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State v. Fisher: Canine Sniffs - Who Let the Dogs Out

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CASENOTES

STATE v. FISHER: CANINE SNIFFS – WHO LET THE DOGS OUT?

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INTRODUCTION

Canines were first used by law enforcement in 1899 in the City of Ghent, Belgium.[1] However, it was not until 1957, after failed attempts to implement police dogs in the early 1950s, that an organized canine unit was operated successfully in the United States.[2] In North Carolina, the State Highway Patrol has operated a canine narcotics sniff team since August 1988.[3] With the advent and increase in the use of canines in police work, the issues surrounding search and seizure have been visited frequently by North Carolina courts, and by the Supreme Court of the United States, in an effort of define the boundaries of the canine sniff.

In *State v. Fisher*, law enforcement officers stopped Felix Fisher for driving with a revoked license.[4] Because the officers had knowledge of his prior involvement with drugs, they conducted a canine sniff of his vehicle and discovered marijuana.[5] Fisher was arrested on the drug charges, but not cited for the traffic violation.[6] The North Carolina Court of Appeals held that the canine sniff and subsequent search both were conducted without justifiable reasonable suspicion and were outside the scope of the initial stop.[7] While the court held a canine sniff is not a search, they also imposed a more restrictive boundary on the use of canine sniffs and searches at investigatory traffic stops.

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1. *History of the Police Dog Service,* Royal Canadian Mounted Police, *at* http://www.rcmp.ca/pds/dog/srvce_hstry/servhstry04_e.htm (last visited Oct. 31, 2003).
2. *Id.*
3. *North Carolina State Highway Patrol Canine Unit*, North Carolina State Highway Patrol, *at* http://www.ncshp.org/k-91.html (last visited Jun. 8, 2002) (printout on file with author).
4. State v. Fisher, 539 S.E.2d 677 (N.C. Ct. App. 2000), *appeal dismissed ex mero motu*, 547 S.E.2d 420 (N.C. 2001).
5. *Id.* at 680.
6. *Id.*
7. *Id.* at 685.

The North Carolina Court of Appeals in *State v. Fisher* followed the United States Supreme Court declaration in *City of Indianapolis v. Edmond* [8] and held that a canine sniff of a vehicle's perimeter is not a search.[9] Before the *Fisher* and *Edmond* decisions, North Carolina courts had held that a canine sniff of a vehicle perimeter likely was not a search.[10] While the North Carolina position on the status of a canine sniff remains consistent with current Supreme Court jurisprudence, North Carolina courts have gone beyond the Supreme Court position and have taken a more restrictive stance in requiring justification to "let the dogs out." In *Fisher,* the lack of a search incident to arrest and the presence of a reasonable suspicion based on objective facts are retained as key elements in determining whether a canine sniff is reasonable under the Fourth Amendment.[11] These elements must be met despite the finding that a canine sniff is not a true search.

North Carolina courts should continue to follow the reasoning of *Fisher.* The decision affords proper protection of citizens against unreasonable search and seizure as provided by the Fourth Amendment. It also provides a clear standard for the use of canine sniffs and subsequent searches of vehicles. Not only does the standard ensure protection of those stopped by law enforcement officers, it also bolsters the potential for evidence to be obtained appropriately, and thus not be suppressed by the courts.

This note will first examine the *Fisher* case – its facts and rationale. Next, it will discuss the status of Supreme Court jurisprudence and North Carolina law regarding canine sniffs at motor vehicle investigatory stops. Further, this note will shed light on the differences between the broader federal standard for canine sniffs, as compared to the more restrictive North Carolina position. Finally, this note will discuss the significance of *Fisher* and the possible implications of the decision on citizens and practitioners.

THE CASE

On December 1, 1998, Felix Fisher was stopped by a New Bern police officer for operating his vehicle with a revoked driver's license.[12] A New Bern police investigator, Investigator Smith, spotted Fisher's

8. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

9. *Fisher*, 539 S.E.2d at 677.

10. *See* State v. Falana, 501 S.E.2d 358 (N.C. Ct. App. 1998); State v. McClendon, 502 S.E.2d 902 (N.C. Ct. App. 1998).

11. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

12. *Fisher*, 539 S.E.2d at 679.

parked vehicle in an area known for its drug trade. Knowing Fisher's reputation for dealing drugs, Investigator Smith ran a record check on Fisher's license plate and found that his license was revoked. However Investigator Smith did not question, or arrest Fisher at that time.[13] When Fisher was spotted on the evening of December 1, 1998, Investigator Smith requested that Fisher be stopped. The officer that stopped Fisher conducted the stop along with Investigator Smith.[14] Upon request of the investigator, Fisher displayed a limited driving privilege license that allowed him to drive his vehicle until 8:00pm - the traffic stop occurred at 8:20pm.[15] Fisher exited his vehicle as instructed and the investigator directed the officer to cite Fisher for driving while his license was revoked. Fisher was then placed under arrest for the violation.[16] Evidence at trial indicated Fisher was cooperative and compliant with the officer and investigator. He exhibited no violent behavior, and he did not attempt to retrieve any firearm or other deadly weapon from his person.[17] The law enforcement officers at the scene did not observe any openly exposed contraband, weapons, or other items that would have indicated the existence of any violation other than driving with a revoked license.[18] Notwithstanding these circumstances, Investigator Smith radioed a request for a canine unit trained in the detection of drugs. When canine "Kiko" arrived, the dog sniffed Fisher's vehicle and "alerted" at the front of the vehicle.[19] "Without obtaining Fisher's consent or informing him of their intent to search the [vehicle], the officers searched under the hood, where they located 135 grams of marijuana inside the vehicle's firewall."[20]

Fisher was charged with possession of marijuana with intent to sell and deliver, maintaining a vehicle for the purpose of keeping controlled substances, and possession of drug paraphernalia.[21] He was transported to the magistrate's office where his bond was set on the drug charges and he was released.[22] However, contrary to statutory procedure, Fisher's citation for driving with revoked license was never signed by the magistrate.[23] Furthermore, the time listed on the cita-

13. *Id.* at 683.
14. *Id.* at 679.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 680.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *See* N.C. GEN. STAT. § 15A-511(c) (2001) ("If the person has been arrested, for a crime, without a warrant: (1) The magistrate must determine whether there is probable cause to believe that a crime has been committed and that the person arrested committed it, and in the manner

tion for driving with a revoked license was 24 minutes after the time the marijuana was seized.[24]

At trial, Judge Everett of the Craven County Superior Court granted Fisher's motion to suppress the evidence of the marijuana found in Fisher's vehicle. The trial court found the search of Fisher's vehicle was performed without his consent and without probable cause.[25] On appeal, the Court of Appeals affirmed the trial court's order to suppress the evidence, but disagreed with the trial court's determination that Fisher was arrested on the evening in question.[26] The court held while the officers had reasonable cause to stop Fisher and probable cause to arrest him for driving with a revoked license, the officers had no justified and reasonable cause to conduct a canine sniff of Fisher's vehicle and to follow up with a search.[27] The Court of Appeals also found there was no evidence to indicate that Fisher was arrested. The officer's failure to obtain a magistrate's signature on the driving with a revoked license citation,[28] and failure to set Fisher's bond, indicated that Fisher was never arrested.[29] Also, the performance of a canine sniff, search, and seizure *prior* to the issuance of the traffic citation indicated, according to the court, activities conducted outside the scope of the stop.[30] The State contended that even if Fisher was not arrested, justification was not necessary to conduct the canine sniff of Fisher's vehicle. The Court of Appeals disagreed with this argument and affirmed the order to suppress the evidence, holding that a justified reasonable suspicion of criminal activity is required to conduct the canine sniff.[31]

The North Carolina Attorney General filed a notice of appeal to the North Carolina Supreme Court based on a substantial constitutional question and filed a petition for discretionary review of the Court of Appeals decision.[32] The notice of appeal was dismissed *ex mero motu* and the petition for discretionary review was denied.[33]

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provided by G.S. 15A-304(d). (2) If the magistrate determines that there is no probable cause the person must be released. (3) If the magistrate determines that there is probable cause, he must issue a magistrate's order . . . ").

24. *Fisher*, 539 S.E.2d at 681.

25. *Id.*

26. *Id.* at 685.

27. *Id.*

28. *Id.*

29. *See* N.C. GEN. STAT. § 15A-511(e) (2001) ("If the person arrested is not released pursuant to subsection (c), the magistrate must release him in accordance with Article 26 of this Chapter, bail, or commit him to an appropriate detention facility pursuant to G.S. 15A-521 pending further proceedings in the case.").

30. *Fisher*, 539 S.E.2d at 685.

31. *Id.* at 683.

32. State v. Fisher, 547 S.E.2d 420 (N.C. 2001).

33. *Id.*

BACKGROUND

The United States Customs Service first used dogs to detect drugs in 1970.[34] Since that time, drug dogs have become a commonly used law enforcement tool. In 2002, the United States Custom's Canine Enforcement Program recorded 4,980 arrests resulting from canine enforcement activity.[35] The usefulness of canine sniffs results from dogs' very powerful olfactory sense. If laid out, the surface area of a dog's olfactory cells would cover a space equivalent to the skin area of the dog's body.[36] In comparison, the surface area of human olfactory cells would cover no more than a postage stamp.[37]

The most recent United States Supreme Court case regarding the canine sniff of a vehicle is *City of Indianapolis v. Edmond*.[38] In *Edmond*, the Court declared that a canine sniff of the exterior of a car is not a search.[39] The *Edmond* Court relied on its holding in *United States v. Place* as the basis for maintaining this position.[40] In *Place*, the Court held that a "sniff-test" by a trained drug detection dog does not violate the Fourth Amendment.[41] While the facts of the case involved a canine sniff and subsequent seizure of an airplane passenger's luggage, the Court broadly construed canine searches. The Court held the information obtained by a canine sniff is limited and thus *sui generis*.[42] This unique nature of the canine search, according to the Court, results in such a limited investigation so as not to violate the Fourth Amendment.[43] The Court further reasoned that "[t]he Fourth Amendment 'protects people from unreasonable government intrusions into their legitimate expectations of privacy' ",[44] and the canine sniff of luggage does not require opening luggage or other intrusive measures. Therefore, according to the Court, sniffing involves no intrusion on a legitimate expectation of privacy. In *Edmond*, the Court likened the lack of need to enter a person's vehicle when performing a

34. Craig Scheiner, *Time Is Of the Es'Scents: The Fourth Amendment, Canine Olfaction, and Vehicle Stops*, 76 FLA. B.J. 26 (2002).

35. *Canine Enforcement Program*, United States Customs and Border Protection, *at* http://www.cbp.gov/xp/cgov/enforcement/canines/canine-program/canine.xml (last visited Nov. 1, 2003).

36. Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 408 (Winter 1996/1997).

37. *Id.*

38. *Edmond*, 531 U.S. 32.

39. *Id.* at 40 ("an exterior of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics . . . a sniff by a dog that simply walks around a car us is 'much less intrusive than a typical search'.").

40. United States v. Place, 462 U.S. 696 (1983).

41. *Id.* at 707.

42. *Id.*

43. *Id.*

44. *Id.* at 706 (quoting United States v. Chadwick, 433 U.S. 1, 7).

canine sniff to the non-intrusive "check" of an airplane passenger's luggage.[45] Under the Supreme Court analysis, justified reasonableness of the canine sniff is not considered because that element is confined to analysis of a search only.

The North Carolina Court of Appeals in *Fisher* adopted the Supreme Court holding in *Edmond* that a canine sniff is not a search for Fourth Amendment purposes. Prior to *Fisher*, North Carolina courts had held the canine sniff likely was not a search but had not established a definitive position.[46] With this adoption, the North Carolina courts now follow almost every other court in the United States. However, somewhat uniquely, the court in *Fisher* took the additional step of requiring reasonable suspicion based on objective facts to perform the canine sniff.[47] This holding, despite its uniqueness among other state positions,[48] is consistent with prior holdings from the North Carolina courts. For example, in *State v. Falana* the Court of Appeals indicated that while a canine sniff was not a search, an officer's suspicions must reach the level of a "reasonable and articulable suspicion that criminal activity [is] afoot."[49] In *Falana*, a North Carolina Highway Patrol officer stopped a driver after observing the car weave within its own lane.[50] After asking several questions and running several records checks, the officer wrote the defendant a warning ticket. As the defendant was walking back to his vehicle, the officer believed the defendant was nervous and thus asked to search his vehicle. When the defendant refused, the officer performed a canine sniff of the vehicle's exterior.[51] Cocaine was located in the vehicle and the defendant was placed under arrest.[52] The Court of Appeals held detention of the defendant in order to conduct a canine sniff must be justified by a reasonable suspicion of criminal activity. The court fur-

45. *Edmond*, 531 U.S. at 40.

46. *Fisher*, 539 S.E.2d at 683.

47. *Id.* at 677.

48. *See* Cresswell v. Florida, 564 So. 2d 480 (Fla. 1990) (holding canine sniff valid and not a search when conducted 20 minutes after initial stop); State v. Hill, 770 So. 2d 280 (Fla. Dist. Ct. App. 2000) (holding canine sniff valid when conducted without relation to initial purpose of stop); Denton v. Florida, 524 So. 2d 495 (Fla. Dist. Ct. App. 1998) (holding canine sniff valid and not a search when conducted 45 minutes after initial stop); O'Keefe v. Georgia, 376 S.E.2d 406 (Ga. Ct. App. 1998) (holding a canine sniff is not a search); State v. England, 19 S.W.3d 762 (Tenn. 2000) (holding a canine sniff does not violate any reasonable expectation of privacy and is not a search).

49. State v. Falana, 501 S.E.2d 358, 360 (N.C. Ct. App. 1998) (quoting State v. Pearson, 498 S.E.2d 599, 600 (N.C. 1998)).

50. *Id.* at 358.

51. *Id.* at 359.

52. *Id.*

ther concluded the officer's suspicions were not sufficient for further detention.[53]

Conversely, the Court of Appeals in *State v. McClendon* held that a vehicle stop, external sniff, and subsequent seizure of marijuana were supported by reasonable suspicion, and thus valid.[54] In *McClendon*, two vans that appeared to be traveling together were stopped by the North Carolina Highway Patrol for speeding.[55] One of the van drivers appeared very nervous and gave conflicting information regarding the owner of the van and his trip itinerary. After the driver refused to consent to search, the officer performed a canine sniff of the van's exterior.[56] The canine "alerted", and more than fifty pounds, but less than one hundred pounds, of marijuana was seized from the van.[57] The Court of Appeals found the officer had probable cause to stop the vehicle, the officer's investigation of the defendant was reasonably related to the issuance of the warning ticket, and the conflicting statements of the defendant provided something more than an "unparticularlized suspicion or hunch."[58] While producing a different result than *Falana*, the *McClendon* court's reasoning remained consistent between the two decisions. Both *Falana* and *McClendon* reinforce the necessity for justified reasonable suspicion in order to conduct a canine sniff.

Another important issue discussed in *Fisher* was the failure of law enforcement to arrest the defendant.[59] The trial court had found that Fisher was arrested for driving with a revoked license. However, the Court of Appeals ruled that this finding was not supported by competent evidence.[60] Therefore, even if the sniff and subsequent search had been based on reasonable suspicion, the reasonable suspicion was not incident to a lawful arrest.

A search must be supported by probable cause unless it meets certain exceptions set out in *United States v. Robinson*.[61] Warrantless searches and seizures violate the Fourth Amendment unless the search meets one of several exceptions.[62] One of these exceptions is a

53. *Id.* at 360. *See generally* Terry v. Ohio, 392 U.S. 1 (1968) (holding once the original grounds of the vehicle stop have been addressed, there must be a reasonable and articulable suspicion in order to justify further delay).

54. State v. McClendon, 502 S.E.2d 902 (N.C. Ct. App. 1998).

55. *Id.* at 903.

56. *Id.* at 904.

57. *Id.* at 903.

58. *Id.* at 908. *See also* United States v. Sokolow, 490 U.S. 1 (1989) (holding the only requirement for the detention during an investigatory stop is a minimum level of objective justification).

59. *Fisher*, 539 S.E.2d at 682.

60. *Id.*

61. United States v. Robinson, 414 U.S. 218 (1973).

62. Chimel v. California, 395 U.S. 752 (1969).

search incident to an arrest. The Court in *Robinson* provided two factors for determining the appropriateness of a search incident to arrest: (1) the need to disarm the suspect to take him into custody, and (2) the need to preserve evidence for later use at trial.[63] However, in *Knowles v. Iowa*[64], a unanimous Supreme Court held that a search incident to a relatively minor traffic violation was not in keeping with the Fourth Amendment, and thus refused to apply the *Robinson* "search incident to arrest" criteria as a bright-line rule.[65] In a minor traffic violation scenario, the concern for officer safety and the concern for loss or destruction of evidence are minimal. The *Knowles* decision was critical to the holding in *Fisher* because Fisher was never arrested for his traffic violation, thus making the search of his vehicle unjustified as a search incident to a lawful arrest.[66] According to the Court of Appeals, the trial court erred in applying the *Robinson* standard,[67] instead of the more appropriate *Knowles* standard.[68] The court in *Fisher* went further to declare that while the canine sniff was not a search, it was still beyond the scope of the initial stop for a traffic violation.[69]

ANALYSIS

The Fourth Amendment protection against unreasonable search and seizure is often quoted as one of the most sacred liberties in the United States. The North Carolina Court of Appeals, with the holding in *Fisher*, leads the vanguard in protecting this right. Currently, most states follow the Supreme Court jurisprudence of *Place*[70] and *Edmond,*[71] holding that a canine sniff is not a search.[72] In fact, the premise is almost universal in the United States. However, courts in this country differ regarding the application of reasonable suspicion as a requirement for a canine sniff. States may interpret their own constitutions uniquely and thereby expand the liberties afforded by the Fourth Amendment.[73] The North Carolina Constitution[74], as well as

63. *Robinson,* 414 U.S. at 235.
64. Knowles v. Iowa, 525 U.S. 113 (1998).
65. *Id.* at 119.
66. *Fisher*, 539 S.E.2d at 682.
67. *Robinson*, 414 U.S. at 235.
68. *Knowles*, 525 U.S. at 119.
69. *Fisher*, 539 S.E.2d at 685.
70. *Place*, 462 U.S. at 707.
71. *Edmond*, 531 U.S. at 40.
72. *See* State v. Hill, 770 So. 2d 280 (Fla. Dist. Ct. App. 2000) (holding canine sniff valid when conducted without relation to initial purpose of stop); O'Keefe v. Georgia, 376 S.E.2d 406 (Ga. Ct. App. 1998) (holding a canine sniff is not a search); State v. England, 19 S.W.3d 762 (Tenn. 2000) (holding a canine sniff does not violate any reasonable expectation of privacy and is not a search).
73. U.S. CONST. amend. IV.

the Fourth Amendment, protects against unsupported search and seizure. North Carolina is one of a few states[75] that impose the additional requirement of justified reasonable suspicion for a canine sniff of a motor vehicle, despite the fact that the sniff is not a search. As a variation on the North Carolina interpretation, Florida courts do not require reasonable suspicion, but do impose a reasonable time limit requirement on the accomplishment of the sniff.[76]

The position asserted in *Fisher* certainly places the North Carolina courts in a more protective position than called for by the Supreme Court.[77] However, *Fisher* is consistent with previous holdings of the North Carolina Court of Appeals in *Falana*[78] and *McClendon*.[79] This consistency demonstrates an element of reliability within the North Carolina courts to apply search and seizure analysis more stringently, and thus provides practitioners with a stable foundation upon which to argue. The *Fisher* holding relates logically to the prior case law, with no great "leaps of logic" required to arrive at the decision. Such exacting reasoning benefits practitioners as they formulate arguments on either side of the canine sniff issue.

In fact, *Fisher* may be construed as "defendant-friendly" with regard to cases of law enforcement intervention. By requiring a law enforcement officer to justify a canine sniff with reasonable suspicion, a defendant may be afforded greater protection from intrusion during a traffic stop. Otherwise, without a warrant, probable cause or reasonable suspicion, the ability of law enforcement to "sniff and search" a motorist's vehicle approaches violation of the Fourth Amendment. By retaining the boundary of reasonable suspicion around the canine sniff, judicial scrutiny of the process is also retained. Without such a

74. N.C. CONST. art. I, § 20 ("General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted"). *See also* U.S. CONST. amend. IV.

75. *See* State v. Miller, 647 N.W.2d 348 (Wis. Ct. App. 2002) (Dykman, J., concurring) (encouraging use of justified reasonable suspicion for conducting canine sniffs). *See also* Pooley v. Alaska, 705 P.2d 1293 (Alaska 1985) (holding a canine sniff is a search); State v. Pellicci, 580 A.2d 710 (N.H. 1990) (holding state constitution more restrictive than federal constitution and requiring probable cause to conduct canine search); People v. Dunn, 564 N.E.2d 1054 (N.Y. App. Div. 1990) (holding reasonable suspicion required before conducting canine sniff of private residence); Commonwealth v. Martin, 626 A.2d 556 (Pa. 1993) (holding police must have probable cause to believe that a canine search of a person will produce evidence of a crime).

76. *E.g.*, Denton v. Florida, 524 So. 2d 495 (Fla. Dist. Ct. App. 1998) (holding canine sniff valid and not a search when conducted 45 minutes after initial stop); Cresswell v. Florida, 564 So. 2d 480 (Fla. 1990) (canine sniff valid and not a search when conducted 20 minutes after initial stop).

77. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32 (2000); United States v. Place, 462 U.S. 696 (1983).

78. *Falana*, 501 S.E.2d 358.

79. *McClendon*, 502 S.E.2d 902.

boundary, sniffs would simply be labeled as "not a search", resulting in potential unchecked abuse of discretion by law enforcement. Some may argue the standard makes law enforcement, particularly drug arrests, more difficult. However, some scholars have proposed that instead of hindering law enforcement, such standards eliminate ambiguity in the process, and thereby lessen the likelihood of suppression of evidence.[80] With a clear delineation of when it is appropriate to employ canine sniffs, evidence obtained via the method will have a greater likelihood of being admitted at trial. This could make the use of law enforcement more effective, and promote greater efficiency in the court system. These are very desirable outcomes for the legal system.

Alternatively, advocates may be able to attack the status of North Carolina law based on its minority view of canine sniffs. Because many states[81] do not follow the requirement of justified reasonable cause for a canine sniff, it may be argued that the position is truly not in keeping with Supreme Court jurisprudence and is inappropriate. While this argument may find support in several other states' positions, it appears North Carolina's stance has remained consistent and such an attempt to distinguish would be ineffective.[82] Not only is the *Fisher* holding in keeping with North Carolina case law, it is also consistent with the North Carolina Constitution.[83]

The *Fisher* decision leaves few issues particular to North Carolina jurisprudence unanswered. However, *Fisher* and its Supreme Court counterparts have left some bigger questions open for clarification. Some authorities argue that the holding in *Place* that canine sniffs are not searches may be contradicted by a more recent decision in *Kyllo v. United States.*[84]

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80. Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 437 (2001).

81. *See* Cresswell v. Florida, 564 So. 2d 480 (Fla. 1990) (holding canine sniff valid and not a search when conducted 20 minutes after initial stop); State v. Hill, 770 So. 2d 280 (Fla. Dist. Ct. App. 2000) (holding canine sniff valid when conducted without relation to initial purpose of stop); Denton v. Florida, 524 So. 2d 495 (Fla. Dist. Ct. App. 1998) (holding canine sniff valid and not a search when conducted 45 minutes after initial stop); O'Keefe v. Georgia, 376 S.E.2d 406 (Ga. Ct. App. 1998) (holding a canine sniff is not a search); State v. England, 19 S.W.3d 762 (Tenn. 2000) (holding a canine sniff does not violate any reasonable expectation of privacy and is not a search).

82. *See Falana*, 501 S.E.2d 358 (N.C. Ct. App. 1998); *McClendon*, 502 S.E.2d 902 (N.C. Ct. App. 1998).

83. *See* N.C. CONST. art. I, § 20.

84. Kyllo v. United States, 533 U.S. 27 (2001) (Stevens, J., dissenting). *See also* State v. Haley, 41 P.3d 666, 671 n.2 (Colo. 2001) ("the logic of this holding undercuts the prosecution's argument that dog sniffs of the outside of an automobile to detect the contents thereof do not fall within a reasonable expectation of privacy"); State v. Miller, 647 N.W.2d 348, 355 n.9 (Wis. Ct. App. 2002) (Dykman, J., concurring) ("some courts have concluded that *Kyllo* undermines the logic behind a conclusion that dog sniffs are not searches.").

In *Kyllo,* law enforcement officers were suspicious that marijuana was being grown in Kyllo's home. Prior to obtaining a warrant, the police used a thermal imager to scan Kyllo's home. Based on evidence gathered by the thermal imager, the police then obtained a warrant to search Kyllo's residence. Both the Federal District Court in Oregon and the Ninth Circuit held the scan was not a search and did not impinge on the Fourth Amendment.[85] Justice Scalia, writing for the majority in *Kyllo,* held surveillance of homes conducted with "sense-enhancing technology" does constitute a search.[86] The Court in *Kyllo* defined "sense-enhancing technology" as obtaining information that "could not otherwise have been obtained without physical intrusion into a constitutionally protected area."[87] The Court further reasoned that use of such technology violated the Fourth Amendment. Justice Stevens, writing for the dissent, proposed the decision could include canine sniffs, thereby classifying them as searches.[88] Justice Stevens perceived such a holding as contrary to the Court's holding in *Place.* It may be argued that in light of the decision in *Kyllo*, a canine sniff should be considered a search. In fact, this has been proposed in the years since *Place*[89] as well as in the wake of *Kyllo.*[90] As previously discussed, the canine's sense of smell is much more powerful than the human sense. It seems quite possible to interpret the canine sense of smell as covered by the Court's definition of sense-enhancing technology, despite the Court's implied attempt to limit the holding to a search of a private residence. However, for Justice Stevens, and Justices O'Connor, Kennedy and Chief Justice Rehnquist, the connection between sniff or search of a private residence and a vehicle is easily made. While the Supreme Court has yet to reconcile *Kyllo* and *Place,* and North Carolina courts have not supported such interpretation, the discrepancy provides perspective for practitioners on the range of interpretation and argument - particularly in light of growing numbers of electronic "sniffers" such as thermal scans and other surveillance technologies.

As a final wrinkle in the canine sniff issue, canine sniff reliability remains untouched by North Carolina courts and by the Supreme Court. According to some scholars, a growing number of judges are affirming canine sniff seizures only upon a finding of the particular

85. *Kyllo*, 533 U.S. at 30.

86. *Id.* at 40.

87. *Id.* at 35.

88. *Id.* at 47.

89. *Place*, 462 U.S. 696; *See also* Hope Walker Hall, *Sniffing Out the Fourth Amendment: United States v. Place - Dog Sniffs - Ten Years Later*, 46 ME. L. REV. 151 (1994).

90. *See Kyllo*, 533 U.S. at 48 (Stevens, J., dissenting) (holding that the majority decision can be construed to classify canine sniffs as searches).

dog's reliability.[91] Some courts have been unwilling to affirm reliability without appropriate supporting evidence such as training or background.[92] Other decisions advocate the need for testimony from individuals familiar with the dog. Some look to the dog's performance in practice, and observe that a dog alert may not provide probable cause if that dog has a poor accuracy record.[93] One commentator has suggested particular elements that the magistrate should look for when issuing a warrant including the selection and training standard for the canine, and the number of false negatives reported by the canine.[94] The implication of this proposition for North Carolina practitioners could be an additional argument against admissibility of canine sniff evidence. Even when there is reasonable suspicion that warrants a canine sniff, the potential for unreliable "alerts" may leave some citizens at risk for needless search.

CONCLUSION

The protections afforded by the Fourth Amendment are a foundation for the privacy rights enjoyed by citizens of the United States. In fact, Justice Scalia wrote for the majority in *Arizona v. Hicks,* "there is nothing new in the realization that the Court sometimes insulates the criminality of a few in order to protect the privacy of us all."[95] By retaining the level of scrutiny afforded by North Carolina courts under *Fisher*, citizens are sheltered from unwarranted intrusions during traffic stops, and closely valued privacy remains protected. The *Fisher* court provides that an officer must have a reasonable suspicion based on material facts in order to conduct a canine sniff, and that suspicion must be within the scope of the initial stop.[96] While canine sniffs play an integral part in the seizure of illegal drugs and in the protection of the public, North Carolina should maintain its protective position on behalf of its citizens and set an example of privacy protection for other states to follow.

91. *See* Logan, *supra* note 80.
92. *Id.* at 418.
93. *Id.* at 419.
94. *Id.*
95. Arizona v. Hicks, 480 U.S. 321, 329 (1987).
96. *Fisher*, 539 S.E.2d at 685.