IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

LONNIE WHITAKER,

Defendant.

REPORT AND RECOMMENDATION

14-cr-17-bbc

REPORT

On January 15, 2014, the United States filed a criminal complaint against defendant Lonnie Whitaker, followed by a four count indictment on January 29, 2014 that charged Whitaker with possessing cocaine and marijuana with intent to distribute them and with possessing a handgun in furtherance of these drug crimes and while a prohibited person, namely a convicted felon. *See* dkt. 8. (Whitaker was then and is now serving a term of supervised release imposed by this court in *United States v. Whitaker*, 07-cr-123 *see* dkt. 58). Virtually all of the evidence against Whitaker was seized during or derived from the January 15, 2014 execution of a state search warrant for Apartment 204 at 6902 Stockbridge Drive, Madison, Wisconsin.

On April 11, 2014, Whitaker, by counsel, moved to quash the warrant and suppress all of the evidence seized, and he has asked for a *Franks* hearing.[1] *See* dkt. 30. In conjunction with this motion, Whitaker moved for the production of additional documentation regarding the training and use of the narcotics detecting dog "Hunter" and his handler, Dane County Deputy Sheriff Jay O'Neill, *see* dkt. 17. In support of his request for more documentation and for a *Franks* hearing Whitaker has submitted an affidavit from Steven D. Nicely, a consultant in

[1] *Franks v. Delaware*, 438 U.S. 154 (1978).

matters relating to the training and handling of police service dogs, *see* dkts. 37 and 37-1; photographs of the secured parking garage and secured hallway associated with 6902 Stockbridge along with excerpts from a police report of the search, *see* dkt. 38; an affidavit from Stephen Marsh, a Lutheran minister who lived in Apartment 208 at 6902 Stockbridge Road, *see* dkt. 39; and Whitaker's own affidavit, claiming that Apartment 204 was his main residence, although it was rented in his mother's name, *see* dkt. 41.

For the reasons stated below, I am recommending that this court deny Whitaker's request for more dog records, deny his request for a *Franks* hearing and deny his motion to suppress. Whitaker bases his motions in main part on two recent Supreme Court cases that clarify how a defendant may challenge a dog's training and qualifications and that forbid the unconsented use of a trained dog within the curtilage of a residence. *See Florida v. Harris*, ___ U.S. ___, 133 S.Ct. 1050, 1057 (Feb. 19, 2013)(State's requirements for qualifying a drug-detecting dog are too rigid; "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert . . . (subject to any conflicting evidence offered)"; *Florida v. Jardines*, ___ U.S. ___, 133 S.Ct. 1409, 1416-17 (March 26, 2013) (police investigation using a drug-detecting dog inside the curtilage of a private residence without permission is an unconstitutional trespass).

Whitaker's challenges raise interesting points but they do not establish any Fourth Amendment violations. First, although Whitaker claims that the use of a trained dog in the hallway of his apartment building violates the rule established in *Jardines*, the actual holding in *Jardines* (as opposed to the three-justice concurrence) is based on–and did not alter– traditional notions of trespass and curtilage, which were not violated here. Second, although Whitaker has

presented an affidavit from a neighbor and from an expert challenging the qualifications and use of the trained dog in this case, because the Dane County Sheriff's Department obtained a search warrant, Whitaker must make a substantial preliminary showing that the detective affiant deliberately or recklessly withheld information from the court, or must make a substantial preliminary showing that the dog was unqualified. Whitaker's evidence has not met this standard. I conclude that the warrant was valid and that this court should deny Whitaker's motion to suppress.

This is the evidence currently in the court's record:

The Search Warrant Application

On January 10, 2014, Dane County Sheriff's Detective Joel Wagner submitted to the Dane County Circuit Court a complaint for a search warrant for Apartment 204, 6902 Stockbridge Drive, Madison. The court, by Judge John W. Markson, issued the warrant that same day. Detective Wagner's complaint speaks for itself, *see* dkt. 30-3, but for ease of reference I will synopsize it at length:

As of January 10, 2014, Detective Wagner had been a law enforcement officer for over 20 years, a detective for seven years, and currently was assigned to the Dane County Narcotics Task Force (DCNTF). Detective Wagner had participated in "hundreds" of investigations involving illegal drugs and had received specialized training in a variety of fields related to narcotics trafficking. As a result of this training and experience, Detective Wagner offered a 2½ page boilerplate summary of how individuals engaged in narcotics trafficking, none of which is specifically relevant to Whitaker's suppression motion.

One of Detective Wagner's confidential informants was "CI 1466," who had been involved in a relationship with a mid-level dealer of powder and crack cocaine, and therefore was very familiar with illegal drugs and drug dealers. CI 1466 had provided information that had led to undercover buys and the arrest of persons who dealt in crack cocaine. On October 11, 2013, CI 1466 met with Detective Wagner because s/he wanted to assist the investigation of people who were selling cocaine, crack cocaine and marijuana from Apt. 204, 6902 Stockbridge Drive, Madison. CI 1466 reported that s/he knew cocaine dealers living in Apt. 204 and specifically identified them as Cameron Dowell, d/o/b 10/04/76, cell phone # 414-399-9792; "Javari," cell phone # 920-360-4675 and "Al" from Milwaukee, cell phone # 414-499-4665. CI 1466 reported that Dowell and Javari lived at Apt. 204 and that Al was a relative from Milwaukee who was ran cocaine to Apt. 402 from a stash house in Milwaukee. CI 1466 reported that Apt. 204 was a two-bedroom apartment and that the residents hid their drugs in socks in the larger bedroom. CI 1466 reported that s/he had attended a party at Apt. 204 in the first week of October 2013 and saw a brick (kilo) of cocaine in the apartment. During this party, Javari commented to CI 1466 about selling powder cocaine and using some of the powder cocaine to make and sell crack cocaine. During this party, CI 1466 saw numerous people entering apartment 204 and buying marijuana from Dowell and Javari. During this party, CI 1466 saw a black, semiautomatic handgun in the waistband of Javari's pants; Javari explained that he and Dowell always carried handguns for protection. Finally, CI 1466 told Detective Wagner that Javari drives a black Cadillac Escalade that is parked in the underground parking garage located below 6902 Stockbridge Drive.

On October 14, 2013 (three days after this report from CI 1466) Detective Wagner met with the property manager of the company that owns and leases the apartment building at 6902 Stockbridge Drive. The manager reported that the lease to Apt. 204 is signed by Ruthie Whitaker, an African American woman born in 1957, and that she is the only person named on the lease. The manager did not know Ms. Whitaker by sight. Every month, an African American man in his mid-twenties would stop by the office to drop off a check for the monthly rent, drawn on an account for a daycare center located at 6538 Fairhaven Road, Madison. Because Ms. Whitaker was the only person on the lease, the manager had attempted to learn the identity of this man, but he refused to identify himself.[2] The property manager provided

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[2] Ms. Whitaker's lease provides at Paragraph 24 that "Tenant will not assign this Lease, nor sublet the premises or any part thereof, without the prior written consent of the Landlord. Subletting the apartment without permission is considered a breach of Lease." Paragraph 32.a. of Ms. Whitaker's lease ("Tenant Obligations") provides that "During the Lease term, as a condition of Tenant's continuing right to use and occupy the premises, Tenant agrees and promises to: Use the premises for Tenant's own residential purposes only." Paragraph 32.k provides that :"Tenant will not permit anyone to live in the premises for any period of time without the prior written consent of Landlord."

Whitaker alleges in his affidavit in support of his suppression motion that his mother leased this apartment for him so that he would have somewhere to live.

According to the January 31, 2014 Probation Form 12A violation report in *United States v. Lonnie Whitaker*, 07-cr-123-bbc:

> When Lonnie Whitaker's term of supervised release commenced on July 21, 2011, he was residing with his wife and their five children in Madison. When he was arrested on January 15, 2014, Mr. Whitaker was found to be living at a different residence leased to his mother. . . . In addition to failing to report his new residence, Mr. Whitaker also failed to report that he was driving a Cadillac Escalade registered to his mother.

See Case No. 07-cr-123, dkt. 68 at 1. Among other things, Whitaker's standard conditions of supervision in Case No. 07-cr-123 required him to notify his probation officer at least ten days in advance of any changes in residence. Dkt. 58 at 4, par. (6).

"It seems contrary to reason to let a person use an alias to hide his connection with leased property and yet maintain that he has standing the challenge a search of the premises." *United States v. Salameh*, __ F.Supp. ___, 1993 WL 364486 at *5 (S.D.N.Y. 1993). Because the parties have not addressed this issue, the court will not explore it further and it will play no part in the court's recommendation.

Detective Wagner with access to the (secure) underground parking at 6902 Stockbridge Drive; parked in stall 204, which was assigned to Apt. 204, was a black Cadillac Escalade registered to Ruthie Whitaker at 6538 Fairhaven Road, Madison.

On November 25, 2013, CI 1466 sent Detective Wagner a text message in which s/he reported a phone call with Dowell in which Dowell told CI 1466 that Dowell was back in town and had a lot of "h" (heroin) at his place at 6902 Stockbridge, Apt. 204.

On December 4, 2013, Detective Wagner obtained from the property manager written consent for the task force to conduct a "K9 search" of 6902 Stockbridge Drive. (*See* dkt. 44-2).

On December 17, 2013, Detective Wagner received an anonymous phone complaint about "drug activity at 6902 Stockbridge Drive, Madison, Wisconsin." The anonymous caller reported that cocaine, crack, heroin and marijuana were being sold out of the apartment, and that the "subject keeps the drug in a closed located in the master bedroom." The anonymous reporter described this subject as a black male with short black hair, about 38 years old, 5'6" tall about 189-200 pounds. The subject's street name was "Neth" and he drove a black Cadillac Escalade that he parked in the garage. Detective Wagner did a records check for Cameron Dowell and learned that he was born in 1976, was 5'6" tall, weighed 165 pounds and twice had been convicted being a felon with a gun (in 1998 and 2004) and had been convicted of cocaine possession in 2011, all in Milwaukee.

On January 7, 2014, Detective Wagner asked canine handler Deputy Jay O'Neil and his K9 partner Hunter to conduct an early morning investigation at 6902 Stockbridge. They started in the secured garage; apparently the manager had given Detective Wagner a key to the common areas of the apartment building. At 4:21 a.m. Hunter "indicated a positive alert for narcotics

inside the black Cadillac Escalade parked in stall 204. At 4:25 a.m., Hunter "indicated a positive alert for narcotics at apartment door #204 . . .." (photographs of the parking garage and the common hallway can be found at dkt. 38-1 and 38-2).

As part of Detective Wagner's search warrant complaint, Deputy O'Neil provided some of his background information and Hunter's background information: Deputy O'Neil reported that he had been a Dane County Deputy Sheriff since 1990. He had been trained in a variety of fields related to narcotics trafficking. Deputy O'Neil was a current member of the Wisconsin Law Enforcement Canine Handlers Association and the North American Police Work Dog Association (NAPWDA) and had received specialized training through both organizations. Deputy O'Neil had started as a canine handler for the Dane County Sheriff's Office in 1998, working with two different dogs (Dino and Thor) between 1998 and 2009. Deputy O'Neil obtained Hunter in 2009 and trained him personally from October 2009 to February 2010. Hunter obtained certification through the NAPWDA in February 2010 and again in May 2010. Hunter had no false alerts or "misses" during this certification process. Hunter was correct in his alerts 100% of the time during certification. Hunter was certified as a "Dual Purpose Patrol/Narcotics Police Dog." From November 2010 to May 2010, Hunter put in 132 hours of narcotics training and was 98% accurate. Hunter[3] is trained to detect the odor of marijuana, cocaine, cocaine base and other drugs in buildings, vehicles, lockers, packages and lockers. As of the time of Detective Wagner's complaint, Hunter had had no known false alerts while working on the street since his February 2010 certification. Hunter successfully certified

[3] The complaint says "Thor" at this point; I infer from context that this is sloppy cutting and pasting by Deputy O'Neil and that the issuing court assumed this was meant to be a reference to Hunter.

through NAWDA in June 2010 and June 2011, with no false alerts and no misses during these certification processes. According to Deputy O'Neil, "Canine Hunter has proven to be reliable over ninety five percent of the time."[4]

Judge John W. Markson of the Dane County Circuit Court issued this warrant on January 10, 2014 at 4:13 p.m.

Report of Deputy O'Neil

In support of his motion to suppress and his request for a *Franks* hearing, Whitaker has submitted Deputy O'Neil's portion of the sheriff's department's written investigation report. This excerpt speaks for itself, *see* dkt. 38-8, but I synopsize it here for ease of reference:

Deputy O'Neil and Hunter met Detective Wagner at 4:00 a.m. on January 7, 2014 at the East precinct parking lot. Per protocol, Detective Wagner told Deputy O'Neil the street address to which they were headed but did not tell him the apartment number of the suspects' residence, asking instead that Deputy O'Neil and Hunter walk the common hallway to see if Hunter alerted. (Detective Wagner assured Deputy O'Neil that management already had given permission for them to conduct such a canine search).

Upon arrival at the apartment building, they entered through a side door into the parking garage. Detective Wagner asked Deputy O'Neil to have Hunter sniff the exterior of the Cadillac Escalade that Detective Wagner said he believed belonged to the suspect. Hunter gave a sitting

[4] Deputy O'Neil and Hunter also had successfully completed 40 hours of training in June, 2013 and had been recertified by the NAPWDA. This more recent training is set forth below at p. 10. It is not clear why Deputy O'Neil did not include this more recent training and certification in his portion of the warrant complaint.

alert at the back of the Escalade where there is a seam leading up to the window. This alert was consistent with Hunter alerting to the presence of the odor of illegal narcotics.

The group went up to the secured common hallway on the second floor (apparently using the common area key the manager had given Detective Wagner). Deputy O'Neil noted at least six to eight apartment doors. Per his standard operating procedure, Deputy O'Neil took Hunter on a "quick walk through in order to get used to any types of people or animal smells located in the hallway." During this "trial pass," Hunter "showed extreme interest in apartment number 204 sniffing it deeply on a couple of occasions and I believe he would have alerted; however, I moved him along to conduct this cursory search." During the "actual" search, Hunter gave a "hard sitting alert" to the door of Apartment 208, which was consistent with Hunter alerting to the presence of the odor of illegal narcotics." Detective Wagner stated that he did not know who lived in Apartment 208, this was not his suspect, but that he would find out who lived there and see if there was any evidence of drug trafficking. (*This segues to Stephen Marsh's affidavit, below*). Hunter continued to sniff the other apartment doors. According to Deputy O'Neil,

> Once again, K-9 Hunter showed extreme interest in apartment number 204 sniffed the door repeatedly, wag his tail and then sat. Once he sat K-9 Hunter would not leave the door until I gave him a release command. This is consistent with K-9 Hunter alerting to the presence of the odor of illegal narcotics.
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> Dkt. 38-3 at 2.

Affidavit of Stephen Marsh

In support of his motion to suppress and his request for a *Franks* hearing, Whitaker has submitted the April 25, 2014 affidavit of Stephen Marsh who avers that: he and his wife have lived at Apt. 208, 6902 Stockbridge Road since December 2012. They are the only people who

live there. Rev. Marsh is a minister at Lake Edge Lutheran Church in Madison. Marijuana, cocaine, methamphetamine and heroin never have been in their apartment. No police officer ever has contacted them about drugs being present in their apartment. Rev. Marsh has never heard any disturbances from Apt. 204 and has not noticed any significant traffic in or out of Apt. 204. *See* dkt. 39.

2013 Certification of Deputy O'Neil and Hunter

Although the search warrant affidavit does not report this, on June 7, 2013, NAPWDA approved accreditation for Deputy O'Neil and Hunter for "'Police Utility Dog' Title, obedience, article search, area search, tracking, building search, aggression control, narcotic detection team–marijuana, cocaine, heroin, methamphetamine. *See* dkt. 36-1 at 1. This accreditation was accompanied by a Certificate of Attendance for Deputy O'Neil "for successfully completing the prescribed courses in "Advanced K9 Training including K9 Utility Phases, K9 Detection Phases, 40 Hours Training" from June 3-7, 2013 in Olathe, Kansas. *Id.* at 2. A certification test sheet for this class was filed out by a master trainer assisted by five other assistant trainer listed by name. O'Neil and Hunter "passed" all eight phases in which they tested, they "failed" none. *Id.* at 3. An accompanying worksheet apparently field out and signed by the trainers reports that Deputy O'Neil and Hunter found four different controlled substances in four rooms of a six room building (missing none), found eight samples of four controlled substances cached in various locations on six vehicles, missing none (and apparently not falsely alerting to two additional "blank" vehicles) and found four different controlled substances cached in four lockers out of 90 at an "old school." *Id.* at 4. The quantify of drugs used for each test varied from 7.0 to 10.4 grams.

Affidavit of Steven D. Nicely

In support of his motion to suppress and his request for a *Franks* hearing, on April 25, 2014, Whitaker submitted the April 23, 2014 affidavit of Steven D. Nicely, *see* dkt. 37. Nicely identifies himself as "a consultant who analyzes certification and reliability of dog and dog handlers throughout the United States." Nicely's curriculum vitae would seem to qualify him as an expert on these topics. *See* dkt. 37-1. Nicely states that he has reviewed the NAPWDA's June 2013 certification records for Hunter and based on this review, "affiant believes that the certification records are inadequate to certify that K-9 Hunter is reliable." *Id.* at ¶4. Although Nicely's critique speaks for itself, I will outline his main points for ease of reference, listed by his paragraph numbers:

> (5) The certification records do not mention packaging materials or cutting agents; therefore it is impossible to tell if Hunter was responding to the actual controlled substance or to packaging material or cutting agents.
>
> (6) The "building" test does not indicate whether the building was similar to an apartment building; in fact it reveals nothing about its layout, so that "it is impossible to tell how [*far?*] the drugs were placed away from the dog."
>
> (7) The records indicate that the testing only was done one time. It should have been done six or seven times to be considered reliable.
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> (8) As for the amount of the drugs used in the tests, "The minimum amount that can be used to certify a dog is one gram, according to NAPWDA standards." The seven-to-ten gram quantities of drugs used for testing made it seven to ten times easier for the dog "than the minimum one gram that can be used." "No discrimination testing was done here either." [*Nicely does not define this term*]. There is no indication how the controlled substances were packaged, whether "the handler" knew the locations where the drugs were hidden, or whether any tests were done for odors associated with drugs, such as cutting agents or

packaging. "These tests are never done in any of the NAPWDA testing certifications of which affiant is aware."

(9) "In addition, in that record, there was no residual testing done to identify the K9's threshold of consciousness to help support responses for a particular dog does occur at the presence of residual and less likely a response where residual is claimed was a false response." [*All sic*].

(10) The certification indicates the dog was "satisfactory" without indicating the standards for passing or failing. "For example, nothing in the record indicates the number of times K-9 Hunter encounter [*sic*] the location where a contraband drug was placed before K-9 Hunter responded."

(11) As for the vehicle testing, "obviously it is easier for the dog to find the controlled substance on the exterior of the vehicle. It never says whether the dog responded on the outside of the vehicle to controlled substances placed on the interior. There should only be one find on each vehicle so as to eliminate the cuing of the dog by the handler."

(12) In the actual search warrant affidavit, the blanket statements of 400 hours of testing with 132 hours of narcotics training "means nothing if one cannot examine the training records to see if the records are adequate." Further, "Apparently K-9 Hunter responded on defendant's Cadillac, yet no controlled substances were found was Non-Productive" [*sic*]. "It is possible a false respond or the dog could be responding to a residual odor." "K-9 Hunter's ability or willingness to respond to residual odor, based on the certification, has not verification from a controlled test." [*sic.*] A residual odor is an odor that lingers in an area where a controlled substance had once been. The other explanation is that the dog was responding on something other than a controlled substance.

(13) Apparently the dog responded at the door of 6902 Stockbridge, Apt. 204. The response does not necessarily mean that controlled substances will be found in the apartment. The dog could be responding to a residual odor, or the dog could be responding to an odor associated with controlled substances such as packaging material or cutting agents."

See dkt. 37.

Analysis

The heart of Whitaker's suppression motion is that any evidence adduced by Deputy O'Neil and Hunter must be excised from the warrant complaint because (1) the investigators had no right to bring a narcotics detecting dog to the very threshold of his apartment door or to bring the dog near his car in the secured garage, and (2) there is inadequate evidence of Hunter's reliability as a narcotics detection dog. As a corollary to his second point, Whitaker claims that under recent case law from the Supreme Court and the Seventh Circuit, he has the right to review all of Hunter's training, field and certification records, and also is entitled to a *Franks* hearing based on the averments of Nicely and Reverend Marsh *See* Suppl. to Mot. To Suppress, dkt. 38; Mem, in Support of Motion To Suppress, dkt. 40.

Use of a Drug Detecting Dog in the Apartment Garage and Hallway

Before the court addresses the issue whether Hunter is qualified to perform reliable alerts, we have to determine whether Hunter even had a right to be present in the garage and hallway of the apartment building where Whitaker lived. Whitaker contends that these intrusions violated the dictates of *Florida v. Jardines*, 138 U.S. 1409, as well as those of *Kyllo v. United States*, 533 U.S. 27 (2001) (warrantless use of a thermal imaging device to detect heat radiating from a residence violates the Fourth Amendment). *See* Mem. in Support, dkt. 40. The government disagrees, arguing that the Court's holding in *Jardines* is based on law enforcement invasion of the defendant's curtilage, and here, no curtilage invasion occurred; and that a dog sniff is not analogous to thermal imaging. *See* Gov't Resp., dkt. 44 at 4-6. In reply, Whitaker disputes both of the government's arguments, *see* dkt. 45 at 2-5. According to Whitaker, *Jardines* has implicitly

overruled circuit precedent such as *United States v. Brock*, 417 F.3d 692, 696 (7th Cir. 2005) in which the court held that a dog sniff outside a bedroom door was not a Fourth Amendment search.

The decision in *Jardines* contains the Court's opinion, a three-justice concurrence and a four-justice dissent. The Court's opinion, in which five justices joined, is based solely on trespass:

> When the government obtains information by physically intruding on persons, house, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred. By reason of our decision in *Katz v. United States*, 389 U.S. 347 (1967), property rights are not the sole measure of Fourth Amendment violations, but though *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections when the Government *does* engage in a physically intrusion of a constitutionally protected area.
>
> 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 that area to engage in conduct not explicitly permitted by the homeowner.
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> 133 S.Ct. at 1414, citations omitted emphasis in original.

The Court had no trouble finding that, by standing on the defendant's front porch "the officers' investigation took place in a constitutionally protected area." The question became whether this amounted to an unlicensed physical intrusion. Since two officers and one drug-detecting dog had planted their eight feet on the "constitutionally protected extension of Jardines' home, the only question is whether he had given his leave (even implicitly). He had not." The Court held that a license to be present on the curtilage may be implied, and "typically

permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received and then (absent invitation to linger longer) leave." *Id.* at 1415.

The Court noted that there is no customary invitation by homeowners to the police allowing them to introduce a trained police dog to explore the area around the home in hopes of discovery incriminating evidence. "An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker." *Id.* at 1516. But, as the Court makes clear, and contrary to Whitaker's argument, "It is not the dog that is the problem, but the behavior that here involved use of the dog." The problem is with "a stranger snooping about his front porch *with or without* a dog." *Id.* at n.3, emphasis in original. "Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search." *Id.* at 1416. The Court was explicit that it was basing its holding on the trespass: the constitutional violation occurred when the government intruded on constitutionally protected areas; "[t]hus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*." *Id*. at 1417. In short, "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Id.* at 1417-18.

Only three justices took the further step of finding that use of the drug-detecting dog violated the defendant's privacy interests. *Id.* at 1418-20 (Kagan, Ginsburg and Sotomayor, JJ., concurring). This clearly is not the holding of *Jardines*. Noting the distinction, Justice Kagan writes that "if we had decided this case on privacy grounds, we would have realized that *Kyllo v. United States* already resolved it." *Id.* At 1419. The dissent also notes this distinction, expressing alarm that if the concurrence's equation of a drug-detecting dog to a thermal imager

had been the Court's actual holding, then the Court's decision would encompass a drug-detecting dog's alert while on a public sidewalk or in the corridor of an apartment building. *Id.* At 1426 (Alito, J., Roberts, C.J., Kennedy and Breyer, JJ., dissenting). But the Court did not adopt the concurrence's position, so the opinion does not reach that broadly.

Thus, it is clear enough that the Court did *not* find that the warrantless use of a drug-detecting dog, standing alone, is an unconstitutional search. Perhaps it will be someday if the concurring justices can find two more votes, but at this time, the law on this point remains unchanged: canine sniffs used to detect the presence of contraband are not Fourth Amendment searches. *Illinois v. Caballes*, 543 U.S. 405, 408 (2005); *United States v. Brock*, 417 F.3d 692, 696 (7th Cir. 2005)

So the operative question is whether the deputies and their dog Hunter intruded upon Whitaker's curtilage. They did not. As was discussed at the pretrial motion hearing, the law of this circuit has been clear for decades: a renter does not have a reasonable expectation of privacy in the common areas of his apartment building. *Harney v. City of Chicago*, 702 F.3d 916, 925 (7th Cir. 2012); this is true even if the common areas are locked. *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991); *United States v. Nettles*, 175 F.Supp.2nd 1089, 1093 (N.D. Ill 2001). As the government notes, at least two district courts have held that the Court's decision in *Jardines* has not affected this view. *See, e.g., United States v. Correa*, 2014 WL 1018236 at *5 (N.D. Ill. March 14, 2014). Because these areas were not within any curtilage of Whitaker's, the deputies and their dog did not need explicit or implicit license from Whitaker to be there.

The bottom line is that it did not violate Whitaker's Fourth Amendment rights for Detective Wagner to bring Deputy O'Neil and Hunter into the parking lot and hallway of the

apartment building at 6902 Stockbridge. This claim is not a basis to redact the search warrant affidavit, to quash the warrant or to suppress any evidence.

Whether Hunter's Alerts Have Any Evidentiary Value When Determining Probable Cause To Search

Whitaker contends that he has sufficiently impeached Hunter's training and the reliability of Hunter's alerts that this court either should redact these searches from the warrant affidavit now, or hold a *Franks* hearing at which Whitaker may perfect his impeachment. The government disagrees. The government is correct. Although Whitaker's various challenges may exceed "throwing pebbles at a tank," *United States v. Swanson*, 210 F.3d 788, 790 (7th Cir. 2000), Whitaker has not cleared the threshold required to obtain a *Franks* hearing. As the court noted in *Swanson,* to obtain a hearing, Whitaker has to estblish by a substantial preliminary showing that: (1) the affidavit contained a material false statement or material omission; (2) the affiant made the false statement or material omission intentionally or with reckless disregard to the trurth; and (3) the false statement or material omission is necessary to support the finding of probable cause. "These elements are hard to prove, and thus *Franks* hearings are rarely held." *Id.* Negligent or innocent mistakes do not entitle a defendant to a *Franks* hearing. *United States v. McMurtry*, 704 F.3d 502, 509 (7th Cir. 2013). An officer's failure to conduct a more thorough investigation is at most negligence and does not establish that a *Franks* hearing is needed. *United States v. Prideaux-Wentz*, 543 F.3d 954, 962 (7th Cir. 2008).

Before we descend into the specifics regarding Hunter, let's back up a step to broaden our view of where we find ourselves: the alerts by Hunter are simply one aspect of a much more robust showing of probable cause that includes a reliable informant providing highly specific

information over time, a consistent, highly detailed anonymous telephone tip, and some objective corroboration by the police (*e.g.,* confirming the presence of the black Escalade in stall 204 and confirming the physical descriptors of Cameron Dowell). Judge Markham of the Dane County Circuit Court reviewed and weighed *all* of this evidence, including Deputy O'Neil's recitation of Hunter's training and certification (which wasn't even the most recent information), and concluded that there was probable cause to issue the warrant for Apt. 204. Probable cause requires no more than the kind of fair probability on which reasonable and prudent people, not legal technicians act. It is a practical and commonsensical standard, devoid of mechanistic inquires in favor of a more flexible all-things-considered approach. *Florida v. Harris*, 133 S.Ct. At 1055-56. Whitaker is not attacking any of the information in Detective Wagner's search warrant complaint except Hunter's alerts. Because the state court issued the warrant, we presume that the court accepted as valid the recitation of Hunter's qualifications and the fact of his alerts to the Escalade and the door of Apt. 204. *See, e.g, United States v. Johnson*, 580 F.3d 666, 670 (7th Cir. 2009). "A determination of probable cause should be paid great deference by reviewing courts," which are to ensure simply that the issuing court "had a substantial basis for concluding that probable cause existed." *United States v. Scott*, 731 F.3d 659, 665 (7th Cir. 2013), citations omitted.

The issuance of a search warrant instant distinguishes this case from *United States v. Funds in the Amount of $100,120*, 730 F.3d 711 (7th Cir. 2013). That case was a civil forfeiture action that was a full, on-the-record adversarial proceeding governed for the most part by the Federal Rules of Civil Procedure, which allow for summary judgment motions *See* F.R. Civ. Pro. 56 and give all parties the opportunity to call expert witnesses and the obligation timely to disclose

them, *see* F.R. Civ. Pro. 26(a)(2) so that the court, at its discretion, may hold a pretrial *Daubert* hearing,[5] as was requested in that case, *see* 730 F.3d at 714. Also relevant was that the government seized the contested funds from the claimant's briefcase without first obtaining a search warrant, a process that would have allowed a neutral judicial officer to determine the qualification of the detection dog and the reliability of its alert prior to the search and seizure. Warrantless searches and seizures are presumptively unreasonable, *see United States v. Delgado*, 701 F.3d 1161, 1164 (7th Cir. 2012), in contrast to searches pursuant to a warrant, which as just noted, are presumptively reasonable.

In *Florida v. Harris,* 133 S.Ct. 1050, the defendant's truck was pulled over on a traffic stop, subjected to two alerts by a drug-detecting dog, which led to a search of the truck without a warrant. Because the search and seizure occurred without a warrant, it was presumptively unreasonable and it would have been the state's burden to establish probable cause after the fact at a post-charging evidentiary hearing. The Florida Supreme Court quashed the search by imposing what that court's dissent characterized as "elaborate and inflexible evidentiary requirements" on the alerts by the drug-detecting dog. 133 S.Ct. At 1055. The United States Supreme Court held that this was too rigid:

> [E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to tyrust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search.
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> * * *

[5] *Daubert v. Merrell Dow Pharm, Inc.*, 509 U.S. 579 (1993)

> A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings. Indeed, evidence of the dog's (or handler's) history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant.
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> 133 S.Ct. At 1057.

These suggested methods of impeachment are exactly what Whitaker has employed here, offering the affidavit of expert Nicely to challenge Hunter's training and reliability, and offering the affidavit of Rev. Marsh to challenge Hunter's performance in the field.

The first question that suggests itself is whether the Court in *Harris* envisioned that every search warrant that involved an alert by a drug-detecting dog would entitle a defendant to an evidentiary hearing. The answer has to be "No." The case before the Court in *Harris* involved a warrantless search, and the issue was whether Florida had placed too high an evidentiary burden on the state. Nothing in *Harris* suggests that the high threshold of *Franks* in a criminal case with a search warrant is lowered simply because the investigators relied on a dog and its nose to establish probable cause.

Therefore, in the *Franks* context, it is not enough for a defendant to have an expert–however knowledgeable and experienced–challenge a court-issued warrant by second-guessing the training methods used by a bona fide organization to test and certify a drug-detecting dog. Although Nicely points out what he views as myriad flaws in NAPWDA's testing and certification program, he does not claim that NAPWDA is not a bona fide testing and

certification program. What he offers is, for the most part, differences of opinion, for reasons he states, albeit tersely.[6] In a civil case, such disputes by experts are routine and courts, after vetting the dueling experts pursuant to F.R. Ev. 702, usually leave it to the jury to pick which expert's opinion(s) to accept. In the *Franks* context, where, as here, a state court judge already has reviewed and found satisfactory the drug-detecting dog's qualifications and the methodology of the searches, differences of opinion do not rise to the level of a substantial showing that Hunter was not properly tested and certified by NAPWDA, or that Deputy O'Neil and Hunter's methodology was substantially flawed.

As for Reverend Marsh, as the government points out, "we do not evaluate probable casue in hindsight, based on what a search does or does not turn up." *Harris*, 133 S.Ct. at 1059. Detective Wagner did not know anything about the resident(s) of Apt. 208, but he said he would check into it. He did not do so in the three days between Hunter's alert and his application for the warrant. This failure to investigate further, as noted above, is mere negligence. Detective Wagner didn't know what he didn't know–and we still don't know and may never know–why Hunter alerted, but this cannot be a basis to convene a *Franks* hearing to attempt to impeach Deputy O'Neil or Hunter.

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[6] Although there also is room to question some of Nicely's opinions. For instance, if Nicely is concerned that NAPWDA tested Hunter with too large a quantify of drugs, doesn't this imply that Hunter will only alert to those larger amounts, which increases the likelihood that drugs are present when Hunter alerts? If Nicely is concerned that Deputy O'Neil "cues" Hunter, then how do we explain Hunter's alert to Apt. 208? Or Apt. 204 for that matter, which Deputy O'Neil did not know was the subject apartment? Why would it be a problem for Hunter to alert to the residual odor of controlled substances that no longer are present when the Supreme Court views this as probable cause that drugs or evidence of a drug crime will be found, *see Harris*, 133 S.Ct. At 1056, n.2. To the same effect, why is NAWPA's use of the grade "satisfactory" a concern when "satisfactory performance in a certification or training program can itself provide sufficent reason to trust [*the dog's*] alert"? 133 S.Ct. At 1057.

In sum, Whitaker has not made a substantial preliminary showing that Hunter did not satisfactorily perform in a certified training program, or that there is a genuine basis to challenge his reliability when alerting to the odor of controlled substances. Therefore, Whitaker is not entitled to disclosure of any additional records regarding Hunter, he is not entitled to a *Franks* hearing and this court should deny his motion to suppress evidence.

RECOMMENDATION

Pursuant to 42 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Lonnie Whitaker's motion to suppress evidence seized during and derived from execution of the challenged state court search warrant (dkt. 30), and that this court deny Whitaker's motion for disclosure of more records regarding the dog Hunter (dkt. 17).

Entered this 19th day of May, 2014.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Madison, Wisconsin 53703

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May 19, 2014

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Re: United States v. Lonnie Whitaker
Case No. 14-cr-17-bbc

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before May 30, 2014, at noon by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by May 30, 2014 at noon, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/
Susan Vogel for Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**