Reverse and Remand; Opinion Filed March 29, 2018.

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 ON REMAND

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

The State of Texas appealed from the trial court's order granting appellee Blake Christopher Davis's pretrial motion to suppress. In a single issue, the State argued the trial court abused its discretion by granting the motion to suppress. On original submission, we affirmed the trial court's judgment. The Texas Court of Criminal Appeals vacated and remanded for further consideration in light of its opinion in *McClintock v. State*, No. PD-1641-15, 2017 WL 1076289 (Tex. Crim. App. Mar. 22, 2017), which had not been handed down when we issued our original opinion. Having considered the issue under *McClintock*'s guidance, we resolve it against Davis and reverse and remand.

DISCUSSION

On March 27, 2012, City of Dallas Police Officer Justin Boyce submitted an affidavit for a warrant to search (as described in paragraph one of the affidavit) a residence located at 6130

Menger Avenue, Dallas, Texas:

> A single-story, single family residence, constructed of red brick with red trim. The number "6130" is displayed in brass colored numbering horizontally over the front entrance. A garage, constructed with blue-grey wood siding, is attached to the west side of the structure. The residence is the sixth structure on the south side of Menger Ave, west of Elmira Street. The front of the structure faces north. Said suspected place is located in Dallas, Dallas County, Texas.

The search warrant affidavit alleged 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.
>
> 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. . . .

A City of Dallas municipal judge signed the search warrant, which was executed that same day. When they executed the warrant, police officers recovered a bag containing in excess of five pounds of marijuana, $6800.10 in United States currency, marijuana seeds, digital scales,

marijuana grow equipment, an identification card of some type, a checkbook, and mail.

Davis was indicted for possession of marijuana in an amount of fifty pounds or less but more than five pounds, and he moved to suppress the evidence seized pursuant to the search warrant. He argued the police obtained two 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 Davis's residence. This argument was based on the Supreme Court's then-recent decision in *Florida v. Jardines*, 569 U.S. 1 (2013), which had been handed down after the search warrant was executed, but before the motion to suppress was filed. The other essential piece of information in the search warrant affidavit — William Smith's statement — was, according to Davis, an uncorroborated and unsubstantiated tip that was insufficient by itself to support a finding of probable cause. The trial court ultimately granted the motion to suppress, and the State appealed to this Court.

In *Jardines*, after the police took a drug-sniffing dog to the defendant's front porch, the dog gave a positive alert for narcotics at the front door, and this was used as the basis for a search warrant resulting in the seizure of marijuana plants found in that house. *Id*. at 4–5. The Supreme Court held that the use of the drug-sniffing dog to investigate the curtilage area "immediately surrounding and associated with the home" was a search within the meaning of the Fourth Amendment, and there was "no doubt" the officers entered that area because the front porch is the "classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" *See id*. at 6–7, 10–12 (quoting *Oliver v. United States*, 466 U.S. 170, 182 (1984)).

We concluded that *Jardines* invalidated the dog-sniff portion of the search warrant affidavit and, without its inclusion, the remaining allegations were insufficient to provide probable cause. *See State v. Davis*, No. 05-15-00232-CR, 2016 WL 60574, at *6–7 (Tex. App.—Dallas Jan. 5,

2016) (not designated for publication), *vacated and remanded*, No. PD-0111-16, 2017 WL 4401879 (Tex. Crim. App. Oct. 4, 2017) (per curiam) (not designated for publication). We also considered and rejected arguments that the statutory good faith exception in article 38.23(b) of the Texas Code of Criminal Procedure should apply. *See Davis*, 2016 WL 60574, at *8–9; *see also* TEX. CODE CRIM. PROC. ANN. art. 38.23(b) (West 2005). Article 38.23 states:

> (a) 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.
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> * * * *
>
> (b) 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 upon probable cause.

TEX. CODE CRIM. PROC. ANN. art. 38.23. We concluded the State was asking 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." *Davis*, 2016 WL 60574, at *9. In reaching this conclusion, we cited the Houston First Court of Appeals' opinion in *McClintock v. State*, 480 S.W.3d 734, 744 (Tex. App.—Houston [1st Dist.] 2015), *reversed and remanded*, No. PD-1641-15, 2017 WL 1076289 (Tex. Crim. App. Mar. 22, 2017), which reached a similar conclusion. *See Davis*, 2016 WL 60574, at *9.

The court of criminal appeals, however, reversed the Houston First Court of Appeals, holding that the good-faith exception in article 38.23(b) applies when the prior law enforcement conduct that uncovered the evidence used in the affidavit for the warrant is "'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*, 2017 WL 1076289, at *7 (quoting *United States v. Massi*,

761 F.3d 512, 528 (5th Cir. 2014)). The court added that there was no question the dog sniff in that case, which occurred at the front door of the appellant's single-dwelling upstairs apartment, was an unconstitutional invasion of the curtilage of the home. *Id*. But the court also held that, at the time the officers used the trained canine to sniff for drugs at the door of the appellant's apartment, the constitutionality of that conduct remained "close enough to the line of validity" for the court to conclude an objectively reasonable officer preparing a warrant affidavit would have believed the information supporting the warrant application was not tainted by unconstitutional conduct. *Id*. at *8. Noting that we did not have the benefit of the *McClintock* decision when we addressed the State's arguments regarding article 38.23(b), the court of criminal appeals granted the State's petition for discretionary review in this case, vacated our opinion, and remanded, concluding we should be given an opportunity to consider whether the facts in this case satisfy the standard adopted in *McClintock*. *See Davis*, 2017 WL 4401879, at *1. We do so now. We must determine whether, at the time the Dallas police used a narcotics detection canine to conduct an open-air sniff for drugs at the exterior of Davis's residence, the constitutionality of that conduct was "close enough to the line of validity" for an objectively reasonable officer to have believed the information supporting the warrant application was not tainted by unconstitutional conduct.

Davis argues that the exterior of his stand-alone home constituted curtilage that was entitled to Fourth Amendment protection under existing law at the time of the open-air canine sniff. He contends that long before the search of his residence took place, the home and its curtilage was a bastion of Fourth Amendment protection. He also points out that *McClintock* involved an apartment and that apartments, with their attendant common areas connecting multiple units, typically involve a more difficult determination of curtilage than a stand-alone residence like the one in this case, where the curtilage is more clearly defined and understood.

Curtilage is the area around the home to which the activity of home life extends. *Oliver*,

466 U.S. at 182, n.12. There is no question a person has a reasonable expectation of privacy in the home and its curtilage. *Jardines*, 569 U.S. at 6–7; *Oliver*, 466 U.S. at 182, n.12. It is equally true, as the court of criminal appeals noted in *McClintock*, that there was no binding precedent prior to *Jardines* holding "that a canine drug sniff conducted on the curtilage of the home was constitutional," and in that sense *Jardines* "did not overrule anything." *McClintock*, 2017 WL 1076289, at *8. "Neverthless, even after *Jardines* was decided, binding precedent continues to hold that — at least in the abstract — the use of a trained canine to detect the presence or absence of illicit narcotics does not constitute a 'search' for Fourth Amendment purposes." *Id*. (citing *Illinois v. Caballes*, 543 U.S. 405 (2005)). "This is because drug dogs detect only illegal substances, and citizens lack any reasonable expectation of privacy in possessing illegal substances." *Id*. (citing *Caballes*, 543 U.S. at 409). As the *McClintock* court also noted:

> Only when the drug-sniff is conducted in the course of a warrantless invasion of the curtilage of a home does it constitute an unconstitutional search for Fourth Amendment purposes. But the Supreme Court did not make this distinction crystal clear until *Jardines* itself. And the distinction remains a subtle one.

Id.

While the Dallas police had no warrant to walk up to the front door of the target residence on March 27, 2012, almost a year before *Jardines* was decided, the body of jurisprudence as it existed on that date included cases that supported the conclusion that no search warrant was required to engage in the act of merely using a drug-detecting canine to see if the canine would provide an alert indicating the presence of drugs. Under the law as it existed on March 27, 2012, and as we acknowledged in our previous opinion, police officers are free to enter onto a residential property, walk up to the front door, and knock for the purpose of contacting the occupants. *See Davis*, 2016 WL 60574, at *5; *see also Florida v. Bostick*, 501 U.S. 429, 434–35 (1991); *State v. Garcia-Cantu*, 253 S.W.3d 236, 243 (Tex. Crim. App. 2008); *State v. Perez*, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002). They may approach the back door for the same purpose after having tried

the front door and receiving no answer. *Davis*, 2016 WL 60574, at *5. Because entry onto the property is impliedly authorized, there is no reasonable expectation of privacy in things observed by those on the pathway to the doors of the house. *Id.* And as we also noted, this implied license exists so long as the resident has not manifested any intent to restrict access to his home and the officer does not deviate from the normal path of traffic. *See id.* at *6. In addition, the Supreme Court had held (as the court of criminal appeals observed in *McClintock*) that a sniff by a drug-detecting canine of the exterior of an automobile during a lawful traffic stop — one that does not expose non-contraband items that otherwise would remain hidden from public view — did not implicate legitimate privacy interests. *See Caballes*, 543 U.S. at 409; *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (walking narcotic-detecting canine around exterior of car at checkpoint does not transform the seizure into a search). Moreover, the Supreme Court had held that any interest in possessing contraband was not a legitimate one and that the actions of government actors that only revealed the presence of contraband did not compromise a legitimate privacy interest. *See Caballes*, 543 U.S. at 408 (citing *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

Texas cases had similarly recognized that defendants have no reasonable expectation of privacy in the odor of illegal drugs that may be emanating from their residences. *See Romo v. State*, 315 S.W.3d 565, 572–73 (Tex. App.—Fort Worth 2010, pet. ref'd); *see also Rodriguez v. State*, 106 S.W.3d 224, 229 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (no legitimate expectation or interest in privately possessing illegal narcotic); *Sabedra v. State*, No. 08-07-00276-CR, 2009 WL 3790012, at *5 (Tex. App.—El Paso Nov. 12, 2009, no pet.) (not designated for publication) (no legitimate expectation of privacy when possessing illegal narcotic and trained narcotic dog's alert for drugs is sufficient to establish probable cause).

Additionally, several cases from Texas jurisprudence had concluded that an open-air

canine sniff similar to the one in this case did not constitute a search under the Fourth Amendment. *See Romo*, 315 S.W.3d at 572–73 (free-air sniff of garage door and backyard fence of suspect location not a search under Fourth Amendment); *Rodriguez*, 106 S.W.3d at 228–29 (dog sniff conducted at front door of defendant's home not a search under Fourth Amendment); *Porter v. State*, 93 S.W.3d 342, 346–47 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (dog sniff outside front door did not constitute search under Fourth Amendment); *see also Smith v. State*, No. 01-02-00503-CR, 2004 WL 213395, at *3 (Tex. App.—Houston [1st Dist.] Feb. 5, 2004, pet. ref'd) (mem. op., not designated for publication) (appellant's privacy interests under the U.S. and Texas Constitutions were not invaded when officer walked up appellant's driveway to allow drug dog to sniff appellant's garage door). These cases reasoned that, because the dog sniff disclosed only the presence or absence of narcotics in which there was no reasonable expectation of privacy, and it did not expose non-contraband items, activity, or information that would otherwise remain hidden from public view, it did not intrude on a legitimate expectation of privacy and was not a search under the Fourth Amendment. *See Romo*, 315 S.W.3d at 573; *Rodriguez*, 106 S.W.3d at 229; *Porter*, 93 S.W.3d at 346.[1]

In this case, the search warrant affidavit contains nothing to indicate access to the front of the target residence was restricted. An officer knocked on the front door and received no response, another officer detected a strong odor of marijuana emitting from the rear door of the residence, and he also smelled marijuana emitting from the east side of the residence. The drug-detecting

[1] We also point out that these cases have been cited by this Court. *See, e.g.*, *Ex parte Saucedo*, No. 05-15-00065-CR, 2015 WL 3751755 (Tex. App.—Dallas June 16, 2015, pet. ref'd) (mem. op., not designated for publication); *Ex parte Schuller*, No. 05-15-00064-CR, 2015 WL 3658064 (Tex. App.—Dallas June 15, 2015, pet. ref'd) (mem. op., not designated for publication). In both of these related cases, which involved co-defendants charged with possessing marijuana, the defendants filed applications for writ of habeas corpus arguing *Jardines* invalidated their convictions, and the trial court granted habeas relief. In our discussion of the background of each case, we explained that the police had procured the warrant authorizing the search solely on the basis of an alert at the defendants' garage door by a drug sniffing dog that the officer brought onto the defendants' property without the defendants' permission. *Ex parte Saucedo*, 2015 WL 3751755, at *1; *Ex parte Schuller*, 2015 WL 3658064, at *1. We also noted that "[a]t the time [defendant's] residence was searched" (which would have to have been prior to July 20, 2012, when the defendants entered negotiated pleas of guilty), "three intermediate Texas appellate courts had concluded that a canine free-air sniff like the one in this case did not violate the Fourth Amendment's prohibition against unreasonable search and seizure." *Ex parte Saucedo*, 2015 WL 3751755, at *1 (citing *Romo*, 315 S.W.3d at 573; *Rodriguez*, 106 S.W.3d at 228–30; *Porter*, 93 S.W.3d at 346–47); *Ex parte Schuller*, 2015 WL 3658064, at *1 (citing *Romo*, 315 S.W.3d at 573; *Rodriguez*, 106 S.W.3d at 228–30; *Porter*, 93 S.W.3d at 346–47). We ultimately reversed the trial court's orders granting habeas relief for reasons that did not concern *Jardines* or its application. *Ex parte Saucedo*, 2015 WL 3751755, at *1, *3; *Ex parte Schuller*, 2015 WL 3658064, at *1, *3.

canine indicated the presence of a controlled substance at the front door and east side of the residence following an open-air sniff of the exterior — an odor in which Davis had no reasonable expectation of privacy, according to then-existing case law. Davis argues the police officer's physical intrusion onto the curtilage of his home with a trained drug-detection dog exceeded the scope of any lawful "knock and talk" and that, under the law existing at the time of the open-air canine sniff, the officer's physical intrusion without a warrant was an unlawful search.

But as we discussed above, prior to March 23, 2013, when the Supreme Court issued *Jardines*, the Court had never made it "crystal clear," as the court of criminal appeals noted in *McClintock*, that a drug-sniff conducted in the course of a warrantless invasion of the curtilage of a home was an unconstitutional search for Fourth Amendment purposes. *See McClintock*, 2017 WL 1076289, at *8. Furthermore, there were cases holding a drug-detection dog sniff similar to the one that occurred here was not considered an intrusion on a legitimate expectation of privacy in violation of the Fourth Amendment. *Romo*, 315 S.W.3d at 573; *Rodriguez*, 106 S.W.3d at 229; *Porter*, 93 S.W.3d at 346. Although these cases are not exactly like the situation here, were never binding on us, and have now been called into question by *Jardines*, they surely demonstrate that, at the time of the search in this case, the use of a drug-detecting canine in the manner described in the search warrant affidavit was "close enough to the line of validity" for an objectively reasonable officer to have believed the information supporting the warrant application was not tainted by unconstitutional conduct. *See McClintock*, 2017 WL 1076289, at *8. Under such circumstances, "[t]o suppress the evidence derived from this warrant would not serve the interest of deterring future constitutional violations." *Massi*, 761 F.3d at 533 (citing *United States v. Leon*, 468 U.S. 897, 919–20 (1984)). Thus, the search of Davis's residence was executed "in objective good faith reliance" on the warrant, and the fruit of that search is therefore excepted from article 38.23(a)'s exclusionary rule. As a result, the trial court erred by granting appellee's motion to suppress, and

we sustain the State's issue.

We reverse the trial court's judgment and remand for further proceedings.

/Lana Myers/
LANA MYERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

THE STATE OF TEXAS, Appellant	On Appeal from the Criminal District Court No. 4, Dallas County, Texas
No. 05-15-00232-CR V.	Trial Court Cause No. F12-57322-K. Opinion delivered by Justice Myers.
BLAKE CHRISTOPHER DAVIS, Appellee	Justices Bridges and Lang-Miers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **REVERSED** and the cause **REMANDED** for further proceedings consistent with this opinion.

Judgment entered this 29th day of March, 2018.