REL: May 29, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0332

Ezingim Demetrius Earl

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-17-4497)

MINOR, Judge.[1]

Although the cops came by not to bring Earl in--at least not that day--they did, eventually, search the apartment high

[1]This case was previously assigned to another member of this Court. It was reassigned to Judge Minor on November 14, 2019.

and low.[2] Afterwards, law-enforcement officers arrested Ezingim Demetrius Earl and charged him with trafficking in marijuana, see § 13A-12-231(a), Ala. Code 1975, based on the amount of marijuana they found in his apartment and in a 1998 Honda Accord vehicle associated with him. Earl moved to suppress the evidence found in the apartment and the vehicle. He argued that under Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), the officers violated his Fourth Amendment[3] right to be free from unreasonable searches and seizures by allowing a drug-sniffing dog to sniff the apartment door without first obtaining a search warrant. He also argued that the search of the Honda Accord in the parking lot of the apartment complex two days later was an unreasonable search. The circuit court denied Earl's motion to suppress, and, based on the marijuana found in the

[2]The Dixie Chicks, Goodbye Earl, on Fly (Monument Records 2000) ("The cops came by to bring Earl in, they searched the house high and low.").

[3]The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." U.S. Const. amend. IV.

apartment, Earl pleaded guilty to trafficking in marijuana.[4] The circuit court sentenced him, as a habitual felony offender, to life in prison. He preserved and reserved the right to appeal the denial of his motion to suppress.

We consider whether the use of a drug-sniffing dog to sniff the door seams of the apartment was, under the reasoning of Jardines, an illegal search in violation of Earl's Fourth Amendment right to be free from unreasonable searches. We hold that it was, and that the remaining facts in the affidavit did not show probable cause to issue a search warrant for the apartment. We reverse and remand.

I. The K9 Drug-Sniff and the Affidavit

On the morning of January 23, 2017, three members of the Mobile Police Department--including Officer Adam Partridge and Corporal Pat McKean--went to the Lafayette Square Apartments in Mobile to walk the police department's K9 dog, Oscar, around Earl's apartment and two vehicles registered to Earl's girlfriend to see if Oscar would "alert." The officers had learned that Earl lived with his girlfriend in apartment 206 at the Lafayette Square Apartments. Officer Partridge had

[4]As part of the plea agreement, the State agreed to dismiss eight counts against Earl.

identified Earl as a suspect in a case he had investigated a few weeks earlier involving the seizure from a hotel room of 21 grams of marijuana and a large amount of cash. Following that seizure, a confidential informant had bought marijuana from Earl through a controlled buy, and Earl had delivered the marijuana in a 1998 Honda Accord vehicle to the confidential informant. Officer Partridge learned that Earl had two prior convictions for first-degree possession of marijuana, and on January 17 and January 19, he made controlled buys of marijuana from Earl. Both times, Earl sold the drugs to Officer Partridge from the 1998 Honda Accord.

When the officers arrived at the Lafayette Square Apartments, Cpl. McKean, who is a K9 handler, took Oscar to the parking lot of the apartment and "ran Oscar around" on a 15-foot lead. Oscar "alerted" on the 1998 Honda Accord and on a 2009 Jeep Wrangler vehicle, both registered to Earl's girlfriend.

Although none of the controlled buys involved apartment 206, and, although the officers had no information that any illegal activity had taken place at that apartment, Cpl. McKean took Oscar into the courtyard area outside the

apartment building to see if Oscar would alert at apartment 206. Officer Partridge testified at the suppression hearing that he believed that Earl was storing marijuana in apartment 206.

> "It's my experience that drug dealers, often times, will not sell drugs from their residence. It's common that they will use other locations and meet places to sell drugs so that it doesn't bring any attention to their residence. And, often times, evidence inside a residence is less likely to be found by an officer than on the street corner or elsewhere. So, I believe that he was using that residence as a place to possibly store his drugs."

(R. 16.) Cpl. McKean explained at the suppression hearing his search of the apartment door with Oscar.

> "I didn't take him directly to that door. As you read in the affidavit, it says an open area search, and what an open area search means is we don't have the dog on a short line and I'm saying, 'hey, search here, search here.' I just have the dog on about a 15-foot lead and I'm taking him through an area, an open area like a parking lot.
>
> "Like the apartment how this was, it was an apartment building with the doors facing out to, like, a big wide open courtyard. And I knew the apartment number, but I wouldn't take him straight to that door. I'll try to hit--I'll give him an opportunity to pass it. He's either going to go to it or he's not."

(R. 30.) Oscar alerted at the door of apartment 206, indicating to the officers that Oscar detected an odor of a controlled substance.

That same morning, Officer Partridge submitted an affidavit to a Mobile County district judge to obtain a search warrant for apartment 206 and for the 1998 Honda Accord and the 2009 Jeep Wrangler. The affidavit stated, in relevant part:

> "Within the last month, I have received information regarding a subject named Ezingim Earl DOB 06/05/1987. The information I received is that Ezingim Earl sells large quantities of marijuana within Mobile County. I worked a narcotics case involving the seizure of $35,790 in US currency and approximately 21 grams of marijuana in which Ezingim Earl was the suspect. Detective Pettway has also made a controlled buy of marijuana from Ezingim Earl within the last month using a confidential informant of the Mobile Police Department. Ezingim Earl has two convictions for possession of marijuana 1st. I also received information from two different sources regarding where Ezingim Earl lives. Both of these different sources of information have told me that Ezingim Earl lives with Shantavia Johnson in Lafayette Square. Lafayette Square is the address listed in section one of this affidavit. Shantavia Johnson is also currently receiving power at the address listed in section one of this affidavit. I have also received information that Ezingim Earl uses both of the vehicles listed in section one of this affidavit to sell marijuana. I have made two controlled buys of marijuana from Ezingim Earl within the last week. Both of these buys have been made from the 1998 Honda Accord.

> "Within the last 72 hours, Corporal Pat McKean, Detective Evans, and I drove to address listed in section one of this affidavit. Corporal McKean is a K9 handler with Mobile Police Department. K9 Oscar is a certified narcotic dog for the Mobile Police Department. K9 Oscar is trained and certified to detect odors of marijuana, cocaine, crack cocaine, methamphetamine, and/or heroin. Corporal McKean conducted an open air sniff at the door seams of the apartment doors located in the building. K9 Oscar gave a final response and alerted at the door of the apartment listed in section one of this affidavit indicating to Corporal McKean that he detected an odor of a controlled substance coming from the apartment for which he is certified to detect. K9 Oscar also gave a final response on the passenger side of both of the vehicles listed in section one of this affidavit which indicated to Corporal McKean that he detected an odor of a controlled substance coming from the vehicles for which he is certified to detect."

(Emphasis added.) The affidavit contained a statement that, based on his training and experience, Officer Partridge expected to find contraband in or on the property searched. Officer Partridge testified at the suppression hearing that he did not provide any more information to the district judge other than what he put in his affidavit. The judge signed a search warrant that same morning for apartment 206 and for both vehicles.

Law-enforcement officers, including Officer Partridge, executed the search warrant two days later. They found about 27 pounds of marijuana in apartment 206.[5]

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[5]As noted, law-enforcement officers also found about six pounds of marijuana in the Honda Accord, and both Earl and the State argue on appeal about the propriety of the circuit court's ruling on the motion to suppress the evidence found in the Honda Accord. But Earl pleaded guilty to trafficking in marijuana based not on the marijuana found in the Honda Accord, but based on the marijuana found in apartment 206 only.

> "The Court: They went [to the Lafayette Square Apartments]. Officer said he smelled something himself. Dog alerted on the car. And I think the dog may have alerted on the door of the apartment. I'm not sure about that. And then, they used that as a basis for a warrant to do a search and they found marijuana in the apartment, a sufficient quantity to charge him with trafficking.
>
> "....
>
> "The Court: All right. I think I remember, as I just recited, what the basic facts were of the case and I know it all occurred here in Mobile County, and I find that is sufficient basis to prove the prima facie elements of the trafficking marijuana case. Therefore, I do adjudge the Defendant guilty of trafficking in marijuana."

(R. 47-48 (emphasis added)). Because the factual basis for Earl's guilty-plea conviction was the marijuana found only in apartment 206, we evaluate only that part of the circuit court's ruling directed to the evidence seized from apartment 206. Because Earl's conviction was not based on the marijuana found in the Honda Accord, we express no opinion on the circuit court's denial of Earl's motion to suppress the

Earl argues on appeal that under Florida v. Jardines the drug-sniff of the apartment door was an illegal search that violated his Fourth Amendment right to be free from unreasonable searches and seizures. He contends that a law-enforcement officer may not, without a search warrant, use a drug-sniffing dog to enter the curtilage of an apartment to sniff for drugs and that any information learned through such a search is tainted and cannot provide the probable cause to support a search warrant. Earl contends that, when the information about the drug-sniff is removed from the affidavit supporting the search warrant, the remaining information cannot support a finding of probable cause for the search warrant.

"In reviewing a decision of a trial court on a motion to suppress evidence, in a case in which the facts are not in dispute, we apply a de novo standard of review." State v. Otwell, 733 So. 2d 950, 952 (Ala. Crim. App. 1999). The parties agree that the facts are undisputed and that this Court must review de novo the circuit court's decision denying Earl's motion to suppress.

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marijuana found in that vehicle.

II. Jardines Analysis

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." U.S. Const. amend. IV. "[T]he Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'" Oliver v. United States, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741, 80 L. Ed. 2d 214 (1984) (quoting Payton v. New York, 445 U.S. 573, 601, 100 S. Ct. 1371, 1387, 63 L. Ed. 2d 639 (1980)). As the United States Supreme Court noted in Wilson v. Layne, 526 U.S. 603, 609-10 (1999):

> "In 1604, an English court made the now-famous observation that 'the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.' Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B.) .... The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."

The Fourth Amendment also protects the area immediately surrounding one's home from unreasonable searches and seizures. Jardines, 569 U.S. at 6.

> "When it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961). This 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; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.
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> "We therefore regard the area 'immediately surrounding and associated with the home'--what our cases call the curtilage--as 'part of the home itself for Fourth Amendment purposes.' Oliver [v. United States, 104 S. Ct. 1735, 466 U.S. 170] at 180 [1984]."

Jardines, 569 U.S. at 6. In deciding whether something is "curtilage" so that the Fourth Amendment protects it from unreasonable searches and seizures, courts consider four factors:

> "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.' United States v. Dunn, 480 U.S. 294, 301, 107 S. Ct. 1134, 1139, 94 L. Ed. 2d 326 (1987)."

Ex parte Hergott, 588 So. 2d 911, 915 (Ala. 1991) (quoting United States v. Dunn, 480 U.S. 294, 301, 107 S. Ct. 1134, 1139, 94 L. Ed. 2d 326 (1987)).

The Fourth Amendment also provides that search warrants shall be issued only upon a finding of probable cause. U.S. Const. amend. IV. ("[N]o warrants shall issue, but upon probable cause.").

> "'[A] search warrant may only be issued upon a showing of probable cause that evidence or instrumentalities of a crime or contraband will be found in the place to be searched.' United States v. Gettel, 474 F. 3d 1081, 1086 (8th Cir. 2007). Moreover, '"[s]ufficient evidence must be stated in the affidavit to support a finding of probable cause for issuing the search warrant," and "[t]he affidavit must state specific facts or circumstances which support a finding of probable cause[;] otherwise the affidavit is faulty and the warrant may not issue."' Ex parte Parker, 858 So. 2d 941, 945 (Ala. 2003) (quoting Alford v. State, 381 So. 2d 203, 205 (Ala. Crim. App. 1979))."

Ex parte Green, 15 So. 3d 489, 492 (Ala. 2008).

A defective search-warrant affidavit "may 'be validated if it is supplemented with additional facts which the magistrate considered before determining that probable cause was present.'" Ex parte Perry, 814 So. 2d 840, 843 (Ala. 2001) (quoting Crittenden v. State, 476 So. 2d 632, 633 (Ala. 1985)). See also Green, 15 So. 3d at 495 ("Even if an

affidavit is facially defective ... its deficiency may be cured by information an affiant supplied to the issuing authority in addition to the assertions in the affidavit."). But later testimony at a suppression hearing will not cure a defective affidavit if that information was not provided to the issuing authority. Seritt v. State, 647 So. 2d 1, 6 (Ala. Crim. App. 1994) (holding that, because when he issued the search warrant the issuing judge had only the information in the affidavit to determine whether there was probable cause for the search, the detective's later testimony at the suppression hearing was irrelevant); see also Green, 15 So. 3d at 495. Officer Partridge testified at the suppression hearing that, other than what he stated in his affidavit, he did not provide any more information to the district judge who issued the search warrant. Thus, although at the suppression hearing Officer Partridge and Cpl. McKean provided more details about Oscar's drug-sniff of the door of apartment 206, that additional information is irrelevant in determining whether the district judge had probable cause to issue the search warrant for the apartment.

The question is whether the affidavit showed--on its face--probable cause to issue a search warrant for apartment 206.

In Jardines, the police received a tip that Jardines was growing marijuana in his house. Several law-enforcement officers went to Jardines's house and, when they could not see inside the house because the blinds were closed, two detectives approached Jardines's house with a drug-sniffing dog. The dog was on a six-foot leash. As the dog approached Jardines's front porch he began "tracking" back and forth. The K9 handler stood back while the dog was tracking. The dog eventually alerted at the base of the front door. Based on the dog's alert at the front door, one of the law-enforcement officers applied for and was issued a search warrant for Jardines's house. When the officers executed the search warrant later that day, they found marijuana in Jardines's house. They arrested Jardines and charged him with trafficking in marijuana. Before trial he moved to suppress the marijuana found in his house, arguing that the officers' use of the drug-sniffing dog was an unreasonable search. The trial court granted the motion and, after appeals in the

Florida Court of Appeals and the Florida Supreme Court, the United States Supreme Court granted certiorari to consider whether the officers' behavior in using a drug-sniffing dog on Jardines's porch to investigate the contents of his house was a "search" under the Fourth Amendment. Jardines, 569 U.S. at 3-5.

The Court held that the porch was a "part of the home itself for Fourth Amendment purposes." Jardines, 569 U.S. at 5. Because the officers' investigation took place in a "constitutionally protected area," the Court then turned to whether the officers accomplished their investigation "through an unlicensed physical intrusion." Jardines, 569 U.S. at 7. The Court stated:

> "While law enforcement officers need not 'shield their eyes' when passing by the home 'on public thoroughfares,' Ciraolo, 476 U.S., at 213, an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas.
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> " ... We have accordingly recognized that 'the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds.' Breard v. Alexandria, 341 U.S. 622, 626 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation

> to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' Kentucky v. King, 563 U.S. ----, ----, 131 S. Ct. 1849, 1862 (2011).
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> "But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to--well, call the police. The scope of a license--express or implied--is limited not only to a particular area but also to a specific purpose ....
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> " ... [T]he question before the court is ... whether the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do."

Jardines, 569 U.S. at 7–10. The Court held that "[t]he government's use of trained police dogs to investigate the

home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." Jardines, 569 U.S. 11-12.

Applying Jardines, we hold that the affidavit in support of the search warrant showed--on its face--that the use of Oscar to sniff the door seams of apartment 206 was an illegal search in violation of the Fourth Amendment. In his affidavit Officer Partridge stated:

> "Corporal McKean conducted an open air sniff at the door seams of the apartment doors located in the building. K9 Oscar gave a final response and alerted at the door of [apartment 206] indicating to Corporal McKean that he detected an odor of a controlled substance coming from the apartment."

When he signed the search warrant for apartment 206, then, the district judge knew only, as it relates to Oscar's alert at the door of apartment 206, that Cpl. McKean used Oscar to conduct an open-air sniff "at the door seams" of several apartment doors, including apartment 206. But Jardines makes clear that the area "immediately surrounding and associated with the home" is "part of the home itself for Fourth Amendment purposes," and that using a dog to conduct a drug-sniff in that area is an unreasonable search that violates the Fourth Amendment.

The State argues that Jardines is distinguishable because there the detective went with the dog onto Jardines's porch, and here, the State says, "the officer did not set foot on Earl's doorstep or on any surrounding curtilage" but walked Oscar "on a common sidewalk area past the door, and other apartment doors, where [he] was allowed to be." (State's brief, pp. 16-17.) Setting aside the fact that Officer Partridge did not include these other details of the search in his affidavit, we believe this distinction--that is, whether the dog and the officer both enter the curtilage, or whether the dog alone enters the curtilage--is irrelevant under the reasoning of Jardines.

Although neither this Court nor the Alabama Supreme Court has before now considered Jardines, we take guidance from federal decisions that have considered Jardines under facts much like the ones presented here.

In United States v. Hopkins, 824 F.3d 726 (8th Cir. 2016), a police officer learned that someone was dealing drugs from one of the buildings in a group of townhomes known as the Cambridge Townhomes. The Cambridge Townhomes consisted of several buildings separated by streets and sidewalks. The

building relating to the information the officer received about the sale of drugs was a two-story building with six apartments on each side. Walkways led from a sidewalk in the central courtyard to a concrete slab in front of a pair of doors, and each door led into a separate apartment. Each townhouse unit had one first-story window facing out into the grassy central courtyard. Hopkins, 824 F.3d at 729-30.

The officer took his K9 unit dog, Marco, to the Cambridge Townhomes, unhooked Marco from his leash, and directed him to sniff the building for drugs. Marco ran along the sides of the building "so that 'he was able to sniff the door bottoms on every apartment.'" Hopkins, 824 F.3d at 730. Marco began to sniff at the bottom of the door of unit 6 and eventually alerted at the front door of unit 6. The officer applied for a search warrant the next day, stating that Marco had "sniffed the door bottoms of all the apartments from the outside common area." When law-enforcement officers executed the search warrant a few days later, they found heroin, cocaine, and marijuana inside unit 6. Hopkins pleaded guilty to possession of the drugs while reserving his right to appeal the denial of his motion to suppress.

On appeal, the United States Court of Appeals for the Eighth Circuit held that the officer's use of Marco to sniff the door of unit 6 was an illegal search in violation of the Fourth Amendment. The Court discussed an earlier case in which it had applied Jardines to a search involving the same officer, the same K9 dog, and a different building at the Cambridge Townhomes.

> "We applied Jardines last year in United States v. Burston, 806 F.3d 1123 (8th Cir. 2015), a case similar to the one we have here. In Burston, Officer Fear led Marco around the exterior walls of a different building at the Cambridge Townhomes. Marco alerted in front of the window of Burston's apartment which was approximately six feet from the walkway to his door. Id. at 1125. The window was partially covered by a bush, and there was a cooking grill between the door and the window. Id. We concluded that the 'close proximity to Burston's apartment' of the sniffed area, six to ten inches from the window, strongly supported a finding that the area was curtilage. Id. at 1127. The cooking grill was also evidence that Burston had made personal use of the area, and the bush prevented close inspection of the window. Id. Because the police 'had no license to invade Burston's curtilage,' we concluded that the dog sniff was unconstitutional under Jardines. Id. at 1127–28.
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> "The area immediately in front of Hopkins' door was also curtilage. Officer Fear testified that Marco was trained 'to get as close to the source as possible' and that he was within 'six to eight inches' of the door when he alerted and 'actually sniffed the creases of the door.' That proximity strongly supports a finding of curtilage. Burston,

806 F.3d at 1127; see id. n.6 (citing the magistrate judge's conclusion in this case). The area within a foot of the only door to the townhome would be used every day by its residents as they came and went. Photographic evidence shows that the areas next to the doors of these apartments and along the walls are used for grilling and storing bicycles. The second and fourth [United States v.] Dunn[, 480 U.S. 294 (1987),] factors weigh against a finding of curtilage in this area because the front of the door was not enclosed by a fence or wall and was not protected from observation by visitors (though neither was the front porch in Jardines, see 133 S. Ct. at 1413). We conclude that the combination of Dunn factors supports a finding of curtilage. '[D]aily experience' also suggests that the area immediately in front of the door of the apartments in this complex is curtilage. Jardines, 133 S. Ct. at 1415 (quoting Oliver v. United States, 466 U.S. 170, 182 n.12, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984)).

"....

"... In our case ... there is no 'common hallway' which all residents or guests must use to reach their units. Hopkins' door faced outside, and the walkway leading up to it was 'common' only to Hopkins and his immediate neighbor. Even his neighbor would not pass within 6 to 8 inches of Hopkins' door when going to his own.

"We further conclude that Officer Fear had no license to have Marco enter the curtilage and sniff the door. See Burston, 806 F.3d at 1127–28. The walkway in this case created an implied invitation for a visitor to go up and knock on one or both of the two doors, Jardines, 133 S. Ct. at 1415–16, but not for an officer to approach with a trained police dog within inches of either of the doors 'in hopes of discovering incriminating evidence,' id. at 1416. The dog sniff at Hopkins' front door violated

> Jardines, and the warrant application was not otherwise supported by probable cause.

Hopkins, 824 F.3d at 731–33 (emphasis added). In both United States v. Burston, 806 F.3d 1123 (8th Cir. 2015), and Hopkins, the officer stayed back while Marco sniffed around the building. But the Court held, in both cases, that, because the officer did not have license to enter the curtilage of the apartment to search it, he could not use Marco to sniff the door of the apartment. Burston, 806 F.3d at 1127-28 ("[B]ecause the police officers had no license to invade Burston's curtilage and the area Marco sniffed was within the curtilage of Burston's apartment, we hold the dog sniff was an illegal search in violation of Burston's Fourth Amendment rights under Jardines."); Hopkins, 824 F.3d at 732 ("Officer Fear had no license to have Marco enter the curtilage and sniff the door." (emphasis added)).

We agree with the reasoning of the Eighth Circuit in Burston and Hopkins. An officer who does not have a license to enter the curtilage of an apartment may not circumvent the Fourth Amendment by using a drug-sniffing dog to go into an area where he himself cannot lawfully go. Cpl. McKean testified at the suppression hearing that, although he did not

take Oscar directly to the door of apartment 206, Oscar was on a 15-foot lead and Cpl. McKean allowed him to go to the apartment door. Photographs introduced at the suppression hearing showed that the door to apartment 206 was at the end of a walkway that led only to that apartment. Two steps at the end of the walkway led to the door of apartment 206, which was inset into the doorframe. No other apartment shared the door to apartment 206. Although Cpl. McKean did not approach the door to apartment 206 with Oscar, he allowed Oscar, on a 15-foot lead, to go into an area--up to the door seams of the apartment--that he himself could not, with the intent to conduct a search, lawfully go. Although any of the law-enforcement officers could have approached the door of the apartment with the purpose of knocking on the door and speaking with Earl, Officer Partridge testified that they did not go to the apartment to knock and talk, but to walk Oscar around to see if he would alert. As the Court stated in Jardines:

> "[T]he question is ... whether the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals

> a purpose to conduct a search, which is not what anyone would think he had license to do."

Jardines, 569 U.S. at 10. When an officer's behavior "objectively reveals a purpose to conduct a search," the constitutionality of that search cannot rest on where in relation to the curtilage the officer plants his feet, or on how long a leash he constrains his drug-sniffing dog. Because Cpl. McKean allowed Oscar to sniff in an area where he did not have a license to enter, Oscar's alert on the door of apartment 206 could not provide probable cause to support a search warrant of that apartment.

But even when, as here, an affidavit contains information about an illegal search, "the warrant is valid if the underlying affidavit contains enough information independently obtained to establish probable cause." Ex parte Maddox, 502 So. 2d 786, 789 (Ala. 1986).

> "'The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contains allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause.'"

Maddox, 502 So. 2d at 789 (quoting United States v. Giordano, 416 U.S. 505, 555, 94 S. Ct. 1820, 1845, 40 L. Ed. 2d 341 (1974)).

Earl argues that, without the information about Oscar's alert at the door of apartment 206, the affidavit contained insufficient information from which the district judge could have determined that there was probable cause to issue the search warrant for the apartment. He contends that the affidavit is insufficient because the information in the affidavit about Earl selling drugs is stale; because the affidavit does not provide a time frame for the earlier case involving the seizure of currency and marijuana in which Earl was a suspect; because the information in the affidavit about a confidential informant purchasing marijuana from Earl is dated only as "within the last month"; because the affidavit does not provide a time frame for Earl's prior convictions for possession of marijuana; because the affidavit does not provide any information about the reputation for truth and veracity of the confidential informant; and because the affidavit does not provide any information that any illegal activity occurred at apartment 206, or that the apartment is

known to contain illegal drugs or that Earl used it for an illegal purpose.

We find it is unnecessary to address all the claims Earl makes about the insufficiency of the affidavit because we agree that, when the drug-sniff information is removed from the affidavit, there is insufficient evidence connecting apartment 206 with any illegal activity or with the items to be seized.

"'Probable cause to search a residence exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place."'" Poole v. State, 596 So. 2d 632, 641 (Ala. Crim. App. 1992) (quoting United States v. Jenkins, 901 F.2d 1075, 1080 (11th Cir. 1990), in turn quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983)).

> "To pass constitutional muster, 'the facts must be sufficient to justify a conclusion that the property which is the object of the search is probably on the premises to be searched at the time the warrant is issued.' United States v. Greany, 929 F.2d 523, 524-25 (9th Cir. 1991) (emphasis added)."

Green, 15 So. 3d at 492. "[A] defendant's possession of illegal drugs does not, without more, make reasonable a search of the defendant's residence." Perry, 814 So. 2d at 843.

> "'It is true that the nexus between the objects to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation,' but 'there still must be a "substantial basis" to conclude that the instrumentalities of the crime will be discovered on the searched premises.' United States v. Lockett, 674 F.2d 843, 846 (11th Cir. 1982). In Lockett, the Eleventh Circuit stated that '[i]n United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970), the court noted that knowledge of a defendant's possession of stolen goods does not, without more, make reasonable a search of the defendant's residence.' Id."

Perry, 814 So. 2d at 843.

In Perry, the officer's affidavit in support of the search warrant detailed the officer's undercover purchase of cocaine from the defendant on three occasions. The defendant delivered the drugs to the officer at "a neutral location not his residence." Perry, 814 So. 2d at 841. The officer stated in his affidavit that, based on his experience and training, people engaged in selling drugs will often meet buyers at a neutral location to divert suspicion from "their residence and/or 'stash house,' where they store the illegal drug." Id. The officer said in his affidavit that he had probable cause to believe drugs were located at the defendant's residence. A judge issued a search warrant for the defendant's residence,

and law-enforcement officers found cocaine at the residence. The defendant was convicted of trafficking in cocaine.

On appeal, the Alabama Supreme Court held that the affidavit did not "present facts from which the judge might make an independent determination of probable cause, but offers instead nothing more than conclusory statements by [the officer] that sufficient probable cause exists to search Perry's residence." Perry, 814 So. 2d at 843. The Court held that the trial court should have granted the defendant's motion to suppress because "the affidavit alone was insufficient to support a valid warrant." Perry, 814 So. 2d at 843. In his concurring opinion in Perry, Justice Harwood pointed out that "[n]othing in the affidavit serves to discriminate between the possibility that Perry was retrieving drugs from a 'stash house' and the possibility that he was retrieving them from his residence." Perry, 814 So. 2d at 844 (Harwood, J., concurring specially).

This Court, relying on Perry, held in Straughn v. State, 876 So. 2d 492 (Ala. Crim. App. 2003), that there was not a sufficient nexus between a marijuana patch in the woods and

the defendant's residence to justify a search of the defendant's home.

> "[T]he mere fact that officers observed Straughn tending the marijuana patch on a neutral site, i.e., one that was not a part of his residence, was simply insufficient to establish a nexus to search Straughn's residence. Nothing in the affidavit indicated that drugs or paraphernalia were being kept at Straughn's residence as opposed to some other location, and there is no indication in the record that the magistrate who issued the warrant was presented with any information or evidence other than the affidavit. '[A] defendant's possession of illegal drugs does not, without more, make reasonable a search of the defendant's residence.' Ex parte Perry, 814 So. 2d at 843 .... Therefore, we hold that, under the facts of this case, as in Ex parte Perry, the affidavit was insufficient to support a valid warrant."

Straughn, 876 So. 2d at 499.

Officer Partridge's affidavit is void of any connection between Earl's sale of marijuana from the Honda Accord and apartment 206. Although Officer Partridge stated in his affidavit that he had learned from two sources that Earl lived with his girlfriend in apartment 206 at the Lafayette Square Apartments, that information does not connect Earl's drug activity in the Honda Accord to the apartment and is, without more, insufficient to create a nexus between Earl's drug-selling activity and apartment 206. Cf. Gord v. State, 475

So. 2d 900 (Ala. Crim. App. 1985) (holding that there was a sufficient nexus between the defendant's residence and his sale of cocaine because on one occasion officers observed the defendant leave his house and, without making any stops, sell cocaine to a confidential informant, and on another occasion officers observed him leave his house and, before the defendant made any stops, law-enforcement officers stopped him and found cocaine in his vehicle); Moore v. State, 650 So. 2d 958 (Ala. Crim. App. 1994) (holding that there were sufficient facts connecting the defendants with the apartment in which cocaine was found because, before selling cocaine to an informant, the defendants had that same day been at the apartment and, after the sale, returned to the apartment).

We note that, although Officer Partridge testified at the suppression hearing that it is his experience that drug dealers often store drugs at their residence but sell them from other locations so that it does not bring attention to their residences, this information, even if it would have been enough to create a nexus between Earl's sale of drugs from the Honda Accord and apartment 206, was not included in Officer Partridge's affidavit. Cf. Bolden v. State, 205 So. 3d 739

(Ala. Crim. App. 2015) (upholding warrant when the affidavit submitted to the issuing judge included information about the officer's knowledge that drug traffickers commonly keep their drugs at different residences).[6]

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[6]Bolden was not a majority opinion. In his dissenting opinion in Bolden, Judge Welch stated that he believed the affidavit was insufficient, and he would have held that the officer's statement in his affidavit that he had knowledge that drug traffickers often store their drugs at different residences was insufficient to create a nexus between the defendant's drug activity and the defendant's second residence.

> "There was no assertion from Officer Mock that anyone had stated that drugs were seen--at any time--at the Eddins Road residence or that any illegal activity was ever observed at that location."
>
> " ... [T]he affidavit overwhelmingly presents only Officer Mock's pure speculation that illegal drugs were probably in the trailer on Eddins Road at the time the warrant was issued. The affidavit essentially presented conclusions based on Officer Mock's experience as a narcotics officer. Officer Mock asserted that because he was well trained in the detection of narcotics, he knew that illegal drug traffickers disguise their business and in doing so it is common for drug traffickers to keep their money and drugs at different residences. With this knowledge Officer Mock formed the opinion that Bolden had separated his drugs and money and was keeping illegal drugs at the Eddins Road residence. Furthermore, Officer Mock supported this opinion with his additional opinion that the absence of a rifle from the Bruce Street residence meant that Bolden was keeping some of his belongings, including the rifle and drugs at the Eddins Road residence.

Because there was insufficient evidence connecting apartment 206 with any illegal activity, the affidavit did not show probable cause to issue a search warrant for the apartment.

Even if an affidavit cannot establish probable cause, evidence obtained based on a search warrant later found to be invalid may be admissible under the "good-faith" exception to the exclusionary rule, "if the executing officers acted in good faith and in objectively reasonable reliance on the warrant." Green, 15 So. 3d at 495 (quoting Nelms v. State, 568 So. 2d 384, 388 (Ala. Crim. App. 1990), in turn quoting United States v. Hove, 848 F.2d 137, 139 (9th Cir. 1988)). But "[t]he application of and rationale for the good-faith exception are particularly inappropriate where, as here, the officer is executing a search warrant that depends on his own affidavit." Green, 15 So. 3d at 496-97 (emphasis in

> None of those opinions is supported by facts presented to the officer before seeking the search warrant."

Bolden, 205 So. 3d at 752, 755–56 (Welch, J., dissenting). Concurring in the result, Judge Joiner, joined by Judge Burke, agreed with Judge Welch that the search warrant was not supported by sufficient probable cause, but he agreed with the main opinion that the good-faith exception applied to render the evidence seized as a result of the warrant admissible.

original). Because Officer Partridge both prepared the affidavit and executed the search warrant based on that affidavit, the good-faith exception does not apply.[7]

III. Conclusion

Because the affidavit lacked sufficient probable cause to support the issuance of a search warrant for apartment 206, the circuit court should have granted Earl's motion to suppress the evidence found in apartment 206. We therefore reverse the judgment of the circuit court and remand this case for further proceedings. In doing so, we note that Earl was originally charged with nine counts but that, because Earl agreed to plead guilty to one count of trafficking in marijuana, the State dismissed eight counts. Because this Court holds that the circuit court erred in denying Earl's

[7]Earl also argues that the drug-sniff of the apartment door was a Fourth Amendment violation under the "expectation of privacy" analysis set out in Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), and applied by Justice Kagan in her concurring opinion in Jardines. See also United States v. Whitaker, 820 F.3d 849 (7th Cir. 2016) (applying a reasonable-expectation-of-privacy analysis to hold that a drug-sniff outside an apartment door was an unreasonable search under the Fourth Amendment). Because we hold that the drug-sniff of the door of apartment 206 violated Earl's Fourth Amendment right under Jardines, we do not consider Earl's "expectation of privacy" argument under Katz.

motion to suppress as to the apartment, this Court is also setting aside Earl's guilty-plea conviction for trafficking in marijuana and his resulting sentence of life in prison. Because this Court is setting aside Earl's guilty-plea conviction, the State may reinstate the eight counts it dismissed and proceed to trial on all nine counts. See Grizzell v. State, 186 So. 3d 478, 487-88 (Ala. Crim. App. 2015) (Joiner, J., concurring specially) ("Because Grizzell's negotiated plea agreement has been set aside by this Court, the State may now reinstate the original murder indictment and proceed to trial on that indictment. See Sheffield v. State, 959 So. 2d 692, 695 (Ala. Crim. App. 2006) ('"The courts that have approved the reinstatement of dismissed charges after the vacation of a guilty plea seem to imply that this is a valid remedy due to the conditional nature of dismissed charges resulting from a guilty plea. When charges are dismissed as a part of a plea bargain agreement, the dismissal of the charges is conditioned upon the defendant being convicted and remaining convicted of the offense to which he pled guilty. [United States v.] Anderson, [514 F.2d 583 (7th Cir. 1975)]. When the State dismisses a charge pursuant to a plea

agreement, it does so relying on the fact that the defendant will plead guilty to the remaining charge or charges and that his conviction will stand."' (quoting Williams v. State, 494 So. 2d 819, 824 (Ala. Crim. App. 1986))).").

REVERSED AND REMANDED.

Windom, P.J., and Kellum and Cole, JJ., concur. McCool, J., concurs in the result.