No. 124289

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court
	)	of Illinois, Third District,
Plaintiff-Appellant,	)	No. 3-15-0877
	)	
	)	
v.	)	There on Appeal from the Circuit
	)	Court of the Fourteenth Judicial
	)	Circuit, Rock Island County,
	)	Illinois, No. 15 CF 290
	)	
JONATHAN LINDSEY,	)	The Honorable
	)	F. Michael Meersman,
Defendant-Appellee.	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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E-FILED
10/17/2019 11:07 AM
Carolyn Taft Grosboll
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POINTS AND AUTHORITIES

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ARGUMENT

The appellate court held that officers violated defendant's reasonable expectation of privacy, and thus the Fourth Amendment, when they employed a trained drug-detection dog to sniff the hallway outside his motel room. But the People's opening brief demonstrated that this Court should not depart from its longstanding precedent establishing that defendant had no reasonable expectation of privacy in the motel common area from which the officers conducted the dog sniff. Peo. Br. 7-10.[1] Further, the dog sniff was not a search under the Fourth Amendment's property-based test because defendant had no possessory interest in the motel hallway. *Id.* at 10-14. Finally, the opening brief showed that because the officers' conduct conformed to this Court's precedent, it was inappropriate to suppress the reliable, trustworthy evidence of defendant's heroin dealing. Defendant's counter-arguments do not alter those legal conclusions.

I. Use of a Trained Drug-Detection Dog in a Motel Common Area Does Not Violate Any Reasonable Expectation of Privacy.

Defendant concedes that he had no reasonable expectation of privacy in the hallway outside his motel room, arguing, instead, that the dog sniff "implicated [his] rights *inside* of his room." Def. Br. 18 (emphasis in original). In his view, police violate Fourth Amendment privacy rights, no matter where they stand, when they use anything other than their unenhanced

[1] "Peo. Br. _" and "Def. Br. _" refer to the People's opening brief and defendant's responsive brief, respectively.

senses to obtain information about the inside of a motel room. *Id.* at 13-20. Under defendant's view, even from a public sidewalk, officers may not use binoculars, a flashlight, or, presumably, the zoom lens on a smartphone camera to obtain any information whatsoever about the inside of a motel room.

Defendant's theory is contradicted by precedent. The People's opening brief cited decades of United States Supreme Court precedent that makes clear that not all uses of sense-enhancing devices constitute Fourth Amendment searches. *See* Peo. Br. 9 (citing *Florida v. Riley*, 488 U.S. 445, 448-52 (1989); *United States v. Dunn*, 480 U.S. 294, 303-04 (1987); *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *United States v. Lee*, 274 U.S. 559, 563 (1927)).

Defendant responds that none of these cases involved dwellings. Def. Br. 26. But, in fact, the cited precedent included cases in which government agents used sense-enhancing devices to observe the curtilage of dwellings. In *Riley*, an officer used a helicopter to conduct surveillance of a greenhouse that "was within the curtilage of [defendant's] home" and that he "no doubt intended and expected . . . would not be open to public inspection." 488 U.S. at 450 (plurality). In finding no Fourth Amendment violation, the Court explained that a "home and its curtilage are not necessarily protected from inspection that involves no physical invasion." *Id.* at 449. *Riley* also emphasized that "no intimate details connected with the use of the home or

curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury." *Id.* at 452; *see also Kyllo v. United States*, 533 U.S. 27, 33 (2001) (sense-enhancing thermal imaging device and aerial photography are examined under same analysis).

Ciraolo also involved the curtilage of a home: land immediately adjacent to the defendant's house behind both a six-foot outer fence and a ten-foot inner fence. 476 U.S. at 209-13. The defendant had taken the "normal precautions to maintain his privacy" in this area, "to which extend[ed] the intimate activity associated with the sanctity of a [person's] home and the privacies of life." *Id.* at 212 (internal quotation marks omitted). Nevertheless, the Court explained that "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares," and, further, that "the mere fact that an individual has taken measures to restrict some views of his activities" does not "preclude an officer's observations from a public vantage where he was a right to be." *Id.* at 213. Thus, no Fourth Amendment violation occurred when an officer secured a private plane, flew 1,000 feet over the defendant's house, and photographed the curtilage with a 35mm camera. *Id.* at 209, 215; *see also Dunn*, 480 U.S. at 305 (even if barn was protected by Fourth Amendment, officers did not conduct search by shining flashlights into it to identify marijuana plants). This precedent clearly establishes that not all uses of sense-enhancing devices to gather

information about a dwelling and its curtilage violate the Fourth Amendment.

Defendant's second proposition, that all details inside a home are intimate and therefore protected, is also incorrect. *See* Def. Br. 14. The United States Supreme Court has repeatedly stated that possession of contraband enjoys no Fourth Amendment protection. "[A]ny interest in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (emphasis in original). "This is because the expectation that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable." *Id.* at 409 (internal quotation marks omitted).

In explaining what privacy interests could qualify as legitimate, *Caballes* explicitly rejected applying *Kyllo* to a dog sniff — not because of the location of the sniff (at a roadside traffic stop), but because "[c]ritical to that decision was the fact that the device was capable of detecting *lawful* activity." 543 U.S. at 409 (emphasis added). *Kyllo* held that the use of a thermal-imaging device that could detect intimate activity in the home, "such as 'at what hour each night the lady of the house takes her daily sauna and bath,'" violated a homeowner's reasonable expectation of privacy. *Caballes*, 543 U.S. at 411 (quoting *Kyllo*, 533 U.S. at 38). But *Kyllo* did not apply to a dog sniff,

which "reveals no information other than the location of a substance that no individual has any right to possess." *Id.* at 410.

Thus, the Supreme Court has explained that dog sniffs are *sui generis* because they are unobtrusive and reveal only the presence or absence of contraband. *See*, *e.g.*, *id.* at 409 ("a canine sniff by a well-trained narcotics-detection dog [i]s *sui generis* because it discloses only the presence or absence of narcotics, a contraband item") (internal quotation marks omitted); *United States v. Place*, 462 U.S. 696, 707 (1983) ("We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."). Thus, in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), the Court held that when officers walked a drug dog around vehicles at a checkpoint, that action was not a search. *Id.* at 40. In other words, a dog sniff does not invade legitimate privacy expectations within the meaning of the Fourth Amendment, regardless of where it occurs. This Court's decisions are in accord. *See*, *e.g.*, *People v. Bartelt*, 241 Ill. 2d 217, 226-27 (2011) ("it is undisputed that the officers had the authority to conduct an exterior dog sniff of defendant's truck during the traffic stop and that the dog sniff itself was not a search subject to the fourth amendment"); *People v. Bew*, 228 Ill. 2d 122, 130 (2008) ("a dog sniff is *sui generis*, as it discloses only the presence or absence of contraband").

For this reason, it is irrelevant that defendant's illegal activity occurred in a motel room. Possession of contraband implicates no legitimate privacy interest, no matter the location. Indeed, in *Caballes*, the dog sniffed not only the car during the traffic stop, but also the people inside the car. *See id.* at 406 (dog walked around entire car). Nevertheless, this Court held that no Fourth Amendment search had occurred. While homes may be first among equals when it comes to Fourth Amendment protection of property, *see* Def. Br. 12, persons are entitled to greater protection than property. *See Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) ("'the Fourth Amendment protects people, not places'") (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). If dog sniffs of persons do not implicate legitimate privacy interests, dog sniffs of property do not either.

Decisions that find a Fourth Amendment search because a dog sniff occurred on the curtilage of a house or apartment are no help to defendant because of the different privacy expectations between residences and motels. Defendant relies on *United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016) (cited Def. Br. 15-17), where the Seventh Circuit reasoned that the hallway outside the front door of the defendant's apartment should be treated like the front porch of a house when deciding whether a dog sniff there was a Fourth Amendment search. *Id.* at 852-53. A federal district court has declined to extend *Whitaker* to a dog sniff in a motel common area materially identical to the one here. *United States v. Lewis*, No. 15 CR 10, 2017 WL 2928199, at *6–

8 (N.D. Ind. July 10, 2017). *Lewis* explained that "when applying *Whitaker*, the Court cannot ignore that the Supreme Court has already rejected the argument that the use of a drug-sniffing dog is the same as the use of a thermal imaging device." *Id.* at *6 (discussing *Caballes*). And because *Whitaker* could not overrule *Caballes*, the "distinction must lie in the place where the investigation took place, and whether the police had a lawful right to be there." *Id.* at *7.

Thus, *Lewis* held that a dog sniff in the motel common area, where police officers were lawfully present, was not a Fourth Amendment search. *Id.* This Court, too, has differentiated common areas outside hotel and motel rooms from those outside residences: "in contrast to the occupant of a private dwelling who has the exclusive enjoyment of the land he possesses immediately surrounding his home, the hotel occupant's reasonable expectations of privacy are reduced with regard to the area immediately adjoining his room." *People v. Eichelberger*, 91 Ill. 2d 359, 366 (1982). Because a dog sniff itself implicates no legitimate privacy interests, and because motel rooms have reduced privacy expectations as compared to residences, a dog sniff outside a motel room is not a Fourth Amendment search.

Defendant also argues that the dog sniff violated the Fourth Amendment because the dog could have alerted to cannabis, and cannabis had lawful uses under the Compassionate Use of Medical Cannabis Program

Act. Def. Br. 23. This new argument, raised for the first time in this Court, fails as a matter of fact and law.

At the threshold, defendant did not meet his burden of establishing the necessary predicate facts. First, defendant admits that he did not establish that the dog would have alerted to cannabis. *See* Def. Br. 23 (conceding that nothing affirmatively established that the dog would alert to cannabis). And, of course, the dog did not alert to cannabis, but to the heroin in defendant's motel room. Second, defendant did not establish that cannabis could be possessed or used legally in the motel, even for medical purposes. *See* 410 ILCS 130/30(h) (businesses could prohibit medical use of cannabis on its property).

Moreover, the medical marijuana law did not supersede the laws prohibiting possession or distribution of marijuana, but instead extended a limited protection from criminal prosecution to qualified patients and caregivers. *See* 410 ILCS 130/25. Indeed, there are various substances that have legal uses that officers may, nevertheless, test for without violating the Fourth Amendment. For instance, even if there are permissible uses for radioactive substances, *see* 430 ILCS 35/1, *et seq.* (Uniform Hazardous Substances Act), those substances are still generally contraband, *see* 720 ILCS 5/29D-15.2(a), and a Geiger counter measuring for them at an airport or a courthouse would not violate the Fourth Amendment rights of those entering the facility. At no point has defendant argued, much less sought to

establish, that he qualifies for protection from prosecution under the medical marijuana law.

Finally, cannabis was contraband in all circumstances under federal law at the time of the offense, *see* 21 U.S.C. § 812(c) (cannabis is a Schedule I drug), 21 U.S.C. § 841(a) (making possession of Schedule I drugs illegal), and the Fourth Amendment would not protect possession of a substance that constituted contraband under federal law. For these reasons, courts have rejected similar Fourth Amendment arguments based on the possible legal use of medical marijuana. *See*, *e.g.*, *State v. Sisco*, 373 P.3d 549, 555 (Ariz. 2016) (no Fourth Amendment rights violation when probable cause determination based on smell of marijuana despite medical marijuana exemption).

In the end, to demonstrate a Fourth Amendment search under his privacy theory, defendant had to show that the use of any sense-enhancing device is a Fourth Amendment search; possession of contraband is an intimate detail that the Fourth Amendment protects; and reasonable expectations of privacy in the common area outside a motel room are the same as in the common area outside an apartment or other residence. Because defendant failed to establish any of the three propositions, his argument fails.

II. *Jardines* Does Not Apply Because the Dog Sniff Did Not Occur in Defendant's Home or Its Curtilage.

Before the appellate court, defendant did not argue, and the court did not hold, that the dog sniff in the motel hallway was a search under the property-based test applied in *Florida v. Jardines*, 569 U.S. 1 (2013). The People's opening brief demonstrated that this was proper, noting that courts have uniformly declined to apply *Jardines* to such areas. *See* Peo. Br. 12 (citing *United States v. Legall,* 585 F. App'x 4, 5-6 (4th Cir. 2014); *United States v. Lewis*, No. 15 CR 10, 2017 WL 2928199, at *7-8 (N.D. Ind. July 10, 2017); *State v. Foncette*, 356 P.3d 328, 331 (Az. Ct. App. 2015); *Sanders v. Commonwealth,* 772 S.E.2d 15, 23 (Va. Ct. App. 2015)). While defendant now raises a property-based argument, it is meritless.

Defendant's attempt to distinguish *Sanders* and *Foncette* (while overlooking *Legall* and *Lewis*) fails. He contends that these cases "focus on the hallway and not the area immediately outside the door." Def. Br. 30. But the area immediately outside the door is, of course, part of the hallway. In any event, the location of the dog sniffs in those cases is indistinguishable from defendant's case. *See Sanders*, 772 S.E.2d at 17-18 (dog was "directly outside [defendant's] motel room door" and "sniffed the bottom and side seams of the door jambs, as well as the exhaust portion of the operating air conditioner that was ventilating the room"); *Foncette*, 356 P.3d at 331 (dog sniff occurred in "hallway outside the door").

These courts correctly applied the "straightforward" principle articulated in *Jardines*: a Fourth Amendment search occurred because officers exceeded an implied license and gathered information "in an area *belonging to Jardines* and immediately surrounding his house." 569 U.S. at 5-6 (emphasis added). Thus, the property-based test does not apply to an area in which a defendant has no possessory interest — such as the common area outside defendant's motel room where the police activity occurred.

Because defendant did not have any possessory interest in the motel common area, it was not the curtilage of his motel room. Defendant asserts that determining whether an area qualifies as curtilage is "fact-specific," citing the analytic factors set forth in *Dunn*. Def. Br. 27. But defendant cites no case holding that (i) a possessory interest is unnecessary to find a Fourth Amendment search under *Jardines*'s property-based test, or (ii) a hotel or motel common area belongs to the curtilage of an individual guest room. Defendant's contentions, *see* Def. Br. 18, 28, that the hallway is more properly described as an alcove and the only means for ingress and egress to the room — aside from being insufficient to establish that the area was curtilage under the *Dunn* factors — are therefore irrelevant.

The remainder of defendant's arguments confuse his privacy rights inside his motel room with possessory interests outside of it. The People's opening brief established that a motel guest could not have the necessary possessory interest in the common area because under Illinois law a guest is

a "business invitee" in a commercial establishment without the rights possessed by apartment tenants. Peo. Br. 13. Defendant argues that it is irrelevant that the motel is a commercial establishment because his room was "a part of the motel" and he "enjoyed the same protections *inside of his room* as any other resident of a home." Def. Br. 27 (emphasis added). Yet the relevant area here was not the inside of his room, but the outside of it, and the relevant issue was one of property rights, not privacy rights. Because the motel common area was part of a commercial establishment, the law with respect to curtilage in commercial establishments and defendant's status as a business invitee is relevant.

Similarly, even if defendant is correct that a motel room can be the site of a residential burglary, the case he cites to support his argument, *People v. Murray*, 2017 IL App (3d) 150586, ¶¶ 22-23 (cited Def. Br. 27), does not help him. First, *Murray* addressed the unauthorized entry requirement of residential burglary, and not whether a motel room was a "dwelling place." Second, *Murray* reached its holding with regard to the interior of a guest room, and not the motel common area. *See* 720 ILCS 5/2-6 (defining "dwelling" as "house, apartment . . . or other living quarters in which . . . the owners or occupants actually reside").

The People's opening brief also demonstrated that the officers did not exceed any implied license because the hallway was unlocked, accessible by other motel guests, staff, and members of the public, and because it was not

customary for motel guests to have the authority to limit or even be aware of who may enter unlocked common areas of the motel. Peo. Br. 14. Defendant responds that this case is like *Jardines*, where an implied license permitted visitors to a front door only to approach, knock, then leave absent invitation to linger. 569 U.S. at 8. But defendant provides no evidence that motel operators limit the public in such a manner. To the contrary, it would be customary for a motel operator, when informed that felonious activity is suspected in the motel, to permit officers to gather information from common areas. Thus, there is no implied license restricting officers from gathering information in motel areas accessible to the public when they suspect that criminal conduct is afoot.

Finally, the Court should not be persuaded by defendant's arguments regarding the "potentially discriminatory effect" of distinguishing between the front porches of houses and the common areas of motels and hotels. *See* Def. Br. 32. First, a week's stay in a tony hotel in downtown Chicago (and other cities) may cost more than a month-long lease for a free-standing house in other locations. Whether a motel or hotel hallway is curtilage reflects who has a possessory interest and its function, not its financial value or its occupant's status. More fundamentally, we should not assume that the majority of motel or hotel guests would prefer that officers be unable to gather information about illegal conduct in common areas. After all, if guests in a neighboring room are committing criminal conduct, their conduct

presents a potential danger to fellow guests. In this case, for instance, other motel guests may have preferred not to bear the potential risks of occupying the room next to a person selling heroin. The dog sniff in the motel common area was not a search under *Jardines*'s property-based test, and defendant's policy reasons do not warrant a deviation from this established law.

III. Exclusion Is Inappropriate Because the Officers' Conduct Conformed to This Court's Precedent.

The People's opening brief established that the exclusionary rule should not apply here because the officers' actions conformed to then-existing precedent. Peo. Br. 17-21; *see also People v. LeFlore*, 2015 IL 116799, ¶ 23 (good-faith exception to exclusionary rule applies when officers conform actions with precedent). Defendant, citing the appellate court's decision below, argues that no Illinois appellate decision specifically condoned the use of a drug-detection dog in the common area of a motel. Def. Br. 34. But that is not the test, lest officers be found to have acted culpably whenever the exact fact pattern has not been the subject of a published Illinois appellate decision.

The People's opening brief further showed that (a) binding appellate opinions informed the officers that motel room occupants have reduced expectations of privacy in motel common areas (*Eichelberger*), (b) dog sniffs are not Fourth Amendment searches because they do not implicate legitimate privacy interests (*Caballes*, *Edmond*, *Place*), and (c) precedent from a federal

appellate court authorized police to conduct a dog sniff of a hotel room from the hallway (*United States v. Roby*, 122 F.3d 1120, 1124 (8th Cir. 1997)).

Defendant challenges only this first proposition, but precedent in Illinois and throughout the country holds that motel guests enjoy reduced privacy expectations in motel common areas. The People's opening brief noted that *Eichelberger* cited with approval two federal appellate decisions: *United States v. Burns*, 624 F.2d 95 (10th Cir. 1980), which found no Fourth Amendment violation when an officer eavesdropped on a motel room from a hallway, and *United States v. Agapito*, 620 F.2d 324 (2d Cir. 1980), which found no Fourth Amendment violation when officers pressed their ears to a crack between the door and the doorframe to eavesdrop on an adjoining hotel room, explaining that "the reasonable expectations of privacy in a hotel room differ from those in a residence," *id.* at 331.

Defendant ignores *Burns* and argues that *Agapito* is distinguishable because there officers rented the adjoining motel room and had "a right to be" present. Def. Br. 36-37. But *Agapito* is not distinguishable. Here, the officers were in a common hallway accessible to the public — where they had a right to be. Indeed, it is because defendant recognizes that the officers had a right to be in the hallway that he argues that the dog sniff was a Fourth Amendment search of his motel room. *See* Def. Br. 17-18, 27, 31, 36.

The real crux of defendant's argument is that a "reasonably well-trained officer would have known the essential holding of *Jardines* — that a

dog sniff of a residence is a Fourth Amendment search." Def. Br. 39. But that is not what *Jardines* held. Instead, the "essential holding" of *Jardines* was that officers cannot gather information by physically intruding on a constitutionally protected area. *See* 569 U.S. at 5 ("When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred.") (internal quotation marks omitted); *see also id.* at 5-6 ("That principle renders this case a straightforward one. The officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner."). *Jardines* did not hold that a Fourth Amendment search, even of a residence, occurs when police conduct a dog sniff from an area that is not constitutionally protected. And, as explained, the motel common area, under binding precedent from this Court and other appellate courts, is not a constitutionally protected area.

In sum, the officers here were in an area that this Court has instructed enjoys a reduced expectation of privacy, conducting activity that the United States Supreme Court and this Court have repeatedly affirmed is not a Fourth Amendment search and is authorized by numerous state and federal

courts. Under these circumstances, exclusion of the drug evidence is inappropriate.

CONCLUSION

This Court should reverse the judgment of the appellate court.

October 17, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is seventeen pages.

/s/ Eldad Z. Malamuth
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) ss.
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 17, 2019, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was at the same time (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the Brief and Appendix to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol Avenue, Springfield, Illinois 62701.

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