

**Court of Criminal Appeals**  
**April 29, 2015**

***State v. Le***

No. PD-0605-14

Case Summary written by Morgan Shell, Staff Member.

JUDGE NEWELL delivered the opinion of the court.

After obtaining a search warrant from the magistrate, police seized 358 marijuana plants from inside the residential house of two Asian males in Houston, Texas. The magistrate granted a search warrant after a concerned citizen alerted the police of an odor of marijuana emanating from the appellee's house, which two sergeants who had advanced training in marijuana detection and indoor grow operations verified. The concerned citizen observed that two males would arrive at the residence for short amounts of time and leave, never conducting normal household activities. The sergeant conducted several nighttime surveillances of the residence, and in one instance, approached the front door and detected the distinct odor of raw marijuana. The sergeant then conducted a traffic stop on the appellee and after detecting additional odors of marijuana coming from the car, requested a narcotics-detection canine to the appellee's residence; the canine alerted them to the smell of raw marijuana. This alert and the citizen and sergeant's affidavits proved sufficient to the magistrate for the issuance of a search warrant of appellee's residence.

The appellee was indicted for felony possession of marijuana. Before the court heard appellee's hearing on a motion to suppress, the Supreme Court ruled in *Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013) that law enforcement's use of a narcotics-detection canine on the front porch of a home without a search warrant violated the Fifth Amendment. In light of this new holding the Court was tasked with determining whether the search warrant, without the drug-dog's alert, clearly established probable cause sufficient to issue a search warrant.

Under a proper totality of the circumstances analysis, the Fourteenth Court of Appeals affirmed the lower court's holding that there was not probable cause without the evidence of the illegal dog-sniff. Ordinarily the reviewing court gives great deference to the magistrate's determination of probable cause. But when part of an

affidavit is excluded, the reviewing court must determine whether the lawfully acquired information clearly established probable cause.

Here, the Court of Criminal Appeals drew “inculpatory inferences from the stated facts in the affidavit as characteristic with the operation of indoor marijuana grow operations.” Using the Supreme Court’s holding in *Johnson v. United States*, 333 U.S. 10, 13 (1948), it observed that the court had never held the affidavit of a qualified affiant attesting to the odor of marijuana insufficient to justify a search warrant. Under a proper totality of the circumstances analysis the Court of Criminal Appeals determined that, even without the dog-sniff evidence, the sergeant’s legal human odor detection, the citizen’s verified observances, and the smell of marijuana in the appellee’s car was sufficient to establish the probable cause necessary to issue a search warrant.

JUDGE MEYERS and JUDGE ALCALA, dissenting separately.

The dissent agreed with the trial court and Fourteenth Court of Appeals that when one eliminated the dog-sniff evidence, there was insufficient evidence to support a finding of probable cause. The concerned citizen’s tip to the officer was unsupported and speculative. While the tip may have suggested that there was peculiar activity at the residence, it was a stretch to infer that there was a marijuana-grow operation inside. Equally speculative was the officer’s inference that the air-conditioning unit that was running on a cold day remained on to keep the heated grow lamps inside the residence from damaging the plants. It was also insufficient to infer the presence of a marijuana-grow operation from the officer’s single instance of smelling marijuana from the front door of the appellee’s residence. Without the dog-sniff evidence, the dissenting judges found the remaining events, even taken together, to be insufficient to conclude that there was probable cause to issue a search warrant into appellee’s residence.

### ***Absalon v. State***

N0. PD-0340-14

Case Summary written by Jana L. Simons, Staff Member.

JUDGE MEYERS delivered the opinion of the court, in which JUDGE KEASLER, JUDGE HERVEY, JUDGE ALCALA, JUDGE

RICHARDSON, and JUDGE YEARY joined. PRESIDING JUDGE KELLER, JUDGE JOHNSON, and JUDGE NEWELL concurred.

In 1984 Ginger Hayden was murdered. In an unrelated 1986 case, the appellant plead guilty to a charge of criminal mischief that resulted in probation and required him to complete a substance abuse program as a condition of the agreement. During the appellant's time in rehabilitation, he purportedly admitted to the 1984 murder, which remained unresolved. In 2010, the appellant was arrested and charged with the murder of Ginger Hayden. During trial, testimony from three fellow substance abuse program participants alleged that the appellant provided various details of how he concealed himself in the victim's home, and once she was asleep, he emerged and stabbed her to death. DNA evidence facilitated the appellant's murder conviction resulting in a sentence of life incarceration in 2012.

Both the Texas Rules of Evidence and Code of Criminal Procedure stipulate that evidence provided at voluntary treatment is inadmissible at trial. The appellant filed a motion to strike the testimony from evidence based on the voluntary nature of the treatment but the trial court refused to grant the motion. The trial court determined that the appellant participated in a substance-abuse program ordered by the court as a result of his criminal mischief plea agreement and was simply an avoidance of jail time; thus the rehabilitation was involuntary. Following the conviction and sentencing, the defendant appealed.

ISSUE: Whether the appellant's substance abuse treatment was voluntary in order to necessitate the exclusion of the evidence.

In addition to arguing that the treatment was voluntary, the appellant referred to the plea agreement in the context of a voluntary contract and asserted that information divulged at the substance abuse program was bound by the confidentiality of the patients. On the other hand, the state argued that the rehabilitation program was a compulsory element of his plea agreement and because the deal was generally accepted to be the lesser punishment between incarceration or probation, the appellant was in fact presented only one option. Because the alternatives were unbalanced in favor of the probation, failing to accept the plea agreement did not constitute a viable option.

The court ultimately agreed with the state's position that because completion of the program was an element of the agreement, it was

involuntary. Additionally, the court clarified the dichotomy of a voluntary patient and a patient agreeing to attend a substance abuse program to avoid greater consequences; the latter encompassed the appellant in this case. The court stated that if a patient, who submits freely and willingly to rehabilitation in an effort to better one's life, chooses to leave, he or she may do so. Alternatively, the consequence of the appellant's early departure from the program would be incarceration. Thus, his participation in the program was not analogous to a voluntary participant. In reality, the appellant was bound by the contractual agreement and repercussions of the arrangement. Therefore, a voluntary agreement does not necessarily imply voluntary treatment.

Finally, the court determined that because the facility provided the rehabilitation service, not the court, the patient was not entitled to confidentiality. The actual agreement between the appellant and the court made no mention of an agreement of confidentiality. Therefore, the court concluded that the information provided during testimony of the appellant's fellow rehabilitation patients was effectively obtained during involuntary treatment and not subject to confidentiality.