

Court of Criminal Appeals
August 21, 2015

State v. Cuong Phu 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.

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.