

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
April 22, 2014

v

JESSE LAWRENCE HOLT, a/k/a JESSE
LAWRENCE HOLT,

No. 302017
Wayne Circuit Court
LC No. 10-007922-FH

Defendant-Appellee.

ON REMAND

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Our Supreme Court remanded this case for reconsideration of the circuit court's orders suppressing evidence and dismissing charges, in light of *Florida v Jardines*, 569 US ___; 133 S Ct 1409; 185 L Ed 2d 495 (2013), and *Davis v United States*, 564 US ___; 131 S Ct 2419; 180 L Ed 2d 285 (2011). The remand requires this Court to decide whether, under *Davis*, the police in this case conducted the search in objectively reasonable reliance on binding appellate precedent. We conclude that the search conformed to precedent that was binding at the time of the search. Accordingly, we again reverse and remand to the circuit court.

I. FACTS AND PROCEDURAL HISTORY

The charges in this case arose out of the execution of a search warrant at defendant's residence. We described the circumstances of the search in our first opinion, as follows:

The affidavit for the warrant stated that after receiving unofficial complaints about distribution of controlled substances at the residence, the affiant monitored activity at the residence for 45 minutes. During that time, the affiant observed a man leave the residence with a black bag. The following day, a police canine handler with a drug dog went to the front door of the residence, and the dog indicated the presence of narcotics. Police subsequently obtained and executed the warrant and seized evidence from defendant's residence. [*People v Holt*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2014 (Docket No. 302017, unpub op p 1).]

The prosecutor charged defendant with possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant moved to suppress the evidence, and the circuit court granted the motion. The court then dismissed the charges.

The prosecution appealed to this Court, and we held that the circuit court erred when it failed to follow *People v Jones*, 279 Mich App 86; 755 NW2d 224 (2008), concerning the use of trained drug-sniffing dogs. Defendant appealed to our Supreme Court. While our Supreme Court was reviewing defendant's appeal, the United States Supreme Court issued *Jardines*, 569 US ___; 133 S Ct 1409. In pertinent part, the *Jardines* majority concluded that police must comply with Fourth Amendment requirements when using a drug-sniffing dog within the curtilage of a home. 569 US ___; 133 S Ct at 1417. Our Supreme Court then issued an order reversing this Court's judgment in this case. *People v Holt*, 494 Mich 863; 831 NW2d 241 (2013).

However, upon the prosecution's motion for reconsideration, our Supreme Court vacated its initial order and remanded the case to this Court for reconsideration in light of *Jardines*, 569 US at ___; 569 133 S Ct 1409, and *Davis*, 564 US ___; 131 S Ct 2419. See *People v Holt*, 495 Mich 851; 835 NW2d 576 (2013).

II. JARDINES AND DAVIS

The *Jardines* case arose after police received a tip that Jardines was growing marijuana in his home. 569 US at ___; 133 S Ct at 1413. Police sent a surveillance team to the home. *Id.* Although the surveillance team did not observe any activity, two detectives approached the home with a trained drug-sniffing dog. *Id.* The dog alerted near the front door. *Id.* The police obtained a search warrant on the basis of the dog's alert. *Id.* When the police executed the warrant, they found marijuana plants. *Id.* Jardines later moved to suppress that evidence and contended that the search was unconstitutional. *Id.* The *Jardines* Court concluded that the use of the trained police dog near the front door of the home without a warrant was a Fourth Amendment violation. *Id.*, 569 US at ___; 133 S Ct at 1417-1418.

In this case, as in *Jardines*, officers brought a trained dog to the outside of defendant's home without a warrant. As our Supreme Court initially noted, under *Jardines* the officers' actions in this case could be deemed an unconstitutional search. However, as our Supreme Court indicated in the controlling remand order, the *Jardines* holding does not end the analysis. We must determine whether reversal is required under *Davis*, 564 US ___; 131 S Ct 2419.

In *Davis*, the issue was whether evidence must be suppressed "when the police conduct a search in compliance with binding precedent that is later overruled." 564 US at ___; 131 S Ct at 2423. The *Davis* Court explained, "[b]ecause suppression would do nothing to deter police misconduct [in the circumstances at issue], and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." 564 US at ___; 131 S Ct at 2423-2424.

This Court analyzed and applied the *Davis* rule in *People v Mungo (On Second Remand)*, 295 Mich App 537, 547-556; 813 NW2d 796 (2012) (*Mungo III*). In *Mungo III*, the question was whether the circuit court erred by suppressing evidence found during a police search of a car. 295 Mich App at 539-540. The Court determined that the car search was constitutionally permissible when the police conducted it, but that a case decided after the search rendered the search unconstitutional. *Id.* at 553, 556. The Court concluded that under *Davis*, the circuit court erred by suppressing the evidence obtained in the search “[b]ecause the search was constitutional under existing law at the time of the search.” *Id.* at 556.

III. APPLICATION OF *JARDINES* AND *DAVIS*

After analyzing the holdings in *Jardines* and *Davis*, we again conclude that reversal of the circuit court’s decision is required. When this Court first reviewed the evidentiary issue, we found the issue governed by *People v Jones*, 279 Mich App 86; 755 NW2d 224 (2008). Both *Jones* and this case involved a trained police dog’s response as the basis of the probable cause for a search warrant. *Id.* at 90. In *Jones*, this Court held that the use of the dog was not a Fourth Amendment violation. *Id.* at 95. Neither party argues that the facts of *Jones* are appreciably different from the facts of this case. Moreover, *Jones* was founded on settled Michigan precedent. Our Court upheld the constitutionality of front porch searches since at least 2001, when we decided *People v Custer (On Remand)*, 248 Mich App 552, 559-562; 640 NW2d 576 (2001).

Under *Jones*, the use of a trained police dog near defendant’s front door was constitutionally permissible at the time the police used the dog in this case. Police reliance on the *Jones* precedent was objectively reasonable at the time. According to *Davis*, evidence obtained in a search should not be suppressed if the search was constitutional under the precedent that existed at the time of the search. Therefore, the circuit court erred by suppressing the evidence in this case.

IV. DEFENDANT’S OTHER ARGUMENTS

Defendant maintains in his supplemental brief that no reasonable officer could find the search warrant affidavit to have been facially valid. We disagree. When this case was first before us, we determined:

There is authority holding that an affidavit need not include a complete history of a drug dog’s reliability. *United States v Kennedy*, 131 F3d 1371, 1377 (CA 10, 1997), cert den 525 US 863; 119 S Ct 151; 142 L Ed 2d 123 (1998); accord, *United States v Sundby*, 186 F3d 873, 876 (CA 8, 1999); *United States v Berry*, 90 F3d 148, 153 (CA 6, 1996). Even if we were to agree with defendant’s position, the good-faith exception to the warrant requirement would preclude suppression of the evidence because the dog’s alert outside defendant’s door created probable cause to believe that there was contraband on the premises. In light of authority holding that a detailed history of the dog’s training and reliability need not be included in the affidavit, the police reliance on the warrant was not objectively unreasonable. See *People v Goldston*, 470 Mich 523, 531, 542-543; 682 NW2d

479 (2004) (adopting the good-faith exception to the exclusionary rule). [*Holt*, unpub op p 2].

For these reasons, we again reject defendant's argument.

Defendant raises two other related arguments in his supplemental brief. He first contends that the prosecution forfeited any reliance on an exception to the exclusionary rule by failing to raise the exception in the circuit court. Defendant also maintains that the prosecution failed to present any evidentiary support for its claim that the search warrant affiant was in fact relying in good faith upon *Jones*.

We reject these arguments. First, defendant's argument that the prosecution has forfeited the ability to argue *Davis* is inconsistent with our Supreme Court's order that we consider this case in light of *Davis*. Second, defendant's argument that the prosecution presented no factual evidence that the search warrant affiant relied on *Jones* is inconsistent with the *Davis* holding that searches must be conducted in "*objectively* reasonable reliance on binding appellate precedent." 564 US at ___, 131 S Ct at 2423-2424 (emphasis added). In the circumstances of this case, the prosecution was not required to present evidence concerning the affiant's subjective reliance on precedent.

V. CONCLUSION

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck