

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RAMON MIGUEL ANGEL MORENO,
Petitioner.

No. 2 CA-CR 2014-0191-PR
Filed September 17, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20102029001

The Honorable Brenden J. Griffin, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Jacob R. Lines, Deputy County Attorney, Tucson
Counsel for Respondent

Law Office of Robert Louis Murray, Tucson
By Robert L. Murray
Counsel for Petitioner

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Presiding Judge Miller concurred.

ESPINOSA, Judge:

¶1 Ramon Moreno petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., in which he claimed that *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409 (2013), is a significant change in the law applicable to his case. We will not disturb that ruling unless the court clearly has abused its discretion. See *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Moreno has not met his burden of demonstrating such abuse here.

¶2 After a jury trial, Moreno was convicted of possession of marijuana for sale and possession of drug paraphernalia. He was sentenced to concurrent prison terms, the longest of which was 15.75 years. This court affirmed his convictions and sentences on appeal. *State v. Moreno*, No. 2 CA-CR 2012-0018 (memorandum decision filed Jan. 17, 2013). In our memorandum decision, we described the events leading to Moreno's arrest:

Tucson Police Department [d]etectives Cheek and Ridgeway were driving through a neighborhood for an unrelated investigation when Cheek rolled down the vehicle's windows and smelled an odor of fresh marijuana while approaching an intersection. The detectives continued with the unrelated investigation before they returned to the intersection and approached the closest residence. The odor was not coming from that residence so they walked north and noticed the odor became stronger and was coming from a duplex.

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Cheek approached a pickup truck parked in front of the duplex and smelled a slight odor of marijuana coming from the truck's bed cover. Cheek then approached the duplex and smelled marijuana mixed with the smell of a deodorizer coming from the front windows and door of the duplex. Cheek looked through part of the blinds on one of the windows and saw deodorizer spray and a roll of packaging tape. He then knocked on the front door and Moreno came outside, shutting the door behind him. Cheek noticed Moreno had a piece of marijuana residue on the front of his shirt. Cheek also smelled a stronger odor of marijuana coming from inside the house as Moreno stepped through the door and shut it behind him. Cheek detained Moreno and applied for a search warrant for Moreno's residence. Officers found 160 pounds of marijuana in the residence and a drug ledger in Moreno's pocket. Moreno was arrested and charged with possession of marijuana for sale and possession of drug paraphernalia.

Id. ¶ 2.

¶3 In February 2014, Moreno filed a petition for post-conviction relief claiming that *Jardines* was a significant change in the law purportedly "re-defin[ing] the rights of officers to come onto the curtil[a]ge of a home to investigate possible criminal activity." In *Jardines*, a law enforcement officer briefly monitored Jardines's residence based on "an unverified tip that marijuana was being grown" there. ___ U.S. at ___, 133 S. Ct. at 1413. The officer then approached the residence with a drug-sniffing dog, which alerted for narcotics at the base of the home's front door. *Id.* Based on that information, the officer obtained a warrant that led to the discovery of marijuana plants in the residence and Jardines's arrest. *Id.* The

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Court determined that, by entering the home's curtilage with a trained police dog, the officer exceeded any "customary invitation" to enter the home's curtilage and approach the front door, thus violating *Jardines's* Fourth Amendment rights. *Id.* at ___, 133 S. Ct. at 1414-18.

¶4 Based on that reasoning, Moreno argued that the detectives "were not acting like members of the public," but "were instead aggressively pursuing an investigation by intruding onto the resident's property in a manner which violated [his] reasonable expectation of privacy." The trial court summarily dismissed Moreno's petition. The court determined *Jardines* was inapplicable to Moreno's case because it "doesn't involve a drug-sniffing dog," and the detectives' "entry onto and subsequent warrantless search of Moreno's curtilage was lawful under the 'plain smell' exception to the warrant requirement" because the detectives had "smelled the marijuana from a public road." The court also noted the detectives were permitted to knock on Moreno's door and speak with him.

¶5 To obtain relief, Moreno must demonstrate not only that *Jardines* constitutes a significant change in the law, but also is applicable to his case and would probably overturn his conviction or sentence. *See* Ariz. R. Crim. P. 32.1(g). Even if *Jardines* qualifies as a significant change in the law,¹ we agree with the trial court that it does not apply to Moreno's case. Moreno argues the trial court's analysis was "oversimplified," insisting that the officers "did not confirm that the [marijuana] smell was coming from his home until they were standing on the front porch, looking through venetian blinds." But Moreno's argument is inconsistent with the facts—the smell of marijuana led the detectives directly to his front door. Moreover, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any

¹"Rule 32 does not define 'a significant change in the law.' But plainly a 'change in the law' requires some transformative event, 'a clear break from the past.'" *State v. Shrum*, 220 Ariz. 115, ¶ 15, 203 P.3d 1175, 1178 (2009), quoting *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991).

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private citizen might do.’” *Jardines*, ___ U.S. at ___, 133 S. Ct. at 1416, quoting *Kentucky v. King*, ___ U.S. ___, ___, 131 S. Ct. 1849, 1862 (2011). The subjective intent of the detectives in approaching Moreno’s door is irrelevant. See *State v. Kosman*, 181 Ariz. 487, 490-91, 892 P.2d 207, 210-11 (App. 1995). Moreno’s argument suggests the detectives’ license to approach his front door is somehow limited because the detectives could smell marijuana before they did so. We find nothing in *Jardines* supporting that reasoning.

¶6 Additionally, the officer in *Jardines* had no reason except an unverified tip to enter the defendant’s property with a drug-sniffing dog. Here, the detectives smelled marijuana from public property and followed that odor to Moreno’s front door. Even assuming the detectives violated some privacy interest by approaching Moreno’s front door, the circumstances fall within the “plain smell” exception to the warrant requirement—the detectives initially smelled the marijuana from “a public place where anyone, including the police, had a right to be.” *Kosman*, 181 Ariz. at 490, 892 P.2d at 210. The discovery was inadvertent, and the evidentiary value was immediately apparent. See *Mazen v. Seidel*, 189 Ariz. 195, 197, 940 P.2d 923, 925 (1997).

¶7 For the reasons stated, although review is granted, relief is denied.