Fourth Amendment Forum

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Drugs, Dogs And Cars: Oh, My!

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Drugs, Dogs, And Cars: Oh, My!

If you could bet on the Supreme Court, Illinois v. Caballes1 would have been a lock. It involved drugs, cars, and the Fourth Amendment. The smart money was on the State of Illinois.

Illinois State Police Trooper Daniel Gillette stopped Roy Caballes for driving 71 miles per hour in a zone with a posted speed limit of 65 miles per hour. Trooper Craig Graham of the Drug Interdiction Team heard on the radio that Gilette was making a traffic stop, and even though Gilette did not seek any assistance from Graham, he decided to come to the scene to conduct a dog sniff. Caballes complied with all of Gilette's requests at the traffic stop, except he did not consent to the search of his trunk. Undeterred, Graham walked the dog around the car while Gilette was writing Caballes a warning ticket for speeding. The dog alerted at Caballes' trunk, and after opening the trunk, the officers found marijuana. The entire incident lasted less than 10 minutes. Caballes was convicted of a narcotics offense and sentenced to

12 years' imprisonment and a $256,136 fine.

The trial judge denied his motion to suppress the seized evidence. He held that the officers had not unnecessarily prolonged the stop and that the dog alert was sufficiently reliable to provide probably cause to conduct the search. The appellate court affirmed. But the Illinois Supreme Court reversed, finding that the drug evidence should have been

suppressed.2 It held that "the police impermissibly broadened the scope of the traffic stop in this case into a drug investigation" without "specific and articulable facts" supporting the canine sniff.

U.S. Supreme Court

The High Court granted certiorari on the following "narrow" issue:

"Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using drug-detection dog to sniff a vehicle during a legitimate traffic stop." The Court, per Justice Stevens, answered no, "proceed[ing] on the assumption that the officer conducting the dog sniff had no information about respondent except that he had been stopped for speeding."3

Justice Stevens, in a short opinion, anchored his decision to a number of shaky grounds:

* If the traffic stop was lawful at its inception and otherwise executed in a reasonable manner, then a dog sniff - which does not infringe on one's right to privacy - is permissible.

* Any interest in possessing contraband cannot be deemed legitimate and thus governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest.

* Canine sniffs by well trained narcotics-detection dogs are "sui generis" because they disclose only the presence or absence of narcotics, a contraband item.4

* Drug detection dogs are reliable.

Accordingly, "a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth

Amendment."5

Justices Souter and Ginsburg in their dissents demonstrate, however, that Justice Stevens' assumptions about dogs and the Fourth Amendment are not correct. First, the assumption - articulated in United States v.

Place6 - that dogs alert to nothing but the presence of contraband and therefore do not implicate one's right to privacy, is long overdue for re-examination. "The infallible dog . . . is a creature of legal fiction.... In practical terms, the evidence is clear that the dog that alerts hundreds of times will be wrong dozens of times."7

Second, the fact that the dog sniff did not lengthen the duration of the stop does not mean that the seizure did not violate the Fourth Amendment. As the Court made clear in Terry v. Ohio, any investigation must be "reasonably related in scope to the circumstances which justified the interference in the first place."8 Accordingly, even if the drug sniff is not characterized as a Fourth Amendment search, "the sniff surely broadened the scope of the traffic-violation-related

seizure."9 Now, dogs may be employed on our streets as they are employed at the airport. Justice Souter describes the Court's decision as an "open-sesame" for general searches, allowing officers to make suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks. Officers could have dogs monitoring shopping malls, lengthy traffic lights, and so on.

The dissenters make passing reference to Knowles v. Iowa,10 a case which merits more extended consideration. Knowles was stopped for speeding, an offense for which he could have been arrested under local law.11 After issuing Knowles a speeding citation, the police officer searched the passenger compartment of Knowles's car, finding marijuana under the driver's seat.12 Although the Iowa Supreme Court saw no conceptual difference between a search incident to a valid arrest and a search incident to a valid speeding citation for which the officer could have made an arrest, the United States Supreme Court did.

The "two historical rationales for the 'search incident to arrest'

exceptions [are] (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at

trial."13 Where a motorist is not being taken into custody, but merely detained briefly for the issuance of a speeding ticket, the concern for officer safety is diminished sufficiently so as to render unjustifiable a rule authorizing a "search incident to citation." And as to the need to preserve evidence, "Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car."14

The police conduct visited upon Caballes differed from that visited upon Knowles in only two particulars: (1) what was searched in Knowles was the passenger compartment of the car, but what was searched in Caballes was the trunk of the car; and (2) the search in Knowles was conducted with the discerning eye of a trained police officer, but the search in Caballes was conducted with the nose of a dumb animal. The former difference cannot possibly have any Fourth Amendment significance, and the Court's opinion does not suggest that it does. The latter difference should weigh in Caballes's favor, not against him. The Court's opinion holds the contrary.

The pith of the Court's holding is that Caballes had no Fourth Amendment interest to assert against the dog search; or that a dog search is not a search; or both. Caballes had no Fourth Amendment interest in play here, we are told, because his initial detention for speeding was lawful, and because he had no protected privacy interest in the possession of contraband. And a dog search is not a search, we are told, because ...

well, because dogs are very good at olfactory searches.

Caballes had a cognizable Fourth Amendment interest in not being stopped as he proceeded along the public thoroughfares of Illinois. His speeding was sufficient justification to overcome that interest, and to justify his seizure, for Fourth Amendment purposes. But Caballes had, separate and apart, a cognizable Fourth Amendment interest in not having the trunk of his car (which is surely comprised within his "persons, houses, papers, and effects" for Fourth Amendment purposes) searched without probable cause. If Knowles stands for anything, it stands for the proposition that a speeding ticket provides no probable cause to search any part of the speeding vehicle. That the contents of Caballes's trunk were contraband is beside the point. What he asserted was not a possessory interest in drugs, but a privacy interest in his car and its trunk. His position would have been no different - from a Fourth Amendment point of view - if the contents of his trunk had been a spare tire (which he may lawfully possess) or a stolen tire (which he may not).

Alternatively, or in addition, the Court seems to hold that the dog search is not a search. Why not a search? Perhaps because it was not "intrusive," i.e. because the trunk wasn't opened. Perhaps because it wasn't performed with eyes. Perhaps because Caballes was deemed to have "abandoned" the scent particles emanating from the contraband in his trunk.

But none of these "perhapses" make for good Fourth Amendment jurisprudence. The notion that a search must be physically intrusive to constitute a search for Fourth Amendment purposes is evocative of the Court's doctrine as it existed before such cases as Katz v. United

States.15 Once upon a time the Supreme Court took the position that the Fourth Amendment protects against trespass or other physical invasion of space. That doctrine has long since been repudiated. It is now uniformly accepted that the Fourth Amendment protects people (and their recognized privacy interests), not places. The outcome of this important constitutional case should not turn on whether or not the cops popped Caballes's trunk.

Nor should it be relevant to the Fourth Amendment analysis that the search in question was done with a dog's nose rather than a cop's eye.

Sight is not the only sense which may be employed to effectuate a search. In Bond v. United States,16 for example, the Court acknowledged that a search proscribed by the Fourth Amendment could be performed by the sense of touch. Nothing in the Fourth Amendment suggests that a search cannot be performed with the sense of smell. True, we do not customarily think of the mere act of sniffing as having constitutional significance. But when the police bring a trained dog to the scene of an arrest - a dog whose sniffing is not merely an incident of breathing but an act undertaken expressly to search for contraband - it is hard to describe what took place as anything other than a search. The police certainly thought they were searching for contraband, they brought a dog to aid them in their search for contraband, and because of the dog's sensory acuity their search for contraband was successful. Smells like a search to us.

The argument that Caballes "abandoned" the scent particles wafting from the trunk of his car and lodging in the nasal passages of the police dog fares no better. The Supreme Court seems to treat abandonment as an "all or nothing" concept. But in real life, one may abandon something for some purposes and not for other. State courts have recently called into question the Supreme Court doctrine17 that what is thrown into the garbage can and left at the curb is abandoned for all purposes.18 The scent particles emanating from Caballes's trunk were "abandoned" in the sense that Caballes made little or no effort to prevent them from escaping his trunk, and society would in any event not recognize his privacy interest in those scent particles even if he had made such efforts. Thus if a police officer testified (as police officers sometimes do) that he, alone and unaided, smelled and recognized the distinctive odor of marijuana wafting from the trunk of a car, we would not (because we could not) argue that he had performed a search for Fourth Amendment purposes, or (what is conceptually the same thing) that he had invaded an area of constitutionally-protected privacy. But to say that Caballes "abandoned" the scent particles escaping his trunk in this sense is not to say that he abandoned them in all senses and for all purposes. He did not "abandon" them for scrutiny by what the Supreme Court considers to be a highly-calibrated scent-analyzing machine (whether of the genus and species canis familiaris or otherwise). "The 'reasonableness' of an individual's expectation of privacy is not defined solely by technological progress. We reject the Orwellian notion that precious liberties derived from the framers simply shrink as the government acquires new means of infringing them."19

Conclusion

It would be easy to chalk this decision up to the typical Fourth Amendment drug ruling. But it appears that something more was going on in this case. Both Justices Souter and Ginsburg in their dissents note that they are not advocating a position that would prohibit officers from using dogs to detect explosives or other terrorist-related weapons.

Justice Souter explains:

I should take care myself to reserve judgment about a possible case significantly unlike this one. All of us are concerned not to prejudge a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion. Suffice it to say here that what is a reasonable search depends in part on demonstrated risk. Unreasonable sniff searches for marijuana are not necessarily unreasonable sniff searches for destructive or deadly material if suicide bombs are a societal risk.20

And Justice Ginsburg makes clear:

The dog sniff in this case, it bears emphasis, was for drug detection only. A dog sniff for explosives, involving security interests not presented here, would be an entirely different matter. . . . This Court has distinguished between the general interest in crime control and more immediate threats to public safety. . . . Even if the Court were to change course and characterize a dog sniff as an independent Fourth Amendment search, . . . the immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine. 21

The Fourth Amendment has long been a victim in the War on Drugs. The War on Terror also has placed the amendment in its crosshairs. "Liberty - the freedom from unwarranted intrusion by government - is as easily lost through insistent nibbles by government officials who seek to do their jobs too well as by those whose purpose it is to oppress; the piranha can be as deadly as the shark." - United States v. $124,570, 873 F.2d 1240, 1246 (9th Cir. 1989).

Notes

1. 125 S. Ct. 834 (2005).

2. 802 N.E. 2d (Ill. 2003).

3. Caballes, 125 S. Ct. at 837.

4. Justice Stevens distinguished dog sniffs from thermal imaging devices as described in Kyllo v. United States, 533 U.S. 27 (2001), as those devices could detect lawful activity, such as "at what hour each night the lady of the house takes her daily sauna and bath."

5. Caballes, 125 S. Ct. at 838.

6. 462 U.S. 696 (1983).

7. Id. at 839-40 (Souter, J. dissenting).

8. Id. at 845 (quoting Terry, 392 U.S. at 20) (Ginsburg, J. dissenting).

9. Id.

10. 525 U.S. 113 (1998)

11. Id. at 114.

12. Id.

13. Id. at 116.

14. Id. at 118.

15. 389 U.S. 347 (1967). Cf. Silverman v. United States, 365 U.S. 505 (1961); Goldman v. United States, 316 U.S. 129 (1942).

16. 529 U.S. 334 (2000).

17. See California v. Greenwood, 486 U.S. 35 (1988).

18. State v. Sweeney, 107 P.3d 110 (Wash. 2005).

19. People v. Cook, 710 P.2d 299, 305 (Cal. 1985).

20. Caballes, 125 S. Ct. at 844.

21. Caballes, 125 S. Ct. at 846. n