Using Drug Detection Dogs
An Update

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Law enforcement officers use dogs to find people, clear buildings, sniff out bombs and to locate evidence or contraband. The use of dogs by officers implicates the Fourth Amendment. The Fourth Amendment preserves the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] This article addresses when courts consider an officer's use of a dog to sniff the exterior of an item, a location, or a person for contraband to be a search under the Fourth Amendment.[2] This article does not address the use of dogs in border contexts.

SUPREME COURT GUIDANCE

In 1983, the U.S. Supreme Court decided *United States v. Place*,[3] a case involving the exposure of a temporarily detained piece of luggage to a dog trained to detect narcotics. In *Place*, agents seized Place's bag and, 90 minutes later, submitted it to a dog sniff. The Court found the initial seizure of Place's luggage legitimate based on a reasonable suspicion that it contained contraband. However, the Court proceeded to find that the length of the detention of the bag, standing alone, constituted a Fourth Amendment violation in the absence of probable cause. After stating that a person has a privacy interest protected by the Fourth Amendment in the contents of luggage, the Court specifically noted that:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained

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> ***"...the exposure of the luggage to a canine sniff in the Place case did not constitute a search."***

> through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.[4]

The Court concluded that the exposure of the luggage to a canine sniff in the *Place* case did not constitute a search.

In 1984, the U.S. Supreme Court decided *United States v. Jacobsen*,[5] a case involving a DEA agent who opened a damaged package containing four plastic bags of white powder concealed in a tube initially opened by employees of an overnight delivery company. The agent removed a trace amount of the powder from one of the bags, conducted a field test, and determined the substance to be cocaine. The Court concluded that "[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy."[6] The Court also stated that: "[h]ere, as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment."[7] And most recently, in *City of Indianapolis v. Edmond,*[8] the Court stated that: "Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.'"[9]

DOG SNIFFS OF INANIMATE ITEMS OR LOCATIONS

The Court's decision in *Place* only determined that a dog sniff of lawfully detained luggage in a public place does not constitute a search. The recent decision by the Court in *Edmond* appears to extend this principle to the dog sniff of the exterior of a vehicle to which police have legitimate access. Lower courts have been left to decide whether a dog sniff in other contexts constitutes a search.[10] In cases not involving dog sniffs of luggage in a public place, some courts will consider the specific level of privacy that a person expects in a particular item or location.

Luggage

Assuming that a piece of luggage has been lawfully detained, typically via obtaining consent from the owner or the development of a reasonable suspicion that it contains contraband, the use of a dog to sniff such luggage is not considered a search.[11] Court decisions holding that the use of a dog in this situation is not a search rely on the Supreme Court's decision in *Place*.

Additionally, if the luggage has been entrusted to the care of a third-party common carrier, the use of a dog to sniff such bags without a warrant has been upheld.[12] For example, in *United States v. Garcia*,[13] the U.S. Court of Appeals for the Tenth Circuit held that using a dog to sniff luggage on a train baggage car did not constitute a search. Officers in that case obtained

permission from the train attendant to enter the baggage car with a certified drug detection dog. The defendant argued that the baggage car was a semiprivate area and that the sniff violated the Fourth Amendment. The court rejected the defendant's argument, noting that there was an expectation of privacy in the bag itself but not in the air surrounding the bag.

Packages

Law enforcement officers have used dogs to sniff packages sent through the mails via package services and with common carriers. The majority of the cases involve packages temporarily detained on the basis of reasonable suspicion that they contain contraband.[14] For example, in *United States v. Lyons*,[15] an airline employee noticed that a suspicious lightweight, crunchy envelope had been sent from New York to Minneapolis via airport-to-airport guaranteed arrival delivery service. The employee observed that the sender had paid the transportation charges in cash and that the airbill did not list the contents of the package. Officers responding to the employee's call recognized the name of the sender as a person involved in an earlier cocaine investigation, and found that the driver's license number given on the package belonged to another individual who also was involved in a prior drug investigation. The police brought a drug dog to a room containing the suspicious package in addition to 15 to 20 other packages. The dog tore open the suspicious package in the process of alerting to the presence of narcotics and cocaine spilled out onto the floor. The U.S. Court of Appeals for the Eighth Circuit held that neither the initial dog sniff of the package, nor the tearing open of the package by the dog constituted a search.

Warehouses or Garages

Most courts addressing cases involving a dog sniff of the exterior of a warehouse or garage from a public location have found that it is not a search.[16] For example, in *United States v. Vasquez*,[17] the U.S. Court of Appeals for the Seventh Circuit held that a dog sniff of a garage from a public alleyway did not constitute a search. In *Vasquez,* officers in a gang crimes unit began surveilling the defendant. The officers observed the defendant repeatedly go to a garage and engage in suspicious behavior. The officers saw the defendant open the locks on the garage door, open the door only high enough so he could crouch down and enter, and then quickly shut the door. While the defendant entered the garage empty-handed, he emerged a few minutes later holding a partially filled garbage bag. He then drove to a house where he entered with the bag, stayed for 10 minutes, and then left empty-handed. After a brief stop at a pay phone, the defendant returned to the garage and repeated the same steps two more times before the end of the day. The surveilling officers observed the same sequence of events on May 19, 20, and 23. On May 24, a confidential source informed the officers that the garage contained a large amount of cocaine. The officers took a drug dog to the public alleyway abutting the garage. The dog alerted to the presence of a controlled substance in the garage, whereupon the officers applied for and obtained a search warrant. Upon execution of the warrant the officers found cocaine. The defendant in the case argued that the dog sniff of the garage constituted an unauthorized search. Relying on *Place* and *Jacobsen*, the *Vasquez* court stated that they had held consistently that "a canine sniff test that is used to detect the presence of contraband is not a fourth amendment search."[18]

> ***"...a person's reasonable expectation of privacy varies according to the context of the area searched...."***

Cars

The United States is an extremely mobile society and the work of law enforcement officers frequently involves cars. Many courts have concluded that the issue of whether the use of a dog to sniff the exterior of a car constitutes a search depends on whether the police have legitimate custody of the vehicle[19] or where it is physically located at the time of the sniff.[20] In *City of Indianapolis v. Edmond*,[21] police set up checkpoints to interdict illegal drugs. During the course of the 5 minute or less stop, officers

walked drug dogs around each stopped car. While the U.S. Supreme Court found the checkpoints violated the Constitution and that the stopping of the cars constituted a seizure, "[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search."[22]

In *United States v. Rodriguez-Morales,*[23] police officers stopped the defendant's vehicle for a traffic violation and determined that neither the driver nor the passenger had a valid driver's license. The police impounded the car and took it back to the police station. At the police station, the officers called for a drug dog to sniff the exterior of the car. The dog alerted to the presence of contraband in the vehicle. The officers obtained a search warrant, and, subsequently, found cocaine hidden in the door panels of the vehicle. After citing *Place* and *Jacobsen*, the court concluded that:

> We hold that the canine sniff of the exterior of a vehicle which is legitimately within the custody of the police is not a search within the meaning of the fourth amendment; and that subjecting the exterior of such a motor vehicle to the olfactory genius of a drug detection dog does not infringe upon the vehicle owner's fourth amendment rights.[24]

If the police already do not have legitimate custody of the vehicle at the time of the dog sniff, the location of the car is important. If the car is parked in a public place, some courts have found that a dog sniff is a search requiring reasonable suspicion that the car contain contraband, while others have held that such a dog sniff is not a search.[25] For example, in the U.S. Court of Appeals for the Fifth Circuit's decision of *United States v. Ludwig*,[26] an agent walked a trained narcotics detection dog through a motel parking lot to see if the dog would alert to any of the cars. The agent had obtained permission from the motel owner to walk the dog through the parking lot for this purpose. The dog alerted to the defendant's car. The agent searched the car and found marijuana inside. The *Ludwig* court found that the defendant failed to prove that either he or the motel owners had a reasonable expectation of privacy in the parking lot. The court held that "even such random and suspicionless dog sniffs are not searches subject to the Fourth Amendment."[27] Significantly, however, the court also stated:

> Of course, the government agent may not unlawfully enter an area in order to conduct such a dog sniff. The physical entry itself may intrude on a legitimate expectation of privacy. This requires separate analysis, however, and we have explained above that the agents' entry into the parking lot and Ludwig's parking space did not intrude on a legitimate expectation of privacy and therefore was not a search under the Fourth Amendment.[28]

> ***"Most courts addressing cases involving a dog sniff of the exterior of a warehouse or garage from a public location have found that it is not a search."***

Buses

Again, assuming that a package or a piece of luggage has been lawfully detained, the use of a dog to sniff it will not be viewed as a search. In the case of *United States v. Gant*,[29] after all of the passengers exited, officers boarded the bus and moved all of the bags from the overhead racks to the seats below.[30] The officers brought a dog on the bus to sniff the bags for contraband. The dog alerted to two bags. The officers returned the bags to the overhead racks. After the passengers returned to the bus the officers asked who owned the two bags on which the dog had alerted. One of the passengers claimed one of the bags, but disclaimed ownership of the other. No other passenger claimed the second bag. The officers took the unclaimed bag off of the bus, opened it as abandoned property, and found cocaine inside. The officers reboarded the bus and obtained consent from the passenger to open the other bag. Inside that bag an officer found a box of laundry detergent that contained cocaine. The U.S. Court of Appeals for the Sixth

Circuit held that the use of a trained dog to sniff the bags did not constitute a search or seizure in violation of the Fourth Amendment.[31]

Trains

Reported cases involving officers using dogs on trains include using dogs in baggage or sleeper cars. Most courts that have considered the issue found that the use of a dog in a public corridor of a sleeper car to sniff the area outside of a roomette does not constitute a search.[32] For example, in *United States v. Colyer*,[33] an Amtrak drug enforcement unit investigator monitoring computerized reservations reported his suspicions to law enforcement in Washington, D.C. regarding a particular passenger's ticket purchase . When the train arrived in Washington for a regularly scheduled stop, officers boarded it with a dog. The dog alerted to the roomette occupied by the passenger who had made the suspicious ticket purchase. The passenger consented to a luggage search and the officers found cocaine. The court addressed the question of whether the use of the dog intruded upon the passenger's legitimate expectation of privacy. Citing *Place* and *Jacobsen*, the court stated that: "[t]he Supreme Court has indicated on at least two occasions that the ability of an investigative technique to reveal only items in which the subject has no legitimate expectation of privacy—and no other arguably private fact—bears heavily on whether the procedure has effected a search."[34] In holding that the use of the dog did not constitute a search, the court stated:

> [i]n sum because Max's sniff "d[id]not expose noncontraband items that otherwise would remain hidden from view," and was not conducted in a manner or location that subjected appellant "to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods," *Place*, 462 U.S. at 707, 103 S. Ct. at 2644, we conclude that the *Place*-enunciated rule governs, and, thus, no search occurred.[35]

Motel Rooms

In the only published federal case to address the issue of the use of a canine to sniff a motel room door, officers in *United States v. Roby*[36] approached Roby in the Little Rock, Arkansas, airport after learning that he had traveled on a one-way overnight cash ticket from Los Angeles, California. Roby refused to consent to a search of his briefcase and proceeded to his hotel. The officers followed Roby to his hotel and later used a trained dog to sniff the door of his room from the corridor. The dog alerted positively to the presence of contraband in the room. The officers eventually obtained a search warrant for the briefcase and found 10 kilograms of cocaine inside. The U.S. Court of Appeals for the Eighth Circuit held that the dog sniff outside of the motel room door did not constitute a search. The court stated that a person's reasonable expectation of privacy varies according to the context of the area searched, and that:

> Mr. Roby had an expectation of privacy in his Hampton Inn hotel room. But because the corridor outside that room is traversed by many people, his reasonable privacy expectation does not extend so far. Neither those who stroll the corridor nor a sniff dog needs a warrant for such a trip. As a result, we hold that a trained dog's detection of odor in a common corridor does not contravene the Fourth Amendment.[37]

Apartments/Homes

In *United States v. Thomas*,[38] officers used a dog to sniff the door of an apartment. The dog alerted to the presence of contraband in the apartment and a subsequent search yielded contraband. The U.S. Court of Appeals for the Second Circuit held that the use of the dog to sniff the door constituted a Fourth Amendment search. The court acknowledged that using dogs to sniff luggage at airports did not constitute a search. After indicating that the question to consider is whether the use of the dog intrudes

on a legitimate expectation of privacy, the court stated that:

> A practice that is not intrusive in a public airport may be intrusive when employed at a person's home. Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, see *United States v. Place*, 103 S. Ct. at 2644, it remains a way of detecting the contents of a private, enclosed space. With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument.... Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at this door constituted a search.[39]

Notably, the *Thomas* decision has been expressly rejected by the U.S. Court of Appeals for the Ninth Circuit and criticized by other courts.[40] In the only other published Federal case involving the use of a dog to sniff the exterior of a house, the district court in *United States v. Tarazon-Silva*[41] determined that the use of a dog in that case did not constitute a search. In *Tarazon-Silva*, officers used a trained dog to sniff at the base of a house near a dryer vent. The court noted that the U.S. Court of Appeals for the Fifth Circuit has stated that a dog sniff is not a search and that "if a police officer, positioned in a place where he has a right to be, recognizes the odor of, for example, marijuana, no search has occurred."[42] The officer and the dog in *Tarazon-Silva* were in a location near the house accessible to neighbors, repair, and sales people that was an extension of the driveway and not included within an enclosure surrounding the home. The court found that the sniff did not constitute a search because the officer and dog were in an area where they had a lawful right to be at the time of the alert.

> ***...using dogs to sniff luggage at airports did not constitute a search.***

DOG SNIFFS OF PEOPLE

There are few reported cases addressing the use of narcotics detection dogs on people.[43] While the Supreme Court has never addressed the issue of whether a dog sniff of a person constitutes a search, one Justice has stated that: "I have expressed the view that dog sniffs of people constitute searches."[44] Cases addressing the use of narcotics dogs to sniff school children and detect drugs have generally held that the use of such dogs is an unconstitutional search, although one court found such a sniff was not a search.[45] Courts holding the dog sniffs unconstitutional drew a distinction between sniffs of objects or places and persons, noting that "the fourth amendment 'protects people, not places.'"[46]

CONCLUSION

As the use of dogs by law enforcement has increased, so too has the amount of case law addressing the Fourth Amendment implications of dog sniffs. One judge has stated that:

> [i]t would seem apparent that *Place* and *Jacobsen* stand for the proposition that a canine sniff capable of detecting only the presence or absence of a contraband item is not a search within the meaning of the Fourth Amendment.... I agree that *Place* and *Jacobsen* compel the conclusion that a canine sniff of an inanimate object is not a search under the Fourth Amendment, regardless of the object or area sniffed.[47]

Despite the fact that *Place* and *Jacobsen* can be read in the manner stated by this judge, until the Supreme Court clarifies the law regarding dog sniffs of persons, items, or locations other than luggage located in a public place, or with the exterior of vehicles as mentioned in the *Edmond* decision, the circumstances under which an officer uses a dog to sniff for contraband will continue to impact whether the dog sniff will be considered a search.

The following insights can, however, be drawn from a review of the existing case law. The Supreme Court has decided that the dog sniff of lawfully detained luggage in a public place does not constitute a search, nor apparently does the dog sniff of the exterior of a legitimately detained vehicle. Whether a dog sniff of the exterior of a car constitutes a search will depend on a number of factors such as whether law enforcement officers have lawful custody of the car or where the car is located at the time of the sniff. Some courts have held that reasonable suspicion is required to have a dog sniff a vehicle.

A dog sniff of luggage entrusted to the care of a third-party common carrier and packages sent through the mail package services and common carriers, in most circumstances, are not searches. Dog sniffs outside of warehouses and garages conducted where the law enforcement officer has a right to be have generally been held not to be a search. Similarly, with respect to dog sniffs from the outside of train roomettes and apartments, and by association motel rooms and homes, some courts have held that such sniffs are not searches, while others conclude that the sniff is a search that requires a reasonable suspicion or even probable cause to believe contraband is at the location prior to the sniff. Finally, while the Supreme Court has never directly addressed the issue, an examination of lower court case law indicates that a dog sniff of a person is generally considered a search. Because courts are divided over when a dog sniff constitutes a search, and because state courts may find dog sniffs are searches under their own state constitutions,[48] officers should consult with their legal advisors before using a dog to sniff items, locations, or persons for the presence of contraband. ✦

Endnotes

[1] U.S. Const. Amend. IV.

[2] This article updates the article by Kimberly A. Kingston, "Hounding Drug Traffickers—The Use of Drug Detection Dogs," *FBI Law Enforcement Bulletin,* August 1989, 26.

[3] 462 U.S. 696 (1983).

[4] *Id.* at 707.

[5] 466 U.S. 109 (1984).

[6] *Id.* at 123.

[7] *Id.* at 124.

[8] 121 S. Ct. 447 (2000).

[9] *Id.* at 453 (citations omitted).

[10] Courts also have addressed such issues as the training and reliability of the dogs, *see, e.g., United States v. Williams*, 726 F.2d 661, 663 (10th Cir.), *cert. denied,* 467 U.S. 1245 (1984), the amount of suspicion necessary to effect a detention of an item to submit it to a dog sniff, *see, e.g., United States v. Green*, 52 F.3d 194 (8th Cir. 1995), and whether a positive dog alert constitutes probable cause, *see, e.g., United States v. Hernandez*, 976 F.2d 929 (5th Cir. 1992), *cert. denied,* 508 U.S. 914 (1993); *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989); *United States v. Knox,* 839 F.2d 285, 294 n.4 (6th Cir. 1988), *cert. denied,* 490 U.S. 1019 (1989).

[11] *See, e.g., United States v. Avery,* 137 F.3d 343, 348 n.2 (6th Cir. 1997); *United States v. Thomas*, 87 F.3d 909 (7th Cir.), *cert. denied,* 519 U.S. 975 (1996); *United States v. Mendez*, 27 F.3d 126 (5th Cir. 1994); *United States v. Moore*, 22 F.3d 241 (10th Cir. 1994), *cert. denied,* 513 U.S. 891 (1994); *United States v. McFarley*, 991 F.2d 1188 (4th Cir.), *cert. denied,* 510 U.S. 949 (1993); *United States v. Jones*, 990 F.2d 405 (8th Cir.), *cert. denied,* 510 U.S. 934 (1993); *United States v. Allen*, 990 F.2d 667 (1st Cir. 1993); *United States v. Attardi*, 796 F.2d 257 (9th Cir. 1986).

[12] *See, e.g., United States v. De Los Santos Ferrer*, 999 F.2d 7 (1st Cir.), *cert. denied,* 510 U.S. 997 (1993); *United States v. Riley*, 927 F.2d 1045 (8th Cir. 1991); *United States v. Massac*, 867 F.2d 174, 176 (3d Cir. 1989); *United States v. Beale*, 736 F.2d 1289, 1292 (9th Cir. 1984), *cert. denied,* 469 U.S. 1072 (1984); *United States v. Bronstein*, 521 F.2d 459 (2nd Cir. 1975), *cert. denied,* 424 U.S. 198 (1976); *United States v. Fulero*, 498 F.2d 748 (D.C. Cir. 1974).

[13] 42 F.3d 604 (10th Cir. 1994), *cert. denied,* 514 U.S. 1073 (1995).

[14] *See, e.g., United States v. Daniel,* 982 F.2d 146 (5th Cir. 1993); *United States v. England*, 971 F.2d 419 (9th Cir. 1992).

[15] 957 F.2d 615 (8th Cir. 1992).

[16] *See, e.g., United States v. Venema*, 563 F.2nd 1003 (10th Cir. 1977) (dog sniff of locker at rental storage facility not a search); *United States v. Cook*, 1990 WL 70703 (6th Cir. 1990) (unpublished) (same); *cf. State v. Smith*, 939 P.2d 157 (Ore. Ct. App. 1997), *rev'd,* 363 P.2d 642 (Ore. 1998).

[17] 909 F.2d 235 (7th Cir. 1990), *cert. denied,* 501 U.S. 1217 (1991).

[18] *Id.* at 238. *See also United States v. Lingenfelter*, 997 F.2d 632 (9th Cir. 1993) (Agents walked a trained dog through a public alley by a warehouse after receiving a tip from an informant that a subject was storing 2 tons of marijuana inside. The dog alerted to the presence of contraband in the warehouse. The court held that the dog sniff did not constitute a search.).

[19] *See, e.g., United States v. Hunnicut*, 135 F.3d 1345 (10th Cir. 1998); *United States v. Holloman*, 113 F.3d 192 (11th Cir. 1997); *United States v. Carrazco*, 91 F.3d 65 (8th Cir. 1996); *United States v. Williams*, 69 F.3d 27 (5th Cir. 1995), *cert. denied,* 516 U.S. 1182