DRUG DOGS---RELIABILITY ISSUES AND CASE LAW
HOW GOOD IS THAT DOGGIE'S NOSE?

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TOPICS COVERED:

I. DRUG DOG SNIFF IS NOT A SEARCH UNDER *ILLIONOIS V. CABALLES* AND NORTH CAROLINA LAW

II. CASE LAW APPEARS TO SUPPORT A REQUIREMENT OF A "WELL-TRAINED" OR "PROPERLY TRAINED" NARCOTIC DOG FOR PROBABLE CAUSE TO BE FOUND

III. *FRANKS* HEARING REGARDING DRUG DOG ALERT

IV. WHAT DO YOU NEED TO ASK FOR IN DISCOVERY TO ATTACK THE DOG'S NOSE?

V. POTENTIAL AREAS AND IDEAS FOR CROSS-EXAMINATION OF DOG HANDLER

I.

DRUG DOG SNIFF IS NOT A SEARCH UNDER ILLIONOIS V. CABALLES AND NORTH CAROLINA LAW

ILLIONOIS V. CABALLES, 543 U.S. 405; 125 S.Ct. 834; 160 L.Ed 2d 842 (2005)

Held: "the use of a **well-trained** narcotics-detection dog—one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U.S., at, 707, 77 L.Ed.2d 110, 103 S.Ct. 2637—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized from a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement." (emphasis added)

STATE OF NORTH CAROLINA V. BRANCH, 177 N.C.App. 104; 627 S.E.2d 506 (2006)

Held: "Although *Branch* arises from a different set of factual circumstances than *Caballes*—one involves a detention at a license checkpoint and the other a stop for a traffic violation—the Supreme Court's analysis is no less applicable. In *Branch*, we

determined that the officers' detention of defendant to verify whether her driving privileges were valid was reasonable under the circumstances. See Branch, 162 N.C. app. at 712-13, 591 S.E.2d at 926. And once the lawfulness of a person's detention is established, *Caballes* instructs us that officers need no additional assessment under the Fourth Amendment before walking a drug-sniffing dog around the exterior of that individual's vehicle. This is directly contrary to what we held in *Branch*. Thus, based on *Caballes*, once Ms. Branch was detained to verify her driving privileges, Deputies Howell and Marshall needed no heightened suspicion of criminal activity before walking Toon around her car. "

BUT REMEMBER LENGTH OF DETENTION:

STATE OF NORTH CAROLINA V. ARLES EUCEDA-VALLE, 641 S.E.2d 858; 2007 N.C. App. LEXIS 584. (2007)

Case cites with approval language from *Caballes* and *Branch:*

> The United States Supreme Court has articulated "that the Fourth Amendment does not give rise to a legitimate expectation of privacy in possessing contraband or illegal drugs, and as such, a well-trained dog that alerts solely to the presence of contraband during a walk around a car at a routine traffic stop 'does not rise to the level of a constitutionally cognizable infringement.'" (citations omitted) However, in order to further detain a suspect from the time the warning ticket is issued until the time the canine unit arrives, there must be "reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot." (citations omitted) "The specific and articulable facts, and the rational inferences drawn from them, are to be 'viewed through the eyes of a reasonable, cautious officer, guided by his experience and training."'(citations omitted) "In determining whether the further detention was reasonable, the court must consider the totality of the circumstances" (citations omitted)

In this case the canine sniff was conducted after the defendant was given his warning ticket and after the defendant was told to remain in the police vehicle. The court ultimately held however that:

> the trial court's findings of fact support its legal conclusion that law enforcement had a reasonable suspicion necessary to conduct the exterior canine sniff of the vehicle. Defendant was extremely nervous and refused to make eye contact with the officer. In addition, there was smell of air freshener coming from the vehicle, and the vehicle was not registered to the occupants. And there was disagreement between the defendant and the passenger about the trip to Virginia. We conclude that these facts support

a basis for a reasonable and cautious law enforcement officer to suspect that criminal activity is afoot.

II.

CASE LAW APPEARS TO SUPPORT A REQUIREMENT OF A "WELL-TRAINED" OR "PROPERLY TRAINED" NARCOTIC DOG FOR PROBABLE CAUSE TO BE FOUND

-A positive indication by a properly-trained dog is sufficient to establish probable cause for the presence of a controlled substance.

United States v. Diaz, 25 F.3d 392 (1994) Sixth Circuit
-"while training and performance documentation would be useful in evaluating a dog's reliability, here the testimony of . . . Dingo's handler, sufficiently established the dog's reliability

United States v. Berry, 90 F.3d 148 (1996) Sixth Circuit
-affiant's references to the dog as a "'drug sniffing or drug detecting dog"' implied that the dog was a "'trained narcotics dog."' Affiant also stated that the dog was trained and qualified to conduct narcotics investigations.
-above was sufficient to show dogs training and reliability

United States v. Venema, 563 F.2d 1003 (1977) Tenth Circuit
-"'trained, certified marijuana sniffing dog"' was sufficient

United States v. Klein, 626 F.2d 22 (1980) Seventh Circuit
-affiant's representation that the dog "'graduated from a training class in drug detection in October 1978"' and "'has proven reliable in detecting drugs and narcotics on prior occasions"' was sufficient

United States v. Sundby, 186 F.3d 873 (1999) Eighth Circuit
-affidavit only needed to state that dog had been trained and certified to detect drugs

-A properly-trained dog's failure to react does not necessarily destroy probable cause.

See-- United States v. Jodoin, 672 F.2d 232 (1982) First Circuit
Court noted: '"although a drug detecting dog did not react when it sniffed the suitcase, the agents pointed out that, according to dog handlers, 'the dogs are not foolproof,' they 'are less accurate on hot muggy days,' and drug traffickers have found ways 'to mask the odors of contraband to fool detection efforts."' "The dogs failure to react does not, in our view, destroy the 'probable cause' that would otherwise exist. It is just another element to be considered by the magistrate."'

III.

FRANKS HEARING REGARDING DRUG DOG ALERT.

Under Franks v. Delaware, when a

> defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false materials set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978).

MUST SHOW: (1) BAD FAITH OR RECKLESS DISREGARD FOR THE TRUTH EXISTED ON PART OF AFFIANT (CAN INCLUDE MATERIAL OMISSIONS) AND
(2) THERE WOULD HAVE BEEN NO PROBABLE CAUSE BUT FOR THE INCORRECT STATEMENT

See also: N.C.G.S. 15A-978(a) which reads in part:

> (A) A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

***Franks* violation found by Court:**

In United States v. Jacobs, 986 F.2d 1231 (1993) Eighth Circuit, a suspicious package was sniffed by Turbo. Turbo showed an interest in the package by pushing it around with his nose and scratching at it twice, but this action did not amount to an official alert. The dog's handler was not sure that the package contained drugs. Officer

Henderson relayed information by telephone to Officer Brotherton, (the officer obtaining the warrant) that the dog had not given a full alert, but had shown an interest in the package. The magistrate judge was informed by Officer Brotherton that Turbo had shown an interest in the package, but the magistrate judge was not told that Turbo had failed to give a full alert to the package. After Officer Henderson's first call, a second dog examined the package and failed to alert or show and interest in it. Officer Henderson called Officer Brotherton a second time and learned that the search warrant had been issued. Officer Henderson told Officer Brotherton that a second drug dog had arrived and they were going to wait until this dog could conduct a sniff before executing the warrant. Apparently, neither, Officer Brotherton nor the magistrate judge was informed of the results of the second sniff.

The Court found a *Franks* violation and held: "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 dogs 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."

No Franks violation found by Court:

United States v. Frost, 999 F.2d 737 (1993) Third Circuit

No *Franks* violation found in this case. Affiant mentioned that dog alerted to cash on defendant, but failed to mention that the dog was exposed to and failed to alert on suitcase.

Court held: "When one includes both the fact that the drug sniffing dog did not alert to the suitcase and the fact that drug couriers often mask the scent of drugs in suitcases so that a drug sniffing dog will not alert, the failure to alert to the suitcase is not inconsistent with the substantial probative thrust of information which Adams did include."

IV.

WHAT DO YOU NEED TO ASK FOR IN DISCOVERY TO ATTACK THE DOG'S NOSE?

INCLUDE BRADY REQUEST---ALL INFORMATION THAT SHOWS THE DOG IS NOT RELIABLE.

*Handler's Logs
*Training Records
*Testing and Field Logs
*Score Sheets
*Certification Records
*Training Standards and Manuals
*What drugs has the dog been trained to alert on?
*Case Reports involving dogs
*Number of False Alerts
*What is the dog's method for Alerting?
*Can the dog tell when drugs were present?
*Training Records of Handler
*Veterinary Records

FEDERAL CASE ON DISCOVERY OF DRUG DOG'S RELIABILITY

United States v. Cedano-Arellano, 332 F.3d 568 (2003) Ninth Circuit
Court held: "the district court judge erred in denying defense counsel's motion for discovery of the dog's training and certification records. ." The court, however, found the error to be harmless.

V.

POTENTIAL AREAS AND IDEAS FOR CROSS-EXAMINATION OF DOG HANDLER

*Did the dog show an interest, cast or actually alert?

See generally, United States v. Rivas, 157 F.3d 364 (1998) Fifth Circuit)
-casting by drug detection dog did not provide reasonable suspicion of criminal activity
See generally, United States v. Jacobs, 968 F.2d 1231 (1993) Eighth Circuit
-drug dog only showed an interest in package

*Cross Contamination

*Unconscious Cuing of the Dog by the Handler

*Dogs are not foolproof:

-**Have to continually train to make sure maintains reliability**
United States v. Kennedy, 131 F.3d 1371 (1997) Tenth Circuit
As noted in the opinion, the discovery materials in this case revealed the following:

> Bobo (drug dog) and Lujan (handler) had been trained as a team and certified by Global Training Academy ("Global") in San Antonio, Texas, in November, 1993. Bobo received a 96 % success rating from Global. Global's manual instructed Lujan to keep proper records of Bobo's activities and periodically field train Bobo to ensure Bobo's continued reliability**. Global's continued assurance of Bobo's accuracy depended on Lujan following these instructions. Over time, if not properly monitored, a dog may fall out of its trained behavior and begin responding to a handler's cues rather than to actual detection of a narcotic odor.** A drug dog will lose its effectiveness in the field and may revert to old, bad habits if not continually trained. (emphasis added)

*False-Positives

*Highly trained dogs can get it wrong