

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT PECK, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Robert Peck, Jr.
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TABLE OF CONTENTS

Magistrate Judge's Report and Recommendation	<u>1-6</u>
District Court Order.....	<u>7</u>
Eighth Circuit Appellate Decision	<u>8-14</u>
Eighth Circuit Order Denying Petition for Rehearing	<u>15</u>
Statutory Provisions	<u>16-18</u>

United States Court of Appeals
For the Eighth Circuit

No. 24-1198

United States of America

Plaintiff - Appellee

v.

Robert Peck, Jr.

Defendant - Appellant

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: November 21, 2024

Filed: March 12, 2025

[Published]

Before COLLOTON, Chief Judge, BENTON and KELLY, Circuit Judges.

PER CURIAM.

Robert Peck, Jr., entered a conditional guilty plea to possession with intent to distribute marijuana and possession of a firearm after having sustained a felony conviction, reserving the right to appeal the denial of his two motions to suppress and his motion to dismiss. We affirm.

I.

In July 2020, Officer Paul Milone received anonymous tips that Peck was selling drugs from an apartment in Omaha, Nebraska. Milone confirmed some of the tips' details about Peck and, recognizing Peck as the subject of a prior investigation, decided to visit Peck's apartment complex. On July 16, 2020, Milone, Officer Jeff Vaughn, and Detective Edith Andersen (the Officers) went to Peck's apartment complex in plain clothes with a drug dog named Nacho. The property manager allowed them to enter the building and confirmed that Peck lived there. Then an assistant manager directed the officers and Nacho to the third floor, where Peck's apartment was located.

There were at least eight apartments on Peck's floor, and the hallway was approximately ten-to-twelve-feet wide. The Officers testified that the hallway outside the apartments was "communal," such that the apartments lacked dedicated personal space around their front doors. According to the Officers' testimony, Nacho traversed the hallway, "sniff[ing] along the bottom of the door seams" of multiple apartments, before he "alerted and indicated to the odor of drugs coming from" Peck's apartment. As the Officers were preparing to leave, they heard the elevator door chime. When the door opened, Peck walked out. The Officers then entered the elevator, with one officer pausing and turning his head to watch Peck enter his apartment.

Using this information, the Officers obtained a warrant to search Peck's apartment. During the ensuing search, they found marijuana, anabolic steroids, numerous guns, drug paraphernalia, and a bump stock device.

In August 2020, a grand jury returned an indictment charging Peck with possession with intent to distribute less than 50 kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1); possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and possession of a firearm in furtherance of a drug trafficking scheme in violation of 18 U.S.C.

§ 924(c)(1)(A). The § 922(g)(1) count was predicated on a prior Nebraska conviction for possession of more than a pound of marijuana.

Peck filed his first suppression motion in April 2021, alleging that the Officers intruded upon Peck's curtilage by having Nacho sniff his apartment door. While that motion was pending, federal agents, relying on the fruits of the search of Peck's apartment, received a new warrant to search Peck's cell phone. A grand jury later returned a superseding indictment adding a count under 21 U.S.C. §§ 841(a)(1), 841(b)(1), and 846, for conspiracy to distribute and possess with intent to distribute less than 50 kilograms of marijuana. Peck filed a motion to suppress the evidence recovered from his cell phone on the same grounds he raised in his first suppression motion. Peck also moved to dismiss the § 922(g)(1) count, arguing that the statute was unconstitutional as applied to him.

The district court¹ denied all three motions. As to the suppression motions, the court concluded that using Nacho to sniff the area around Peck's apartment door did not trespass on his curtilage and that, regardless, suppression of the evidence seized from both warrants was inappropriate under the good-faith exception to the exclusionary rule. See United States v. Leon, 468 U.S. 897, 922–24 (1984). The court also concluded that, despite the fact that his conviction for possession of marijuana was nonviolent, applying § 922(g)(1) to Peck's later possession of a firearm did not violate the Second Amendment.

Peck pleaded guilty to two of the charges, and the district court sentenced him to 46 months of imprisonment: 13 months on the possession count and 33 months on the § 922(g)(1) count, the terms to run consecutively.

¹The Honorable Robert F. Rossiter, Jr., Chief Judge, United States District Court for the District of Nebraska.

II.

A.

Peck argues that the area around his apartment door was his curtilage and that the Officers' warrantless use of a dog to sniff that area for drugs violated his Fourth Amendment rights under Florida v. Jardines, 569 U.S. 1 (2013). The government argues that regardless of whether the dog sniff constituted a search, the good-faith exception announced in Leon applies, and suppression of evidence found in Peck's apartment and cell phone is inappropriate.² We agree that we need not address the constitutionality of Nacho's sniff because the good-faith exception applies.

The Supreme Court has "held that the exclusionary rule does not apply when the police conduct a search in 'objectively reasonable reliance' on a warrant later held invalid." Davis v. United States, 564 U.S. 229, 238–39 (2011) (quoting Leon, 468 U.S. at 922). Under this good-faith exception to the warrant requirement, evidence is only suppressed if:

(1) the affiant misl[ed] the issuing judge with a knowing or reckless false statement; (2) the issuing judge wholly abandoned her judicial role; (3) the supporting affidavit was 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'; or (4) the warrant was 'so facially deficient' that the executing officer could not reasonably presume its validity.

United States v. Perez, 46 F.4th 691, 697 (8th Cir. 2022) (alteration in original) (quoting United States v. Notman, 831 F.3d 1084, 1089 (8th Cir. 2016)). We review a district court's application of the good-faith exception to the warrant requirement de novo. United States v. Hessman, 369 F.3d 1016, 1019 (8th Cir. 2004).

²Both of Peck's suppression motions stand on the constitutionality of the Officers' actions in the apartment hallway, so we analyze them together.

We have confronted issues substantially similar to Peck's in two recent cases and have held that the Leon exception applies because "[i]t was reasonable for the officers to rely on our then-applicable precedent that dog sniffs at an interior apartment door are permissible." Perez, 46 F.4th at 698; see also United States v. Hines, 62 F.4th 1087, 1092–93 (8th Cir. 2023). In Perez and Hines, we recognized that, prior to Jardines, our Court rejected a challenge to the use of drug dogs to sniff an apartment-dweller's front door off a common hallway. Perez, 46 F.4th at 697 (citing United States v. Scott, 610 F.3d 1009, 1016 (8th Cir. 2010)); see also Hines, 62 F.4th at 1092. And though the Supreme Court later held in Jardines that bringing a drug dog onto someone's front porch to sniff into their home intruded on the homeowner's curtilage, 569 U.S. at 6–7, we have still "neither expressly overruled Scott nor explained how Jardines applies to apartment doors in a common hallway." Perez, 46 F.4th at 697–98; Hines, 62 F.4th at 1092–93.

Peck's argument fails for the same reason. When Milone, Vaughn, and Andersen visited Peck's apartment complex in 2020, it was objectively reasonable for them to rely on Scott and use a drug dog to sniff Peck's apartment door. Nor does any fact meaningfully distinguish Peck's case from the circumstances present in Perez and Hines; for example, there is no evidence in the record that Nacho's nose went under Peck's door or that the Officers otherwise effected a physical trespass into his apartment.

Peck also argues that the Leon exception should not apply because the Officers each testified they knew nothing about the Supreme Court's holding in Jardines at the time of their first visit to Peck's apartment. But because "[t]he applicable standard is an objective—not subjective—one," the Officers' personal knowledge or poor training is irrelevant to the good-faith exception's applicability. Hines, 62 F.4th at 1093, 1093 n.6. Accordingly, we affirm the denial of Peck's suppression motions.

B.

Peck also argues that his § 922(g)(1) count should be dismissed because it violated the Second Amendment as applied to him. Specifically, he argues that because his prior conviction for marijuana possession is nonviolent, the Second Amendment prohibits punishing his later possession of a firearm. Peck's argument is foreclosed by our precedent. We recently rejected an as-applied challenge to § 922(g)(1) in which the defendant had prior nonviolent drug offenses. United States v. Jackson, 110 F.4th 1120, 1125 (8th Cir. 2024). In Jackson, we noted that "history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society" and concluded that "there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)." Id. at 1125–27. We rejected the idea that the Supreme Court's decisions in United States v. Rahimi, 602 U.S. 680 (2024), or New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), did anything to change this conclusion. Id. at 1125.

Accordingly, we affirm the judgment of the district court.

KELLY, Circuit Judge, concurring.

I agree that the district court properly denied both motions to suppress under the good-faith exception. However, I would further address the Fourth Amendment issue and conclude, as I have written elsewhere, that the area immediately surrounding Peck's front door was curtilage. See United States v. Perez, 46 F.4th 691, 704–07 (8th Cir. 2022) (Kelly, J., concurring). On that view, I would find that Nacho's sniff violated Peck's Fourth Amendment rights. I otherwise join the court's opinion in full.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 24-1198

United States of America

Appellee

v.

Robert Peck, Jr.

Appellant

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:20-cr-00227-RFR-1)

ORDER

The petition for rehearing is denied as untimely.

May 21, 2025

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

08/25/2025

128/20

APP015

Amendment 2 Right to bear arms.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,
to ship or transport in interstate or foreign commerce, or possess in or affecting commerce,
any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or
transported in interstate or foreign commerce.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT PECK JR.,

Defendant.

8:20CR227

FINDINGS AND RECOMMENDATION

This matter is before the Court on Defendant's Second Motion to Suppress. (Filing No. 94.) The parties stipulated that an evidentiary hearing was not necessary on this motion, and that the Court could take judicial notice of the entire docket of this case in considering the motion. (Filing No. 106.) The undersigned approves and adopts the parties' stipulation and hereby takes judicial notice of the filings in this case as stipulated by the parties.

For the reasons explained below, the undersigned will recommend that the Second Motion to Suppress be denied.

BACKGROUND

Law enforcement began investigating Defendant in or around June, of 2020 based on Omaha Crime Stoppers tips. On July 16, 2020, officers went to the ZAG Apartment complex where Defendant resided. ZAG property management gave law enforcement access to a communal hallway outside of Defendant's apartment, where law enforcement then deployed a drug dog. The dog sniffed along the bottom of apartment door seams and alerted and indicated to the odor of drugs coming from Defendant's apartment.

On July 17, 2020, law enforcement obtained a warrant to search Defendant's apartment. The warrant was executed on July 21, 2020. During the search, officers located marijuana, marijuana derivatives, anabolic steroids, multiple firearms, drug paraphernalia, a safe, as well as other things consistent with drug distribution. Officers also located a black LG cell phone with a Tracfone logo ("LG cell phone").

On April 29, 2021, Defendant moved to suppress all evidence obtained from the search of his apartment, arguing the warrant was not supported by probable cause. (Filing No. 26.) Defendant argued that the dog sniff of his apartment door was an unlawful search and, therefore, evidence that the dog alerted to the presence of drugs should not have been considered in determining whether probable cause existed for the search warrant. Defendant further argued that the good faith exception to the exclusionary rule was inapplicable. An evidentiary hearing was held regarding that motion to suppress on November 3, 2021.

Defendant requested leave to submit a supplemental brief regarding the motion to suppress on December 2, 2021, which the Court allowed. (Filing Nos. 51, 53.) Defendant was ordered to submit his supplemental brief by December 30, 2021, and the government's responsive brief was to be filed by January 13, 2022. (Filing No. 53.) The Court indicated in its order that the motion to suppress would be considered submitted upon the filing of the supplemental briefs. (Filing No. 53.) The government's deadline to submit its supplemental brief was later extended to January 27, 2022. (Filing No. 56.) The supplemental briefs were timely submitted by both parties and the motion to suppress was considered submitted on January 27, 2022. (Filing Nos. 54, 57.)

On February 22, 2022, the undersigned issued a Findings and Recommendation denying Defendant's motion to suppress. (Filing No. 58.) The undersigned found that the dog sniff did not violate Defendant's Fourth Amendment rights and that there was probable cause for issuance of the warrant. The undersigned further concluded that even assuming the warrant was not supported by probable cause, the good faith exception would operate to preclude suppression of the evidence. Defendant objected to the undersigned's Findings and Recommendation. (Filing No. 61.) On April 26, 2022, Chief United States District Judge Robert Rossiter, Jr. overruled Defendant's objections and accepted the undersigned's Findings and Recommendation. (Filing No. 63.)

On November 21, 2022, a search warrant application and affidavit were presented to the Court for the search of the LG cell phone obtained during the search of Defendant's apartment. (Filing No. 106-1.) The search warrant application presented to the Court stated, in part, as follows:

During July of 2020, the Omaha Police Department Narcotics Unit began investigating multiple Omaha Crime Stoppers Complaints which alleged a party named "Robert Peck Jr." a/k/a "Bobby PECK" was selling marijuana, cocaine, heroin, hash oil and steroids from his apartment. The anonymous complaints further alleged that PECK was also in possession of multiple firearms despite being a convicted felon. The Omaha Police Department Narcotics Unit was able to identify PECK's apartment as 5106 Mayberry Street, #2312, Omaha, Douglas County, Nebraska. Officers confirmed through NCJIS that Peck was a convicted felon. Officers utilized investigative techniques which led to the issuance of a court authorized search warrant for PECK's residence located at 5106 Mayberry Street, #2312, Omaha, Douglas County, Nebraska.

On Tuesday, July 21, 2020, at approximately 0701 hours, the Omaha Police Department SWAT Team executed the court authorized no-knock search warrant. Robert PECK was located in the living room area of the apartment and was taken into custody. There were no other occupants in the residence. A cellular telephone (Device 1) was located in the living room on the coffee table and seized as evidence. According to reports, the cell phone found in the living room (listed as Item #39 on police reports) was identified as belonging to Robert PECK. A systematic search of the apartment was conducted; officers located over one pound of marijuana, THC wax, anabolic steroids, three digital scales (one with residue located in a safe), drug packaging, \$5,400 U.S. currency and venue items for Robert PECK. Officers also located a loaded 9mm handgun on top of the nightstand in the bedroom, a loaded shotgun next to the bed, and a loaded AR-15-style rifle, also in the bedroom. Additional boxed ammunition and loaded magazines for the rifle and handgun were also located on top of and inside of the nightstand in the bedroom. Officers also found a bump stock to an AR-15-style rifle, bullet proof vest, and bullet proof trauma plates. I know from experience and training that the aforementioned items are indicative of illegal narcotic sales and that persons involved in drug trafficking often keep loaded firearms as protection against robbery attempts.

(Filing No. 106-1.) Based on the warrant application and affidavit, the Court issued a warrant allowing law enforcement to search the contents of the LG cell phone. (Filing No. 106-1.) The warrant was executed on or about December 5, 2022.

Defendant filed the instant Second Motion to Suppress on February 24, 2023, seeking to suppress evidence obtained from the search of the LG cell phone. (Filing No. 94.) The parties have stipulated that the Court can "take judicial notice of the entire docket including, but not

limited to, the parties' briefings on all matters, all exhibits, hearing audio recordings, court recommendations, court orders, and parties' objections in reaching its determination regarding the current motion to suppress." (Filing No. 106.) The Court has done so.

DISCUSSION

In his Second Motion to Suppress, Defendant seeks to exclude all evidence obtained through the search of the LG cell phone. Defendant argues the search of the LG cell phone and the evidence obtained therefrom is "fruit of the poisonous tree," under Wong Sun v. United States, 371 U.S. 471 (1963) because the phone was seized through the unlawful dog sniff and the search of his apartment on July 21, 2020 by using an illegal search warrant. Defendant further asserts in his motion that the officers' reliance on the search warrant for the LG cell phone was not objectively reasonable or in good faith. Defendant represents that he filed the Second Motion to Suppress to preserve any issues related to the search conducted on the LG phone because the search was derivative of the previous dog sniff and search warrant issued for his apartment.

If officers conduct an unlawful search, physical evidence from the search must be excluded as fruits of the officers' illegal action. Wong Sun v. United States, 371 U.S. 471 (1963). The exclusionary rule is a "deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." Davis v. United States, 564 U.S. 229, 231 (2011). This Court has already concluded that the dog sniff conducted outside Defendant's apartment, and the subsequent search of his apartment, did not violate Defendant's constitutional rights. This Court has also ruled that the warrant for the apartment was supported by probable cause and that the good faith exception to the warrant requirement is applicable. Therefore, the fruits of the search of the apartment, including the LG cell phone, remain admissible.

In his brief, Defendant does not argue that the affidavit for the warrant for the LG cell phone in and of itself lacked probable cause. Instead, he argues that the first search warrant was illegal and, therefore, the LG cell phone is the illegal "fruit" from the search of his apartment. However, in his motion to suppress, Defendant indicates the information contained in the application and affidavit for the search warrant for the LG cell phone was insufficient to constitute probable cause for said search warrant.

To be constitutionally valid, “a search warrant must be supported by a showing of probable cause.” United States v. Summage, 481 F.3d 1075, 1077 (8th Cir. 2007). Probable cause exists if, based on the totality of the circumstances, a showing can be made “sufficient to create a fair probability that evidence of a crime will be found in the place to be searched.” United States v. Gabrio, 295 F.3d 880, 883 (8th Cir. 2002) (quotation omitted). “Probable cause to issue a search warrant exists when an affidavit in support of the warrant sets forth sufficient facts to establish that there is a fair probability that contraband or evidence of criminal activity will be found in the particular place to be searched.” United States v. Proell, 485 F.3d 427, 430 (8th Cir. 2007) (quotation omitted). The warrant for the LG cell phone was issued, in part, based on evidence obtained from the search of Defendant’s apartment following the dog sniff, which included the LG cell phone itself, drugs, firearms, and other things consistent with drug distribution. Based on the totality of the circumstances, there was a fair probability that evidence of a crime would be found on the LG cell phone. Thus, there was probable cause for issuance of the search warrant for the LG cell phone and evidence from the LG cell phone remains admissible.¹

Accordingly,

IT IS HEREBY RECOMMENDED to Chief United States District Court Judge Robert Rossiter, Jr. that Defendant’s Second Motion to Suppress (Filing No. 94) be denied.

Dated this 20th day of June, 2023.

BY THE COURT:

s/ Susan M. Bazis
United States Magistrate Judge

¹ The Court notes that the good faith exception would apply to the search warrant for the LG cell phone. At the time the search warrant was issued, Chief Judge Rossiter had already found that the search of Defendant’s apartment was lawful. Given Judge Rossiter’s ruling, the officers’ reliance on the warrant for the LG cell phone was objectively reasonable. See Proell, 485 F.3d at 430 (“Under the good-faith exception, evidence seized pursuant to a search warrant issued by a magistrate that is later determined to be invalid, will not be suppressed if the executing officer’s reliance upon the warrant was objectively reasonable.”).

ADMONITION

Pursuant to NECrimR 59.2, any objection to this Findings and Recommendation shall be filed within fourteen (14) days after being served with a copy of this Findings and Recommendation. Failure to timely object may constitute a waiver of any such objection. The brief in support of any objection shall be filed at the time of filing such objection. Failure to file a brief in support of any objection may be deemed an abandonment of the objection.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT PECK, JR.,

Defendant.

8:20CR227

MEMORANDUM
AND ORDER

This matter is before the Court on defendant Robert Peck, Jr.'s ("Peck") second Motion to Suppress (Filing No. 94). Peck is seeking to exclude evidence obtained from the search of an LG cell phone. The parties stipulated to the magistrate judge¹ that no evidentiary hearing was necessary and that the Court take judicial notice of the filings in this case. The magistrate judge issued her Findings and Recommendation on June 20, 2023 (Filing No. 107) and Peck timely objected (Filing No. 108).

The Court has conducted a careful de novo review of the matter, *see* 28 U.S.C. § 636 (b)(1), and agrees that the Motion to Suppress should be denied.

The Court adopted (Filing No. 63) the magistrate judge's Findings and Recommendations over the objections by Peck on the first Motion to Suppress (Filing No. 58), finding that Peck's Fourth Amendment rights were not violated by the dog sniff at Peck's apartment complex door, and that there was probable cause supporting the July 21, 2020 warrant. In the alternative, the Court found that the good-faith exception would apply.

The November 21, 2022 warrant for the LG cell phone was based on and consistent with this probable cause finding. The LG cell phone evidence is admissible.

¹The Honorable Susan M. Bazis, United States Magistrate Judge for the District of Nebraska.

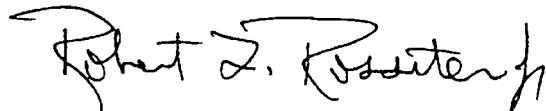
Accordingly, and for the reasons set forth in the Magistrate Judge's Findings and Recommendations,

IT IS ORDERED:

1. Defendant Robert Peck, Jr.'s objections (Filing No. 108) to the magistrate judge's Findings and Recommendation are overruled.
2. The magistrate judge's Findings and Recommendation (Filing No. 107) is accepted.
3. Peck's second Motion to Suppress (Filing No. 94) is denied.

Dated this 7th day of July 2023.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Robert F. Rossiter, Jr.", with a stylized flourish at the end.

Robert F. Rossiter, Jr.
Chief United States District Judge