

Canine Legal Update for 2007 **By Terry Fleck**

It is an honor to write this canine legal update for 2007 for the National Police Canine Association Newsletter. This update will become a regular article in each newsletter edition. I will be addressing the latest Federal cases, affecting patrol dogs, tracking dogs, FLSA "at-home care" of a police dog, narcotics dog and explosives dog issues.

In addition to the updates, I welcome any specific questions that you may have, and would like to answer these questions in the articles. Please contact me with any questions by visiting my Canine Legal Update and Opinions web site at www.k9fleck.org or by e-mail, k9fleck@aol.com. The Canine Legal Update and Opinions web site has been updated for 2007 with the cases I will be addressing in these articles.

NARCOTICS CASES:

VEHICLE SNIFFS:

United States v Perez (440 F. 3d 363 (2006) Sixth Circuit

Throughout defendant's detention following Terry stop of vehicle in which they were driver and passenger, law enforcement officers were engaged in continuous activity aimed at confirming or dispelling reasonable suspicion that transfer of duffle bags from vehicle to second vehicle, which officers had observed at hotel, was part of drug transaction. Thus, continued detention of defendants for an hour between completion of consensual search of their vehicle and police dog's alert to second vehicle did not impermissibly extend scope of Terry stop. Although first dog on scene did not alert to second vehicle, officers believed bags were not in vehicle long enough to produce odor, and officers searched hotel room while awaiting second dog's alert.

There was evidence in this case that the agents knew how long the duffle bags had been in the vehicle and had reason to believe that the first dog failed to alert because the bags had not been in the vehicle long enough for the odor to escape. The court concluded that calling a second drug detection dog was a reasonable investigative technique under the circumstances. Under these circumstances, the failure of the first dog to alert to the vehicle did not dispel reasonable suspicion that drugs would be found in it and use of a second drug detection dog served a reasonable investigatory purpose.

Police canine sniff of defendant's vehicle did not constitute a search within the meaning of the Fourth Amendment.

United States v Eura (440 F. 3d 625 (2006) Fourth Circuit

A K-9 sniff is not a search within the meaning of the Fourth Amendment and, thus, neither probable cause nor a warrant is required.

Reasonable suspicion is required for the temporary seizure of the vehicle and any occupants that are necessary to facilitate a K-9 sniff of the exterior of a vehicle.

Agents' failure to find drugs in defendant's home pursuant to a search warrant did not prevent the agents from ordering K-9 sniff of defendant's automobiles.

United States v Alexander (448 F. 3d 1014 (2006) Eighth Circuit

Dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only de minimis intrusions on the defendant's Fourth Amendment rights.

Even if lawfully initiated traffic stop terminated at the point at which trooper told defendant that he would receive only a warning, a subsequent conducted dog sniff was a de minimis intrusion on defendant's Fourth Amendment rights. At most, defendant's detention was extended some four minutes from the point at which he was notified that he would receive a warning ticket to the point at which the dog sniff was completed.

Drug dog's identification of drugs in defendant's car provided probable cause that drugs were present, which entitled the officers to search the vehicle forthwith pursuant to the automobile exception to the warrant requirement.

United States v Valle Cruz (452 F. 3d 698 (2006) Eighth Circuit

Law enforcement officer had probable cause to justify warrantless search of an automobile when drug-sniffing dog arrived. Driver attempted to interfere with search and subsequently resisted officer's demands that she exit the vehicle.

A determination of probable cause became a foregone conclusion when the canine handler tried to run the drug dog around the vehicle despite suspect's opposition. She interfered to such an extent that the dog had to be pulled away so he would not bite her. After that, the officer asked the suspect to get out of the car and she resisted for several minutes, locking herself in the car. By then, the officer's determination that he had probable cause to search the vehicle was objectively reasonable.

United States v Ladeaux (454 F. 3d 1107 (2006) Tenth Circuit

The U.S. Court of Appeals had issue with ordering a vehicle's occupant to close windows and open vehicle's air ventilation to help facilitate a canine sniff:

Remand was warranted to permit district court to consider whether to suppress evidence based solely on request made by law enforcement officer, in ordering defendant and another passenger to exit vehicle and that vehicle's windows be closed and its vents be opened.

The district court had previously considered both the request and order to exit vehicle together in applying Supreme Court's decision in *Maryland v Wilson*, which dealt only with ordering occupants out of vehicle and not with other, ancillary requests.

United States v Tamari (454 F. 3d 1259 (2006) Eleventh Circuit

Agents hand searched a vehicle pursuant to a search warrant. They did not locate any contraband. They then brought in a narcotics detection dog.

Agents had probable cause to search the vehicle once more after the narcotics detection dog circled the vehicle. The dog sniffed the vehicle and alerted agents to the presence of narcotics in the rear of the vehicle.

We have long recognized that probable cause arises when a drug-trained canine alerts to drugs. The dog's positive alert was itself sufficient to give agents probable cause to search the vehicle a second time.

United States v Carpenter (462 F. 3d 981 (2006) Eighth Circuit

Police officer had reasonable suspicion of drug activity to justify brief detention of driver for purpose of conducting dog sniff of vehicle. Driver had parked his vehicle off side of road after exiting highway after signs indicated that a drug checkpoint was ahead.

Driver claimed to be looking for gas station even though he had a quarter of a tank of gas; sign for exit taken did not indicate that exit had gas services; signs on highway indicated gas services at previous exits; and when questioned about his travel, driver explained he was traveling from Austin, Texas to New York, despite providing car rental agreement indicating that car had been rented in El Paso.

United States v Mendoza (468 F. 3d 1256 (2006) Tenth Circuit

Probable cause was unnecessary to detain driver and vehicle pending arrival of drug dog following traffic stop, where trooper had reasonable suspicion to believe that driver was engaged in the unlawful transportation of contraband.

Forty-minute detention of vehicle following traffic stop while awaiting arrival of nearest handler with properly trained dog to sniff vehicle for contraband was reasonable.

Alert by drug dog on rear door area, near gas cap, created probable cause to search the vehicle following traffic stop.

CURRENCY SNIFFS:

United States v \$124,700 (458 F. 3d 822 (2006) Eighth Circuit

Substantial connection existed between drug trafficking offense and \$124,700 found in vehicle during traffic stop, as required for forfeiture, where:

- Currency was concealed in aluminum foil inside cooler;
- Canine alerted to currency;
- Driver had flown on one-way ticket and gave vague explanation as to why he elected to return by car;
- Car was leased to another person who was not present;
- Driver lied about having money in car;
- Driver stated he carried cash to buy refrigerated truck for produce business and he was unable to identify key party in such transaction.

PARCEL SNIFFS:

United States v Lakoskey (462 F. 3d 965 (2006) Eighth Circuit

Package was seized, for Fourth Amendment purposes, when it was pulled from regular stream of mail and subjected to dog sniff.

Two negative dog sniffs, that followed Postal Inspector's detention of package, did not dispel officers' reasonable suspicion that package contained drugs and continued detention of package thus did not violate Fourth Amendment.

The Inspector was not present at first dog sniff and thus did not act unreasonably in conducting second dog sniff. Only one day elapsed between removal of package from mail stream and when Inspector had facts necessary to support probable cause determination. Second sniff was conducted in very large area and was followed by positive sniff when package was placed in confined area.

United States v Zacher (465 F. 3d 336 (2006) Eighth Circuit

A law enforcement officer must have reasonable suspicion before he or she may seize a package for investigatory purposes.

Police officer had reasonable suspicion to seize package being shipped based on police dog's alert to package at shipping facility. Package in question was placed on floor at shipping facility along with other packages when police dog alerted to it. Dog alerted to package before it was to be sent out to be delivered by agreed upon deadline, and no change in custody occurred when package was placed on floor, since a reasonable person would expect a shipper to handle a package in same way.

The dog alerted to the package, tearing a hole in the cardboard envelope in the process. To confirm the alert, the police had an employee hide the package and the dog found it and alerted again. After the dog alerted the second time, the magistrate ordered that a search warrant be issued.

BUS SNIFFS:

United States v Ojeda-Ramos (455 F. 3d 1178 (2006) Tenth Circuit

During a routine screening of luggage in bus stop, a drug dog alerted to a blue suitcase.

Defendant abandoned his suitcase, and thus, police officer's warrantless search of suitcase did not violate Fourth Amendment. Officer saw defendant walk up to suitcase after officer entered bus posing as bus company employee. Officer told passengers, including defendant, that bus had mechanical problems and directed passengers to leave the bus and claim their luggage.

Officer identified himself as police officer and asked defendant why drug dog had alerted to his suitcase. Defendant said it was not his bag, and although defendant picked up suitcase and brought it with him when officer asked him to accompany officer to parcel storage area of bus station, defendant again told officer that suitcase was not his when officer asked for consent to search it.

It is undisputed that the drug dog's alert to the blue suitcase provided police with probable cause to believe the suitcase contained illegal drugs.

RESIDENCE SNIFFS:

United States v Smith (459 F. 3d 1276 (2006) Eleventh Circuit

Search of premises and lockbox pursuant to warrant authorizing officers to search for and seize evidence of illicit drug activity was valid, and seizure of pornographic photographs of minor children was legitimately conducted pursuant to plain view doctrine. Warrant specifically authorized officers to seize "photographs that would be probative to establish residency."

Officers, alerted to lockbox by narcotics dog, were justified in searching it for evidence of drugs or photographs, and it was immediately apparent to officers they had probable cause to believe that among what they found in lockbox, was evidence of crime of child pornography.

Florida v Rabb (127 S. Ct. 665 (2006) U.S. Supreme Court

The U.S. Supreme Court refused to hear this case on appeal from Florida. By refusing to hear the case, the U.S. Supreme Court let the ruling from the Florida court stand:

Search and seizure provision of (Florida) State Constitution does not prevent Florida District Court of Appeal from granting more protection than that provided in Fourth Amendment, in the absence of United States Supreme Court precedent directly on point to the contrary.

Dog sniff by trained drug-detection canine at exterior door of defendant's home was an illegal search under Fourth Amendment. Dog's sense of smell crossed the firm line of Fourth Amendment protection at door of home, and smell of marijuana detected by dog was an intimate detail of home.

NOTE: This case is not consistent with two other U.S. Supreme Court cases, **Illinois v Caballes** and **Smith v Texas**. As it stands today, Florida, particularly the 4th District Court of Appeals in Florida, is the only geographical area not allowing residential canine sniffs.

TRAIN SNIFFS:

United States v Goodwin (449 F. 3d 766 (2006) Seventh Circuit

Ordinarily the detention of a piece of luggage merely to permit a dog to sniff it, is even less of an intrusion than a stop and frisk or being stopped at a roadblock. The only information that a successful sniff reveals is the presence of contraband, in which the possessor has no legally protected interest.

The interval between the seizure of the luggage and the sniffing by the dog was 20 to 30 minutes. That delay to conduct the sniff was reasonable.

JAIL / PRISON SNIFFS:

United States v Prevo (435 F. 3d 1343 (2006) Eleventh Circuit

Search of vehicle belonging to visitor of work release correctional facility was reasonable under the Fourth Amendment. Signs posted at entrance to facility's parking lot stated that all vehicles were subject to search.

Keeping contraband out of prison was critical security measure served by unscheduled searches of cars in visitor parking lot. Visitor's diminished expectation of privacy in her automobile was reduced further upon entering prison grounds and seeing sign warning that visitors were subject to search.

Search of car belonging to visitor of work release correctional facility, performed pursuant to signs posted at entrance to facility's parking lot stating that all vehicles were subject to search, was not rendered unreasonable by visitor's request to leave without her car being searched.

Officers conducting searches of vehicles in visitor parking lot of work release correctional facility were not vested with unbridled discretion, as would render search of defendant's car unreasonable. All vehicles entering the parking area were being stopped and searched on day that defendant's car was searched.

In the next article, I will continue to review the other cases for 2007. Please forward any questions or comments to me.