

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-606

DCA NO. 3D08-483
Consolidated with 3D08-598

TOMAS ARIAS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

On Review from the District Court of Appeal, Third District

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INTRODUCTION

This petition requests review of Arias v. State, 2010 WL 680701, 35 Fla. L. Weekly D490 (Fla. 3d DCA Feb. 24, 2010). Although the decision was issued as a per curiam affirmance without a written opinion, this Court has jurisdiction to review the case. Jurisdiction is based on the fact that the district court of appeal cited as controlling authority a case that is pending review under this Court's conflict jurisdiction: State v. Jardines, 9 So. 3d 1 (Fla. 3d DCA 2008) (SC08-2101). See Jolie v. State, 405 So. 2d 418, 420 (Fla. 1981) (even after 1980 amendment to article V, section 3, of the Florida Constitution, per curiam opinion which cites as controlling authority a decision pending review in supreme court continues to constitute prima facie express conflict and allows supreme court to exercise its jurisdiction); State v. Lofton, 534 So. 2d 1148, 1149 (Fla. 1988) (same).

STATEMENT OF THE CASE AND FACTS¹

Tomas Arias was charged with one count of trafficking in cannabis and one count of theft of electricity. (R. 14-17) The charges were filed in May 2007 after Detective Kevin Donnelly prepared a probable cause affidavit (SWR. 5-10), obtained a warrant to

¹ In this brief, the following abbreviations are used: "R." for the clerk's record, consisting of one volume of documents; "SR." for the supplemental clerk's record, consisting of two volumes of transcripts of court hearings, along with additional documents; and "SWR." for documents related to the search warrant, which were the subject of a motion to supplement the record that was granted by the district court of appeal.

search a residence (SWR. 2-4), seized marijuana inside the residence (SWR. 11), and arrested Mr. Arias. (SWR. 1)

Defense counsel filed a motion to suppress (R. 19-54), arguing that Donnelly lacked the requisite probable cause necessary for the issuance of a residential search warrant, based either on the “alerting” of a drug-sniffing police dog outside the home or on other evidence independent of the alert. The court held a hearing on the motion. (SR. 11-54)

The following facts are established by statements made by Donnelly in the search warrant affidavit (SWR. 5-10), as well as testimony provided by Donnelly and K-9 officer Lazaro Valdez at the hearing on the motion. (SR. 11-42)

On April 23, 2007, Detective Donnelly received an anonymous “crime stoppers” tip regarding a suspected marijuana grow house. (SWR. 6; SR. 12). On May 1, 2007, Donnelly went to the house with other officers. (SWR. 6; SR. 13) He wanted to knock on the door and try to get written consent to search the house. (SR. 13) Accompanying Donnelly were Sergeant Jose Ramirez, Detective Lazaro Valdes. and Valdes’s drug-detecting dog, “Babe.” (SR. 13, 14)

Donnelly saw that there were three vehicles parked in front of the house. He also noticed that all the blinds of the house were closed. (SWR. 6) He approached the front door along with Valdes and his dog. (SWR. 3) They all approached within seconds of

each other, basically simultaneously. (SR. 15-16, 30) "Babe" alerted to the odor of one of the controlled substances he/she is trained to detect (SWR. 6; SR. 30), i.e., marijuana, cocaine, heroin, hashish, methamphetamine, and ecstasy. (SWR. 8) Valdes testified that he immediately informed Donnelly that the dog had alerted (SR. 33) by giving a "thumbs up." (SR. 37) Donnelly saw the thumbs up. (SR. 40) After that, Donnelly mentioned that he had smelled something. (SR. 37, 42) Valdes did not smell anything. (SR. 32, 40)

Donnelly testified that he talked to "K-9" and was told there was a positive alert. He also detected the smell of live marijuana emanating from the closed front door. (SWR. 6; SR. 15, 17) But he didn't say anything at the time. (SR. 16)

At the time the affidavit was prepared, "Babe" was receiving weekly "maintenance training," including controlled negative testing and distractor training; had worked approximately 725 narcotics detections tasks in the field; and had positively alerted to the odor of narcotics approximately 614 times. These alerts resulted in the seizure of marijuana, including live growing plants and processed marijuana. (SWR. 8)

After "Babe" alerted, Donnelly knocked on the front door, but got no response. (SWR. 7; SR. 14, 16) He heard an air conditioning unit on the east side of the premises, continually running without recycling. According to Donnelly, "This is a common practice with a hydroponics laboratory because of the high intensity lights that generate

extreme heat.” (SWR. 7)

Donnelly concluded, “Based upon the positive alert by narcotics detector dog ‘Babe’ to the odor [of certain controlled substances] and ‘Babe[’s]’ 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 ‘Babe.’” (SWR. 7; SR. 18 [stating that, after talking to Det. Valdez about the dog alerting, Donnelly determined he had probable cause for a warrant])²

In a detailed order (R. 55-61), the trial court denied the motion to suppress. The case proceeded to trial. After a jury was selected (SR. 67-210), Mr. Arias asked if the court would entertain the plea offer that was withdrawn by the State when the jury was sworn. After conducting a plea colloquy (SR. 214-221), the court accepted Mr. Arias’s plea, adjudicated him guilty, and sentenced him to prison. (SR. 225; R. 66-68, 69-71) Mr. Arias reserved his right to appeal the denial of his motion to suppress. (SR. 218, 226)

² The affidavit also contained a summary of the training and experience of Detective Donnelly (SWR. 7, 9) and Detective Valdes. (SWR. 6-7)

A timely notice was filed by the Public Defender's Office. (R. 73 [subsequently assigned case no. 3D08-598])³

After the case was briefed, on December 23, 2009, the district court of appeal affirmed the conviction in a per curiam affirmance without a citation. Appellate counsel filed a motion for a written opinion, which was granted on February 24, 2010. The order granting the motion stated, "[T]his Court's opinion issued December 23, 2009 is withdrawn and the citation opinion issued herewith is substituted in its stead. The mandate is stayed pending the decision in the Supreme Court in *Jardines v. State*, SC08-2101."

A notice of intention to invoke the discretionary jurisdiction of this Court was filed on March 24, 2010. This brief is timely. See Fla. R. App. P. 9.120(d); 9.420(e).

SUMMARY OF ARGUMENT

The district court of appeal denied relief to Mr. Arias in reliance on State v. Jardines, 9 So. 3d 1 (Fla. 3d DCA 2008). The facts and the legal issue raised in Mr. Arias's case are identical in all relevant respects to the facts and the legal issue raised in Jardines. For the same reasons this Court accepted review of Jardines – and to assure consistent results and equal treatment of Mr. Jardines and Mr. Arias, who is equally

³ Before the judgment and sentence were officially "rendered" by filing the signed orders with the clerk of the court, Mr. Arias filed a pro se notice of appeal. (R. 65) The case was assigned case number 3D08-483. The two appeals were later consolidated under the first assigned case number. (R. 77)

situated – this Court should exercise its jurisdiction in this case.

ARGUMENT

THIS COURT CAN AND SHOULD EXERCISE ITS
JURISDICTION TO REVIEW MR. ARIAS'S CASE FOR THE
SAME REASONS THAT THE COURT ACCEPTED REVIEW OF
STATE V. JARDINES

The facts and the legal issue raised in Mr. Arias's case are identical in all relevant respects to the facts and legal issue raised in State v. Jardines, 9 So. 3d 1 (Fla. 3d DCA 2008).

In Jardines, the defendant was charged with trafficking in cannabis and theft for stealing electricity, after his home was searched pursuant to a search warrant. He filed a motion to suppress, arguing that no probable cause existed to support the search warrant because (1) the dog "sniff" constituted an illegal search; (2) the officer's "sniff" was impermissible 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. His motion was granted, and the State appealed. The district court of appeal reversed, holding that the use of a drug detector dog at the defendant's house did not constitute a search and that, even if the drug search constituted an illegal search, the marijuana plants and the equipment used to grow them were still admissible under the inevitable discovery doctrine. State v. Jardines, 9 So. 3d 1 (Fla. 3d DCA 2008) (certifying, at page 10, direct conflict with State v. Rabb, 920 So. 2d 1175 (Fla. 4th DCA 2006)).

In this case, Mr. Arias was charged with trafficking in cannabis and theft of electricity after his home was searched pursuant to a search warrant. He filed a motion to suppress, arguing that the police lacked the requisite probable cause necessary for the issuance of a residential search warrant, based either on the “alerting” of a drug- sniffing police dog outside the home or on other evidence independent of the alert. His motion was denied, and he appealed. His conviction was affirmed by the district court of appeal in a per curiam affirmance without a written decision but with a citation to State v. Jardines that acknowledged the pendency of that case in this Court. (See A). For the same reasons this Court accepted review of Jaridines – and to assure consistent results and equal treatment of Mr. Jardines and Mr. Arias, who is equally situated – this Court should exercise its jurisdiction in this case.

CONCLUSION

For the foregoing reasons, Tomas Arias urges this Court to exercise its discretionary jurisdiction in this case, and grant review.

Respectfully submitted,
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APPENDIX

District Court of Appeal decision in Arias v. State, 3D08-483

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Brief of Petitioner on Jurisdiction has been furnished by mail to Rolando A. Soler, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, this _____ day of April 2010

BILLIE JAN GOLDSTEIN
Assistant Public Defender

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief was typed using 14-point proportionately spaced Times New Roman font, pursuant to Florida Rules of Appellate Procedure, Rules 9.100(1) and 9.210.

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