STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 29, 2012
v BOB JARVIS RIVERA, Defendant-Appellee.	No. 307315 Wayne Circuit Court LC No. 11-007524-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v SANDRA DANIELLE STACKPOOLE, Defendant-Appellee.	No. 307316 Wayne Circuit Court LC No. 11-007502-FH

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

PER CURIAM.

Defendants Bob Rivera and Sandra Stackpoole were each charged with manufacture of marijuana, MCL 333.7401(2)(d)(*ii*), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*), and possession of Vicodin, MCL 333.7403(2)(b)(*ii*), after drugs were found at their residence during the execution of a search warrant. The trial court granted their motions to suppress the evidence and thereafter dismissed the charges. The prosecutor appeals as of right the orders of dismissal. We reverse and remand for reinstatement of the charges.

The police received a citizen tip about defendant Rivera. The tip, according to the affidavit submitted by an officer in support of the request for a search warrant, related "to narcotic trafficking and/or use at" the house. After the police discovered that defendant Rivera had a prior conviction for possession of a controlled substance, a police canine handler took his trained narcotic detection dog to the house. While at the front door of the house, the dog, according to the search warrant affidavit, "gave a positive indication for the presence of narcotic

odor." The police obtained and executed a search warrant for the house, which led to the discovery of drugs inside the home.

Defendant Rivera 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. Defendant Rivera also asserted that he had a registry identification card issued under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., and that the dog's response would not justify a search because, to the extent the dog detected marijuana, it was "detecting legal activity." Defendant Stackpoole joined in the motion. The trial court ruled that persons with a registry identification card issued under the MMMA have a legitimate expectation of privacy in their marijuana and, therefore, the use of a drug dog constitutes a search that must be supported by "more detailed information" than that provided in the affidavit.

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. Assuming arguendo that the information in the search warrant affidavit apart from that relating to the use of the drug dog did not establish probable cause for issuance of a warrant, 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. *People v Jones*, 279 Mich App 86, 90 n 2; 755 NW2d 224 (2008); *People v Clark*, 220 Mich App 240, 243; 559 NW2d 78 (1996). However, suppression may still be appropriate if "the use of the dog is itself the result of illegal" police conduct. *Id.*

In *Jones*, 279 Mich App at 93, 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."[1] This is true even when the sniff is conducted at a residence because "[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

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[1] Defendants do not claim that the dog was not legally present on their property.

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.

We find it unnecessary to determine whether the enactment of the MMMA effectively altered the holding in *Jones*, which was issued before the MMMA took effect, such that the conduct of the police now violated defendants' rights to be secure against unreasonable searches and seizures. Even were we to find a constitutional violation, there is no valid reason to invoke the exclusionary rule under the circumstances presented; therefore, the evidence is admissible and there is no basis for dismissal of the charges.

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 magistrate 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 magistrate's probable cause determination and on the technical sufficiency of the search warrant was objectively reasonable. Considering this Court's holding in *Jones*, 279 Mich App 86, the police could reasonably conclude that they were acting within constitutional limits when going to the unobstructed front door of a home 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 the case at bar.

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, and *assuming* 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.[2] 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 orders granting defendants' motions to suppress the evidence and dismiss the charges.

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

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

[2] We note that the United States Supreme Court will soon be hearing the case of *Jardines v State*, 73 So 3d 34 (Fla, 2011), cert gtd __ US __; 132 S Ct 995; 181 L Ed 2d 726 (2012), wherein the Florida Supreme Court held contrary to this Court's decision in *Jones*. Given our ruling disposing of this case on the basis of the exclusionary rule, even should the United States Supreme Court effectively overrule *Jones* and similarly-decided cases, it will not impact our ruling.