

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

GARY ALAN MATHESON,

Respondent.

FSC Case No. SC04-490

2DCA Case No. 2D00-1611

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF PETITIONER

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ARGUMENT

ISSUE

WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN DETERMINING THAT THE "TRACK RECORD," OR NUMBER OF "FALSE ALERTS" IN THE FIELD, BY A PROPERLY TRAINED AND CERTIFIED NARCOTICS DETECTION DOG IS PROBATIVE IN ESTABLISHING THE DOG'S RELIABILITY AND WHETHER THE ALERT BY A PROPERLY TRAINED AND CERTIFIED NARCOTICS DETECTION DOG, STANDING ALONE, IS SUFFICIENT TO DEMONSTRATE PROBABLE CAUSE.

In the Answer Brief Respondent claims the deposition testimony of Razor's trainer, Sergeant Olive, was not admitted into evidence at the suppression hearing, and therefore, not properly a part of the appellate record and not properly relied upon by the State in support of its argument that probable cause existed. (Respondent's Answer Brief p.33-34). This assertion is incorrect. On February 7, 2000, prior to the hearing on his motion to suppress, Respondent filed with the trial court the deposition of Sergeant Olive as, "Supplement to Defendant's Previous Motion to Suppress Motion in Limine & For More Discovery & Notice of Filing The Deposition of HCSO Sergeant Mark Olive." (V.1: R.97-153). Because Respondent filed the deposition of Sergeant Olive with the trial court as a part of his motion to suppress, the trial court was presented with this

information in determining whether probable cause existed and in ruling on the motion. Therefore, the deposition of Sergeant Olive is properly a part of the record on appeal and Petitioner has properly relied on it in these proceedings.

Another erroneous assertion made by Respondent in the Answer Brief, p.34, is that the United States Police Canine Association (USPCA) certificate and/or notebook containing Razor's information was not included in the appellate record, even though Respondent acknowledges in the Answer Brief (p.34), that the USPCA certificate or notebook containing information relating to Razor was admitted into evidence by the trial court at the suppression hearing. Respondent claims the State failed to move to supplement the record with these items before the Second District Court of Appeal rendered its decision, therefore this evidence is not a part of the appellate record.¹

A review of the record on appeal in this case shows that Razor's notebook, which includes his training records and field activity reports, as well as his certificate from the United States Police Canine Association (USPCA), were admitted into evidence not only by the State at the hearing, but were first submitted with the trial court before the hearing by Respondent as a supplement to his motion to suppress. (V.2:R.154-346;

¹Notably, pursuant to Florida Rule of Appellate Procedure 9.200(e)(2003), Respondent, as Appellant below, bore the burden to "ensure the record is prepared and transmitted in accordance with" the rules of appellate procedure.

V.3:R.347-405, 407). Before submitting its answer brief to the Second District Court of Appeal, counsel for Petitioner determined the evidence submitted by the State (Razor's notebook and certificate) were already contained in the appellate record in volume 2 at pages 154-346, and volume 3 at pages 347-405.² While Florida Rule of Appellate Procedure 9.200(f), allows parties to stipulate to supplementing the record, because Razor's notebook and USPCA certificate were already a part of the record on appeal, Petitioner did not move to have the record supplemented with what the record already contained, as such supplementation would be repetitious and not in the interest of judicial economy. The purpose of supplementing an appellate record is to **complete** the record on appeal and not to duplicate existing documents already contained in the appellate record. Therefore, Respondent's assertion is without merit as Razor's notebook and USPCA certificate are a part of the record on appeal before this Court and are properly relied upon by the State in these proceedings.

Respondent also contends that Deputy Grecco's knowledge that Razor was a trained and certified narcotics detection dog was insufficient evidence to provide Razor as a reliable source of probable cause because Razor's records establish that he

²Prior to submitting an answer brief to the Second District Court of Appeal, counsel for Petitioner went to the Hillsborough County Courthouse and reviewed the exhibits the State entered into evidence, which was Razor's notebook and certificate.

frequently alerted to areas that did not contain illegal narcotics, that he was not conditioned to refrain from responding from residual odors, and he did not perform well during training. Petitioner relies on the arguments made in its Initial Brief and again submits that a review of the record, refutes this claim. Razor never falsely alerted in certification or training and any alleged "false alerts" in the field can not properly be deemed false alerts as the dog may have been alerting to residual odors. Additionally, a review of the entire appellate record reveals the extensive and overwhelming documentation of Razor's certification, training and performance in the field, which the trial court considered in finding that Razor was a reliable, properly trained and certified narcotics dog. The appellate record further rebuts the Second District Court of Appeal's conclusion, and Respondent's assertion, that the State did not present any evidence of Razor's track record and refutes the Second District's opinion that the Hillsborough County Sheriff's Office (HCSO) did not maintain records of Razor's performance.

Moreover, recently, in Maryland v. Cabral,³ 2004 WL 2234029, (Md.App. Oct 06, 2004), the Maryland Court of Appeals declined to follow the Second District Court of Appeal's Decision in

³Petitioner's Initial Brief inadvertently quotes Appellant's initial brief in Maryland v. Cabral, 2004 WL 1696069 as an opinion of the Maryland Court of Appeals. The opinion of the court is cited and discussed above.

Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003). In Cabral the state challenged an order from the trial court suppressing heroine and cash recovered during a search of a vehicle pursuant to a traffic stop. The search was conducted after a trained canine, Bruno, alerted to the presence of drugs in the vehicle. Id. The appellate court considered the question of whether probable cause to search a vehicle is undermined because of the possibility that a narcotics detection dog could alert on residual odor. Id. At the hearing on the motion, Bruno's handler testified that Bruno never had a false alert in training and wherever he alerted there was a drug. Id. Bruno had never alerted to a blank vehicle, although on the street there had been times where Bruno alerted and the trooper searching that vehicle has not found the drug; but that did not mean there had not been drugs there previously. Id. In the instant case, Razor had also never falsely alerted in training or to a blank vehicle, although Razor had alerted, like Bruno, to vehicles in the field when no drugs were found.

In Cabral, Bruno's handler further testified that even if drugs were no longer present in a vehicle, Bruno could alert to a residual odor, and, in fact, there had been previous alerts by Bruno where there had not been drugs in the car, but drugs had been in the vehicle up to 72 hours prior to the search. Id. The trooper testified that Bruno would have alerted to a

residual odor in the vehicle if there had been a drug in the vehicle within 72 hours; and Bruno would have alerted even if a passenger in the vehicle had drugs in their possession and had been in the car and gotten out and left within the past 72 hours, as their still could have been a residual odor in the vehicle.

The appellate court in Cabral, recognized:

Numerous cases in Maryland have addressed the issue of whether, and under what circumstances, a positive alert by a drug dog gives rise to probable cause to search. In Wilkes v. State, 364 Md. 554, 774 A.2d 420 (2001), for example, the Court said: "We have noted that once a drug dog has alerted a trooper 'to the presence of illegal drugs in a vehicle, sufficient probable cause exist[s] to support a warrantless search of [a vehicle].'" Id. at 586, 774 A.2d 420 (quoting Gadson v. State, 341 Md. 1, 8, 668 A.2d 22 (1995), cert. denied, 517 U.S. 1203, 116 S.Ct. 1704, 134 L.Ed.2d 803 (1996)).

Id. at 10.

The court also acknowledged, "Despite the plethora of cases involving drug detecting dogs, we have not found any Maryland case that has discussed the issue of probable cause in light of evidence that the canine has the capacity to alert to a residual odor." Id. While the Cabral court also acknowledged the Second District Court of Appeal's ruling in Matheson, (that the fact that a canine has been trained and certified, standing alone, is insufficient to give officers probable cause to search based on the dog's alert), the court refused to follow such a holding.

On the contrary, the Cabral court held that:

These cases lead us to conclude that Cabral is "barking up the wrong tree." He has confused probable cause with proof beyond a reasonable doubt. If a trained drug dog has the ability to detect the presence of drugs that are no longer physically present in the vehicle or container, but were present perhaps as long as 72 hours prior to the alert, such an ability serves to strengthen the argument that the dog has a superior sense of smell on which to rely to support a finding of probable cause. The possibility that the contraband may no longer be present in the vehicle does not compel the finding that there is no probable cause; for purposes of the probable cause analysis, we are concerned with probability, not certainty. The issue of a possible alert to a residual odor is a factor to be considered by the trial court, but it is not dispositive.

We are reminded of what Judge Moylan wrote in *Fitzgerald*, recognizing the reliability of a trained drug dog.

"[T]he instant court sees a positive alert from a law enforcement dog trained and certified to detect narcotics as inherently more reliable than an informant's tip. Unlike an informant, the canine is trained and certified to perform what is best described as a physical skill. The personal and financial reasons and interest typically behind an informant's decision to cooperate can hardly be equated with what drives a canine to perform for its trainer. The reliability of an informant is really a matter of forming an opinion on the informant's credibility either from past experience or from independent corroboration. With a canine, the reliability should come from the fact that the dog is trained and annually certified to perform a physical skill." Fitzgerald, 153 Md.App. at 637, 837 A.2d 989 (quoting United States v. Wood, 915 F.Supp. 1126, 1136 n. 2 (D.Kan.1996)(italics

omitted).

Accordingly, we hold that the circuit court erred in finding that there was no probable cause because Bruno might have alerted to the presence of an illegal drug that was in the vehicle as much as 72 hours before the alert.

Id. at 14.

The State submits that the Second District Court of Appeal erroneously premised its reversal on the concept that Razor was not a properly trained and certified narcotics detection dog because he could have "falsely alerted" in the field based on residual odors. However, probable cause is not undermined merely because the dog might have alerted to a residual odor, and a dog's performance in the field should not be negatively impacted because of such alerts.

ISSUE II

WHETHER THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE SUBJECT DECISION OF THE SECOND DISTRICT COURT OF APPEAL. (Restated by Petitioner).

It remains the State's position that this Court properly has discretionary review of this case under Art. V, Section 3(b)(3), Fla. Const. While this jurisdictional issue was not raised in Petitioner's Initial Brief on the merits, it was raised in Respondent's Answer Brief and addressed in Petitioner's Jurisdictional Brief. Therefore, Petitioner relies on the arguments made therein and for this Court's benefit has recited the argument in its entirety as follows:

The decision of the Second District Court of Appeal expressly and directly conflicts with the decision of the Third District Court of Appeal's decision in Vetter v. State, 395 So. 2d 1199 (Fla. 3D DCA 1981), review denied (1981). The Second District Court of Appeal's opinion states that Razor's alert to the defendant's vehicle was insufficient to provide the officers with probable cause because a narcotics detection dog that has been trained and certified, standing alone, is insufficient to give officers probable cause to search. The State respectfully submits that the opinion of the Second District Court of Appeal is in conflict with the Third District Court of Appeal's opinion in Vetter v. State, 395 So. 2d 1199 (Fla. 3d DCA 1981), review denied (1981).

In Vetter, supra, the court held that the representation in the search warrant that the narcotics detection dog was properly trained conferred probable cause standing alone for the search. In light of the foregoing, the State respectfully submits that the Second District Court of Appeal's opinion misapprehends Razor's alert on the defendant's vehicle.

Accordingly the state contends that this opinion expressly and directly conflicts with the decision of another district court of appeal. Furthermore, the standards set forth in Matheson should be reconsidered in light of Vetter.

CONCLUSION

Petitioner respectfully requests that the Second District Court's opinion be reversed and Respondent's convictions and sentences be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been furnished by U.S. mail to Celene Humphries, Special Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33831-9000, this 8th day of November, 2004.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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