APPENDIX - A

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
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CAROLYN TAFT GROSBOLL
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September 28, 2020

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Editha Rosario-Moore
Office of the State Appellate Defender, Third District
770 E. Etna Road
Ottawa, IL 61350-1014

In re: People v. Lindsey
124289

Dear Editha Rosario-Moore:

The Supreme Court today entered the following order in the above-entitled cause:

Petition for rehearing denied.

Opinion modified upon denial of rehearing.

The mandate of this Court will issue to the Appellate Court and/or Circuit Court or other agency on 11/02/2020.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Appellate Court, Third District
Attorney General of Illinois - Criminal Division
Eldad Zvi Malamuth
Justin Andrew Nicolosi
Office of the State Appellate Defender, Third District
State's Attorney Rock Island County
State's Attorney's Appellate Prosecutor, Third District

APPENDIX - B

2020 IL 124289

IN THE

SUPREME COURT

OF

THE STATE OF ILLINOIS

(Docket No. 124289)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v.
JONATHAN LINDSEY, Appellee.

Opinion filed April 16, 2020.—Modified upon denial of rehearing September 28, 2020.

JUSTICE THEIS delivered the judgment of the court, with opinion.

Justices Kilbride, Garman, and Karmeier concurred in the judgment and opinion.

Chief Justice Anne M. Burke dissented, with opinion, joined by Justice Neville.

Chief Justice Anne M. Burke and Justice Neville dissented upon denial of rehearing, without opinion.

Justice Michael J. Burke took no part in the decision.

OPINION

¶ 1 The central issue in this case is whether a warrantless dog sniff outside the door of the motel room where defendant Jonathan Lindsey was staying violated the fourth amendment. The Rock Island County circuit court decided that it did not and denied the defendant's motion to suppress evidence. The defendant was convicted of unlawful possession with intent to deliver a controlled substance within 1000 feet of a school (see 720 ILCS 570/407(b)(1) (West 2014)) and sentenced to seven years' imprisonment. The appellate court reversed and remanded, holding that the trial court should have granted the defendant's suppression motion. 2018 IL App (3d) 150877. For the reasons that follow, we reverse the judgment of the appellate court and affirm the judgment of the trial court.

¶ 2 BACKGROUND

¶ 3 Rock Island police officer Timothy Muehler received information from a confidential informant that the defendant was selling narcotics from a room at a local motel. A background check revealed that the defendant had an extensive criminal record, including two 2012 arrests for the manufacture and delivery of controlled substances. Another officer then contacted the defendant. The defendant stated that he had narcotics for sale and agreed to meet the officer. At the meeting, the officer and the defendant discussed drugs, but no deal occurred.

¶ 4 On April 27, 2014, Officer Muehler surveilled the motel and observed the defendant drive away from the parking lot. Muehler knew that the defendant had a suspended driver's license, so he followed the defendant's vehicle and called dispatch for help. Officer Jacob Waddle eventually stopped the defendant. He was arrested for driving with a suspended license (see 625 ILCS 5/6-303 (West 2014)) and transported to the Rock Island Police Department, where he signed a waiver of rights form. According to Officer Muehler, the defendant stated that he was staying in Room 129 at the motel. Another officer went there and spoke to the motel's staff, who advised that the defendant was staying in Room 130. Deputy Jason Pena of the Rock Island County Sheriff's Department and his K-9 partner Rio then went to the motel. Rio conducted a "free air sniff" outside Room 130 and alerted to the odor of narcotics. Officer Muehler submitted an affidavit outlining the investigation to a trial judge, who issued a search warrant. Inside the room, police found 4.7 grams

of heroin in a dresser drawer, along with related items—a digital scale, scissors, corner-cut plastic bags, and sandwich-sized plastic bags. The defendant later admitted that the heroin was his, and he was charged with unlawful possession with intent to deliver a controlled substance within 1000 feet of a school.

¶ 5 The defendant filed a motion to suppress evidence, arguing that the dog sniff violated the fourth amendment. The trial court held a hearing on the motion. The State called Sergeant Shawn Slavish of the Rock Island Police Department as its first witness. Sergeant Slavish testified that he participated in the investigation and learned the defendant was staying in Room 130 of the American Motor Inn. According to Slavish, the motel "is shaped in a U or a horseshoe shape with another building that sits at the entrance forming kind of a block there." The door to Room 130 is "set back in a little alcove[,] and as you stepped into the alcove to the right was Room 130." Slavish added that the alcove itself had a door, but the area was "open to the public, the door was propped open" on April 27.

¶ 6 Deputy Pena also testified the area was open to the public that day. There were no locked doors that prevented access to the door of Room 130. On the day of the dog sniff, Pena directed Rio to perform a free air sniff along the side of the motel. Once Rio reached "the general area" outside Room 130, he changed his behavior, sitting and lying down, which signaled an alert to the odor of narcotics. On cross-examination by defense counsel, Deputy Pena clarified that Rio "was approximately at the door handle and the door seam" and "within inches of the door" when he alerted. The State presented no further evidence.

¶ 7 The defendant called a single witness, Kylinn Ellis. Ellis testified that she was the mother of the defendant's son. On April 27, she "came down to see him" after work. At some point that afternoon, the defendant was driving Ellis's car with her in the passenger seat, when he was stopped by police and arrested. The car was impounded, and she walked back to the motel. As she approached the defendant's room, she noticed that "the curtains were moving, and you can like see somebody" inside the room. On cross-examination by the State, Ellis clarified that she did not see a person inside the room.

¶ 8 The trial court denied the defendant's motion. The trial court relied upon *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997), where a federal circuit court of appeals held that a hotel guest may have had a reasonable expectation of privacy

in his room but not in the corridor outside, so a warrantless dog sniff in that corridor did not violate the fourth amendment. The court concluded, "the motel room corridor is a public place of accommodation, and, as such, [police] have the right to walk that dog down there." Following a stipulated bench trial, the defendant was convicted and sentenced to seven years' imprisonment and three years' mandatory supervised release. He appealed.

¶ 9 A divided appellate court panel reversed and remanded. 2018 IL App (3d) 150877. The appellate court majority rejected *Roby* and relied instead upon *United States v. Whitaker*, 820 F.3d 849, 853-54 (7th Cir. 2016), where another federal circuit court of appeals held that an apartment resident may have had a reasonable expectation of privacy in the hallway outside his door, so a warrantless dog sniff in that hallway violated the fourth amendment. 2018 IL App (3d) 150877, ¶¶ 23-24. The majority explained that the defendant "had a justifiable expectation of privacy because, until Pena focused the free air sniff on the motel door and seams to detect the odor of drugs inside [his] motel room, the smell was undetectable outside of the room." *Id.* ¶ 24.

¶ 10 Having concluded that the warrantless dog sniff violated the fourth amendment, the appellate court majority shifted its attention to the exclusionary rule. The majority held that case law at the time was "quite sufficient to have apprised a reasonably well-trained officer that the execution of the Pena dog sniff without a warrant" was unconstitutional. *Id.* ¶ 36. The majority determined that the police lacked an objectively reasonable good-faith belief that their conduct was lawful, so the heroin ultimately recovered inside the defendant's room should have been suppressed. *Id.* ¶ 37.[1]

¶ 11 Justice Schmidt dissented. He observed that, while some courts have determined that dog sniffs of house and apartment doors constitute fourth amendment searches, those cases have not been extended to hotel room doors "because a hotel tenant possesses a reduced expectation of privacy." *Id.* ¶ 51 (Schmidt, J., concurring in part and dissenting in part) (citing, *inter alia*, *Roby*, 122 F.3d 1120). He added, "Even assuming that the majority correctly determined that

[1]The appellate court majority also vacated the drug assessment and street value fines and the DNA analysis fee levied against the defendant. 2018 IL App (3d) 150877, ¶¶ 41, 45. Those fines and fees are not at issue in this appeal.

the dog sniff in this case violated the fourth amendment (it did not), the good faith exception to the exclusionary rule applies." *Id.* ¶ 50.

¶ 12 This court allowed the State's petition for leave to appeal. Ill. S. Ct. R. 315(a) (eff. July 1, 2018).

¶ 13 ANALYSIS

¶ 14 Here, we must determine whether the appellate court erred in reversing the trial court's denial of the defendant's motion to suppress evidence. In reviewing a ruling on a suppression motion, we apply the familiar two-part standard of review announced by the United States Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 699 (1996). See *People v. Luedemann*, 222 Ill. 2d 530, 542-43 (2006). Under that standard, we give deference to the factual findings of the trial court, and we will reject those findings only if they are against the manifest weight of the evidence. *Id.* We remain free, however, to decide the legal effect of those facts, and we review *de novo* the trial court's ultimate ruling on the motion. *Id.*

¶ 15 The fourth amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

The Illinois Constitution of 1970 provides:

> "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." Ill. Const. 1970, art. I, § 6.

This court has long held that the search and seizure clause of our state constitution stands in "limited lockstep" with its federal counterpart. *People v. LeFlore*, 2015 IL 116799, ¶ 16.

¶ 16 Those guarantees offer protection to people, not places (*People v. Smith*, 152 Ill. 2d 229, 244 (1992) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)), but the extent to which they protect people depends upon where the people are (*Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). Our analysis begins and ends, therefore, with the question of whether the defendant has established a legitimate expectation of privacy in the place searched. *People v. Johnson*, 237 Ill. 2d 81, 90 (2010). In doing so, the defendant must point to a source outside the constitution—namely, formal property interests or informal privacy interests. *United States v. Jones*, 565 U.S. 400, 408 (2012); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.").

¶ 17 Those two types of sources roughly correspond to two complementary and overlapping tracks of fourth amendment jurisprudence: a property-based approach, exemplified by the United States Supreme Court's opinion in *Florida v. Jardines*, 569 U.S. 1 (2013), and a privacy-based approach, exemplified by Justice Kagan's concurrence in that case and Justice Harlan's concurrence in *Katz*. The government violates the fourth amendment either by a warrantless intrusion onto a person's property (see *id.* at 5) or by a warrantless infringement of a person's societally recognized privacy (see *id.* at 12 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.) (citing *Katz*, 389 U.S. at 360 (Harlan, J., concurring))). As the Supreme Court has explained, property rights are the baseline to which *Katz* adds. *Id.* at 5 (majority opinion).

¶ 18 The parties focus almost solely on the privacy-based approach and only touch upon the property-based approach in the interest of "completeness." According to the State, the defendant "properly disclaimed" in the appellate court any argument that the unwarranted dog sniff violated the fourth amendment under *Jardines*. The defendant concedes that "property rights are not the sole measure of Fourth Amendment protections," so a property-based approach is "not necessary" to resolve this case. We disagree. If, as the State contends, the warrantless dog sniff

here did not violate the fourth amendment under the privacy-based approach, we still must determine whether it violated the fourth amendment under the property-based approach. Thus, we will address both approaches in turn.

¶ 19 Property-Based Approach

¶ 20 The property-based approach to the fourth amendment exclusively provided its protections for much of our history. *Id.*; see *Jones*, 565 U.S. at 405 ("The text of the Fourth Amendment reflects its close connection to property ***."). When the government obtains information by physically intruding on persons, houses, papers, or effects without a warrant, an unconstitutional search occurs. *Jardines*, 569 U.S. at 5 (citing *Jones*, 565 U.S. at 406 n.3).

¶ 21 In *Jardines*, the police received an unverified tip that the defendant was growing marijuana inside his home. A month later, a joint surveillance team of federal drug enforcement agents and local police officers descended on the house. After watching the house for 15 minutes, two officers and a drug-detection dog entered the defendant's yard and approached his porch. The dog sniffed the base of the defendant's front door and alerted to the odor of narcotics. One of the officers obtained a warrant and subsequently found marijuana plants inside the house. The defendant was charged with drug trafficking. Before trial, he filed a motion to suppress, arguing that the dog sniff was an unreasonable search. The trial court agreed, but the appellate court did not. The state supreme court affirmed the trial court's decision, and the State sought review from the United States Supreme Court.

¶ 22 The Court emphasized that "the home is first among equals" for fourth amendment purposes. *Id.* at 6. The amendment's core protection encompasses a person's right to escape inside the home and thereby to avoid unwanted government intrusion. *Id.* (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961)). That right "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." *Id.* Thus, the area immediately surrounding and associated with the home—the so-called curtilage—remains constitutionally indistinct from it. *Id.* The Court described the front porch as "the classic exemplar" of the curtilage. *Id.* at 7. Because the officers had no

permission to plant themselves there in order to "engage in canine forensic investigation" (*id.* at 9), the dog sniff was indeed a search (*id.* at 11-12).

¶ 23 This court dissected *Jardines* in *People v. Burns*, 2016 IL 118973. In *Burns*, the Urbana Police Department received an anonymous tip that the defendant was selling marijuana. *Id.* ¶ 4. A detective conducted a background check of the defendant and learned that she had two prior arrests for marijuana possession. *Id.* ¶ 5. Several weeks later, the detective went to the defendant's apartment building to confirm her address. *Id.* ¶ 6. She lived in an apartment on the third floor of a multiunit building. The building had two locked entrances, so its common areas were not publicly accessible. *Id.* ¶ 3. The detective knocked on one entrance door, and another tenant admitted him into the building. *Id.* ¶ 6. Eventually, the detective was replaced by another police officer, who admitted a third officer and a drug-detection dog into the building. That officer and the dog went to the third floor. The defendant's apartment was located across a small landing from another apartment, and the dog alerted to the odor of narcotics outside her door. *Id.* ¶ 7. The detective then secured a warrant and found marijuana inside the apartment. *Id.* ¶¶ 8-9. She was charged with unlawful possession of cannabis with intent to deliver. The defendant filed a motion to suppress evidence, arguing that the dog sniff violated the fourth amendment under *Jardines*. The trial court granted that motion, and the State appealed. *Id.* ¶ 10. The appellate court affirmed the trial court's decision, holding that the warrantless dog sniff was unconstitutional, so the marijuana subsequently found in the defendant's apartment must be suppressed. *Id.* ¶ 13. The State appealed again.

¶ 24 This court affirmed the lower courts' decisions. *Id.* ¶ 81. We reviewed *Jardines* in great detail (*id.* ¶¶ 20-30), then considered, and summarily rejected, each of the State's arguments. First, the court disagreed with the State that the landing in front of the defendant's apartment did not qualify as curtilage under *Jardines* because the entrances were locked when the police attempted to enter the building and were "clearly not open to the general public." *Id.* ¶ 33. Second, the court disagreed with the State that the landing did not qualify as curtilage under the four-part test of *United States v. Dunn*, 480 U.S. 294, 301 (1987). *Burns*, 2016 IL 118973, ¶ 34. The court observed that the landing was in close proximity to the apartment; the landing and the apartment were both inside the building, whose entrances were locked; the landing was used only by the defendant and her nearest neighbor; and the landing

could not be seen by people outside. *Id.* ¶¶ 35, 37. Third, the court disagreed with the State that the boundaries of the landing were not easily determined: "The boundary to the landing of defendant's apartment is easily understood as curtilage" because it is "a clearly marked area within a locked building with limited use and restricted access." *Id.* ¶ 39. Fourth, the court disagreed with the State that the landing was not intimately associated with home activities, dismissing the State's final argument as a mere rehash of its unavailing *Dunn*-factors argument. *Id.* ¶ 40.

¶ 25 The court again highlighted the fact that the entrances to the defendant's apartment building were locked when the police attempted to enter, knowing that the building was not publicly accessible. *Id.* ¶ 41. We noted, however, that "this case is distinguishable from situations that involve police conduct in common areas readily accessible to the public." *Id.* Under *Jardines*, "when police entered defendant's locked apartment building at 3:20 a.m. with a drug-detection dog, their investigation took place in a constitutionally protected area." *Id.* ¶ 44. Because the police did not have a warrant to conduct that search, it violated the fourth amendment. *Id.*

¶ 26 More recently, this court stated that the distinction between locked and unlocked buildings emphasized in *Burns* "does not create a difference." *People v. Bonilla,* 2018 IL 122484, ¶ 25. The court held that a common area hallway of an apartment in an unlocked building is curtilage. *Id.* Consequently, a warrantless dog sniff at the defendant's apartment door in such a hallway violated the fourth amendment. *Id.* ¶ 32.

¶ 27 *Burns* and *Bonilla* are simple and straightforward applications of *Jardines*. In all three cases, the dog sniffs occurred outside the doors of the defendants' homes. As *Jardines* makes abundantly clear through repetition of the term, "home" is the crux of the curtilage determination. If there is no home, there can be no "constitutionally protected extension" of it. *Jardines*, 569 U.S. at 8. As the defendant acknowledges, there are certain dwellings "where a traditional curtilage concept and analysis do not apparently or readily apply." We agree. The concept of curtilage may be incongruent with respect to a place of temporary lodging because

the area around that place is not physically and psychologically linked to it (*id.* at 7) and does not belong to the person staying there (*id.* at 5-6).[2]

¶ 28 The record in this case does not show that Room 130 was the defendant's home. According to Officer Muehler's affidavit in support of a search warrant, a confidential informant warned that the defendant was "selling narcotics from the American Motor Inn." Muehler did not specify the date of the tip. The defendant stated that he was "staying" at the motel, and the motel's staff stated that he was "currently registered to room 130." Sergeant Slavish and Ellis both confirmed in their suppression hearing testimony that the defendant was "staying" at the motel, but neither revealed the length of his stay. If the defendant was only a guest at the motel for a day or a few days, it would be difficult to say that the room was his home and, consequently, difficult to say that the alcove was its curtilage. The defendant, who bore the burden of proof at the suppression hearing (see *People v. Brooks*, 2017 IL 121413, ¶ 22), offered no evidence in this regard. That alone is enough to decide the curtilage question against him and reject any property-based fourth amendment claim.

¶ 29 Even if we assume that the defendant's motel room was his home, the alcove outside it was not curtilage under *Dunn*. Although the Supreme Court in *Jardines* did not cite *Dunn* or mention its four-factor test for determining whether the area searched is within the curtilage of a home, that test remains instructive. *Burns*, 2016 IL 118973, ¶ 87 (Garman, C.J., specially concurring). In *Dunn*, 480 U.S. at 301, the Court stated:

> "[C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. [Citations.] We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage

[2]We do not imply, however, that a hotel or motel room may never be a home or that the area outside such a room may never be within its curtilage. That is a case-by-case factual determination. As the defendant aptly notes, "a person residing in a motel long-term could indeed have curtilage depending on the facts of the case."

> questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, 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."

See *People v. Pitman*, 211 Ill. 2d 502, 516 (2004) ("In determining whether a particular area falls within a home's curtilage, a court asks whether the area harbors the intimate activities commonly associated with the sanctity of a person's home and the privacies of life."). But see *State v. Williams*, 862 N.W.2d 831, 838 (N.D. 2015) (observing that the *Dunn* factors are "insufficient" to gauge whether a condominium building hallway is curtilage).

¶ 30 Here, the alcove was in close proximity to Room 130 but also to Room 131. The alcove was not within an enclosed area surrounding the room. It had a door, which was closed in the pictures the defense counsel offered into evidence at the suppression hearing but propped open when Deputy Pena and Rio arrived at the motel. The alcove was not put to personal use by the defendant. He had no ownership or possession of the alcove, only a license to use it. The alcove offered a means of ingress and egress to the defendant and anyone visiting him, but also to a guest staying in Room 131 and that person's associates, as well as the motel's staff or service technicians charged with cleaning and maintaining both rooms. Indeed, it was accessible to the public at any time. Further, the defendant took no steps to shield it from observation by other motel guests or the public. Not only was the door to the alcove open on April 27, but the defendant disclaimed any connection to it when he misled police that he was staying in another room.

¶ 31 Under *Dunn*, the alcove was not within the curtilage of his motel room. See *United States v. Legall*, 585 F. App'x 4, 5 (4th Cir. 2014) (*per curiam*) (applying the Dunn factors and concluding "the common hallway of the hotel was not within any curtilage of the hotel room"); *State v. Foncette*, 356 P.3d 328, 331 (Ariz. Ct. App. 2015) ("Although in close proximity to a private area, the public access hallway outside the door was not the type of area 'to which the activity of home life extends' so as to qualify as curtilage of the hotel room." (quoting *Oliver v. United States*, 466 U.S. 170, 182 n.12 (1984))). Consequently, the warrantless dog sniff in this case did not violate the fourth amendment under the property-based approach. We must determine next whether it violated the fourth amendment under the

privacy-based approach.[3]

¶ 32 Privacy-Based Approach

¶ 33 The privacy-based approach to the fourth amendment has its roots in Justice Harlan's short, but oft-referenced, concurrence in *Katz*, which "decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property." *Kyllo v. United States*, 533 U.S. 27, 32 (2001). Justice Harlan summarized his understanding of earlier cases: "[T]here is a twofold requirement, 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*, 389 U.S. at 361 (Harlan, J., concurring); see *California v. Ciraolo*, 476 U.S. 207, 211-12 (1986) (stating that *Katz* posits a two-part inquiry into whether a person has "manifested a subjective expectation of privacy" in the object of the challenged search and whether that expectation is reasonable in light of " 'the personal and societal values protected by the Fourth Amendment' " (quoting *Oliver*, 466 U.S. at 182-83)). When the government, even in the absence of a physical intrusion into a constitutionally protected area, obtains information by invading a reasonable expectation of privacy in persons, houses, papers, or effects without a warrant, an unconstitutional search occurs. *Kyllo*, 533 U.S. at 33; *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

¶ 34 In *Jardines*, Justice Kagan joined the Court's opinion but took up the *Katz* mantle in her concurrence, which Justices Ginsburg and Sotomayor joined. Justice Kagan agreed with the Court that the police activity was a trespass on the defendant's property, but she asserted that it was also an invasion of his privacy. *Jardines*, 569 U.S. at 13 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.). While the Court considered the case under "a property rubric," Justice Kagan "could just as happily have decided it" under a privacy one. *Id.* According to Justice Kagan, "It is not surprising that in a case involving a search of a home, property

[3]Neither *Jardines* nor *Burns* offers guidance on that question. In *Jardines*, 569 U.S. at 11, the Court felt that it "need not decide whether the officers' investigation of [the defendant's] home violated his expectation of privacy under *Katz*" because the property-based approach "keeps easy cases easy." And in *Burns*, 2016 IL 118973, ¶ 45, we observed that our "application of *Jardines* makes it unnecessary to address the merits of whether use of the drug-detection dog violated defendant's reasonable expectation of privacy."

concepts and privacy concepts should so align" because property law naturally influences shared social understandings "of what places should be free from governmental incursions." *Id.* (citing *Georgia v. Randolph*, 547 U.S. 103, 111 (2006)). The defendant's home was his property, as well as his most intimate and familiar space, so a property analysis and a privacy analysis would run on similar paths. *Id.* at 14.

¶ 35 Justice Kagan felt that the case could have been resolved on privacy grounds alone after *Kyllo*. *Id.* In *Kyllo*, the Court held that police conducted a search when they directed a thermal sensor to detect heat emanating from the defendant's home, even though they committed no trespass. *Kyllo*, 533 U.S. at 40. To Justice Kagan, that firm and bright rule governed *Jardines*. The dog in *Jardines*, like the sensor in *Kyllo*, was " 'a device that is not in general public use' " employed " 'to explore details of the home that would previously have been unknowable without physical intrusion.' " *Jardines*, 569 U.S. at 14 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.) (quoting *Kyllo*, 533 U.S. at 40). Both the sensor and the dog effected searches for which a warrant was required. *Id.* at 14-15.

¶ 36 Justice Kagan's concurrence was the primary support for the Seventh Circuit's decision in *Whitaker*, upon which the appellate court majority below heavily relied. In *Whitaker*, the police received information from a confidential informant that a person was dealing drugs at an apartment. *Whitaker*, 820 F.3d at 851. The property manager of the apartment building signed a consent form authorizing police to conduct a dog sniff of the building. A police officer and his dog proceeded to the building, where the dog alerted to the presence of drugs at the door to the defendant's apartment. A subsequent search of the apartment pursuant to a warrant revealed marijuana, cocaine, and heroin. *Id.* The defendant was charged with possession with intent to deliver. *Id.* The defendant filed a motion to suppress, which the trial court denied. He was convicted and sentenced. *Id.* at 851-52. He appealed, insisting that the warrantless dog sniff violated the fourth amendment under *Jardines* and *Kyllo*. *Id.* at 852.

¶ 37 The federal court of appeals reversed and remanded. *Id.* at 855. The appeals court analyzed the case under the privacy rubric, holding that "[t]he use of a drug-sniffing dog *** clearly invaded reasonable privacy expectations, as explained in Justice Kagan's concurring opinion in *Jardines*." *Id.* at 852. A dog sniff in an

apartment hallway comes within the rule in *Kyllo* because a dog is a "sophisticated sensing device not available to the general public" and because it detected something—the presence of drugs—that would have been unknowable without entering the apartment. *Id.* at 853.[4] Although the defendant did not have "a reasonable expectation of complete privacy in his apartment hallway," that did not mean he had "no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *Id.* The appeals court added that the defendant did not have the right to exclude other people from the hallway, but he did have the right to expect certain norms of behavior there: "Yes, other residents and their guests (and even their dogs) can pass through the hallway. They are not entitled, though, to set up chairs and have a party in the hallway right outside the door." *Id.*

¶ 38 The defendant contends that *Kyllo* and *Whitaker* dictate the result here. According to the defendant, those cases intimate that he had a reasonable expectation of privacy inside his motel room, so that the warrantless dog sniff was a search in violation of the fourth amendment. Certainly, the defendant is correct in asserting that hotel or motel guests have a reasonable expectation of privacy inside their rooms. See *Stoner v. California*, 376 U.S. 483, 490 (1964) ("[n]o less than a tenant of a house, or the occupant of a room in a boarding house [citation], a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures"); *Hoffa v. United States*, 385 U.S. 293, 301 (1966) ("[a] hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office"); accord *People v. Bankhead*, 27 Ill. 2d 18, 23 (1963). But see *United States v. Agapito*, 620 F.2d 324, 331 (2d Cir. 1980) ("the reasonable privacy expectations in a hotel room differ from those in a residence").

¶ 39 The only expectation of privacy that matters, however, is the expectation related to the place searched. Contrary to the appellate court majority's suggestion below,

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[4]Notably, the appeals court distinguished *United States v. Place*, 462 U.S. 696 (1983), where the Supreme Court upheld a dog sniff of luggage at an airport, and *Illinois v. Caballes*, 543 U.S. 405 (2005), where the Court upheld a dog sniff of a vehicle during a traffic stop, because "[n]either case implicated the Fourth Amendment's core concern of protecting the privacy of the home." *Whitaker*, 820 F.3d at 853. The *Jardines* Court similarly limited *Place* and *Caballes* to their factual settings by stating that those cases held "canine inspection of luggage in an airport" and "canine inspection of an automobile during a lawful traffic stop" did not violate the defendants' reasonable expectation of privacy under *Katz*. *Jardines*, 569 U.S. at 10.

Rio's free air sniff did not detect the odor of narcotics inside Room 130 (see 2018 IL App (3d) 150877, ¶ 24) but rather outside. That is, Rio did not teleport through the door and smell the air in the room; Rio smelled the air in the alcove. See *Sanders v. Commonwealth*, 772 S.E.2d 15, 25 (Va. Ct. App. 2015) ("a dog does not detect anything inside a [motel room], but merely detects the particulate odors that have escaped from a [motel room]," so "the odors are no longer private, but instead are intermingled with the public airspace" (internal quotation marks omitted)); *cf. United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir. 1990) ("we find that when the odor of narcotics escapes from the interior of a vehicle, society does not recognize a reasonable privacy interest in the public airspace containing the incriminating odor"); see generally, *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) ("the dog sniff was performed on the exterior of respondent's car"); *United States v. Place*, 462 U.S. 696, 707 (1983) (remarking that the dog sniff was performed on "respondent's luggage, which was located in a public place," and not its contents). The question becomes whether the defendant had an expectation of privacy there.

¶ 40 In determining whether a person has a reasonable expectation of privacy in a place searched, we consider the person's ownership or possessory interest in the place, the person's prior use of the place, the person's exclusive control of the place or ability to exclude others from it, and the person's subjective expectation of privacy in the place. *Johnson*, 237 Ill. 2d at 90 (citing *People v. Sutherland*, 223 Ill. 2d 187, 230 (2006)). That determination is fact-specific. See *People v. Gill*, 2018 IL App (3d) 150594, ¶ 96 ("[t]he question of whether a defendant has a reasonable expectation of privacy depends on the totality of the circumstances," which "will vary from person to person and case to case").

¶ 41 Here, the defendant had no reasonable expectation of privacy in the alcove outside his room. He did not own the alcove. See *Esser v. McIntyre*, 267 Ill. App. 3d 611, 618 (1994) ("the hotel, not the guest, is the possessor of the real property to which the guest and his guests have access"); *Sanders*, 772 S.E.2d at 24 (stating that the defendant had a possessory interest in a motel room, "but as to the walkways, his interest, like that of the other motel guests, was one of common, not exclusive, use and access"). Consequently, he could not control who entered the alcove or exclude people from it. The defendant was staying in Room 130, so he presumably used the alcove for ingress and egress, but there is no evidence that he used it in any other way.

¶ 42 Finally, there is no evidence that he had a subjective expectation of privacy in the alcove. A guest's expectation of privacy inside a motel room diminishes quickly outside it. See *People v. Eichelberger*, 91 Ill. 2d 359, 366 (1982) ("[I]n contrast to the occupant of a private dwelling who has the exclusive enjoyment of the land he possesses immediately surrounding his home, the hotel occupant's reasonable expectations of privacy are reduced with regard to the area immediately adjoining his room."); see also *Roby*, 122 F.3d at 1125 (holding that a hotel guest had an expectation of privacy in his room but that the expectation did not extend to the corridor outside his room); *United States v. Dockery*, 738 F. App'x 762, 764 (3d Cir. 2018) (holding that the defendant did not have a "reasonable expectation of privacy in [the] common area of the motel, which was open to guests and the public alike"); *United States v. Jackson*, 588 F.2d 1046, 1052 (5th Cir. 1979) (stating that a motel guest's fourth amendment rights do not evaporate, but "the extent of the privacy he is entitled to reasonably expect may very well diminish" because "a transient occupant of a motel must share corridors, sidewalks, yards, and trees with the other occupants"); *United States v. Marlar*, 828 F. Supp. 415, 419 (N.D. Miss. 1993) (holding that a dog sniff of an exterior motel room door did not intrude upon the defendant's reasonable expectation of privacy); *Sanders*, 772 S.E.2d at 24 (holding that the defendant had a reasonable expectation of privacy inside his room but "no expectation of privacy in the sights, sounds, and smells detectible without unconstitutional intrusion from outside" the room). The defendant undoubtedly wanted his illegal activity to remain private. "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity" but "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver*, 466 U.S. at 182-83. When the defendant's expectation was but a sliver of hope that the odor of narcotics would not be sensed by a drug-detection dog in the alcove outside his motel room, that expectation is not reasonable and not subject to fourth amendment protection.

¶ 43 CONCLUSION

¶ 44 For the reasons that we have stated, the judgment of the appellate court is reversed, and the judgment of the circuit court is affirmed. The reversal of the appellate court is without prejudice as to defendant filing a motion in the circuit court for correction of fines and fees under Illinois Supreme Court Rule 472 (eff.

May 17, 2019).

¶ 45 Appellate court judgment reversed.

¶ 46 Circuit court judgment affirmed.

¶ 47 CHIEF JUSTICE ANNE M. BURKE, dissenting:

¶ 48 The majority holds that a police officer's use of a trained drug-detection dog to sniff at the door of defendant's motel room did not constitute a search of the room within the meaning of the fourth amendment. *Supra* ¶ 39. Instead, it holds that the dog sniff was merely a search of the alcove outside the room. *Supra* ¶¶ 40-42. This holding cannot be reconciled with the clear precedent of the United States Supreme Court. I therefore respectfully dissent.

¶ 49 ANALYSIS

¶ 50 Police in Rock Island, Illinois, used a trained drug-detection dog to conduct a sniff at defendant's motel room door. The dog alerted to the presence of drugs inside the room, and based on that alert, police obtained a search warrant. Heroin was discovered inside the motel room, and defendant was thereafter convicted of unlawful possession with intent to deliver a controlled substance. Before this court, defendant contends that the dog sniff was an unreasonable search of his motel room in violation of the fourth amendment.

¶ 51 The fourth amendment, which applies to the states through incorporation by the fourteenth amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. A search occurs within the meaning of the fourth amendment "when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Determining whether a reasonable expectation of privacy exists is a two-part inquiry. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). First, the person must have exhibited a subjective expectation of privacy in the

place searched. Second, the expectation must be one that society is prepared to recognize as reasonable. *Id.*

¶ 52 In this case, the majority concedes that defendant had a reasonable expectation of privacy inside his motel room. *Supra* ¶ 38. However, the majority concludes this fact is of no moment. The majority explains that the only expectation of privacy that matters "is the expectation related to the place searched." *Supra* ¶ 39. The majority then states that the dog in this case "did not teleport through the door and smell the air in the room; [it] smelled the air in the alcove." *Supra* ¶ 39. From this, the majority concludes that the police did not conduct a search of the interior of defendant's motel room at all but, instead, searched only the alcove outside the room. *Supra* ¶ 39. I disagree. The majority holds that the dog sniff would only have been a search of defendant's motel room if the dog had been on the other side of the door. In other words, according to the majority, a search does not occur under the fourth amendment unless a government agent or monitoring device gathering information physically intrudes into a space in which a person has a reasonable expectation of privacy. This reasoning is directly contrary to United States Supreme Court precedent.

¶ 53 The Supreme Court has repeatedly held that a government agent's use of a monitoring device to obtain information about the interior of an enclosed space in which a person has a reasonable expectation of privacy constitutes a search under the fourth amendment—even if the monitoring device collecting the information is itself located outside the enclosed space. The Court has applied this rule to (1) an eavesdropping device attached to the outside of a public telephone booth (*Katz*, 389 U.S. at 353), (2) a tracking device collecting information from a "beeper" attached to a can of chemicals inside a house (*United States v. Karo*, 468 U.S. 705, 714-16 (1984)), (3) a thermal imaging device used to measure the amount of heat emanating from a house (*Kyllo v. United States*, 533 U.S. 27, 34-35 (2001)), and, of particular relevance here, (4) a drug-detection dog sniff on the front porch of a house (*Florida v. Jardines*, 569 U.S. 1 (2013)).

¶ 54 Underlying each of these decisions is the fundamental principle that "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. That is, the fourth amendment protects a person's right to a reasonable expectation of privacy, not just the right to be free from unreasonable physical intrusion. Thus, the collection of

information by the government can amount to a search under the fourth amendment even where the government does not physically intrude into the place being searched. *Id.* at 353.

¶ 55 For instance, in *Karo*, government agents used a tracking device to monitor a beeper signal emanating from a house from a separate location. *Karo*, 468 U.S. at 714. Neither the agents nor the tracking device ever crossed the threshold of the curtilage surrounding the home. Nevertheless, the Supreme Court held that the monitoring of the beeper was a violation of the defendant's reasonable expectation of privacy and, thus, constituted a search of the house, because it "reveal[ed] a critical fact about the interior of the premises that the Government [wa]s extremely interested in knowing and that it could not have otherwise obtained without a warrant." *Id.* at 715.

¶ 56 Similarly, in *Kyllo*, a thermal imaging device was placed inside a vehicle parked across the street from the home that the government agents were monitoring. *Kyllo*, 533 U.S. at 30. The government argued that the thermal imaging was permissible under the fourth amendment because it detected only heat radiating from the external surface of the house. *Id.* at 35. The Court rejected this argument, finding that the thermal imager infringed upon a reasonable expectation of privacy by detecting information about the inside of the home that could not otherwise have been obtained without entering inside. *Id.* at 40. The Court explained:

> "just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development." *Id.* at 35-36.

¶ 57 The Supreme Court has also applied these principles to dog sniffs. In *Jardines*, police used a drug-detection dog to conduct a sniff on the front porch of the house

in which the defendant resided. *Jardines*, 569 U.S. at 4. Although the majority opinion and the concurrence in that case relied on different rationales,[5] the five justices in the majority agreed that the dog sniff gathered information about the *inside* of the house, not information about the porch on which the dog sniff took place. *Id.* at 3, 5 (finding the officers used the dog sniff to investigate the contents of the home); *id.* at 12 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.) (concluding that the purpose of the dog sniff was to detect things inside the home that the officers could not perceive unassisted). Indeed, no justice held, or even suggested, that the dog sniff was not a search of the house's interior because the dog had only smelled the air on the porch. See also, *e.g.*, *Florida v. Harris*, 568 U.S. 237, 248 (2013) (the sole purpose of a dog sniff is to gather information about the contents of a private enclosed space); *United States v. Whitaker*, 820 F.3d 849, 853 (7th Cir. 2016) (same); *United States v. Thomas*, 757 F.2d 1359, 1366-67 (2d Cir. 1985) (same).

¶ 58 To be sure, the government's gathering of information about the interior of an enclosed space may not amount to a search if that information is in plain view or "plain smell." However, a drug-detection dog is only necessary in those situations where nothing is in "plain smell." A trained police dog is as much a sophisticated monitoring "device" as was the eavesdropping device in *Katz*, the tracking device in *Karo*, or the thermal imager in *Kyllo*. As Justice Kagan explained in *Jardines*, "drug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information to their human partners. [Citation.] They are to the poodle down the street as high-powered binoculars are to a piece of plain glass." *Jardines*, 569 U.S. at 12-13 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.). Just as the police are not entitled to stand on a person's front porch and peer inside the window with

[5]The majority opinion in *Jardines*, authored by Justice Scalia, held that the dog sniff constituted a search because the police officers physically entered and occupied the house's curtilage, which enjoys protection as part of the home itself, in order to engage in conduct not explicitly or implicitly permitted by the defendant. *Jardines*, 569 U.S. at 5-6. The concurring justices joined in this reasoning but argued that the dog sniff was a search for the additional reason that it violated the defendant's reasonable expectation of privacy in the home. *Id.* at 12 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.).

high-powered binoculars, they also are not entitled to bring a drug-sniffing dog to a house in order to detect objects "not in plain view (or plain smell)." *Id.* at 13.

¶ 59 The United States Court of Appeals for the Seventh Circuit applied the foregoing decisions to a dog sniff at the door of an apartment in *Whitaker*, 820 F.3d at 853. In that case, the Seventh Circuit stated "[t]here is little doubt that a highly trained drug-detecting dog is a 'super-sensitive instrument' under *Kyllo*." *Id.* at 853 n.1 (citing *Jardines*, 569 U.S. at 13 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.)). The court then held that the dog sniff violated the defendant's reasonable expectation of privacy "against persons in the hallway snooping *into his apartment* using sensitive devices not available to the general public." (Emphasis added.) *Id.* at 853. For the same reason that a police officer may not put a stethoscope to an apartment door and listen to the conversation inside, the court reasoned, an officer is not entitled to "park a sophisticated drug-sniffing dog outside an apartment door, at least without a warrant." *Id.* at 853-54.

¶ 60 Supreme Court precedent leaves no question that a government agent's use of a sophisticated monitoring device to obtain information about the interior of an enclosed space in which a person has a reasonable expectation of privacy constitutes a search under the fourth amendment. And this remains true even if the monitoring device collecting the information is itself located outside the enclosed space. In this case, it is clear the dog sniff collected information about the interior of defendant's motel room, an area in which defendant had a reasonable expectation of privacy. Deputy Jason Pena testified that he and his K-9 partner were asked to perform a "free air sniff" of room 130 of the motel. He testified that the dog alerted to the odor of narcotics at the door to room 130 by lying down in front of the door. According to Deputy Pena's testimony, the dog was positioned "at the door handle and the door seam" when he alerted. He testified that the dog "got within inches of the door" to room 130.

¶ 61 Following the positive alert, the police department applied for a search warrant in the circuit court. The complaint for search warrant alleged that police had probable and reasonable grounds to believe that defendant was in possession of controlled substances and/or other illicit items at his

> "residence on the premises located at 4300-11th St. room #130 Rock Island, Rock Island County, Illinois being a tan with blue trim, single story, multi-unit

> hotel complex with room #130 being a single unit of the multi-unit complex known as American Motor Inn with the numbers '130' affixed to the west side of the south-facing door."

An affidavit attached to the complaint alleged, in part, that "Rock Island County Deputy Pena and his K-9 partner conducted a free air sniff of 4300-11th St. room #130 with a positive alert." According to the affidavit, defendant subsequently admitted to police that he was currently staying in room 130 at the American Motor Inn. The court signed the search warrant. Police then searched the interior of room 130, where they found a quantity of what was later determined to be heroin, along with United States currency and alleged drug paraphernalia. Based on the discovery of these items, defendant was charged with unlawful possession with intent to deliver a controlled substance and was later convicted of that charge at a bench trial.

¶ 62 The police in this case used a monitoring "device" not in general public use, a trained police drug-detection dog, to obtain information that defendant was possessing illegal drugs inside his motel room. The purpose of the dog sniff was to provide information about what was inside the room, not what was in the alcove. We know this because the police were directed to obtain a free air sniff of Room 130, not the alcove outside Room 130. Moreover, the police used the evidence of the dog's positive response to establish probable cause for a warrant to search the inside of the motel room. They did not seek a search warrant for the alcove but for the room. If the dog was merely detecting odors in the alcove, as the majority concludes, then it was not possible that the canine alert established sufficient evidence to secure a warrant to search the room. The majority fails to explain this discrepancy. Without question, the dog sniff collected information about the interior of defendant's motel room, a space in which the majority concedes defendant had a reasonable expectation of privacy. The dog sniff was therefore a search of the room.

¶ 63 The majority makes no attempt to explain why the Supreme Court's decisions in *Katz*, *Karo*, *Kyllo*, and *Jardines* have no application here. Nor does the majority make any attempt to explain why the Seventh Circuit's decision in *Whitaker* is unpersuasive. Instead, the majority relies almost entirely on an opinion by the intermediate Virginia Court of Appeals, *Sanders v. Commonwealth*, 772 S.E.2d 15 (Va. Ct. App. 2015). *Supra* ¶ 39. Like the majority here, the court in that case held

that a dog sniff at a motel room door did not detect anything inside the room but merely detected the odor particles that escaped from the room and that, thus, no search occurred. *Sanders*, 772 S.E.2d at 25. This analysis is deeply flawed.

¶ 64 Just as the uses of the eavesdropping device in *Katz*, the tracking device in *Karo*, the thermal imager in *Kyllo*, and the dog sniff in *Jardines* all constituted searches under the fourth amendment because they gathered formation from an area in which a person had a reasonable expectation of privacy, so too did the warrantless dog sniff in this case. The conclusion by *Sanders* and the majority, that a dog sniff at a motel room door gathers no information about the room's interior and therefore is not a search of the room itself, is simply wrong.

¶ 65 In support of its conclusion that the dog sniff was not a search of defendant's motel room, the majority also cites cases addressing the dog sniff of a vehicle during a lawful traffic stop or a sniff of luggage at an airport. *Supra* ¶ 39 (citing *Illinois v. Caballes*, 543 U.S. 405 (2005), *United States v. Place*, 462 U.S. 696 (1983), and *United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990)). However, the majority mischaracterizes these cases as finding that the dog sniffs gathered information only about the exterior of the vehicle or luggage. This is incorrect. The entire point of the dog sniff is to gather information about the interior of an enclosed space. See *Caballes*, 543 U.S. at 410 (holding the dog sniff was conducted to detect and locate contraband *inside* the car); *Place*, 462 U.S. at 707 (holding the dog sniff revealed information about the luggage's contents, *i.e.*, whether contraband was present *inside* the luggage).

¶ 66 I would find that the free-air dog sniff in this case constituted a warrantless search of the motel room in violation of defendant's fourth amendment rights. Without the evidence of the positive dog sniff alert, there was insufficient evidence in the complaint and affidavit for a search warrant to support a finding of probable cause. The exclusionary rule prohibits the introduction into evidence of the products of unreasonable searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Therefore, the evidence resulting from the search of defendant's motel room should have been suppressed as fruit of the poisonous tree. See *People v. Henderson*, 2013 IL 114040, ¶ 33.

¶ 67 Finally, I express no opinion on that part of the majority opinion holding that no search occurred under the property-based approach. *Supra* ¶¶ 19-31. This

analysis is unnecessary to determine that a fourth amendment search occurred in this case.

¶ 68 For the foregoing reasons, I respectfully dissent.

¶ 69 JUSTICE NEVILLE joins in this dissent.

¶ 70 JUSTICE MICHAEL J. BURKE took no part in the consideration or decision of this case.

APPENDIX - C

2018 IL App (3d) 150877

Opinion filed October 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Rock Island County, Illinois.
	)	
v.	)	Appeal No. 3-15-0877
	)	Circuit No. 15-CF-290
JONATHAN LINDSEY,	)	
	)	The Honorable
Defendant-Appellant.	)	Michael F. Meersman,
	)	Judge, presiding.

JUSTICE McDADE delivered the judgment of the court, with opinion.
Justice O'Brien concurred in the judgment and opinion.
Justice Schmidt concurred in part and dissented in part, with opinion.

OPINION

¶ 1 In April 2014, the police used a trained drug-detection dog to conduct a free air sniff of the door handle and seams of defendant Jonathan Lindsey's motel room. The dog alerted to the presence of drugs inside the room, and the police obtained a search warrant. During their search, they found 4.7 grams of heroin, and Lindsey was charged with unlawful possession with intent to deliver a controlled substance while being within 1000 feet of a school. Lindsey filed a motion to suppress evidence, arguing that the dog sniff violated his fourth amendment rights. The trial court denied the motion. Ultimately, the court found Lindsey guilty and entered a judgment of

conviction and a separate second judgment ordering Lindsey to pay a $3000 drug assessment fee, a $500 drug street value fine, and a $250 DNA analysis fee and to submit a DNA sample. Lindsey appealed, arguing that (1) the trial court erred when it denied his motion to suppress evidence and (2) this court should vacate his fees and fine. We reverse and remand.

¶ 2 FACTS

¶ 3 On April 27, 2014, Lindsey was arrested for driving while his license was suspended. While Lindsey was in custody, he told police he was staying in a motel room at American Motor Inn. He did not give the officers consent to search the room. Rock Island County sheriff deputy Jason Pena arrived at the American Motor Inn with a drug-detection dog and performed a free air sniff on the exterior of Lindsey's motel room door. The dog alerted to the presence of drugs in the room. Rock Island Police Department Detective Timothy Muehler obtained a search warrant and found 4.7 grams of a powdery substance later determined to be heroin. After the search, Lindsey admitted that he possessed the heroin. Lindsey was charged with one count of unlawful possession with intent to deliver a controlled substance while being within 1000 feet of a school (Class X felony).

¶ 4 In July 2015, Lindsey filed a motion to suppress evidence. In the motion, he argued that the dog sniff violated his fourth amendment rights because it constituted an unreasonable search of the corridor of his motel room. He, therefore, claimed that any evidence seized and any statements made to the officers subsequent to the search should be suppressed.

¶ 5 A hearing on the motion was held in September 2015. Rock Island Police Department Sergeant Shawn Slavish testified that a dog sniff was conducted on the door of room 130 at the American Motor Inn. He explained that "the door itself set back in a little alcove and as you stepped into the alcove to the right was Room 130 and I believe across the hall to that would be

Room 131." The door to the alcove was propped open and the area was open to the public. Pena informed Slavish that the dog had alerted the presence of drugs at the door. Afterward, the officers obtained a search warrant and searched the room.

¶ 6 Officer Pena testified that, on April 27, the Rock Island Police Department requested him to conduct a free air sniff of motel room 130. During the dog sniff, Pena explained,

> "I let him off lead and basically had him go to that side of the building actually checking for free air sniffs alongside that building. Once you reach Room 130, he changed his behavior, alerting to the odor of narcotics. In this particular instance what he did is he came up around the door handle and its seams and he—an alert would be that he would actually sit and lay down, which he did, indicating that he is in the odor of narcotics."

The dog was "within inches" of the door when he sniffed the handle and seams. The dog also searched the general area around the room but did not alert the officer about the presence of drugs until he reached room 130.

¶ 7 Kylinn Ellis testified that Lindsey was her son's father. On April 27, Ellis was in the passenger seat of her car while Lindsey was driving. The police pulled the car over, arrested Lindsey for driving without a license, and took possession of the car. Afterward, Ellis walked to American Motor Inn to charge her phone in Lindsey's motel room. When she arrived, she saw a black Suburban with tinted windows in front of the motel. She also believed someone was in the motel room because "the curtains were moving, and you can see like somebody in there" but she did not actually see a person in the room. She did not know if anyone besides Lindsey had stayed

in the motel room but she had seen clothes that were not Lindsey's in the room. As she walked up to the motel room, she was stopped by a detective who told her she could not enter the room.

¶ 8 The trial court did not find Ellis's testimony that she believed someone was in the motel room after Lindsey was arrested credible because she had testified that she did not see a person in the room and there could have been other causes, such as an air conditioning or heating unit, for the movement of the curtains. It also stated that the police had a right to bar Ellis from the motel room to secure the scene. Relying on the Eighth Circuit's decision in *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997), the court determined that Lindsey did not have a reasonable expectation of privacy in the corridor of his motel room because, unlike an apartment or house, the corridor of a motel room "was a public place of accommodation, and it was a public access area." The trial judge explained that there were no Illinois cases that addressed this issue, and although he agreed with some of the points discussed in the *Roby* dissent, he was not going to create new case law. Ultimately, the court denied the motion to suppress.

¶ 9 In October 2015, a stipulated bench trial was held. The court found Lindsey guilty and sentenced him to seven years' imprisonment and three years of mandatory supervised release. At sentencing, the court commented on his fines and fees, stating "I note that there's still monies owing there. The clerk is to take all the monies that is showing [*sic*] owing in these cases and reduce everything to judgment, including the costs here, because obviously, he doesn't have the ability to pay any of them and it's just silly to keep these files open just for money issues in relation to that."

¶ 10 In November 2015, the court entered two separate judgments. The first judgment did not list any fines or fees. The second judgment ordered Lindsey to pay a $3000 drug assessment and a $500 drug street value fine. It also ordered him to submit a specimen of his blood, saliva, or

other tissue and pay a $250 DNA analysis fee. The Illinois State Police DNA indexing lab system shows that Lindsey had submitted a swab sample on October 16, 2012. Lindsey appealed both his conviction and the imposition of fines and fees.

¶ 11 ANALYSIS

¶ 12 I. Fourth Amendment

¶ 13 A. Reasonable Expectation of Privacy

¶ 14 Lindsey argues that the trial court's denial of his motion to suppress evidence was error because the police officer's use of a drug-detection dog near his motel room door constituted a warrantless search and, therefore, violated his fourth amendment rights. He claims that case law established that a guest in a motel room is constitutionally protected under the fourth amendment and that this rule also applies to his motel door, which is a part of the structure of the motel room. He also alleges that, pursuant to *Kyllo v. United States*, 533 U.S. 27 (2001), the dog sniff violated his fourth amendment rights because a drug-detection dog was used to explore details of the motel room not previously discernible without physical intrusion.

¶ 15 To begin, Lindsey references *Stoner v. California*, 376 U.S. 483 (1964), and *People v. Eichelberger*, 91 Ill. 2d 359 (1982), to support his argument that a guest in a motel room is entitled to constitutional protections under the fourth amendment. In *Stoner*, the United States Supreme Court established that "[n]o less than a tenant of a house, or the occupant of a room in a boarding house, [citation], a guest in a hotel room is entitled to constitutional protections against unreasonable searches and seizures." *Stoner*, 376 U.S. at 490.

¶ 16 Our supreme court in *Eichelberger* concluded that a hotel occupant's reasonable expectation of privacy is *reduced* with regard to the area immediately adjoining the room and cites *United States v. Burns*, 624 F.2d 95 (10th Cir. 1980), and *United States v. Agapito*, 620

F.2d 324 (2nd Cir. 1980), to support its reasoning. In *Burns*, the Tenth Circuit stated that, in the context of conversation,

> "[m]otel occupants possess the justifiable expectation that if their conversation is conducted in a manner undetectable outside their room by the electronically unaided ear, that it will go unintercepted. Contrarily, to the extent they converse in a fashion insensitive to the public, or semipublic, nature of walkways adjoining such rooms, reasonable expectations of privacy are correspondingly lessened." *Burns*, 624 F.2d at 100.

¶ 17 In *Agapito*, the Second Circuit stated that a person has a different expectation of privacy in the corridor of a hotel room than in the curtilage of a private residence. The court explained:

> " '[D]espite the fact that an individual's Fourth Amendment rights do not evaporate when he rents a motel room, the extent of privacy he is entitled to reasonably expect may very well diminish. For although a motel room shares many of the attributes of privacy of a home, it also possesses many features which distinguish it from a private residence: "A private home is quite different from a place of business or a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn or other buildings, and also the area under his home. But a transient occupant of a motel must share corridors, sidewalks, yards, and trees with the other occupants. Granted that a tenant has standing to protect the room he occupies, there is nevertheless an element of

public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home." ' " *Agapito*, 620 F.2d at 331 (quoting *United States v. Jackson*, 588 F.2d 1046, 1052 (5th Cir. 1979), quoting *Marullo v. United States*, 328 F.2d 361, 363 (5th Cir. 1964)).

¶ 18 Lindsey also cites multiple cases with varying fact patterns to support the proposition that the use of a drug-sniffing dog in the common area of a motel constitutes a fourth amendment search. In *Florida v. Jardines*, 569 U.S. 1, 3-4 (2013), the police conducted a dog sniff on the front porch of Jardines's private home. When the dog sniffed the front door, he gave a positive response for drugs, and the police obtained a search warrant. *Id.* at 4. The officers found marijuana during the search, and Jardines was charged with trafficking. *Id.* Our Supreme Court stated that the curtilage, or area immediately surrounding and associated with the home, was the "constitutionally protected extension" of the home and determined that Jardines's front porch was considered curtilage. *Id.* at 6-8. It also found that, although a visitor would have an implied license to approach the home for a brief moment, a resident does not give a police officer a "customary invitation" to use a trained police dog to investigate the area to find incriminating evidence. *Id.* at 8-9. The court declined to discuss whether the dog sniff violated Jardines's reasonable expectation of privacy. *Id.* at 11 ("The *Katz* [*v. United States*, 389 U.S. 347 (1967)] reasonable-expectations test has been *added to*, not *substituted for*, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." (Emphases in original and internal quotation marks omitted.)).

¶ 19 Justice Kagan concurred, stating that if the case had reviewed Jardines's reasonable expectation of privacy, the Court's decision in *Kyllo*, would provide guidance. *Id.* at 14 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.). In *Kyllo*, wherein the Court held that the police officers' use of a thermal-imaging device to detect heat from a private home constituted a search, the Court established that " 'Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant.' " *Id.* at 14 (quoting *Kyllo*, 533 U.S. 27 at 40). Justice Kagan opined that the police officers conducted a search because the officers used a trained drug-detection dog, or a "device that is not in general public use," to explore details of Jardines's home they would not have otherwise discovered without entering the home. *Id.* at 14-15.

¶ 20 In *United States v. Whitaker*, 820 F.3d 849, 850 (7th Cir. 2016), police officers obtained permission from an apartment manager to conduct a dog sniff in a locked, shared hallway of an apartment building. The dog alerted the presence of drugs at Whitaker's apartment. *Id.* The officers obtained a search warrant, found incriminating evidence, and charged Whitaker with various drug and firearm offenses. *Id.* On appeal, Whitaker argued that the use of a drug-detection dog violated his privacy interests under *Kyllo*. *Id.* at 852. The Seventh Circuit determined that, under the *Kyllo* rule, a "trained drug-sniffing dog is a sophisticated sensing device not available to the general public." *Id.* at 853. "The dog here detected something (the presence of drugs) that otherwise would have been unknowable without entering the apartment." *Id.* The court noted that Whitaker did not have "complete" reasonable expectation of privacy in his apartment hallway. *Id.* However, "Whitaker's lack of a reasonable expectation of complete privacy in the hallway does not also mean that he had no reasonable expectation of privacy

against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *Id.* The court also stated:

> "Whitaker's lack of a right to exclude did not mean he had no right to expect certain norms of behavior in his apartment hallway. Yes, other residents and their guests (and even their dogs) can pass through the hallway. They are not entitled, though, to set up chairs and have a party in the hallway right outside the door. Similarly, the fact that a police officer might lawfully walk by and hear loud voices from inside an apartment does not mean he could put a stethoscope to the door to listen to all that is happening inside. Applied to this case, this means that because other residents might bring their dog though the hallway does not mean the police can park a sophisticated drug-sniffing dog outside an apartment door, at least without a warrant." *Id.* at 853-54 (citing *Jardines*, 569 U.S. at 9).

The court concluded that the facts presented constituted a search under the fourth amendment and that Whitaker's rights were violated when the officers conducted a warrantless search in the hallway of his apartment. *Id.* at 854.

¶ 21 In a similar analysis, our supreme court in *People v. Burns*, 2016 IL 118973, found that the police officers' warrantless use of a sniff dog at the defendant's apartment door in a locked apartment building violated the defendant's fourth amendment right because the locked apartment building was a constitutionally protected area pursuant to *Jardines*. In *People v. Bonilla*, 2017 IL App (3d) 160457, *pet. for leave to appeal allowed*, No. 122484 (Sept. 27, 2017),

this court determined that the police officer's actions constituted a search under the fourth amendment when he entered the common area hallway of an unlocked apartment building and conducted a dog sniff of the defendant's front door. The court reached that conclusion because the common area hallway constituted curtilage under *Jardines* and *Burns*. However, both courts declined to apply the privacy-based approach because the government in both cases intruded onto constitutionally protected areas.

¶ 22 The State argues that case law establishes that a guest in a motel room is entitled to a reduced expectation of privacy. Furthermore, it claims that this court should adopt the ruling in *Roby*, 122 F.3d 1120 , as the trial court did in its decision. In *Roby*, police officers conducted a dog sniff on the floor of Roby's hotel room. *Id.* at 1122. The officers walked the dog down the hall two or three times, and the dog alerted to Roby's room. *Id.* The officers obtained a search warrant and found cocaine, and Roby was charged with possessing cocaine with intent to distribute. *Id.* at 1123. On appeal, Roby challenged the denial of his motion to suppress evidence obtained during the search of his hotel room because, *inter alia*, the dog sniff violated his fourth amendment rights. *Id.* The Eighth Circuit held that a trained dog's detection of odor in a common corridor did not violate the fourth amendment. *Id.* at 1125. It reasoned that Roby's expectation of privacy was limited in a hotel corridor because people can access the area and "[n]either those who stroll the corridor nor a sniff dog needs a warrant for such a trip." *Id.* It further noted that the fact that the dog was more skilled than a human at detecting odor does not make the dog sniff illegal. *Id.* at 1124-25. Furthermore, it stated that evidence of plain smell—similar to evidence in plain view—may be detected without a warrant. *Id.* at 1125.

¶ 23 We find that the reasoning in *Whitaker* and *Jardines* is more persuasive. Similar to a sense-enhancing technology, a trained drug-detection dog is a sophisticated sensing device not

available to the general public. See *Jardines*, 569 U.S. at 14-15 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.); *Whitaker*, 820 F.3d at 853. In this case, the drug-detection dog was used to explore the details previously unknown in Lindsey's motel room, which the Supreme Court established was entitled to constitutional protections. See *Stoner*, 376 U.S. at 490.

¶ 24 The State argues that Lindsey's reasonable expectation of privacy is reduced with regard to the area immediately adjoining the motel room. In *Whitaker*, the court recognized that the defendant did not have a complete expectation of privacy in his apartment hallway; however, this did not mean he had "no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *Whitaker*, 820 F.3d at 853. Furthermore, in *Burns*, 624 F.2d at 100—the case our supreme court in *Eichelberger* relies on—the court stated that a motel guest has a *justifiable* expectation that "if their conversation is conducted in a manner undetectable outside their room by the electronically unaided ear, that it would go unintercepted." Lindsey had a justifiable expectation of privacy because, until Pena focused the free air sniff on the motel door and seams to detect the odor of drugs inside Lindsey's motel room, the smell was undetectable outside of the room. Therefore, we reject the State's argument and find that the dog sniff constituted a warrantless search in violation of Lindsey's fourth amendment rights.

¶ 25 B. Exclusionary Rule

¶ 26 Next, we address whether Pena's violation meets the good faith exception to the exclusionary rule. The State contends that it has met the good faith exception because the officer had no reason to believe that he was violating Lindsey's fourth amendment rights. Although the State acknowledges that the police could not rely on any binding precedent to *authorize* the dog

sniff or the search warrant, it argues, however, there is no precedent *prohibiting* the officers' actions in a hotel hallway and, if anything, the officers would have relied on *Roby* and similar cases as guidance.

¶ 27 Generally, courts will not admit evidence obtained in violation of the fourth amendment. *Burns*, 2016 IL 118973, ¶ 47. "The fruit-of-the-poisonous-tree doctrine is an outgrowth of the exclusionary rule providing that the fourth amendment violation is deemed the poisonous tree, and any evidence obtained by exploiting that violation is subject to suppression as the fruit of that poisonous tree." (Internal quotation marks omitted.) *Id.* The main purpose of the exclusionary rule is to deter future unlawful police conduct and fulfill the guarantee of the fourth amendment against unreasonable searches and seizures. *Id.*

¶ 28 The exclusionary rule is applied only in unusual cases when its application will deter future fourth amendment violations. *Id.* ¶ 49 (citing *People v. LeFlore*, 2015 IL 116799, ¶ 22). Exclusion of evidence is a court's last resort, not its first impulse. *Id.* In considering the good faith exception to the exclusionary rule applies in any case, the inquiry is "whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." (Internal quotation marks omitted.) *Id.* ¶ 52 (quoting *LeFlore*, 2015 IL 116799, ¶ 25). "The Supreme Court expanded the good-faith exception to the exclusionary rule to include good-faith reliance upon binding appellate precedent that specifically authorized a particular practice but was subsequently overruled." *Id.* ¶ 49 (citing *Davis v. United States*, 564 U.S. 229, 241 (2011)).

¶ 29 Illinois courts have addressed the good faith exception in the context of binding authority. *Bonilla*, 2017 IL App (3d) 160457, ¶ 24 (finding that, similar to *Burns* and *Whitaker*, United States Supreme Court and Illinois Appellate Court already ruled that a dog sniff of the front door

of a residence was a fourth amendment search, and therefore, police could not rely on the good faith exception); *Burns*, 2016 IL 118973, ¶ 68 (holding that the good faith exception does not apply because there was no binding precedent authorizing officers' conduct except for a Fourth District case prohibiting the conduct); See also *Whitaker*, 820 F.3d at 854-55 (ruling that "no appellate decision specifically authorizes the use of a super-sensitive instrument, a drug-detecting dog, by the police outside an apartment door to investigate the inside of the apartment without a warrant," and therefore, good faith exception did not apply).

¶ 30 Here, the parties concede, and we agree, that there was no binding appellate precedent in effect at the time but subsequently overruled that Pena could have relied on to justify the dog sniff. In fact, there *was* sufficient binding precedent for him, as a reasonably well-trained officer, to know the dog sniff required a warrant. The dog sniff in this case occurred on April 27, 2015. At least four, and arguably five, cases decided prior to this dog sniff establish the proposition sufficiently that a reasonably well-trained officer should have known that conducting a warrantless air sniff to detect contents *inside* a hotel room violates the fourth amendment.

¶ 31 Fifty-one years prior to the search in this case, the United States Supreme Court decided, in *Stoner*, 376 U.S. at 490, that guests in hotel rooms, tenants in apartments, and residents in homes all have the same expectation of privacy in their personal space and are all entitled to the same constitutional protections against unreasonable search and seizure under the fourth amendment.

¶ 32 Thirty-three years prior to this search, the Illinois Supreme Court decided *Eichelberger*, 91 Ill. 2d 359, recognizing a hotel occupant's reasonable expectation of privacy in the hotel room—as had *Stoner*—but explicitly finding that expectation reduced with regard to the common area adjoining the room. In reaching that conclusion, our supreme court expressly relied

on two federal appeals court decisions, *Burns*, 624 F.2d at 100 ("Motel occupants possess the justifiable expectation that *if their conversation is conducted in a manner undetectable outside their room by the electronically unaided ear*, that it would go unintercepted." (Emphasis added.)), and *Agapito*, 620 F.2d at 331 ("*Granted that a tenant has standing to protect the room he occupies*, there is nevertheless an element of public or shared property in *motel surroundings* that is entirely lacking in the enjoyment of one's home." (Emphases added and internal quotation marks omitted.))

¶ 33 Fourteen years prior to Pena's search, in *Kyllo*, the Supreme Court, in a case involving the use of thermal imaging to detect activity inside a home, decided that the use of a sense-enhancing technology not available to the general public to obtain information about activities inside a home that are not visible to the naked eye and that could not be obtained without physical intrusion into the home is a search entitled to fourth amendment protection.

¶ 34 Two years prior to the Pena search, the United States Supreme Court decided in *Jardines*, 569 U.S. at 9-11, that the use of a trained drug-detection dog to sniff the area outside the defendant's private home was a fourth amendment search entitled to fourth amendment protections. The *Jardines* majority decided the case on property grounds. However, as three concurring judges noted, a trained drug-detection dog is also a sense-enhancing detection tool and its use to detect details of and activities inside a protected space that would not have been discovered without entering the home violated the defendant's reasonable expectation of privacy and would similarly constitute a fourth amendment search under a privacy analysis. *Jardines*, 569 U.S. at 14-15 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.). Privacy is the basis of Lindsey's argument in this case.

¶ 35 Finally, in *People v. Burns*, 2015 IL App (4th) 140006, the appellate court opinion, issued shortly before Pena's search, found that a dog sniff of the frame around an apartment door—the same type of sniff as that in this case—was a search under the fourth amendment entitled to constitutional protection.

¶ 36 In sum, these decisions had clearly established at the time of Pena's dog's sniff of the door to Lindsey's motel room that the sniff violated his reasonable expectation of privacy in his motel room and could not have been undertaken without a warrant. The fact that subsequent decisions of the Illinois Supreme Court and our appellate courts have restated this fact with additional specificity and clarity does not undermine the fact that the earlier cases were quite sufficient to have apprised a reasonably well-trained officer that the execution of the Pena dog sniff without a warrant violated the fourth amendment. The evidence seized as a result of the sniff should have been suppressed on this basis.

¶ 37 Second, the evidence shows that the dog sniff was not merely "simple, isolated negligence," as argued by the State, but was a deliberately executed attempt to find drugs inside Lindsey's motel room. See *LeFlore*, 2015 IL 116799, ¶ 24 ("[w]here the particular circumstances of a case show that police acted with an objectively reasonable good-faith belief that their conduct was lawful, or when their conduct involved only simple, isolated negligence, there is no illicit conduct to deter" (internal quotation marks omitted)). The police were suspicious of Lindsey's activities because a confidential informant stated that Lindsey was selling drugs in the motel and that Lindsey had a criminal history. Subsequently, the police conducted a surveillance of Lindsey's motel. After Lindsey was arrested, the police spoke with motel staff to inquire about Lindsey's motel room. Pena and his K-9 arrived at the motel and conducted an air sniff of the door handle and seam of Lindsey's motel room to detect narcotics. Under these

circumstances, Pena's conduct, as required by *LeFlore*, was "sufficiently deliberate that deterrence is effective and sufficiently culpable that deterrence outweighs the cost of suppression." (Internal quotation marks omitted.) *Id.* We, therefore, hold that suppression of the evidence was necessary. The denial of defendant's motion to suppress is reversed, the evidence is suppressed, his conviction is vacated, and the matter is remanded for further proceedings consistent with this decision.

¶ 38 II. Court Fines

¶ 39 Because Lindsey's conviction has been vacated and this case is being remanded, the fines and fees issues raised by the defendant are moot. However, in the event that a petition for leave to appeal is filed and granted, we briefly address those issues. Lindsey argues that the trial court erred when it assessed a $3000 drug assessment and $500 street value fine in its written judgment because the court stated that it would not impose any fines at sentencing. He asks this court to vacate the drug assessment and street value fine. The State concedes that both fees should be vacated.

¶ 40 "When the oral pronouncement of the court and the written order conflict, the oral pronouncement of the court controls." *People v. Roberson*, 401 Ill. App. 3d 758, 774 (2010). Illinois Supreme Court Rule 615(b) allows a court to modify a written judgment to bring it into conformity with the oral pronouncement of the trial court. *People v D'Angelo*, 223 Ill. App. 3d 754, 784 (1992). Questions regarding the appropriateness of fines, fees, and costs imposed by a sentencing court are reviewed *de novo*. *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 26.

¶ 41 At sentencing, the trial court instructed the clerk to remove Lindsey's fines. However, the second judgment showed that the court assessed a $3000 drug assessment and $500 street value

fine. Based on the evidence presented, we vacate the $3000 drug assessment and $500 street value fine.

¶ 42 III. DNA Analysis Fee

¶ 43 Lindsey also alleges that the trial court erred when it ordered him to submit a DNA sample and pay a $250 DNA analysis fee although he previously submitted a DNA sample and paid the fee. He asks this court to vacate the DNA analysis fee. The State concedes that this fee should be vacated.

¶ 44 Section 5-4-3(a) of the Unified Code of Corrections provides that any person convicted of felony offense must submit specimens of blood, saliva, or tissue to the Illinois Department of State Police. 730 ILCS 5/5-4-3(a) (West 2016). Section 5-4-3(j) states that if someone submits specimens of blood, saliva, or tissue, he must pay a $250 analysis fee. *Id*. § 5-4-3(j). Our supreme court has established that section 5-4-3 authorizes the $250 analysis fee only when the defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Questions regarding the appropriateness of fines, fees, and costs imposed by a sentencing court are reviewed *de novo*. *Ackerman*, 2014 IL App (3d) 120585, ¶ 26.

¶ 45 Lindsey states that he failed to preserve this issue for review. However, the State does not argue that he waived this issue and concedes to the vacatur of the analysis fee. *People v. Williams*, 193 Ill. 2d 306, 347 (2000) ("the State may waive an argument that the defendant waived an issue by failing to argue waiver in a timely manner"). Based on the Lindsey's Illinois State Police DNA form and prior convictions, it is presumed that he was previously ordered to submit a DNA sample and pay the $250 analysis fee, and therefore, the subsequent order is improper. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38 (determining that because a

convicted felon is required to submit a DNA sample, it is presumed that the trial court imposed the requirement on a prior conviction). Therefore, we vacate the DNA analysis fee.

¶ 46 CONCLUSION

¶ 47 The judgment of the circuit court of Rock Island County is reversed and remanded.

¶ 48 Reversed and remanded; fines and fees vacated.

¶ 49 JUSTICE SCHMIDT, concurring in part and dissenting in part:

¶ 50 Even assuming that the majority correctly determined that the dog sniff in this case violated the fourth amendment (it did not), the good faith exception to the exclusionary rule applies.

¶ 51 Up to this point, courts have determined that canine sniffs of residential and apartment doors constitute fourth amendment searches. See *Jardines*, 569 U.S. 1; *Burns*, 2016 IL 118973; *Bonilla*, 2017 IL App (3d) 160457; *Whitaker*, 820 F.3d 849. No similar holding has been made regarding canine sniffs of hotel room doors. In fact, until now the relevant authority indicates that canine sniffs in the common corridors of hotels are not fourth amendment searches because a hotel tenant possesses a reduced expectation of privacy. See *Roby*, 122 F.3d 1120 (8th Cir. 1997); *Eichelberger*, 91 Ill. 2d 359; *Agapito*, 620 F.2d 324. Based on the facts of this case and the state of the law, no one can reasonably argue that the officers acted in bad faith. Accordingly, I would find the good faith exception to the exclusionary rule applies.

¶ 52 With respect to the fines and fees issues, I agree that we should accept the State's concession and vacate them. Otherwise, I would affirm.