

# Search, Seizure & Dogs

“Attacking K-9 Evidence at Border Patrol  
Checkpoints”

Presented by

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*Criminal Law Updates Trends and Updates*

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# THE K-9 DETECTION TEAM



# Narcotics-Detection K-9s

- Valuable tool used by law enforcement during the war on drugs.
- 30 years of case law has developed concerning most 4<sup>th</sup> Amendment scenarios.
- When used properly and under the right conditions, drug-dogs work...

# Goals

- Challenging Assumptions about Narcotics-Detection K-9s for:
  - Judges
  - Prosecutors
  - You
- The law regarding Narcotics-Detection K-9s
- How K-9's detect Narcotics

# Areas to Sniff out Success

- Was there violation of the Fourth Amend.?
  - (a lot of bark, no bite)
- Was the “K-9 Alert” reliable to establish P. C.?
  - (the Real Focus)
    - Look at the actions of the Narcotics Detection Team.
    - Look at the “Alert” itself.
    - Look at the Reliability of the K-9.

# Narcotics Detection Team

- The Team works as a “Unit.”
- A trained Handler.
- A trained K-9.
- Reliable only when both are working together properly.



# In General, a Sniff is not a Search

- *U.S. v. Place*, 462 U.S. 696 (1983)
  - Exposure of luggage to a trained narcotics-detection dog is not a search for 4<sup>th</sup> Amendment purposes.
- *Illinois v. Caballes*, 543 U.S. 405 (2005)
  - Where lawful traffic stop did not extend beyond time necessary to issue ticket and conduct inquiries incident to the stop, other officer's arrival and use of narcotics detection dog to sniff around the exterior of vehicle did not rise to level of infringement of 4<sup>th</sup> Amendment rights.



# ***U.S. v. Place*, 462 U.S. 696 (1983)**

- Passenger in Miami International Airport suspected of carrying Narcotics.
- Passenger arrived at La Guardia and DEA seized his bags based on discrepancies on address tags and nervous behavior.
- Took bags to Kennedy Airport and subjected to a drug-dog sniff.
- Dog alerted.

# ***U.S. v. Place*, 462 U.S. 696 (1983)**

- Rational:
  - The initial taking of the luggage was a reasonable temporary seizure under *Terry*
  - “A K-9 sniff by a well-trained narcotics detection dog,... does not require opening the luggage.”
  - “It does not expose non-contraband items that otherwise would remain hidden from public view, as does, for example, the officers rummaging through the contents of the luggage.”

# ***U.S. v. Place*, 462 U.S. 696 (1983)**

- Rational:
  - The is “*much less intrusive than a typical search.*”
  - A sniff does not subject the property owner to “*embarrassment and inconvenience of a less discriminate and more intrusive investigation method.*”

# ***Illinois v. Caballes*, 543 U.S. 405 (2005)**

- Motorist stopped with R.S. for a lawful traffic violation.
- While a warning citation being written, second officer arrived with K-9 and sniffed exterior of vehicle.
- Stop lasted no more than 10 minutes.
- Dog Alerted.

# ***Caballes Sniff***

- Trained narcotics detection K-9 Team
- Lawful traffic stop
- Traffic stop does not extended beyond time necessary
- Sniff around the exterior of vehicle

# **Trained Narcotics Detection K-9 Team**

- The K-9 alert must be sufficiently reliable to provide probable cause to conduct the search.
- Therefore, the Handler and the Dog must have received proper training and be current in that training.
- Testimony and records must support proper training.

# Trained Narcotics Detection K-9 Team

- Remember FRE 702 *Expert requirements*.
- The training that officers receive varies greatly from department to department.
- The training records for the K-9 should be extensive and detailed.
- The training records should include a log of every training session as well as every use of the dog in the field.
- K-9s should receive a minimum of 4 hours training per week.

# Trained Narcotics Detection K-9 Team

- The dog **must** be trained, certified and reliable. The dog does not have to be 100% accurate or perfect. The courts have recognized the fact that “false responses”, “false positives” or “false alerts” occur and **dogs can be as low as 54% accurate.** *United States v Cedano-Arellano*, 332 F. 3d 568 (9<sup>th</sup> Cir 2003)



# **Trained Narcotics Detection K-9 Team**

- While the vast majority of cases in most jurisdictions simply require a showing that the dog was “trained,” the following issue can provide fertile ground for cross-examination of the officer regarding the sufficiency of training:
- Type of training.
- Duration of training.
- Date of last training.
- Ability of officer to explain training.
- Relevancy of training to actual field use.

# The Science of Sniff

## (the place for great Cross-X)

- Principles of Conditioning
- There a number of steps that are required to take a dog from untrained to a Narcotics-Detection K-9.
- Dogs must learn through a series of methodical steps.
- Dogs are taught on each drug separately.
- No short cuts in training.

# Discovery of K-9 Training and Certification Materials

- Since only a trained, certified , and reliable Narcotics Detection Team can give Probable Cause, then:
- full disclosure of training and certification materials is vital to an adequate defense.

# Discovery of K-9 Training and Certification Materials

- Under Rule 16 of the Federal Rules of Criminal Procedure, the government is required to disclose materials pertaining to narcotics-detection K-9 Training. *U.S. v. Cedano-Arellano*, 332 F3d 568, 571 (9<sup>th</sup> Cir. 2003) .
- The records are crucial for effective cross-examination.

# Discovery of K-9 Training and Certification Materials

- While a *Daubert* hearing is not necessarily the appropriate procedural vehicle to challenge the reliability of a canine inspection, the court must recognize the importance of a “trained and certified canine unit.” *See United States v. Outlaw*, 134 F.Supp.2d 807 (W.D. Texas 2001) *citing United States v. Dovali-Avila*, 895 F.2d 206 at 207 (5<sup>th</sup> Cir. 1990).

# Discovery of K-9 Training and Certification Materials

- Judge, “We are not asking for a *Daubert*, to challenge the sniff, we are challenging this officers ability to testify as an Expert.”

# Discovery of K-9 Training and Certification Materials

- The following should be discovered:
- 1. Verification that the canine was trained to detect the odors for the particular drug.
- 2. Verification of the canine's success rate.
- 3. The method used to train the canine to indicate an alert.
- 4. The type of alert used.
- 5. A statement showing that the canine positively alerted to the presence of narcotics in the proper fashion.
- 6. Proof of the canine's certification.
- 7. Proof that the canine has continued to meet all certification requirements and received necessary training on a regular basis.
- 8. Verification that the handler has been trained to handle narcotics-detection canines.

# ASK for an Independent Evaluation

- **Motion to for an Independent Evaluation of Narcotics Detection Team**
- Have your expert test set up a test



# Lawful Traffic Stop

- Reasonable suspicion required of an offense for a lawful traffic stop.
- Lawful traffic stop at inception must remain lawful through out the stop. *See U.S. v. Jacobsen*, 466 U.S. 109 (1984)

# Traffic Stop Must Not Extend Beyond Time Necessary

- The *Caballes* stop lasted less than 10 minutes
- “A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” *Illinois v. Caballes*

# **Traffic Stop Must Not Extend Beyond Time Necessary**

- Items to Discover and Subpoena:
- Dispatch or radio logs and Mobile Data Terminal (MDT) records for times of:
  - Traffic Stop
  - Call for or arrival of K-9 Unit
  - Call for assisting officers
  - When the individuals identification is checked
  - Arrest of individual
  - Conclusion of traffic stop
- This documentation will allow a time line to be established to determine if the stop was unreasonably extended.

# Sniff Around the Exterior of Vehicle

- The sniff must be limited to the exterior of vehicle.
- Dog cannot be taken in to the vehicle without prior probable cause.
- *\*What if the dog jumps in?*
- *\*What if the dog “breaks the plane” of the window?*
- *\*What if the officer opens the door for the dog?*

# ***Caballes* Did Not Challenge the Alert**

- Remember that *Caballes* only dealt with:
- Trained K-9 Team.
- Lawful traffic stop.
- Short duration of traffic stop.
- Sniff of Exterior of vehicle.
- THE ALERT ITSELF WAS NOT CHALLENGED

# ***Caballes* Did Not Challenge the Alert**

- The vast majority of K-9 Sniff case law deals with the factors surrounding and leading up to the search.
- Most case law does not deal with the validity of the Alert itself.

# Other K-9 Searches

- Luggage
- Automobiles
- Hotels, Motels, etc.
- Packages
- School Lockers
- Persons
- International Borders

# Luggage

- The submission of luggage to a canine sniff for narcotics does not constitute a Fourth Amendment search. *United States v. Williams*, 365 F.3d 399 (5<sup>th</sup> Cir. 2004).





# Breathing Luggage

- \* *“Breathing the luggage” - officers will manipulate the bag to force out detectable air. Some will train dogs to walk on luggage to cause the same to occur.*
- The manipulation of luggage constitutes a search for 4<sup>th</sup> Amendment purposes, *Bond v. United States*, 529 U.S. 334, (2000)
- Furthermore, a “squeeze and sniff” is the same sort of manipulation that *Bond* classifies as a Search *U.S. v. Ellis*, 330 F.3d 677, (2003), *U.S. v. Jaime*, 473 F.3d 178, (2006)
- (*Minnesota v. Dickerson*)

# Breathing Luggage

- What if the dog is trained to “breath” the luggage by stepping on it or forcing air out of the luggage with his nose?
- \* *“Breathing the luggage” video 1*



# Automobiles

- *Pre-Caballes* - Border Patrol agents may stop motorists, and selectively conduct dog sniffs of their vehicles, without reasonable suspicion because dog sniffs are not searches within the meaning of the Fourth Amendment. *United States v. Hernandez*, 976 F.2d 929 (5<sup>th</sup> Cir. 1992).

*Caballes* broadens *Hernandez* to entire country.



# Automobiles

- REMEMBER, at a Checkpoint, must still have:
- Trained K-9 Team.
- Reasonable duration of stop.
- Sniff of Exterior of vehicle.

# Hotels, Motels, etc.

- The use of a narcotics-detection dog at the exterior of a motel-room door that opens onto a public sidewalk and parking lot is not a search within the meaning of the Fourth Amendment. *United States v. Marlar*, 828 F.Supp 415 (N.D. Miss. 1993), dismissed, 68 F.3d 464 (5<sup>th</sup> Cir. 1995).
- Different than residences because exterior of motel is public.
- The Alert can still be challenged.

# Packages

- A canine sniff outside a package on a common air-carrier is not a search within the meaning of the Fourth Amendment. *United States v. Daniel*, 982 F.2d 146 (5<sup>th</sup> Cir. 1993).
- Similar to luggage.

# School Lockers

- A dog sniff of a student's locker at a school is not a search within the meaning of the Fourth Amendment. *United States v. Daniel*, 982 F.2d 146 (5<sup>th</sup> Cir. 1993).
- Similar to hotel door.



# Persons

- The non-contact dog sniff of a passenger, after the dog had alerted to the presence of narcotics in the passenger compartment of a bus, was not a search within the meaning of the Fourth Amendment. The dog was four to five feet away from the passenger when sniffed, and the handler did not intend to have the dog sniff the passenger as he exited the bus. *United States v. Reyes*, 349 F.3d 219 (5<sup>th</sup> Cir. 2003).

# Persons

- BUT:
- An up close sniffing of a person at the border by a trained K-9 offends reasonable expectations of privacy and is thus a “search” under the 4<sup>th</sup> Amendment. *U.S. v. Kelly*, 302 F.3d 291 (5<sup>th</sup> Cir. 2002.)

# Border Exception to 4<sup>th</sup> Amendment

- Under the “border-search doctrine,” government agents may conduct routine searches at international borders or their functional equivalents without probable cause, a warrant, or any suspicion to justify a search. *U.S. v. Rivas*, 157 F.3d 364, at 367 (5<sup>th</sup> Cir. 1998).
- But the stop and search must be ROUTINE!!!!
- Otherwise, reasonable suspicion is required.

# Border Exception to 4<sup>th</sup> Amendment

- Routine stop and searches under *Rivas*, are ones that do not “seriously invade a traveler’s privacy.”
- In *Rivas*, the court suppressed a sniff known as “casting”.
- Casting is an improper alert in which the handler claims that a K-9 smelled contraband from a distance.
- The agents “drilled” into a vehicle in *Rivas* which would not be considered “routine”.

# Border Exception to 4<sup>th</sup> Amendment

- Remember *Kelly*, an up close sniff of a person, even at the border is a search,
- But, under the “border-search doctrine,” an up close sniff at the boarder is permitted without reasonable suspicion as long as it is routine.

# Border Check Points

- Fixed Checkpoints have videos.
- Request video early to preserve.
- If video not preserved, **file Motion to Exclude and Charge on Spoliation.**
- *Show Video 2*
  - \*\*\**What about alerting to “Humans or Narcotics.”*
- *Border Patrol specific technique.*



F40-Primary Lane 2- 55

12/26/2006  
4:09:20 PM

PLAY

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July 10, 2007

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*Via Facsimile No. 956-726-2266*

*Re: U.S. v. Isauro Mora Tinoco; CR-L-07-907*  
Request for Retention and Preservation of Evidence

Dear Mr. Sardelli,

I understand that my client, Isauro Mora Tinoco, was stopped and arrested at the U.S. Border Patrol checkpoint at Hwy 16 near Hebbronville, Texas east of Laredo at approximately 6:20 a.m. on June 13, 2007. I am requesting that any and all video and/or audio recordings associated with the stop and arrest of Mr. Mora-Tinoco be preserved and maintained as I believe them to contain be potential exculpatory evidence in my client's case. I would also request that your office preserve the video and audio recordings which captured the detention and arrest of the co-defendant's Megan and Cecilia Hood. Their arrest and detention occurred on or about the same time as my client's arrest but they may have been driving in a different lane. Furthermore, if any video or audio recordings were made of the "alien witnesses" I would also request that those recordings be maintained and preserved as they too may contain exculpatory evidence on them. I am also requesting that the videos be provide to my office for inspection and discovery. This request will be formally made in my motion for discovery which is forth coming.

Thank you for your attention to this matter and if you have any questions, please do not hesitate to call.

Sincerely,



Donald H. Flanary, III.  
for the firm Goldstein, Goldstein, and Hilley



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February 1, 2007

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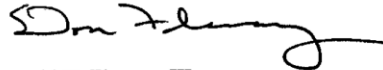
*Re: U.S. v. Bruce Ortman; CR-L-07-78*

Dear Ms. Pirra,

I understand that my client, Bruce Ortman, was stopped and arrested at the U.S. Border Patrol checkpoint at Hwy 359 east of Laredo at approximately 4:00 p.m. on December 26, 2006. I am requesting that any and all video and/or audio recordings associated with the stop and arrest of Mr. Ortman be preserved and maintained as believe them to be potential evidence in my client's case. I am also requesting that they be provide to my office for inspection and discovery. This request will be formally made in my motion for discovery to be filed on Monday.

Thank you for your attention to this matter and if you have any questions, please do not hesitate to call.

Sincerely,



Donald H. Flanary, III.  
for the firm Goldstein, Goldstein, and Hilley

copy via fax: 956-726-2266

# The Alert

- The Alert is the Second half of the Inquiry!
- *Place* and *Cabellas* do not deal with the Alert
- Most fertile ground to attack the Probable Cause
- But, biggest obstacle to overcome.

# The Focus of the Motion to Suppress

- Was the “Alert” sufficiently reliable to establish probable cause for the Search?
  - Look at the Alert itself
  - Explore the reliability of the Team to do its job
    - Was the Team properly trained?
    - Does the Team execute its job according to that training?

# Was it a legitimate “Alert”?

- A trained or conditioned response by a K-9 to a stimulus.
- Two types of alerts:
  - Passive
    - Sitting, stop and stare, lay down, a bark, something passive and non-aggressive.
  - Aggressive
    - Scratching, clawing, and/or biting

# Reasons for different types Alerts

- Passive alerts are used for explosives, to prevent to personal property damage, and minimize liability.
- Aggressive alerts is a more natural response for the dog and easier to train.
- Neither are better than the other.

# Signs of Legitimate Alerts

- K-9 works independently of the Handler.
- K-9 shows active and independent sniffing behavior.
  - “Bracketing”
  - Curiosity of the environment
  - Mouth closed (*can't sniff if they are panting*)
- K-9 must make an independent choice to respond to stimulus.

# Signs of Legitimate Alerts

- K-9 must make an independent choice to respond to stimulus.
  - Focused on the search, not the handler
  - Does or does not respond regardless of handlers activities
  - Not looking to Handler for direction or assistance
- If the Handler immediately rewards the response, the Handler believes it is a good alert.
- The K-9 should not leave the alert position until he receive the reward.

# Signs of False Alerts

- Handler must not cue the dog in any way.
  - Should not stop and stand or stare at dog.
  - Should not reach for the reward before the alert is given by the dog.
  - Should not start talking to the dog before the alert is given by the dog.
- Handler should not repeatedly run a dog through the same areas.
- Handler should trust their dog.



# Sole Purpose of Handler

- “Portable toy Dispenser”
- Insure that all productive areas have been checked.
- Insure the dog is working the area properly.
- Reward a legitimate alert.

# Was the “Alert” sufficiently reliable to establish P.C. for the Search?

- Only officer’s testimony
  - Cross-Examine, get an expert
- Video evidence
  - Watch, get an expert
  - (*Your expert can be appointed\**)

# **Its all about the TOY!**

- The Dog doesn't care about the bad guy.
- The Dog doesn't care about the drugs.
- The Dog doesn't care about the law.
- The Dog just wants his TOY.
- The Dog has been conditioned what to do to get his TOY!

# Dogs are Selfish!

- DNA tests, Intoxilizers, Ballistics tests, and all other scientific instruments do not have a desires or agendas.
- Unlike other Law Enforcement tools the dog has an agenda and a desire.
- The Dog wants the toy and will do anything to get it.
- Dogs are more like CI's then they are like machines.

# Top 10

## Things to Look for on a K-9 Video

- 1. The actual response of the dog sitting is over rated.
- It is the actions of the handler and canine in the 10 - 20 seconds before that which are important.

# Top 10

## Things to Look for on a K-9 Video

- 2. The K-9 should be showing "active sniffing behavior" and not just following along with the handler's hand presentations.

# Top 10

## Things to Look for on a K-9 Video

- 3. The K-9 should be exploring and curious about areas other than the specific spots that the handler points out to it.

# Top 10

## Things to Look for on a K-9 Video

- 4. The K-9 should not be looking at the handler constantly.
- This is a sign of a very dependant and unreliable K-9. This is also an indication of a K-9 looking for some sort of "cue" from the handler about where he is expected to respond.



# Top 10

## Things to Look for on a K-9 Video

- 5. Fluid motions of the handler.
- The handlers should keep moving without stuttering their step or hesitating when the K-9 is showing an interest in an area.

# Top 10

## Things to Look for on a K-9 Video

- 6. Handlers should not “tap back.”
- This is going back to an area where a K-9 has already checked and making them do it again. The K-9 will take this as a cue and respond even if nothing is there.

# Top 10

## Things to Look for on a K-9 Video

- 7. The K-9 should be working almost independently of the handler and not actively paying much attention to him
- A good K-9 needs little or no presentations from the handler.
- Handlers are merely portable toy or food dispensers for when the canine does right.

# Top 10

## Things to Look for on a K-9 Video

- 8. Once a K-9 responds, it should become still until the given its reward.
- If a canine is seen to respond or “sit”, and then immediately get back up again, then this is a false response or a sign that the canine is weak in its task.

# Top 10

## Things to Look for on a K-9 Video

- 9. A good K-9 that does not get its reward in a timely manner (within 1 - 3 seconds) it will go back, sniff again and respond again and start getting antsy.
- A weak canine will get up and walk off.

# Top 10

## Things to Look for on a K-9 Video

- 10. The handler should believe the K-9 the first time, whether it is a response or not.
- If the K-9 responds and the handler has it check that area again, then rewards the response, this is a sign of a weak or poor handler that does not know how to read or trust his K-9.
- Once a canine checks an area, the handler should not have it go back and check again.

# Top 10

## Things to Look for on a K-9 Video

- 11. (One More) Wind direction is CRITICAL!!!
- Odor from drugs is heavier than air and will drop in low wind currents.
- Odors will follow the wind currents.
- This is the biggest issue in vehicle searches, large open buildings, or any other outdoor environment.
- If the wind is blowing from the left to the right, and the canine responds on the door seam on the left side of the vehicle, but shows no interest on the right side, watch for cues from the handlers.

# Videos

- *Watch Video 3 – Example of Good Training*
- *Watch Video 4 – Example of Good Alert on structure*
- *Watch Video 5 – Example of Good Alert on Vehicle*
- *Watch Video 6 – FALSE ALERT, CUED BY COP*
- *Watch Video 7 – Example of Bad Training*
- *Watch Video 8 – Example of Bad Handler*









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