of the Texas Code of Criminal Appeals applied to the facts of the case, and thereafter, the State filed its petition for discretionary review. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(b). In the interim, the Texas Court of Criminal Appeals held in *McClintock* that the good-faith exception of article 38.23(b) would 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*, 541 S.W.3d 63, 73 (Tex. Crim. App. 2017) (quoting *United States v. Massi*, 761 F.3d 512, 528 (5th Cir. 2014)). Thereafter, in *Perez v. State*, 2017 WL 4401882, at *1–2, the Court of

Criminal Appeals granted the State's petition, vacated our decision reversing Perez's conviction, and remanded back to this Court for us to address in the first instance whether the facts in this case satisfied the test adopted in *McClintock* recognizing we did not have the benefit of *McClintock* when we first addressed the argument.

DISCUSSION

In his sole issue, Perez argues that the affidavit supporting the search warrant contained false information and it relied on an illegal search of the curtilage of Perez's home to establish probable cause. Given those circumstances, Perez asserts that the test of good faith set forth in *McClintock* did not apply to this case asserting that an objectively reasonable officer could not believe that the information supporting the warrant was not tainted by unconstitutional conduct. In short, Perez contends that article 38.23(b) of the Texas Code of Criminal Procedure did not apply because (1) the affidavit supporting the search warrant contained false information; and (2) the dog sniff occurring on the curtilage of his home violated his Fourth Amendment rights.

1. Constitutional Violations and Article 38.23(b)'s Good-Faith Exception

The Fourth Amendment expressly protects "persons, houses, papers, and effects," against unreasonable searches and seizures without a warrant based on probable cause. U.S. CONST. amend. IV. In *Florida v. Jardines*, the United States Supreme Court held that police use of a narcotics-sniffing dog on the front porch of a home, without a search warrant supported by probable cause, violated the Fourth Amendment's prohibition against warrantless searches. *Jardines*, 569 U.S. at 11–12; *see also State v. Rendon*, 477 S.W.3d 805, 810–11 (Tex. Crim. App. 2015) (holding that a warrantless drug sniff by a canine at the front-door threshold of an apartment constitutes an unlawful invasion of the curtilage of the home in violation of the Fourth

Amendment). The text of the Fourth Amendment "indicates with some precision the places and things encompassed by its protections." *Jardines,* 569 U.S. at 6 (quoting *Oliver v. United States,* 466 U.S. 170, 176, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). Among areas protected, "the home is first among equals," and its protection extends to "the area 'immediately surrounding and associated with [it],'" otherwise known as "the curtilage." *Id.* (citing *Oliver,* 466 U.S. at 180). This area is "intimately linked to the home, both physically and psychologically," and is long recognized as an area outside the home where "privacy expectations are most heightened." *Id.* at 7 (citing *California v. Ciraolo,* 476 U.S. 207, 213 (1986)).

Evidence seized in violation of the Fourth Amendment is subject to the exclusionary rule codified at TEX. CODE CRIM. PROC. ANN. art. 38.23(a), which reads as follows:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

As such, article 38.23(a) requires the exclusion of evidence obtained in violation of the law. *State v. Daugherty,* 931 S.W.2d 268, 272–73 (Tex. Crim. App. 1996). Article 38.23(b) is Texas's codified version of the good-faith exception to the exclusionary rule, which is narrower in scope than the federal version. *See McClintock,* 541 S.W.3d at 66–67. Subsection (b) reads as follows:

> It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

TEX. CODE CRIM. PROC. ANN. art. 38.23(b). Thus, evidence obtained by an officer who relies in good faith on a warrant issued by a magistrate based on probable cause will not be subject to exclusion. *See McClintock*, 541 S.W.3d at 66–67.

2. Dog Sniff

In this case, Perez argues that the Supreme Court's decision in *Jardines* rendered illegal the search performed by police-use of a narcotics-sniffing dog at the front door of his home without a warrant. With regard to the dog's positive alert, Perez argues the search warrant affidavit relied on illegal conduct. In response, the State acknowledges that under *Jardines* the use of a narcotics-sniffing dog occurring at the curtilage of a home is a search requiring a warrant as prescribed by the Fourth Amendment. Nonetheless, the State argues that prior to the release of *Jardines*, the constitutionality of that conduct remained close enough to the line of validity to support the conclusion that an objectively reasonable officer preparing a warrant affidavit would have believed that the information supporting the warrant was not tainted by said conduct. Consequently, the State argues that under the test established by *McClintock,* the good-faith exception provided by article 38.23(b) renders the evidence seized not subject to exclusion.

We recently considered this same issue in *Moreno v. State*, No. 08-16-00003-CR, 2019 WL 698091 (Tex. App.—El Paso Feb. 20, 2019, no pet. h.) (not designated for publication). There, officers received an anonymous tip that the defendant was storing cocaine at his house. *Id*., at *1. The officers then conducted a pre-*Jardines* search of the front door of the defendant's house using a narcotics-sniffing dog and included the dog's alert to the presence of narcotics in their search warrant affidavit. *Id*. The magistrate issued the warrant, and the officers seized evidence from a closet inside the house pursuant to the warrant. *Id*., at *2. Although we recognized that this type

of warrantless search is prohibited under *Jardines* and its progeny, we nonetheless held that the good-faith exception to the exclusionary rule under article 38.23(b) applied as an objectively reasonable officer preparing the affidavit would have believed pre-*Jardines* that the information included was not tainted by this unlawful conduct. *Id.*, at *5, *8. As guided by *McClintock*, 541 S.W.3d at 74, officers conducting pre-*Jardines* searches using narcotics-sniffing dogs did not have the benefit of *Jardines*, which thereafter made it "crystal clear" that such activity constituted a search under the Fourth Amendment. *Id.*, at *8. Such behavior by the officers was "close enough to the line of validity" to trigger the application of article 38.23(b), as the officer preparing the affidavit or executing the warrant at that time "would believe that the information supporting the warrant was not tainted by unconstitutional conduct." *Id.*, at *7; *see also McClintock*, 541 S.W.3d at 73 (quoting *United States v. Massi*, 761 F.3d 512, 528 (5th Cir. 2014)).

This case presents largely similar facts. Here, the search of the front door of Perez's home using the narcotics-sniffing dog occurred on or about October 4, 2011, which predates by more than a year the *Jardines* decision of March 26, 2013. The officer included the information regarding the dog's alert to the presence of narcotics, along with information regarding a confidential informant's tip asserting that Perez was distributing narcotics from the house, in the affidavit supporting the warrant. Although the warrantless search at the front door of Perez's home using the narcotics-sniffing dog constitutes a Fourth Amendment violation under *Jardines* and its progeny, there is no dispute here that this conduct occurred before *Jardines* clarified that such a physical invasion of a curtilage was not permitted without a warrant when there objectively existed a purpose to conduct a search for evidence. *Jardines*, 569 U.S. at 10 (Fourth Amendment rights are implicated where officers' behavior objectively reveals a purpose to conduct a search). Relying

on an absence of a protected privacy interest, a few cases from our sister courts released prior to *Jardines* had stood for the proposition that the use of a narcotics-sniffing dog outside areas of a home did not constitute a search within the meaning of the Fourth Amendment. *See, e.g., Romo v. State,* 315 S.W.3d 565, 568, 572–73 (Tex. App.—Fort Worth 2010, pet. ref'd) (held that dog's sniff at the garage door and the backyard fence were not searches because these areas were not protected from observation by passersby); *Rodriguez v. State*, 106 S.W.3d 224, 225, 229–30 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd), *cert. denied*, 540 U.S. 1189 (2004) (held no reasonable expectation of privacy outside front door as area was not enclosed, it was used as a main entrance, and it was not protected from observation by passersby). *Jardines* clarified that the reasonable expectation of privacy was itself "*added to,* not *substituted for,*" the original property-based understanding of the Fourth Amendment, and therefore, it would not be necessary to consider whether an expectation of privacy exists "when the government gains evidence by physically intruding on constitutionally protected areas." *Jardines*, 569 U.S. at 11.

Guided by *McClintock*, we conclude that the officers here did not have the benefit of the *Jardines* ruling at the time of their search, which later clarified that such conduct was constitutionally prohibited based on a physical invasion of Perez's protected property. As such, we conclude that (1) the prior law enforcement conduct that uncovered evidence used in the affidavit 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 their unconstitutional conduct; and (2) the resulting search warrant was sought and executed by officers acting in good faith. With inclusion of the dog alert, the affidavit provided sufficient information to establish probable cause. The officer stated in the affidavit that a

confidential informant had informed him that Perez was trafficking narcotics from the house, and that Kim, the narcotics-sniffing dog, alerted to the presence of narcotics at the front door of the house. Prior to the issuance of *Jardines* in 2013, a confidential informant's tip corroborated by an alert by a narcotics-sniffing dog was sufficient evidence to justify the issuance of a search warrant. *See, e.g., Romo,* 315 S.W.3d at 568, 572–73 (confidential informant's tip corroborated by narcotics-sniffing dog's alert to the presence of narcotics in the searched house was sufficient probable cause supporting issuance of search warrant); *Rodriguez,* 106 S.W.3d at 225, 229–30 (same). Accordingly, the officers' subsequent search of Perez's home was executed in objective good faith reliance on a warrant issued by a magistrate based on probable cause. Thus, we hold that the trial court did not err in denying Perez's motion to suppress evidence *See McClintock,* 541 S.W.3d at 73–74; *Moreno*, 2019 WL 698091, at *8; *see also State v. Davis,* --S.W.3d--, No. 05-15-00232-CR, 2018 WL 1531441, at *5–6 (Tex. App.—Dallas Mar. 29, 2018, pet. ref'd) (op. on remand) (in a pre-*Jardines* search, officers who approached the front door of the defendant's house with a narcotics-sniffing dog had a good-faith basis "close enough to the line of validity" to believe their behavior was legally sufficient to trigger the exclusionary rule under article 38.23(b) and render the fruit of the subsequent search of the house pursuant to a warrant untainted).

3. False Information

Finally, Perez also argues that the false information contained in the search warrant affidavit rendered article 38.23(b) inapplicable and that the evidence seized pursuant to the warrant should have been excluded. If a defendant establishes by a preponderance of the evidence that a warrant affidavit contains a false statement made intentionally, knowingly, or with reckless disregard for the truth, and if the statement was material to proving probable cause, the false

material must be excised from the affidavit. *Franks v. Delaware*, 438 U.S. 154, 164–65 (1978); *State v. Five Thousand Five Hundred Dollars in U.S. Currency*, 296 S.W.3d 696, 705 (Tex. App.—El Paso 2009, no pet.). If the remaining information in the affidavit is insufficient to establish probable cause, the search warrant should be voided and the evidence that was seized pursuant to the warrant should be excluded. *Five Thousand Five Hundred Dollars*, 296 S.W.3d at 705 (citing *Franks*, 438 U.S. at 155–56). A misstatement in the affidavit resulting from simple negligence or inadvertence will not render the warrant invalid. *See id*.

Here, the State conceded during the hearing on Perez's motion to suppress that the officer falsely stated that he had purchased small baggies of marijuana from Perez's house, but argued that the remaining information in the affidavit still established probable cause to justify the issuance of the warrant. On appeal, the State contends that the false statement was the result of simple negligence or inadvertence because the statement appeared not in the section of the affidavit containing the facts supporting probable cause, but rather in the section of the affidavit requesting the issuance of a no-knock warrant. The State likewise argues that Perez has not alleged or demonstrated that the false statement was made intentionally, knowingly, or with reckless disregard for the truth.

We need not decide whether the false statement was made intentionally, knowingly, or with reckless disregard for the truth. *See id.* As stated earlier, even if the false statement regarding the officer's prior purchase of marijuana from the house is excised from the affidavit, the remaining information in the affidavit is sufficient to establish probable cause. *See Five Thousand Five Hundred Dollars*, 296 S.W.3d at 705–06 (confidential informant's tip corroborated by other information was sufficient to establish probable cause to support search warrant, even when false

statement was excised from search warrant affidavit); *Romo*, 315 S.W.3d at 568, 572–73; *Rodriguez*, 106 S.W.3d at 225, 229–30. Perez's sole issue is overruled.

CONCLUSION

Having overruled Perez's sole issue, we affirm the trial court's judgments supporting Perez's convictions.

GINA M. PALAFOX, Justice

June 24, 2019

Before McClure, C.J., Palafox, J., and Larsen, J. (Senior Judge)
Larsen, J. (Senior Judge), sitting by assignment

(Do Not Publish)