No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

RAHEIM TRICE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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966 F.3d 506
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Raheim Abdullah TRICE, Defendant-Appellant.

No. 19-1500
|
Argued: May 8, 2020
|
Decided and Filed: July 21, 2020

Synopsis

Background: Defendant conditionally pleaded guilty in the United States District Court for the Western District of Michigan, Robert J. Jonker, Chief Judge, to possession of methamphetamine with intent to distribute. Defendant appealed.

Holdings: The Court of Appeals, Bush, Circuit Judge, held that:

[1] defendant did not have a reasonable expectation of privacy in unlocked common hallway of his apartment building;

[2] wall opposite defendant's apartment door did not constitute curtilage;

[3] defendant did not have reasonable expectation of privacy in activity of leaving from constitutionally protected area of his apartment to constitutionally unprotected area of common unlocked hallway that was open to public.

Affirmed.

West Headnotes (22)

[1] **Criminal Law** Review De Novo

Criminal Law Evidence wrongfully obtained

When reviewing a district court's decision on a motion to suppress evidence obtained through a search warrant, the Court of Appeals uses a mixed standard of review, reviewing findings of fact for clear error and conclusions of law de novo. U.S. Const. Amend. 4.

[2] **Criminal Law** Reception of evidence

Evidence should be viewed in the light most favorable to the district court's conclusions, on review of a district court's denial of a motion to suppress. U.S. Const. Amend. 4.

[3] **Criminal Law** Theory and Grounds of Decision in Lower Court

A denial of a motion to suppress evidence obtained through a search warrant will be affirmed on appeal if the district court's conclusion can be justified for any reason. U.S. Const. Amend. 4.

[4] **Searches and Seizures** Necessity of and preference for warrant, and exceptions in general

A warrantless search is per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions. U.S. Const. Amend. 4.

[5] **Searches and Seizures** What Constitutes Search or Seizure

A "search" has occurred within the original meaning of the Fourth Amendment when the government gains information by physically intruding into a constitutionally protected area, namely, persons, houses, papers, and effects. U.S. Const. Amend. 4.

[6] **Searches and Seizures** What Constitutes Search or Seizure

Searches and Seizures Expectation of privacy

A "search" occurs within the meaning of the Fourth Amendment when a government official invades an area in which a person has a constitutionally protected reasonable expectation of privacy. U.S. Const. Amend. 4.

[7] **Searches and Seizures** Expectation of privacy

There are two requirements for a government intrusion to constitute a Fourth Amendment search: first, a person must exhibit an actual, i.e., subjective, expectation of privacy in the place or thing searched; second, the expectation is one that society is prepared to recognize as reasonable. U.S. Const. Amend. 4.

[8] **Searches and Seizures** Expectation of privacy

Defendant did not have a reasonable expectation of privacy in unlocked common hallway of his apartment building, weighing against finding that search occurred by police officer placing camera there, since entry door through which police officer entered was unlocked and ajar, there was no intercom system, doorbell, or any other way to alert tenants about presence of visitor, and defendant had not taken any steps to maintain his privacy. U.S. Const. Amend. 4.

[9] **Searches and Seizures** Expectation of privacy

A number of factors are considered to determine whether an expectation of privacy is objectively reasonable under the Fourth Amendment: (1) whether the defendant was legitimately on the premises; (2) his proprietary or possessory interest in the place to be searched; (3) whether he had the right to exclude others from the place in question; and (4) whether he had taken normal precautions to maintain his privacy. U.S. Const. Amend. 4.

[10] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

Placement of a camera within the curtilage of a home without a warrant would be presumptively unreasonable under the Fourth Amendment. U.S. Const. Amend. 4.

[11] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

Under the Fourth Amendment, the area immediately surrounding and associated with the home, i.e., the curtilage, is regarded as part of the home itself. U.S. Const. Amend. 4.

[12] **Searches and Seizures** Persons, Places and Things Protected

When it comes to the Fourth Amendment, the home is first among equals. U.S. Const. Amend. 4.

[13] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

Under the Fourth Amendment, "curtilage" is the area that is intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened; it is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life. U.S. Const. Amend. 4.

[14] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

Conducting a warrantless investigation through the placement of a camera may be unlawful if it works a physical intrusion into the curtilage or if it violates the property owner's reasonable expectation of privacy. U.S. Const. Amend. 4.

[15] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

Wall opposite defendant's apartment door did not constitute curtilage, and therefore that area was not protected by Fourth Amendment; although camera was placed on that wall, which was less than 10 feet from defendant's home, and therefore within Fourth Amendment protections, area was common unlocked hallway open to public, defendant did not take any measures to protect area from observation, and he did not have any authority over that area. U.S. Const. Amend. 4.

[16] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

Four factors are considered to determine under the Fourth Amendment whether an area falls within a home's curtilage: (1) the proximity of the area to the home, (2) whether the area is within an enclosure around the home, (3) how that area is used, and (4) what the owner has done to protect the area from observation from passersby. U.S. Const. Amend. 4.

[17] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

The factors used to determine under the Fourth Amendment whether an area falls within a home's curtilage are not to be applied mechanically; rather, they are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration, i.e., whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection. U.S. Const. Amend. 4.

[18] **Searches and Seizures** Curtilage or open fields; yards and outbuildings

Readily visible common areas do not constitute curtilage of an apartment under the Fourth Amendment. U.S. Const. Amend. 4.

[19] **Searches and Seizures** Expectation of privacy

Defendant did not have reasonable expectation of privacy in activity of leaving from constitutionally protected area of his apartment to constitutionally unprotected area of common unlocked hallway that was open to public, and therefore 10 minutes of video government obtained in short increments about his entry and exit to and from his apartment over six hour time period was not protected by Fourth Amendment, since defendant necessarily assumed risk of being seen by virtue of fact that one was going to place where one reasonably must expect others might be. U.S. Const. Amend. 4.

[20] **Searches and Seizures** Plain View from Lawful Vantage Point

The Fourth Amendment does not preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. U.S. Const. Amend. 4.

[21] **Searches and Seizures** Expectation of privacy

A person cannot have a reasonable expectation of privacy under the Fourth Amendment in what he knowingly exposes to the public. U.S. Const. Amend. 4.

[22] **Searches and Seizures** Plain View from Lawful Vantage Point

Law enforcement may use technology to augment the sensory faculties bestowed upon them at birth without violating the Fourth Amendment; it is only the possibility that a member of the public may observe activity from a public vantage point, not the actual practicability of law enforcement's doing so without technology, that is relevant for Fourth Amendment purposes. U.S. Const. Amend. 4.

***509** Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 1:18-cr-00192-1—Robert J. Jonker, District Judge.

Attorneys and Law Firms

ARGUED: Kort W. Gatterdam, CARPENTER LIPPS & LELAND LLP, Columbus, Ohio, for Appellant. Joel S. Fauson, UNITED STATES ATTORNEY'S OFFICE, Grand Rapids, Michigan, for Appellee. ON BRIEF: Kort W. Gatterdam, CARPENTER LIPPS & LELAND LLP, Columbus, Ohio, for Appellant. Joel S. Fauson, UNITED STATES ATTORNEY'S OFFICE, Grand Rapids, Michigan, for Appellee.

Before: SUHRHEINRICH, BUSH, and MURPHY, Circuit Judges

OPINION

JOHN K. BUSH, Circuit Judge.

Raheim Trice entered a conditional guilty plea to one count of possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii), (B)(iii), and (C). He conditioned his plea on this appeal challenging the warrant issued to search his apartment. Law enforcement officers entered the common area of his apartment building and placed a camera disguised as a smoke detector on the wall across the hallway from the front door of his unit. The camera was equipped with a motion detector and set to activate whenever the door to his apartment opened. The camera made several videos of Trice entering and exiting, and this information was used in an affidavit in support of the search warrant. Law enforcement executed the warrant and seized drugs and other paraphernalia consistent with distribution. Trice contends that the use of the camera violated his Fourth Amendment rights.

We disagree because Trice's arguments are squarely foreclosed by two lines of authority from this court. The first makes clear that he had no reasonable expectation of privacy in the apartment's unlocked common hallway where the camera recorded the footage. The second teaches that law enforcement may use video to record what police could have seen from a publicly accessible location. Although the camera was placed inside an apartment building rather than on a utility pole (as is more ***510** typical), we are compelled by this authority to allow use of the video. The camera captured nothing beyond the fact of Trice's entry and exit into the apartment and did not provide law enforcement any information they could not have learned through ordinary visual surveillance. We **AFFIRM**.

I.

As part of the investigation that led to Trice's arrest, Investigator Marcel Behnen and the Kalamazoo Valley Enforcement Team (KVET) executed three controlled buys using a confidential informant (CI). The first controlled buy occurred on July 10, 2018 in the parking lot of a liquor store. Trice arrived at the lot as a passenger in a black Pontiac Grand Prix driven by a female. The Pontiac was registered in the name of Cradonda Dominique Trice,[1] 114 Espanola Avenue, Apartment B5 in Parchment, Michigan.[2] Trice and the CI completed the buy, and Trice returned to the Pontiac. Officers confirmed that the purchased substance was heroin.

The second controlled buy occurred on July 19, 2018, in the parking lot of a Sam's Party Store located near an apartment building at the 114 Espanola address where the Pontiac was registered. Trice arrived on foot. Officers observed him exit the rear door of the apartment building and walk to the store lot, where he completed the drug deal. Trice then walked back to the apartment building.

Based on the car registration, Investigator Behnen suspected that Trice was associated with Apartment B5 in the apartment building. Behnen conducted a search of police records to corroborate his suspicion, and he identified a June 2017 police report responding to a complaint made by a Cradonda McFerrin, a name that officers knew to be an alias for Cradonda Trice. The report indicated that officers had spoken to the resident of Apartment B6 in the same building, who indicated that Cradonda Trice's apartment (B5) was located directly across the hallway.

The third controlled buy occurred on July 23, 2018. Before conducting this buy, Behnen visited the apartment building to confirm that Trice lived in, or made use of, Unit B5. This apartment is one of two units in the basement of the two-story building. Behnen entered through the building's front door, which was ajar and had no lock, intercom, or doorbell. He went to the basement floor and identified two apartments, one of which had "B6" on its door. The door opposite Apartment B6 was unmarked.

Behnen deduced that the unmarked door was the front entryway of Apartment B5, and Trice does not dispute that the unmarked door was to that unit. Police installed a motion-sensor camera disguised as a smoke detector on the hallway wall opposite the unmarked door. The hidden camera's location on the wall was between the door to Apartment B6 and the door to a common storage closet. The camera was set to record for a period of two to three minutes when anyone entered or exited Apartment B5.

After the camera was installed, KVET and the CI executed the final controlled buy, again in the parking lot of Sam's ***511** Party Store. Investigators watched Trice exit the apartment building, walk to the designated location, complete the purchase, and return to the building. Trice entered and exited the building using the rear door, which accesses the basement.

After the buy was completed, Investigator Behnen returned to the apartment building and retrieved the camera. It had been in place for approximately four to six hours and had video-recorded Trice's entering and exiting Apartment B5 on three or four occasions. One video shows Trice using his cell phone for several minutes, but the display on the cell-phone screen is not visible in the footage. Also, although the video records a view through the threshold of the apartment doorway when the apartment's door is open, nothing inside the apartment is visible.

The video supported the affidavit that Behnen submitted in his application for a search warrant for Apartment B5. The affidavit described the previous controlled buys and explained that Trice had exited and entered the apartment building to execute the second buy. It further stated that the Pontiac driven to the first buy, and in which Trice was a passenger, was registered to Cradonda Trice at that address. The affidavit also relied upon a June 2017 police report, made in response to a call from Cradonda Trice, in which the occupant of Apartment B6 indicated that she was in the apartment directly across the hall. Finally, the affidavit stated that Behnen had "conducted surveillance of 114 Espanola Apt B5 on this day and observed Trice entering and exiting Apt B5 on several occasions." R. 56-1 at PageID 463 ¶ G(i).

After the search warrant issued, officers executed a search of Apartment B5 on July 25, 2018. Police seized 64 grams of methamphetamine, 43 grams of crack cocaine, 28 grams of powder cocaine, three grams of heroin, digital scales, and packaging material.

Trice was indicted on four counts: three counts of distribution of heroin in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (Counts I–III); and one count of possession of methamphetamine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii), (b)(1)(B)(iii), and (b)(1)(C) (Count IV). He moved to suppress evidence seized in the apartment search, arguing that the use of the hidden camera was unconstitutional. The district court held an evidentiary hearing and heard testimony from Investigator Behnen and Joe Lukeman, the property manager of the apartment building.

Lukeman testified about the layout of the property and explained that the exterior doors do not have locks and are sometimes ajar, that the building does not have an intercom or doorbells, and that there are no fences preventing entry. He also explained that the basement hallway outside of Apartment B5 can be accessed from the upstairs apartments to reach the laundry room, which was also in the basement. The basement hallway is relatively small, and Lukeman estimated that the distance between Apartment B5 and B6 is ten or slightly under ten feet from door to door. He testified that the only people allowed in the hallways are tenants and invited guests, and explained that he would expect the apartment staff or a tenant to call the police if someone was loitering in the building for several hours uninvited. He indicated that if tenants saw something that gave them concern or someone loitering in a common area, they would typically call management who would in turn direct them to call the police.

Investigator Behnen testified about the controlled buys and his placement of the hidden camera in the building. The facts concerning the controlled buys and the ***512** hidden camera are set forth above. Trice did not put on any evidence.

After the district court denied the motion to suppress, Trice entered a conditional guilty plea as to Count IV, pursuant to a plea agreement in which the Government agreed to drop the remaining counts and Trice retained his right to appeal the denial of the suppression motion. The district court imposed a sentence of 192 months to be followed by five years of supervised release. This appeal followed.

II.

[1] **[2]** **[3]** When reviewing a district court's decision on a motion to suppress, we use a mixed standard of review,

reviewing findings of fact for clear error and conclusions of law de novo. *United States v. Hines*, 885 F.3d 919, 924 (6th Cir. 2018). Evidence should be viewed in the light most favorable to the district court's conclusions. *United States v. McCraney*, 674 F.3d 614, 616–17 (6th Cir. 2012). "[A] denial of a motion to suppress will be affirmed on appeal if the district court's conclusion can be justified for any reason." *United States v. Moorehead*, 912 F.3d 963, 966 (6th Cir. 2019) (alteration in original) (quoting *United States v. Pasquarille*, 20 F.3d 682, 685 (6th Cir. 1994)).

Trice argues that that the district court erred in denying his motion to suppress because the use of the disguised camera violated his Fourth Amendment rights. Without the tainted evidence obtained by use of the camera, he contends, the affidavit would not be sufficient to support the warrant. Trice further maintains that the good-faith exception does not apply because Investigator Behnen purposefully misled the magistrate to obtain the warrant.

[4] **[5]** **[6]** "It is well settled under the Fourth Amendment that a warrantless search is *per se* unreasonable subject only to a few specifically established and well-delineated exceptions." *Morgan v. Fairfield Cty.*, 903 F.3d 553, 560–61 (6th Cir. 2018) (cleaned up) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). "Under Fourth Amendment jurisprudence, there are two ways in which government action may constitute a search." *United States v. May-Shaw*, 955 F.3d 563, 567 (6th Cir. 2020). First, "when the government gains information by physically intruding into a constitutionally protected area—namely, 'persons, houses, papers, and effects,' U.S. Const. amend. IV—'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.' " *Id.* (quoting *Morgan*, 903 F.3d at 561 (in turn quoting *Florida v. Jardines*, 569 U.S. 1, 5, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013))). Second, "a search occurs when 'a government official invades an area in which "a person has a constitutionally protected reasonable expectation of privacy." ' " *Id.* (quoting *Taylor v. City of Saginaw*, 922 F.3d 328, 332 (6th Cir. 2019) (in turn quoting *Katz v. United States*, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring))).

Trice argues only that the use of the disguised camera violated his reasonable expectation of privacy; he does not raise any argument sounding in a property-based approach.[3]

A. Reasonable Expectations of Privacy in Apartment Common Areas

[7] Under the *Katz* framework, "there are two requirements for a government intrusion to constitute a Fourth Amendment ***513** search: first, a person must exhibit 'an actual (subjective) expectation of privacy' in the place or thing searched; second, the expectation is one 'that society is prepared to recognize as "reasonable." ' " *May-Shaw*, 955 F.3d at 567 (quoting *Katz*, 389 U.S. at 361, 88 S.Ct. 507); *see also United States v. Warshak*, 631 F.3d 266, 284 (6th Cir. 2010) (explaining these "two discrete inquiries" under the reasonable-expectation-of-privacy framework).

[8] As to the first, we find that Trice may have had a subjective expectation of privacy in the basement area and the area outside his doorway. The area is an enclosed basement hallway near his apartment unit. Moreover, as Investigator Behnen testified, Trice's casual behavior and use of his cell phone, as recorded by the camera, indicated that he did not believe he was being watched.

[9] The question is therefore whether Trice's belief was objectively reasonable. This court considers a number of factors to determine whether an expectation of privacy is objectively reasonable: "(1) whether the defendant was legitimately on the premises; (2) his proprietary or possessory interest in the place to be searched ... ; (3) whether he had the right to exclude others from the place in question; and (4) whether he had taken normal precautions to maintain his privacy." *United States v. Dillard*, 438 F.3d 675, 682 (6th Cir. 2006) (citing *United States v. King*, 227 F.3d 732, 744 (6th Cir. 2000)).

Applying these factors, we have held that an apartment tenant has a reasonable expectation of privacy in the apartment building's locked common area. *See United States v. Heath*, 259 F.3d 522, 534 (6th. Cir. 2001) ("The officers in the instant matter entered a locked building without utilizing the proper procedure and, therefore, the ensuing search was violative of defendants' subjective expectation of privacy."); *United States v. Carriger*, 541 F.2d 545, 552 (6th Cir. 1976) ("[W]hen, as here, an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common area of the building must be suppressed."). We have similarly held that a resident in a duplex had a reasonable expectation of privacy in a shared basement, even though it was unlocked, where the duplex residents "lived there as one family" and treated the property as a single unit. *King*, 227 F.3d at 748.

However, we limited the scope of these holdings in *Dillard*, 438 F.3d 675. There, we held that the defendant "did not have a reasonable expectation of privacy in the common hallway and stairway of his duplex that were unlocked and open to the public." *Id.* at 682. We explained that even though the defendant had a possessory interest in the common area and the right generally to exclude non-tenants, he nonetheless lacked a reasonable expectation of privacy because he "made no effort to maintain his privacy in the common hallway." *Id.* The exterior doors were "not only unlocked but also ajar." *Id.* Further, the apartment building had no intercom system, nor any indication of a doorbell. *Id.* Thus, officers (or anyone else needing to speak to the defendant) had no way of alerting the defendant of their presence without entering the unlocked common area and approaching the tenant's individual interior door. *See id.* at 682–83.

B. Trice's Reasonable Expectation of Privacy in the Basement Hallway

The common hallway in *Dillard* is indistinguishable from the hallway at issue here. *See* 438 F.3d at 682–83. The entry door through which Investigator Behnen entered was unlocked and ajar. There was no intercom system, doorbell, or any other way to alert tenants about the presence of ***514** a visitor. As in *Dillard*, anyone who wanted to knock on a tenant's door would need to enter through the exterior door, walk through the common hallway, and locate the door of the individual unit. The hallway was effectively a common area, open to all, in which Trice had taken no steps to "maintain his privacy." *See id.* at 682 (quoting *King*, 227 F.3d at 744). He therefore did not have a reasonable expectation of privacy in the unlocked common hallway. *See id.*

[10] **[11]** **[12]** **[13]** Trice argues that *Dillard* is distinguishable because here, law enforcement entered into his curtilage to place the camera in the common hallway near his doorway.[4] We agree that placement of a camera within the curtilage of a home without a warrant would be presumptively unreasonable. For the purposes of the Fourth Amendment, "the area 'immediately surrounding and associated with the home'—what [the Supreme Court] call[s] the curtilage—[is regarded] as 'part of the home itself.' " *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409 (quoting *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Collins v. Virginia*, —— U.S. ——, 138 S. Ct. 1663, 1670, 201 L.Ed.2d 9 (2018) (alteration in original) (quoting *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409). Curtilage is the area that is "intimately linked to the home, both physically and psychologically, and is where 'privacy expectations are most heightened.' " *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409 (internal quotations omitted) (quoting *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)). It is "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' " *Ciraolo*, 476 U.S. at 212, 106 S.Ct. 1809 (quoting *Oliver*, 466 U.S. at 180, 104 S.Ct. 1735).

[14] **[15]** Conducting a warrantless investigation by placing a camera in this constitutionally protected area would therefore be unlawful, either because it worked a physical intrusion into the curtilage, *see Jardines*, 569 U.S. at 9–10, 133 S.Ct. 1409; *Taylor*, 922 F.3d at 333; *accord United States v. Jones*, 565 U.S. 400, 404–05, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), or because it would violate the owner's reasonable expectation of privacy, *see Jardines*, 569 U.S. at 12–13, 133 S.Ct. 1409 (Kagan, J., concurring). Yet, although we agree that Trice's constitutional rights would have been violated had the camera been placed in the curtilage of his home, we find the search was lawful because the area in which the camera was placed—the wall opposite his apartment door—does not constitute curtilage.

[16] **[17]** Courts have identified four factors to determine whether an area falls within a home's curtilage: (1) the proximity of the area to the home, (2) whether the area is within an enclosure around the home, (3) how that area is used, and (4) what the owner has done to protect the area from observation from passersby. *Morgan*, 903 F.3d at 561 (citing *United States v. Dunn*, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)). "These factors are not to be applied mechanically; rather, they are 'useful analytical tools only to the degree that, in any given case, ***515** they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.' " *May-Shaw*, 955 F.3d at 569–70 (quoting *Dunn*, 480 U.S. at 301, 107 S.Ct. 1134).

The first factor weighs in favor of Trice. The camera was placed in close proximity to his home, on the wall opposing his unit in between the door to his neighbor's apartment and the door to a storage closet. Investigator Behnen estimated that the distance was "about ten or slightly under ten feet from door to door." R. 49 at PageID 263–64. This distance is within the range that we have held falls within Fourth Amendment

protections. *See Morgan*, 903 F.3d at 561 (area five to seven feet from home constitutes curtilage); *see also Brennan v. Dawson*, 752 F. App'x 276, 282 (6th Cir. 2018) (same for area arm's length from home); *Widgren v. Maple Grove Twp.*, 429 F.3d 575, 582 (6th Cir. 2005) (same for area four to six feet from home).

However, the other three factors weigh strongly against him. The area was not in an enclosure around the home, but instead in a common unlocked hallway. Similarly, Trice did not take any measures to protect the area from observation. Most important for this case, though, is how the area is used. *See United States v. Jackson*, 728 F.3d 367, 374 (4th Cir. 2013) (finding the third *Dunn* factor the "most telling" in holding that an outdoor common area did not constitute curtilage of an apartment). Simply put, there is nothing about the hallway wall to suggest that it was "an area adjacent to the home and 'to which the activity of home life extends.' " *Collins*, 138 S. Ct. at 1671 (quoting *Jardines*, 569 U.S. at 7, 133 S.Ct. 1409). The hallway in question was a common area open to the public to be used by other apartment tenants to reach their respective units. The exterior doors did not have locks and were at least sometimes ajar, so the hallway was accessible to any passersby. It was also used by other tenants as a passageway to the basement laundry unit.

Further, the camera was placed on a wall opposite Trice's door, an area over which Trice does not claim to have any authority. Indeed, from the testimony introduced at the suppression hearing, it appears that the camera was placed closer to his neighbor's door than his own. *See* R. 49 at PageID 262 ¶¶ 19–21 (explaining that area in which camera was located was next to the door of "unit number 6"). There is little doubt that the apartment manager would have been free to post flyers or signs, and seemingly did post at least a sign on the door on the other side of the camera indicating that tenants could not store their personal belongings in the storage closet. *See id.* at ¶¶ 15–18. So too would the landlord have been able to put a camera in the hallway if he had so chosen.

[18] We therefore conclude that the camera was not placed within the curtilage of Trice's apartment. This is consistent with our previous cases holding that readily visible common areas do not constitute curtilage of an apartment. *See May-Shaw*, 955 F.3d at 571 (holding that a carport located in an apartment complex's common parking lot was not curtilage); *United States v. Coleman*, 923 F.3d 450, 456–57 (6th Cir. 2019) (citing *United States v. Jones*, 893 F.3d 66, 72 (2d Cir. 2018) (holding that shared driveway was not curtilage)); *United States v. Galaviz*, 645 F.3d 347, 356 (6th Cir. 2011) (similar); *see also United States v. Makell*, 721 F. App'x 307, 308 (4th Cir. 2018) ("[W]e find that the common hallway of the apartment building, including the area in front of [the defendant's] door, was not within the curtilage ***516** of his apartment."); *Jackson*, 728 F.3d at 374 (area not curtilage because it "was a common area used by all residents in the apartment complex").

Accordingly, we find that the camera was not placed in a constitutionally protected area.

C. Use of the Camera

[19] Trice argues that even if law enforcement were permitted to conduct an investigation in the common hallway, it was not entitled to do so using a hidden camera. He argues that even if the hallway itself is not a constitutionally protected area, the use of a camera represented such a significant degree of intrusion that it violated his reasonable expectation of privacy. And, he notes that *Dillard* did not pertain to use of a hidden camera.

True enough, *Dillard* involved law enforcement's physical entry into the unlocked common area of the duplex after which the officers obtained consent to search the defendant's unit. *See* 438 F.3d at 677–79. Accordingly, although it is clear that law enforcement could have physically entered the basement hallway and observed Trice enter and exit his apartment, *Dillard* does not address whether law enforcement could obtain the same information through use of a video camera. However, we have upheld the use of cameras by law enforcement to record on video what it could have observed through ordinary surveillance. *See May-Shaw*, 955 F.3d at 565; *United States v. Houston*, 813 F.3d 282, 288 (6th Cir. 2016). For the reasons that follow, we find *Houston* and its progeny sufficient to uphold the use of the camera here.

[20] **[21]** "[T]he Fourth Amendment does not 'preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible.' " *Houston*, 813 F.3d at 288 (quoting *Ciraolo*, 476 U.S. at 213, 106 S.Ct. 1809). This is because there is "no reasonable expectation of privacy in what [one] 'knowingly exposes to the public.' " *Id.* (quoting *Katz*, 389 U.S. at 351, 88 S.Ct. 507). Accordingly, the Supreme Court in *Ciraolo* held that law enforcement did not violate the defendant's reasonable expectation of privacy by flying a plane over his home and viewing illegal activity that was visible from that vantage point, even though it was within the curtilage

of the home and was not visible from the street. *See* 476 U.S. at 215, 106 S.Ct. 1809. The Court explained that it was "unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet." *Id.*

Applying this principle, we held in *Houston* that law enforcement did not violate a homeowner's reasonable expectation of privacy by recording video footage from a utility pole. *See* 813 F.3d at 288. This was so, even though the camera recorded activities that occurred within the curtilage of the home, because the pole camera "captured the same views enjoyed by passersby on public roads," and agents therefore "only observed what Houston made public to any person traveling on the roads surrounding the farm." *Id.*; *see also May-Shaw*, 955 F.3d at 566 (upholding use of pole camera because "the area surveilled by the pole camera was readily accessible from a public vantage point"); *United States v. Powell*, 847 F.3d 760, 773 (6th Cir. 2017) (upholding pole camera that took photographs observing a driveway that was "open and accessible to public view"). We further explained that the Fourth Amendment was not violated simply because law enforcement used a camera rather than conducting ordinary visual surveillance because "[t]he law does not keep [law enforcement] from more efficiently ***517** conducting surveillance ... with the technological aid of a camera." *Houston*, 813 F.3d at 289 (citing *United States v. Knotts*, 460 U.S. 276, 282, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)).

Trice argues that *Houston* is inapplicable because the hallway in which the camera was placed was not a "truly public space." Appellant's Br. at 24. He argues that although it may be permissible to post a camera on a utility pole, it is different to "trespass in an apartment building" and place a camera in Trice's hallway. *Id.*

Although we recognize that the camera at issue here implicates different concerns than a camera placed upon a utility pole, we find Trice's argument unconvincing. To be sure, the pole camera cases—and the authorities upon which they rely—emphasize that the camera was capturing what was visible from a "public vantage point." *Houston*, 813 F.3d at 288 (quoting *Ciraolo*, 476 U.S. at 213, 106 S.Ct. 1809). But that part of the analysis concerned the subject of the surveillance, not the means of surveillance. For example, the subject of the surveillance in *Ciraolo* was a marijuana garden that was located in the curtilage of the home and hidden from street view behind a large fence. *See* 476 U.S. at 209–10, 106 S.Ct. 1809. Yet the Court held that the Fourth Amendment was not violated when law enforcement viewed that garden from an airplane because it could be seen by "[a]ny member of the public flying in this airspace." *Id.* at 213, 106 S.Ct. 1809. Similarly, the point was made in *Houston* in response to an argument that the camera captured images of the defendant standing near his trailer, in an area that could be considered curtilage. *See* 813 F.3d at 288. Yet we rejected the argument because the area, even if curtilage, was readily visible from the public street. *See id.* at 288–89.

Here, there is no question that the subject of surveillance —Trice's apartment door—was readily visible from the unlocked hallway in which he had no reasonable expectation of privacy. *See Dillard*, 438 F.3d at 677–79. There is accordingly no question that law enforcement could have observed his entry and exit into the apartment from the unlocked common hallway, regardless of whether it was truly public.

[22] As to the means of surveillance, *Houston* acknowledged that the pole camera was useful because police vehicles "stuck out like a sore thumb at the property." 813 F.3d at 289 (cleaned up). But as the court explained, law enforcement "theoretically could have staffed an agent disguised as a construction worker to sit atop the pole." *Id.* That was not necessary because "law enforcement may use technology to 'augment [ ] the sensory faculties bestowed upon them at birth' without violating the Fourth Amendment." *Id.* (alteration in original) (quoting *Knotts*, 460 U.S. at 282, 103 S.Ct. 1081). "[I]t is only the possibility that a member of the public may observe activity from a public vantage point—not the actual practicability of law enforcement's doing so without technology—that is relevant for Fourth Amendment purposes." *Id.*

The *Houston* panel relied on *Knotts*, in which the Supreme Court upheld the use of a GPS tracker affixed to a bottle of chloroform to track the defendant as he traveled on public roads. *See* 460 U.S. at 280, 103 S.Ct. 1081. The *Knotts* Court explained that such GPS tracking did not violate the defendant's reasonable expectation of privacy because "[v]isual surveillance from public places along [the driven] route ... would have sufficed to reveal all of the[ ] facts [gleaned from the investigation] to the police." ***518** *Id.* at 281, 103 S.Ct. 1081.[5] In limiting its holding, the Court explained that if technology were to develop to allow "dragnet type law enforcement practices," the Court could

determine "whether different constitutional principles may be applicable." *Id.* at 284, 103 S.Ct. 1081.

The Court addressed that outer limit in *Carpenter v. United States*, —— U.S. ——, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018). There the Court held that the Government invaded the defendant's reasonable expectation of privacy by accessing 127 days of historical cell-site location information ("CSLI") that provided a "detailed, encyclopedic, and effortlessly compiled" record of his location. *See id.* at 2216–17. Such information gathering ran afoul of the concerns raised in Justice Alito's and Justice Sotomayor's twin concurrences in *Jones*, 565 U.S. 400, 132 S.Ct. 945. First, collection of this data violated "society's expectation ... that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual[ ] ... for a very long period." *Carpenter*, 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 430, 132 S.Ct. 945 (Alito, J., concurring)). Second, these detailed records provided "an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.' " *Id.* (quoting *Jones*, 565 U.S. at 415, 132 S.Ct. 945 (Sotomayor, J., concurring)).

These concerns, paired with the "retrospective quality of the data" that gave law enforcement access to information that was "otherwise unknowable," rendered use of the data unconstitutional. *Id.* at 2218–19. However, the Court left undisturbed its holding in *Knotts*, both because of the "rudimentary tracking" at issue and also the " 'limited use which the government made of the signals from [the GPS tracker]' during a discrete 'automotive journey.' " *Carpenter*, 138 S. Ct. at 2215 (quoting *Knotts*, 460 U.S. at 284, 285, 103 S.Ct. 1081).

Trice argues that the use of the camera runs afoul of *Carpenter* because he did not assume the risk that the Government would hide a camera outside his door, and further because the recordings "gave the Government the ability to travel back in time to retrace [his] whereabouts." Appellant's Br. at 24. We find this argument unconvincing.

First, Investigator Behnen used the camera for a singular and narrow purpose: to confirm his suspicion that Trice was associated with Apartment B5 rather than another unit. *See Knotts*, 460 U.S. at 284, 285, 103 S.Ct. 1081 (upholding GPS because of the "limited use which the government made of the signals"). The camera therefore did not provide the type of comprehensive monitoring at issue in *Carpenter*.

Second, to gather this information, investigators needed only to walk into the hallway and visually observe Trice enter or exit the unit on the way to the controlled buy. *See Knotts*, 460 U.S. at 281, 103 S.Ct. 1081 (emphasizing that use of the beeper "amounted principally to the following of an automobile of public streets and highways"); *Houston*, 813 F.3d at 289 (explaining that law enforcement could have obtained the same information by ***519** visual observation). They could have done this observation by posing as one of the many individuals that Trice could reasonably have expected in the hallway, be it "maintenance staff," "mail service," "garbage service," an invited guest of a tenant, or another tenant using the shared laundry room. *See* R. 49 at PageID 266 ¶¶ 6–9, 268 ¶ 1. Even if this was not practicable (although it seems it would have been), it was certainly possible. *See May-Shaw*, 955 F.3d at 568 (citing *Houston*, 813 F.3d at 289–90). The camera was therefore not a form of technology that provided law enforcement with information that was "otherwise unknowable," *Carpenter*, 138 S. Ct. at 2218, or could not have been otherwise obtained without conducting a search within the house, *see Jardines*, 569 U.S. at 11–12, 133 S.Ct. 1409 (drug-sniffing dog); *id.* at 12–14, 133 S.Ct. 1409 (Kagan, J., concurring); *Kyllo v. United States*, 533 U.S. 27, 40, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (thermal-image device).[6]

Third, the camera was activated by a motion sensor to record only in short increments and only when the front door to Apartment B5 was opened. All told, this produced three or four separate video clips, each of which lasted two to three minutes. Their length was much shorter than that of the pole-camera footage that we have allowed. *See May-Shaw*, 955 F.3d at 565 (twenty-three days); *Powell*, 847 F.3d at 773 (ninety days); *Houston*, 813 F.3d at 285 (ten weeks). The video hardly approached the type of "prolonged ... monitoring" that Justice Alito suggested could give rise to a constitutional violation in his concurrence in *Jones*, 565 U.S. at 431, 132 S.Ct. 945 (Alito, J., concurring). And the information obtained—the simple entry and exit from his apartment—revealed nothing about Trice's "familial, political, professional, religions, [or] sexual associations," areas of concern for Justice Sotomayor. *See id.* at 415, 132 S.Ct. 945 (Sotomayor, J., concurring); *see May-Shaw*, 955 F.3d at 568–69 (holding that surveillance images that only captured the defendant's comings and goings from his

apartment did not raise this type of Fourth Amendment concern).[7]

Finally, and importantly, we note the area where the surveillance occurred—a common hallway through which other tenants needed to walk to reach the common laundry room and in which Trice had no reasonable expectation of privacy. The door to the building was unlocked, and there was no intercom or internal buzzer system. Tenants would therefore expect that any member of the public was free to enter the building to knock on the door of individual units. *See Dillard*, 438 F.3d at 682–83.

Trice argues that law enforcement could not have remained in this common area for the length of time the hidden camera was installed—four to six hours—without alerting ***520** attention. Although Lukeman testified that tenants would be encouraged to call the police themselves if they saw an uninvited loiterer, it is not clear that under Michigan law Trice would have the right to exclude anyone from the hallway. Michigan courts have explained that "[t]he landlord grants to tenants rights of exclusive possession to designated portions of the property, but the landlord retains exclusive possession of the common areas." *Stanley v. Town Square Coop.*, 203 Mich.App. 143, 512 N.W.2d 51, 54 (1993); *see People v. Lumpkins*, No. 321844, 2015 WL 4470153, at *3 (Mich. Ct. App. July 21, 2015) (holding that apartment tenant had only "a license to *use* the common areas," but "no possessory interest in the hallway"); *O'Sullivan v. Greens at Gateway Ass'n*, No. 290126, 2010 WL 3184374, at *5 (Mich. Ct. App. Aug. 12, 2010) (similar); *see also Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060–61 (D.C. 2014) (holding that tenant in office building cannot bring action for trespass in common area, relying on *Stanley*); *Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc.*, 820 N.E.2d 158, 166 (Ind. Ct. App. 2005) (holding that landlord retains exclusive possession in common areas and can thus bring action for trespass). In any event, it matters not whether investigators would have faced practical difficulties in conducting an analogous visual investigation; all that matters is that it was possible. *See May-Shaw*, 955 F.3d at 568 (citing *Houston*, 813 F.3d at 289–90).

Again, we emphasize the limited scope of our holding. The only information gained was his entry and exit to and from his apartment. We think that there is no reasonable expectation of privacy in the activity of leaving from a constitutionally protected area (the home) to an area without constitutional protection. In doing so, one necessarily "assume[s] the risk," *Carpenter*, 138 S. Ct. at 2220 (citation omitted), of being seen by virtue of the fact that one is going to a place where one must reasonably expect others may be. This is true for someone leaving a single-family home as well as someone exiting an apartment.[8]

Accordingly, the use of the camera did not violate Trice's reasonable expectation of privacy.

* * *

Because we find that the use of the camera did not constitute a search within the meaning of the Fourth Amendment, we do not address the Government's alternative arguments.

III.

For all these reasons, we **AFFIRM** the district court's judgment.

All Citations

966 F.3d 506

Footnotes

1 We will refer to the defendant as "Trice" and Cradonda Dominque Trice as "Cradonda Trice" throughout the remainder of this opinion.

2 Trice is not listed as a resident of the apartment, but he refers to it as his apartment in his briefs. We refer to it as Trice's apartment for the sake of simplicity, but our analysis would be the same whether he lived in the apartment or merely was associated with and made some use of the unit.

3 Because Trice did not raise a property-based Fourth Amendment argument, we express no views on the merits of such an argument.

4 At oral argument, Trice suggested that both the area around his door that was the subject of surveillance as well as the area in which the camera was placed both constitute curtilage. But as we discuss below, we have upheld the constitutionality of utility-pole cameras, even if the area being surveilled constitutes curtilage. *See, e.g.*, *United States v.*

Houston, 813 F.3d 282, 288 (6th Cir. 2016). Thus, we address only whether the area in which the camera was placed constitutes curtilage.

5 *Houston* also relied on similar reasoning from this court's case in *United States v. Skinner*, 690 F.3d 772, 779 (6th Cir. 2012), which upheld the use of real-time cell-site location information to track the defendant on public roads for a period of three days. *Carpenter v. United States*, —— U.S. ——, 138 S. Ct. 2206, 2217 n.3, 201 L.Ed.2d 507 (2018) left open the question of this type of cell-site location information, and we need not address it here.

6 We note that the Seventh Circuit has held that the use of a drug-sniffing dog in a common area violates an apartment-dweller's reasonable expectation of privacy. *See United States v. Whitaker*, 820 F.3d 849, 850–51 (7th Cir. 2016). Although Trice cites this case for support, we need not adopt or reject the Seventh Circuit's holding because the camera at issue here, unlike a canine that has been specially trained to sniff drugs, is not a "sophisticated sensing device not available to the general public" providing access to information "that otherwise would have been unknowable without entering the apartment." *Id.* at 853.

7 Trice argues that law enforcement violated his reasonable expectation of privacy because the cameras were directed to "view activities ... inside the apartment." Appellant's Br. at 24. But as the district court found, the inside of the apartment is not visible in the footage, and the only information gleaned from the recordings was his entry and exit from the unit.

8 Trice argues that upholding the use of the camera in this situation will create an income-based disparity between the scope of Fourth Amendment protections, affording greater protections to those who live in homes than those who live in apartments. Although we are sympathetic to these concerns, they do not apply here. We are simply applying the same rule to Trice's apartment that would obtain for a single-unit house under *Houston*. *See* 813 F.3d at 288. Therefore, rather than parity, Trice actually argues for a more favorable rule than would apply in the single-unit context. To the extent he argues that this disparity arises because law enforcement would not be able to place a camera on the front porch of a single-unit home, we disagree because the wall in a common apartment hallway is simply not analogous to a front porch, as we have explained above. To be sure, we do draw a distinction between multi-unit dwellings with locked doors and those with doors that are unlocked and ajar, but that distinction comes not from this case, but from *Dillard*. *See* 438 F.3d at 682.

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APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAHEIM ABDULLAH TRICE,

Defendant.
_____/

CASE NO. 1:18-CR-192

HON. ROBERT J. JONKER

OPINION AND ORDER

A. INTRODUCTION

Police searched Defendant Trice's apartment based on a search warrant and found distribution quantities of multiple drugs. Defendant Trice admits that the affidavit supporting the warrant was sufficient, as written, to establish probable cause for the search. However, he claims that two paragraphs used to provide a nexus to his apartment should be disregarded because they were based on constitutionally improper surveillance, including a hidden camera police used for several hours inside the common hallway of the lower level apartment that Defendant occupied. The Court conducted an evidentiary hearing and finds no basis for suppression.

B. FACTUAL BACKGROUND

Based on Investigator Marcel Behnen's affidavit, a Magistrate Judge on July 24, 2018 issued a warrant authorizing a search of Apartment B5 in an apartment building at 114 Espanola Avenue in Parchment, Michigan. (ECF No. 16-1, PageID.45-52.)[1] In the affidavit, Investigator

[1] The copy of the affidavit appears at ECF No. 16-1 with the street and apartment numbers redacted. Without objection from the defendant, the government provided the Court with an unredacted copy during the evidentiary hearing.

Behnen states that his current duties include, without limitation, "investigating violations of City Ordinances and State Statutes including controlled substance violations." (*Id.*, PageID.47.) He avers that he has been a public safety officer for ten years and that during that time "has been the primary investigating officer on over 390 investigations involving controlled substances." (*Id.*) He also describes training he has received in the investigation of controlled substance activities and in interrogation and interview tactics. (*Id.*) Investigator Behnen states that his experience and training have made him "knowledgeable in activities surrounding the packaging, sale and trafficking of controlled substances." (*Id.*)

1. Linking Drug Activity to Defendant

According to the affidavit, a confidential informant advised Investigator Behnen in the spring of 2018 that the CI could purchase heroin from a person known as "Radio." (*Id.*) The KDPS I/LEADS records database linked the alias "Radio" to Raheim Abdullah Trice. (*Id.*) When shown a photograph of Mr. Trice, the CI identified him as "Radio." (*Id.*)

Investigator Behnen attests that on July 19, 2018, KVET investigators used the CI to conduct a controlled buy of heroin from Mr. Trice. (*Id.*)[2] The CI was strip-searched, and the CI's vehicle was also searched. (*Id.*) No contraband or U.S. currency was found. (*Id.*) Investigator Behnen gave the CI "official KVET funds to purchase the heroin." (*Id.*, PageID.48.) KVET investigators surveilled the CI as the CI went to the predetermined meet location. (*Id.*) Investigator Patterson observed Mr. Trice walk down the driveway of 114 Espanola Avenue towards the predetermined meet location. (*Id.*) Mr. Trice and the CI made contact, and Mr. Trice returned to 114 Espanola Avenue. (*Id.*) The CI "was surveilled back to your affiant where he/she produced

[2] The affidavit notes that the CI had previously conducted seven successful controlled-buy operations under KVET's control, and that "[i]nformation this confidential informant has provided has been found to be credible and reliable." (*Id.*, PageID.50.) In this investigation, the CI "was cooperating with KVET for financial gain." (*Id.*)

a quantity of heroin." (*Id.*) Investigator Benhen field-tested the heroin, which tested positive for the presence of heroin. (*Id.*) The CI was again strip-searched. (*Id.*) Neither the CI nor the CI's vehicle contained contraband or U.S. currency. (*Id.*)

A second controlled buy of heroin from Mr. Trice took place within 24 hours before Investigator Behnen submitted the affidavit. (*Id.*, PageID.49.) The second controlled buy used the same protocol as the first. (*Id.*) A strip search of the CI and the CI's vehicle revealed no contraband or U.S. currency. (*Id.*) Investigator Behnen provided official KVET funds to the CI to purchase the heroin. (*Id.*) KVET investigators surveilled the CI to the predetermined meet location. (*Id.*) Sgt. Ferguson observed Mr. Trice "exit the rear first floor/basement door of 114 Espanola Avenue and walk down the driveway." (*Id.*) Mr. Trice made contact with the CI, and then returned to 114 Espanola Avenue and went back into the rear first floor/basement door of the apartment building. (*Id.*) The CI was again surveilled back to Investigator Behnen, and the CI produced a quantity of heroin that field-tested positive for the presence of heroin. (*Id.*) A second strip search confirmed that neither the CI nor the CI's vehicle contained contraband or U.S. currency.

The affidavit notes that Mr. Trice has at least five prior controlled substance related convictions. (ECF No. 50). The affidavit details the kinds of evidence drug traffickers commonly have in their residences or other locations to which they have ready access. (*Id.*, PageID.50-52.) The affidavit concludes that "there is probable cause to believe that narcotics can be found at [114 Espanola, Apt. B5], and that the occupant there is partaking in ongoing violations of the controlled substance act." (*Id.*)

2. Linking the Drug Activity to Apartment B5

The affidavit attempted to provide probable cause to associate this drug activity with Apartment B5 in several ways. First, as already recited, each controlled buy involved Defendant leaving from and returning to the apartment building at 114 Espanola. Second, again as already recited, on the second controlled buy, Defendant not only returned to the building, but also returned to the rear door of the apartment building, which provided direct access to the basement, or lower level, of the apartment building. Third, on July 10, 2018, investigators "surveilled Rhaeem Trice as the passenger in a 2004 Pontiac Grand Prix, bearing Michigan registration [redacted]." (*Id.*) The Michigan Secretary of State's records returned the license plate number to Cradonda Dominique Trice with an address of 114 Espanola Ave., Apartment B5 in Parchment, Michigan. (*Id.*)[3] And fourth, Investigator Behnen located a June 17, 2017 Kalamazoo Township Police report of officers responding to a complaint at 114 Espanola called in by Cradonda McFerrin (an alias for Cradonda Trice). (*Id.*) In that report, he found a reference to contact with McFerrin's neighbor at Apt. 6, which the report described as directly across the hall from McFerrin's apartment. (*Id.*)

Defendant does not challenge the constitutional validity of any of this information, but says it is inadequate to establish probable cause to provide a nexus to his particular apartment, B5 on the lower level of 114 Espanola. Defendant says the following two paragraphs are also essential:

> E. That your affiant entered 114 Espanola Ave to locate Apt. B5. Your affiant located six mailboxes inside the common entryway. Furthermore, your affiant located Apt. 1 and 2 on the third floor, Apt. 3 and 4 on the second floor, and apartment 6 on the first/basement floor. There was an additional door across from Apt 6 which did not have a number on it.
> ….
> G.(i) That KVET investigators conducted surveillance of 114 Espanola Apt B5 on this day and observed Trice entering and exiting Apt B5 on several occasions.

[3] Both sides refer to the apartment as Mr. Trice's residence, and neither side questions his standing to challenge the search.

And according to Defendant, these paragraphs depend on information gleaned during an unconstitutional entry and search by police into the common hallway of 114 Espanola. The government contends the information was properly obtained, but not necessary to establish nexus.

3. The Evidentiary Hearing

The affidavit itself recites that Investigator Behnen entered 114 Espanola to see if he could locate Apartment B5. He found six mailboxes in a common entryway, and apartments on three floors. At the evidentiary hearing, Investigator Behnen elaborated that he entered through the front door; found two apartments each on the upper, ground, and lower levels; and found apartment B5 on the lower level across from Apartment 6, consistent with the police report described elsewhere in the affidavit.

The affidavit also adds that "KVET investigators conducted surveillance of 114 Espanola Apt. B5 on this day and observed Trice entering and exiting Apt. B5 on several occasions." (*Id.*) During the evidentiary hearing, the Court learned that this surveillance occurred by means of a hidden camera in the common hallway across from the apartment door. (*Id.*) In fact, investigator Behnen placed the camera in a smoke detector positioned to capture video of the doorway of apartment 5B.

The building manager, Joseph Lukeman, testified that the main entrance of the apartment building has no lock or other barriers to entry. A photograph of the front door confirms this. There is no barrier to entry from the back door either, which leads most directly to the lower level. There is no lock, doorbell, or intercom. Mr. Lukeman testified that the building is freely accessible through the front door. Once inside the building, it is possible to access every floor of the building, including the basement level, through common stairs and hallways. Anyone could freely access the common hallways. This particular building did not post "No Trespassing" signs. Management

relied on tenants to report any unwanted people loitering in the hallways. There has been no testimony about that ever happening at 114 Espanola.

Investigator Behnen testified that in the course of the investigation he went to the building and found the main entrance door unlocked and ajar. He entered the building and walked the hallways of each floor, locating six apartments, including two on the basement level. He visited the building at a later point, again entering through the unlocked main entry, and placed a camera disguised as a smoke detector across the common hallway from the door of Mr. Trice's apartment. Investigator Behnen positioned the camera in a way that would allow it to capture images of people coming and going through the door of the apartment.

Investigator Behnen testified that he left the camera in place for approximately five or six hours. The camera was not recording all the time. Instead, it had a motion detector and recorded only when it sensed movement around the apartment door. Video clips introduced as evidence during the hearing showed Mr. Trice entering and exiting the apartment multiple times over the course of several hours. The few, brief video clips played at the hearing were the entire collection of video footage captured – a total of less than five minutes. The Court saw nothing intelligible on the clips other than Defendant Trice entering and exiting the apartment on multiple occasions.[4]

4. The Search and Motion to Suppress

Officers executed the search warrant on July 25, 2018. (ECF No. 19, PageID.61.) The search yielded "approximately 64 grams of crystal methamphetamine, 43 grams of crack cocaine, 28 grams of powder cocaine, three grams of heroin, digital scales, and packaging material." (*Id.*) Mr. Trice moves to suppress this evidence as the fruit of an invalid search warrant. He contends that the surveillance within the apartment building, particularly the placement and use of the

[4] On one clip, he paused a short time in the common hallway to do something with his cell phone. From the video, it was not possible to tell exactly what he did, or to read anything on his screen.

hidden surveillance camera, amount to an unconstitutional search. He argues further that absent the information the hidden camera provided -- his coming and going from Apartment B5 -- the affidavit fails to establish a nexus between his alleged criminal activity and Apartment B5, and the search warrant is invalid. The government contends that the surveillance within the apartment building did not violate the Constitution, and that the affidavit contains enough information to establish a nexus even without the video evidence.

C. LEGAL STANDARDS

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation[.]" U.S. CONST. amend. IV. Probable cause to issue a search warrant exists when there is a "fair probability," given the totality of the circumstances, "that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238 (1983); *see also United States v. Rose,* 714 F.3d 362, 366 (6th Cir. 2013). To establish probable cause to justify the search of a place, an affidavit in support of a search warrant "must contain facts sufficient to lead a prudent person to believe that a search would uncover contraband or evidence of criminal activity." *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000). "A court must look to the 'totality of the circumstances' . . . in order to answer 'the commonsense, practical question' of whether an affidavit is sufficient to support a finding of probable cause." *United States v. May*, 399 F.3d 817, 822 (6th Cir. 2005) (quoting *Gates*, 462 U.S. at 230). At least two criteria must inform this practical, common sense determination: "[f]irst, the affidavit or warrant request 'must state a nexus between the place to be searched and the evidence sought.' . . . [s]econd, '[t]he belief that the items sought will be found at the location to be searched must be supported by less than prima facie proof but more than mere suspicion.'" *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008) (quoting *United States v. Bethal*, 245 F. App'x 460, 464 (6th Cir. 2007)).

It is not enough to establish probable cause to search a property that "the owner of property is suspected of crime." *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978)). Rather, "[t]he affidavit must contain particularized facts demonstrating a 'fair probability that evidence of a crime will be located on the premises of the proposed search.'" *Id.* (quoting *United States v. Frazier*, 423 F.3d 526, 531 (6th Cir. 2005)). "In other words, the affidavit must suggest 'that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought.'" *Id.* (quoting *Zurcher*, 436 U.S. at 556). "The connection between the residence and the evidence of criminal activity must be specific and concrete, not 'vague' or 'generalized.'" *United States v. Brown*, 828 F.3d 375, 382 (6th Cir. 2016) (quoting *United States v. Carpenter*, 360 F.3d 591, 595 (6th Cir. 2004) (en banc)). An affidavit establishes probable cause only if it establishes "a nexus between the place to be searched and the evidence to be sought." *Carpenter,* 360 F.3d at 594. "[W]hether an affidavit establishes a proper nexus is a fact-intensive question resolved by examining the totality of circumstances presented." *Brown*, 828 F.3d at 382.

The "capacity to claim the protection of the Fourth Amendment depends … upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). A legitimate expectation of privacy requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In determining whether a subjective expectation of privacy is objectively reasonable, courts in the Sixth Circuit consider factors such as: "(1) whether the defendant was legitimately on the premises; (2) his proprietary or possessory interest in the place to be searched or the item to be seized; (3) whether he had the

right to exclude others from the place in question; and (4) whether he had taken normal precautions to maintain his privacy." *United States v. Dillard*, 438 F.3d 675, 682 (6th Cir. 2006).

D. ANALYSIS

1. Common, Unlocked Apartment Hallways

Investigator Behnen's entry into the unlocked apartment building and its common hallways did not violate Mr. Trice's rights under the Fourth Amendment. Even if he had a subjective expectation of privacy, Mr. Trice lacked an objectively reasonable expectation of privacy in the unlocked common hallway. In similar challenges to searches under the Fourth Amendment, the Sixth Circuit has found that there is no reasonable expectation of privacy in unlocked common areas in unlocked apartment buildings. For example, in *Dillard* the court considered whether a defendant had an objectively reasonable expectation of privacy in the common hallway of the duplex in which he resided. The court found that "officers did not violate the Fourth Amendment when they entered Dillard's duplex and walked to the second floor because Dillard did not have a reasonable expectation of privacy in the common hallway and stairway of his duplex that were unlocked and open to the public." *Dillard*, 438 F.3d at 682. In *Dillard*, the door was not only unlocked, but there was no doorbell or intercom system that could alert a tenant of police or other presence. *Id.* The same is true here.

In contrast, in *United States v. Kimber*, the Sixth Circuit found that a defendant did have an objectively reasonable expectation of privacy in the lobby area of a locked residential apartment building. *United States v. Kimber*, 395 F. App'x 237, 248 (6th Cir. 2010). Similarly, in *United States v. Carriger*, the Sixth Circuit found that a tenant in a locked apartment building had a reasonable expectation of privacy in common areas not open to the general public where a government agent entered the building without permission by slipping in while workmen were

leaving. *United States v. Carriger*, 541 F.2d 545, 548, 550 (6th Cir. 1976). Likewise, in *United States v. Heath*, the court ruled that where officers entered a locked apartment building "without utilizing the proper procedure," evidence seized in an ensuing search had to be suppressed, because the evidence "was gained as a result of [the officer's] presence in the common areas of the building." *United States v. Heath*, 259 F.3d 522, 534 (6th Cir. 2001) (quoting *Carriger*, 541 F.2d at 552). The problem for Defendant Trice is that his apartment building had no locked exterior doors, and no other barriers to entry. *Kimber*, *Carriger*, and *Heath* do not apply here. *Dillard* does.

2. The Hidden Camera

But what about Investigator Behnen's placement of the hidden camera in the hallway across from Mr. Trice's doorway? Does that change the calculus? The Court finds that under the governing law, and on the facts presented here, it did not. It was permissible for Investigator Behnen to enter the unlocked, publicly accessible apartment building. Once inside the building, there were no barriers to accessing the common stairs and hallways, and it was permissible for Investigator Behnen to enter those spaces. He could have stood in the hallway all afternoon and waited for an opportunity to observe people coming and going from Apartment B5. In fact, the testimony showed the building laundry facility was on the lower level near Apartment B5, so it would have been possible to develop a plausible cover story. But the more practical – and probably more effective – method was using available technology to place a motion-activated camera on a temporary, short-term basis.

The placement of the hidden camera in the hallway at issue here is functionally similar to use of a pole camera on a public thoroughfare. In *United States v. Houston*, 813 F.3d 282 (6th Cir. 2016), officers used a pole camera to surveil a farm in rural Tennessee. They placed the camera

at the top of a public utility pole and recorded footage over the course of ten weeks. The Sixth Circuit found that the ten-week "use of the pole camera did not violate Houston's reasonable expectations of privacy because the camera recorded the same view of the farm as that enjoyed by passersby on public roads." *Houston*, 813 F.3d at 285. The court emphasized that the agents "only observed what Houston made public to any person traveling on the roads surrounding the farm." *Id.* at 288. The court stated that "the Fourth Amendment does not punish law enforcement for using technology to more efficiently conduct their investigations." *Id.* The same analysis applies here to use of a camera in a publicly accessible hallway. The placement and use of the camera did not violate Mr. Trice's rights under the Fourth Amendment.

The Court also notes that Investigator Behnen was careful to limit the camera surveillance. The camera stayed in place for five or six hours, and it recorded only upon sensing motion. The video clips substantiate Investigator Behnen's testimony that he positioned the camera at an angle meant to capture footage of individuals entering and exiting the apartment. The camera captured no more than what a person passing through the hallway would have seen. "[P]olice may view what the public may reasonably be expected to view." *Houston*, 813 F.3d at 289. The evidentiary record also reflects that Investigator Behnen used the hidden camera to corroborate his reasonable belief that Mr. Trice resided in Apartment B5 based on other information gained during his investigation. That information includes identifying Mr. Trice as a passenger in a car registered to Cradonda Dominique Trice with an address of 114 Espanola Ave., Apartment B5 in Parchment, Michigan; the police report linking Cradonda McFerrin (alias for Cradonda Trice) to the apartment across the hall from Apartment 6; and surveillance during two controlled buys of Mr. Trice exiting and returning to 114 Espanola through the main basement entrance. Investigator Behnen did not use the hidden camera for a fishing expedition. *See United States v. Mohammed*, 501 F. App'x

431, 436-37 (6th Cir. 2012) (contrasting corroboration of independent evidence with improper fishing expedition).

3. Curtilage?

Defendant Trice argues that the part of the hallway area immediately in front of his front door is akin to curtilage and that a heightened expectation of privacy exists in the space. It is certainly true that curtilage is garnering significant new attention in Fourth Amendment analysis. *Florida v. Jardines*, 569 U.S. 1 (2013); *Collins v. Virginia*, 138 S. Ct. 1663 (2018). And in some ways, the front door of a dwelling serves as an important threshold to the private home regardless of whether that is a single-family home in the suburbs, or a low-rent apartment in the city. But under current law, as just reviewed, the common, unlocked hallway in the low-rent apartment building does not carry the same level of protection as the doorstep in suburbia. Defendant cannot cite any case authority establishing that any part of a common, unlocked hallway in an apartment building qualifies as curtilage.

Moreover, even assuming the common hallway amounts to curtilage, there is still no reasonable expectation of privacy in what a person makes visible to anyone viewing the curtilage from a public area. *See Houston*, 813 F.3d at 288 ("[E]ven assuming that the area near the trailer is curtilage, the warrantless videos does not violate Houston's reasonable expectations of privacy, because the ATF agents had a right to access the public utility pole and the camera captured only views that were plainly visible to any member of the public who drove down the roads bordering the farm."); *see also California v. Ciraolo*, 476 U.S. 207 , 213 (1986) (Fourth Amendment does not "preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."). So once the apartment dweller steps into the

hallway, whatever that person presents is fair game for surveillance without a warrant – just as happened with the pole camera in *Houston*.

4. The Future

This case may present another example of how changes in technology challenge existing Fourth Amendment analytical categories. It is one thing to say that what a person exposes to public view is fair game. But maybe it is something different to say that law enforcement could theoretically follow anyone 24 hours a day so that a warrantless GPS tracking device can constitutionally do the job. The Supreme Court wrestled with that problem in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). It reached a result requiring a warrant but did not agree on the appropriate analytical categories. Similarly here, it is one thing to say that an officer is free to walk into an unlocked common hallway of an apartment building and observe what any of the rest of us could while there. But maybe it would be something else to say that officer could place a hidden camera in front of every door that runs without interruption for 24 hours a day and captures everything happening in the hallway.

Here, the officers did not test the outermost limits of that possibility. They placed a camera for five to six hours, and they captured only motion-triggering activity at the doorway of Apartment B5. They recorded less than five minutes of activity total and never captured any information beyond what anyone standing in the hall by the laundry would have seen. Maybe analytical categories will change to prevent the most extreme logical extensions of the current "reasonable expectation of privacy" regimen. *Cf. Morgan v. Fairfield County, Ohio*, 903 F.3d 553, 567-75 (Thapar, J., concurring in part and dissenting in part). But under current law, based on the actual facts of this case, the Court cannot find a Fourth Amendment violation.

5. Leon Good Faith Exception

The Court finds that Investigator Behnen's entry into 114 Espanola and use of the hidden camera for surveillance did not violate Mr. Trice's rights under the Fourth Amendment. But even if a Fourth Amendment violation occurred, the Court finds that the *Leon* good faith exception to the exclusionary rule applies here. *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the Supreme Court "established a new objective inquiry limiting suppression to circumstances in which the benefits of police deterrence outweigh the heaving costs of excluding 'inherently trustworthy tangible evidence' from the jury's consideration." *United States v. White*, 874 F.3d 490, 496 (6th Cir. 2017) (quoting *Leon*, 468 U.S. at 907). The good faith exception provides that even where a search warrant is held to be defective, the evidence is admissible if the searching officers acted in good faith and seized evidence in "objectively reasonable reliance" on the warrant. *Leon,* 468 U.S. at 921–22; *United States v. Czuprynski,* 46 F.3d 560, 563–64 (6th Cir. 1995). "Following *Leon*, courts presented with a motion to suppress claiming a lack of probable cause must ask whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's decision." *White*, 874 F.3d at 496 (internal quotation marks omitted). Here, there is no basis to find that a reasonably well-trained officer would have known of any impropriety in entering the unlocked apartment building and its common hallways, and in making limited use of a camera in the common hallway to corroborate a reasonable belief that Mr. Trice resided in Apartment B5. Investigator Behnen and his fellow searching officers acted in good faith, and their reliance on the search warrant was objectively reasonable. Even if there was a Fourth Amendment violation, *Leon* protects their actions, and the evidence the search yielded must not be suppressed.

E. CONCLUSION

For these reasons, the requested suppression of the evidence is not warranted.

ACCORDINGLY, IT IS ORDERED:

Defendant Trice's Motion to Suppress Evidence (ECF No. 16) is **DENIED**.

Dated: December 10, 2018

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE