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⚖ Vol. 22, No. 49, December 8, 2014

Case Name: [Michael Eric Rendon v. The State of Texas](#)

- OFFENSE: Possession of Marijuana & Money Laundering
- COUNTY: Victoria
- C/A CASE No. 13-13-0665-CR & 13-13-0666-CR
- DATE OF OPINION: December 4, 2014
- DISPOSITION: Trial Court Affirmed OPINION: [Benavides, J.](#)
- TRIAL COURT: 377th D/C; Hon. Robert Cheshire
- LAWYERS: [Edward Bartolomei](#) (Defense); [Brendan Guy](#) & [Stephen Tyler](#) (State)

(Background Facts) On May 8, 2012, Victoria, Texas police officers conducted a drug investigation at an apartment complex located on Bingham Street following a confidential informant's tip. The police's target suspect was Appellant, who was a resident of the apartment complex. Victoria Police Detective Jason Stover and his police-trained dog, Baco, assisted other officers in the investigation. Stover testified that Baco initially conducted a warrantless "open-air sniff" of the exterior of Appellant's parked vehicle, which was located in the apartment complex's parking lot. Following the sniff, Baco exhibited a "positive alert to the presence of narcotics." At that point, other Victoria police officers approached Appellant's apartment, but Appellant exited his apartment and greeted the officers before they were able to knock on his apartment door. The other officers spoke to Appellant outside of his apartment, and the officers later advised Stover "by radio" to approach Appellant's residence with Baco. Stover and Baco arrived at Appellant's apartment door, and Baco again conducted a warrantless sniff of the apartment's door and "alerted [Stover] to the odor of illegal narcotics." After the positive alert, Stover returned Baco to his police unit and joined the other officers outside of Appellant's apartment. Police officers then requested Appellant's consent to search his apartment, but Appellant declined. Stover testified that because Appellant declined consent to search his apartment, he applied for a search warrant of Appellant's apartment and vehicle. In his search warrant application affidavit, Stover noted Baco's "positive" alerts to the odor of narcotics from the "open-air sniff" outside of Appellant's vehicle, as well as after sniffing the "bottom left portion" of Appellant's apartment door. Stover's application for the search warrant was granted by a magistrate and executed the same day.

⚖ **31.024 Search & Seizure / Probable Cause:** After his arrest, Appellant was charged with possession of marijuana and money laundering and filed a motion to suppress in each respective case. Appellant sought to suppress, in relevant part, any and all evidence that was seized by the Victoria Police Department pursuant to the execution of Stover's search warrant. Appellant attacked the warrant on Fourth and Fourteenth Amendment grounds, as well as under Article I,

Sections 9, 10, and 19 of the Texas Constitution. Specifically, Appellant asserted that Stover's affidavit lacked probable cause to support the search and arrest. At the consolidated suppression hearing, Appellant's counsel argued that Baco's sniff of Appellant's apartment door was an unconstitutional search under the Fourth Amendment, and thus, insufficient probable cause supported the warrant. The trial court agreed and granted Appellant's motions. The State asserts that the trial court erred.

Holding: The United States Supreme Court recently addressed the constitutionality of the use of drug-sniffing dogs in [Florida v. Jardines](#), (No. 11-564; 03/26/2013)(see [§§](#), [Vol. 21, No. 13](#); 04/01/2013). In [Jardines](#), the Court reiterated that “when ‘the Government obtains information by physically intruding’ on persons, houses, papers, or effects, ‘a search within the original meaning of the Fourth Amendment’ has ‘undoubtedly occurred.’” *** According to Detective Stover's testimony and affidavit requesting a search warrant, Baco sniffed the “bottom left portion” of [Appellant]'s apartment door and indicated the odor of narcotics “from within” [Appellant]'s apartment. However, facts from the record support [Appellant]'s curtilage argument, including that (1) [Appellant]'s apartment was the only apartment on the upper-left side of the building; (2) [Appellant]'s neighbor, John Crook, who lives in the apartment on the upper-right side of the building, testified that he hangs plants along the railing in front of his apartment; and (3) Defendant's Exhibit 3, a photograph of [Appellant]'s apartment building taken from the parking lot, depicts that [Appellant]'s downstairs neighbor has chairs in the area immediately in front his apartment as well. Logically, this means that at the time of Baco's sniff, [Appellant]'s door was closed, and the sniff occurred immediately in front of the apartment's door. Based on this record, we conclude that the area immediately in front of [Appellant]'s apartment is no different from the front porch of a free-standing home. Thus, bringing a trained police dog to sniff the bottom left portion of [Appellant]'s apartment door in hopes of discovering incriminating evidence exceeded the scope of any express or implied license allowed under the Fourth Amendment. (“Residual Probable Cause”) After reviewing the four corners of the affidavit “in a commonsensical and realistic manner,” *** and giving the appropriate deference to the magistrate, *** we cannot conclude that the remaining “independently acquired and lawful information stated in the affidavit” clearly establishes probable cause to search [Appellant]'s apartment. After setting aside Baco's sniff of [Appellant]'s apartment door, the remaining allegations contained in Detective Stover's affidavit focus on establishing [Appellant]'s identity and his use of the Chevrolet vehicle to transport drugs. Nothing in the remainder of the affidavit establishes that under the totality of the circumstances, there was a fair probability that contraband or evidence of a crime would be found inside of [Appellant]'s apartment. *** Therefore, we conclude that the magistrate did not have a substantial basis for concluding that probable cause existed to search [Appellant]'s apartment.