Legal Issues Relevant to Scientific Research discussed by T. Jezierski, J. Ensminger, and L.E. Papet 5-3-2021

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Are field records discoverable?
Florida v. Harris, 568 U.S. 237 (2013, Kagan): "relatively limited", "may sometimes be relevant", but precluding a finding of probable cause by their absence would be "the antithesis of a totality-of-the-circumstances analysis."
1st Circuit courts:
U.S. v. White, 2013 WL 5754948 (D. Maine 2013); aff'd on other grounds: U.S. v. White, 804 F.3d 132 (1st Cir. 2015): field records contained sensitive information about ongoing investigations; defense "offered no reason why he should be entitled to information beyond that contemplated by the Supreme Court in the run-of-the-mill drug-sniffing dog case."
U.S. v. Jones, 2020 WL 3128905 (D. Maine 2020): defendant "must make a showing that such records are material"; "a proffer indicating that the narcotic-detecting dog or its handler lacked proper training or certification would support the need for additional discovery regarding the dog or handler's field performance. So too might a proffer to show that the dog has falsely alerted on other occasions", but no such showing here.
2nd Circuit courts:
U.S. v. Foreste, 780 F.3d 518 (2d Cir. 2015): district court abused its discretion in denying request for field performance records because "the principle that a defendant 'must have an opportunity to challenge ... evidence of a dog's reliability' would be stripped of its value if the defendant were not entitled to discover the evidence on which he would base such a challenge." 2nd Circuit notes that even though *Harris* says field performance records are not necessary, it does not hold them to be irrelevant.
5th Circuit courts:
U.S. v. Gomez, 444 F.Supp.3d 739 (MD Louisiana 2020): Court gave greater deference to prosecution expert who is still dog handler than to defense expert who is evaluator and no longer handler so ignored gap in training from January to July 2018, noting that in *Harris* dog had been trained though his certification had lapsed. Motion to suppress denied. Thus, experts were used to overcome gap in training and make dog sufficiently reliable.
6th Circuit courts:
U.S. v. Fuchs, 2019 WL 4751556 (W.D. Tenn. 2019). "There was testimony … that there were no records of Kilo's performance in the field." This was **not enough to support finding of unreliability** because of "relatively limited import" of field records per **Harris**.
U.S. v. Robinson, 2020 WL 3962130 (ND Ohio, 2020). Couple under surveillance delivered package to post office in Toledo after which officers brought certified narcotics detection dog to post office where package was picked out in lineup of other packages; officers seized package and applied for search warrant. Defendant seeks to challenge dog's reliability and obtain dog's field performance but no showing that certification was inadequate; also, fact dog alerted to fentanyl in package, which was not drug dog was trained to recognize (similar to **Harris**), and did not mean dog did not detect an odor it was trained to recognize. Motion to suppress denied.
Kentucky v. Harris, 2015 WL 5781422 (Ct. App. Kentucky 2020). Certification expired 4 months before stop, no evidence of training since previous certification 3 yrs earlier, and dog due to retire because of age; suppression of evidence affirmed**. Dissent would have remanded for further evidence that might include field records** to overcome absence of certification and training.
8th Circuit courts:
U.S. v. Johnson, 2016 U.S. Dist. LEXIS 62962 (D. South Dakota 2016), finding that in 410 deployments she "indicated" 241 times, in which drugs were found 163 times, but in 60 of these cases the amount was too small to weigh or measure. 32% of the time when she indicated, no drugs were found. The court finds that 68% record of drugs being found when Zara indicated **satisfies the probable cause requirement**, which is probably satisfied with 51% (preponderance). NOTE: the case seems to refer to the records as both (1) both training and field, (2) "voluminous" actual deployments, and (3) training records.

US v Herbst, 2017 WL 9440792 (ND Iowa 2017) training records show concerning periods but recently dog has been accurate. Court notes that despite lower expectations per **Harris** on field data, such data "can still support a finding of reliability."
US v Acosta, 2019 WL 454247 (ND Iowa 2019): "Absence of records about Duke's training and field performance magnify issues that might otherwise be unconcerning"; absence of standards and rules by Nashua Police Department meant **handler was basically on his own in determining what practices he adhered to**; no records of what dog was trained to recognize, no records of dog's failures during training since "always ended on high note." Dog could have been alerting just to complete the exercise. This is one case where field performance records could have helped overcome lack of training records, but they also were very deficient. Motion to suppress should be granted.
9th Circuit courts:
U.S. v. Bishop, 2020 WL 3270728 (D. Montana 2020): claim of defendant was ineffective assistance of counsel because counsel failed to argue that warrant application did not include information that trooper knew how to handle dog or that dog was not reliable. However, a warrant application need not "contain specific information demonstrating a drug dog's reliability." Nevertheless, under **Harris**, "Judges and law enforcement authorities need some reason to think a drug dog is reliable. If defendant thinks otherwise, a motion to suppress puts the burden on the government to prove the K-9 unit contributed competent information that, taken together with all other relevant facts, established probable cause for a search."

Is a behavior change (sometimes "alert" or "interest") sufficient without a trained final response ("indication" but also often "alert")?

Florida v. Harris, 568 U.S. 237 (2013): "Aldo alerted at the driver's-side door handle—signaling, through **a distinctive set of behaviors**, that he smelled drugs there." "Wheetley also acknowledged that he did not keep complete records of Aldo's performance in traffic stops or other field work; instead, he maintained records only of alerts resulting in arrests." "The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, **viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime**. A sniff is up to snuff when it meets that test." Court also noted that dog's alert to residual odor is not an error because dogs alert to odors, not a drug per se. So Court did not get into the niceties of the dog's behavioral patterns, but did indicate that the dog's behavior could be evaluated by a "reasonably prudent person."

1st Circuit courts:

U.S. v. Almeida, 2012 WL 75751 (D Maine 2012):

> "Diesel is trained to "indicate," or "alert to," the presence of narcotics by sitting when he detects a narcotics odor and facing the direction of the odor. If he tries to sit and is unable to fully sit, for example, if he is in the interior of a vehicle and there is inadequate space, he usually looks at Bean and begins to bark. Diesel has never given Bean a false positive, that is, an indication of the presence [*9] of narcotics in the absence of either drugs or at least a residue odor of drugs."

Court acknowledged that a trained final response might not always be possible and jumping in car under certain circumstances is OK.

2nd Circuit courts:

Landaverde, 2020 U.S. Dist. LEXIS 2990, 2020 WL 93890 (ED New York 2020): Beny's behavior by scratching at car door, standing perpendicular to vehicle, and stiffened posture was objective and observable, and court could accept that Beny's handler could interpret such behavior as alerting sufficient to provide probable cause. Court stated that "recognition of an alert… should be based **on objective criteria."**

3rd Circuit courts:

U.S. v. Xiao Wu Zhou, 2019 WL 3564579 (MD Pennsylvania 2019): Court finds behavioral changes of increased shallow respirations was consistent with Canine Tom's alert behavior, which defendants argued was dependent on controversial, ambiguous interpretation of handler, but court cited Pierce, 622 F.3d 209 (3d Cir. 2010, **pre-Harris**) where change in posture and increased desire to sniff constituted positive alert and provided probable cause for search. Even if this was not enough, dog's staring behavior while remaining standing frozen in place was "indication behavior" also sufficient to give reasonable suspicion of criminal activity.

4th Circuit courts:

U.S. v. Diaz, 2018 WL 1697386 (D. South Carolina 2018): alert without final indication insufficient as this would be tantamount to permitting law enforcement officers to issue their own search warrants.

U.S. v. Peterson, 2019 US Dist LEXIS 69922, 2019 WL 1793138 (ED Va., 2019): court noted that field records sometimes relevant, noted difference in weak response in training (95%) vs. field (52%). "Whether Walker gives a weak response or a strong response depends on the strength of the odor. For example, Walker might give a weak response if he smelled a residual odor of drugs." Here, **3 weak responses did not amount to an alert giving probable cause**, citing Wilson, 995 F.Supp.2d 455 (WD North Carolina, 2014) that allowing a weak response to be sufficient was tantamount to letting officers issue their own search warrants), partial grant of motion to suppress.

U.S. v. Paholsky, 2020 WL 5914526 (SD West Virginia 2020): Dog had 2 methods of alerting (1) pitter patter with front feet, and (2) sit. When dog sits, handler leads dog around car again and if he sits a second

time, he regards this as a hit. Handler's familiarity with dog's behavior allows him to call alert. Motion to suppress denied.

5th Circuit courts:

U.S. v. Walsh, 2017 US Dist LEXIS 137404, 2017 WL 3702018 (ND Texas 2017): dog's trained final response was to sit on detecting odor of certain drugs, though other behavior changes included closing his mouth, taking shorter, deeper breaths, pinning his ears back and detail searching by putting his nose closer to an area. Here, dog came to near-sitting position at license plate. Handler's experience with dog put him in best position to interpret dog's actions which therefore provided probable cause for search. Citing Clayton (5th Cir. per curiam 2010), a full alert is not required to provide probable cause.

U.S. v. Miller, 2019 WL 8064078 (**WD Louisiana 2020**): "no Fifth Circuit law demanding that a drug dog come to a full and final alert before probable cause exists." United States v. Shen, 749 Fed. Appx. 256 (5th Cir. 2018). Furthermore, the Fifth Circuit has held that "a dog provided probable cause even though it did not sit as trained to do when alerting to narcotics" because the officer "was able to articulate several specific indicators he used, as [the dog's] handler, to interpret [the dog's] actions to be an 'alert.'" United States v. Clayton, 374 Fed. Appx. 497, 502 (5th Cir. 2010) (per curiam). The "specific indicators" identified by the handler included the dog jumping on the vehicle, elevating his ears, and pulling the handler to the vehicle. "So long as officers are able to articulate specific, reasonable examples of the dog's behavior that signaled the presence of illegal narcotics, this Court will not engage itself in the evaluation of whether that dog should have used alternative means to indicate the presence of the drugs."

6th Circuit courts:

U.S v Sharp, 689 F.3d 616 (6th Cir., 2012): holding that "The canine's jump and subsequent sniff inside the vehicle was not a search in violation of the Fourth Amendment because the jump was instinctive and not the product of police encouragement." More specifically:

> Thus, on some level, the dog jumped into Sharp's car because of his training. But while it is a Fourth Amendment violation for a narcotics canine to be trained to jump into cars, it is not a Fourth Amendment violation for a dog to jump into a car on its own volition and instinct when sniffing for drugs, as long as the dog's behavior has not been facilitated by law enforcement. This inquiry focuses on the police's conduct in training the dog before the search and the officers' conduct during the search. It is a Fourth Amendment violation for a narcotics detection dog to jump into a car because of something the police did, like training the dog to jump into cars as part of the search or facilitating or encouraging the jump.

So is training a dog on an agility course where one hurdle looks like a car door different from just training a dog to sniff objects for drugs?

Tennessee v. Bowden, 2018 WL 2149731 (Ct. Crim. Appeals, Nashville 2018): Testimony because of airflow dog might alert to area of vehicle that is not where drugs are; body language changes (slower walk, mouth closing, tail becoming erect, ears erect) occur when dog is "in odor", but once Axel gets to the source of the odor he gives an aggressive alert described as a "scratch, bite, bark, whatever he can to try to attempt to achieve a reward." Reward was toy. Handler admitted to some false positives and false negatives; here there were body language changes on first scan, but no final indication, nevertheless called alert by handler; court **cited** U.S. v. Parada, 577 F.3d 1275 (10th Cir. 2009) which said that dog could give alert justifying search without giving final indication; court recognized that final indication would be most reliable but less than final indication could still satisfy **Harris** "**common sense**" rule that a reasonably prudent person would think that a search would reveal contraband.

Ohio v. Newman, 2021 Ohio App LEXIS 108 (Ohio Ct. App. 2021): court discounted testimony of defense expert, Andre Falco Jimenez, who interpreted what officers called alert as dog being bothered by exhaust fumes, conviction affirmed. NOTE: Jimenez was also expert in Nebraska v. Tinlin, 2020 Neb App LEXIS 7 (Neb. Ct. App. 2020), where also officer's testimony was taken over that of Jimenez.

8th Circuit courts:

U.S. v. Jacobs, 986 F.2d 1231 (8th Cir., 1993): "Without an alert, the police clearly lacked the probable cause necessary to open the package. While the information received from Officer Billingsley, plus the fact that the dog showed an interest in the package, might have provided reasonable suspicion that it contained contraband, more is needed to overcome the defendant's Fourth Amendment right to privacy in its contents. In this case, the failure to inform the magistrate judge that the dog had not given its trained response when confronted with a package containing drugs, coupled with the dog handler's admission that he could not say with certainty that drugs were in the package, causes us to hold that the warrant would not have been supported by probable cause, if the omitted material had been included."

U.S. v. Holleman, 743 F.3d 1152 (8th Cir., 2014), 8th Cir. analyzed **Harris** and noted trend to allow less than final indication to be sufficient, citing 10th Circuit in U.S. v. Parada, 577 F.3d 1275 (10th Cir., 2009), and U.S. v. Clayton, 247 Fed.Appx. 497 (5th Cir., 2010). Alert for this court could include making "abrupt stops to detail a particular area of the truck with intense closed-mouth sniffing," but dog indicated by sitting or lying down. Court noted that field records established dog's alerts produced drugs 57% of time, whereas 8th Cir. has accepted as low as 54% (in 2007 case, US v. Donnelly, 475 F.3d 946, 8th Cir. 2007). Court notes handler testified dog may not have given full indication because perhaps "so overwhelmed by the odor of marijuana that he **had difficulty pinpointing the strongest source of the odor.**" Handler said dog gave "two definitive alerts" by side of truck, so court was "not concerned about Henri's failure to give a full indication and did not find defendant's reliance upon *Jacobs* persuasive." Other facts also supported probable cause.

U.S. v. Herbst, 2017 WL 9440792 (ND Iowa 2017): alert identified by handler "based on Odin's change in breathing, his scratching on one of the bags …, and his possible drooling. Odin did not give a final indication by sitting or lying down, which Officer Noltze attributed to him not having room to do so inside the vehicle…."

> "Officer Noltze testified that there are times when Odin will not provide a final indication after he alerts to the odor of narcotics. According to Officer Noltze, factors that may affect whether Odin indicates include the temperature (he will not want to sit if the ground is cold), an elevated source (if the odor source is above his head, he may "bracket" the area or jump or stand on the wall or object to try and reach the source of the odor), and the area where he is located (he cannot sit in confined spaces or when his footing is uneven). Odin's ability to locate an odor's source can also affect his ability to provide a final indication, including the size of the area (he may be able to narrow the source of a scent more quickly in a smaller area) and climate conditions (such as wind or air flow)."

Dog's training records show "Odin was able to alert but was slow or not able to provide a final indication." Court found that Odin's failure to give a final indication when drugs are present did not detract "from the reliability of the sniff he conducted in this case." **Training records show false alerts which were "concerning" to the court; handler explained them as sometimes due to residual odor**; most such false alerts were more than a year before case incident; court concludes training records do not support conclusion Odin is unreliable.

U.S. v. McClelland, 2017 WL 5158682 (D South Dakota 2017). Handler said "head check" was alert, after which dog sat down but appeared to lose interest, which handler explained as dog having given final indication and completed job so nothing more to do. Court acknowledged *Holleman*, supra, saying "an alert is enough and that a follow up indication is not necessary" but accepts that "movements once to the rear of the car were, however, an indication." But court found that series of alerts/indications with "no results other than a search… is troubling, especially if the Courts fully abdicate to the handler what constitutes an alert and an indication. If so, canine teams become the key to every desired search." Court notes similarity to pointers in hunting, where false points sometimes occur. Court also looked at possibility of cueing because of defense expert in that handler had toy during sniff. Court acknowledges this may not have been a best practice but decided video showed no signs of cueing. Since reasonable

person could think that search would produce contraband, though the contraband turned out to be machine guns, not drugs, but still OK.
10th Circuit courts:
U.S. v. Jordan, 455 F.Supp. 1247 (DC Utah, 2020): Defense expert Mary Cablk who argued that single-blind training is insufficient to prevent bias and cueing. Utah POST **certification program** does not use double-blind testing, or even single-blind, as handler knows how many hides will be present. Officer did not always keep careful training records. Dog repeatedly left off sniffing vehicle and had to be drawn back. Dog gave no trained final response, but only "innate natural behaviors of a dog going through the paces of sniffing the vehicle." "Behavior by the dog that is so subjective that only the handler may be identify it risks allowing a search in violation of the Fourth Amendment that is based on nothing more certain that [? than] the **officer's hunch** that drugs may be present." Here, POST training "inadequately addresses, and therefore fails to remove the risk of, inadvertent handler bias or cuing." Most of the training "consisted of scenarios that made it impossible for Tank to make a false-identification of narcotics." The search was in effect based on the officer's hunch. Motion to suppress granted.
Kansas v. Payton, 2020 Kan App Unpub LEXIS 91, 2020 WL 858133 (Kan. Ct. App. 2020): Detailing and bracketing, sniffing with mouth closed, but not sitting, and handler and officers were trying to explain why dog had stopped at license plate, so court not persuaded there had been probable cause and motion to suppress granted.
Kansas v. Jones, 2021 Kan. App. Unpub. LEXIS 157, 2021 WL 1044987 (Kan. Ct. App. 2021): handler argued dog does not give final alerts outside a car because he does not do so until in physical contact with the source; also, handler did not facilitate dog's entry into car by command or by opening window. Dog sniff is not a search under Fourth Amendment but can provide probable cause for a search if a reasonably prudent person would think that a search would reveal evidence of criminal activity (per *Harris*). Dog's behavior changed outside car by staying in one area, deeply inhaling, paw grip change, and tail stops moving, indicating he is "in odor." Dog had "**sufficiently alerted**" to odor of drugs outside car.

What is a "bona fide" certifying organization?

Florida v. Harris, 568 U.S. 237 (2013): Aldo's certification had expired a year before the stop.

> "If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs."

4th Circuit courts:

U.S. v. Diaz, 2018 WL 1697368 (D. South Carolina 2018): Alabama Canine Center was, according to Sweatman (the handler), "not certified by the National Association of Public Working Dogs Association ("NAPWDA"). Prosecution argued there was "nothing suggesting" ATC was not reliable, but court lacked information on (1) "records of the results of Rao's certification and recertification tests as well as his error rate in a controlled environment", (2) "passing rate … for a certification test at the Alabama Canine Center"; (3) "any information about the adequacy of the certification program of the Alabama Canine Center." So, enough questions raised about Alabama Canine Center that with other weaknesses in certification evidence, and lack of final alert, motion to suppress granted.

6th Circuit courts:

U.S. v. Davidoff, 46 F.Supp.3d 744 (D Ohio 2014): although "dog gave a false signal for the presence of drugs—no drugs were ever found—the Court finds that the dog's alert was sufficiently reliable even though the dog had not been certified within the prior year." But to establish probable cause, dog's alert must have been reliable, which may be demonstrated by evidence of dog's training and certification, per **Harris**. This is facts and circumstances test, and lack of certification does not mean dog is necessarily unreliable. Dog had recently successfully completed a training program. Nor does dog need perfect record in the field.

7th Circuit courts:

U.S. v. Eymann, 962 F.3d 273 (7th Cir. 2020). Sniff of airplane temporarily parked on field based on information supplied by AMOC (DHS Air and Marine Operations Center). Whether dog has state certification is question of state law but lack of certification was administrative error and dog was retroactively certified by Illinois State Police Canine Academy.

> "Outside of the Academy, Grammer and Arie completed bi-weekly trainings with other handler/*dog* teams. Arie also participated in additional out-of-state training programs. In addition, during a July 2012 session, Arie received special recognition for being the only dog successfully to pass a complex proofing odors test; the training included about 75 different proofing odors and no drug odors, and Arie was the only dog [**31] that went through the entire building without giving a single false alert."

Inevitable discovery doctrine applied and district court's denial of motion to suppress affirmed, with one concurrence and one dissent. So, exceptional training could overcome lack of certification (when such certification was a matter of administrative error).

8th Circuit courts:

U.S. v. Acosta, 2019 WL 454247 (ND Iowa 2019): court was supplied with insufficient information on Midwest K-9 ("MK9") to conclude that it is a "bona fide organization" under Harris; but Dogs for Law Enforcement ("DLE") was, based on prior acceptance of the organization in U.S. v. Herbst, 2018 WL 445532, ND Iowa, 1-16-2018, where prosecutor presented DLE's bylaws and certification rules (neither of which was provided the judge in Acosta). Acosta court noted nevertheless that "it appears that DLE operates in several states, has many members, has certified hundreds of dogs, and takes pains to vet its master trainers who actually certify the dogs [citing testimony in transcript]." Whether such testimony would have been sufficient without Herbst is unclear.

9th Circuit courts:
US v Ruiz, 2017 WL 1031137 (D Arizona 2017): Certification exam need not include double-blind testing, rejecting opinion of expert, L. Myers.
10th Circuit courts:
U.S. v. Jordan, 455 F.Supp. 1247 (DC Utah, 2020): Defense expert Mary Cablk who argued that single-blind training is insufficient to prevent bias and cueing. Utah POST **certification program** does not use double-blind testing, or even single-blind, as handler knows how many hides will be present. Officer did not always keep careful training records (see above for additional description of case).
11th Circuit courts:
U.S. v. Trejo, 551 Fed.Appx. 565 (11th Cir. 2014). Even if certifying organization was not "bona fide," within the meaning of Harris, fact dog had recently and successfully completed a training program was sufficient to provide reliability and therefore probable cause; field deficiencies could also be overlooked per Harris. Denial of motion to suppress affirmed.
Torrez v. Fla., 294 So.3d 390 (Fla. Ct. App. 2020): wife of defendant disappeared, blood stains in house mixture of hers and his; dog Jewel alerted near front door of shared house; gave trained final response of sitting in trunk, as did another dog Piper. Ct. followed logic of Fla. v. Harris that satisfactory performance in a certification or training program can provide reason to trust alert.

When is a traffic stop permissibly or impermissibly extended for a sniff?
Rodriguez v. U.S., 575 U.S. 348 (2015, Ginsburg): follows Illinois v. Caballes, 543 U.S. 405 (2005), which held that a seizure justified only by a police-observed traffic violation "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation. Traffic stop cannot be extended "absent the reasonable suspicion ordinarily demanded to justify detaining an individual." Dissent (Thomas, joined by Alito and as to Parts I and II of dissenting opinion by Kennedy) argues that the rigid termination point of the majority is not consistent with the Court's prior emphasis on reasonableness as to Fourth Amendment cases. **Illinois v. Caballe**s, 543 US 405 (2005), 6-2 decision of Stevens joined by O'Connor, Scalia, Kennedy, Thomas, Breyer; dissents of **Ginsburg** joined by Souter, and Souter separately; Rehnquist did not participate.
1st Circuit courts:
U.S. v. Morganstern, 2020 US Dist LEXIS 240746, 2020 WL 7588576 (DC Maine, 2020): state trooper was informed vehicle contained narcotics, knowledge acquired because of investigation of defendant's son. Trooper pulled her over and though there was a minor traffic violation, driving without a seat belt, but trooper **abandoned any pretense** of the stop being related to a traffic violation and asked her to leave the car so that a K-9 sniff could be conducted. When dog arrived, he jumped in driver's open window but did not formally alert but did later at driver's door. *Rodriguez* was elaboration of *Caballes*. "The government has not argued that the troopers had a basis before the dog sniff for expanding their investigation into narcotics." Motion to suppress granted.
2nd Circuit courts:
U.S. v. Dunnigan, 2019 WL 5257572 (WD N.Y., 2019): Suppression motion. Traffic stop for making lane change without signaling. Defendant refused search of vehicle and K9 assistance was requested. During exterior sniff, dog changed behavior by getting on her hind legs at back of car and also smelled car door handle, but then went to tree and had to be commanded to continue searching. On next pass she jumped in passenger side door which was open and gave final alert on center console and then attempted to get under driver's seat. Officers then searched vehicle and found 1 kg. cocaine in inflatable chair box in back of vehicle; going to tree may have been bracketing behavior trying to find source of odor; fact Lola had to be directed to sniff vehicle again did not change second pass into a search but rather meant she was still conducting a lawful sniff; in any case probable cause for search of vehicle existed independent of dog from behavior of suspects in New York; making second pass around car when sniffing briefly stopped when dog went to tree did not amount to prolonging sniff unacceptably.
3rd Circuit courts:
U.S. v. Cox, 2017 WL 240914 (ED Pennsylvania 2017), difficulty in getting dog to do sniff (3 agencies fell through) was not reason for extending stop.
4th Circuit courts:
U.S. v. Diaz, 2018 WL 1697368 (D. South Carolina 2018), reasonable suspicion lacking to prolong traffic stop (5 air freshioners; driver's rapid breathing, also when informed there would be sniff, driver said "Okay."; extensive analysis of each of these factors); officer had handed Diaz the warning before sniff was initiated. (See also above re certifying organization and less than trained final response.)
Moore v. Maryland, 2021 Md. App. LEXIS 224 (Md. Ct. Special Appeals 2021): emphasized that key issue is not whether sniff occurs before ticket is issued but rather whether sniff adds time to the stop, so when traffic enforcement tasks and canine scan were conducted simultaneously, such multi-tasking "did not delay the attention or constitute an abandonment of his traffic enforcement mission."
6th Circuit courts:
U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005): once first drug dog fails to alert after reasonable suspicion, suspicion is dispelled; traffic stop cannot be extended to get a 2nd dog.
Foster v. Kentucky, 2019-CA-000472-MR (Ky. Ct. App. 2020): officer making stop did not impermissibly extend stop by standing beside officer asking occupants to leave when one was arguing

with officer with dog; this lasted only 40-45 seconds and after individuals left car, officer returned to processing ticket while sniff occurred under other officer. No impermissible extension.
Ohio v. King, 2020-Ohio-1312, 2020 Ohio App LEXIS 1269 (Oh. Ct. App. 2020): initial officer stopped vehicle with 3 occupants, saw indications of methamphetamine use, while dealing with traffic stop radioed for drug dog, asked driver to leave vehicle, drug dog arrived but did not alert, documents given back to driver with warning, but then asked driver if he objected to taking his own dog around vehicle, at which time dog alerted; fact driver "did not care" about second dog was not shown by prosecution to be valid consent and suspicion of meth use was dissipated by first dog's failure to alert and return of documents ended justification for stop. Motion to suppress should have been granted, so reversed.
Hernandez v. Boles, 949 F.3d 251 (6th Cir. 2020). Dog alerted outside car but not inside though it did eat some fast food out of a bag inside; but suspected amphetamines were found by trooper's manual search as well as gift cards re-encoded with credit card numbers; question was whether probable cause from search outside car was terminated when dog did not alert inside, making manual search inside unlawful. Reasonable jury, however, could infer that dog's distraction by food meant internal search was not thorough and did not dissipate probable cause from outside alert, justifying manual search. Therefore, qualified immunity affirmed.
Ohio v. Womack, 2021 Ohio App LEXIS 96 (Ct. App. Ohio, 2021): traffic stop was not prolonged for sniff, but even if that had been true, officer "had a reasonable, articulable suspicion of drug activity necessary to prolong the traffic stop for the purpose of conducting the open-air sniff with Rico." Such suspicion arose because officer had seen driver pick up a passenger from a known drug house and received conflicting information from those in the car for their being in the house, also acted nervous.
7th Circuit courts:
Jones v. U.S., 2021 US Dist LEXIS 2891 (CD Ill. 2021): Defendant was arrested for driving with suspended license and put in back of squad car, sniff around vehicle took place after arrest and defense argued that this was beyond purpose of traffic stop because arrest of defendant ended traffic stop. No authority that an arrest marks the end of a traffic stop.
9th Circuit courts:
U.S. v. Gorman, 859 F.3d 706 (9th Cir. 2017). Officer stopped Gorman on I-80 outside Wells, Nevada, could not get reason to search and released Gorman without citation; then he called ahead and suggested to the sheriff's office in Elko that they pull over Gorman provided they had a dog, which they did. Resulted in $167,000 cash, perhaps drug money to which dog alerted. No criminal charges filed, but government attempted civil forfeiture of cash. Non-routine record checks and dog sniffs are paradigm examples of "unrelated investigations" that may not be performed if they prolong a roadside detention absent independent reasonable suspicion. These inquiries "[l]ack[] the same close connection to roadway safety as the ordinary inquiries." **Rodriguez**, 135 S. Ct. at 1615. Court previously held that prolonging a traffic stop to perform an ex-felon registration check or a dog sniff is unlawful because these tasks are "aimed at detecting evidence of ordinary criminal wrongdoing" and are not "ordinary inquir[ies] incident to the traffic stop." Evans, 786 F.3d at 788 (original brackets omitted). The second stop was not an intervening circumstance but rather a continuation of an earlier unlawful detention, so also a violation of defendant's Fourth Amendment rights. Motion to suppress affirmed.
Idaho v. Riley, 2021 Ida. App. Unpub. LEXIS, 2021 WL 454250 (Id. Ct. App., 2021): radio call for drug-dog availability does not constitute abandonment of purpose of traffic stop. "Counting every pause taken while writing a citation as conduct that unlawfully adds time to a stop is inimical to the Fourth Amendment's reasonableness requirement."
Oregon v. Soto-Navarro, 309 Ore. App. 218 (Or. Ct. App. 2021): under Oregon constitution, traffic stop cannot be sole justification for sniff as state wishes to deter officers from converting minor traffic stops into criminal investigations.
10th Circuit courts:
Kansas v. Arrizabalaga, 447 P.3d 391 (Kansas Sup. Ct. 2019). Officer had not diligently and reasonably pursued purpose of stop after finding reasonable suspicion of illegal drug activity and did not attempt to

locate a dog until after stop had been going for 24 minutes by which time defendant had withdrawn consent to search vehicle and it took another 24 minutes for dog to arrive and 3 minutes later perform a search. Here officer was not diligently and reasonably pursuing the purpose of the stop and stop was of excessive duration. If officer had attempted to get a drug dog as soon as he had reasonable suspicion, search might have been legal. Instead, he continued talking to defendant and increased his own suspicion but did nothing to get a dog for 24 minutes, during which defendant revoked consent and stop became a detention and officer took keys to van from defendant. Motion to suppress affirmed, with one dissent.
Kansas v. Jones, 2021 Kan. App. Unpub. LEXIS 157, 2021 WL 1044987 (Kan. Ct. App. 2021): reasonable suspicion to extend traffic stop came from CI tip that Jones was traveling to KC to pick up methamphetamine, also was nervous, had dry mouth and was sweating, and was lying about returning from work.
11th Circuit courts:
U.S. v. Harris, 347 F.Supp. 1233 (SD Fla. 2018, thus in 11th Circuit), prior "not extensive" criminal history about which driver was honest + some nervousness + presence in high-crime area but car passing through did not provide reasonable suspicion to extend stop; traffic violation not pursued to end as officer threatened to arrest driver for obstruction if he and his family did not leave car. So, here there was an interruption in pursuing the traffic violation that was unacceptable, motion to suppress granted.
U.S. v. Anguiano, 791 Fed.Appx. 841, 11th Cir. 2019. Car stopped twice for separate traffic violations (but 2nd stop after radio contact between 1st and 2nd officers involved in stops) so successive search, which may be inherently more coercive and might amount to an unlawful arrest by prior caselaw. Both times dog was run around vehicle but first time no alert, second time alert. However, neither stop was unlawfully prolonged as was case in 9th Cir. case, Gorman, infra, where unreasonably prolonged first stop tainted second stop. Convictions affirmed.
U.S. v. Williams, 2020 US Dist. LEXIS 96779 (**SD Georgia 2020**). During 90 seconds officer ceased dealing with traffic violation he was assisting canine handler. If removal of passengers from car was incident to the traffic stop, it is not unrelated to the traffic stop, but if it was incident to the sniff, it was unrelated to the traffic stop. Here it was incident to the sniff. Therefore, **Rodriguez** and Campbell require suppression, which motion is granted.
Tedford v. Florida, 307 So.3d 738 (Fla. Ct. App., 2020): dog alerted during traffic stop to driver and passenger side doors, but no drugs found, then dog alerted to passenger. Defense argued that once no drugs were found, search should have ceased. Supreme Court has not addressed sniff of person during traffic stop. Dog touched defendant's pocket with his nose so was not a free-air sniff. Once dog alerted, officers had reasonable articulable suspicion of presence of drugs but since none were in vehicle, it was okay to sniff passenger's person, and that gave authority to remove defendant's shoe as part of search of his person.

Do courts readily identify cueing after Florida v. Harris?

Florida v. Harris, 568 U.S. 237 (2013): Kagan notes that Florida Supreme Court had insisted that field performance records be discoverable because that "data … could help to expose such problems as a handler's tendency (conscious or not) to "cue [a] dog to alert" and "a dog's inability to distinguish between residual odors and actual drugs."

> "[E]ven assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions.
>
> "… Harris's briefs in this Court raise questions about [Aldo's] training's adequacy—for example, whether the programs simulated sufficiently diverse environments and whether they used enough blind testing (in which the handler does not know the location of drugs and so cannot cue the dog)."

So cueing could mitigate evidence supporting probable cause and would then be relevant, which might make training records relevant.

Fourth Circuit courts:

U.S. v. Newell, 2012 US Dist LEXIS 18050, 2021 WL 329662 (WD North Carolina, 2021): Lit et al. (*Animal Cognition*, 2011) did not concern cueing dog to initiate sniff (which is okay) but rather cueing dog to alert. First was present here, but second was not.

Fifth Circuit courts:

U.S. v. Walsh, 2017 WL 3702018 (ND Texas): Expert argued that handler faced dog and this cued dog to sit, but court found no cueing as officer "has superior experience interpreting [dog's] particular behaviors, and based on the team's record, his interpretations are reliable."

U.S. v. Gomez, 444 F.Supp.3d 739 (**MD Louisiana 2020**): Prosecution expert Nope wrote article in which he said dog constantly looking back at handler was an indication of cueing but explained in testimony that dog in case seemed focused and motivated and that here looking at handler was natural trait when alerting; defense expert did not argue cueing (though defense did) but that team was not well trained; court believed dog was focused and motivated and motion to suppress denied.

8th Circuit courts:

U.S. v. Poole, 2013 WL 1694776 (ND Iowa 2013):

> "Based on his review of the video of this traffic stop, [defense expert Kyle Heyen] testified that Wingate erred in several aspects of the deployment in this case. He stated the dog never focused or alerted to any specific area on the vehicle. He also noted that [handler] did not keep the dog close to the vehicle when making turns and that he stopped moving, which could cue the dog to indicate. [Expert] did not see the dog alert or indicate the first two times he went around the vehicle. He noted that the dog did not seem to have any focus and that [handler] kept bringing the dog to the rear taillight on the driver's side. In his opinion, this behavior of stopping and watching the dog and bringing him to the same spot may have cued the dog to indicate in that spot. [Expert] did not see the dog display an alert or natural response to narcotics odor at any time on the video."

Court found dog was certified and had alerted to odor of narcotics.

U.S. v. Simeon, 115 F.Supp.3d 981 (ND Iowa 2015): disagreement among experts as to whether dog was cued decided in favor of government.

U.S. v Nabavi, 2017 US Dist LEXIS 49917 (D. Nebraska 2017), dog had 2 final indications, one of which was to freeze; dog also showed significant behavior changes as well as freezing; defense expert said prolongation of sniff and repeatedly pointing to target area was cueing:

> "[Defense expert] does not mention Henkel's testimony that Sacha provided an indication around a minute and a half into the search. And he similarly did not acknowledge that Sacha consistently alerted on the passenger side of the vehicle and independently directed much of her attention to the open passenger window. Each of these facts negate much of [defense expert's] argument regarding the alleged cuing behavior. The first indication was within [defense expert's] prescribed time-limit and a large amount of the redirection and verbal cuing alleged by [defense expert] did not occur until after the first couple minutes of the search."

Held: probable cause for search of vehicle because canine was reliable.

U.S. v. McClelland, 2017 WL 5158682 (DC South Dakota 2017). Touching specific part of car to indicate where dog should sniff could be inappropriate cueing but was not present here; handler having toy in handler's belt during sniff/search is not a good practice but did not establish cueing.

U.S. v. Tuton, 893 F.3d 562 (8th Cir. 2018): officer asked handler to sniff bag in bus's luggage compartment, but handler said dog would sniff entire compartment so as not to appear to be cueing the dog; dog showed considerable interest but did not give final indication on any bag; nevertheless because of dog's reluctance to leave compartment, handler described behavioral change as a "profound alert", not a "normal alert."

> "**Common sense** suggests that inadvertent cueing is an unlikely explanation for [dog's] *sustained* profound-alert behavior in the luggage compartment."

Dissent noted that in luggage compartment dog was not interested in bags but in rear wall of compartment.

Flora v. Southwest Iowa Narcotics Enforcement Task Force, 292 F.Supp.3d 875 (SD Iowa 2019):

> "Flora alleges that the circumstances surrounding Francesco's alert give this Court reason to discount the alert as a basis for probable cause because Miller cued Francesco's alert to Flora's vehicle. Miller's patrol car video shows that Miller moved his arms in an ambiguous fashion while leading Francesco counterclockwise around Flora's vehicle. Additionally, Miller reached behind his back and presented something to Francesco after Francesco sat behind the car's trunk…. (Unredacted Miller Patrol Car Video 14:01:35-14:02:05). Officer cueing can undermine the case for probable cause, ***Harris**, 568 U.S. at 247*, and Defendants have presented no evidence to counter Flora's claim that Miller's gestures amounted to cueing. Whether Miller cued Francesco's alert represents a genuine issue of material fact in determining whether Miller had probable cause to search Flora's car."

It appears that the unexplained gestures identified from the video shifted the burden of producing evidence to the defense (governmental agency in § 1983 action). Court notes that in a motion to dismiss, it must assess "the facts in the light most favorable to [plaintiff] as the Court must…."

11th Circuit courts:

U.S. v. Anguiano, 2017 U.S. Dist. LEXIS 99169 (MD Ala., 2017): Use of flashlight or laser to direct dog's attention to specific part of truck was not per se cueing without further evidence; defendants did not provide evidence that such practice was not **commonly accepted**.

U.S. v. Wofford, 2021 US Dist LEXIS 5587, 2021 WL 95916 (WD N.Y. 2021): Professor William Shields testified repeated commands to "sook" and shortening of leash may have cued dog to alert, but Shields did not know if this was also done during training, in which case it may not have cued the dog. Handler testified dog had never aggressively alerted solely in response to gestures or search commands, so magistrate judge recommends that district court deny motion to suppress.

Does a warrantless sniff outside an apartment/condo in a secured building violate the Fourth Amendment?

Florida v. Jardines, 569 U.S. 1 (2012, Scalia): "The officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." Handler testified dog began tracking airborne odor by … tracking back and forth, engaging in bracketing back and forth, back and forth. Handler gave dog the full six feet of the leash. Sat down before front door, "trained behavior upon discovering the odor's strongest point." Warrant to search issued.

Note: Scalia cites Sir William Blackstone (1723-1780), *Commentaries on the Laws of England*, vol. 4, chap. 16, Offenses Against the Habitations of Individuals, ¶¶ 223, 225, which provides that burglary can include "if the barn, stable, or warehouse be parcel of the mansionhouse, though not under the fame roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all it's branches and appurtenants, if within the curtilage or homestall." Black's Law Dictionary says this is the "inclosed space of ground and buildings immediately surrounding a dwelling-house."

Kagan (joined by Ginsburg and Sotomayor concurred, could base the decision on "reasonable expectation of privacy," not just trespass as per Scalia. Kyllo v. U.S., 533 U.S. 27 (2001) held that use of thermal imaging device, like a trained detection dog, a "device not in general use."

Alito (joined by Roberts, Kennedy, and Breyer) note entire process took a minute or two, finds not to be trespass, and criticizes Kagan's reasonable expectation argument as inconsistent with Illinois v. Caballes. Justice Alito:

> The concurring opinion attempts to provide an alternative ground for today's decision, namely, that Detective Bartelt's conduct violated respondent's reasonable expectations of privacy. But we have already rejected a very similar, if not identical, argument, see Illinois v. Caballes, 543 U. S. 405, 409–410 (2005), and in any event I see no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand.

2nd Circuit courts:

U.S. v. Lucas, 338 F.Supp. 139 (WD N.Y. 2019): "principles of Jardines do not extend to the common area outside a storage locker." Issuance of warrant for storage locker relied on far more than just the dog sniff.

6th Circuit courts:

Tennessee v. Wiley, 2020 Tenn Crim App LEXIS 25 (Tenn. Ct. Crim. App. 2020): vehicle in car-camping site at Bonnaroo Music Festival did not have curtilage.

7th Circuit courts:

U.S. v. Whitaker, 820 F.3d 849 (7th Cir. 2016) held "use of a drug-sniffing dog [at door inside secured apartment building] clearly invaded reasonable privacy expectations, as explained in Justice Kagan's concurring opinion in Jardines").

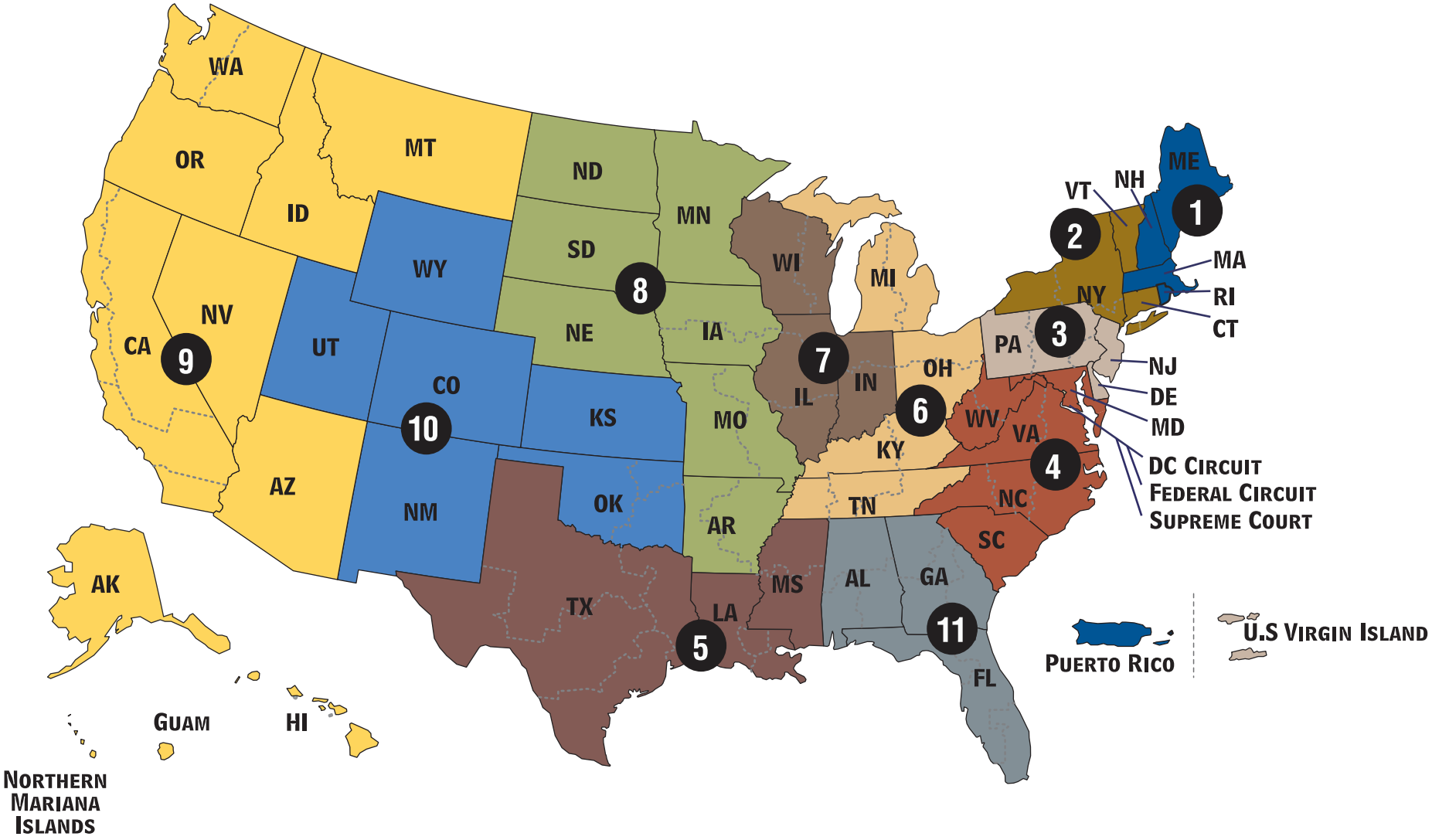
8th Circuit courts:

Minnesota v. Edstrom, 901 NW2d 455 (Ct.App.Minn., 2017): curtilage argument did not apply because prior Minnesota caselaw had concluded that "area immediately outside a resident's door in a secured, multi-unit condominium" was not within home's curtilage "because the area was not enclosed and the area was visible to anyone who might walk by"; however, Justice Kagan's concurrence in Jardines had argued that privacy rights were also violated because police use of dog was similar to use of (quoting Kagan) "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion." Thus, "this warrantless intrusion into the apartment violated Edstrom's legitimate expectation of privacy." Prior Minnesota law had allowed narcotics-detection dog to be used in hallway outside an *unsecured* apartment as there could be no expectation of privacy in such a situation, but that did not apply. Also, found to be violative of Minnesota Constitution.
U.S. v. Lewis, 2017 WL 2928199 (ND Indiana 2017): Use of a trained drug dog outside the hotel room implicated only defendant's hope that contraband would not be detected as it did not implicate any legitimate expectation that information about perfectly lawful activity would remain private. "Because the drug-detecting dog could not reveal any information other than the likely presence of illegal narcotics, it did not compromise an expectation of privacy that society is prepared to consider reasonable." However, because other evidence would have supported warrant, so exclusionary rule cannot preclude introduction of canine evidence.

Does an alert by a dog trained to recognize marijuana and other drugs in a jurisdiction where marijuana is legal provide probable cause for a search?
1st Circuit courts:
U.S. v. Centeno Gonzalez, 2015 U.S. Dist. LEXIS 177547 (D. Puerto Rico 2010): Firearms dog. "Thus, officers are entitled to seize anything on which a narcotics canine is trained to alert. At least in Puerto Rico, however, firearms are not per se contraband. Although defendant, as a convicted felon, is not permitted to possess a firearm, there is no evidence that he told anyone this or that anyone ran a check to determine if defendant had a criminal record even though, according to Agent Calderón, defendant's drivers' license was obtained once defendant was in the patrol car. Further, there is no evidence that any of the officers used the drivers' license information to check if defendant had a license to carry a firearm or if, on the other hand, he was a drug user, illegal alien, or other person prohibited from possessing a firearm. Thus, because the officers did not have probable cause to search the vehicle either before or after the canine alert, the search here cannot fall under the automobile exception. Therefore, the evidence seized from within the car was fruit of the unlawful arrest and should [*64] be suppressed." This argument was rejected by the district court and not addressed by the Ninth Circuit. **Reversed by district court and affirmed on appeal:** U.S. v. Centeno-Gonzalez, 989 F.3d 36 (9th Circuit, 2021): During arrest, officer arrived with firearms-detection dog sat, which, after defendant's arrest, indicated to the presence of a firearm. The court determined that the dog sniff was reasonable and was supported by probable cause because the officers had reason to believe defendant had been involved in a murder and any invasion of privacy was minimal. A gun had been used in the murder and the judge issuing the warrant appropriately found probable cause in the officer's affidavit about the dog's alert. Conviction affirmed.
5th Circuit courts:
Atsemet v. Texas, 2020 Tex.App. LEXIS 3734 (Texas Ct. App.) Fact suspects were from Colorado was considered relevant to issue of whether continued detention beyond traffic purpose of stop was completed, though so was fact officer had seen the suspects smoking marijuana and other facts.
6th Circuit courts:
U.S. v. Hayes, 2020 WL 4034309 (ED Tenn. 2020): handler "said he was not aware that Assistant Director Mike Lyttle of the TBI Forensic Services Division said that a *dog* trained to detect the odor of *marijuana* is now "useless," because the *dog* cannot differentiate between *marijuana* and commercial hemp, which is now *legal* in Tennessee." Traffic stop itself was illegal because there was no evidence that any violation, even a small one, had occurred and car was going slower than tractor-trailer that obscured officer's view. Fact car had Virginia plates was not good reason. Court notes marijuana remains illegal under federal law; also says that legalization of hemp does not mean odor of marijuana can no longer provide probable cause for search.
10th Circuit courts:
Colorado v. Gadberry, 440 P.3d 449 (Sup. Ct. Colo. 2019). Probable cause needed to deploy drug-detection dog because dog was trained to detect marijuana, a legal substance in Colorado.

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



Tedford v. State

Court of Appeal of Florida, Fourth District

November 12, 2020, Decided

No. 4D19-2184

Reporter
307 So. 3d 738 *; 2020 Fla. App. LEXIS 16111 **; 45 Fla. L. Weekly Fed. D 2533; 2020 WL 6604816

SHAUN ANTHONY TEDFORD, Appellant, v. STATE OF FLORIDA, Appellee.

Notice: Not final until disposition of timely filed motion for rehearing.

Prior History: [1]** Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Okeechobee County; Michael C. Heisey, Judge; L.T. Case No. 472018CF000545A.

Core Terms

dog sniff, ***alert***, sniff, ***dog***, traffic stop, drugs, probable cause, narcotics, privacy, seizure, intrusion, suppress, touched, passenger, pocket, front, nose, transport, seat, contraband, principles, synthetic, searched, luggage, probable cause to search, reasonable suspicion, sui generis, circumstances, marijuana, cannabis

Case Summary

Overview
HOLDINGS: [1]-The officers had an articulable and reasonable suspicion that defendant may be in possession of illegal drugs when he was approached by the ***dog*** for a sniff; [2]-Because a ***dog*** sniff was sui generis, the officers' suspicions that defendant had drugs on his person became articulable and reasonable after the search of the car revealed no drugs, and the ***dog*** sniff of defendant's person was reasonable and not intrusive; [3]-There was no evidence that the ***dog*** acted in any intimidating fashion or that his nose touched defendant for an extended period; [4]-The forced removal of defendant's shoe was a legal search, yielding the discovery of synthetic cannabis on his person, which in turn, justified his arrest and transport to jail.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Motions to Suppress

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

Evidence > ... > Presumptions > Particular

Presumptions > Regularity

HN1[] Substantial Evidence, Motions to Suppress

The appellate court reviews orders on motions to suppress to determine whether the trial court's factual findings are supported by competent substantial evidence and review legal issues de novo. A trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > ***Dog*** Sniff Searches

HN2[] Search & Seizure, Scope of Protection

The focus of the distinction between a "free air sniff" and an "up close sniff" is the concern about the intrusiveness of governmental action.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > ***Dog*** Sniff Searches

HN3[] Search & Seizure, Scope of Protection

The *Fourth Amendment of the United States Constitution* provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *U.S. Const. amend. IV*. Similarly, the Florida Constitution provides the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. This right shall be construed in conformity with the *4th Amendment to the United States Constitution*, as interpreted by the United States Supreme Court. As directed by the state constitution, the appellate court focuses its analysis on the legal principles espoused by the United States Supreme Court regarding Fourth Amendment searches in general and the appropriate use of law enforcement drug ***dogs*** to find contraband vis-à-vis the protections of the Fourth Amendment.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN4[] Search & Seizure, Scope of Protection

The United States Supreme Court has made clear that the Fourth Amendment, *U.S. Const. amend. IV*, protects people, not places because no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. The Court has explained that a search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Search & Seizure

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN5[] Law Enforcement Officials, Search & Seizure

The exception to the probable-cause requirement for limited seizures of the person recognized in Terry and its progeny rests on a balancing of the competing ***interests*** to determine the reasonableness of the type of seizure involved within the meaning of the Fourth Amendment's general proscription against unreasonable searches and seizures, *U.S. Const. amend. IV*. The court must balance the nature and quality of the intrusion on the individual's Fourth Amendment ***interests*** against the importance of the governmental

interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment ***interests***, the opposing law enforcement ***interests*** can support a seizure based on less than probable cause.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN6 **Search & Seizure, Scope of Protection**

Official conduct that does not compromise any legitimate ***interest*** in privacy is not a search subject to the Fourth Amendment, *U.S. Const. amend. IV*. Any ***interest*** in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that only reveals the possession of contraband compromises no legitimate privacy ***interest***. This is because the expectation that certain facts will not come to the attention of the authorities is not the same as an ***interest*** in privacy that society is prepared to consider reasonable.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > ***Dog*** Sniff Searches

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

HN7 **Search & Seizure, Scope of Protection**

A ***dog*** sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment, *U.S. Const. amend. IV*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > ... > Warrantless Searches > Stop & Frisk > Detention

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > ***Dog*** Sniff Searches

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

Criminal Law & Procedure > Search & Seizure > Seizure of Persons

HN8 **Search & Seizure, Scope of Protection**

A ***dog*** sniff conducted after the completion of a lawful traffic stop violates the Fourth Amendment, *U.S. Const. amend. IV*, because the authority for the seizure (the traffic stop) thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > ... > Warrantless Searches > Stop & Frisk > Detention

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > ***Dog*** Sniff Searches

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

Criminal Law & Procedure > Search & Seizure > Seizure of Persons

HN9 **Search & Seizure, Scope of Protection**

Because the Court has traditionally treated traffic stops analogous to a Terry stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's mission—to address the traffic violation that warranted the stop, and attend to related safety concerns. Thus, because detecting evidence of ordinary criminal wrongdoing has nothing to do with the reasons for a traffic stop or officer safety concerns during the stop, a ***dog*** sniff cannot be justified under the Fourth Amendment if conducting the sniff prolongs—i.e., adds time to—the stop, *U.S. Const. amend. IV*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN10 **Search & Seizure, Scope of Protection**

The Fourth Amendment, U.S. Const. amend. IV, establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN11 **Search & Seizure, Scope of Protection**

The expectation of privacy test has been added to, not substituted for, the traditional property-based understanding of the Fourth Amendment, U.S. Const. amend. IV.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > ***Dog*** Sniff Searches

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Sensory Perceptions

HN12 **Search & Seizure, Probable Cause**

In evaluating whether probable cause exists, a court must consider the totality of the circumstances. The Court also emphasized that probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. In short, a probable-cause hearing focusing on a ***dog***'s ***alert*** should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a ***dog*** performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

HN13 **Search & Seizure, Scope of Protection**

Importantly, Supreme Court precedents treat traffic stops as analogous to Terry stops in evaluating whether the Fourth Amendment has been violated, U.S. Const. amend. IV.

Counsel: Carey Haughwout, Public Defender, and Breanna Atwood, Assistant Public Defender, West Palm Beach, for appellant.

Ashley Moody, Attorney General, Tallahassee, and Deborah Koenig, Assistant Attorney General, West Palm Beach, for appellee.

Judges: CONNER, J. LEVINE, C.J., and KLINGENSMITH, J., concur.

Opinion by: CONNER

Opinion

[*739] CONNER, J.

We address an issue of first impression: the propriety of using a drug ***dog*** to sniff the passenger of a vehicle

during a traffic stop based on a reasonable and articulable suspicion the passenger possesses drugs, where the sniff itself is not based on a warrant or probable cause. Upon consideration of the lens of the totality of the circumstances in this case and utilization of the analysis applicable to a stop authorized by *Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)*, and its progeny, we conclude the officers did not violate the *Fourth Amendment*. Thus, we affirm the trial court's denial of the motion to suppress evidence.

Background

Shaun Tedford ("Defendant") was arrested and charged with one count of possession of 20 grams or less of cannabis and one count of possession of a synthetic cannabinoid after **[**2]** officers found synthetic cannabis on his person and cannabis in the back of the patrol vehicle following his transport to jail. Defendant moved to suppress the drugs, arguing that the officers lacked probable cause to search his person and the subsequent discovery of drugs in the patrol vehicle was fruit of the poisonous tree.

A narcotics detective testified that he worked with a drug ***dog*** named Samba. Samba was trained to detect five substances up to 100 feet away and within one foot of the exact location: marijuana, cocaine, methamphetamine, heroin, and ecstasy. However, Samba was *not* trained to ***alert*** to synthetic marijuana. Samba was also trained to get as close as he could to the narcotic and "***alert***" by sitting once he smells the narcotic. Samba has never given a false positive ***alert*** but can give a non-productive ***alert***, which is an ***alert*** to a substance that had been there in the past but was no longer there.

The narcotics detective was called to the scene by the officer who conducted the traffic stop. There were two occupants in the vehicle: the driver and Defendant, who was a front seat passenger. Upon arriving at the scene, the narcotics detective had both occupants step back to **[**3]** the officer's vehicle, which was about eight to ten feet away, and he brought Samba to the stopped vehicle. Samba first ***alerted*** to the front seat passenger door handle and then the front passenger seat. Based on the ***alerts***, the narcotics detective searched the entire vehicle but did not find anything. After the search of the car, he then had Samba conduct a sniff of both occupants. Samba did not ***alert*** to the driver but ***alerted*** to Defendant's front right pocket. Samba got close enough that his nose touched Defendant's pocket. The narcotics detective searched the pocket ***alerted*** to by Samba, as well as all pockets on Defendant's pants, but did not find anything. He did not search under Defendant's waistband or his underwear. After some resistance from Defendant, the narcotics detective removed and searched Defendant's right shoe and found synthetic marijuana. After an on-scene test to confirm the substance, Defendant was arrested and placed in the backseat of a third officer's vehicle.

The third officer testified that he was called to transport Defendant to jail. When transporting people, he always checks the backseat area before and after transport, which he did in this case. When he **[**4]** shined his flashlight on the backseat area after **[*740]** transport, a cellophane wrapper caught his attention. He then found marijuana.

Defendant moved to suppress the drugs. At the suppression hearing, Defendant conceded that there was probable cause for the traffic stop, that there was probable cause to search the vehicle, and that it was a short time between the stop and when the narcotics detective conducted the ***dog*** sniff of Defendant's person. However, he argued that after the search of the car yielded no drugs, probable cause had "gone away" and the narcotics detective should have ceased his search for drugs and not used Samba to search Defendant's person. Defendant contended to the trial court that without probable cause or a warrant, the search was unconstitutional.

The trial court issued a written order denying the motion to suppress, finding that Samba conducted a free air sniff and "the search of [Defendant's] person, pursuant to the K9 ***alert*** [of Defendant's person], was permissible as the K9 ***alert*** gave [the narcotics detective] the necessary probable cause to conduct the search."

Defendant entered a plea of no contest to both counts and expressly reserved the right to appeal the denial **[**5]** of the motion to suppress. After a county jail sentence was imposed, Defendant gave notice of appeal.

Appellate Analysis

HN1[↑] "We review orders on motions to suppress to determine whether the trial court's factual findings are supported by competent substantial evidence and review legal issues de novo." *Gentles v. State, 50 So. 3d 1192, 1196 (Fla. 4th DCA 2010)* (quoting *State v. Young, 971 So. 2d 968, 971 (Fla. 4th DCA 2008)*. "A

trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness and the court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *Id.* (quoting *Day v. State, 29 So. 3d 1178, 1179 (Fla. 4th DCA 2010))*.

Defendant argues that the ***dog*** sniff of his person was unlawful because it was a search without the requisite probable cause or warrant. More specifically, Defendant argues that after the search of the car revealed no contraband or illegal activity, probable cause to search further was dispelled. Defendant further argues that the sniff of his person was not a "free air sniff" conducted from a distance because the ***dog***'s nose touched him, "invad[ing] [Defendant's] privacy and bodily integrity." ***HN2***[⬆] The focus of the distinction between a "free air sniff" and an "up close sniff" is the concern **[**6]** about the intrusiveness of governmental action. Defendant concedes, however, that the stop, sniff of the car, and search of the car were lawful.

The State counters that the sniff of Defendant's person did not constitute a search, and thus, the *Fourth Amendment* was not implicated. More specifically, the State argues that the sniff of Defendant's person did not violate the *Fourth Amendment* because ***dog*** sniffs have been recognized as "*sui generis*" and authorized under *Terry*. The State alternatively argues that if the sniff of Defendant's person is deemed a search, then there was probable cause for the search.[1]

HN3[⬆] The *Fourth Amendment of the United States Constitution* provides that "[t]he **[*741]** right of the people to be secure in their *persons*, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . . ." *U.S. Const. amend. IV* (emphases added). Similarly, the Florida Constitution provides "[t]he right of the people to be secure in their *persons*, houses, papers and effects against *unreasonable* searches and seizures . . . . This right shall be construed in conformity with the *4th Amendment to the United States Constitution*, as interpreted by the United States Supreme Court." *Art. I, § 12, Fla. Const.* (emphases added). As directed by our state constitution, we focus our analysis on the legal principles espoused by the United States **[**7]** Supreme Court regarding *Fourth Amendment* searches in general and the appropriate use of law enforcement drug ***dogs*** to find contraband vis-à-vis the protections of the *Fourth Amendment*. Those principles are discussed in five cases: *United States v. Place, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983)*; *Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005)*; *Florida v. **Harris**, 568 U.S. 237, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013)*; *Florida v. Jardines, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013)*; and *Rodriguez v. United States, 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015)*. We note that the Supreme Court has not directly addressed the propriety of a ***dog*** sniff of a person while detained for a traffic stop. *Place* and *Caballes* address the *Fourth Amendment* and ***dog*** sniffs in the context of seizures of personal property. *Jardines* addresses a ***dog*** sniff conducted on the front porch of the defendant's home. ***Harris*** discusses the contours of probable cause in relation to a ***dog*** sniff. *Rodriguez* addresses the propriety of a ***dog*** sniff after a traffic stop has come to an end.

Dog *Sniffs and U.S. Supreme Court Precedents*

HN4[⬆] The United States Supreme Court has made clear that "the *Fourth Amendment* protects people, not places" because "[n]o right is held more sacred, or is more carefully guarded, by the common law, than *the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law*." *Terry, 392 U.S. at 9* (emphasis added) (quoting *Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251, 11 S. Ct. 1000, 35 L. Ed. 734 (1891))*. The Court has explained that "[a] 'search' occurs when an expectation **[**8]** of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984)*. In *Jardines*, the Court noted that "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the *Fourth Amendment*' has 'undoubtedly occurred.'" *Jardines, 569 U.S. at 5* (quoting *United States v. Jones, 565 U.S. 400, 406 n.3, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012))*.

Contending the ***dog*** sniff in this case violated the *Fourth Amendment*, Defendant asserts that Samba touching his pocket with his nose during the sniff "invaded [his]

[1] It is important to note that Defendant makes no issue on appeal about the seizure of his person (detention as a passenger) or the length of the seizure. His sole focus on appeal is the propriety of the ***dog*** sniff as a search of his person. We proceed to address Defendant's contention that the ***dog*** sniff of his person was a search that required probable cause.

privacy and bodily integrity." Additionally, Defendant challenges the trial court's factual finding that the ***dog*** sniff was a "free air sniff," arguing that the finding was not supported by competent, substantial evidence because the evidence was undisputed that Samba's nose touched his pocket. In support of his position that the ***dog***'s touch invaded his privacy and bodily integrity, Defendant cites several **[*742]** federal cases.[2] However, the cases upon which Defendant relies are not relevant to our analysis in this case because those cases address random ***dog*** sniffs of persons where there was no reasonable suspicion of criminal activity.

Terry is the first case in which the Supreme Court "recognized 'the narrow authority of police officers who suspect **[**9]** criminal activity to make limited intrusions on an individual's personal security based on less than probable cause.'" *Place, 462 U.S. at 702* (quoting *Michigan v. Summers, 452 U.S. 692, 698, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)*). Although *Place, Caballes*, and *Jardines* analyze *Fourth Amendment* protections in the context of governmental actions constituting a *seizure of property*, the Court announced some general principles of *Fourth Amendment* jurisprudence that apply to actions constituting searches as well. ***HN5***[⬆] For example, in *Place*, the Court explained:

> The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing ***interests*** to determine the reasonableness of the type of seizure involved within the meaning of "the *Fourth Amendment's* general proscription against unreasonable searches and seizures." *392 U.S., at 20, 88 S. Ct., at 1879*. *We must balance the nature and quality of the intrusion on the individual's Fourth Amendment* ***interests*** *against the importance of the governmental* ***interests*** *alleged to justify the intrusion*. When the nature and extent of the detention are *minimally intrusive* of the individual's *Fourth Amendment* ***interests***, the opposing law enforcement ***interests*** can support a seizure *based on less than probable cause*.

Place, 462 U.S. at 703 (emphases added). Applying this balancing principle, the Court in *Place* concluded **[**10]** that:

> [W]hen an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

Id. at 706.

More important to our analysis is the Court's discussion in *Place* as to whether a ***dog*** sniff of luggage was a *search* prohibited by the *Fourth Amendment*. The Court recognized that the purpose of seizing Place's luggage was to conduct a ***dog*** sniff. *Id.* The Court observed that a ***dog*** sniff is *sui generis* because the sniff "does not require opening the luggage," "does not expose noncontraband items that otherwise would remain hidden from public view," and "discloses only the presence or absence of narcotics, a contraband item." *Id. at 707*. Because the information disclosed by a ***dog*** sniff is limited and less intrusive than a typical search, the Court "conclude[d] that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' **[**11]** within the meaning of the *Fourth Amendment*." *Id.* We note, however, that the context of the *Fourth Amendment* principles applied in *Place* involved exposure of personal property **[*743]** to a ***dog*** sniff, rather than exposing a person to a ***dog*** sniff.

The Court's opinion in *Caballes* also discusses important *Fourth Amendment* principles regarding the use of ***dog*** sniffs by law enforcement. There, the question addressed by the Court was very narrow: "Whether the *Fourth Amendment* requires reasonable, articulable suspicion to justify using a drug-detection ***dog*** to sniff a vehicle during a legitimate traffic stop." *Caballes, 543 U.S. at 407*. Importantly, the Court proceeded "on the assumption that the officer conducting the ***dog*** sniff had no information about respondent except that he had been [properly] stopped for speeding." *Id.* With that assumption, the Court went on to note that "a seizure that is lawful at its inception can violate the *Fourth Amendment* if its manner of execution unreasonably infringes ***interests*** protected by the Constitution." *Id.* The Court noted that the Illinois Supreme Court suppressed the evidence obtained as the result of a ***dog*** sniff because, "[i]n its view, the use

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[2] *B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999)*; *Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982)*; *Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223 (E.D. Tex. 1980)*.

of the ***dog*** converted the citizen-police encounter from a lawful traffic stop into a drug investigation, and because the **[**12]** shift in purpose was not supported by any reasonable suspicion that respondent possessed narcotics, it was unlawful." *Id. at 408*. The Court disagreed with the analysis of the Illinois Supreme Court:

> In our view, conducting a ***dog*** sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the ***dog*** sniff itself infringed respondent's constitutionally protected ***interest*** in privacy. ***HN6***[] Our cases hold that it did not.
>
> Official conduct that does not "compromise any legitimate ***interest*** in privacy" is not a search subject to the *Fourth Amendment*. *Jacobsen, 466 U.S., at 123, 104 S. Ct. 1652*. We have held that any ***interest*** in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy ***interest***." *Ibid.* This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an ***interest*** in "privacy that society is prepared to consider reasonable." *Id., at 122, 104 S. Ct. 1652* (punctuation omitted). In *United States v. Place*[ ], we treated a canine sniff by a well-trained narcotics-detection ***dog*** as "*sui generis*" because it "discloses only the presence or absence of **[**13]** narcotics, a contraband item." *Id., at 707, 103 S. Ct. 2637*; see also *Indianapolis v. Edmond, 531 U.S. 32, 40, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000)*.

Id. at 408-09. ***HN7***[] After concluding that "use of a well-trained narcotics-detection ***dog*** . . . during a lawful traffic stop, generally does not implicate legitimate privacy ***interests***," the Court went on to hold that "[a] ***dog*** sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the *Fourth Amendment*." *Id. at 409-10*. We again note that the context of the Court's analysis in *Caballes* was a ***dog*** sniff of the exterior of the respondent's car.

HN8[] The Court's decision in *Rodriguez*, makes clear that a ***dog*** sniff conducted *after* the completion of a lawful traffic stop violates the *Fourth Amendment* because the "[a]uthority for the seizure [(the traffic stop)] thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez, 575 U.S. at 354*. Critical to the Court's reasoning was the fact that **[*744]** "[a] ***dog*** sniff, by contrast [to the ordinary inquiries incident to a traffic stop], is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'" *Id. at 355* (third alteration in original) (quoting *Indianapolis v. Edmond, 531 U.S. 32, 40-41, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000)*). ***HN9***[] Because the Court has traditionally treated traffic stops analogous to a *Terry* **[**14]** stop, "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns." *Id. at 354* (citations omitted). Thus, because detecting evidence of ordinary criminal wrongdoing has nothing to do with the reasons for a traffic stop or officer safety concerns during the stop, a ***dog*** sniff cannot be justified under the *Fourth Amendment* if "conducting the sniff '*prolongs*'—i.e., adds time to—'the stop.'" *Id. at 357* (emphasis added).

In *Jardines*, the Court addressed the use of a drug ***dog*** on the front porch of the defendant's home. *569 U.S. at 3*. The ***dog*** accompanied officers as they approached the front door to conduct a citizen encounter, analogous to any visitor approaching a house to make an inquiry of the occupant. *Id. at 3-4*. The ***dog***'s ***alert*** to drugs at the front door of the residence was the basis for seeking a search warrant. *Id. at 4*. ***HN10***[] The Court observed:

> The [Fourth] Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the *Fourth Amendment*" has "undoubtedly occurred."

569 U.S. at 5 (quoting *Jones, 565 U.S. at 406 n.3*.). After noting that the officers "gathered [information for the search warrant] by physically entering and occupying [the curtilage of the home] to engage in conduct [(the ***dog*** sniff)] not explicitly or implicitly permitted by **[**15]** the homeowner," *id. at 6*, the Court went on to address the state's argument that *Place* and *Caballes* established that an investigation using a drug ***dog***, by definition, does not implicate any legitimate privacy ***interest***. *Id. at 10*. The Court responded to the state's argument by simply stating it addressed the same argument in *Jones*, which had been decided in the immediate prior term. *Id.*

HN11[⬆] In *Jones*, the Court said that although *Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)*, established that property rights are not the sole measure for the *Fourth Amendment* and an additional measure is the reasonable expectation of privacy test in determining the validity of searches under the *Fourth Amendment*, the expectation of privacy test "has been *added to*, not *substituted for*," the traditional property-based understanding of the *Fourth Amendment*. *Jones, 565 U.S. at 408-09*. For that reason, the majority in *Jardines* deemed it unnecessary to decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*, because the officers clearly intruded on Jardines' property without express or implied permission to conduct a ***dog*** sniff. *Jardines, 569 U.S. at 11*. Pertinent to our analysis is the Court's conclusion that because the ***dog*** *physically intruded* onto Jardines' property, the *Fourth Amendment* was violated. However, we note that *Jardine* **[**16]** s did not involve a *Terry* stop in a public place.

[*745] In ***Harris***, the Court addressed the probable cause standard in the context of a ***dog*** ***alert*** to drugs. The Court rejected the evidentiary standards established by the Florida Supreme Court to allow a drug ***dog*** ***alert*** to constitute probable cause to search. ***Harris***, *568 U.S. at 248*. The standards set by the Florida Supreme Court were deemed "inconsistent with the 'flexible, common-sense standard' of probable cause." *Id. at 240* (quoting *Illinois v. Gates, 462 U.S. 213, 239, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*). After observing that "[t]he test for probable cause is not reducible to 'precise definition or quantification,'" the Court noted that "[a]ll we have required is the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" *Id. at 243-44* (second alteration in original) (quoting *Gates, 462 U.S. at 238, 231)*. ***HN12***[⬆] The Court also made clear that in evaluating whether probable cause exists, a court must consider the totality of the circumstances. *Id. at 244*. The Court also emphasized that probable cause is "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Id.* (quoting *Gates, 462 U.S. at 232*).

Important to our analysis, the Court said:

> In short, a probable-cause hearing focusing **[**17]** on a ***dog***'s ***alert*** should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a ***dog*** performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause.

Id. at 247-48. Even more important to our analysis is a comment the Supreme Court made in a footnote of the opinion:

> In the usual case, *the mere chance that the substance might no longer be at the location does not matter*; a well-trained ***dog***'s ***alert*** establishes a fair probability—all that is required for probable cause—that either drugs or evidence of a drug crime (like the precursor chemicals in ***Harris***'s truck) will be found.

Id. at 247 n.2 (emphasis added).

Application of U.S. Supreme Court Precedents to This Case

As previously stated, Defendant does not dispute that Samba's ***alert*** on the car provided probable cause to search the vehicle. Analogous to a ***dog*** ***alert*** to a vehicle, we conclude that Samba's ***alert*** after sniffing Defendant's body provided **[**18]** probable cause to remove his shoe, leading to the discovery of the synthetic marijuana. The question we resolve is whether under the facts of this case, Samba's sniff of Defendant's body constituted a search in violation of the *Fourth Amendment*.

Our analysis is guided by the context of the events as they unfolded. Stated another way, consideration of the totality of the circumstances in this case requires the recognition that the ***dog*** sniff was conducted as a result of a legal traffic stop, and there is no issue as to the length of the stop or whether the sniff of Defendant's person was conducted after the procedures for a routine traffic stop concluded. ***HN13***[⬆] Importantly, Supreme Court precedents treat traffic stops as analogous to *Terry* stops in evaluating whether the *Fourth Amendment* has been violated.

[*746] We are satisfied that the officers in this case had an articulable and reasonable suspicion that Defendant may be in possession of illegal drugs when he was approached by Samba for a sniff. Samba first

alerted on the passenger door handle and the passenger seat. Defendant was sitting in that same seat when the car was stopped. Because a ***dog*** sniff is *sui generis*, the officers' suspicions that Defendant had drugs on his person **[**19]** became articulable and reasonable *after* the search of the car revealed no drugs. On the facts of this case, we do not view the sniff of Defendant's person to violate the *Fourth Amendment*, using the lens of a *Terry* stop, which is applicable to a traffic stop. In other words, balancing the nature and quality of the intrusion (a single touch of a ***dog***'s nose) on the individual's *Fourth Amendment* ***interests*** (freedom not to be touched) against the importance of the governmental ***interests*** alleged to justify the intrusion (locating illegal drugs), we are satisfied the ***dog*** sniff of Defendant's person was reasonable and not intrusive. This is because it occurred *after* Samba ***alerted*** on the seat in which Defendant was sitting, and it occurred *after* a search of the passenger seat area and the entire car did not reveal drugs. Because a drug ***dog*** sniff is *sui generis*, we also reject Defendant's argument that a *single brief touch* of Samba's nose to Defendant's pocket was impermissibly intrusive and violated Defendant's personal privacy of his body or the *Fourth Amendment*. There is no evidence that Samba acted in any intimidating fashion or that his nose touched Defendant for an extended period.[3]

We conclude that during the traffic stop, a reasonable **[**20]** suspicion developed that Defendant was in possession of illegal drugs. This reasonable suspicion justified a ***dog*** sniff of Defendant's person. Additionally, there was no *Fourth Amendment* violation when Samba sniffed Defendant's person and briefly touched Defendant's pocket one time with the ***dog***'s nose. Once Samba ***alerted*** on Defendant's person, the officers had probable cause to search Defendant for illegal drugs. The forced removal of Defendant's shoe was a legal search, yielding the discovery of synthetic cannabis on his person, which in turn, justified his arrest and transport to jail. The transport to jail resulted in more natural cannabis found in Defendant's constructive possession. Thus, we affirm the trial court's denial of the motion to suppress.[4]

Affirmed.

LEVINE, C.J., and KLINGENSMITH, J., concur.

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[3] We leave for another day the determination of whether the following scenarios violate the *Fourth Amendment*: (1) repeated touching of a person by a drug ***dog***'s nose, particularly to different areas of the body; (2) a drug ***dog***'s ***alert*** to a person's crotch; and (3) the sequence of the ***dog*** sniff in a different chain of events.

[4] We also note that our decision in this case is narrow, based on the specific facts, and reaffirm our holding in *Rehm v. State, 931 So. 2d 1071 (Fla. 4th DCA 2006)*, "that a ***dog*** ***alert*** to a vehicle, or a seat in a vehicle, does not, *in and of itself*, provide sufficient probable cause to search the driver or a passenger." *Id. at 1072* (emphasis added).

People v. Gadberry

Supreme Court of Colorado

May 20, 2019, Decided

Supreme Court Case No. 18SA208

Reporter
2019 CO 37 *; 440 P.3d 449 **; 2019 Colo. LEXIS 373 ***; 2019 WL 2167909

Plaintiff-Appellant: People of the State of Colorado, v. Defendant-Appellee: Amanda Eileen Gadberry.

Prior History: [*1]** Interlocutory Appeal from the District Court. Mesa County District Court Case No. 17CR2426. Honorable Valerie J. Robison, Judge.

Disposition: Order Affirmed.

Core Terms

marijuana, alert, probable cause, ***sniff***, plate, deploy, trained, ***dog***, front, missing, reasonable expectation of privacy, violation of state law, search and seizure, suppression order, disclose

Case Summary

Overview

HOLDINGS: [1]-The trial court properly granted defendant's motion to suppress evidence of methamphetamine lodged inside a wallet in a car, because the officers needed probable cause under Colo. Const. art. II, § 7 that the vehicle contained illegal narcotics before they deployed a drug-detection ***dog***; [2]-An expectation of privacy doesn't disappear once a citizen states that certain items aren't in the car or on their person. Therefore, defendant's declaration that her car contained no ***marijuana*** didn't strip her of her constitutional rights.

Outcome
Order affirmed.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > ... > Controlled Substances > Substance Schedules > Hashish & ***Marijuana***

HN1[] **Fundamental Rights, Search & Seizure**

Colo. Const. art. II, § 7 provides persons twenty-one years of age or older with a reasonable expectation of privacy in the lawful activity of possessing an ounce or less of ***marijuana***, therefore necessitating probable cause that an item or area contains a drug in violation of state law before officers deploy ***dogs*** trained to alert to ***marijuana***.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN2 **Fundamental Rights, Search & Seizure**

For suppression orders, the appellate court reviews ***legal*** conclusions de novo but defers to factual findings that have record support. Thus, the appellate court reviews the constitutionality of a ***sniff*** de novo.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > ... > Controlled Substances > Substance Schedules > Hashish & ***Marijuana***

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Vehicle Searches

HN3 **Search & Seizure, Probable Cause**

Where a drug-detection ***dog*** is trained to alert to ***marijuana***, the officers need probable cause that the vehicle contains a drug in violation of state law before conducting an exploratory ***sniff***.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN4 **Fundamental Rights, Search & Seizure**

Both the U.S. Constitution and the Colorado Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Colo. Const. art. II, § 7. As a result, when a person has a reasonable expectation of privacy, the prohibition on unreasonable searches and seizures protects a citizen from governmental intrusion. The yardstick is that there must be a reasonable expectation of privacy, and there is no reasonable expectation of privacy in contraband. Accordingly, a ***sniff***, which typically does not expose noncontraband items that otherwise would remain hidden from public view, during an otherwise ***legal*** stop isn't an unreasonable search prohibited by either the federal or state constitution.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN5 **Search & Seizure, Expectation of Privacy**

An expectation of privacy doesn't disappear once a citizen states that certain items aren't in the car or on their person.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN6 **Search & Seizure, Expectation of Privacy**

It's only once someone discloses the presence of contraband, rather than withholding disclosure, that an expectation of privacy is lost.

Headnotes/Summary

Headnotes

Searches and Seizures—Drug-Detection *Dog*—Probable Cause.

Syllabus

At issue in this interlocutory appeal is whether law enforcement needed probable cause before deploying a drug-detection ***dog*** that was trained to alert to both ***marijuana*** and other substances. Adopting the analytical framework announced today in the companion case, *People v. McKnight, 2019 CO 36, 446 P.3d 397*, the supreme court holds that the officers needed

probable cause before deploying such a drug-detection ***dog***, and a defendant's statements regarding the presence or non-presence of ***marijuana*** does not change this. Because the officers did not have probable cause, the drug-detection ***dog*** never should have been deployed. Accordingly, we affirm the trial court's suppression order.

Counsel: Attorneys for Plaintiff-Appellant: Daniel P. Rubinstein, District Attorney, Twenty-First Judicial District; Brian Conklin, Deputy District Attorney, Grand Junction, Colorado.

Attorneys for Defendant-Appellee: Megan Ring, Public Defender; Kristin Westerhorstmann, Deputy Public Defender, Grand Junction, Colorado.

Judges: JUSTICE HOOD delivered the Opinion of the Court. **[***2]** CHIEF JUSTICE COATS dissents, and JUSTICE BOATRIGHT and JUSTICE SAMOUR join in the dissent. JUSTICE SAMOUR dissents, and JUSTICE BOATRIGHT joins in the dissent.

Opinion by: HOOD

Opinion

[451]** *en banc*

JUSTICE HOOD delivered the Opinion of the Court.

[*P1] ***Marijuana*** isn't meth. But drug-detection ***dog*** Talu can't tell the difference. So when Talu alerted to the driver and passenger side doors of Amanda Gadberry's truck, the officers didn't know whether Talu had found ***marijuana***, which is ***legal*** in some circumstances in Colorado, or meth, which never is. This quandary led us in *People v. McKnight*, a companion case also announced today, to hold that persons twenty-one years of age or older have a reasonable expectation of privacy in the possession of one ounce or less of ***marijuana*** in Colorado, therefore requiring officers to have probable cause that an item or area contains a drug in violation of state law before they deploy a ***dog*** trained to alert to ***marijuana***. *See* *2019 CO 36, ¶ 7, 446 P.3d 397*. We see no difference between Gadberry's situation and McKnight's. Thus, Talu's wide-ranging, though outdated, training demanded probable cause before the drug-detection ***dog***'s deployment, just as it did in *McKnight*.

[*P2] In this interlocutory appeal, we therefore hold **[***3]** that the officers needed probable cause to deploy Talu. They didn't have it. Accordingly, we affirm the trial court's suppression order.

I. Facts and Procedural History

[*P3] While patrolling Mesa County, Deputy Stuckenschneider observed a black Dodge pickup driving with a missing front license plate. Stuckenschneider phoned Deputy Briggs, alerting her to the situation. But this wasn't just any vehicle with a missing front plate—a few days prior, Sergeant Beagley had stopped the same car for being incorrectly registered and for displaying invalid license plates. Briggs knew all of this when she received the alert from Stuckenschneider. With knowledge of the previous stop and Stuckenschneider's observation regarding the front plate, Briggs pulled the Dodge over. In the driver's seat, she found Gadberry.

[*P4] Briggs informed Gadberry that she initiated the stop because of the missing front plate. Gadberry told Briggs that the car indeed had a front plate and, upon inspection, Briggs found the missing plate shoved into the grill of the Dodge, although the car was still improperly registered. While all of this was happening, Beagley, Handler Cheryl Yaws, and ***dog*** Talu, who is trained to alert to methamphetamine, **[***4]** cocaine, heroin, and ***marijuana***, arrived on the scene. During the time that it took Briggs to run Gadberry's plates, Beagley asked Gadberry if there was any ***marijuana*** in the vehicle. She said no.

[*P5] Shortly thereafter, Talu ***sniffed*** around the car and alerted to the driver and passenger doors. With the benefit of that alert, the officers conducted a search of the car, finding a cellophane wrapper of methamphetamine lodged inside a wallet. Gadberry was then charged with (1) display of a fictitious license plate, (2) possession of drug paraphernalia, and (3) possession of a controlled substance.

[*P6] Gadberry moved to suppress the evidence on four grounds: (1) Briggs didn't have reasonable suspicion to initiate the stop; (2) the stop was unreasonably prolonged; (3) Talu's ***sniff*** was unlawful

because Talu was trained to alert on both ***marijuana***, a ***legal*** substance, and illegal substances, such as methamphetamine; and (4) Talu's ***sniff*** was unreliable. The trial court denied claims one and two. It held that the "fellow officer rule" imputed Stuckenschneider's knowledge of the missing front plate and improper registration to Briggs, therefore justifying the stop. Additionally, it found that the stop only **[***5]** lasted long enough for Briggs to obtain information, view the vehicle, and run the plates. As a result, the court concluded that the officers didn't unreasonably delay Gadberry.

[*P7] The trial court did, however, grant Gadberry's motion to suppress based on claim three. It followed the court of appeals' decision in *People v. McKnight, 2017 COA 93, P.3d*, and found that a ***sniff*** is a search when a drug-detection ***dog*** can alert to both illegal and ***legal*** substances. Here, no one presented any evidence suggesting that the vehicle had any illegal substances in it or **[**452]** that Gadberry was aware of all the belongings in the car, especially since multiple people had driven the car in the few days before the stop. Therefore, the trial court reasoned that, under *McKnight*, the officers on the scene needed reasonable suspicion that Gadberry had been involved in criminal activity to initiate Talu's ***sniff***. Because the officers here lacked reasonable suspicion to deploy Talu, the court granted the motion to suppress and didn't reach claim four.

[*P8] The People filed the interlocutory appeal at issue here, raising the following question: Did the trial court err in finding that a free air ***sniff*** of the Defendant's vehicle by a ***dog*** trained in ***marijuana*** **[***6]** and illegal narcotics was a search, which required a showing of reasonable suspicion?

II. Analysis

[*P9] We start with the standard of review and a quick synopsis of relevant search and seizure caselaw. As we hold today in *McKnight*, ***HN1***[↑] *article II, section 7 of the Colorado Constitution* provides persons twenty-one years of age or older with a reasonable expectation of privacy in the lawful activity of possessing an ounce or less of ***marijuana***, therefore necessitating probable cause that an item or area contains a drug in violation of state law before officers deploy ***dogs*** trained to alert to ***marijuana***. *See McKnight, ¶ 7*. Gadberry is such an individual—regardless of her statements about the contents of the vehicle—and, therefore, the officers needed probable cause that the vehicle contained a drug in violation of state law before they conducted an exploratory ***sniff***. Because there was no such probable cause here, the officers impermissibly deployed Talu.

A. Standard of Review

[*P10] ***HN2***[↑] For suppression orders, we review ***legal*** conclusions de novo but defer to factual findings that have record support. *See People v. Gutierrez, 222 P.3d 925, 931-32 (Colo. 2009)*. Thus, we review the constitutionality of the ***sniff*** de novo.

B. The Officers Needed Probable Cause to Deploy Talu

[*P11] The narrow question before us is only whether **[***7]** Talu's ***sniff*** required probable cause. The validity of the investigatory stop is not at issue. Here, ***HN3***[↑] where the drug-detection ***dog*** was trained to alert to ***marijuana***, the officers needed probable cause that the vehicle contained a drug in violation of state law before conducting the exploratory ***sniff***. *See McKnight, ¶ 7*.

[*P12] ***HN4***[↑] Both the U.S. Constitution and the Colorado Constitution protect against unreasonable searches and seizures. *See U.S. Const. amend. IV* ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); *Colo. Const. art. II, § 7* ("The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures . . . ."). As a result, when a person has a reasonable expectation of privacy, the prohibition on unreasonable searches and seizures protects a citizen from governmental intrusion. *See Kyllo v. United States, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)*; *Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)* (Harlan, J., concurring).

[*P13] The yardstick, however, is that there must be a *reasonable* expectation of privacy. And both the Supreme Court and this court have held that there is no reasonable expectation of privacy in contraband. *See Illinois v. Caballes, 543 U.S. 405, 408-09, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005)*; *People v. Esparza, 2012 CO 22, ¶ 11, 272 P.3d 367, 370*. Accordingly, a ***sniff***, which typically "does not expose noncontraband **[***8]** items that otherwise would remain hidden from public view," during an otherwise ***legal*** stop isn't an

unreasonable search prohibited by either the federal or state constitution. *Caballes, 543 U.S. at 409* (quoting *United States v. Place, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983)*); *accord Esparza, ¶ 11, 272 P.3d at 370*.

[*P14] In the companion case, we hold that this isn't always the case. *See McKnight, ¶ 7*. There, a ***dog*** trained to alert to both **[**453]** ***marijuana*** and state-banned substances alerted to methamphetamine in a vehicle. *Id. at ¶¶ 12-14*. These facts bear an uncanny resemblance to our current case. The People, however, argue that there is a crucial difference: McKnight never stated that there wasn't any ***marijuana*** in the car. But we fail to see the relevance of that fact. ***HN5***[⬆] An expectation of privacy doesn't disappear once a citizen states that certain items aren't in the car or on their person. Talu might still alert to ***marijuana***, regardless of Gadberry's statements, and it's this potential to reveal lawful activity that renders Talu's ***sniff*** suspect.

[*P15] Consider whether Gadberry uttering that there is "nothing" in the car versus there isn't any "***marijuana***" in the car should yield any doctrinal difference. If Gadberry states that there's nothing in the car, or says nothing, Talu still might still alert **[***9]** to ***legal*** activity—the possession of one ounce or less of ***marijuana***. That's why we held in *McKnight* that probable cause is required. *McKnight, ¶¶ 54-55*. ***HN6***[⬆] It's only once someone discloses the presence of contraband, rather than withholding disclosure, that an expectation of privacy is lost. *See, e.g., People v. Carper, 876 P.2d 582, 584-85 (Colo. 1994)* (holding that the defendant didn't have a subjective expectation of privacy in the contents of his shirt pocket after disclosing the presence of cocaine in the pocket to police officers). Thus, when someone says that there is "nothing" in the car, that might assert that person's privacy interest by refusing to disclose the presence of something in which the person has a reasonable expectation of privacy.

[*P16] That Gadberry stated that there wasn't any ***marijuana*** in the car, rather than "nothing," doesn't change this analysis. Gadberry still refused to disclose the presence of ***marijuana***, thereby asserting her privacy interest in lawful activity. And regardless of any such assertion, Talu is still able to detect lawful activity, and the ***sniff*** "can no longer be said to detect 'only' contraband." *McKnight, ¶ 43*. Gadberry's statements do nothing to help the officers parse out whether the alert was **[***10]** for meth or ***marijuana***: Talu doesn't have a mastery of the English language and still gives the same alert for all trained substances. In other words, Gadberry's declarations are gobbledygook to Talu.

[*P17] There also exists a practical problem with following the People's analysis. If we were to hold that disclosing the *lack* of ***marijuana*** to an officer results in permission to ***sniff*** a car, we would be urging drivers to always assert that there is ***marijuana*** in the vehicle. We would thus be encouraging citizens to lie to the police so that they may maintain their constitutional rights. No source of law compels that absurdity.

[*P18] Therefore, the officers needed probable cause that the vehicle contained illegal narcotics before they deployed Talu.

C. The Officers Lacked Probable Cause to Deploy Talu

[*P19] The only information that any of the several officers involved in the stop had was: (1) the Dodge had been stopped a few days prior and had improper registration and (2) the vehicle was, apparently, missing a front plate. While these two facts might have been enough to initiate the stop, they certainly didn't "warrant a [person] of reasonable caution in the belief" that a drug in violation of state law **[***11]** was present in the vehicle. *McKnight, ¶ 51* (alteration in original) (citing *People v. Zuniga, 2016 CO 52, ¶ 16, 372 P.3d 1052, 1057)*. Indeed, there is nothing in the record that suggests any illegal narcotic involvement at all, previously or at the time of the stop. As a result, the officers didn't have probable cause and shouldn't have deployed Talu.

III. Conclusion

[*P20] Gadberry's declaration that her Dodge contained no ***marijuana*** didn't strip her of her constitutional rights. We therefore hold that the officers needed probable cause before deploying Talu and that such cause wasn't present here. Accordingly, we affirm the trial court's suppression order.

[454]** **CHIEF JUSTICE COATS** dissents, and **JUSTICE BOATRIGHT** and **JUSTICE SAMOUR** join in the dissent.

JUSTICE SAMOUR dissents, and **JUSTICE BOATRIGHT** joins in the dissent.

Dissent by: COATS; SAMOUR

Dissent

CHIEF JUSTICE COATS, dissenting.

[*P21] For the reasons articulated in my dissenting opinion in *People v. McKnight, 2019 CO 36, 446 P.3d 397*, also reported by the court today, I would reverse the trial court's suppression order.

[*P22] I therefore respectfully dissent.

I am authorized to state that JUSTICE BOATRIGHT and JUSTICE SAMOUR join in this dissent.

JUSTICE SAMOUR, dissenting.

[*P23] I respectfully dissent. For the reasons articulated in my dissenting opinion in the companion case of **[***12]** *People v. McKnight, 2019 CO 36, 446 P.3d 397*, including my agreement with the Chief Justice's dissenting opinion in that case, I would reverse the trial court's suppression order.

I am authorized to state that JUSTICE BOATRIGHT joins in this dissent.

United States v. Jordan

United States District Court for the District of Utah

April 21, 2020, Decided; April 21, 2020, Filed

Case No. 2:19-cr-125

Reporter
455 F. Supp. 3d 1247 *; 2020 U.S. Dist. LEXIS 71048 **

UNITED STATES OF AMERICA, Plaintiff, vs. DESMOND TRAVIS JORDAN, Defendant.

Core Terms

training, ***dog***, narcotics, detected, odor, alert, sniff, probable cause, certification, reliability, drugs, target, behaviors, records, video, traffic stop, hides, sniffing, motion to suppress, surveillance, communicate, marijuana, questions, scenario, searched, smelling, suppress, license, testing, innate

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Judges: Clark Waddoups, United States District Judge.

Opinion by: Clark Waddoups

Opinion

[*1248] MEMORANDUM DECISION AND ORDER GRANTING LEAVE TO DISMISS THE INDICTMENT AND GRANTING MR. JORDAN'S MOTION TO SUPPRESS

Before the court is a Motion to Suppress filed by Defendant Desmond Travis Jordan, **[*1249]** which seeks to suppress all evidence obtained during a traffic stop on February 28, 2019, on the basis that, among other things, the police searched Mr. Jordan's car without a warrant or probable cause. (ECF No. 22). The court held an evidentiary hearing on Mr. Jordan's motion on March 3 and 4, 2020 (the "Hearing"), at which it heard testimony from Detective David Allen, the investigating officer, Officer Clinton "CJ" Moore, the K9 handler, and Dr. Mary Cablk, an expert retained by Mr. Jordan. Following the Hearing, the court requested the parties to submit proposed findings of fact and briefing, and set a date for the court **[**2]** to hear oral argument. Rather than submitting briefing and proposed findings, on March 31, 2020, the United States moved for leave to dismiss the Indictment against Mr. Jordan with prejudice due to "inter alia, a lack of prosecutable evidence and for good cause." (ECF No. 44). This motion is also now before the court. Mr. Jordan does not oppose the dismissal. The court finds that the United States lacks prosecutable evidence and that the motion to suppress is well taken. The court, therefore, **GRANTS** the United States' Motion for Leave to Dismiss the Indictment. Moreover, after considering the merits of Mr. Jordan's Motion to Suppress, and the evidence presented at the Hearing, it also **GRANTS** the Motion to Suppress. Under the *Rule 48(a) of the Federal Rules of Criminal Procedure*, the United States is required to seek leave of court to dismiss an indictment. Where the United States has proceeded on the merits of the

charge and, as in this case, proceeded to oppose a motion to suppress evidence for lack of probable cause, the court has a responsibility to rule on the merits of the motion. Moreover, the development of the law requires that conduct of the officers be assessed to provide guidance in the arena of K9 sniffs.

BACKGROUND

A. The [**3] Traffic Stop

On February 28, 2019, Detective Allen, a four-and-a-half-year veteran of the West Valley City Police Department, was conducting surveillance at an address he believed to be the residence of Mr. Jordan. (ECF No. 41 at 6:4-7:20). While conducting surveillance, Detective Allen called Officer Moore, a K9 officer for West Valley City Police Department, to alert him that he was conducting surveillance and ask him to "be available" if a vehicle left the home so that Officer Moore "could assist [him] on a traffic stop and a K9 sniff." (*Id.* at 14:21-15:17).

Shortly thereafter, Detective Allen saw a silver Mazda Protégé leave the home, and he followed the vehicle. (*Id.* at 10:12-15). Detective Allen, based on prior investigation, believed the vehicle was registered to Mr. Jordan, but he did not know that Mr. Jordan was driving the vehicle when he began following it. (*Id.* at 8:11-9:8; 10:4-17). Almost immediately, Detective Allen called Officer Moore and alerted him that Mr. Jordan had left the home, again putting him on notice to be available with his K9. (*See* Video of Pursuit, admitted as Gov. Ex. 9 at Suppression Hearing, hereinafter "Gov. Ex. 9"). Within one-and-a-half to two minutes **[**4]** of beginning to follow the vehicle, Detective Allen initiated a traffic stop after observing that Mr. Jordan was speeding. (ECF No. 41 at 10:18-11:2).

After informing Mr. Jordan of the reason for the traffic stop, Detective Allen obtained Mr. Jordan's identification and returned to his vehicle. He then called Officer Moore again and gave him his location so that Officer Moore could respond to his location to conduct a K9 sniff; Officer Moore responded that he was on his way. (*Id.* at 14:16-16:1, 33:21-34:11; Video of Traffic Stop, admitted as Gov. Ex. 10 at Suppression Hearing, hereinafter "Gov. **[*1250]** Ex. 10"). At this point, there was no reason for the stop other than the traffic violation. Detective Allen then completed a search of Mr. Jordan's name through a database, the results of which showed that Mr. Jordan's license had been suspended. (ECF No. 41 at 11:19-13:20). Detective Allen returned to Mr. Jordan's vehicle, told Mr. Jordan that his license had been suspended, and inquired as to whether he had a license in another state. (*See* Gov. Ex. 10). Detective Allen returned to his car, waiting for approximately three minutes, until Officer Moore arrived at the location. (*Id.*). Detective **[**5]** Allen informed Officer Moore that he was "waiting for a licensed driver" to come get Mr. Jordan's vehicle and that Officer Moore could therefore "take his time." (*Id.*). Detective Allen then returned to Mr. Jordan's vehicle, asked him to step out of the vehicle and to call a licensed driver to come pick up the vehicle. (*Id.*). It is undisputed that Mr. Jordan had indicated that a licensed driver was available and would pick up the car. There is no indication that Detective Allen was intending to impound the car. Officer Moore then approached with his K9, Tank, and initiated an exterior sniff of the vehicle. (*Id.*).

B. Tank's Training

Tank was imported from Slovakia in March 2018 to a kennel in Ogden. The West Valley City Police Department got him from the kennel shortly thereafter. (ECF No. 41 at 113:23-114:10). At an initial veterinary visit in April 2018, in which Officer Moore participated, Tank was diagnosed with mild chronic bilateral hip degenerative joint disease and a suspicion for hip dysplasia. (*Id.* at 114:14-115:11). It is important for the K9 to be in good health because pain or other health conditions may impact the ***dog***'s ability to be successfully trained and perform.

Officer **[**6]** Moore began training Tank through the Utah POST program ("Utah POST") in April 2018. Tank graduated from, and was certified by, that program in July 2018. (*Id.* at 56:22-58:24; 115:12-17). Most of the training was related to narcotics. (*Id.* at 58:3-61:3). Tank was trained to detect and respond to the odors of marijuana, heroin, cocaine, and methamphetamine. (*Id.* at 50:3-8).

In its training course, Utah POST recognizes two tiers of behaviors that K9s may exhibit in response to the odor of narcotics. One is an innate natural response; the other is a trained response. To be certified as a drug ***dog***, the animal must consistently demonstrate the trained response when the target odor is present. A ***dog*** will not pass certification if it only demonstrates the innate natural response, which may also be

demonstrated in response to any item of interest to the ***dog***, such as food or the scent of another animal. In its handbook, Utah POST characterizes "innate natural behaviors that a ***dog*** does when it smells something of interest" as an "alert." Such a natural response may include a long list of ***dog*** behaviors, including "[c]losed mouth sniffing" and "change in the movements of the ***dog*** seeking the highest **[**7]** concentration." (ECF No. 42 at 199:8-24). Practically, the list of behaviors includes any change in the ***dog***'s actions that may indicate interest or excitement by the ***dog***. The list is not specific or distinctive to any particular item of interest to the ***dog***. The Utah POST manual does not define the particular behavior or any required number of behaviors necessary to conclude that the ***dog*** has focused on a particular odor or that the odor in which the ***dog*** is showing interest in the target order. These alert behaviors are not unique to detecting the odor of narcotics, but are "consistent with the ***dog*** smelling anything of interest."

To be certified as a drug ***dog***, Utah POST requires the ***dog*** to demonstrate **[*1251]** behavior that a ***dog*** is trained to perform when it detects the highest concentration of a target odor. (*Id.* at 199:4-201:3). The Utah POST manual defines this behavior as an "indication" or "trained final response." The manual states it is "the specific taught behavior that Tank uses to tell [his] handler 'I am detecting a target odor.'" (ECF No. 41 at 116:5-7). It is intended to be distinctive behavior from the natural behavior a ***dog*** demonstrates in response to any item of interest. In Tank's **[**8]** case, his trained final response was to "stop movement in front of the source of the odor" and "sit or lay down and focus on the sources of that odor." (*Id.* at 117:7-19). Because Tank's trained final response is a "specific instructed behavior," the only time he exhibits it is when he has detected the odor of any of the four narcotics he was trained to find—marijuana, heroin, cocaine, and methamphetamine. (*Id.* at 118:9-119:18). This trained final response is imperative because it is a "definitive signal" that is "deliberately taught to a ***dog*** so that the ***dog*** understands this is how I signal that I have target odor"—it is an objective display that removes the "subjectivity that goes into" reading a ***dog***'s behavior. (ECF No. 42 at 245:4-246:2).

As part of Tank's training, Officer Moore regularly worked with Tank to perform his trained final response. (*Id.* at 119:2-120:14). Once Tank completed enough of these training searches that he had "shown that he can locate narcotics and bypass any other novel odors that might be present in these real-world setting," he was tested for certification. (*Id.* at 59:6-14). His certification requirements required that he be able to consistently perform his **[**9]** trained final response during his training searches. (*Id.* at 120:11-121:10). Officer Moore testified that after Tank was certified, they continued to regularly train, both for obedience and drug locating. (*See id.* at 134:13-19).

Notwithstanding Officer Moore's testimony, evidence at the Hearing raised serious questions about the sufficiency and veracity of Tank's training. First, the police training records supported that between July 2018, when Tank was certified, and November 2018, Officer Moore only conducted four narcotics trainings with him. (*Id.* at 134:13-135:14; *see also* Gov. Ex. 7). Moreover, from October 20, 2018 through March 1, 2019, a period that enveloped the search of Mr. Jordan's vehicle, Officer Moore only performed one narcotic training exercises that involved searching an area that did not contain narcotics, compared to 27 "normal" exercises where there were narcotics present to be found. (*Id.* at 135:22-137:6; Def. Ex. 4). As discussed below, it is important for tests to be conducted in which neither the handler nor the supervising judge knows whether narcotics are present. Otherwise, the handler will continue the search until the drugs are found, and cuing may defeat **[**10]** the value of the ***dog*** being an objective basis for detecting the presence of the drugs. During that same period, records show that Officer Moore did not perform any "negative controlled exercises" and only performed one "blind" exercise. (ECF No. 41 at 137:7-138:12; Def. Ex. 4).[1]

To address the importance of well-founded training and the need for an objective trained final response, Mr. Jordan called Dr. Mary Cablk. Dr. Cablk is an expert with 20 years' experience studying and teaching K9 detection and training. (ECF No. 42 at 172: 4-5). Dr. Cablk is a member of the American Academy of Forensic Sciences and the Nevada POST K9 **[*1252]** Committee. She is a POST K9 Evaluator in Nevada and a POST instructor in California; has assisted numerous law enforcement agencies in training and deploying K9s; has personally trained K9s and K9 handlers; and has extensively researched, lectured, and offered testimony on the topics of K9 training, detection, and deployment. (*Id.* at 171:3-175:4). The court finds the

[1] While Officer Moore suggested these records may be incomplete, the court finds no basis to support such a suggestion and does not find his testimony on the subject to be credible. (*See* ECF No. 41 at 138:12-142:22).

testimony and opinions that Dr. Cablk offered at the Hearing to be well founded, credible, and persuasive. Dr. Cablk's testimony and opinion was not countered by any opposing expert testimony and **[**11]** was not meaningfully questioned on cross-examination. The United States did not offer any expert testimony at the Hearing.[2]

A critical aspect of Dr. Cablk's testimony was her discussion of handler bias or "cuing." (*See id.* at 178:7-183:3). The United States offered no testimony to contradict or challenge Dr. Cablk's testimony and, indeed that testimony appears to be well supported in the scientific literature. She explained that because ***dogs*** are "extremely sensitive to our body positioning and our facial expressions," a handler, even "the best intentioned handler" with the "best of ***dogs***" can inadvertently impart bias on a ***dog***, leading the ***dog*** to potentially "do its final indication whether or not it has target odor." (*See id.* at 178:7-179:16). In short, cuing "interferes with independence of the ***dog***, [and] interferes with the definitiveness of the [***dog***'s] signal." (*See id.* at 178:24-179:4). Thus, when the handler knows, or believes, drugs may be present, the ***dog*** will sense the cuing from the handler and continue to search until the handler cues the animal to discontinue the search.

Dr. Cablk opined that in order to properly train a K9, a program must take steps to prevent handler **[**12]** bias and cuing, namely through blind training. (*Id.* at 182:23-183:3). Single-blind training occurs when the handler does not know how many, if any, quantities of narcotics are hidden in a scenario, but someone else present does. (*Id.* at 185:10-14). The third person may be present to judge whether the ***dog*** passed the test. Such a procedure is important because when a handler knows how many hides are present in a scenario, he will continue to search with his ***dog*** until the ***dog*** finds them all, which does not create a "realistic scenario that mimics what happens on the street." (*Id.* at 188:5-18). Single-blind testing is important to train a ***dog*** to work independently and in turn gives a handler confidence in his ***dog***. (*Id.* at 188:19-25). Nevertheless, single-blind training is insufficient to prevent bias and cuing. Even if the handler does not know how many hides are present in a scenario, research shows that *anyone* who is present for the training and knows the quantity and/or location of the hidden narcotics, even the judge, can inadvertently cue the K9. (*Id.* at 185:19-186:9). Thus, in Dr. Cablk's opinion, the "only means that you can use to demonstrate the reliability of a K9" is to have **[**13]** no one who is present during the training know how many, if any, hides are present. (*See id.* at 186:4-9). This is considered ***double-blind*** training.

Utah POST does not use ***double-blind*** training or testing (*id.* at 189:3-4), and its certification testing is not even done single-blind, as the handler knows exactly how many hides will be present. (*Id.* at 187:9-188:4). The general absence of, and **[*1253]** seemingly unawareness of the importance of, blind training as part of the Utah POST program was demonstrated by Officer Moore's equating blind training with "controlled negative training." (*Compare* ECF No. 141 at 62:13-63:18 *with* ECF No. 142 at 184:3-16). Given these deficiencies, along with additional aspects of the program that she found problematic,[3] Dr. Cablk opined that Utah POST is not a valid assessment of a K9's ability to detect the odor of target narcotics.

Moreover, through cross-examination, it was demonstrated that Officer Moore was often not careful in accurately recording the training with Tank he did complete. Critical information about whether the training exercise involved a negative hide or whether Officer Moore knew that fact prior to the training was not recorded. **[**14]** From the records, it was impossible to determine whether Tank was in fact reliable or whether he was being intentionally or unintentionally cued to the presence of drugs.

C. Tank's Sniff

Tank's sniff of Mr. Jordan's vehicle lasted approximately three minutes. (*See* Gov. Ex. 10). A review of the video shows that Officer Moore walked Tank around the

[2] While the United States orally requested to postpone the hearing so that it could present Mr. Wendell Nope as a rebuttal witness, the court denied the request on the grounds that the United States failed to take sufficient steps to either arrange for Mr. Nope to testify or to request additional time, before the hearing, so that it could make such arrangements. Moreover, the court has already heard from Mr. Nope on this topic. *See United States v. Esteban, 283 F. Supp. 3d 1115 (D. Utah 2017)*.

[3] These problematic aspects included Utah POST's failure to randomize the number of its hides (*see id.* at 189:17-192:12); its use of a complicated grade point average to certify ***dogs*** instead of a simple pass/fail criteria, which removes any subjectivity (*id.* at 192:13-194:1); the quantities of drugs it uses as its hides, which she believes lacks standardization (*id.* at 194:2-195:24).

vehicle three full times and made numerous additional passes of both sides of the vehicle and the vehicle's trunk. (*Id.*). Officer Moore repeatedly directed Tank's attention to certain areas of the vehicle, namely the trunk, driver's side door, and passengers' doors, by pointing to those areas and giving Tank a command or by tapping on that area of the vehicle. (*Id.*). Throughout the search, Tank's attention was often drawn away from the vehicle, and Officer Moore was repeatedly required to physically guide him back to the vehicle to continue sniffing the same. (*See id.*). Sometimes Tank was drawn to passing traffic. Other times he was drawn to something of interest on the sidewalk. The video does not confirm a consistent and intense interest by Tank in the vehicle or any odor coming from it.

Tank did not perform a trained final response while conducting **[**15]** a sniff of Mr. Jordan's vehicle. (*See* ECF No. 41 at 123:20-21). He never demonstrated any clearly objective behavior communicating that he had detected a target odor. Rather, Tank demonstrated the innate natural behaviors of a ***dog*** going through the paces of sniffing the vehicle. Officer Moore relied on Tank's natural behaviors, which he perceived as "alerts," to conclude that Tank had detected the odor of narcotics emitting from Mr. Jordan's vehicle. (*See id.* at 90:14-20, 143:15-19 ("Q: The thrust of your direct is saying, I know he didn't do the trained final response for the indication, but I can tell, as his handler, from his behavior that I can see, that he is detecting narcotic, right? A: Yes.")). There is nothing on the video of the sniff from which a third person can objectively conclude that Tank had performed to respond as he had been trained to do when he detected a target odor. Indeed, Dr. Cablk, as a trained animal observer, reached the opposite conclusion, as discussed hereafter, that Tank's behavior repeatedly indicated he had not detected drugs.

At the conclusion of the sniff, Officer Moore appears to tell Detective Allen "yep," and Detective Allen informed Mr. Jordan **[**16]** that the ***dog*** "thinks there is something **[*1254]** in the car" and that he was therefore going "to make sure" there was nothing in the vehicle. (*Id.*). Mr. Jordan acknowledged that he smoked marijuana, but "not much," and denied that there were any drugs in the vehicle. (*Id.*). Officers then conducted a search of Mr. Jordan's vehicle and found "a small amount of marijuana," a digital scale, and a firearm. (ECF No. 41 at 164:4-7). A review of the video shows that the "small amount of marijuana" appears to have been in the form of residue in an empty "pipe." (*See* Gov. Ex. 10). Mr. Jordan was thereafter charged with possession of marijuana and felon in possession of a firearm.

At the Hearing, Dr. Cablk reviewed each critical segment of the video of Tank's sniff. She explained what the ***dog*** was doing and stated her interpretation and opinions of the actions of Tank and Officer Moore shown therein. (*See* ECF No. 142 at 207:7-217:15). Based on her experience and training, she stated there was no objective basis upon which Officer Moore could interpret Tank's alleged "alerts," to communicate the presence of drugs. Among other things, Dr. Cablk testified that some of the alleged "alerts" were simply not present **[**17]** in the video,[4] that none of the cited behaviors were unique to a target odor of narcotics, that Tank's interest in the driver's side door could have easily been due to the presence of Detective Allen's familiar scent in the area, and that had Tank detected the odor of narcotics, there was nothing about the scenario or environment that would have prevented him from performing a trained final response. Dr. Cablk then offered her own analysis of Tank's behavior, stating that Tank sniffed the vehicle and then cleared and came off it "because he [didn't] have target odor," a fact that he "attempt[ed] to communicate that to his handler multiple times." (*Id.* at 217:3-9). In conclusion, she found that Tank's behavior in the sniff provided "nothing" that the officers could learn. (*Id.* at 217:10-13).

ANALYSIS

Mr. Jordan moves to suppress the evidence obtained from the search of his vehicle on the ground that, among other things, the officers lacked probable cause to conduct the search. The officers' finding of probable cause was predicated on Tank's sniff of the vehicle and Officer Moore's belief and representation that Tank had determined that there were narcotics in the vehicle. (*See* Gov. **[**18]** Ex. 10). Mr. Jordan argues that Tank's

[4] Officer Moore was not wearing a body camera during the sniff, although he was required to under West Valley City Police Department policy. (ECF No. 41 at 77:4-14; 111:6-113:21). The only video of the sniff was that captured by Detective Allen, who stood a distance from the vehicle in a stationary position. (*See* Gov. Ex. 10). Given the angle of Detective Allen's camera, portions of Tank's and Officer Moore's actions are not visible in the footage, as they are obstructed by the vehicle. To the extent that Officer Moore testified of events occurring that are not depicted on the video, the court finds the video to be the more reliable source of information.

sniff did not and could not reasonably support a finding of probable cause for the officers to search his vehicle.

The Tenth Circuit has stated that a ***dog***'s alert may give officers "probable cause to search [a] car and its contents." *United States v. Engles, 481 F.3d 1243, 1245 (10th Cir. 2007)*; *see also United States v. Ludwig, 641 F.3d 1243, 1250-51 (10th Cir. 2011)* (finding "a positive alert by a certified drug ***dog*** is generally enough, by itself, to give officers probable cause to search a vehicle"). The Tenth Circuit has also said, a K9 need not display a "final indication," and that probable cause may be supported by a ***dog***'s "alert." *See United States v. Parada, 577 F.3d 1275, 1281-82 (10th Cir. 2009)*; *see also* ***[*1255]*** *United States v. Rosborough, 366 F.3d 1145, 1153 (10th Cir. 2004)* (recognizing that a ***dog***'s "alert . . . does not implicate the precision of a surgeon working with scalpel in hand," and that probable cause does not require such exaction). In none of these cases, however, does the Tenth Circuit analyze whether the "alert" testified to by the ***dog*** handler was sufficiently distinct from the ***dog***'s natural behavior to be objectively identifiable as a response to narcotics. Behavior by the ***dog*** that is so subjective that only the handler may be able to identify it risks allowing a search in violation of the *Fourth Amendment* that is based on nothing more certain that the officer's hunch that drugs may be present. **[**19]**

Allowing a K9's alert to support a finding of probable cause to search a vehicle on the unverifiable, subjective interpretation of the handler would seriously erode long protected Constitutional rights. K9 responses have been found sufficient to support probable cause sufficient to satisfy the Constitution because the ***dog***'s proven ability to detect the odor of a narcotic reduces the risk that an officer is simply acting on a hunch. This protection of the Constitutional right, however, becomes meaningless if the ***dog***'s communication of its detection of drugs is so subjective that it is nothing more certain than a reflection of the handler's hunch that drugs must be there. Because of this risk, a search based on such behavior must always be subject to review and challenge. The review and challenge is met by demonstrating both the handler and the canine's proper training and proven reliability. *See e.g.*, *Ludwig, 641 F.3d at 1251* (noting that "it surely goes without saying that a drug ***dog***'s alert establishes probable cause only if that ***dog*** is reliable"); *see also United States v. Ludwig, 10 F.3d 1523, 1528 (10th Cir. 1993)* (observing that "[a] ***dog*** alert might not give probable cause if the particular ***dog*** had a poor accuracy record"). Moreover, over-arching the Tenth Circuit's **[**20]** willingness to recognize alerts as sufficient is the Supreme Court's long-standing recognition that "the 'touchstone of the *Fourth Amendment* is reasonableness.'" *Ohio v. Robinette, 519 U.S. 33, 39, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996)* (quoting *Florida v. Jimeno, 500 U.S. 248, 250, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991)*). Here, Mr. Jordan has raised serious questions as to adequacy of Officer Moore and Tank's training and reliability, as well as to the reasonableness of this search.

A. The court has serious concerns about Tank's training and reliability.

In allowing a K9's indication, or even its alert, to serve as a basis for finding probable cause to search an individual's personal property, we, as a society, are placing an enormous amount of trust, and indeed our very civil liberties, in the responses of creatures that have limited ability to communicate with us. It is therefore imperative that a K9 be meticulously trained so that we can be assured that its signals are clear and direct and that we, as a community, can be confident in the reliability of the message that the K9 is communicating. The Tenth Circuit has recognized that in assessing the reliability of a K9, "courts typically rely on the ***dog***'s certification." *Ludwig, 641 F.3d at 1251*. The courts have consistently recognized that the training necessary to support certification must be completed successfully, **[**21]** that the certification must be current and updated through ongoing training, and that both must be supported by accurate and timely kept records. Here, the manner by which Tank was trained and certified, together with the supporting records, does not warrant such confidence.

First, the court finds, based on the testimony of Dr. Cablk and the records before it, that Utah POST Training inadequately addresses, and therefore fails to remove the risk of, inadvertent handler bias or **[*1256]** cuing. Specifically, Utah POST's failure to implement ***double-blind*** training raises questions as to the independence of its K9s and casts doubt as to whether the K9s are alerting or indicating because they actually detect the odor of narcotics or because they have learned that displaying such action is the best way to please their masters. This doubt is not allayed by Utah POST's certification process, as the final test that a K9 must pass in order to be certified is not even performed single-blind. As such, the K9's handler in the exam, who is the same officer who has worked with the K9 for months and has a clear interest in having his K9 be certified, knows exactly how many hides will be present

in the exam and **[**22]** can therefore continue to search until the K9 finds them all. (ECF No. 42 at 187:9-188:18). Such an examination does not reflect a real-world setting and does not, therefore, indicate that a passing K9 can reliably detect, and communicate his detection of, narcotics in the field. The training and certification should objectively demonstrate that the ***dog*** can find the hides, and all of the hides, only when neither the handler nor the judge knows how many or where they were placed. Such a change in the training and certification would be easy and inexpensive.

Generally, the court should rely on the credentialing organization to manage the certification and training[5] . But that assumes that organization bases its credentialing on accepted and proven procedures. It also assumes that the organization consistently applies those procedures and that the K9 at issue has met the requirements. The requirements include repeated examination and testing and medical history. In this case, Tank's medical history and training raise additional questions as to his reliability. First, it is clear that Tank had hip problems that could be painful to him and therefore interfere with his abilities to perform **[**23]** his assigned tasks. (*See* ECF No. 41 at 114:14-115:11). Second, the court's above-discussed concerns with Tank's training and certification are enhanced by the nature and infrequency of Tank's post-certification training. Tank only underwent four narcotics trainings in the four months after he was certified, and in the following months almost all of his narcotics training consisted of scenarios that made it impossible for Tank to make a false-identification of narcotics. (*See id.* at 134:13-137:6; Def. Ex. 4; Gov. Ex. 7). These trainings are insufficient to maintain, let alone make up for the deficient nature of, Tank's initial training and certification and prepare him to perform in the real world. Moreover, the records of the training are incomplete and not reliable, as Officer Moore testified that sometimes he filled in reports from "muscle memory" and on occasion simply disregarded filling in boxes or providing information. (ECF No. 41, at 146) To meet the requirement to allow a K9's responses to satisfy the Constitutional requirement for probable cause, there must be a record supporting both the reliability of the K9 and the handler. There are lapses in this case as to both.

[5] The Tenth Circuit has stated that ordinarily courts should limit their task in review performance of K9 "to assessing the reliability of the credentialing organization, not individual ***dogs***." *See* ***[**24]*** *Ludwig, 641 F.3d at 1251*.

Given these concerns, the court declines to recognize Tank's certification by Utah POST as proof that the results of his sniff of Mr. Jordan's vehicle were reliable.

B. The court has serious concerns as to whether the search of Mr. Jordan's vehicle, and specifically the officers' finding of probable cause, was reasonable.

Whether a search is "reasonable" under the *Fourth Amendment* "is measured **[*1257]** in *objective terms* by examining the totality of the circumstances." *See Robinette, 519 U.S. 33, 39, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996)* (emphasis added); *see also United States v. Hernandez, 847 F.3d 1257, 1268 (10th Cir. 2017)* (observing that "the *Fourth Amendment* requires at least 'some minimal level of objective justification for making [a] stop.'" (quoting *United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)*)). Here, an objective viewing of all aspects of Mr. Jordan's traffic stop and sniff raises serious questions as to the reasonableness of the Officers' search of Mr. Jordan's vehicle.

Officer Moore's finding of probable cause here was purely subjective. As discussed above, a K9's trained final response is an objective and "definitive signal" that a ***dog*** has detected the odor of a narcotic in a vehicle, but here Tank did not display his trained final response. (*See Compare* ECF No. 41 at 123:20-21 *with* ECF No. 42 at 245:4-246:2). Rather, the determination that Tank had detected narcotics was made by **[**25]** Office Moore and was based on his interpretation of Tank's behavior and his subjective classification of those actions as "alerts." (*See* ECF No. 41 at 90:14-20, 143:15-19 ("Q: The thrust of your direct is saying, I know he didn't do the trained final response for the indication, but I can tell, as his handler, from his behavior that I can see, that he is detecting narcotic, right? A: Yes."). Officer Moore conceded on cross-examination that the behavior he observed by Tank that he perceived as indicating the presence of drugs would not have satisfied the requirements for certification. (ECF No. 41, at 157). The purely subjective nature of Officer Moore's interpretation is enhanced by the fact that after objectively viewing footage of the sniff, Dr. Cablk, an expert with over 20 years' of experience in reviewing and judging K9 detection, concluded that the sniff indicated "nothing." (ECF No. 42 at 217:10-13). All she observed was innate natural responses to the K9 going about the search. Nothing was definite and certainly not a clear communication by the ***dog*** that he had detected narcotics. The court reached the same conclusion after

objectively viewing the sniff twice at the Hearing **[**26]** and numerous more times in drafting this order. Indeed, absent Officer Moore's mono-syllabic "yep," the video contains no evidence that could be interpreted by an objective viewer as showing, let alone indicating, that Tank had detected the scent of narcotics in Mr. Jordan's vehicle.

Thus, the finding of probable cause here was based solely on Officer Moore's subjective interpretation of what he believed Tank's actions meant. Such a finding cannot be considered "reasonable" under the *Fourth Amendment*, as the Supreme Court has long held that more than such "inarticulate hunches" are necessary in order to permit "intrusions upon constitutionally guaranteed rights," recognizing that "[i]f subjective good faith alone were the test, the protections of the *Fourth Amendment* would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police." *See Terry v. Ohio, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)* (quotations and citations omitted). Indeed, even in the Tenth Circuit, where alerts may be sufficient to support probable cause, a court must find an officer's testimony that he believed his ***dog*** alerted to be credible in order to sustain a finding of probable cause. *See Parada, 577 F.3d at 1281*.

The court does not find Officer Moore's interpretation **[**27]** of Tank's "alerts" to be credible, as the "alerts" that Tank allegedly displayed cannot be objectively viewed as a clear communication that he had detected the odor of narcotics. Rather, the actions on which Officer Moore relied—Tank moving his head back and forth **[*1258]** quickly (*id.* at 79:12-80:18, 124:5-6, 144:2-4); going back to the vehicle on his own (*id.* at 80:22-81:6, 82:3-7, 87:16-88:7); pinning his ears back (*id.* at 82:11-21, 124:3-4, 143:21-24); intensifying his sniffing (*id.* at 143:25-144:1); and sniffing the wind (*id.* at 82:11-21)—were not unique to a ***dog*** smelling narcotics, but were instead "consistent with the ***dog*** smelling anything of interest." (ECF No. 42 at 200:12-24). Dr. Cablk explained that "no matter what the ***dog*** is smelling, they're going to close their mouth so that they can funnel that air and those molecules in through their nose. So it cannot be that -- that closed mouth intense sniffing is specific to target odor. That's what they do for anything that they sniff." (*Id.*).[6] The court accepts Dr. Cablk's testimony as credible and persuasive and concludes that while the behavior upon which Officer Moore relied may have indicated that Tank was smelling something of interest, **[**28]** the sniff lacked objective behavior by which a reasonable observer could have determined that Tank was detecting the odor of marijuana and not that of a squirrel, sandwich, or anything else that piqued his interest. Tank's behavior, especially the breathing through the mouth and moving his head back and forth, may also have been nothing more than the ***dog*** performing his search. Without a clear indication, there is no way for an objective observer to conclude Tank had detected the odor of any narcotic.

Finally, events leading up to the sniff indicate that it was inevitable the officers were set upon searching Mr. Jordan's car. Detective Allen testified that approximately six months before Mr. Jordan's car was searched, he had observed Mr. Jordan conduct a hand-to-hand narcotics transaction. (ECF No. 41 at 7:25-8:10). Then, approximately two weeks before the search, Detective Allen witnessed what he believed was a narcotic transaction being conducted from a silver Mazda Protégé, which he later learned belonged to Mr. Jordan. (*Id.* at 8:11-9:8). Thus, on February 28, 2019, when Detective Allen began performing surveillance at the address at which he believed Mr. Jordan lived, he had suspicion **[**29]** that Mr. Jordan dealt narcotics and used his silver Mazda Protégé in those transactions. Indeed, Detective Allen referred to Mr. Jordan as his "primary" for the investigation, which he defined as someone "who we have reason to believe is either selling narcotics or is in possession of a firearm or has a felony warrant, that we're going to arrest." (ECF No. 141 at 20:3-9). This suspicion led Detective Allen to contact Officer Moore twice to put him on notice to be ready to have a K9 sniff Mr. Jordan's vehicle, just in case he had an opportunity to pull him over—first while he was outside the home conducting surveillance (*see id.* at 14:21-15:17) and again shortly after he began following Mr. Jordan's vehicle (*see* Gov. Ex. 9).[7] Thus, it appears

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[6] Moreover, Utah POST's own manual indicates that Tank pulling away from the vehicle and sniffing the wind was inconsistent with the recognized alerts of "resisting leaving an area of interest" and resisting distractions. (ECF No. 41 at 154:15-156:5; Def. Ex. 5).

[7] On this point, the record before the court is unclear. Detective Allen testified that he first called Officer Moore while he was outside of Mr. Jordan's home, but unlike the second call made while Detective Allen was driving, this call was not included in the video footage presented to the court. As such, it is possible that Detective Allen's testimony was referring to the call he made while driving, and that only one call was made before the traffic stop was initiated. The court notes that its analysis is the same whether Detective Allen called Officer

to the court that the primary purpose **[*1259]** of Detective Allen's surveillance was to initiate a traffic stop on Mr. Jordan's silver Mazda Protégé so that a K9 could perform a sniff of the vehicle, and officers could then search the vehicle.

Viewing this evidence together with Officer Moore's completely subjective determination that Tank had detected the odor of narcotics in Mr. Jordan's vehicle one must question whether a reliable and objective assessment **[**30]** of probable cause could have been made. The "totality of the circumstances" suggests that when Officer Moore arrived on site, he was already of the belief drugs were in the car and that this belief influenced him, perhaps even inadvertently, to interpret Tank's uncertain "alerts" as supporting a conclusion of probable cause. A K9 sniff cannot simply be a formality or an excuse to support a search. In this case, the court is reluctant to and does not reach that conclusion. The court recognizes that narcotics are a serious problem and that the officers often do their work in dangerous and uncertain circumstances. The court also recognizes that the officers understand and take their Constitutional duties seriously. Nevertheless, in the heat of the hunt, judgment can be compromised and even zeal to apprehend a perceived criminal may influence a decision that would not otherwise be justified. The court does not conclude that either Detective Allen or Officer Moore gave sway to such pressures, but the risk of such clouded judgment is the very reason that the K9's behavior signaling the presence of drugs must be clear, distinctive, and objectively observable. That is the very reason the Utah **[**31]** POST certification requires an "indication," not just natural innate behavior. A search, like the one conducted here, based on such subjective behavior that only the handler can see it could hardly be considered "reasonable" under the *Fourth Amendment*. As such, Mr. Jordan's Motion to Suppress (ECF No. 22) is **GRANTED**.

CONCLUSION

For the reasons stated herein, Mr. Jordan's Motion to Suppress (ECF No. 22) is **HEREBY GRANTED**. Further, pursuant to *Rule 48(a) of the Federal Rules of Criminal Procedure*, for good cause shown, and because the United States lacks prosecutable evidence, the United States' Motion for Leave to Dismiss the Indictment against Mr. Jordan with Prejudice (ECF No. 44) is also **HEREBY GRANTED**.

DATED THIS 21st day of April, 2020.

BY THE COURT:

/s/ Clark Waddoups

Clark Waddoups

United States District Judge

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Moore once or twice before initiating the traffic stop. The court also notes that Detective Allen called Officer Moore a third time, after he had initiated the traffic stop, to provide Officer Moore with his location so that he could perform the sniff. (*See* Gov. Ex. 9).