APPENDIX

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUVENTINO LARA PLANCARTE,

Defendant.

OPINION AND ORDER

22-cr-64-wmc

On January 20, 2022, defendant Juventino Plancarte was riding in the backseat of a Buick in an area of La Crosse, Wisconsin, known for the sale and purchase of drugs. Because of the way the driver of the vehicle looked and the way the vehicle was moving, La Crosse Police Department Investigator James Mancuso directed officers to stop the vehicle for violating a prohibition on tinted windows. Once stopped, the passenger in the vehicle further provided officers inconsistent answers and behaved suspiciously. Thus, when La Crosse Police Department Officer Aaron Westphal and his K9 partner, Loki, arrived on the scene, he commanded Loki to sniff the Buick, and Loki gave a positive alert for drugs at the trunk of the Buick. At that point, officers opened the trunk and recovered a backpack that contained 10.9 pounds of methamphetamine.

Plancarte was then charged in this court with possessing methamphetamine with intent to distribute and running a drug house.[1] In response, Plancarte's counsel filed a motion to suppress evidence obtained from the search of the vehicle. (Dkt. #16.) After an evidentiary hearing, Magistrate Judge Stephen Crocker issued a Report and

[1] Others in the vehicle appear to be facing state-court charges on related conduct.

Recommendation ("R&R") to deny Plancarte's motion to suppress. (Dkt. #41.) In particular, Judge Crocker relied upon the law of this circuit that "an alert from an adequately trained and reliable dog is sufficient to give rise to a finding of probable cause." *United States v. Bentley*, 795 F.3d 630, 635 (7th Cir. 2015). Based on the totality of the circumstances, Judge Crocker also found that there was probable cause to search the car despite the chance that Loki may have alerted to legal substances.

In objecting to the R&R (dkt. #48), Plancarte maintains his position that because CBD and certain hemp-derived products are now legal, and because Loki was trained to alert to those products, the officers lacked probable cause to search the vehicle. However, Plancarte offers no legal authority for the court to disagree with Judge Crocker. Although the court echoes Judge Crocker's sentiment that law enforcement would be wise to retrain drug-detecting dogs, including "retraining" dogs like Loki, *Bentley* remains the law of the circuit on which the officers here can continue to rely in good faith. In any event, Plancarte has identified no error in Judge Crocker's alternative, totality-of-the-circumstances analysis, nor can this court. Accordingly, the court will overrule plaintiff's objections, accept the R&R, and deny his motion to suppress.

OPINION[2]

Under 28 U.S.C. § 636(b)(1), the court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made," subject to appropriate deference with respect to any findings of

[2] The material facts underlying the charges in this case, as well as the evidence presented at the hearing are undisputed and set forth in detail in the R&R.

credibility he may have made during the evidentiary hearing. *See McIntosh v. Wexford Health Sources, Inc.*, 987 F.3d 662, 665 (7th Cir. 2021). Here, plaintiff objects to both of Judge Crocker's principal conclusions.

First, whether a reasonably well-trained officer would have known that the search was illegal considering binding appellate precedent. *United States v. Velazquez*, 906 F.3d 554, 560-61 (7th Cir. 2018). Relying on the Seventh Circuit's holding in *Bentley* that an alert from an adequately trained and reliable dog supports a finding of probable cause, Judge Crocker concluded that the officers had good reason to rely on Loki. In particular, he found that the evidence presented at the hearing showed that Loki was adequately trained and reliable in the field after comparing Loki's 90% success rate in the field to the 59% success rate of the dog challenged in *Bentley*. (R&R (dkt. #41) 11 (citing *Bentley*, 795 F.3d at 636).)

Judge Crocker also properly rejected defendant's specific argument that Loki was unreliable solely because he had been trained to detect some, now-legal substances, like CBD products. For one, as Judge Crocker noted, since 2018 federal statutes regarding hemp and state legalization of possession of THC, no Supreme Court or Seventh Circuit decision has even suggested that law enforcement agencies may no longer reasonably rely on alerts by certified, drug detecting dogs. Certainly, as Judge Crocker acknowledged, the legalization of THC products might prompt the Supreme Court to revisit its reasoning in *Illinois v. Caballes*, 543 U.S. 405, 410 (2005), that a dog sniff was not a search, arguably in part because the dog was trained to detect only unlawful conduct. This uncertainty does not justify a district court setting aside long-standing Supreme Court and Seventh Circuit

precedent, much less to do so retroactively to undermine law enforcement's reliance on *Caballes*. (R&R (dkt. #41) at 12-13.)

Alternatively, plaintiff directs the court to a decision from the Colorado Supreme Court, *People v. McKnight*, 2019 CO 36, ¶ 7, 446 P.3d 397, 400. In that case, the court agreed that a dog sniff constituted a search because it can detect lawful activity in that state. However, the *McKnight* decision was grounded in the Colorado State Constitution, and as the court explained, "[m]arijuana is not only decriminalized in Colorado, it is legalized, regulated, and taxed." *Id.* ¶ 42, 446 P.3d at 408. Moreover, the court acknowledged federal decisions from Colorado declining to conclude that dogs who alert to legal substances are more akin to the thermal imaging technology in *Kyllo v. United States*, 533 U.S. 27 (2001), concluding "that is precisely why we rest our holding on the Colorado Constitution, not on the Fourth Amendment." *Id.* ¶ 47, 446 P.3d at 410. Accordingly, that decision not only lacks precedential value, but it is distinguishable as to the applicable legal principles and facts.

Finally, Plancarte reargues that exclusion is necessary because the dog sniff is the product of a "systematic Fourth Amendment violation." Again, Judge Crocker rejected this assertion because the inquiry is whether *existing* caselaw supports suppression, not whether that caselaw is subject to question. Plancarte's objection does not give the court any legal or logical basis to disagree. More importantly, it certainly does not support *suppression* of evidence discovered based on an officer's good faith reliance on a trained, drug detecting police dog.

Second, Judge Crocker reviewed the totality of the circumstances, concluding that the officers had probable cause to search the vehicle. Following decisions from the Tenth Circuit, Eastern District of Tennessee and North Carolina, Judge Crocker rejected defendant's argument that Loki must be retired completely because his training includes marijuana detection. (R&R (dkt. #41) 14-15 (quoting *United States v. DeLuca*, No. 20-8075, 2022 WL 3451394 (10th Cir. Aug. 18, 2022); *United States v. Hayes*, No. 3:19-CR-73-TAV-HBG, 2022 WL 4034309 (E.D. Tenn. 2020); *State v. Walters*, 881 S.E.2d 730 (Ct. App. 2022)). Judge Crocker found this holding particularly appropriate in this case because: (1) Loki had never alerted to hemp in the field and *maybe* alerted only to CBD oil once; (2) the specific police using Loki in this case had never encountered anyone possessing only hemp or legal CBD; and (3) in Investigator Mancuso's experience, his cases seldom involved unlawful marijuana. Judge Crocker further recounted the evidence of what Mancuso considered in deciding to stop and search the Buick: the driver's reaction to seeing a state trooper on the interstate; the Buick was driving from a methamphetamine source in an area in Minneapolis, Minnesota, to a well-known drug zone in La Crosse, Wisconsin; the unusual maneuvers by the vehicle that were consistent with a drug courier looking for or waiting for a contact; and once the vehicle was pulled over, the passenger's inconsistent answers and nervousness. Thus, Judge Crocker concluded that even accounting for the "slim possibility" Loki might be alerting to hemp or CBD oil, the other information before Investigator Mancuso provided probable cause to conduct a search, noting that "[p]robable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." (R&R (dkt. #41) 16.)

Defendant's objection to this finding is unpersuasive. In characterizing the facts viewed by the officers as "actions that could gain an officer's attention," as opposed to behavior suggesting a reasonable probability of criminal activity, defendant does not address the undisputed facts as recounted by Judge Crocker. Instead, defendant relies on Mancuso's testimony that he originally did not have reasonable suspicion of drug activity to pull over the car, directing officers to stop the vehicle for a legitimate, tinted-window violation. More importantly, defendant challenges Judge Crocker's consideration of Loki's alert as part of the probable cause analysis. In particular, citing *Florida v. Harris*, 568 U.S. 237 (2013), defendant argues that Loki could not reliably indicate the presence of contraband because he cannot distinguish between contraband and legal THC products. However, Judge Crocker addressed this, noting that under *Harris*, the question about the reliability of a dog's alert is "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime," 568 U.S. at 248, and then doing just that.

In particular, Judge Crocker again considered not just that Loki's success rate is 90% in the field, but also that: Loki had never alerted to hemp in the field and *may* have alerted to CBD oil just once; police in an area known for meth trafficking had never encountered anyone possessing only hemp or legal CBD; and Investigator Mancuso's cases generally did not involve unlawful marijuana. (R&R (dkt. #41) 14.) Critically, defendant once again does not account for the fact that Loki alerted under circumstances in which legal THC products were *not* present at all, nor does he offer any legal authority or evidence

undermining Judge Crocker's careful parsing of Loki's reliability in the specific circumstances of the search in this case. Instead, Plancarte cites websites reporting the ubiquity and portability of CBD, apparently to show the likelihood that Loki will alert to this product. However, this is *not* the evidence or circumstances that Mancuso was addressing in January of 2020, and it is not a reason to overrule Judge Crocker's probable cause finding. Accordingly, the court will overrule defendant's objections, accept Judge Crocker's R&R, and deny the motion to suppress.

ORDER

IT IS ORDERED that:

1) Defendant Juventino Plancarte's objections to the report and recommendation (dkt. #48) are OVERRULED.

2) The Magistrate Judge's report and recommendation (dkt. #41) is ADOPTED, and Plancarte's motion to suppress (dkt. #16) is DENIED.

Entered this 23rd day of May, 2023.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge

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In the

United States Court of Appeals

For the Seventh Circuit

No. 23-2224

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUVENTINO L. PLANCARTE,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Wisconsin.
No. 22-cr-00064 — **William M. Conley**, *Judge*.

ARGUED MAY 20, 2024 — DECIDED JUNE 28, 2024

Before FLAUM, BRENNAN, and KOLAR, *Circuit Judges*.

FLAUM, *Circuit Judge*. During a traffic stop, Wisconsin police officers used a K-9 unit to sniff a car they suspected was involved in drug trafficking. The dog returned a positive alert, so the officers searched the car and found almost eleven pounds of methamphetamine in its trunk. On appeal, defendant Juventino Plancarte, who was inside the car during the stop, challenges the district court's denial of his motion to suppress. We affirm.

I. Background

A. Factual Background

On the evening of January 20, 2022, Officer James Mancuso was conducting surveillance in La Crosse, Wisconsin, when a state trooper notified him of a vehicle of interest heading in his direction. Soon after, Mancuso saw a car matching the trooper's description and tailed it for several hours. As he followed the car, he observed the vehicle exhibiting behavior consistent with drug trafficking activity.

Mancuso also noticed that the car had unlawful window tints, so he directed two other officers to perform a traffic stop. During the stop, Officer Aaron Westpfahl and his K-9 partner Loki arrived on the scene. Loki conducted a sniff and alerted to drugs in the car. The officers then searched the car and discovered a backpack containing "a large amount of a crystal-like substance" in its trunk. They arrested the car's occupants, including Plancarte. Lab testing later revealed that the substance in the backpack was 10.96 pounds of methamphetamine.

B. Procedural Background

A grand jury indicted Plancarte on two counts related to methamphetamine distribution. He moved to suppress the evidence obtained after Loki's sniff. According to Plancarte, Loki can identify both illegal marijuana products and legal products that come from cannabis plants. Since Loki could theoretically alert officers to legal cannabis products, Plancarte argues that the sniff violated the Fourth Amendment because it was a warrantless search unsupported by probable cause.

A magistrate judge held an evidentiary hearing before ruling on Plancarte's motion. At the hearing, Westpfahl testified that Loki was trained to identify several illegal drugs, including marijuana and methamphetamine, based on their scent. If Loki smelled one of those drugs during a sniff, he would exhibit a behavioral signal indicating a "positive alert." Westpfahl also explained that Loki's positive alerts have never uncovered physical evidence of legal cannabis products. Even so, an expert witness testified that dogs cannot tell the difference between illegal marijuana and legal cannabis products based on smell.

Westpfahl also presented data to illustrate Loki's accuracy during sniffs. The data showed that, when officers searched a vehicle after Loki returned a positive alert, they discovered contraband about 80% of the time. If the ensuing search did not reveal contraband, Westpfahl would later ask the vehicle's owner or occupants if any contraband had recently been in the car. In response to that inquiry, over half of respondents confirmed that contraband had recently been in the sniffed vehicle. On one occasion, after Loki returned what appeared to be a false positive during a car sniff, the vehicle's owner told Westpfahl that he frequently smoked legal cannabis products in the car. There is no evidence, however, corroborating that the cannabis product in that inquiry was legal.

Following the evidentiary hearing, the magistrate judge issued a report and recommendation denying Plancarte's suppression motion. The district court adopted those recommendations, and Plancarte later pleaded guilty to both drug charges. Plancarte received concurrent 180-month sentences,

and he now appeals the district court's denial of his motion to suppress.[1]

II. Discussion

"In considering a district court's denial of a motion to suppress, we review questions of law de novo and findings of fact for clear error." *United States v. Beechler*, 68 F.4th 358, 364 (7th Cir. 2023).

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Utah v. Strieff*, 579 U.S. 232, 237 (2016) (alteration in original) (quoting U.S. Const. Amend. IV). As its plain text indicates, "the Fourth Amendment is triggered only by a search or seizure." *Hess v. Garcia*, 72 F.4th 753, 764 (7th Cir. 2023).

"Two lines of precedent govern whether officer conduct amounts to a search." *United States v. Lewis*, 38 F.4th 527, 533 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 2499 (2023). The first is called the "property-based approach," which applies when "an officer enters a constitutionally protected area, such as the home, for the purpose of gathering evidence against the property owner." *Id.* The second is called the "privacy-based approach." *Id.* at 534. Under that approach, we consider whether government action invaded a person's actual, subjective expectation of privacy that society recognizes as reasonable. *Id.* at 535 (7th Cir. 2022) (discussing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); *see also United States*

[1] Plancarte, in his opening brief, argued that he is eligible for safety valve relief. His reply brief concedes that *Pulsifer v. United States*, 601 U.S. 124, 127–28 (2024), forecloses that argument.

v. Wood, 16 F.4th 529, 534 (7th Cir. 2021) (explaining that "the ultimate touchstone of the Fourth Amendment is reasonableness" when determining what constitutes a search (citation and internal quotation marks omitted)).

Plancarte does not suggest—and rightly so—that the area around a car on a public road is a "constitutionally protected area." *Lewis*, 38 F.4th at 533. As a result, we instead focus on the privacy-based approach.

However, "canine inspection of an automobile during a lawful traffic stop[] do[es] not violate the 'reasonable expectation of privacy' described in *Katz*." *Florida v. Jardines*, 569 U.S. 1, 10 (2013) (discussing *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005)). Rather, when "performed on the exterior of [a] car" during a "lawful[] seiz[ure] for a traffic violation," dog sniffs "generally do[] not implicate legitimate privacy interests." *Caballes*, 543 U.S. at 409. "A 'canine sniff' by a well-trained [drug] detection dog," therefore, "d[oes] not constitute a 'search' within the meaning of the Fourth Amendment." *United States v. Place*, 462 U.S. 696, 707 (1983); *see also Caballes*, 543 U.S. at 410.

Two related principles underscore this conclusion. First, dog sniffs on the exterior of an automobile during a traffic stop are "not designed to disclose any information other than the presence or absence of narcotics." *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000). Second, they are "generally likely … to reveal only the presence of contraband." *Caballes*, 543 U.S. at 409. Together, these concepts illustrate that "the manner in which information is obtained" during a sniff is "much less intrusive than a typical search" and results in only a "limited disclosure," which protects against the property

owner's "embarrassment and inconvenience." *Place*, 462 U.S. at 707.

Despite this precedent, which affirms the constitutionality of K-9 sniffs in public places, Plancarte nevertheless argues that the legalization of some cannabis products changed the Fourth Amendment landscape for dog sniffs. He contends that K-9s like Loki cannot distinguish between illegal marijuana and other, legal cannabis products, so drug sniffs reveal more than just contraband. According to Plancarte, that undercuts the holdings of *Place* and *Caballes*, which emphasized that dog sniffs are unique—and not searches—because they alert only to illegal items. *Caballes*, 543 U.S. at 409; *Place*, 462 U.S. at 707.

He instead points to *Kyllo v. United States*, a case in which the Supreme Court limited the warrantless use of thermal imaging technology to observe activity inside a home. 533 U.S. 27, 40–41 (2001). There, the Court explained that "the Government['s] use[] [of] a device that is not in general public use[] to explore details of the home that would previously have been unknowable without physical intrusion … is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40. Plancarte urges us to apply *Kyllo* here because drug detection dogs, like thermal imaging technology, are "super-sensitive instrument[s]," unavailable to the general public and capable of revealing "details … that would … be[] unknowable without physical intrusion." *United States v. Whitaker*, 820 F.3d 849, 853 & n.1 (7th Cir. 2016).

But there is a problem with extending *Kyllo* to these facts: Loki's sniff occurred outside the home. It is well established that the home is "[a]t the very core of the Fourth Amendment," *Kyllo*, 533 U.S. at 31 (citations and internal quotation

marks omitted), and "first among equals," *Jardines*, 569 U.S. at 6. "The expectation of privacy with respect to one's automobile" or in a public space is therefore "significantly less than that relating to one's home." *United States v. Lozano*, 171 F.3d 1129, 1131 (7th Cir. 1999) (quoting *United States v. Velarde*, 903 F.2d 1163, 1166 (7th Cir. 1990)).

Our dog sniff jurisprudence itself sets apart dog sniffs occurring in public areas from those that involve homes or other private places. *Whitaker*, 820 F.3d at 853 (distinguishing Fourth Amendment concerns attendant to using drug-sniffing dogs on homes compared to sniffs performed in public places). So, while using "trained police dogs to investigate the home … is a 'search' within the meaning of the Fourth Amendment," *Jardines*, 569 U.S. at 11–12, dog sniffs conducted in public places are generally not, *Caballes*, 543 U.S. at 409. Just as is the case here, the sniffs in both *Place* and *Caballes* occurred in public areas, and "[n]either implicated the Fourth Amendment's core concern of protecting the privacy of the home." *Whitaker*, 820 F.3d at 853. Since *Kyllo*'s holding also cannot be divorced from that context, we decline to extend it to these facts. *See* 533 U.S. at 40 (explaining that "the Fourth Amendment draws a firm line at the entrance to the house" (citation and internal quotation marks omitted)).

Another problem remains for Plancarte: Courts have long acknowledged and tolerated the imperfection of drug detection dogs. For example, in *United States v. Bentley*, we concluded that a dog sniff supported probable cause despite the dog's 59.5% accuracy rate. 795 F.3d 630, 636–37 (7th Cir. 2015); *see also Caballes*, 543 U.S. at 409 (recognizing that, even "if properly conducted," dog sniffs are merely "generally likely[] to reveal only the presence of contraband"); *United States v.*

Perez, 29 F.4th 975, 986–87 (8th Cir. 2022) (discussing instances in which drug-sniffing dogs had been deemed reliable despite accuracy rates under 60%); *United States v. Kennedy*, 131 F.3d 1371, 1378 (10th Cir. 1997) (stating that a search following a positive alert by a dog with at least a 71% accuracy rate satisfied probable cause); *Whitaker*, 820 F.3d at 853 n.1 (explaining that "the results and accuracy of dog searches are subject to detailed research and analysis"). *But see Caballes*, 543 U.S. at 410 (Souter, J., dissenting) (describing dog sniff jurisprudence as resting on the "untenable … assumption that trained sniffing dogs do not err"). While *Bentley* occurred in the probable cause context, that error rate is much higher than what can be attributed to Loki. And as for Loki, "a very low percentage of false positives is not necessarily fatal to a finding that a drug detection dog is properly trained and certified." *United States v. Diaz*, 25 F.3d 392, 396 (6th Cir. 1994).

Even if drug sniffing dogs struggle to differentiate between illegal marijuana and other legal cannabis products, Loki does not. On the contrary, at the time of the suppression hearing, Loki had returned 215 positive alerts from a total of 328 sniffs during his career. Of those 215 positive alerts, Loki's sniffs led to the discovery of physical evidence of contraband around 80% of the time. Furthermore, in more than half of "false positive" cases, officers later learned that drugs had recently been inside the vehicle, further decreasing Loki's "false positive" rate.

At most, Loki may have—on a single occasion—returned a false positive where the car's operator later admitted that he routinely smoked legal cannabis products in the vehicle. Even looking beyond the fact that officers did not recover cannabis products of any kind from that operator's vehicle and were

otherwise unable to confirm whether the cannabis product in question was, in fact, legal, that lone instance does not mean Loki is not "well-trained." This rings especially true because physical evidence of legal cannabis products has never been discovered after any of Loki's positive alerts. Instead, that single instance resembles a false positive alert, and we have never held that a low rate of false positive alerts converts an otherwise permissible dog sniff into a search.

Loki, a reliable drug detection dog, conducted an open-air sniff on a public road during an ordinary traffic stop. *Place* and *Caballes* confirm that a sniff performed in this manner is not a Fourth Amendment search because it does not disrupt any reasonable expectation of privacy. For that reason, the district court appropriately denied Plancarte's motion to suppress.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's denial of Plancarte's motion to suppress.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 7, 2024

Before

JOEL M. FLAUM, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 23-2224

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	Appeal from the United States District Court for the Western District of Wisconsin.
v.	No. 3:22-cr-00064-1
JUVENTINO L. PLANCARTE, *Defendant-Appellant*.	William M. Conley *Judge*.

O R D E R

On August 12, 2024, defendant-appellant filed a petition for rehearing en banc in connection with the above-referenced case. On September 20, 2024, an Answer was filed by the plaintiff-appellee to the petition for en banc rehearing. No judge* in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition for rehearing. The petition is therefore DENIED.

* Circuit Judge Nancy L. Maldonado did not participate in the consideration of this petition for rehearing en banc.