

Affirmed and Memorandum Opinion filed August 4, 2011.



In The

**Fourteenth Court of Appeals**

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**NO. 14-10-00378-CR  
NO. 14-10-00379-CR**

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**MICHAEL DENNIS VESTAL, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 185th District Court  
Harris County, Texas  
Trial Court Cause Nos. 1243313;1243314**

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**M E M O R A N D U M    O P I N I O N**

Appellant, Michael Dennis Vestal, appeals his conviction for possession with intent to deliver gamma hydroxybutyrate weighing four to 200 grams in cause number 1243313 and his conviction for possession of methamphetamine weighing one to four grams in cause number 1243314. Appellant contends the trial court erred by denying his motion to suppress evidence obtained pursuant to a search warrant because the evidence seized from his house was “the product of an illegal search and seizure.” We affirm.

## **Background**

Harris County Deputy James Savell presented an affidavit in support of a search and arrest warrant on December 2, 2009 to a Harris County magistrate. In his affidavit, Deputy Savell stated that he had probable cause to believe that Charles Relan and Michael D. Vestal possessed and concealed methamphetamine in “a two story single family, wood framed condominium” located at 10456 Hammerly Blvd. in Houston, Texas. Deputy Savell stated in his affidavit that his probable cause belief was supported by the following facts.

Sergeant Robert Clark informed Deputy Savell that a reliable confidential informant, who had been a methamphetamine abuser in the past, had told Sergeant Clark in early November 2009 that Relan was involved in the sale of large quantities of methamphetamine and resided at 10456 Hammerly Blvd. in Houston, Texas. The confidential informant described Relan and reported that Relan maintained “a safe concealed under his bed in which he conceals narcotics and currency.” The confidential informant reported that Relan operated a blue Chevrolet pickup truck and a Mazda Miata convertible sports car. The confidential informant also stated that Relan has a roommate named “Mike LNU”<sup>1</sup> who provides “financial backing for the distribution of methamphetamine.”

Based on the Harris County Appraisal District’s data base, Sergeant Clark determined that appellant owned the property on 10456 Hammerly Blvd. Sergeant Clark was familiar with the residence because he had conducted surveillance at the location in mid-2008 after the Harris County Sheriff’s Office received an anonymous e-mail complaint. The complainant alleged in the e-mail that “Relan was involved in the distribution of methamphetamine, that Relan regularly traveled to Arizona to obtain methamphetamine and that the narcotics were concealed in a safe in his bedroom.”

Sergeant Clark conducted surveillance on November 11, 2009 at 10456 Hammerly

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<sup>1</sup> “LNU” stands for Last Name Unknown.

Blvd. He observed a white male — matching Relan’s description — walk from the condominium to the blue Chevrolet pickup truck. Sergeant Clark also observed a blue Mazda Miata parked beside the pickup truck. Sergeant Clark learned that the Mazda Miata was registered to Steven D. Gerardi, who is the brother of Charles Robert Gerardi. Deputy Savell and Sergeant Clark both were familiar with Charles Robert Gerardi because they previously had arrested him for distribution of methamphetamine.

Deputy Savell requested a narcotics detection canine on December 1, 2009, and Deputy R. Hoyt and his canine partner, Ducke, responded to 10456 Hammerly Blvd. Deputy Hoyt placed Ducke on the north side front door of 10456 Hammerly Blvd. for an open air sniff. “The door was accessed via the common sidewalk serving multiple buildings located within the complex.” Deputy Hoyt received a positive alert from Ducke indicating the presence of controlled substances inside 10456 Hammerly Blvd. Ducke is certified for the detection of methamphetamine, cocaine, marijuana, and heroin.

Deputy Savell stated that based on his investigation, “information provided by a credible and reliable confidential informant, corroborated by surveillance conducted by certified Texas Peace Officers and a positive alert for the presence of controlled substances at the suspected place by a certified narcotics detection canine,” he had probable cause to believe that a quantity of methamphetamine was “located inside the private residence located at 10456 Hammerly Blvd.” Deputy Savell asked for the issuance of a search and arrest warrant.

A magistrate found that there was probable cause to issue a search and arrest warrant based on Deputy Savell’s affidavit; the magistrate issued a search warrant for 10456 Hammerly Blvd. and an arrest warrant for appellant and Relan on December 2, 2009. The warrant was executed on December 3, 2009, and methamphetamine and gamma hydroxybutyrate, among other things, were seized from the residence. Appellant was indicted for possession with intent to deliver gamma hydroxybutyrate weighing four to 200 grams in cause number 1243313 and for possession of methamphetamine weighing one to four grams in cause number 1243314 on January, 21, 2010.

Appellant filed a motion to suppress on April 19, 2010; he filed an identical motion to suppress on April 28, 2010. The trial court held a hearing on appellant's motions to suppress on April 28, 2010. At the hearing, the trial court was asked to "review the warrant to determine if there was probable cause, based on the warrant, to allow for the warrant to issue and the search to occur." The parties agreed not to present any testimony but to rely "on the warrant itself and the supporting affidavit." After hearing the parties' arguments, "reading all of the cases and reviewing the search warrant," the trial court decided "to remove from consideration" all the facts in Deputy Savell's supporting affidavit except for Ducke's positive alert to the presence of a controlled substance. The court denied appellant's motions to suppress, stating that based on Texas caselaw "a dog sniff alone is enough to allow a search warrant to issue, that a dog sniff is not a search and that it is enough to allow a search warrant to issue."

Appellant pled guilty to possession with intent to deliver gamma hydroxybutyrate weighing four to 200 grams, was fined \$1,000, and was placed on deferred adjudication for five years in cause number 1243313. Appellant also pled guilty to possession of methamphetamine weighing one to four grams and was placed on deferred adjudication for five years in cause number 1243314. Appellant filed a timely appeal.

### **Analysis**

In his sole issue on appeal, appellant contends that the trial court erred by denying his motion to suppress evidence seized from his house because (1) "[t]he use of the narcotic detection canine at the front door of the house was an unreasonable and unconstitutional search;" and (2) "[t]he issuance of the search warrant based upon the dog alerting at the front door was based upon information gained illegally." According to appellant, "the evidence seized from the house was the product of the illegal search and seizure, and obtained in violation of the [appellant]'s rights under the Fourth Amendment to the United States Constitution."

We apply a bifurcated standard of review to a trial court's ruling on a motion to suppress evidence. *Martinez v. State*, Nos. PD-1238-10, PD-1239-10, 2011 WL

2555712, at \*2 (Tex. Crim. App. June 29, 2011); *State v. Dugas*, 296 S.W.3d 112, 115 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (citing *Maxwell v. State*, 73 S.W.3d 278, 281 (Tex. Crim. App. 2002); *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000)). We give almost total deference to the trial court's determination of historical facts that depend on credibility and review *de novo* the trial court's application of the law to those facts. *Martinez*, 2011 WL 2555712, at \*2; *Dugas*, 296 S.W.3d at 115. We also review *de novo* the trial court's application of the law of search and seizure. *Martinez*, 2011 WL 2555712, at \*2; *Dugas*, 296 S.W.3d at 115 (citing *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000)).

“The Fourth Amendment to the United States Constitution requires that ‘no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’” *State v. Jordan*, No. PD-1156-10, 2011 WL 2555708, at \*2, (Tex. Crim. App. June 29, 2011). “Under Article 18.01 of the Code of Criminal Procedure, a search warrant may be obtained from a magistrate only after submission of an affidavit setting forth substantial facts establishing probable cause.” *Id.* Probable cause exists if, under the totality of the circumstances set forth in the affidavit before the magistrate, there is a “fair probability” that contraband or evidence of a crime will be found in a particular place at the time the warrant is issued. *Id.* The magistrate may interpret the affidavit in a non-technical, common-sense manner and may draw reasonable inferences from the facts and circumstances contained within its four corners. *Id.* Reviewing courts should give great deference to a magistrate's determination of probable cause. *Id.*

Appellant's argument on appeal centers around whether the drug-detection dog sniff constituted a search. Appellant contends that the drug-detection dog's sniff outside his front door, which alerted the police officers to the presence of a controlled substance inside his house, was an illegal search; therefore, he contends that the State obtained a search warrant based on an illegal search.

A “search” does not occur for Fourth Amendment purposes even when the

explicitly protected area of a house is concerned unless a reasonable expectation of privacy exists in the object of the challenged search. *Rodriguez v. State*, 106 S.W.3d 224, 228-29 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd); *Porter v. State*, 93 S.W.3d 342, 346 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (citing *Kyllo v. United States*, 533 U.S. 27 (2001)). A person has no reasonable expectation of privacy in possessing illegal drugs. *Rodriguez*, 106 S.W.3d at 229; *Porter*, 93 S.W.3d at 346 (citing *United State v. Jacobsen*, 466 U.S. 109, 123 (1984)).

An investigative method that can only detect the existence of illegal items in a home and does not reveal legal information about the interior of a home is not a search for Fourth Amendment purposes. *Rodriguez*, 106 S.W.3d at 229; *Porter*, 93 S.W.3d at 346 (citing *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Jacobsen*, 466 U.S. at 122-24; *United States v. Place*, 462 U.S. 696, 706-07 (1983)). Therefore, a government investigative technique, such as a drug-detection dog sniff, that discloses only the presence or absence of narcotics, and does not expose non-contraband items, activity, or information that would otherwise remain hidden from public view, does not intrude on a legitimate expectation of privacy and is thus not a search for Fourth Amendment purposes.<sup>2</sup> *Romo v. State*, 315 S.W.3d 565, 573 (Tex. App.—Fort Worth 2010, pet. ref'd); *Rodriguez*, 106 S.W.3d at 229; *Porter*, 93 S.W.3d at 346; *Josey v. State*, 981 S.W.2d 831, 845 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd); *Porter v. State*, Nos. 14-01-00687-CR, 14-01-00688-CR, 2002 WL 1488983, at \*3 (Tex. App.—Houston [14th Dist.] July 11, 2002, pet. ref'd) (not designated for publication).

Because the dog sniff in this case did not intrude on a legitimate expectation of privacy, it was not a search for Fourth Amendment purposes. *See Romo*, 315 S.W.3d at 573; *Rodriguez*, 106 S.W.3d at 229; *Porter*, 93 S.W.3d at 346. Thus, the State did not obtain a search warrant based on an illegal search. Further, a trained and certified dog's alert is sufficient to provide probable cause to search a site. *Romo*, 315 S.W.3d at 573-74;

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<sup>2</sup> By contrast, the use of a thermal imaging device to record the heat being emitted from within a home is a search for Fourth Amendment purposes because it can reveal information other than the presence of contraband about the home's interior. *Rodriguez*, 106 S.W.3d at 229.

*Rodriguez*, 106 S.W.3d at 229; *Josey*, 981 S.W.2d at 846; *Stauffer v. State*, No. 14-03-00193-CR, 2004 WL 253520, at \*3 (Tex. App.—Houston [14th Dist.] Feb. 12, 2003, pet. ref'd) (not designated for publication); *Porter*, 2002 WL 1488983, at \*3.

Accordingly, the trial court did not err in denying appellant's motion to suppress. We overrule appellant's sole issue.

### **Conclusion**

We affirm the trial court's judgment.

/s/ William J. Boyce  
Justice

Panel consists of Justices Brown, Boyce, and Jamison.

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