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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 19-CR-20010**
	)	
CHAD KELLER,	)	
	)	
Defendant.	)	

ORDER

Defendant, Chad Keller, filed a Motion to Suppress (#20) on August 14, 2019. The government filed a Response (#27) on September 17, 2019. Following a suppression hearing on November 25, 2019, Defendant filed a Reply to the Government's Response (#35) on February 3, 2020, and the government filed a Second Response (#36) on February 17, 2020. For the following reasons, Defendant's Motion to Suppress (#20) is GRANTED.

BACKGROUND

Defendant has been charged, in a Superseding Indictment (#21) issued on August 21, 2019, with possessing with intent to distribute 50 or more grams of methamphetamine, on January 17, 2019, in Edgar County, Illinois, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(viii). Defendant filed a Motion to Suppress (#20) asking the court to suppress all evidence and statements obtained by the government "as a result of the illegal seizure and search of" Defendant's vehicle and person. Defendant argues that: (1) there was no independent probable cause, based on the

confidential source's description of a controlled purchase the day before, to stop and search Defendant and his vehicle; (2) Deputy Dee Burgin illegally prolonged the traffic stop; (3) Lucas, the dog who sniffed Defendant's vehicle, was not properly trained and, in any event, did not alert to the presence of drugs in the vehicle; and (4) Burgin's pat down search of Defendant was illegal and Defendant could not properly consent to a search of the vehicle or himself because he was illegally seized.

A hearing on the suppression motion was conducted before this court on November 25, 2019. The following evidence was adduced at the hearing.

Deputy Dee Burgin

Direct Examination

Dee Burgin testified as follows. He has been a deputy with the Edgar County Sheriff's Department for fifteen years. In January 2019, he was employed with the office as a patrol officer. He was also working with the Paris, Illinois police department, and the Drug Enforcement Agency ("DEA"), in particular with DEA Agent Chris McGuire. Burgin's work was focused on investigating methamphetamine ("meth") trafficking in Edgar County.

On January 16, 2019, Burgin was involved in the debriefing, along with Agent McGuire, of a confidential source ("CS") following the completion of a controlled purchase of meth. The CS told Burgin that he had purchased "methamphetamine ice" on that date from "Chad Keller." Keller is the Defendant in the instant case. At the time, Burgin was not familiar with Defendant. The CS told Burgin that Defendant had indicated he was coming back to Paris the next day, January 17, 2019, to bring back

approximately four more ounces of meth to sell.

Burgin and McGuire then developed a plan for January 17. McGuire would work on "figuring out who Chad Keller was" and Burgin would do surveillance and patrol the area to see if he could observe Defendant. Burgin would attempt to conduct a traffic stop on Defendant for a violation of the Illinois Vehicle Code. Burgin would only stop Defendant if he observed a traffic violation. Burgin wanted a visual identification of Defendant, because, at the time, he was unfamiliar with Defendant. On the morning of January 17, McGuire provided Burgin with a mug shot of Defendant.

While on patrol in Paris at around 1:35 pm on January 17, 2019, Burgin observed a blue Chevrolet truck fail to stop for a stop sign. Burgin observed, through the truck's window, a driver matching the mug shot photo of Defendant that he had been provided by Agent McGuire. Due to Defendant's failure to stop for the stop sign, Burgin initiated a traffic stop.

Once Defendant had pulled the truck over, Burgin left his squad car and approached Defendant's truck. Burgin advised Defendant why he initiated the traffic stop. Burgin then identified Defendant as the man he pulled over. Defendant was the only person in the truck. Burgin then had a conversation with Defendant.

Burgin then stepped towards the rear of the truck and contacted dispatch, and asked if the canine officer was coming to the stop. Burgin requested the canine officer because of the information received from the DEA the previous night following the controlled purchase by the CS. Burgin had dispatch run Defendant's name and license plate. While dispatch ran the requested records, Burgin returned to his squad car to

begin writing the traffic ticket.

Upon arriving back at his car, Burgin checked his cell phone, because that is how he communicates with other officers. He took out his ticket book and started filling out the ticket. Because Defendant had an Indiana license, it was in a format not familiar to Burgin, so it took him a little longer to locate the information to write in the ticket. While he was drafting the ticket, Paris police officer Terry Rogers arrived on the scene. Burgin had him position his squad car in front of Defendant's truck so Defendant could not leave. About five to six minutes after Burgin initiated the stop, Edgar County Sheriff's Deputy Chris Ray, the canine officer, arrived on the scene. Burgin was still writing the ticket when Ray arrived.

Burgin then described his ticket writing process. He obtains most of the information for the ticket from the person's driver's license and registration. Once the top part of the ticket is filled out, Burgin calls dispatch to request a traffic court date and provide time of stop information. Burgin says a routine traffic stop is 15 to 20 minutes.

By the time Deputy Ray arrived on scene, Burgin still had over half the ticket left to write. As Ray conducted a dog sniff of Defendant's truck, Burgin continued to write the ticket. Burgin observed Ray's canine, Lucas, alert very quickly, maybe 30 to 60 seconds, after Lucas began to sniff the truck. Burgin confirmed with Ray that Lucas alerted for narcotics.

Upon being informed by Ray of the alert, Burgin left his squad car and advised Defendant that the dog alerted to the odor of narcotics in the truck. Burgin directed

Defendant to step out of the truck and asked him if he had anything illegal inside it. Defendant said he did not. Burgin then asked Defendant if the officers could search the truck. Defendant said he did not care if they searched it. Burgin then asked Defendant if he could pat Defendant down to search for weapons. Defendant said "sure" and Burgin performed an officer safety pat down of Defendant. Burgin felt an object in Defendant's crotch area that "was pointed and felt like it could be a knife or some kind of blunt object." Burgin asked Defendant what the object was, and Defendant responded that "it was his dick." Based on his training and experience, Burgin believed the object to be a knife or shards of meth.

Burgin then placed Defendant into handcuffs and read Defendant his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Burgin then patted Defendant down again, and felt something slick and plastic, and, hearing the crumbling of the plastic, concluded it was more than likely a shard of meth. He indicated to Defendant what he had felt, and Defendant stated that it was "dope." Burgin then removed a plastic Ziploc bag with four individual packages of large meth chunks inside. The majority of the chunks were "larger-style rocks" and the one that Burgin had felt was "extremely large." Burgin later learned that the other officers who were searching Defendant's truck located a key ring in the ignition that had a small round silver canister on it containing a bag of what was believed to be meth. Burgin wrote a report of Defendant's arrest, and recorded it on his body camera.

Cross-Examination

Burgin was then cross-examined by defense counsel. Burgin indicated that,

before he pulled Defendant over, he had no prior knowledge of Defendant besides what he had heard from the CS and seeing a picture of Defendant's mug shot. Burgin stated that he pulled Defendant's truck over because it failed to stop for a stop sign. Burgin stated that when he approached Defendant after initiating the stop, Defendant did not appear nervous, answered questions calmly, and did not have any visible weapons.

At the time Burgin requested the canine officer, he did not know if Defendant had any narcotics on him.

Defense counsel then questioned Burgin about the ticket writing process, in relation to the body camera video of Burgin writing the ticket in his squad car. Burgin acknowledged that he stopped writing at one point to look at his cell phone, even though it did not beep and he did not receive a call from anyone. Burgin stated he could not recall if there was a communication from anyone when he looked at the phone. Burgin unintentionally covered his body camera while picking up his cell phone and trying to simultaneously balance the ticket paperwork in his other hand. Burgin kept having to manipulate Defendant's driver's license because of the glare on the license making it hard to read. Indiana licenses, unlike those from Illinois, had smaller lettering on the address lines, making them harder to read, so Burgin had to "get the [] angle correct to be able to see the numbers on there."

Burgin admitted that Defendant's truck was boxed in by his squad car and that of Terry Rogers. After Rogers had arrived on scene, Burgin continued writing the ticket, filling in Defendant's address and driver's license number. At 1:45, Deputy Ray

arrived with the canine Lucas. A few minutes after Ray's arrival, Burgin put down the ticket and stepped out of his squad car.

Burgin testified on cross-examination that "[w]hat takes the longest in ticket writing is when you have to call dispatch" in order for dispatch to provide a court date for the ticket. However, Burgin never called dispatch for a court date, even though he did have opportunities to do so before he started writing the ticket.

Burgin could not smell any odor of narcotics around Defendant's truck. Burgin saw what he thought was an alert by Lucas, only because he saw Ray reward Lucas. Burgin directed Defendant to step out of the vehicle. He did not confirm with Ray, however, that Lucas had alerted. Defendant, at this time, was not free to leave.

Deputy Chris Ray

Direct Examination

Chris Ray has been a deputy with the Edgar County Sheriff's Office since 2009, and has been a canine officer since 2015. He has been with canine Lucas, a Belgian Malinois dog originally from the Netherlands, since 2016. Prior to becoming a canine officer he completed the canine officer academy with Lucas. Lucas is trained to detect crack cocaine, meth, heroin, and ecstasy. Lucas is also trained to track people. Lucas has different alerts for people and narcotics. When he finds narcotics, Lucas "enters a secondary response where he's attempting to source the location of the odor, and his final response is seated and intently focused on a certain area."

Ray and Lucas completed the Illinois canine certification testing successfully, and have done so every year since 2016. Ray testified that in the 2018 certification Lucas

correctly located all areas of the testing grounds that had narcotics in blind searches, where neither he nor Lucas knew where the narcotics were located. Lucas provided no false alerts. Ray continued to train with Lucas even outside of the annual certification, however, the training searches were not blind, as Ray knew where the narcotics were located.

Ray and Lucas were on duty on January 17, 2019, when Ray was contacted by dispatch at around 1:35 or 1:40 in the afternoon about a traffic stop involving Deputy Burgin. Burgin had requested a canine unit. The only information Ray was provided was the location of the stop. Ray arrived on the scene at approximately 1:45 pm. Upon arrival, Ray observed a blue pickup truck facing southbound with Deputy Burgin in his squad car behind the truck. Burgin's emergency lights were activated. A Paris police car was in front of the truck, with its emergency lights on as well.

Ray testified that the weather that day was cold, and stated that it had just rained and there snow on the ground. Ray left his squad car and began a "free-air screening" of the truck with Lucas. Ray started at the front driver's side of the truck, and ran Lucas counterclockwise around the truck. At the rear seam of the driver's door, Lucas abruptly changed direction, and his "sniffing" "became rapid, as if he was in a secondary response, attempting to source the odor; and he went to the seam, basically, at the bottom of the door, and attempted to go into a final response."

Ray described a "secondary response" as a "distinct behavioral change in your dog where he goes from just a casual walk around the vehicle to a more intense, focused search for the source of an odor."

Ray continued to walk Lucas around the truck, but Lucas wanted to go back the other direction, so Ray walked back in Lucas' direction. Lucas was back at the driver's side door. Ray observed Lucas "being very indecisive about completing his final response[,]" as Lucas had sourced the odor and was intently focused on it, but did not want to sit down. Ray stated that Lucas was "trying" to sit down, or at least "make it appear that he was trying to sit down, but didn't want to sit down[.]"

Ray testified that Lucas did not appear confused or indecisive about the odor of narcotics because Lucas "had definitely identified something that he was interested in at that point in time, so there was no doubt in my mind that he had identified an odor that he was attempting to source." Concerning Lucas "attempting" to sit down, Ray testified that Lucas did not like to sit down in wet or cold areas, and, "if you watch the video, he is intently focused and trying to pick up his back legs to, to enter into a seated position without sitting on the cold wet ground." Ray had never seen Lucas indicate a "truncated" final response in a real life scenario before, but stated that he had seen Lucas do so in training situations.

Having observed Lucas' truncated final response, Ray elected to "reward him and move on" by giving Lucas a rubber toy, or "gifty." Ray estimated that he rewarded Lucas with gifties 95% of the time that Lucas alerted to the odor of narcotics. Lucas was not rewarded with gifties when did not alert.

Once Deputy Burgin had secured Defendant in the back seat of Burgin's squad car, Ray began to search Defendant's truck. Ray observed a small silver canister on a key chain. The key itself was still in the vehicle's ignition. Ray opened the canister and

found a substance inside that appeared to be meth.

Cross-Examination

On cross-examination, Ray admitted that there was no snow on the roadway, but stated that the road itself was wet, and there was "water standing on the roadway." Ray contended that, on the dashcam video, water can be seen rippling[1] on the roadway when a vehicle pulls up.

Ray testified that Lucas' certification was conducted in a controlled environment, and was not done in the snow and rain, and the certification training did not simulate traffic stop conditions. No certification instructor had ever seen Lucas come to "an indecisive final response." Ray never informed any of the certification instructors that Lucas did not like cold and wet conditions.

Lucas' final response for when he is searching for an article, such as narcotics, is to lay down and intently look at the article. During certification, Lucas always laid down in the final position, not the "semi" position he attempted during the traffic stop of Defendant's vehicle. During training, if Lucas did not want to lay down due to cold or wet conditions, Ray would "make him" lay down to try and "get [Lucas] over that." However, Ray would not do so in a "real world" scenario because it would look "terrible" and would make it appear as if Ray was forcing Lucas to complete a real response.

[1]Having watched the video several times, the court did *not* observe water rippling as other vehicles drove by the scene of the traffic stop.

Ray agreed that it would be proper to pull Lucas away and restart the search if Ray was not sure if Lucas actually alerted or not.

Ray never gives Lucas a gifty at the vehicle if he does not alert. Ray gave him the gifty here because, in Ray's mind, Lucas had a secondary response. Ray agreed that he gave Lucas a gifty even though Ray did not know if there were narcotics in the car and Lucas did not sit down. Ray agreed that tugging on a dog's leash can be a signal, or "correction," and that he did pull the leash on Lucas at least two times by the door. Lucas only lowered his behind "inches" and did not "even go all the way down as if he was sitting down to pretend." Ray admitted that when Lucas sits down he is searching for his gifty, and that Lucas does not chase narcotics, but rather "chases the ball[.]"

Redirect

On redirect examination, Ray testified that his tugging on Lucas' leash was not telling Lucas to sit down in front of the driver's side door. Ray testified that Lucas is trained to alert to the odor of narcotics. Ray testified that narcotics were found in Defendant's vehicle at the location Lucas alerted to. Ray further testified that another option when Lucas stopped at the driver's side door, apart from starting the search over, would have been to attempt to pull Lucas off the vehicle, or at least that part of the vehicle, and continue the search. Ray attempted to do so, but Lucas did not want to keep moving.

Andre Brian Falco Jimenez

Direct Examination

Andre Brian Falco Jimenez, Defendant's expert witness, owns Falco Enterprises,

Inc., also known as Falco K9 Academy, and has been training dogs, particularly for law enforcement purposes, for over 30 years. Jimenez had been a police officer with the city of Anaheim, California for 21 years, and was first paired with a dog in 1989. Jimenez began training dogs for the Anaheim Police Department, and eventually expanded to training dogs in other municipalities.

Before his testimony in court, Jimenez had reviewed the video recordings of Defendant's traffic stop along with the reports regarding Lucas' alert and Lucas' training records.

Jimenez testified that for a dog like Lucas, from the Netherlands, it is very unlikely he would refuse to sit or lay down in cold or wet conditions. Jimenez testified that a dog, in a state like Illinois where it is frequently cold and wet, would not pass his certification if he did not like to sit down on cold, wet areas. Jimenez testified that such an issue would have to come up during training, and should have been figured out "way before" the dog would be ready to go in the field. Further, Jimenez testified that such an issue would be an "easy fix." Also, a dog like Lucas would be used to being in a kennel, where floors are often wet from cleaning and being washed down with a hose on a regular basis.

Regarding Lucas' stopping at the driver's side door, Jimenez testified that Ray's throwing the gifty at that moment was "the worst thing that could happen[.]" Jimenez stated that Lucas essentially did nothing, but that Ray just rewarded him for it. Jimenez would never throw a gifty to a dog performing actual duty in the field, because the officer does not know for sure that narcotics are present. The dog might be trying to

sort out other related odors, such as plastic baggies, and "we don't want to reward when we don't know for sure what the dog is thinking about."

Jimenez testified that, under the conditions he observed in the video, finding meth wrapped in the plastic baggies "would be the most difficult type of search for a dog to be successful at."

Jimenez testified that Lucas' secondary response at Defendant's driver's side door "was not a reliable indication that there [were] narcotics in the vehicle." Jimenez noted that Ray tugged at Lucas' leash as Lucas came to the door. This was the "worst thing" Ray could do, because "it was telling the dog to do something." Rather than in response to an odor of narcotics, Lucas' attempt to sit was a response to the leash tugs. If Ray would have waited to tug on Lucas' leash, "we would have seen whether the dog would have sat on his own or tried to sit on his own or continued to search on his own[,]" but that "wasn't allowed to happen."

Cross-Examination

Jimenez admitted that he was not present during Ray and Lucas' certification testing, and had not watched any videos of those certifications. Jimenez testified that a dog's handler is not necessarily in the best position to identify whether his dog is confused or not confused in a given situation.

Redirect

Jimenez stated sometimes handlers cannot identify things they are doing that are causing the problem, and it takes an outside expert, like himself, to identify the problem to the handler. Jimenez stated Ray's decision to reward Lucas for his "semi" or

"pretend" sitting was not a proper way to handle a dog and was not an indication that narcotics would be found or an indication by the dog relating to his training to seek for narcotics.

DEA Agent Christian McGuire

Direct Examination

McGuire testified that, as a DEA agent, he routinely coordinates investigations with other law enforcement agencies, such as, in this case, the Edgar County Sheriff's Department. In early 2018 an investigation was begun in Edgar County into an individual who was obtaining large quantities of meth from out-of-state sources. This person was known as "Individual A." By early 2019, the DEA had developed a confidential source that was helping them in the investigation. The CS was contacted by the Edgar County Sheriff's Department and signed up as a source according to the department's protocol.

On January 16, 2019, the CS met with law enforcement and indicated that they had information that Individual A was storing a large quantity of meth. The CS was then utilized by law enforcement to make controlled purchases of meth from Individual A on that date. The CS, as well as the vehicle the CS was to be transported in, was thoroughly searched by law enforcement. The CS was also provided DEA official authorized funds (OAF) to make the controlled purchase, which was to take place in Paris, Illinois. Deputy Burgin was involved in the operation.

At the location, the CS was not able to purchase meth from Individual A, despite having lengthy conversations with him. At some point, Individual B arrived at

Individual A's residence. Individual B invited the CS to come to Individual B's residence, located some distance away from Individual A's residence. Law enforcement was able to partially hear the CS in the detached garage of Individual B's residence via remote transmitter. Individual B assured the CS that B's meth source would arrive. Law enforcement could hear that "a meeting's occurring and that some form of negotiation is occurring." However, because they had to sit some distance away, law enforcement could not receive good, clear audio on the transmission. At some point during the transaction a third individual arrived, who sold the CS meth. The next sounds law enforcement heard were vehicle doors opening and the CS departing the area. The CS headed to meet with law enforcement at a prearranged location, where the CS was debriefed.

During the debriefing following the controlled purchase, the CS identified the third individual as Defendant, Chad Keller. The CS indicated that he had known Defendant and that Defendant had just gotten out of federal prison a short time before and resided somewhere in Indiana. McGuire was able to obtain identifying information for Defendant the next day, January 17, 2019. McGuire identified Defendant in court.

During his conversation with the CS, Defendant indicated that he would be going back to Paris the next day with four ounces of meth, probably during the day time. McGuire then developed a plan for how to proceed regarding Defendant. He forwarded Defendant's photograph to Deputy Burgin and Officer Rich Wilson of the Paris Police Department, so that they could physically identify Defendant or visually identify him in a vehicle. McGuire decided that officers would seek an independent

reason to stop Defendant's vehicle, such as a traffic violation, in order to protect the identity of the CS. Once the traffic stop had been effectuated, the officers were to contact a canine unit or seek consensual search of the vehicle and proceed from there.

On January 17, 2019, immediately after Defendant was taken into custody, Burgin contacted McGuire and informed him of the stop and arrest of Defendant and the recovery of meth from Defendant's person and vehicle.

Cross-Examination

McGuire did not see Defendant at all on the CS' recorded video. McGuire had never met Defendant before, and did not know what he looked like. Prior to the transaction, the CS had never mentioned Defendant to McGuire as a person who sells meth. McGuire did not know of any history between the CS and Defendant.

To McGuire's knowledge, the CS was working with Edgar County for a benefit on a traffic offense. McGuire testified that the CS had a written agreement with the County, and that, while Burgin was the one who signed the CS to work for the County, McGuire provided direction to the CS concerning the controlled purchase.

The only information McGuire had concerning the CS' relationship to Individuals A and B and Defendant was from what the CS had told him. McGuire testified that when he asked the CS why he wanted to target Individual A, the CS told him "that he had run-ins with that individual in the past[.]"

At the time of the January 16, 2019 purchase and January 17, 2019 arrest, McGuire was not aware if the CS had any prior issue with Defendant. McGuire had no independent information, besides the CS' word, that it was, in fact, Defendant at the

January 16, 2019 transaction. Although McGuire testified that he had no reason to doubt the CS' information, the CS had only been working for McGuire for a short time and had not done any prior deals, and McGuire did not yet have "anything to corroborate his reliability." Defense counsel then asked McGuire to consider if Defendant and the CS had a "beef[,]" and whether the CS decided to "snitch" on Defendant because he did not like him. Defense counsel asked "Did you have a way to verify that Chad Keller was actually there that night?" McGuire responded that the "verification I would have gone through at a subsequent time but did not because of the events that transpired on the 17th would have been to do a form, some form of a photo lineup to show the informant." Defense counsel asked "So the answer is 'no' for that day?" McGuire responded "for the 16th, correct."

Redirect

On redirect examination, McGuire stated that on the morning of January 17 he obtained Defendant's criminal history, and learned that Defendant had multiple convictions, and at least one conviction involving meth.

Recross

On recross examination, defense counsel asked McGuire what the contingency plan was on January 17, 2019, if Defendant had not committed a traffic infraction. McGuire responded: "Depending on what the officers informed me on Mr. Keller's behavior and if there's any other activity involving Individual A or Individual B in the area, I may or may not have directed them to do an investigative stop on Mr. Keller and start asking him questions specifically about what occurred during the evening of the

16th, as well as what he was doing there in Paris, Illinois, on the 17th and taken the investigation further as it warranted from there."

McGuire testified that the purpose of the investigative stop would have been to "elicit a response from [Defendant] which would indicate if he is bringing drugs over on the 17th."

Police Video from the January 17, 2019 Traffic Stop

Burgin's Dashcam Video

The first video recording of the January 17, 2019 traffic stop is from Deputy Burgin's squad car dashcam. The video shows a cloudy, wet day with snow on the ground in daylight hours. Defendant's blue truck can be seen doing a "rolling" stop at a stop sign, i.e. Defendant's truck slows down for the stop sign, but never comes to a complete stop, and proceeds through the sign, whereupon Deputy Burgin effectuates a traffic stop. The facial features of the driver cannot be made out from the dashcam video as Defendant's truck rolls the stop sign.

Defendant's truck comes to a stop at the 1:00 minute mark[2] in the video. Deputy Burgin exits his squad car and approaches Defendant's driver's side door at the 1:40 mark of the video. The court would note that the roadway where Defendant has pulled over is wet, but there do not appear to be any puddles around Defendant's truck. Burgin speaks with Defendant, and apparently obtains Defendant's license and

[2]The court will indicate time by minutes and seconds from the initiation of the traffic stop up until the moment when Lucas allegedly alerted, for issues relevant to the U.S. Supreme Court's decision in *Illinois v. Caballes*, 543 U.S. 405 (2005).

registration, until the 3:00 mark, whereupon he appears to call information into his handheld radio. At the 4:00 mark, Burgin finishes talking on the radio and walks back to his squad car. Once in his squad car, the camera does not pick up any activity of Burgin in the front seat.

At the 5:20 mark, another police car arrives on scene and pulls in front of Defendant's truck, facing frontward. At around the 5:45 mark, an officer who appears to be Terry Rogers leaves that police car and goes to Defendant's driver's side door to speak with Defendant.

At the 7:05 mark, canine Lucas and Deputy Ray approach Defendant's truck. Ray and Lucas go to the front driver's side of Defendant's truck. Within seconds, Lucas stops at Defendant's driver's side door, looking up at the door, wagging his tail. Ray appears to tug on Lucas' leash two to three times. On the last tug, Lucas backs up slightly, but does not otherwise move. Ray attempts to walk to the back of the vehicle. Lucas, still looking up at the driver's side door, appears to be lowering his bottom an inch or two a couple of times. Ray then throws Lucas the gifty. Lucas never sits on the ground. The ground underneath Lucas is perhaps wet, but there are no puddles. Lucas and Ray walk away from Defendant's vehicle.

Burgin then approaches Defendant's driver's side door and Defendant gets out of the truck. Burgin pats down Defendant. Defendant is placed in handcuffs. Following the pat down, Burgin speaks with Defendant. While Burgin speaks with Defendant, another officer can be seen searching Defendant's truck. Defendant is taken to Burgin's squad car. Ray then searches Defendant's truck and finds the meth in the key chain,

bringing it to Burgin. Burgin eventually departs the scene.

Burgin's Bodycam Video

Deputy Burgin also recorded the traffic stop with his body camera. This video does have audio. The video begins upon Burgin's leaving his squad car to approach Defendant's truck after Burgin initiated the traffic stop. Defendant provides Burgin with his license and registration. At the 1:30 mark (a minute and a half after Burgin leaves his squad car) Burgin calls in Defendant's information to dispatch and requests a "110[,]" a canine unit. At 2:30 Burgin walks back to his squad car. Burgin checks his phone for messages, which takes 20 seconds or so. At the 3:00 minute mark Burgin begins writing the ticket. Burgin begins writing Defendant's name on the ticket. At the 3:35 mark, Burgin picks up his radio and speaks into it. At 3:46 Burgin checks his phone again. At 4:07 Burgin resumes writing the ticket, filling in Defendant's name. This process continues until the 5:50 mark, with Burgin frequently stopping to look at the license in his hand. At 5:35 he rolls down his window as Deputy Ray and Lucas walk by his squad car. Burgin does not write any more on the ticket past this point, but continues holding Defendant's license and registration in his hand. At 5:50 he puts the license and registration down and leaves his squad car.

At 6:18, Burgin approaches Defendant's driver's side door and instructs Defendant to get out of the truck, informing him that the canine alerted to the odor of narcotics in the truck. Burgin asks Defendant if he has anything illegal "in here" to which Defendant says "no." Burgin then asks "so you don't mind if we check?" to which Defendant replies "no." Burgin asks Defendant if he can pat him down for

weapons, and Defendant consents. Burgin pats down Defendant's crotch area and says "be honest with me" to which Defendant replies "that's my dick." Burgin says "no it isn't." Burgin tells Defendant "that's not your dick. You're dick doesn't have a sharp point." Defendant is placed in handcuffs. Defendant insists that what Burgin felt was his penis. At 7:54, Burgin reads Defendant his *Miranda* rights. Defendant is taken to the back of Burgin's squad car. Burgin tells another officer that what he felt was either a "shard or a knife."

At 9:22 Burgin pats Defendant down again, stating that what he feels is "something in a plastic bag." Defendant admits "yeah it's dope." Defendant admits it is two ounces worth. At 10:35, Ray shows Burgin the meth recovered from Defendant's key chain. Defendant states that there may be "a gram" of meth in the key chain.

ANALYSIS

Defendant raises several arguments in support of suppressing his arrest and the meth seized during his arrest: (1) Deputy Burgin illegally prolonged the traffic stop; (2) Lucas never actually alerted to the presence of narcotics and the open air sniff was unreliable; (3) there was no probable cause to arrest Defendant prior to the seizure of narcotics from his vehicle; and (4) Burgin's pat down search of Defendant was illegal and Defendant could not properly consent to a search of the vehicle or himself because he was illegally seized. Because the court finds the probable cause and failure to alert issues dispositive, it will address those two issues, in that order.

Probable Cause to Arrest Defendant after the January 16, 2019 Controlled Purchase

Defendant argues that there was no independent reasonable suspicion or probable cause to stop Defendant's truck outside of the traffic infraction. In other words, absent Defendant's failure to stop at the stop sign, and absent Lucas alerting to Defendant's truck, there was no probable cause to stop Defendant and search his person or truck for drugs. The government argues that law enforcement had reasonable suspicion at the time of the stop that Defendant had engaged in criminal activity, in that: (1) Defendant had sold meth to the CS the day prior to the stop; and (2) Burgin and the DEA were aware that, following the controlled purchase, Defendant had expressed his intent to return to Paris the next day to sell meth.

> The Fourth Amendment protects citizens against unreasonable searches and seizures. Ordinarily, warrantless searches are presumptively unreasonable. Cars, however, are exempted from the warrant requirement provided officers have probable cause to believe the car contains contraband. When officers have such probable cause, the search may extend to "all parts of the vehicle in which contraband or evidence could be concealed, including closed compartments, containers, packages, and trunks."

United States v. Richards, 719 F.3d 746, 754 (7th Cir. 2013).

Probable cause exists when, based on the known facts and circumstances, a reasonably prudent person would believe that contraband or evidence of a crime will be found in the place to be searched, which requires a "common-sense judgment" based upon the totality of the circumstances. *Richards*, 719 F.3d at 754. Officers may "draw reasonable inferences based on their training and experience in making that determination." A "fair probability of discovering contraband" is enough, and probable

cause does not require information sufficient to support conviction or even enough to show a preponderance of the evidence. *Richards*, 719 F.3d at 754-55.

Confidential informants may be used to support probable cause. See *Illinois v. Gates*, 462 U.S. 213 (1983). When reviewing probable cause in a case where an informant has provided information, therefore, the court looks at the totality of the circumstances, noting that "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *United States v. Cherry,* 920 F.3d 1126, 1133 (7th Cir. 2019). If information from an informant has a relatively low degree of reliability, more information is required to establish "the requisite quantum of suspicion than would be required if the tip were more reliable." *United States v. Huebner*, 356 F.3d 803, 813-14 (7th Cir. 2004), quoting *Alabama v. White*, 496 U.S. 325, 330-31 (1990).

The Seventh Circuit has listed several factors for a district court to consider in making such a credibility determination: (1) the extent to which police corroborated the informant's statements; (2) the degree to which the informant acquired knowledge of the events through first-hand observation; (3) the amount of detail provided; and (4) the interval between the date of the events and the police officer's application for the search warrant. *United States v. Bell*, 585 F.3d 1045, 1049 (7th Cir. 2009). No one factor is dispositive, so a deficiency in some areas can be compensated by a stronger showing in others. *Bell*, 585 F.3d at 1049. Although *Gates* and *Bell* both involved a determination of probable cause for the issuance of a warrant, "[t]his determination of probable cause ...

is applicable to both warrant and warrantless searches." *United States v. Marin*, 761 F.2d 426, 431 (7th Cir. 1985).

Taking all of the evidence adduced at the suppression hearing, the court concludes that, under the totality of the circumstances, law enforcement did not have probable cause to stop and search Defendant's truck for drugs on January 17, 2019, based on the controlled purchase the day earlier. The government's argument is simply not borne out by the evidence in the record from the suppression hearing.

In simplest terms, the entire basis for law enforcement's suspicion of Defendant rested on the word of an untested CS. Defendant was not even known to law enforcement until the CS, after the controlled purchase, indicated that it was Defendant who sold him the methamphetamine. Prior to the transaction, the CS had never mentioned Defendant to McGuire as someone who sold meth, and McGuire knew of no history between the CS and Defendant.

Moreover, law enforcement had no independent basis to verify, in any way, that it was Defendant at the controlled purchase. They did not obtain video or audio of Defendant at the purchase. They did not see Defendant arrive at the purchase in person nor did they see Defendant's truck in the vicinity of the purchase. There was not even a mention of Defendant's name on the audio recording of the purchase.

McGuire, an experienced and capable DEA agent, who the court finds both credible and candidly honest, testified that he had no independent information, besides the CS' word, that it was in fact, Defendant at the January 16 controlled purchase. Thus, because the entirety of the probable cause argument turns on the CS' information, the

CS' reliability is crucial. That reliability, in this case, is lacking.

McGuire testified that, as far as he knew, the CS was working with Edgar County for benefits on a traffic offense. McGuire was not aware if the CS had any prior issue with Defendant. Further, the CS had only been working for McGuire a short time and had not done any prior deals for him, and McGuire did not yet have "anything to corroborate his reliability." While McGuire testified that he had no reason to doubt the CS' information, an officer's conclusory statement that an informant is "believed to be a reliable source[,]" standing alone without any supporting factual information, merits absolutely no weight and information obtained from a "reliable source" must be treated as information obtained from an informant of unknown reliability. *United States v. Koerth*, 312 F.3d 862, 867 (7th Cir. 2002).

Thus, in this situation, where the reliability of the CS has not been established, the reasonable suspicion standard required law enforcement to verify at least *some* facts supporting the CS' allegation of criminal activity before seizing Defendant. *United States v. Lopez*, 907 F.3d 472, 482 (7th Cir. 2018). Information that comes from more trustworthy sources will require less corroboration than those obtained from more questionable sources. See *Lopez*, 907 F.3d at 480. Without such corroboration, law enforcement is relying on the word of a CS who is lacking in reliability.

Here, law enforcement never developed such corroboration before Defendant was stopped. Defense counsel asked McGuire "Did you have any way to verify that Chad Keller was there that night?" McGuire responded that the "verification I would

have gone through at a subsequent time but did not because of the events that transpired on the 17th would have been to do a form, some form of a photo lineup to show the informant." Defense counsel pressed the issue, asking "So the answer is 'no' for that day?" McGuire responded "for the 16th, correct."

In short, law enforcement was not able to take any steps to independently corroborate the CS' information, or do *any* investigation beyond obtaining a photo of Defendant, before Burgin pulled Defendant over for a minor traffic infraction. Even showing the CS a photo lineup containing Defendant, while not definitive, would have been a step in the right direction. The fact that law enforcement learned that Defendant existed and had prior narcotics-related convictions does not cure the problem, because it does not *independently* corroborate the CS' assertion that Defendant was at the controlled purchase and sold him meth. McGuire's testimony essentially confirms that law enforcement was not able to independently corroborate the CS' information because "of the events that transpired on the 17th." In other words, Burgin's traffic stop of Defendant prematurely rushed the investigation before law enforcement had developed enough independent corroboration to satisfy probable cause.

Indeed, at the time of the stop on January 17, all that law enforcement had to go on in this case was the CS' word that he bought meth from Defendant. The government points to the CS' assertion that Defendant said he would be back in Paris the next day to sell narcotics as corroborating the CS' reliability and information. However, the CS may have known that Defendant, for whatever reason, would be in Paris the next day. It does not independently corroborate his information. Similarly, the CS could have

equally said he bought meth from *any person* he knew might be in Paris the next day, because nothing in the record independently corroborates the CS' information.

In support of his argument that no independent probable cause was provided by the January 16 controlled purchase, Defendant cites to the Seventh Circuit's decision in *Bell*. In *Bell*, law enforcement was conducting an investigation into crack cocaine sales in Coles County, Illinois, and arrested several individuals, some of whom identified the defendant as being involved in the sale and delivery of crack. The lead investigator, Endsley, also received reports from confidential sources pointing to the defendant. Later, an informant named Rob Hale told Endsley that he had just left the defendant's residence, where he saw an undisclosed amount of crack in two plastic bags and a large sum of cash on a table in the living room. Hale described the location of the defendant's apartment and said he had seen crack there on previous occasions, along with a handgun kept underneath the couch that the defendant had used to physically threaten others. Endsley checked the defendant's criminal history and verified that he had previous arrests and convictions for armed robbery. Based on that information, Endsley obtained a warrant to search the defendant's apartment, where crack and handguns were recovered. The district court denied the defendant's motion to suppress.

On appeal, the defendant argued that the affidavit offered in support of the warrant to search his apartment lacked sufficient probable cause.

The Seventh Circuit first noted that the affidavit relied heavily on Hale's accounts, yet failed to provide any information to establish Hale's reliability, as it did not indicate whether Hale had provided accurate information to law enforcement in the

past, nor did it give any information about the nature of Hale's relationship with the defendant. *Bell*, 585 F.3d at 1050. The court had no idea how Hale and the defendant knew each other, and "[f]or all we know, Hale could have been a rival drug dealer, an angry customer, or had some other beef with [the defendant], which is certainly a factor to consider when assessing the credibility of his statements." *Bell*, 585 F.3d at 1050. Based on the above, and because Hale did not appear before the issuing judge, the court found that it had "little reason to believe that Hale, Inspector Endsley's primary informant, is reliable." *Bell*, 585 F.3d at 1050.

The Seventh Circuit also concluded that the amount of detail in the affidavit was lacking, as it was unclear just how much crack was in the baggies and how Hale could identify the substance as crack. Further, the court found that the government's efforts to corroborate the informant's statements were unpersuasive, due to the vague and conclusory nature of the other unidentified informants' information. The court found that the affidavit "provides no additional details regarding the informants whatsoever[,]" and did "not indicate how they obtained the information, the extent of the informants' or arrestees' relationship to [the defendant], or even the recency of these reports." *Bell*, 585 F.3d at 1050-51. The court held that the questions around Hale's reliability were best answered with specifics or independent corroboration of the facts that Hale had disclosed, not with additional conclusory statements from unnamed sources and, thus, based on the totality of the circumstances, found that the issuing judge did not have a substantial basis for finding the affidavit established probable cause. *Bell*, 585 F.3d at 1050-51.

The court finds *Bell* instructive. Here, the CS had never before been used, and was basically unknown to the DEA. He was known only to Deputy Burgin and had no track record of reliability. Further, before the January 16 purchase, law enforcement had no familiarity with Defendant and had no idea of the relationship or any pre-existing animosity between the CS and Defendant. See *Bell*, 585 F.3d at 1050.

This is in contrast to situations where a confidential source's information is a known quantity and law enforcement has knowledge of the source's veracity, reliability, and basis of knowledge. In such circumstances the Seventh Circuit has found probable cause to stop and search a vehicle where the confidential source's tip was detailed, highly reliable in its own right, and thoroughly verified by independent police work. See *United States v. Navarro*, 90 F.3d 1245, 1253-54 (7th Cir. 1996).

The government cites to several cases in support of its argument that the January 16 controlled purchase provided sufficient probable cause for the stop and search of Defendant and his truck: *United States v. Sidwell*, 440 F.3d 865 (7th Cir. 2009); *United States v. Koerth*, 312 F.3d 862 (7th Cir. 2002); and *United States v. Rosario*, 234 F.3d 347 (7th Cir. 2000). However, all of those cases are distinguishable, in some form, from the instant case.

First, the court finds *Sidwell* to be distinguishable. The court in *Sidwell* found "ultimately persuasive the fact that the informant had completed numerous other controlled buys in the past and provided, on those occasions, accurate and reliable information." *Sidwell*, 440 F.3d at 869. Here, obviously, the CS in question did not have

anywhere near the past history of reliability. The CS had no history of reliability at all.

In *Koerth*, the court found that the affidavit supporting the warrant did not contain sufficient probable cause for the warrant to issue, but the search was upheld due to the good faith exception because it was not clearly established at the time of the search "that an officer seeking to obtain a search warrant was required to provide more than an uncorroborated, conclusory assertion of illegal activity from a *confidential informant* of unknown reliability." *Koerth*, 312 F.3d at 870 (emphasis in original). This case, by contrast, involved a warrantless search, and thus the good faith exception utilized by the court in *Koerth* would not apply.

In *Rosario*, law enforcement had much more corroboration of the information provided by the CS. The informant in *Rosario* "did not have a prior history as an informant that would enhance the reliability of the information provided by him prior to the arrest and search of [the defendant]." *Rosario*, 234 F.3d at 351. However, law enforcement was able to corroborate that the defendant was in the drug business; that the defendant did indeed call the informant after the informant paged him; that the defendant told the informant that someone named "Jose" would call him regarding the cocaine, which did occur, something that only could have been set in motion by the defendant himself; and then "Jose" arrived to meet the informant, they discussed a prior shipment of cocaine that had been delivered, corroborating the informant's statement that he had previously delivered 37 kilograms of cocaine. *Rosario*, 234 F.3d at 351. In essence, "agents were able to corroborate numerous facts provided by [the

informant], and that established a reasonable basis for them to credit his information regarding [the defendant] and to believe that a crime had been or was being committed." *Rosario*, 234 F.3d at 351.

In this case, by contrast, as testified to by McGuire, the CS provided methamphetamine related information about individual A. This set the January 16 controlled purchase events in motion. The purchase, however, did not go as planned. Rather than making a purchase from individual A, which would have in some small way corroborated the CS, no purchase was made from individual A. Instead, the CS went from individual A's house to individual B's house. Even at individual B's house, neither individual A nor individual B sold methamphetamine to the CS. Instead, a third unknown and unidentified individual arrived at the house and made a sale of methamphetamine. The CS claims this was Chad Keller.

There was no corroboration other than the untested CS claiming the purchase was made from Defendant and indicating that Defendant would be back the next day. For the reasons discussed above, this does not do much to corroborate the CS' veracity or statement that Defendant sold him the meth at the controlled purchase. Indeed, the CS could have known that *anyone,* "Mr. X", would be in Paris the next day, and then claimed that Mr. X was the unidentified person that sold him the methamphetamine. The fact that Mr. X was in Paris the next day does not prove that Mr. X was involved in selling the CS the methamphetamine the night before.

Following the January 16 controlled purchase, law enforcement had many avenues to open an investigation and independently corroborate the CS' information

relating to Defendant. According to Agent McGuire, they were in the process of beginning to do just that. The court does not doubt that Agent McGuire would have been able to put together such an investigation, given time. However, due to Deputy Burgin initiating the traffic stop and pulling Defendant over on the afternoon of January 17, no investigative work was done to sufficiently corroborate the statements of the untested CS. Thus no probable cause existed, independent of the traffic offense, to stop and search Defendant and his vehicle.

With regards to McGuire's testimony, it is also worth highlighting what he did *not* say. At no time, even after being questioned by the court about the operational plan involving a traffic stop of Defendant,[3] did McGuire testify that based upon the transaction the night before, the plan was to arrest Defendant, or even to search his truck, because there was probable cause. The lack of such testimony further buttresses the court's belief that McGuire's testimony was honest and candid, as well as suggests that a highly experienced DEA agent like McGuire did not believe there was sufficient probable cause to take action merely based upon the limited investigative activities of the night before the traffic stop.

The court would also note that the government, in its filings, argues that law enforcement had reasonable articulable suspicion that Defendant had committed an offense, a standard that is lower than probable cause. This standard applies when officers carry out a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), where a suspect

[3] Supp. Hrng pp.242-243

may be seized briefly but lawfully, without warrant or probable cause, if the officers have reasonable suspicion that the suspect is engaged in criminal activity. *Lopez*, 907 F.3d at 478. Officers may carry out a *Terry* stop only when they have a reasonable suspicion, grounded in specific and articulable facts, that an individual has committed a felony or is about to commit a crime. *Lopez*, 907 F.3d at 478. While the reasonable suspicion standard is a lower bar than the probable cause standard necessary for an arrest, the police are not entitled to detain a person for questioning based on only a hunch. *Lopez*, 907 F.3d at 478.

Defendant was not stopped due to the controlled purchase the day before. McGuire's testimony clearly established this fact. Moreover, Deputy Burgin testified that he stopped Defendant because of the traffic infraction at the stop sign. While Burgin testified on direct examination that he recognized Defendant as the driver of the truck that rolled the stop sign based upon McGuire showing Burgin Defendant's mug shot earlier that morning, the court does not find Burgin's testimony in this regard to be credible. Having watched the video of the traffic infraction several times, the court cannot in any way identify the driver of the truck. Burgin is simply too far away to make any sort of positive identification based on Defendant's mug shot. Thus, absent the traffic infraction, Burgin would not have had reasonable suspicion to stop Defendant's truck.

Probable cause is the proper standard to analyze a stop of Defendant's truck and subsequent search. However, even if the court were to apply the reasonable suspicion standard after Burgin pulled Defendant over for the traffic infraction, for the reasons

stated above in regard to probable cause, the seizure and search of Defendant and his truck would still be unlawful, because there must still be corroboration of the details of an informant's information by independent police work. See *Lopez*, 907 F.3d at 480. In this case, no such corroboration was produced. Therefore, under either reasonable suspicion or probable cause, law enforcement had no basis to stop and search Defendant based solely on the January 16 controlled purchase.

Whether the Dog Sniff Provided Probable Cause to Search Defendant's Truck

Because there existed no independent probable cause to stop and search Defendant's truck based on the January 16 controlled purchase, probable cause must come from the dog sniff following the traffic stop. The court will assume, *arguendo*, that the traffic stop was not illegally prolonged from the time Burgin pulled Defendant over until the time Lucas allegedly alerted. If the dog sniff does not provide probable cause, then anything that happened after that, from directing Defendant to get out of his truck to asking Defendant's consent to search, must be suppressed, because if, at that point, Defendant was being detained in violation of the Fourth Amendment, his consent to search the vehicle cannot be deemed voluntary. See *Lopez*, 907 F.3d 487.

Further, if Lucas does not alert, Burgin has no reason to instruct Defendant to step out of his truck. The traffic stop in this case was a normal traffic stop for a stop sign infraction, not a DUI or suspended license investigation. As a general rule, if a traffic stop is proper, an officer may demand a driver exit his or her vehicle. *Pennsylvania v. Mimms*, 434 U.S. 106, 112 n. 6 (1977) ("[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get

out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures."); *United States v. Davis*, 200 F.3d 1053, 1054 (7th Cir. 2000). Here, however, Defendant was not directed to leave his truck due to the traffic violation. Rather, he was told that Lucas had alerted, and instructed to get out of his truck. These actions were premised upon Lucas' alert. The traffic stop became (or always was) a narcotics investigation. Thus, the only way for probable cause to exist is if Lucas properly alerted to the presence of narcotics in Defendant's vehicle.

The government argues that Lucas' alert to the odor of narcotics provided probable cause because Lucas and Ray were a successful team, as evidenced by their success in blind testing, which undermines much of the criticism aimed at the team's training and practices. The government also argues that Ray's understanding of Lucas' behavior should be found persuasive, as he is the person best acquainted with Lucas. Defendant argues that Lucas was not properly trained and did not adequately alert.

The court will put aside the issue of whether, as a whole, Lucas was properly trained, because the court finds dispositive the question of whether or not Lucas actually alerted. Thus, the court will assume, *arguendo*, that Lucas was properly trained.

A positive alert by a trained dog gives rise to probable cause to search a vehicle. *United States v. Washburn*, 383 F.3d 638, 643 (7th Cir. 2004). The question in this case is whether Lucas actually gave a positive alert. Deputy Ray testified that when Lucas finds narcotics he "enters a secondary response where he's attempting to source the location of the odor, and his final response is seated and intently focused on a certain area."

In this instance, Lucas never entered into his final response. The court viewed the video of the dog sniff multiple times. Immediately after the start of the search, Lucas stopped at Defendant's driver's side door, looked up at the door, and wagged his tail. At this point, Ray tuggs on Lucas' leash two to three times and, on the last tug, Lucas backs up slightly, but does not otherwise move. Lucas may be beginning to sit, lowering his bottom an inch or so a couple of times, but never actually goes into his final response. An objective, neutral observer could not say that Lucas alerted.

This is corroborated by the testimony of Lucas' handler, Ray. Ray testified that Lucas was being "very indecisive" about completing his final response, and that Lucas was "trying" to sit down, but did not want to sit down. Ray described it as a "truncated" alert or response, a behavior that Lucas never previously demonstrated in the field.

> Q Now, when he was doing these secondary behaviors and you were walking back towards him located outside of the driver's side door, what did you observe him do?
>
> A He was being very indecisive about completing his final response. He had sourced the odor and was intently focused on it but didn't want to sit down.
>
> Q Now, you said that he was indecisive. What do you mean by that?
>
> A You could see him trying to sit down, like make it appear that he was trying to sit down, but he didn't want to sit down, so....

(Supp. Hrng p.93)

> Q Has Lucas, during your time with him, performed a final truncated response like that previously?
>
> A Not in a real-life scenario.

(Supp. Hrng p.95-96)

> Q Now, you indicated that he has done sort of these truncated responses in training. Has he done it in the field?
>
> A Never before this, no.

(Supp. Hrng p.96)

In other words, Lucas did not alert in any normal fashion, if he was alerting at all. Still, Ray testified he believed Lucas was not confused or being indecisive about the presence of the odor of narcotics, because Ray believed Lucas had "definitely identified" an odor he was trying to source.

On cross-examination, however, Ray admitted that Lucas had never attempted such a "truncated" final position like he did at Defendant's truck. Ray also agreed that tugging on a leash could be a "signal" or "correction." He also admitted that he gave Lucas a reward (a "gifty") even though Lucas did not sit down and Ray did not know if narcotics were in the car.

Defense expert witness Jimenez testified that Lucas essentially "did nothing" and that Ray's throwing the gifty at that moment was the "worst thing that could happen" because Ray rewarded Lucas for really doing nothing. Because Lucas was only in a secondary response, Jimenez testified, Lucas might be trying to sort out other narcotics-related odors, such as plastic baggies, and that Ray could not be sure that narcotics were present. Jimenez testified that Lucas' secondary response at the driver's side door "was not a reliable indication that" narcotics were in the truck.

Further, Ray's leash tugs were "the worst thing[,]" Jimenez believed, because it

was telling Lucas to "to do something." Rather than a response to the odor of narcotics, Jimenez believed that Lucas' attempt to sit down was a response to the leash tuggings. Jimenez testified that it would have been better to wait before tugging on Lucas' leash, because then it would have been evident whether Lucas would have sat down on his own or whether he would try to continue the search on his own.

Ray testified that he believed the reason Lucas attempted a "truncated" version of his final response was because the ground was cold and wet and he did not want to sit down in such an environment. Jimenez, however, testified that, as Lucas was from the Netherlands, it is very unlikely he would refuse to sit or lay down in cold conditions and, further, a dog in a state like Illinois would not pass his certifications if he did not like to sit down in wet, cold areas, as those conditions are frequent in Illinois. Finally, Jimenez testified that a dog like Lucas would be used to being in a kennel, where floors are often wet from cleaning and being washed down on a regular basis.

Ray also admitted that it would be proper to pull Lucas away and restart the search if Ray was not sure if Lucas actually alerted or not. Ray also testified that another option, apart from starting the search over, would have been to attempt to pull Lucas off the truck, or at least that part of the truck, and continue the search. Ray used none of these options.

In an evidentiary suppression hearing, the district court is in the best position to evaluate credibility, and its determinations in that regard are entitled to special deference. *United States v. Simon*, 937 F.3d 820, 829 (7th Cir. 2019). The court, having

heard the evidence and watched the video, finds that Lucas did not positively alert for the odor of narcotics in Defendant's truck so as to provide sufficient probable cause to order Defendant out of the truck and to allow for the searches that followed.

First, with regard to the video itself, the ground appears to be wet, but there is no standing water, contrary to Ray's testimony. Further, it is clear, and admitted by Ray, that Lucas never enters his final response position. He stops, and looks up at the door, but Ray then tugs on his leash before Lucas can do anything else. As testified to by Jimenez, this sends a confusing signal to Lucas as to what do to next, almost as if he is being given an instruction. Based on the video, the testimony of Jimenez, and Ray's own testimony, it appears to the court that Lucas' attempt to sit down may be a response to the leash tugging as opposed to detecting the odor of narcotics in the truck.

The court finds Jimenez to be a credible witness, and finds his testimony to be highly probative and useful. The court agrees that Lucas' failure to enter a full final response, and instead "truncate" his response, is likely not related to the weather and road conditions, but for the reasons put forward by Jimenez. Further, based upon the testimony and the video, the court agrees with Jimenez that Lucas' "attempt" to sit is more than likely a response to Ray's leash tugging, as opposed to any narcotics odor, The secondary response is certainly not definitive of the presence of narcotics so as to give rise to probable cause to search the vehicle. Indeed, during certification, Lucas has never gone into such a "truncated" final response.

Further, the court agrees that the better practice would have been to walk Lucas around the car a second time, to provide a more clear opportunity for a definitive final

response. That did not happen here.

Because the court cannot say Lucas positively alerted to the presence of narcotics in the truck, no probable cause existed to search the truck and, consequently, to direct Defendant out of the truck. Because there was no probable cause from the dog sniff, the further detention of Defendant past that point, and all the searches flowing from it, violated the Fourth Amendment. All evidence relating to those searches must be suppressed.

Also, the fact that Defendant was told that the dog alerted (even though it did not) and the fact that Defendant's truck was blocked in by another squad car, essentially informed Defendant that he was not free to leave. From that point forward, Defendant was being detained in violation of the Fourth Amendment, and thus Defendant's consent to search his truck cannot be deemed voluntary. See *Lopez*, 907 F.3d at 487.

Totality of the Circumstances

The government argues that, even if the controlled purchase and dog sniff, on their own, fall short of providing probable cause to search Defendant's truck, under the totality of the circumstances, each individual piece reinforces the other and provides probable cause. It is true that "the whole may be more than the sum of the parts when assessing probable cause." *United States v. Harris*, 464 F.3d 733, 740 (7th Cir. 2006).

Here, the whole is not greater than the sum of its parts because, as noted above, the parts themselves are worthless. The CS was untested, and his information was not corroborated in any meaningful way. Likewise, Lucas did not truly alert at Defendant's

truck. Here, the individual pieces do not reinforce each other, and do not provide probable cause.

IT IS THEREFORE ORDERED:

(1) Defendant's Motion to Suppress (#20) is GRANTED. All evidence recovered as a result of the January 17, 2019, traffic stop and search of Defendant and his vehicle is hereby suppressed.

(2) This case remains set for a jury trial on June 9, 2020.

ENTERED this 13th day of April, 2020.

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE