STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 29, 2012
v	No. 307318 Wayne Circuit Court
RICHARD LEE, Defendant-Appellee.	LC No. 11-004827-FH

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Defendant was charged with manufacturing marijuana, MCL 333.7401(2)(d)(*i*), and possession of a firearm during the commission of a felony, MCL 750.227b, after contraband was found during the execution of a search warrant at a commercial building used by defendant as a residence. The trial court granted defendant's motion to suppress the evidence and dismissed the case. The prosecutor appeals as of right. We reverse and remand for reinstatement of the charges.

According to the search warrant affidavit, the police received a citizen tip that there was a "drug trafficking operation" on defendant's property and that a strong odor of marijuana was coming from inside the building. During surveillance of the building, and as reflected in the affidavit, the police observed "high intensity lighting" in some of the windows and the presence of "surveillance cameras pointed at the front door and around the building." Accompanied by other officers, a police canine handler took a trained narcotics detection dog to the property. The handler and dog "conducted a narcotics sniff of the front door area of [the building], at which time [the dog] immediately gave a positive alert (scratching) for the presence of a controlled substance odor originating from the front door area of [the building]." The police then obtained and executed a search warrant, which led to the discovery of drugs and a firearm inside the building.

Defendant moved to suppress the evidence, arguing that the use of a drug dog at a residence without probable cause is improper and that, absent the dog's positive response, the remainder of the information in the search warrant affidavit did not provide probable cause for the issuance of a warrant. The trial court initially denied defendant's motion on the ground that the dog sniff had occurred outside a commercial building, not a private residence. After defendant pointed out that the search warrant affidavit indicated that he was living on the

premises, the trial court granted reconsideration and suppressed the evidence. Relying on *Jardines v State*, 73 So 3d 34 (Fla, 2011), cert gtd ___ US ___; 132 S Ct 995; 181 L Ed 2d 726 (2012), the trial court ruled that "where a home or residence is involved, some preceding evidence must show probable cause of wrongdoing before the police can take the drug detection dog to the door."

A trial court's ultimate ruling on a motion to suppress evidence is reviewed de novo on appeal. *People v Marcus Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak,* 461 Mich 411, 417; 605 NW2d 667 (2000). "A search or seizure is considered unreasonable when it is conducted pursuant to an invalid warrant or without a warrant where the police officer's conduct does not fall within one of the specific exceptions to the warrant requirement." *People v Hellstrom,* 264 Mich App 187, 192; 690 NW2d 293 (2004). Issuance of a search warrant must be based on probable cause. MCL 780.651(1); *Hellstrom*, 264 Mich App at 192. "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *Kazmierczak,* 461 Mich at 417-418.

Fourth Amendment interests are only implicated when the government infringes upon a person's reasonable expectation of privacy. *People v Smith,* 420 Mich 1, 25; 360 NW2d 841 (1984). Clearly, one may have a reasonable expectation of privacy in one's own home. *People v Custer (On Remand),* 248 Mich App 552, 561-562; 640 NW2d 576 (2001). One may also have a reasonable expectation of privacy in a temporary place of abode, such as a friend's home, *People v Parker,* 230 Mich App 337, 340; 584 NW2d 336 (1998), or a hotel room, *People v Davis,* 442 Mich 1, 10; 497 NW2d 910 (1993). Here, the prosecutor does not dispute that defendant had a reasonable expectation of privacy in the commercial building in which defendant was residing.

In *People v Jones*, 279 Mich App 86, 93; 755 NW2d 224 (2008), this Court held "that a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused." This is true even when the sniff is conducted at a residence, considering that, "[w]hether or not a heightened expectation of privacy exists, the fact remains that a canine sniff reveals only evidence of contraband" and "there is no legitimate expectation of privacy" in contraband. *Id.* at 94. The *Jones* panel stated that "[a]ny intrusion on defendant's expectation of privacy was insufficient to find a Fourth Amendment infringement, given that the canine sniff could only intrude to the extent that illegal drugs or activities, for which there is no legitimate privacy interest, were detectable." *Id.* at 96. The Court concluded that the canine sniff did not violate the defendant's constitutional rights, where, as here, "the canine was lawfully present at the front door of defendant's residence when it detected the presence of contraband." *Id.* at 94.

Defendant did not argue below, nor has he asserted on appeal, that the dog was not legally present on his premises when it conducted the sniff and alerted police to the presence of drugs. Thus, under *Jones*, the use of the dog did not constitute a search; therefore, contrary to the trial court's ruling, it was unnecessary to establish probable cause in support of, and prior to conducting, the dog sniff. While the Florida Supreme Court held to the contrary in *Jardines,* 73

So 3d at 49-50, a judicial decision from a foreign jurisdiction is not precedentially binding in Michigan, *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007), and the trial court was required to follow controlling precedent established by a published decision of this Court "until a contrary result is reached by this Court or the Supreme Court takes other action," *Holland Home v Grand Rapids*, 219 Mich App 384, 394; 557 NW2d 118 (1996).

Because this Court's decision in *Jones* established that the use of the drug dog did not constitute a search which itself had to be supported by a finding of probable cause, it was properly considered by the judge in issuing the warrant. Furthermore, an affidavit which indicates, as here, that a properly trained narcotics dog alerted its handler to the presence of drugs is sufficient to establish probable cause that contraband is present. *Jones*, 279 Mich App at 90 n 2; *People v Clark*, 220 Mich App 240, 243; 559 NW2d 78 (1996). Therefore, the trial court erred in granting defendant's motion to suppress.

A substantial portion of defendant's appellate brief is devoted to, essentially, rearguing the *Jones* case and applauding the dissenting opinion. Nevertheless, *Jones* remains binding precedent. Defendant suggests that, if the panel finds that it is compelled to follow and apply *Jones* pursuant to MCR 7.215(J)(1), we hold the case in abeyance pending the United States Supreme Court's decision in *Jardines.* Of course, there is also the option under MCR 7.215(J)(2) and (3) to call for the convening of a conflict panel if we disagree with *Jones*. However, we find it unnecessary to entertain either of these options because, assuming *Jones* is effectively overruled by the United States Supreme Court or that it was wrongly decided, there is no basis to invoke the exclusionary rule even with a constitutional violation. Another reason for us to examine the exclusionary rule is that defendant adamantly argued below that the Michigan Medical Marijuana Act (MMMA), MCL 333.26421 *et seq*., negated all or certain aspects of *Jones*, which was issued before the MMMA took effect, regardless of the fact that defendant did not have a registry identification card under the MMMA. Although defendant does not renew the argument on appeal, our position regarding the inapplicability of the exclusionary rule renders irrelevant the MMMA argument even had it been presented on appeal and assuming it to be a legally sound argument.

Michigan recognizes the good-faith exception to the exclusionary rule. *People v Goldston*, 470 Mich 523, 543; 682 NW2d 479 (2004). Under that exception, suppression is not required where "[t]he police officers' reliance on the district judge's determination of probable cause and on the technical sufficiency of the search warrant was objectively reasonable." *Id.* at 542. The exclusionary rule is to be applied on a case-by-case basis, and suppression is only appropriate when it furthers the purpose of the rule, which is to deter police misconduct. *Id.* at 539, 543. Suppression remains a proper remedy (1) "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," (2) if "the issuing magistrate wholly abandoned his judicial role," such that "no reasonably well trained officer should rely on the warrant," (3) if the warrant is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" and (4) if the warrant is "so facially deficient – *i.e.*, in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *United States v Leon*, 468 US 897, 923; 104 S Ct 3405; 82 L Ed 2d 677 (1984) (citations omitted).

Here, there was no misleading or false information in the police affidavit, there was no indication that the issuing judge wholly abandoned his judicial role, the affidavit was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, and the warrant was not facially deficient. Rather, the reliance by the police on the judge's probable cause determination and on the technical sufficiency of the search warrant was objectively reasonable. Considering this Court's holding in *Jones*, the police could reasonably conclude that they were acting within constitutional limits when going to the front door of the building with a trained narcotics detection dog and then obtaining a search warrant based on a positive response to narcotics by the dog. There was no police misconduct.

In *Davis v United States*, __ US __; 131 S Ct 2419, 2427-2429; 180 L Ed 2d 285 (2011), the United States Supreme Court discussed the Fourth Amendment, the exclusionary rule, and the good-faith exception to the rule, noting:

> The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way."
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> "[I]solated," "nonrecurring" police negligence . . . lacks the culpability required to justify the harsh sanction of exclusion.
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> Indeed, in 27 years of practice under *Leon*'s good-faith exception, we have "never applied" the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct. [Citations omitted.]

Especially relevant here, the *Davis* Court held "that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Davis*, 131 S Ct at 2423-2424. The Supreme Court elaborated:

> About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn what is required of them under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than act as a reasonable officer would and should act under the circumstances. The deterrent effect of exclusion in such a case can only

> be to discourage the officer from doing his duty. [*Id.* at 2429 (citations, alterations, internal quotations omitted; emphasis in original).]

Here, the police acted in conformity with this Court's binding decision in *Jones*. We recognize that the police were certainly aware of the subsequent enactment of the MMMA, but it would be unreasonable to demand that the police engage in their own legal analysis concerning *Jones* and the MMMA, make a conclusion regarding the MMMA's impact on the decision in *Jones*, and then proceed in accordance with their independent, non-judicial finding. Even *assuming* that the police needed to contemplate the MMMA's effect on dog sniff matters, that *Jones* was wrongly decided, or that the MMMA actually negates some or all of the holding in *Jones*, the police conduct here, at worst, amounted to simple, isolated negligence, not deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights. We find that innocent, good-faith police conduct was involved and that the police lacked the culpability required to justify the harsh sanction of exclusion. Accordingly, we reverse the trial court's order granting defendant's motion to suppress the evidence and dismiss the charges.

Reversed and remanded for reinstatement of the charges against defendant. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck