In the
Court of Appeals
Fifteenth District of Texas at Arlington

No. 15-16-00034-CV

THE STATE OF TEXAS
Appellant

V.

DIXIE HERBSTER
Appellee

On Appeal from the 202nd District Court
Linchfield County, Texas
The Honorable Shivali Sharma
Trial Court No. 50031

Before Tucker, C.J., Wright, J. and Franks, J.
Opinion by Tucker, Chief Justice

OPINION

After Dixie Herbster was charged with possession of marihuana, the trial court granted her motion to suppress evidence on the grounds that: (1) marihuana found on Herbster's person was obtained following an illegal arrest not supported by probable cause; and (2) additional marihuana found in a garage and a vehicle allegedly belonging to Herbster was obtained following an illegal canine search. On appeal, the State challenges each of these grounds. We will affirm the trial court's order.

I. Factual Background

At the hearing on the motion to suppress, Deputy Leif Olson of the Linchfield County Sheriff's Department testified that on the night of March 16, 2016, his office received an anonymous tip reporting "loud music" and "possible narcotics activity" at a condominium located within the city limits of Linchfield. Olson and another deputy, Clint Harbour, were dispatched to the condo to investigate. Olson testified that because narcotics were reportedly involved, they brought along the Department's police-trained canine, Sniffy. According to Olson, when they arrived at the condo community, they heard what Olson characterized as "loud 80s music" coming from the unit that had been reported. Olson noted that the condo buildings were "triplex-style," with each building containing three adjoining units, one on the right side of the building, one on the left side of the building, and one in the middle. The unit that had been reported to the police was 1B, a middle unit. Each building also had its own detached three-car garage, located approximately 50 yards behind the building, with a sidewalk connecting each garage to the condo building. According to the governing documents of the condo community, the garage was considered common property, for use by all three unit owners in each building. Similar to the

condos, each garage was divided into three separate but adjoining units with common walls. Each garage unit had only enough space for a single vehicle to park inside. The governing documents of the condo community provided that the garages were to be used for vehicle storage only and not for any other activities. Each garage unit had its own vehicle entrance door and a back door leading out to a green, grassy area separating the garages from the condos (in other words, each garage building had three vehicle entrances and three back boors). The green, grassy area was also considered common property and was accessible to all of the owners and their guests. The garage also had windows along the back wall, from which the grassy area outside the garage was visible. Also, there were additional parking spaces adjacent to the garages that were also considered common property and were accessible to all of the owners and their guests.

Olson testified that he had Sniffy conduct a warrantless "open-air sniff" of the grassy area outside the garage, as well as the parking spaces on either side of the garage (all of which were occupied by vehicles), the sidewalk leading away from the garage, and the exterior of the garage itself. According to Olson, Sniffy exhibited a "positive alert for narcotics" at the vehicle entrance to the middle garage unit (corresponding to condo unit 1B), which was open at the time. Olson testified that the lights in the garage were off, but he could see a single vehicle parked inside. Olson testified that even though the vehicle entrance to the garage was open, neither he nor Sniffy entered the interior of the garage. On the back side of the garage, the door leading to the sidewalk was closed and locked. Olson also had Sniffy smell the closed back door to the garage, and the dog exhibited another positive alert for narcotics both outside the door and along the sidewalk leading to the condo. Finally, Olson had Sniffy smell the exterior of the vehicles that were parked in the additional parking spaces adjacent to the garage. Olson testified that Sniffy exhibited another positive alert for one of the vehicles, a pink Toyota Camry with a license plate that read,

"Dixie." After Sniffy had finished sniffing around the premises surrounding the garage, Olson returned to his patrol vehicle with Sniffy and placed the dog inside the vehicle, where Sniffy remained for the remainder of the officers' time at the house. The dog never approached the condo itself. In the vehicle, Olson began the process of drafting an affidavit to obtain a search warrant for the garage. Attached to his affidavit was a diagram of the property that Olson had drawn himself. A copy of this diagram was admitted into evidence as State's Exhibit 1, after the parties had agreed that the diagram provided a fair and accurate visual representation of the property.

While Olson was preparing the search-warrant affidavit, Harbour approached the front door of the condo and knocked on the door. The door was answered by a young woman who identified herself as Dixie Herbster. There were several other people inside the unit at the time, all of whom, according to Harbour, appeared to be "having a party" and "enjoying the loud music." Harbour testified that he proceeded to ask Herbster what was going on and whether the condo belonged to her. According to Harbour, Herbster told him that she did not own the condo but was subleasing the unit from her friend, Jesse Pinkman, and that Pinkman had given her permission to throw a party at the condo. Harbour asked to see a copy of the sublease agreement, and Herbster retrieved a copy from inside and brought it to the door. Harbour browsed the agreement and noticed that it contained the signatures of both Herbster and Pinkman and appeared to be a valid contract. However, Harbour also observed that the effective date of the contract was the following day. Harbour also asked other guests to disclose who had invited them to the party. Harbour testified that he received conflicting responses, with some guests telling him that Herbster had invited them to what she had called her "housewarming party," other guests indicating that they had been invited by Pinkman to what he had called a "cooking party," and a few other guests saying that they had been invited to the condo by a man named Walter White, who they claimed

owned the condo and was throwing a "going away [for good] party." Because Harbour was aware that there were narcotics possibly located on the premises, and realizing that ownership of the condo might become an issue, Harbour asked Herbster if he could call Pinkman and ask him who owned the condo. Herbster provided Harbour with Pinkman's number, and Harbour proceeded to call Pinkman.

Harbour testified that Pinkman told him that he had rented the condo from Walter White and that Harbour could "confirm it with Walter." Pinkman also told Harbour that although the sublease with Dixie was not yet "officially effective," he had given Herbster permission to throw a party at the condo that night. When Harbour asked Pinkman to return to the condo to answer more questions in person, Pinkman refused, telling Harbour that he was afraid he might "get arrested" if he returned. Harbour then asked Pinkman if he had anything stored in the garage. Pinkman told Harbour, "Maybe," and then hung up the phone. Harbour tried calling Pinkman again, but the phone went straight to voicemail.

Harbour then asked Herbster if she had Walter White's phone number. Herbster answered in the affirmative and told Harbour that White's number was in her phone. Herbster then gave Harbour her phone so that the officer could use it to call White. According to Harbour, during his conversation with White, White told him that he was trying to work out a lease agreement with Pinkman but had not yet done so and that it was his understanding that Pinkman would not have the authority to sublease the condo to anyone, based on the prohibition on subleases in the condo's governing documents. White also told Harbour that Herbster and the other partygoers did not have his permission to be in the condo that night. When Harbour informed Herbster that White was denying that he had given Herbster permission to be there, Herbster vigorously maintained that she had been given permission, by Pinkman. Harbour testified, "Dixie told me that Pinkman had

told her that Mr. White had 'definitely' agreed to let Dixie occupy the condo, as soon as White and Pinkman had reached an agreement on the lease." Harbour continued, "Dixie also told me that Pinkman had informed her that he and White had, that day, reached an agreement, and that Pinkman had told her that she could have a party that night to celebrate, although Pinkman had cautioned Dixie that he had not received permission from White to host a party on the premises." Harbour testified that in his opinion, Herbster honestly believed that she had permission to be at the condo that night. However, Harbour added that White was similarly adamant in his claim that he had not given Herbster or anyone other than Pinkman permission to be in the condo, especially not to throw a party. Additionally, everyone to whom Harbour had spoken seemed to be in agreement that White was the owner of the condo. Therefore, after finishing his conversation with White, Harbour decided to arrest Herbster for criminal trespass and disorderly conduct and told the other guests to leave the premises immediately.

Harbour then searched Herbster incident to the arrest, and discovered a plastic baggie in her pants pocket that contained a leafy green substance that was later determined to be marihuana. As Harbour walked Herbster to the patrol vehicle, he asked her if the pink Toyota Camry belonged to her and whether she was using the garage or if it was still being used by either Pinkman or White. Herbster admitted that the Camry belonged to her but told Harbour, "The garage belongs to me, Jesse, and Walter. We all use it. Perhaps. Or maybe none of us use it." Harbour replied, "Whatever you say, ma'am. But may I look inside the garage?" Herbster told him, "Absolutely not."

After Herbster had been booked into the county jail, officers obtained and executed a search warrant for the garage and the Camry, based solely on the results of the dog sniff. Additional marihuana was found inside both the garage and the Camry, and Herbster was charged with

possessing all of it, along with the marihuana that had been found on her person. Prior to trial, Herbster filed a motion to suppress the evidence, which the trial court granted following a hearing. In its written ruling, the trial court included the following findings of fact and conclusions of law:

1. The condo was owned by Walter White.
2. Walter White had rented the condo to Jesse Pinkman.
3. Pinkman had authority to act on behalf of White.
4. Herbster had subleased the condo from Pinkman.
5. Herbster believed that she had permission to occupy the condo on the night in question.
6. Herbster did not have the necessary intent to commit the offense of criminal trespass.
7. The "loud music" emanating from the condo was not sufficient to constitute the offense of disorderly conduct.
8. Deputy Harbour did not have probable cause to arrest Herbster for criminal trespass or disorderly conduct. *See Wesby v. District of Columbia*, 765 F.3d 13 (D.C. Cir. 2014).
9. The marihuana found on Herbster's person during the search incident to her arrest was illegally obtained.
10. The detached garage and the area surrounding it, including the adjacent vehicle parking spaces, were included within the curtilage of the condo.
11. The canine search of the garage violated Herbster's reasonable expectation of privacy. *See Kyllo v. United States*, 533 U.S. 27 (2001); *Katz v. United States*, 389 U.S. 347 (1967).
12. The canine searches of the garage exterior and of the automobile parked outside the garage were illegal. *See Florida v. Jardines*, 133 S. Ct. 1409 (2013); *State v. Rendon*, 477 S.W.3d 805 (2015).
13. The marihuana found in Herbster's garage was illegally obtained.

This appeal by the State followed.

II. Standard of review

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion and overturn the ruling only if it is arbitrary, unreasonable, or "outside the zone of reasonable disagreement." *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014); *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We apply a bifurcated standard of review, *Weems v. State*, 493 S.W.3d 574, 577 (Tex. Crim. App. 2016); *see State v. Saenz*, 411 S.W.3d 488, 494 (Tex. Crim. App. 2013) (citing *Guzman v. State*, 955 S.W.2d 85, 87-89 (Tex. Crim. App. 1997)) (reviewing court applies bifurcated standard of review to trial court's findings of fact and conclusions of law regarding motion to suppress), giving almost total deference to the court's determination of historical facts if supported by the record, but reviewing the trial court's application of the law to those facts de novo. *Weems*, 493 S.W.3d at 577; *Story*, 445 S.W.3d at 732; *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). We view the evidence in the light most favorable to the ruling, *State v. Robinson*, 334 S.W.3d 776, 778 (Tex. Crim. App. 2011), and uphold the court's ruling if the record reasonably supports it and it is correct on any theory of law applicable to the case, *Weems*, 493 S.W.3d at 577; *Valtierra*, 310 S.W.3d at 447-48.

III. Deputy Harbour did not have probable cause to arrest Herbster

"The Fourth Amendment to the Constitution of the United States guarantees that '[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated.'" *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009) (quoting U.S. Const.

amend. IV). "This guarantee was made applicable to the states by the Due Process Clause of the Fourteenth Amendment." *Id*. (citing *Mapp v. Ohio*, 367 U.S. 643, 650 (1961)). "Under the Fourth Amendment, a warrantless arrest for an offense committed in the officer's presence is reasonable if the officer has probable cause." *Id*. (citing *United States v. Watson*, 423 U.S. 411, 418 (1976)).

"'Probable cause' for a warrantless arrest exists if, at the moment the arrest is made, the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a prudent man in believing that the person arrested had committed or was committing an offense." *Id*. (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). "The test for probable cause is an objective one, unrelated to the subjective beliefs of the arresting officer, and it requires a consideration of the totality of the circumstances facing the arresting officer." *Id*. (citing *Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Beck*, 379 U.S. at 97). "A finding of probable cause requires 'more than bare suspicion' but 'less than . . . would justify . . . conviction.'" *Id*. (citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). We review de novo whether an officer had probable cause to make a warrantless arrest. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996).

The State contends that Deputy Harbour was justified in arresting Herbster for the offenses of criminal trespass and disorderly conduct. Thus, we must look to the relevant statutes to identify the elements of each of those offenses. *See Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). ("Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law."). Upon examination of the statutes in question, we conclude that no reasonable officer could have found that there was probable cause to arrest Herbster for either crime.

A. Criminal trespass

A person commits the offense of criminal trespass "if the person enters or remains on or in property of another . . .without effective consent and the person had notice that the entry was forbidden." Tex. Penal Code § 30.05(a)(1). "Notice" means oral or written communication by the owner or someone with apparent authority to act for the owner. *Id*. § 30.05(b)(2)(A). "'Effective consent' includes consent by a person legally authorized to act for the owner. Consent is not effective if given by a person the actor knows is not legally authorized to act for the owner." *Id*. § 1.07(19)(B).

The probable-cause inquiry in this case, we conclude, centers on the culpable mental state for criminal trespass and whether "a reasonable officer with the information that the officer[] had at the time of the arrest[] could have concluded that [Herbster] knew or should have known [she] had entered the [condo]" without the "effective consent" of the owner, and intended to act in the face of that knowledge. *See Wesby v. District of Columbia*, 765 F.3d 13, 20 (D.C. Cir. 2014), *cert. granted*, No. 15-1485, 2017 U.S. LEXIS 788 (Jan. 19, 2017). Following the reasoning in *Wesby*, which we find to be persuasive, we conclude that the evidence summarized above compels a conclusion that Herbster had every reason to believe that she had permission to occupy the condo on the night in question. Accordingly, there was no probable cause for Deputy Harbour to believe that Herbster had entered the condo knowing that she did not have "effective consent" to be there.

B. Disorderly conduct

A person commits the offense of disorderly conduct if she "makes unreasonable noise . . . in or near a private residence that [she] has no right to occupy." Tex. Penal Code § 42.01(a)(5). In this case, the only evidence of "unreasonable noise" was the report of "loud music," combined with the deputies' testimony tending to show that they heard "loud music" once they arrived at the

condo. We cannot conclude that "loud music," standing alone, gives rise to probable cause to arrest someone for disorderly conduct. Additional evidence would be needed.

Because Deputy Harbour did not have probable cause to arrest Herbster for either criminal trespass or disorderly conduct, the arrest was illegal, as was the search incident to that arrest. Accordingly, the trial court did not abuse its discretion in concluding that the marihuana found on Herbster's person was illegally obtained.

We overrule the State's first issue.

IV. The canine search was illegal

Just as Herbster's arrest violated the Fourth Amendment, so did the canine search that preceded it. As the United States Supreme Court has observed, "when it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). A person has the right "to retreat into his own home and there be free from unreasonable governmental intrusion," *Silverman v. United States*, 365 U.S. 505, 511 (1961), and "[t]his right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." *Jardines*, 133 S. Ct. at 1414. But that is precisely what occurred here. Even if the sublease agreement was not yet "official" at the time of the search, the condo belonged to Herbster for all practical purposes. And Deputy Olson entered the curtilage of Herbster's private property, searched the curtilage of that property using a drug-sniffing dog, and came upon evidence of contraband. Similar searches have been found to be illegal by both the United States Supreme Court and the Texas Court of Criminal Appeals. *See Jardines*, 133 S. Ct. at 1415-18; *State v. Rendon*, 477 S.W.3d 805, 808-11 (Tex. Crim. App. 2015). Although the area that was searched in this case was different than the areas that were searched in *Jardines* and

Rendon, we conclude that the same Fourth Amendment principles apply to a person's garage and the area surrounding the garage, even when the garage is detached from the home, and even when the garage and the surrounding area is not exclusively owned by the homeowner.

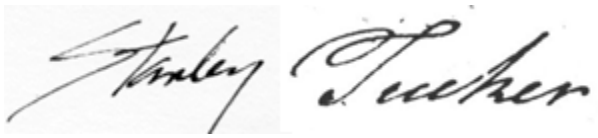
However, even if the "physical-intrusion theory" announced in *Jardines* did not apply here, we would nevertheless affirm the trial court's order on the ground that the search in this case violated Herbster's reasonable expectation of privacy. *See Kyllo v. United States*, 533 U.S. 27 (2001); *Katz v. United States*, 389 U.S. 347 (1967); *see also Jardines*, 133 S. Ct. at 1418-20 (Kagan, J., concurring); *Rendon*, 477 S.W.3d at 811-13 (Richardson, J., concurring).

Finally, we note that this is not a case in which the warrant was supported by probable cause even without the dog sniff. *See State v. Cuong Phu Le*, 463 S.W.3d 872, 877 (Tex. Crim. App. 2015). In this case, there was no basis for the warrant other than the canine sniff.

We overrule the State's second issue.

V. Conclusion

We affirm the trial court's order granting the motion to suppress.



Stanley Tucker

Chief Justice

FRANKS, Justice (Dissenting)

With all due respect, I believe that the majority's analysis in this case is deeply flawed. First, I believe Herbster's arrest was supported by probable cause. As an initial matter, I would decline to follow *Wesby* here. The "unlawful entry" statute in that case is not the same as the "criminal trespass" statute in this case, and they contain very different elements. For that reason alone, I find *Wesby* unpersuasive. But even if the Texas statute were identical to the District of Columbia statute, I would be more persuaded by the dissenting opinion in *Wesby*. The evidentiary threshold for finding probable cause is lower than the threshold for finding guilt. Although I am skeptical that, on this record, a jury would convict Herbster for either criminal trespass or disorderly conduct, I believe Deputy Harbour had more than enough evidence to at least arrest her for committing either of those offenses. Finally, I observe that the United States Supreme Court has recently granted certiorari in *Wesby*. Therefore, I would be hesitant to rely on that case in any manner, especially here. We are dealing with Texas statutes. We should rely on Texas cases when analyzing the elements of those statutes, in my humble opinion.

The legality of the canine search presents a closer question, in my opinion. The answer depends in large part on whether the detached garage and the surrounding area is considered curtilage. The factors to consider include: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States v. Dunn*, 480 U.S. 294, 301 (1987). In my opinion, application of these factors in this case counsels against a holding that the garage and the surrounding area constitutes curtilage. I would add that, because this is a close question, I think

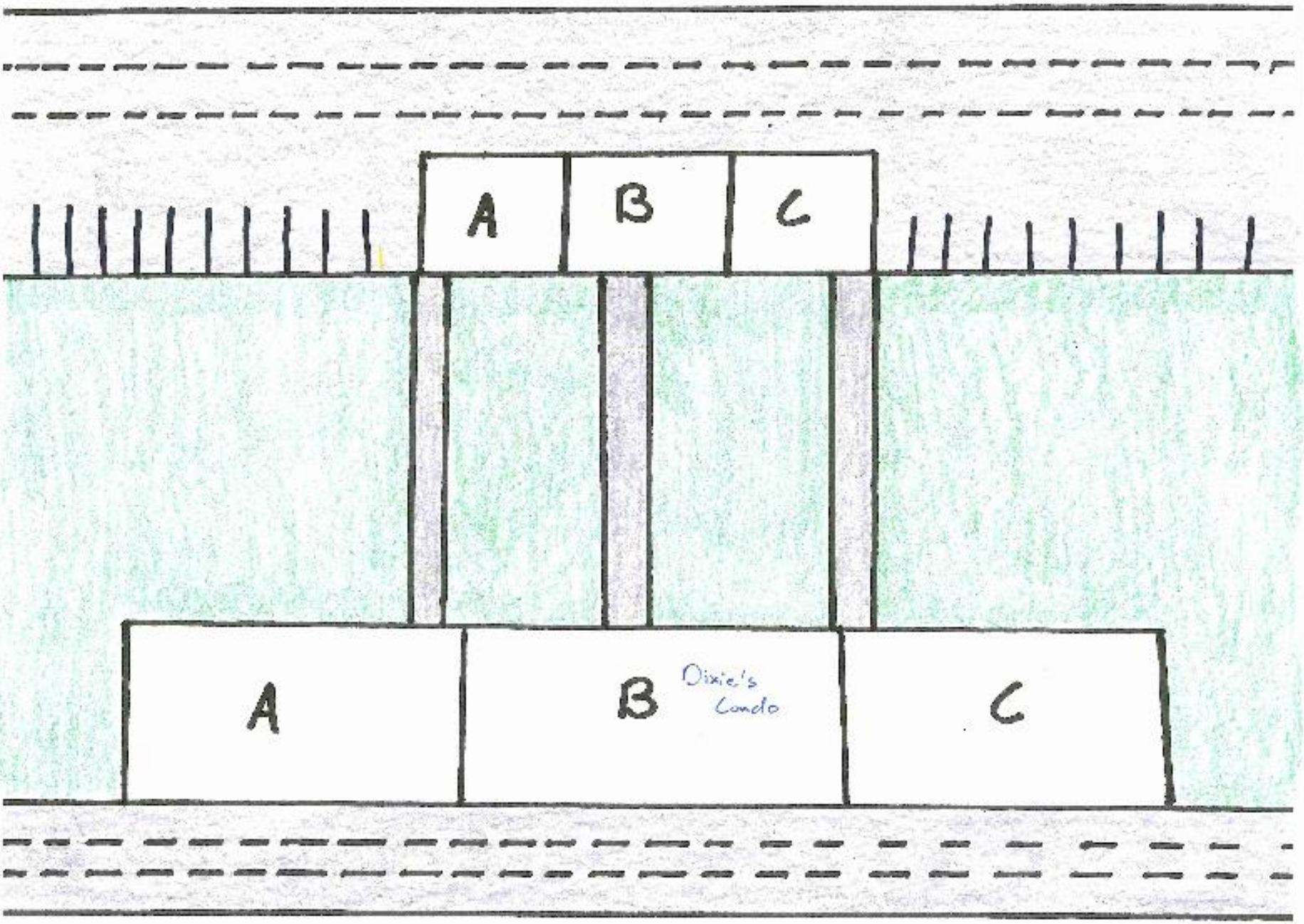
that we should at least consider whether the good-faith exception to the exclusionary rule would apply here. *See, e.g.*, *United States v. Holley*, 831 F.3d 322, 326-27 (5th Cir. 2016).

Finally, did Herbster really have a *reasonable* expectation of privacy in a garage that, by her own admission, she shared with others and that, according to the governing documents of the condo community, was considered common property? I am deeply skeptical of such a claim, particularly in light of the fact that this particular garage had windows through which the interior was visible by neighboring homeowners. And Herbster most certainly did not have a reasonable expectation of privacy in the grassy area surrounding the garage and in the parking spaces next to the garage, where the Camry containing drugs was parked.

In sum, I would conclude that Herbster's Fourth Amendment rights were not violated in this case. Because the majority does not, I respectfully dissent.

Lisa Franks
Justice

Date Submitted: January 31, 2017
Date Decided: February 10, 2017



State's Exhibit 1