IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

14-cr-17-bbc

v.

LONNIE WHITAKER,

Defendant.

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Armed with a warrant issued by a state court judge, law enforcement agents executed a search warrant for defendant Lonnie Whitaker's apartment and found drugs and a handgun. A grand jury charged him with three counts of possessing with intent to distribute cocaine and marijuana with the intent to distribute and one count of possessing a handgun. Defendant moved to suppress the evidence seized during the search on various grounds and asked for a Franks hearing, arguing that the sheriff's deputy who applied for the search warrant had given intentionally false and misleading statements to the state court judge who issued it. In addition, he moved for the disclosure of additional records about the narcotics sniffing dog (Hunter) used by the police to collect evidence to support their warrant application.

The magistrate judge declined to hold a hearing, but issued a report, dkt. #56, in which he recommended that the court deny defendant's motion to suppress. Defendant has

filed objections to the recommendation, but a review of those objections reveals no reason to reject the recommendation. The magistrate judge addressed each of defendant's objections, explaining why they do not require a hearing or the production of additional reports about the dog and his record. He explained as well as why it was not a violation of defendant's reasonable expectation of privacy under the Fourth Amendment for the sheriff's deputies to use a dog in the common areas of the building in which defendant's apartment is located.

On this last point, defendant argues strongly for the proposition that the recent Supreme Court decision in Florida v. Jardines, 133 S. Ct. 1409 (2013), requires fresh consideration of the privacy rights inherent in common areas of an apartment building. Jardines did not involve an apartment building but a private residence. Law enforcement officers took a trained canine up to the door of the house, where the dog alerted to narcotics. That alert became a basis for a application for a search warrant, which was executed the same day and led to the discovery of a marijuana grow. Jardines moved to suppress the evidence; the Supreme Court ruled in his favor. The Court called the issue a straightforward one: the officers and the dog physically entered and occupied a space within the curtilage of the house, an area that the Court has held enjoys protection as part of the house, and they did so to engage in conduct not explicitly or implicitly permitted by the homeowner. Id. at 1414.

Defendant asserts that the magistrate judge failed to follow the holding in Jardines when he recommended a finding that defendant "had not been wronged by the dog sniff of

his apartment door by a K-9 unit located in the common hallway of his apartment building." Dft.'s Objs. dkt. #48, at 1. Defendant believes that the only way the magistrate judge could reach his decision was to ignore the notions of license and social expectation that the Supreme Court acknowledged in Jardines v. Florida, 133 S. Ct. 1409 (2013), but he is mistaken in his premise. The magistrate judge did not ignore these matters, but addressed them straight on. As he pointed out in his report and recommendation, dkt. #46 at 16, it has been clear for years in this circuit that apartment residents have no privacy interest in the common areas of an apartment. E.g., Harney v. City of Chicago, 702 F.3d 916, 925 (7th Cir. 2012); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991). Nothing that defendant has argued and nothing in Jardines suggests any reason to believe that the law has changed on this issue in the two years since Harney was decided or that society's expectations in this area have changed.

Little need be said about defendant's other objections. The magistrate judge was correct in finding that defendant had not shown that a Franks hearing was required in this case. Under Franks, no hearing is necessary unless the movant can show that (1) the warrant application contained a material false statement or material omission; (2) the affiant made the false statement or material omission intentionally or with reckless disregard for the truth; and (3) the false statement or material omission was necessary to support the finding of probable cause. Franks v. Delaware, 438 U.S. 154, 155-56 (1978). Defendant argues that the affiant's failure to include the information that Hunter had alerted on a second apartment as well as on defendant's was not merely a mistake, but the result of a deliberate

and intentional decision. Even if I assume he is correct and that the failure was intentional, he has not shown that the omission was material. Common sense says that it was not. The question for the issuing judge was not whether other residents in the apartment building might have controlled substances in their apartments but whether there was probable cause to believe that defendant did. Moreover, the dog's alert was only one piece of information that made up the application.

It was not necessary for the affiant to include more information in the application about Hunter's reliability. That there might have been more information available is irrelevant so long as what was included was sufficient to give the issuing judge a basis for finding that the narcotics detecting dog had been properly trained and certified, which it was. As the magistrate judge explained, a determination of probable cause requires no more than "the kind of fair probability on which reasonable and prudent people, not legal technicians, act." R& R, dkt. #46, at 18. The information in the warrant was sufficient for that purpose. It summarized the dog's training, his certifications by the North American Police Work Dog Association and his experience with the Dane County Sheriff's Department.

Finally, the magistrate judge acted correctly in denying defendant's motion to compel the government to turn over additional information about Hunter. Defendant bases his motion on the holding in Florida v. Harris, 133 S. Ct. 1050 (2013), but the case does not support his position. The search in that case was undertaken without a warrant, unlike the search in this case, which was supported by a warrant issued by an impartial judge.

ORDER

IT IS ORDERED that defendant Lonnie Whitaker's objections to United States Magistrate Judge Stephen L. Crocker's May 19, 2014 report and recommendation are DENIED and the recommendation is ADOPTED. FURTHER, IT IS ORDERED that defendant's motion to suppress the evidence seized during a search of Apt. #204, 6902 Stockbridge Drive, Madison, Wisconsin, is DENIED.

Entered this 16th day of June, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge