IN THE SUPREME COURT OF FLORIDA

CLAYTON HARRIS,

Petitioner,

v.

CASE NO. SC08-1871

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
APPELLATE DIVISION CHIEF
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 664261
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
ATTORNEY FOR PETITIONER

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I. A POSITIVE ALERT TO THE EXTERIOR OF A VEHICLE BY AN EXPERIENCED DRUG-DETECTOR DOG DOES NOT ESTABLISH PROBABLE CAUSE TO SEARCH THE VEHICLE WITHOUT EVIDENCE THAT THE DOG'S PREVIOUS ALERTS IN THE FIELD RELIABLY RESULTED IN THE DISCOVERY OF CONTRABAND.

Compelling the state to show how often a particular dog's alerts during other encounters led to the discovery of drugs will not turn the probable cause requirement of the Fourth Amendment into a certainty standard, as Respondent asserts. Field performance records safeguard reliability without requiring certainty; even a confidential informant need not bat 1.000 for his next tip to help supply probable cause. If field records show that the great majority of alerts by a dog in field deployments led to the discovery of contraband, the state will have carried much of its burden of establishing probable cause from any single alert.

How frequently must a search prompted by an alert turn up empty before a court can conclude that the dog is not merely an imperfect predictor of the presence of drugs, but an unreliable one as well? If the state is not obligated to generate, maintain, and present these records, the law on this question will never develop. Because these records were not kept in Gibson, Matheson, or this case, those courts had, and now this Court has, nothing to go by in determining whether

training and certification produced a drug-sniff dog that is an accurate indicator of the presence of drugs in the real world of motor vehicle searches during traffic stops.[1] Law enforcement agencies control selection, training, certification (by no uniform standard), and deployment of drug-sniff dogs. The only variable outside the state's control is field accuracy—the one measure of reliability it seeks to conceal.

Underlying the state's opposition to an open presentation of field performance records is the implicit assumption that dogs cannot be conditioned to refrain from alerting to stale or dead scents. Precedent belies this assumption. In Matheson, the Second District noted that training received by United States Customs Service dogs includes instruction in disregarding distractions such as food, harmless drugs, and residual scents. 870 So. 2d at 14. See also Massachusetts v. Ramos, 894 N.E.2d 611, 613 (Mass. Ct. App. 2008) (affirming trial court suppression order which noted that dog did not receive " 'extinction training' [that] can teach the dogs to ignore such trace or 'dead' scents"), rev.

1. Respondent asserted at pages 23-24 of the answer brief that Harris' counsel declined to allow the state to provide evidence of Aldo's field performance records at the suppression hearing. Petitioner believes this is an incorrect reading of the transcript. The officer testified that he kept records only for alerts followed by arrests -- in other words, successes and not failures. (T31) The discussion centered on what was requested in discovery and deposition; the state did not seek to introduce the records in the hearing or offered to provide counsel a full record of Aldo's successes and failures.

denied, 901 N.E. 2d 138 (Mass. 2009); United States v. Torres-Ramos, 536 F.3d 542, 554 (6th Cir. 2008) (en banc) (reflecting testimony of animal behavior expert, who had developed a set of training protocols for military working dogs, that training of dog in that case failed to "certify residual odors [i.e. extinction training-training the dog to ignore odors that would normally excite an animal] or small quantities"), cert. denied by Rhaburn v. United States, 129 S.Ct. 772 (2008).

A residual odor is just one of the variables that can cause a dog to alert when no drugs are present:

> [D]ogs themselves vary in their abilities to accept, retain, or abide by their conditioning in widely varying environments and circumstances. "[E]ach dog's performance is affected differently by working conditions and its respective attention span. There is also the possibility that the handler may unintentionally or otherwise prompt his dog to alert."

Matheson, 870 So. 2d at 14 (quoting Max A. Hansen, United States v. Solis: Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?, 13 San Diego L.Rev. 410, 416 (1976)). Field performance records supply a control for these variations in abilities, conditions, and handler error.

Respondent's suggestion that the United States Supreme Court rejected Matheson's holding (and by extension Harris' argument) in Illinois v. Caballes, 543 U.S. 405 (2005), is wrong. The Supreme Court held in Caballes that the use of a "well-trained narcotics-detection dog" does not constitute a Fourth Amendment

search. Id. at 409. The term "well-trained" was important because an alert by a poorly trained dog – one that alerts to methamphetamine, cocaine, cannabis, and rotisserie chicken from the grocery store, for example – could in fact constitute a Fourth Amendment search. The Court in Caballes did not address whether the field performance records of a well-trained dog are necessary or relevant to a judicial determination that an alert in a particular case supplies probable cause to search. Caballes' greater significance to this case comes from Justice Souter's citation to precedent establishing, again whether a dog sniff *is* a search rather than whether it *justifies* a search, that "[t]he infallible dog . . . is a creature of legal fiction" and "the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times." Id. at 412 (Souter, J, dissenting).

Respondent bristles at the term "false alert," and presumably also "wrong" and "failure," preferring instead the term "unverified alert." (Answer Brief at 39). This is a semantic distinction without a constitutional difference. If a dog alerts and no drugs are found, its next alert becomes a less reliable indicator of the presence of drugs. Evidently, the absence of drugs following an alert makes no difference to a dog not trained to refrain from alerting to residual odors. Deputy Wheetley's testimony suggests that Aldo receives a reward either way. (T17) Cf. Matheson, 870 So. 2d at 10 (reflecting that dog's handler "often left the scene of a

sniff after alerting deputies that Razor had alerted, and thus never learned whether the alert had led to the discovery of contraband").

Rejecting Harris' comparison of a drug-sniff dog to a confidential informant, the state invokes instead the citizen-informant "motivated not by pecuniary gain, but by the desire to do justice." State v. Maynard, 783 So. 2d 226, 230 (Fla. 2001). The fictional Lassie of television fame was a canine citizen informant; the succession of dogs who portrayed Lassie were, in contrast, conditioned to perform tricks for treats, the canine equivalent of pecuniary gain. So too with drug-sniff dogs, including Razor in Matheson and Aldo in this case. The hope of reward make these canine officers more like paid confidential informants than public-minded citizen-informants, and therefore subject to greater scrutiny of their previous accuracy.

The comparison of a drug-sniff dog to a police officer who has a normal human sense of smell is also inapt. An officer who testifies in a suppression hearing that he conducted a warrantless search because he detected the odor of burned cannabis conveys a wealth of information beyond the capacity of a dog: the nature of the substance detected, whether it was fresh or burned, the strength of the odor, and its apparent source or direction. In contrast, a dog conveys only that it detected, at a particular location outside the vehicle, the odor of a substance to which it was trained to alert. The dog does not communicate the nature of the

substance detected or its strength. This is a weakness in determining probable cause. Another weakness, as the Second District noted in Matheson, is the "olfactory superiority" of a dog without extinction training to its human counterpart, which leads it to alert to both "live" and "dead" scents. 870 So. 2d at 13 (quoting Hansen, supra, 13 San Diego L. Rev. at 416).

It is unclear from the Answer Brief whether Respondent agrees that, at the very least, a defendant must have the opportunity to introduce field performance records in challenging a warrantless search based on a drug-sniff dog's alert. The Fourth District in Laveroni granted defendants this right:

> Judge Northcutt's opinion in Matheson does persuade us that, because these dogs are not always correct, their past performance records are relevant. . . . When the evidence presented, whether testimony from the dog's trainer or records of the dog's training, establishes that the dog is generally certified as a drug detection dog, any other evidence, including the testimony of other experts, that may detract from the reliability of the dog's performance properly goes to the "credibility" of the dog. . . . We therefore conclude that the state can make a prima facie showing of probable cause based on a narcotic dog's alert by demonstrating that the dog has been properly trained and certified. If the defendant wishes to challenge the reliability of the dog, he can do so by using the performance records of the dog, or other evidence, such as expert testimony.

910 So. 2d at 335-36 (emphasis supplied). The Fifth District aligned itself with Laveroni on this point. Coleman, 911 So. 2d at 261. Respondent has asked this

Court to approve Laveroni and Coleman, although not specifically as to the admissibility of field-performance records.

Harris was denied the opportunity to present field performance records because Aldo's handler kept no records of alerts that did not result in arrest. As argued in the initial brief, the obligation to present these records should rest with the state as the only party that can create and maintain them and as the party that bears the burden of justifying a warrantless search. However, even if the Court disagrees, the state's inability to produce these records in response to a defense discovery request for "performance records" (T30-31) warrants reversal of Harris' conviction.

II. EVIDENCE THAT ON TWO DIFFERENT OCCASIONS, THE DRUG-DETECTOR DOG ALERTED TO PETITIONER'S TRUCK WHEN IT DID NOT CONTAIN DRUGS TO WHICH THE DOG WAS CONDITIONED TO ALERT REBUTTED THE STATE'S PRIMA FACIE SHOWING OF PROBABLE CAUSE.

The state argues that Aldo's two alerts to Harris' truck, weeks apart, were not false, and therefore the presumption of reliability flowing from the certification and training records remained unrebutted. (Answer Brief at 49.)

First, Harris does not concede that the training and certification records created any presumption of reliability. However, assuming the Court concludes to the contrary, the presumption was overcome in this case. The evidence showed that Aldo twice alerted when none of the substances to which he was trained to alert were in the truck. Respondent asserts that the odor came from methamphetamine user Harris's handling of the door on June 24, when he was transporting methamphetamine ingredients, and again weeks later, presumably because he conceded on June 24 that he was a methamphetamine user. However, Deputy Wheetley testified that Aldo is not trained to detect pseudoephedrine or the other ingredients of methamphetamine. (T32-34) Cf. Matheson, 870 So. 2d at 11 (discussing expert's testimony that dog was not given "stimulus generalization" training, "which conditions a dog trained in one class of drugs to detect all drugs in that class"). Further, Wheetley testified that Harris told him he'd last

manufactured methamphetamine two weeks earlier. (T25) There is no explanation other than residual odor detection for the alerts either on June 24 or during the second encounter weeks later.

Field performance history is, if not essential, at least relevant to the probable cause determination. The field performance evidence in this case demonstrates that Aldo alerted to the residual odor or dead scent of a substance not present on June 24. Under these circumstances, the trial court committed reversible error in concluding that, nonetheless, Aldo's alert that day created probable cause to search the interior of Harris' truck.

CONCLUSION

Based on the arguments contained herein and in the initial brief, and the authorities cited in support thereof, Petitioner requests that this Court quash the decision of the First District Court of Appeal and remand with directions to reverse Harris' conviction and remand for discharge.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Natalie D. Kirk, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this ____ day of March, 2009. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLEN P. GIFFORD
APPELLATE DIVISION CHIEF
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 664261
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8524
giffordg@leoncountyfl.gov
ATTORNEY FOR PETITIONER