Search & Seizure Commentary

BY BRUCE BARON

A Human Look at Canine Sniffing

On four feet stands man's best friend. So too, the law of canine sniffing stands on four Supreme Court cases: *Terry v. Ohio*, *United States v. Place*, *City of Indianapolis v. Edmond,* and *Illinois v. Caballes*.[1] These cases put suspicion, searches, seizures, and sniffs in the context of the Fourth Amendment. As the Supreme Court noted, the sniff of a "well-trained narcotics detection dog" is "sui generis."[2] A variety of lower courts have barked up related trees. Knowing about these cases helps to keep canine sniffs rewarding in the here and now.

Terry v. Ohio

Two men hover about a street corner, waiting for no one. Dozens of times, they pace up the block, stare in a store window, and return to their corner to chat. A law enforcement officer of 30 years' experience suspects that the two are contemplating a daylight robbery. He decides to investigate. The officer lacks probable cause for an arrest, but needs to protect himself, i.e., needs to determine whether the two men are carrying weapons. He identifies himself as a policeman and makes reasonable inquiries. Nothing serves to dispel his "reasonable suspicion" as to safety. Then the officer conducts a carefully limited search of the men's outer clothing in an attempt to discover weapons.

In *Terry v. Ohio*, the Supreme Court validated this conduct. The Court upheld the tempered act of a policeman who in the course of an investigation had to make a quick decision about protecting himself and others from possible danger.

The Right to Be Nervous

In *State v. Slavin*,[3] a driver had been extremely nervous after being told that a dog would come to conduct a search. The court held that, even if nervousness can occasionally be a factor, a determination as to whether a trooper has an adequate basis for a reasonable suspicion of criminal activity must be made *as of the time he completes the traffic stop*, and not in light of nervousness after being told that a dog is coming.

In *Wilson v. State*,[4] the court held that a person's nervousness when stopped by the police at 2:00 a.m. is thoroughly understandable, as is his staring at a passing patrol car. Carrying $4,000 in cash is unusual, but it is not illegal. After the traffic stop was concluded, the officer lacked reasonable suspicion to detain the motorist until the arrival of a drug-sniffing dog.

A Mere Hunch Is Not Enough

In *United States v. Kirkpatrick*,[5] a trooper had completed his business — returning the driver's license and rental agreement and giving a verbal warning about speeding. Then, the trooper asked the driver if he had guns, marijuana, cocaine, or large amounts of cash in the vehicle. No one would feel free to leave; this was a new detention. The dog arrived while the driver was being detained. This renewed detention was unlawful because it was based on a mere hunch and not reasonable suspicion.

A Montana court held in *State v. Tackitt*[6] that a seven-year-old misdemeanor citation for possession of marijuana paraphernalia does not give rise to reasonable suspicion. The stale citation did not serve as sufficient corroboration of an anonymous informant's tip. Thus, the police did not have sufficient particularized suspicion to use a drug-detection dog to sniff the exterior of James Tackitt's vehicle.

The court in *State v. Ramos*[7] held that the police had unduly prolonged their traffic stop-related activities up to the time that the drug-sniffing canine arrived. Thus, they engaged in an unlawful detention and seizure of the motorist. There was no reasonable suspicion — merely an officer's hunch that the defendant might be engaged in "some kind of criminal activity." Similarly, in *People v. Gilbert*[8] the court held that, because there was no reasonable suspicion supporting the canine sniff, it impermissibly broadened the scope of the traffic stop into a drug investigation.

In *Campbell v. State*,[9] the trooper had merely embarked on a fishing expedition in the hope that something might turn up. That type of probing is not permitted by the Fourth Amendment, and the lower court erred in denying a motion to suppress.

In *State v. Haar*,[10] the court held that a cargo box, the lack of visible luggage, and an out-of-state license plate provided no articulable basis reasonably to suspect that a vehicle was transporting illegal drugs.

No Cue Is Due

The courts abhor even a whiff of "handler cuing," i.e., where the conduct of the handler, rather than the presence of contraband, influences the dog to give an "alert" reaction. "[L]ess than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing,' may well jeopardize the reliability of dog sniffs."[11] "Reliability problems arise when the dog receives poor training, has an inconsistent record, searches

for narcotics in conditions without reliability controls, or receives cues from its handler."[12]

Suppression Orders Are Likely to Be Upheld

As a general proposition, the suppression order of a lower court is likely to be upheld by a reviewing court.

In *People v. Ortiz*,[13] the defendant was driving a third-party vehicle, he could not name the friend that owned it, the road was a major drug thoroughfare, the destination was known for its drug trafficking, the vehicle contained a tarp such as is used to conceal illicit drugs, the demeanor of the driver was "irregular," and he was traveling with a passenger who had been arrested for drugs. The trial court held that there was no basis for a "reasonable suspicion," and the reviewing court declined to disturb its finding.

The police officers in *State v. Fisher*[14] had duly stopped and detained a driver for the purpose of issuing a citation. He was cooperative and nonviolent, and the officers observed no contraband, firearms, or other evidence related to criminal activity. The driver's further detention, to enable a canine sniff, was an illegal seizure. The trial court found that the officer's knowledge that the area was notorious for its drug trade and that the driver was previously involved in drug-related activity did not give rise to a reasonable suspicion. The reviewing court declined to disturb this finding.

In *People v. Haley*,[15] the reviewing court upheld the ruling of the trial court. The dog-sniff search of the automobile for illegal substances required, but lacked, reasonable suspicion.

In *State v. Miller*,[16] the reviewing court acknowledged that the lower court was best suited to make credibility determinations — to choose whether to disregard the officers' claimed reasons for the search. The state failed to carry its high burden of showing that the lower court's suppression order was "unequivocally erroneous."

In *State v. Fields*,[17] the police claimed to have acted upon knowledge that a motorist had previously been arrested for drugs, was continuing to deal in drugs, and had recently received a shipment of drugs. The state argued that the defendant acted in a nervous manner during the traffic stop, and that it was doubtful that he had truly gone out for milk and cereal at three o'clock in the morning. The lower court held that the police lacked a reasonable and articulable suspicion. It was an unlawful seizure to detain the driver pending arrival of a drug-detection dog. The reviewing court declined to disturb this finding.

The police in *State v. Tanner*[18] deprived a stopped motorist of her purse and detained her. The lower court held that the officers had lacked a reasonable suspicion and suppressed the results of the subsequent dog sniff. The reviewing court upheld this ruling.

United States v. Place

In *United States v. Place*, the Supreme Court held that a 90-minute detention of luggage was unreasonable, as was the officer's failure to tell the defendant where the luggage was going, how long it would be kept, and how it would be returned. Impermissibly, the seizing had intruded on both the defendant's interest in his luggage and his interest in proceeding with his itinerary. At the same time, the Court was careful to emphasize that, although the Constitution did not permit such *seizure* of the luggage, exposure to a trained canine would not constitute a *search*. The Court pointed out that a canine sniff does not require opening the luggage. The Court added that the manner in which information is obtained through a canine sniff is much less intrusive than a typical search. No other investigative procedure gathers information so carefully and reveals a degree of information that is so modest. Thus, despite the fact that a canine sniff tells the police something about the contents of luggage, the information obtained is limited. Although seizing the luggage was not permitted, subsequent exposure to a trained canine did not constitute a search within the meaning of the Fourth Amendment.

Putting *Place* in Its Place

Courts have declined to apply the dictum in *Place* that a canine sniff does not constitute a search. In *United States v. Buchanon*,[19] the court acknowledged the dictum in *Place* — that a dog sniff is not a search — but declined to apply it. A defendant in *Buchanon* argued that the police had seized defendants and their personal property without reasonable suspicion in order to conduct a canine sniff. While the encounter began when a trooper stopped to assist a motorist, later other troopers converged

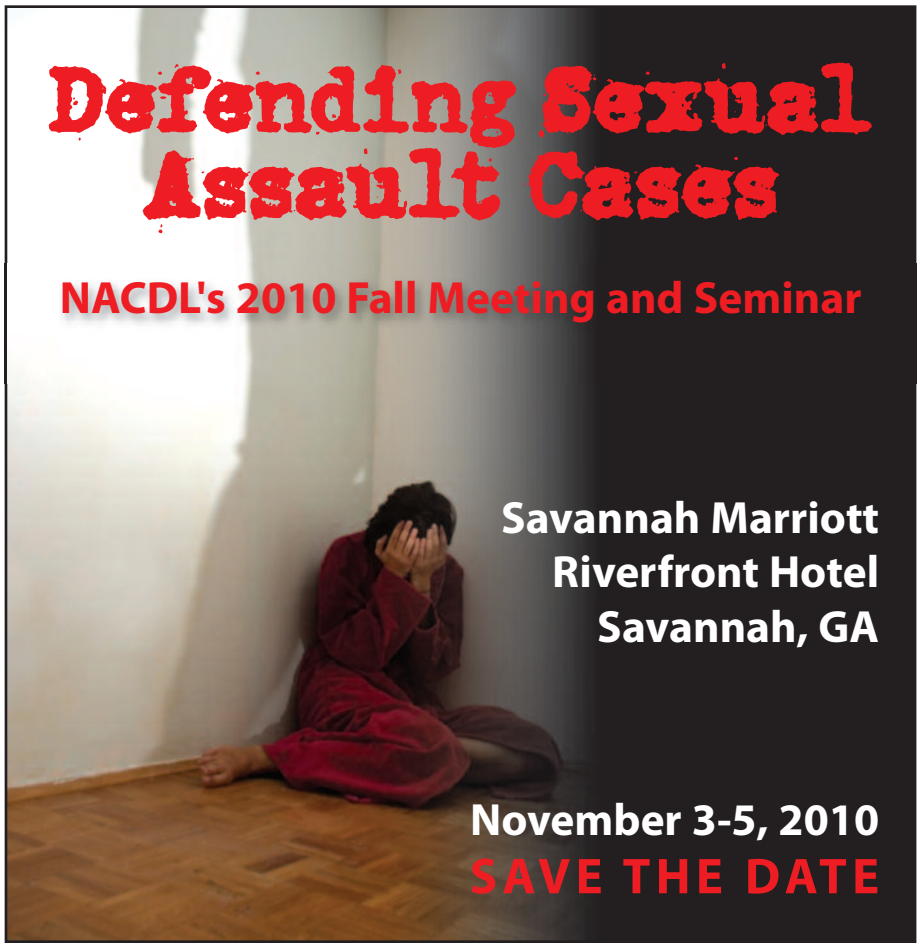
on the scene. "Move back onto the grass," one trooper ordered the motorists. Two other troopers stood between the men and their vehicles. A dog came forward. No one would feel free to leave in such a situation — a seizure had occurred. Moreover, the seizure was unlawful, the court said, because the troopers did not have reasonable and articulable suspicion for seizing the defendants, and the truck, for a limited investigatory purpose. When made possible by an unconstitutional seizure, a canine narcotics sniff, even if not technically a search, violates the Fourth Amendment.

In *People v. Yarber*,[20] another lower court declined to apply the dictum in *Place* that a dog sniff is not a search. Samuel Yarber had refused to consent to the search of his bags. There was no probable cause to arrest him or to obtain a search warrant. The officers had no right to seize his bags, and so it did not matter that the subsequent dog sniff might not be, in legal parlance, a "search."

The court in *State v. Vikesdal*[21] also declined to apply the dictum in *Place*. Without either a search warrant or probable cause to search without a warrant, the police requested that a bus pull over when it passed a police station to allow a drug-detecting dog to "work" the passengers' luggage. Regardless of the fact that a canine sniff is not a search, the seizure of Steven Vikesdal had occurred with no probable cause to believe that he or anyone else on the bus had violated the law. The marijuana obtained from his luggage was not legally admissible. Citing LaFave's *Search and Seizure*, the court noted that if an encounter between a dog and a person or object is achieved by bringing the dog into an area entitled to Fourth Amendment protection, that entry is itself a search subject to constitutional restrictions.

An Indiana court, in *D.K. v. State*,[22] declined to apply the dictum in *Place* that a canine sweep is not a search. The court held that, upon the completion of a traffic stop, the officer must have reasonable suspicion of criminal activity in order to proceed thereafter with an investigatory detention. After a traffic stop, *Terry*-level reasonable suspicion is a necessary predicate to a canine sniff.

In *Jean-Laurent v. Commonwealth*,[23] a narcotics officer had no particularized suspicion — merely his usual interest in trying to stop the flow of illegal narcotics. With no consent, he seized the bag of a passenger who had gotten off a bus. A dog alerted to the bag as the officer carried it to the dog's location. Because the passenger had not given consent for this seizure, the cocaine obtained as a result was not admissible.



Bosco's Law

The positive alerts of a drug-detection dog named Bosco had provided probable cause for police officers to search an automobile without a warrant in *State v. Wallace*.[24] Bosco made two positive alerts to the presence of drugs at the driver's side front door. One of the officers testified that, due to air currents and other factors, there is little correlation between where a canine alerts and where drugs are located in a vehicle. Instead, it is merely a general alert to the entire passenger compartment. In *Wallace*, nothing linked any particular passenger to the drugs. Accordingly, there was not sufficient probable cause to search the passengers themselves. A canine alert on the exterior does not support the proposition that the drugs are concealed on a particular occupant. The police cannot use a positive general canine scan of the car as authority to search a passenger who is neither owner nor driver. To the same effect is *Whitehead v. Commonwealth*.[25] Somewhat in contrast is the Supreme Court's decision in *Maryland v. Pringle*.[26]

Edmond

In *City of Indianapolis v. Edmond*, the city was operating checkpoints on its roads in an effort to block unlawful drugs. The Supreme Court held that stopping a vehicle is a seizure within the meaning of the Fourth Amendment and is unlawful without probable cause, which was lacking. True, under *Place*, doing a walk-around with a narcotics-detection dog is not a search. Nevertheless, the walk-around was invalid because it had arisen from roadblocks that violated the Fourth Amendment.

Illinois v. Caballes

The decision in *Illinois v. Caballes* stemmed from a state trooper's stop of a motorist for speeding. Concededly, the stop was based on probable cause and lawful. A second trooper arrived with his narcotics-detection dog and walked the dog around the car while the first trooper wrote a ticket. When the dog alerted at the trunk, the officers searched the trunk and found marijuana.

Finally, the moment had arrived to

put bite into the dictum in *Place,* i.e., that a canine sniff is not a search. A divided Supreme Court held that, because the dog sniff was performed on the exterior of the car while the motorist was lawfully seized for a traffic violation, any intrusion on his privacy expectations did not infringe upon his constitutional rights. During a concededly lawful traffic stop, a dog sniff that reveals only the location of contraband passes muster under the Fourth Amendment.

The dissent held back the biscuits. Justice Souter cautioned that the "infallible dog … is a creature of legal fiction. [His] supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine."[27] In the cases, Justice Souter found one dog with a 29 percent error rate and another who had alerted erroneously four times out of the last 19. He noted that even Wendy, the drug-detection dog in the Seventh Circuit's *Limares* decision, had given 38 percent false positives. The dissent cited evidence that 80 percent of all currency in circulation contains drug residue and a study showing false positives in the range from 12.5 percent to 60 percent.

The Wonders of Wendy

Although an infallible dog may respond to nothing but contraband, a dog in the Seventh Circuit named Wendy has been deemed good enough.

In *United States v. Limares*, a drug-detection dog named Wendy gave alerts for two packages and the police obtained search warrants. One package contained $18,000 in currency; the other contained more than four pounds of methamphetamine. According to defendant Luis Limares, the agents defrauded the magistrate who issued the first two search warrants by asserting that Wendy reliably detected drugs by smell. Limares argued that this was impossible because so much currency has acquired at least some drug residue that dogs alert more to folding money than to drugs — exemplified by what Limares called the "false alert" to the first package, which contained currency but no drugs. According to the record, 62 percent of Wendy's alerts were followed by the discovery of drugs; another 31 percent signaled the presence of currency. Only seven percent of Wendy's "hits" were unambiguous false positives.

"An affidavit for a search warrant … need not describe training methods or give the dogs' scores on their final exams," the court said. "It is enough if a dog is reliable in the field. Wendy's handler testified that she has 'never passed by anyone and suddenly done a turn for their wallet.' … Wendy has been right 62 percent of the time, enough to prevail on a preponderance of the evidence, and 'probable cause' is something less than a preponderance."[28]

One Bite at the Apple

Despite *Caballes*, the police must continue to be careful. In *United States v. Davis*,[29] one canine sniff complied with *Caballes*, but a second did not. The first dog had reported that no narcotics were in the vehicle. It was unlawful to delay the driver for another hour in order to permit a second dog to arrive. "Reasonable suspicion, a limited exception to the probable cause requirement, does not permit unlimited bites at the apple. Officers must act to confirm or dispel their suspicions quickly. While they may be disappointed when their chosen investigatory technique dispels their suspicions, the Fourth Amendment does not permit them to keep trying until they obtain the desired results."[30]

A Dog's Home Is His Castle

In *State v. Rabb*,[31] a police officer and his drug-detector dog walked by a residence. The dog walked from the public roadway up to the front door and alerted to the odor of cannabis emitting from the residence. In a well-worded opinion, the Florida court managed to keep *Place* and *Caballes* at bay. *Place* involved luggage and *Caballes* involved a vehicle, whereas the Florida case involved the citadel of a home. The court held that, under the Fourth Amendment, a dog sniff is indeed a search when it occurs at the exterior of a home. There, a drug dog is no more welcome than is a man in a doghouse. Other cases have said the same about the exterior of a person's *body*.[32]

Rabb is premised on *Kyllo v. United States.*[33] In *Kyllo*, the police had employed a thermal imager to scan a house and reveal heat signatures. They concluded that the occupant was using halide lamps to grow marijuana, and they secured a search warrant. The Supreme Court suppressed the evidence, holding that it was a Fourth Amendment violation for law enforcement to employ a thermal imager to discern the warmth of the house. To use the words of the Florida court in *Rabb*, "Just as *Kyllo* did not pass on the constitutional permissibility of thermal scans of vehicles, *Caballes* did not pass on the constitutional permissibility of dog sniffs of houses."[34]

Conclusion

A canine sniff demands the highest degree of human attention. In *Evans v. City of Aberdeen*,[35] the city conducted a dog sniff at the station house. Prior to the test, an officer placed the suspected currency in a brown paper bag that he had found on the station house floor. The bag or the entire area may have been contaminated. To this day, no one knows whether the dog hit on the bag, the area or the money, and he has declined to elaborate. The court rejected the test.

Long before DNA testing, the blood hound could identify a man to arrest for rape (*State v. Williams)*.[36] He could track a man for arson (*Carpenter v. State)*.[37] He could point his nose toward murder (*Juelich v. United States)*.[38] As society progressed, the dog arrived to fight narcotics (*State v. Virdure)*.[39] He has borne witness to the

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vicissitudes of vice, and he looks with trusting eyes to handlers well-versed in the law. The canine sniff for drugs represents the latest chapter in a laudable partnership between man and the best of his friends. It deserves the finest training and performance in both.

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Notes

1. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000); and *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).

2. "It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *United States v. Place*, 462 U.S. at 707, 103 S. Ct. at 2644.

3. 944 S.W.2d 314 (Mo. Ct. App. 1997).

4. 847 N.E.2d 1064 (Ind. Ct. App. 2006).

5. 5 F. Supp. 2d 1045 (D. Neb. 1998).

6. 67 P.3d 295 (Mont. 2003).

7. 801 N.E.2d 523 (Ohio App. 2003).

8. 808 N.E.2d 1173 (Ill. App.), *app. den.*, 823 N.E.2d 971 (2004), *cert. den.*, 544 U.S. 992, 125 S. Ct. 1826, 161 L. Ed. 2d 756 (2005).

9. 97 P.3d 781 (Wyo. 2004).

10. 772 N.W.2d 157 (S.D. 2009).

11. *United States v. Trayer*, 898 F.2d 805, 809 (D.C. Cir.), *cert. den.*, 498 U.S. 839, 111 S. Ct. 113 (1990).

12. *United States v. $80,760.00 in U.S. Currency*, 781 F. Supp. 462, 478 (N.D. Tex. 1991), *aff'd*, 978 F.2d 709 (5th Cir. 1992).

13. 738 N.E.2d 1011 (Ill. App. 2000).

14. 539 S.E.2d 677 (N.C. App. 2000), *app. dism., rev. den.*, 547 S.E.2d 420 (N.C. 2001).

15. 41 P.3d 666 (Colo. 2001).

16. 659 N.W.2d 275 (Minn. Ct. App. 2003).

17. 662 N.W.2d 242 (N.D. 2003).

18. 915 So. 2d 762 (Fla. App. 2005).

19. 72 F.3d 1217 (6th Cir. 1995).

20. 663 N.E.2d 1131 (Ill. App.), *app. den.*, 671 N.E.2d 742 (Ill. 1996), *cert. den.*, 519 U.S. 1150, 117 S. Ct. 1084, 137 L. Ed. 2d 218 (1997).

21. 688 So. 2d 685 (La. App. 1997); *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE (3d ed. 1996) §§ 1.5, 2.2(f), 9.3(c).

22. 736 N.E.2d 758 (Ind. App. 2000).

23. 538 S.E.2d 316 (Va. App. 2000).

24. 812 A.2d 291 (Md. 2002), *cert. den.*, 540 U.S. 1140, 124 S. Ct. 1036, 157 L. Ed. 2d 951 (2004).

25. 683 S.E.2d 299 (Va. 2009).

26. 540 U.S. 366, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003). The search of a passenger was permitted (although not on the basis of a canine sniff). Joseph Pringle was a passenger. There was $763 of rolled-up cash in the glove compartment directly in front of him. The Court thought it "an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine." 540 U.S. at 372, 124 S. Ct. at 800. According to *Whitehead*, the key determinant is whether the evidence indicates that the passengers are involved in a common enterprise involving criminal activity.

27. *Illinois v. Caballes*, 543 U.S. at 411-412, 125 S. Ct. at 839.

28. *United States v. Limares*, 269 F.3d 794, 798 (7th Cir. 2001).

29. 430 F.3d 345 (6th Cir. 2005).

30. *Id.* at 357.

31. 920 So. 2d 1175, 1184 (Fla. App.), *rev. den.*, 933 So. 2d 522 (Fla. 2006), *cert. den.*, 549 U.S. 1052, 127 S. Ct. 665, 166 L. Ed. 2d 513 (2006).

32. As a dog will understand too: "The body and its odors are highly personal." *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1267 (9th Cir. 1999).

33. 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

34. 920 So. 2d at 1192.

35. 926 So. 2d 181 (Miss. 2006).

36. *State v. Williams*, 6 S.W.2d 915 (Mo. 1928).

37. *Carpenter v. State*, 164 S.W.2d 993 (Ark. 1942).

38. *Juelich v. United States*, 214 F.2d 950 (5th Cir. 1954).

39. *State v. Virdure*, 371 S.W.2d 196 (Mo. 1963).

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