AFFIRMED; Opinion Filed January 5, 2016.

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00232-CR

THE STATE OF TEXAS, Appellant
V.
BLAKE CHRISTOPHER DAVIS, Appellee

On Appeal from the Criminal District Court No. 4
Dallas County, Texas
Trial Court Cause No. F12-57322-K

OPINION

Before Justices Bridges, Lang-Miers, and Myers
Opinion by Justice Myers

The State of Texas appeals from the trial court's order granting appellee Blake Christopher Davis's pretrial motion to suppress. In a single issue, the State asserts the trial court abused its discretion by granting the motion to suppress. We affirm.

BACKGROUND AND PROCEDURAL HISTORY

On March 27, 2012, a City of Dallas Police Officer assigned to the narcotics division, Justin Boyce, submitted an affidavit for a warrant to search a single-story red-brick-and-trim family residence located at 6130 Menger Avenue in Dallas, Texas. A Dallas County municipal judge signed the search warrant, which was executed that same day. The search warrant affidavit reads in part as follows:

> On March 27, 2012, I, the affiant, received the following information from Officer E. Seyl . . . , a fellow Dallas Police Officer currently assigned to the

> Central Patrol Division Crime Response Team: On March 27, 2012, at approximately 10:45 am, Officer Seyl, along with Officers M. Renfro . . . , C. Humphreys . . . , K. Coates . . . , C. Hess . . . , C. Barnes . . . , and Sgt R. Sartin . . . followed up on a previous call from the police dispatcher regarding an active drug house located at 2121 Routh Street #3344. Upon arrival, officers made contact with the resident who was identified as Smith, William W/M 5–1–83. Suspect Smith provided verbal consent for the officers to search his residence. A search of the residence by M. Renfro . . . revealed marijuana residue in the toilet. Suspect Smith was then interviewed by Officer Seyl. Suspect Smith told Officer Seyl he did possess marijuana in the residence and that he flushed it down the toilet as officers were knocking on the door. *Upon further interview, Suspect Smith told Officer Seyl that he commonly buys marijuana at the location described in paragraph #1 which the suspect described as a "grow house" referring to a location where marijuana is grown and cultivated*. Officers then went to the location described in paragraph # 1 where Officer Seyl knocked on the door and received no response. *Officer Humphreys, who was located at the rear of the structure, detected a strong odor of marijuana emitting from the residence through the rear door. Officer Humphreys could also smell marijuana emitting from the east side of the residence*. Officers then notified Detective J. Martinez . . . who responded with narcotics detection canine "Reagan." *Upon 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*. Canine Reagan has been trained to alert to the presence of marijuana, cocaine, methamphetamine, and heroin. Canine Reagan has proven to be reliable and accurate in previous narcotics searches [emphasis added].
>
> The Affiant believes that the residence may contain marijuana and other evidence that goes along with marijuana trafficking inside the residence at 6130 Menger Ave in the City of Dallas, Dallas County, Texas. This is based on the information provided by Officer E. Seyl . . . .

When they executed the search warrant, police officers recovered "marijuana grow equipment," $6800 in United States currency, a bag containing in excess of five pounds of marijuana, a checkbook, mail, an identification card of some type, and "marijuana seeds." Appellee was subsequently indicted for possession of marijuana in an amount of fifty pounds or less but more than five pounds.

Appellee filed a motion to suppress the evidence seized pursuant to the search warrant. In his supporting brief and in arguments before the trial court, appellee contended the police searched his home pursuant to a search warrant that was not based on probable cause. He argued the police obtained two of the critical pieces of information included in the affidavit—Officer

Humphreys's detection of "a strong odor of marijuana" through the rear door of the residence and "the east side of the residence," and the "open air search of the exterior" by Reagan, the narcotics detection canine—during an illegal warrantless search of the curtilage of appellee's residence. This argument was based largely on the Supreme Court's then-recent decision in *Florida v. Jardines*, ––– U.S. ––––, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013). The remaining essential piece of information in the affidavit—William Smith's statement—was, appellee argued, an uncorroborated and unsubstantiated tip that was insufficient by itself to support a finding of probable cause. Without the illegally acquired evidence, the affidavit failed to provide probable cause to support the search warrant.

The trial court that originally heard appellee's motion to suppress signed an order on September 22, 2014 denying the motion. That order contained findings of fact and conclusions of law that relied, in part, on "the good faith provisions of" Texas Code of Criminal Procedure article 38.23(b) and *Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419 (2011).[1] Appellee subsequently pleaded guilty and was placed on three years of deferred adjudication community supervision and fined $1500. He filed a motion for new trial that was heard by the instant trial court, which granted the motion.[2] Appellee then re-urged his suppression motion. At the conclusion of a hearing held on February 13, 2015, the trial court granted the motion to suppress. The court memorialized its ruling in an order signed that same day. Neither side requested findings of fact and conclusions of law.

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[1] Article 38.23(b) and *Davis* are discussed in part III of this opinion.

[2] The granting of the motion for new trial restored the case to its former position and the judgment was no longer in place. Rule 21.9 provides in part that a motion for new trial "restores the case to its position before the former trial, including, at any party's option, arraignment or pretrial proceedings initiated by that party." TEX. R. APP. P. 21.9(b); *see also McNatt v. State*, 188 S.W.3d 198, 202 (Tex. Crim. App. 2013) (noting that Rule 21.9 recognizes that a new trial restores the case to the beginning stages of the prosecution). Additionally, because our review of the search warrant affidavit is limited to the "four corners" of the affidavit, we do not look beyond the four corners of the affidavit for probable cause. *See Brooks v. State*, 642 S.W.2d 791, 796-97 (Tex. Crim. App. 1982); *Garza v. State*, 161 S.W.3d 636, 639-40 (Tex. App.–San Antonio 2005, no pet.). Thus, photographs or other evidence admitted during the hearing should not be considered here since it was not considered by the magistrate who signed the search warrant. *See Massey v. State*, 933 S.W.2d 141, 148 (Tex. Crim. App. 1996).

STANDARD OF REVIEW

We review the trial court's ruling on a motion to suppress by using a bifurcated standard, giving almost total deference to the historical facts found by the trial court and analyzing de novo the trial court's application of the law. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). When a trial court is determining probable cause to support the issuance of a search warrant, there are no credibility determinations and the court is limited to the four corners of the affidavit. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). The facts upon which the magistrate bases a probable cause determination must appear within the four corners of the affidavit submitted in support of the request for a warrant. *See, e.g., Crider v. State*, 352 S.W.3d 704, 707 (Tex. Crim. App. 2011); *Cassias v. State*, 719 S.W.2d 585, 587–88 (Tex. Crim. App. 1986). The affidavit must allow the magistrate to independently determine probable cause, and the magistrate's actions "cannot be a mere ratification of the bare conclusions of others." *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007) (quoting *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983)).

Typically, the preference for searches based on warrants requires reviewing courts to give "great deference" to a magistrate's determination of probable cause. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *Gates*, 462 U.S. at 236; *see also Swearingen v. State*, 143 S.W.3d 808, 811 (Tex. Crim. App. 2004). "[I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106 (1965); *see also Jones v. State*, 364 S.W.3d 854, 857 (Tex. Crim. App. 2012) ("'[T]he magistrate's decision should carry the day in doubtful or marginal cases, even if the reviewing court might reach a different result upon de novo review.'") (quoting *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010)).

That deference to the magistrate, however, is not called for when, as in this case, the

question is whether the affidavit, stricken of its tainted information, meets the standard of probable cause. *State v. Cuong Phu Le*, 463 S.W.3d 872, 877 (Tex. Crim. App. 2015); *McClintock v. State*, 444 S.W.3d 15, 19 (Tex. Crim. App. 2014). This is partly because a "magistrate's judgment would have been based on facts that are no longer on the table," and there is "no way of telling the extent to which the excised portion influenced the magistrate judge's determination." *Cuong Phu Le*, 463 S.W.3d at 877 (citing *United States v. Kelley*, 482 F.3d 1047, 1051 (9th Cir. 2007)). Moreover, it reinforces the principle that "[a] search warrant may not be procured lawfully by the use of illegally obtained information." *Brown v. State*, 605 S.W.2d 572, 577 (Tex. Crim. App. 1980), *overruled on other grounds by Hedicke v. State*, 779 S.W.2d 837 (Tex. Crim. App. 1989). "When part of a warrant affidavit must be excluded from the calculus, . . . then it is up to the reviewing courts to determine whether 'the independently acquired and lawful information stated in the affidavit nevertheless clearly established probable cause.'" *McClintock*, 444 S.W.3d at 19. A search warrant based in part on tainted information is nonetheless valid if it clearly could have been issued on the basis of the untainted information in the affidavit. *Brown*, 605 S.W.2d at 577.

But reviewing courts are still required to read the purged affidavit in accordance with *Illinois v. Gates*. *Cuong Phu Le*, 463 S.W.3d at 877. Courts should interpret the affidavit in a commonsensical and realistic manner, drawing reasonable inferences from the information. *Id.* (citing *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007)). Appellate courts should not invalidate a warrant by interpreting the affidavit in a hyper-technical manner. *Id.* at 878 (citing *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013)). Probable cause exists if, under the totality of the circumstances, there is fair probability contraband or evidence of a crime will be found at a specified location. *Id.* (citing *McLain*, 337 S.W.3d at 272. "It is a flexible, non-demanding standard." *Id.*

DISCUSSION

I. The Dog Sniff

After the execution of the search warrant but prior to the suppression hearings that were held in this case, the United States Supreme Court issued its opinion in *Florida v. Jardines*, in which the Court held that law enforcement officers' use of a drug-sniffing dog on the front porch of a suspect's house without a search warrant violated the Fourth Amendment. 133 S.Ct. at 1417–18. The Court noted that the areas "immediately surrounding and associated with the home" are considered the "curtilage" of the home and are "part of the home itself for Fourth Amendment purposes." *Id*. at 1414. The Court stated that "[w]hile the boundaries of the curtilage are generally 'clearly marked,' the 'conception defining the curtilage' is at any rate familiar enough that it is 'easily understood from our daily experience.'" *Id*. at 1415 (quoting *Oliver v. United States*, 466 U.S. 170, 182 n.12 (1984)). The Court held that the front porch of a home is the "classic exemplar" of such an area, reasoning that the core Fourth Amendment right

> to retreat into [one's] own home and there be free from unreasonable governmental intrusion . . . would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

Id. at 1414 (internal quotations and citations omitted). The Court rejected the argument that the homeowner had implicitly gran532ted license to police to conduct a search outside the front door, noting that, although the knocker on the front door is treated as an invitation or license to attempt an entry, there is no customary invitation to introduce a trained police dog to explore the area around the home in hopes of discovering incriminating evidence. *Id.* at 1415–16. Using these principles, the *Jardines* Court upheld the Florida Supreme Court's holding that the Miami–Dade Police Department's use of trained police dogs to investigate a home and its immediate surroundings was a "search" within the meaning of the Fourth Amendment that was unsupported

by probable cause, thereby rendering the warrant invalid. *See id*. at 1417–18

The State argues that *Jardines* should not apply retroactively. Generally, however, the Supreme Court's new interpretation of the federal constitution must be given retroactive application to pending cases. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."). Furthermore, the Texas Court of Criminal Appeals and this Court have applied *Jardines* in situations similar to the present case. *See Cuong Phu Le*, 463 S.W.3d at 874 (considering whether search warrant affidavit established probable cause in light of *Jardines* opinion even though *Jardines* issued after police conducted the dog sniff but before hearing on motion to suppress); *McClintock*, 444 S.W.3d at 19 (same except that *Jardines* opinion issued after suppression hearing but while case pending on appeal); *State v. Williamson*, No. 05–12–00699–CR, 2013 WL 1646636, at *2 (Tex. App.—Dallas April 17, 2013, no pet.) (not designated for publication) (State conceded *Jardines* would be dispositive in appeal and that warrantless dog sniff, which occurred prior to *Jardines* opinion, was a search within meaning of *Jardines*).

The search in this case occurred on March 27, 2012. The Supreme Court issued the *Jardines* opinion almost one year later, on March 26, 2013. The first hearing on appellant's motion to suppress was started on November 1, 2013 and continued on September 12, 2014; the second was held on February 13, 2015. Therefore, given the above authorities, *Jardines* applied when the trial court ruled on appellee's motion to suppress and it applies to this Court's review of the State's issue on appeal. And based on *Jardines*, the warrantless canine sniff at appellee's residence must be regarded as unconstitutional. The State does not dispute that issue. The question is whether the search can be independently justified by the untainted information

contained in the affidavit, and if not, whether we should apply a good faith exception to the exclusionary rule.

II. The Remainder of the Affidavit

The Court of Criminal Appeals held in *McClintock* that, after excising evidence that a police drug-dog sniff at the landing in front of the door to McClintock's apartment indicated the presence of narcotics, the balance of the search warrant affidavit failed to clearly establish probable cause. In *McClintock*, the remaining facts underlying the probable cause finding by the magistrate were: (1) an unverified tip that marijuana was being grown inside the residence; (2) the activity of McClintock coming and going, "at hours well before and after the business hours of the business on the first floor," which, "[b]ased on training and experience," the officer "found this to be consistent with possible narcotics activity"; and (3) the officer approached the location and, "from the outside of this location," the officer "could smell" what he knew "from training and experience to be, marijuana." *McClintock*, 444 S.W.3d at 17–19.

More recently, in *Cuong Phu Le*, the Court held that, after disregarding evidence of an illegal dog sniff, the independent and lawfully acquired information in the search warrant affidavit, viewed as a whole and in a common-sense manner, clearly established probable cause. *Cuong Phu Le*, 463 S.W.3d at 879–880. That information included the following facts: (1) a concerned citizen, who was in good standing in the community, provided detailed information about the marijuana grow operation in the defendant's residence, which officers verified over a three week surveillance of the defendant's residence; (2) an officer verified the smell of raw marijuana at the front door of the residence; (3) after three weeks of surveillance, an officer also smelled raw marijuana on the defendant's person and in his car after the officer observed the defendant leaving the suspected place. *Id*. at 878–79.

The search warrant affidavit in this case, however, presents less information and more

ambiguity than either *McClintock* or *Cuong Phu Le*. The affidavit alleged the following facts: (1) during a consensual search of William Smith's home he told the police he "commonly buys marijuana" from the target residence at 6130 Menger Avenue, which he described as a "grow house"; (2) on that same day, police officers went to the target residence where Officer Seyl knocked on the front door and received no response, after which Officer Humphreys, "who was located at the rear of the structure, detected a strong odor of marijuana emitting from the residence through the rear door," and he "could also smell marijuana emitting from the east side of the residence"; (3) following an "open air search of the exterior of the residence," a narcotics detection canine, Reagan, made a positive alert indicating "the presence of a controlled substance at the front door and at the east side of the structure."

It is important to remember that law enforcement officers' entry onto the curtilage or approach to the entrance of a home does not necessarily rise to the level of a search as contemplated by the Fourth Amendment. *Tijerina v. State*, 334 S.W.3d 825, 833 (Tex. App.—Amarillo 2011, pet. ref'd); *Rodgers v. State*, 162 S.W.3d 698, 709 (Tex. App.—Texarkana 2005), *aff'd*, 205 S.W.3d 525 (Tex. Crim. App. 2006). Law enforcement officers, like any other members of the public, can enter onto a residential property, walk up to the front door, and knock on the front door for the purpose of contacting the occupants. *Cornealius v. State*, 900 S.W.2d 731, 733–34 (Tex. Crim. App. 1995); *Tijerina*, 334 S.W.3d at 834; *Washington v. State*, 152 S.W.3d 209, 214 (Tex. App.—Amarillo 2004, no pet.); *see also Jardines*, 133 S.Ct. at 1416 ("a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'") (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)). Law enforcement officers may also approach the residence's back door for the same purpose after having first tried the front door and received no answer. *See Long v. State*, 532 S.W.2d 591, 594–95 (Tex. Crim. App. 1975) (sheriff who knocked at front door of home and

received no answer, then knocked at back door and also received no answer, and then while returning to his car smelled marijuana though open window, did not conduct a "search"); *see also Morgan v. State*, No. 05–12–01442–CR, 2013 WL 6327202, at *4 (Tex. App.—Dallas Dec. 4, 2013, no pet.) (mem. op., not designated for publication); *Sokulski v. State*, No. 05–12–01597–CR, 2013 WL 3951890, at *3 (Tex. App.—Dallas July 31, 2013, no pet.) (not designated for publication). Because the entry onto the property is impliedly authorized, there is no reasonable expectation of privacy regarding things observed by those on the pathway to the doors of the house. *Washington*, 152 S.W.3d at 214.

But this implied license granting permission to police officers to enter onto the curtilage to contact the resident exists so long as the resident has not manifested an intent to restrict access to his home, such as by locking a gate or posting "no entry" or "no trespassing" signs indicating the officer is not invited, and the officer does not deviate from the normal path of traffic to the front or back doors of the house. *Sayers v. State*, 433 S.W.3d 667, 675 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see also Duhig v. State*, 171 S.W.3d 631, 637–38 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citing with approval cases holding that approaching back door of home permissible and does not constitute search as long as officers first tried front door and received no answer); *Washington*, 152 S.W.3d at 215 ("[A]n officer can enter the curtilage of a house in an effort to contact its occupants . . . when the occupant has not manifested his intent to restrict access by locking a gate or posting signs informing the officer he is not invited or the officer does not deviate from the normal path of traffic."); *Nored v. State*, 875 S.W.2d 392, 397 (Tex. App.—Dallas 1994, pet. ref'd) (record did not show "No Entry" or "No Trespassing" signs had been posted on the fence or gate of the apartment property, and the gate was unlocked and could be opened by pushing down the handle). A license to enter onto property is limited to a particular area of the property. *See Jardines*, 133 S.Ct. at 1416. "Thus, an implied license to

approach the front door via the front walkway to contact the resident does not extend permission to walk up to a window located on a separate side of the house to attempt to contact the resident." *Sayers*, 433 S.W.3d at 675. As the Supreme Court noted in *Jardines*:

> To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.

Jardines, 133 S.Ct. at 1416.

The affidavit states that the front of the "structure" faces north and the garage is attached to the west side of the home. But the affidavit omits information such as whether Officer Humphreys walked along the east or west side of the house to reach the rear door, whether he followed a sidewalk, walkway or "normal" path of traffic in doing so, whether there was a fence surrounding the back yard of the property, whether there was a gate, whether the owner posted any "no entry" or "no trespassing"–type signs on the fence or gate, whether the gate was locked, and if so, whether the officer went over the fence to reach the back yard. Nor does the affidavit give any idea of the relative distances involved; the affidavit does not say, for example, approximately how far away from the residence Officer Humphreys was located when he smelled the odor of marijuana emitting from the east side or rear of the home. The affidavit also says nothing about Officer Humphreys's training or experience. Furthermore, the affidavit indicates the officers went to appellee's home immediately after receiving Smith's tip that he had purchased drugs at that location on some unknown date and that the house was a "grow house."

We recognize that we must interpret an affidavit in a commonsensical and realistic manner, drawing reasonable inferences from the information, and that we should not invalidate a warrant by interpreting the affidavit in a hyper-technical manner. *Cuong Phu Le*, 463 S.W.3d at 877–78. But this does not permit us to read things into the affidavit that are not there. "It is one

thing to draw reasonable inferences from information clearly within the four corners of an affidavit. . . [but it] is quite another matter to read material information into an affidavit that does not otherwise appear on its face." *Crider*, 352 S.W.3d at 711 (quoting *Cassias*, 719 S.W.2d at 590); *see also Gates*, 462 U.S. at 239.

Consistent with the case law discussed earlier, the officers in this case had a license or implied invitation to approach the front door of the house, knock, and ask to talk. *See Jardines*, 133 S.Ct. at 1415–16. Based on the information found within the four corners of the affidavit, however, they exceeded the scope of that invitation. The officer's behavior "reveals a purpose to conduct a search, which is not what anyone would think he had license to do." *Id*. at 1417. Accordingly, the trial court could have concluded that the officer's detection of an odor of marijuana was procured as a direct result of an unjustified warrantless search—conducted under no declared exception to the warrant requirement—and that this illegally acquired evidence should not be considered in determining whether the affidavit established probable cause for the search warrant. *See id*. at 1417 ("That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.").

As for the tip from William Smith, the affidavit alleges that Smith told Officer Seyl he "commonly buys" marijuana at the target location, which he described as a "grow house." But the affidavit does not include any other details about Smith's tip to establish the reliability of this information. *See Gates*, 462 U.S. at 242 (information provided by informant must contain some indicia of reliability or be reasonably corroborated by police before it can be used to justify a search); *State v. Duarte*, 389 S.W.3d 349, 357 (Tex. Crim. App. 2012) (reliability of an informant's information must be demonstrated within the four corners of the affidavit). The affidavit says nothing about Smith's reliability, trustworthiness, or that he had provided

information in the past that had been corroborated. The affidavit also does not provide any details about when Smith last purchased marijuana from appellee's home in relation to when the police searched Smith's home and interviewed him. The affidavit does not say, for example, whether Smith was at appellee's home and purchased marijuana there the day before, several days earlier, or a week or a month ago. At most, the affidavit establishes that Smith purchased marijuana at appellee's home on some unknown date or dates and that the home is known as a "grow house." Even so, however, the lack of specificity and detail in the affidavit regarding when Smith purchased the marijuana at appellee's home or why Smith had reason to believe appellee's home was known as a "grow house" renders Smith's tip unreliable for purposes of establishing probable cause to search appellee's home for marijuana. The fact that Smith purchased drugs on some unknown date or dates from appellee's home without any other concrete details does not indicate a fair probability that contraband or evidence of a crime would be found at the home at the time the magistrate issued the search warrant. The affidavit simply does not include facts suggesting Smith's information was reliable. Without any evidence of reliability, the facts in the affidavit about Smith's tip alone fail to establish a fair probability or substantial likelihood that the police would find marijuana inside appellee's home.

After reviewing the four corners of the affidavit in a commonsensical and realistic manner, *see Rodriguez*, 232 S.W.3d at 59–61, we cannot say the remaining independently acquired and lawful information stated within the four corners of the affidavit *clearly* establish probable cause to search appellee's home. After setting aside information related to the odor of marijuana and the dog-sniff, the remaining untainted information in the affidavit that arguably supports probable cause is Smith's unverified tip. Considering the totality of the circumstances, however, that untainted information, i.e. Smith's tip, fails to clearly establish probable cause. Consequently, the information contained within the four corners of the search warrant affidavit

fails to establish probable cause.

III. Article 38.23(b)

The State also argues that the good faith exception to the federal exclusionary rule in *Davis v. United States*, 564 U.S. 229, should apply in this case because the officers acted in objectively reasonable good faith reliance on pre-*Jardines* precedent when they conducted the dog-sniff search. The State contends the police acted appropriately because their conduct was entirely consistent with their objectively reasonable good faith reliance on what was at that point legal authority allowing officers to use drug-detecting dogs at a person's front door without obtaining a warrant. Appellee contends the good faith exception in *Davis* does not apply in this case because the Texas exclusionary rule, which was statutorily created and provides more protection than its federal counterpart, does not provide an exception for good faith reliance on binding appellate precedent.

The Texas exclusionary rule was enacted by our Legislature and is found in article 38.23 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23; *Miles v. State*, 241 S.W.3d 28, 33–36 (Tex. Crim. App. 2007) (discussing history of article 38.23). The statute provides that evidence may not be used or admitted in the criminal trial against the defendant if the evidence is obtained by "an officer or other person in violation of any of the provisions of the Constitution or the laws of the State of Texas, or of the Constitution or laws of the United States of America." TEX. CODE CRIM. PROC. ANN. art. 38.23(a); *Burks v. State*, 454 S.W.3d 705, 709 (Tex. App.—Fort Worth 2015, pet. filed); *State v. Anderson*, 445 S.W.3d 895, 912 (Tex. App.—Beaumont 2014, no pet.). The Texas statutory exclusionary rule specifies only one legislative good faith exception: "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); *Anderson*, 445 S.W.3d at 912; *State v. Esher*, No. 05–14–00694–CR, 2015 WL 4527715, at *4 (Tex. App.—Dallas July 27, 2015, no pet.) (mem. op., not designated for publication).

The federal exclusionary rule is judicially created and has several good faith exceptions. *McClintock v. State*, No. 01–11–00572–CR, 2015 WL 6851826, at *4 (Tex. App.—Houston [1st Dist.] Nov. 5, 2015, no pet. h.) (opinion on remand); *Anderson*, 445 S.W.3d at 912. One of those exceptions was promulgated in *Davis*, where the United States Supreme Court held that an officer's objectively reasonable reliance on binding court precedent at the time of the search or seizure, even if the precedent is later overruled, satisfies the good faith exception to the exclusionary rule. 131 S.Ct. at 2428–29; *see also Illinois v. Krull*, 480 U.S. 340, 350 (1987) (reliance on a subsequently invalidated statute); *United States v. Leon*, 468 U.S. 897, 922–24 (1984) (reliance on subsequently invalidated warrant).

The Court of Criminal Appeals has previously noted that article 38.23(b)'s good faith exception is more limited than the federal constitutional good faith exception to the exclusionary rule because article 38.23 requires an independent finding of probable cause. *See Curry v. State*, 808 S.W.2d 481, 482 (Tex. Crim. App. 1991) (reiterating that "Art. 38.23(b) requires a finding of probable cause, while the exception enunciated in [*Leon*, 468 U.S. at 922–24] appears more flexible in allowing a good faith exception if the officer's belief in probable cause is reasonable."); *see also Miles*, 241 S.W.3d at 34 (Texas exclusionary statute "broader than its federal counterpart" and thus more broadly protective of individual rights). Illegally obtained evidence cannot provide the probable cause necessary to support a warrant under article 38.23. *Cuong Phu Le*, 463 S.W.3d at 877. As we discussed earlier, when a search warrant is issued based on an affidavit containing illegally obtained information, as it was here, the evidence seized pursuant to the warrant is admissible only if the independently and lawfully acquired

information in the affidavit clearly established probable cause. *McClintock*, 444 S.W.3d at 19. But the warrant in this case did not contain sufficient lawfully acquired information to clearly establish probable cause without the dog-sniff evidence.

In a recent decision, the Houston First Court of Appeals rejected an argument virtually identical to the one the State is making here, concluding the "judge-made" *Davis* exception to the "judge-made" federal exclusionary rule did not create an exception to the Texas exclusionary rule that was adopted by the Legislature, and since the search warrant in that case was not based on probable cause, the Texas rule required the illegally obtained evidence be suppressed:

> We reject the State's proposed application of the *Davis* exception to allow consideration of illegally obtained evidence in the magistrate's probable cause analysis for a warrant. As the Court of Criminal Appeals affirmed, the dog-sniff search was unlawful. Binding precedent holds that illegally obtained evidence cannot provide probable cause to support a warrant. Based on past interpretation of Article 38.23, we conclude that the good-faith exception established in *Davis* does not apply to allow the State to use the illegal dog-sniff evidence to support the warrant. As a result, the warrant used to seize the marijuana evidence from McClintock's residence was "not based on probable cause," and the marijuana evidence does not satisfy Article 38.23(b). Accordingly, the Texas exclusionary statute applies and the marijuana evidence must be suppressed. *See* TEX. CODE CRIM. PROC. art. 38.23(a).

McClintock, 2015 WL 6851826, at *8 (opinion on remand).[3]

We reach a similar conclusion in this case. The State asks us 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. *See State v. Daugherty*, 931 S.W.2d 268, 271 (Tex. Crim. App. 1996) ("Were we implementing a court-made rule we would of course be free to follow the lead of the United States Supreme Court. However, because [article 38.23] is a statute enacted

[3] The State cites two cases, *Taylor v. State* and *State v Elias*, in support of its argument that Texas courts have used *Davis* to find that good faith reliance on binding appellate precedent is an exception to the Texas exclusionary rule. *Taylor v. State*, 410 S.W.3d 520, 526-27 (Tex. App.—Amarillo 2013, no pet.); *State v Elias*, No. 08-08-00085-CR, 2012 WL 4392245, at *7 (Tex. App.—El Paso Sept. 26, 2012, pet. ref'd) (not designated for publication). Neither decision, however, addresses the Texas statutory exclusionary rule in article 38.23. We conclude that neither case provides any guidance to the issue in the present case.

by the Texas Legislature, we are required to interpret the language of the statute in order to implement the legislative intent in enacting it."); *Howard v. State*, 617 S.W.2d 191, 193 (Tex. Crim. App. 1979) (op. on reh'g) (declining to adopt exception for good faith reliance on a subsequently invalidated statute); *but see Wehrenberg v. State*, 416 S.W.3d 458, 467–68 (Tex. Crim. App. 2013) (finding that article 38.23 does not preclude application of the federal independent source doctrine because evidence was not "obtained" in violation of the law).

Having therefore concluded that the trial court did not abuse its discretion by granting appellee's pretrial motion to suppress, we overrule the State's sole issue.

We affirm the trial court's judgment.

/ Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THE STATE OF TEXAS, Appellant

No. 05-15-00232-CR V.

BLAKE CHRISTOPHER DAVIS, Appellee

On Appeal from the Criminal District Court No. 4, Dallas County, Texas
Trial Court Cause No. F12-57322-K.
Opinion delivered by Justice Myers. Justices Bridges and Lang-Miers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 5th day of January, 2016.