IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2101
DCA CASE NO. 3D07-1615

JOELIS JARDINES,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

ON APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar No. 0230987

ROLANDO A. SOLER
Assistant Attorney General
Florida Bar No. 0684775
Attorneys for the State of Florida
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, FL 33131
Telephone:(305) 377-5441
Facsimile: (305) 377-5655

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

STATEMENT OF THE FACTS AND THE CASE

The statement of the facts and the case, according to the Third District's written opinion, are as follows:

> The State of Florida appeals from an order suppressing evidence seized pursuant to a search warrant executed on the home of Joelis Jardines. We reverse because the trial court erred in ruling that the magistrate lacked probable cause to issue the warrant and because the evidence suppressed was admissible under the "inevitable discovery" doctrine.
>
> On December 5, 2006, William Pedraja, an officer with the Miami-Dade Police Department, obtained a search warrant from Miami-Dade County Court Judge George Sarduy. The warrant was supported by a probable cause affidavit which identified the premises to be searched, detailed Officer Pedraja's extensive experience in detecting hydroponic marijuana laboratories and the methods and equipment used in such laboratories, and stated:
>
> > "Your Affiant's" reasons for the belief that "The Premises" is being used as [a marijuana hydroponics grow lab] and that "The Property [consisting of marijuana and the equipment to grow it]" listed above is being concealed and stored at "The Premises" is as follows:
> >
> > On November 3, 2006, "Your Affiant" detective William Pedraja, # 1268, received information from a crime stoppers tip that marijuana was being grown at the described residence.
> >
> > On December 5, 2006, "Your Affiant" conducted surveillance at the residence and observed no vehicles in the driveway. "Your

Affiant" also observed windows with the blinds closed. **"Your Affiant" and Detective Doug Bartelt with K-9 drug detection dog "FRANKY" approached "The Premises" in an attempt to obtain a consent to search. While at front door [sic], "Your Affiant" detected the smell of live marijuana plants emanating from the front door of "The Premises."** The scent of live marijuana is a unique and distinctive odor unlike any other odor. Additionally, K-9 drug detection dog "FRANKY" did alert to the odor of one of the controlled substances he is trained to detect. "Your Affiant," in an attempt to obtain a written consent to search, knocked on the front door of "The Premises" without response. "Your Affiant" also heard an air conditioning unit on the west side of the residence continuously running without recycling. The combination of these factors is indicative of marijuana cultivation.

Based upon the positive alert by narcotics detector dog "FRANKY" to the odor of one or more of the controlled substances that she is trained to detect and "FRANKY" [sic] substantial training, certification and past reliability in the field in detecting those controlled substances, it is reasonable to believe that one or more of those controlled substances are present within the area alerted to by "FRANKY." Narcotics Canine handler, Detective Bartelt, Badge number 4444, has been a police officer with the Miami-Dade Police Department for nine years. He has been assigned to the Narcotics Bureau for six years and has been a canine handler since May 2004. In the period of time he has been with the Department, he has participated in over six hundred controlled substances searches. He has attended the following training and received certification as a canine handler....

> Since becoming a team, Detective Bartelt and narcotics detector canine "FRANKY" have received weekly maintenance training.... Narcotics detector canine "FRANKY" is trained to detect the odor of narcotics emanating from the following controlled substances to wit: marijuana.... To date, narcotics detector canine "FRANKY" has worked approximately 656 narcotics detection tasks in the field. He has positively alerted to the odor of narcotics approximately 399 times. "FRANKY'S" positive alerts have resulted in the detection and seizure of approximately 13,008 grams of cocaine, 2,638 grams of heroin, 180 grams of methamphetamine, 936,614 grams of marijuana, both processed ready for sale and/or live growing marijuana.
>
> WHEREFORE, Affiant prays that a Search Warrant be issued ... to search "The Premises" above-described....

(Emphasis added).

A search conducted pursuant to the warrant resulted in seizure of live marijuana plants and the equipment used to grow them, and resulted in Jardines being charged with trafficking in cannabis and theft for stealing the electricity needed to grow it.

Jardines, relying primarily on *State v. Rabb*, 920 So.2d 1175 (Fla. 4th DCA 2006), moved to suppress arguing that no probable cause existed to support the warrant because: (1) the dog "sniff" constituted an illegal search; (2) Officer Pedraja's "sniff" was impermissibly tainted by the dog's prior "sniff"; and (3) the remainder of the facts detailed in the affidavit were legally insufficient to give rise to probable cause.

We reverse the trial court's determination that "the use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search" and that

> the evidence seized at Jardines' home must be suppressed. We do so because, first, a canine sniff is not a Fourth Amendment search; second, the officer and the dog were lawfully present at the defendant's front door; and third, the evidence seized would inevitably have been discovered.

State v. Jardines, --- So.2d ----, 33 Fla. L. Weekly D2455, 2008 WL 4643082, *1-*2 (Fla. 3rd DCA October 22, 2008).

The Third District expressly declined to follow the decision of the Fourth District Court of Appeal in State v. Rabb, 920 So.2d 1175 (Fla. 4th DCA 2006), which held that a dog sniff at the front door of a home constituted a search, and certified direct conflict with that decision as follows:

> In sum, we reverse the order suppressing the evidence at issue. We conclude that no illegal search occurred. The officer had the right to go up to defendant's front door. Contrary to the holding in *Rabb*, a warrant was not necessary for the drug dog sniff, and the officer's sniff at the exterior door of defendant's home should not have been viewed as "fruit of the poisonous tree." The trial judge should have concluded substantial evidence supported the magistrate's determination that probable cause existed.

State v. Jardines, at *7.

However, as an alternative basis for reversing the trial court's order granting defendant's motion to suppress evidence, the Third District determined that "[e]ven if the dog sniff constituted an illegal search, the evidence seized at

Jardines' home would still be admissible under the inevitable discovery rule." State v. Jardines, at *6. The Third District explained that "[b]oth the affidavit and the evidence adduced below confirm that an investigation was already well under way, and Officer Pedraja had already decided to knock on Jardines' front door to see if he could obtain consent to search, by the time the dog got involved. Thus, even in the absence of the canine search, Officer Pedraja would, pursuant to normal police practices, have detected the scent of marijuana as he approached Jardines' door." State v. Jardines, at *7. Accordingly, the Third District concluded:

> Moreover, the evidence at issue should not have been suppressed because its discovery was inevitable. To the extent our analysis conflicts with *Rabb*, we certify direct conflict. To the extent that Judge Gross' dissent in *Rabb* is consistent with this analysis we adopt his reasoning as our own. *See Rabb*, 920 So.2d at 1196 (Gross, J., dissenting). Reversed and remanded.

State v. Jardines, at *7.

SUMMARY OF ARGUMENT

Respondent concedes that there is express and direct conflict between the Third District's decision in State v. Jardines, --- So.2d ----, 33 Fla. L. Weekly D2455, 2008 WL 4643082 (Fla. 3rd DCA October 22, 2008), and the Fourth District's decision in Rabb v. State, 920 So.2d 1175, 1179 (Fla. 4th DCA 2006), *review denied*, 933 So.2d 522 (Fla.2006), *cert. denied*, - U.S. -, 127 S.Ct. 665, 166

L.Ed.2d 513 (2006) as to the issue of whether Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) or Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) governs a dog sniff of a residence. Therefore, this Court has discretionary jurisdiction to review this issue.

However, as an alternative basis for reversing the trial court's order granting defendant's motion to suppress evidence, the Third District determined that, even if the dog sniff constituted an illegal search, the evidence seized would still be admissible under the inevitable discovery rule. As to this issue, Respondent submits that there is no conflict between the decision of the Third District, and the decision of the Fourth District in Rabb v. State or any other district court decision. In fact, Jardines has not sought review of this alternative basis for reversal, and there is little likelihood that this Court would review that issue.

In sum, even if this Court were to grant discretionary review of the dog sniff issue and Petitioner were successful on this issue, the inevitable discovery doctrine would nonetheless require that the order granting suppression of the evidence be reversed. Therefore, a review of this case would likely result in unnecessary delay which would benefit neither party.

ARGUMENT

THERE IS NO BASIS FOR DISCRETIONARY REVIEW OF THE DISTRICT COURT'S ALTERNATIVE BASIS FOR REVERSING THE TRIAL COURT'S ORDER, AND THEREFORE, THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION IN THIS CASE.

While the State agrees that this Court has discretionary jurisdiction to review the conflict certified between the Third and Fourth Districts with respect to the Rabb decision, the State submits that this Court should nevertheless decline to exercise review in the instant case. As the Third District issued its opinion on alternative grounds, - i.e, the inevitable discovery doctrine - the ultimate outcome of any decision by this Court as to the Rabb conflict will have no effect on the admissibility of the evidence in this case. While this Court does have the discretion to entertain issues beyond those which provide the jurisdictional basis for granting review, see Angrand v. Key, 657 So.2d 1146, 1148 at n. 3 (Fla. 1995), as a general rule, this Court declines to do so. See, e.g., Asbell v. State, 715 So.2d 258, 258 (Fla. 1998) ("We also decline to review petitioner's second point on review as it is beyond the scope of the conflict issue."); Williams v. State, 863 So.2d 1189 (Fla. 2003) ("We decline to address the additional issue raised by Williams that is beyond the scope of the conflict issue.).

Here, it is clear that, as to the inevitable discovery issue, there is absolutely no conflict between the decision of the Third District, and the decision of the Fourth District in Rabb v. State or any other district court decision. In fact, Jardines has not sought review of this alternative basis for reversal. Further, there is no disagreement between the parties, or between the majority and the dissent as to the well-settled applicable law; the issue is purely factual. Moreover, it appears that even the facts are not in dispute, and that it is not likely that Petitioner would succeed on this issue. The dissent opined that the problem was "that the dog handler went to the porch first, and informed the detective that the dog had a positive alert. It was with this knowledge of the positive alert that the detective then went to the front door and smelled marijuana. In light of this time sequence, the second identification is tainted by the first." State v. Jardines, at *12. However, Respondent respectfully submits that this is not at all inconsistent with, and does not undermine, the majority's determination that "[b]oth the affidavit and the evidence adduced below confirm that an investigation was already well under way, and Officer Pedraja had already decided to knock on Jardines' front door to see if he could obtain consent to search, by the time the dog got involved. Thus, even in the absence of the canine search, Officer Pedraja would, pursuant to

normal police practices, have detected the scent of marijuana as he approached Jardines' door." State v. Jardines, at *7.

Accordingly, this Court should not grant jurisdiction on this issue. See e.g., Kelly v. Community Hosp. of Palm Beaches, 818 So.2d 469, 470 n. 1 (Fla.2002) (declining to address issues that were beyond the scope of this Courts conflict jurisdiction); Heidbreder v. State, 613 So.2d 1322, 1323 (Fla.1993) (declining to address the issue lying beyond the scope of conflict jurisdiction); Wood v. State, 750 So.2d 592, 595 n. 3 (Fla.1999) (declining to address issues beyond the scope of the certified conflict).

In sum, even if this Court were to grant discretionary review of the dog sniff issue and Petitioner were successful on this issue, the inevitable discovery doctrine would nonetheless require that the order granting suppression of the evidence be reversed. Therefore, a review of this case would likely result in unnecessary delay which would benefit neither party.

CONCLUSION

WHEREFORE, the State of Florida respectfully requests an Order of this Court declining to exercise its discretionary review jurisdiction in this case.

Respectfully Submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

and

ROLANDO A. SOLER
Florida Bar Number 0684775
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar Number 230987

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, and that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENT was mailed this _____ day of _____, 2008, to Howard Blumberg, Esq., Office of the Public Defender, 1320 NW 14th Street, Miami, Florida 33125.

ROLANDO A. SOLER
Florida Bar Number 0684775
Assistant Attorney General