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# DRUG-DETECTION DOGS, TRAFFIC STOPS, AND THE FOURTH AMENDMENT

MICHAEL J. FIELDS\*

## *I. Introduction*

The use of drug-detection dogs by law enforcement has become one of the focal points in government efforts to enforce drug laws. In particular, courts have scrutinized the use of drug-detection dogs during traffic stops under the Fourth Amendment.<sup>1</sup> Until very recently however, courts were unclear whether the Fourth Amendment permitted police to use a drug-detection dog to sniff the exterior of a vehicle during a lawful, routine traffic stop without any suspicion of drug-related activity. In January 2005, the U.S. Supreme Court in *Illinois v. Caballes*<sup>2</sup> held that a dog sniff conducted during a lawful, routine traffic stop that reveals nothing more than the presence or absence of an illegal substance does not violate the Fourth Amendment.<sup>3</sup>

This Article discusses the latest trends relating to the use of drug-detection dogs during routine traffic stops, emphasizing U.S. Supreme Court, Tenth Circuit, and Oklahoma Court of Criminal Appeals cases. Part II discusses general Supreme Court cases involving drug-detection dogs and police encounters with private citizens, and lays the foundation for a more specific discussion of the use of drug-detection dogs during routine traffic stops in Part III. Part III outlines the most prevalent Fourth Amendment analysis used by courts examining the use of drug-detection dogs at traffic stops. Finally, Part IV examines *Caballes* and the Supreme Court's analysis of whether reasonable suspicion is required to conduct a dog sniff of a vehicle during a routine traffic stop.

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1. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, 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.

U.S. CONST. amend. IV. For an analysis of how the Fourth Amendment applies to the use of drug-detection dogs, see *United States v. Place*, 462 U.S. 696 (1983).

2. 125 S. Ct. 834 (2005).

3. *Id.* at 838.

## II. Background

In *United States v. Place*,<sup>4</sup> the U.S. Supreme Court established the analytical framework for subsequent drug-detection dog cases. In *Place*, law enforcement officers became suspicious of the defendant as he waited in line at an airport to purchase a ticket to New York City.<sup>5</sup> Officers asked the defendant for permission to search his checked bags.<sup>6</sup> Although Place consented, the officers did not have time to search the bags and allowed the defendant to board the plane.<sup>7</sup> After discovering discrepancies in the defendant's luggage tags, however, the officers alerted Drug Enforcement Administration (DEA) authorities in New York City.<sup>8</sup>

When Place arrived in New York, DEA agents told him that they suspected he was transporting illegal drugs.<sup>9</sup> After the defendant refused to consent to a search, the agents seized his luggage and subjected it to a "sniff test" by a drug-detection dog.<sup>10</sup> The dog reacted positively to a suitcase, and the agents used this information to obtain a search warrant.<sup>11</sup> Using the warrant, the agents ultimately found cocaine in Place's luggage.<sup>12</sup> Place pleaded guilty to the charge of possessing cocaine with the intent to distribute, but reserved the right to appeal the trial court's denial of his motion to suppress the contents of his suitcase.<sup>13</sup>

Although the Supreme Court held that the seizure of the defendant's luggage violated the Fourth Amendment, the Court maintained that subjecting the bag to a "sniff test" by a drug-detection dog did not constitute a search within the meaning of the Fourth Amendment.<sup>14</sup> The Court noted that the sniff was less invasive and more discerning than a typical search because it disclosed "only the presence or absence" of contraband.<sup>15</sup> Indeed, the Court stated that it was not aware of any other investigative technique that was "so limited both in the manner in which the information is obtained and in the

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4. 462 U.S. 696 (1983).

5. *Id.* at 698.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 699.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 700.

14. *Id.* at 707.

15. *Id.* Specifically, the sniff allowed the luggage to remain closed so that noncontraband items were not exposed to the public eye.

content of the information revealed by the procedure.”<sup>16</sup> Therefore, the Court concluded that a dog sniff did not constitute a search within the meaning of the Fourth Amendment.<sup>17</sup>

In subsequent cases, the Supreme Court used *Place*'s rationale to examine the use of drug-detection dogs to sniff vehicles. In *City of Indianapolis v. Edmond*,<sup>18</sup> the Court noted that sniffing the exterior of an automobile does not require entry, nor does it reveal the presence or absence of anything but contraband.<sup>19</sup> The Court also again noted that a dog sniff is much less intrusive than a typical search.<sup>20</sup>

Following the Supreme Court, both the U.S. Court of Appeals for the Tenth Circuit and the Oklahoma Court of Criminal Appeals have similarly held that dog sniffs are not searches.<sup>21</sup> These courts have also held that a positive indication for the presence of illegal drugs by a drug-detection dog justifies a warrantless search of a vehicle.<sup>22</sup>

### *III. Fourth Amendment Analysis of Cases Involving Drug-Detection Dogs at Traffic Stops*

In analyzing Fourth Amendment issues associated with the use of drug-detection dogs at traffic stops, courts have applied a fairly consistent analysis. Courts will first classify the police-citizen encounter as (1) a consensual encounter, (2) an investigative detention, or (3) an arrest. Because police

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16. *Id.*

17. *Id.*

18. 531 U.S. 32 (2000). In *Edmond*, police established a drug interdiction checkpoint and required vehicles traveling through the checkpoint to submit to a canine sniff. *Id.* at 35. The Court held that although a dog sniff did not transform the checkpoint seizure into a search, the checkpoint itself was a violation of the Fourth Amendment. *Id.* at 40.

19. *Id.*

20. *Id.* (citing *United States v. Place*, 462 U.S. 696, 707 (1983)).

21. In *Scott v. State*, 1996 OK CR 57, 927 P.2d 1066, the Oklahoma Court of Criminal Appeals held that “[i]t is not disputed that a canine sniff of luggage in custody of a common carrier without reasonable suspicion does not constitute a search within the meaning of the Fourth Amendment.” *Id.* ¶ 8, 927 P.2d at 1068. Likewise, in *United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990), the Tenth Circuit held in a case involving an alert on a vehicle by a drug-detection dog at a police checkpoint that when an intrusion is solely limited to revealing the presence or absence of contraband, there is no search and hence no Fourth Amendment violation. *Id.* at 203.

22. For example, in *State v. Paul*, 2003 OK CR 1, 62 P.3d 389, the Oklahoma Court of Criminal Appeals held that “a dog sniff ‘hit’ creates probable cause to search without a warrant.” *Id.* ¶ 3, 62 P.3d at 390. Similarly, in the case of *United States v. \$189,825.00*, 8 F. Supp. 2d 1300 (N.D. Okla. 1998), the District Court for the Northern District of Oklahoma held that a positive alert from a trained drug-detection dog alone provides law enforcement officers with probable cause to search a vehicle for drugs. *Id.* at 1311.

officers predominately use drug-detection dogs *before* an arrest as a way to investigate or confirm suspicions of drug-related criminal activity, the use of dog sniffs is more common in consensual encounters and investigative detentions.

#### A. Consensual Encounters

Courts have generally characterized consensual encounters as contacts between citizens and law enforcement officers in which the citizen is free to leave and may refuse to answer questions posed by the officer.<sup>23</sup> Thus, police officers do not violate the Fourth Amendment simply by approaching someone in a public place and asking if he is willing to answer some questions.<sup>24</sup> Likewise, any voluntary responses to such questions may be admitted into evidence without objection.<sup>25</sup>

During consensual encounters, police officers may request consent to search.<sup>26</sup> Permission to search may include consent to a dog sniff. For example, in *United States v. Chavira*,<sup>27</sup> the Tenth Circuit upheld the legality of a dog sniff performed on a lawfully detained vehicle pursuant to the driver's voluntary consent to the sniff.<sup>28</sup> Although the Supreme Court has not yet specifically resolved this issue, courts are likely to follow *Chavira*, especially given *Florida v. Royer*,<sup>29</sup> in which the Supreme Court held that police are free to approach individuals and engage them in voluntary conversation without effecting a seizure.

#### B. Investigative Detentions

If the court determines that the sniff occurred during an investigative detention, the court will examine whether the detention itself is valid.<sup>30</sup> Courts have routinely held that law enforcement officers have the right to detain individuals on less than probable cause if there is a "reasonable suspicion of

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23. See, e.g., *Florida v. Royer*, 460 U.S. 491 (1983) (holding that without giving any justifying reasons, police are free to approach individuals in public places and engage them in voluntary conversation without effecting a seizure); *DeVooght v. State*, 1986 OK CR 100, ¶ 7, 722 P.2d 705, 708 (holding that when a person voluntarily cooperates with the police and is free to leave, there is no arrest).

24. *United States v. Chavira*, 9 F.3d 888, 889 (10th Cir. 1993).

25. *Id.*

26. See, e.g., *Florida v. Bostic*, 501 U.S. 429 (1991).

27. 9 F.3d 888 (10th Cir. 1993).

28. *Id.* at 889-90.

29. 460 U.S. 491 (1983).

30. Courts will analyze the detention and not the sniff because the Supreme Court has already determined that canine sniffs are not searches under the Fourth Amendment. See *United States v. Place*, 462 U.S. 696, 696 (1983).

criminal activity derived from ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion . . . .’<sup>31</sup> The Supreme Court has also held that a brief detention is justified for a routine traffic stop.<sup>32</sup>

Once police have detained a vehicle for a traffic violation, the police officer may order the driver and passengers out of the vehicle, and ask them about their travel plans, occupations, and relationship to each other, even in the absence of reasonable suspicion of other criminal conduct.<sup>33</sup> In such situations, courts have routinely held that if the scope and duration of the detention are reasonable under the circumstances, police may use drug-detection dogs to confirm or dispel suspicion of drug-related criminal activity.<sup>34</sup>

#### *IV. Is a Reasonable Suspicion of Drug Activity Required Before Requesting or Conducting a Canine Sniff of a Vehicle?*

While the law is well settled that a dog sniff is justified during investigative stops based on a reasonable suspicion that the person being detained is involved in criminal drug activity, the expanded use of dog sniffs in situations unrelated to drug activity was less clear until the Supreme Court’s recent decision in *Illinois v. Caballes*. Although the Tenth Circuit had ruled on the issue, other circuit and state courts either had not ruled or had ruled in direct contrast to the Tenth Circuit’s opinion.

The Tenth Circuit first ruled on the issue in the case of *United States v. Morales-Zamora*.<sup>35</sup> The *Morales-Zamora* court combined two cases involving the same New Mexico police department. In one case, defendant Morales-Zamora was traveling on the interstate when police officers stopped her at a roadblock.<sup>36</sup> The stated purpose of the roadblock was “to check for drivers’

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31. *United States v. Sandoval*, 29 F.3d 537, 539 (10th Cir. 1994) (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)); *see also* *Knighton v. State*, 1996 OK CR 2, ¶ 22, 912 P.2d 878, 886 (holding that an officer who stops and briefly detains a person “must be able to point to specific and articulable facts which, taken together with rational inferences therefrom” create a reasonable suspicion that the person detained is or was engaged in criminal activity).

32. *Whren v. United States*, 517 U.S. 806, 808 (1996) (“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”).

33. *See, e.g., Maryland v. Wilson*, 519 U.S. 408, 415 (1997); *United States v. Galindo-Gonzalez*, 142 F.3d 1217, 1221 (10th Cir. 1998).

34. *See, e.g., Place*, 462 U.S. at 696; *United States v. \$189,825.00*, 8 F. Supp. 2d 1300, 1310 (N.D. Okla. 1998).

35. 914 F.2d 200 (10th Cir. 1990).

36. *Id.* at 201.

licenses, vehicle registrations, and proofs of insurance.”<sup>37</sup> While one officer checked Morales-Zamora’s documents, another walked a drug dog around the exterior of her car.<sup>38</sup> Before the officers completed the document check, the dog alerted them to something in the car. A subsequent search revealed 126 pounds of marijuana in the trunk.<sup>39</sup>

In the other case, defendant Ozuna-Fuentes was driving a van on the same interstate and also encountered a roadblock.<sup>40</sup> Again, while police checked Ozuna-Fuentes’s documents, a drug dog signaled the police to something in the van.<sup>41</sup> A search revealed thirty pounds of marijuana concealed under the van’s chassis.<sup>42</sup>

Both defendants moved to suppress the evidence of contraband seized at the roadblock; the courts in both cases sustained the motions.<sup>43</sup> The government took an interlocutory appeal of the two district court rulings, and the Tenth Circuit consolidated the cases on appeal.<sup>44</sup>

The Tenth Circuit began its analysis by examining the propriety of the initial detentions at the roadblocks.<sup>45</sup> In holding that the detentions at the roadblock were lawful, the court stated that as long as the roadblock was established “for the valid purpose of checking drivers’ licenses, vehicle registrations, and proofs of insurance, . . . detention at the roadblock was not an unreasonable seizure under the fourth amendment.”<sup>46</sup>

Next, the court addressed whether defendants’ continuing detention to facilitate the dog sniff was also lawful.<sup>47</sup> In ruling on this aspect of the case, the court looked closely at the sequence of events at the roadblock.<sup>48</sup> The court noted that the drug-detection dogs alerted on the vehicles before officers had finished checking the defendants’ documents.<sup>49</sup> Because the defendants were not detained any longer than necessary to effectuate the initial reason for the stop, the court held that officers had not unlawfully seized the vehicles for purposes of conducting a dog sniff.<sup>50</sup>

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 201-02.

43. *Id.* at 202.

44. *Id.*

45. *Id.* at 202-03.

46. *Id.* at 203.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

The court then considered the specific question raised on appeal of “whether the police must have a reasonable suspicion of drug-related criminal activity” to initiate a dog sniff on a lawfully detained vehicle.<sup>51</sup> Using the same justifications set forth in *Place*,<sup>52</sup> the court reasoned that the dog sniff at the roadblock was not a search under the Fourth Amendment.<sup>53</sup> After noting that there is no intrusion on legitimate privacy interests when the only confidential information is the presence or absence of contraband,<sup>54</sup> the court held that “individualized reasonable suspicion of drug-related criminal activity is not required when the dog sniff is employed during a lawful seizure of the vehicle.”<sup>55</sup>

The Supreme Court ruled consistently with *Morales-Zamora* in *Illinois v. Caballes* and used a similar analysis in reaching its conclusion. In *Caballes*, an Illinois state trooper stopped Caballes for speeding on an interstate highway.<sup>56</sup> When the trooper radioed the dispatcher to report the stop, another trooper overheard the transmission and immediately went to the scene of the traffic stop with his drug-detection dog.<sup>57</sup> While the first trooper wrote the respondent a warning ticket, the second trooper walked the drug-detection dog

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51. *Id.*

52. *Id.* The court specifically noted that the sniff took place in public and was limited to the exterior of the vehicle so that it did not invade the defendants’ privacy or subject them to any embarrassment, inconvenience, or even delay. *Id.*

53. *Id.*

54. *See, e.g.,* United States v. Jacobsen, 466 U.S. 109 (1984); United States v. Place, 462 U.S. 696 (1983); *Morales-Zamora*, 914 F.2d at 205 (citing United States v. Colyer, 878 F.2d 469, 474 (D.C. Cir. 1989) (“*Place* and *Jacobsen* stand for the proposition that a possessor of contraband can maintain no legitimate expectation that its presence will not be revealed.”)); *see also* United States v. Goldstein, 635 F.2d 356, 361 (5th Cir. 1981) (holding that “reasonable expectation of privacy does not extend to airspace surrounding . . . luggage”).

55. *Morales-Zamora*, 914 F.2d at 203. In contrast to the Tenth Circuit’s opinion in *Morales-Zamora*, a handful of state court decisions have held that police officers must have reasonable suspicion of drug-related criminal activity before they can use a drug-detection dog in a routine traffic stop. For example, in the Wyoming case of *Damato v. State*, 64 P.3d 700 (Wyo. 2003), the Wyoming Supreme Court held that the officer did not have reasonable suspicion to call for the drug dog when he pulled over a driver for going two miles an hour over the speed limit. *Id.* at 710. In 2002, the Illinois Supreme Court similarly held that a police officer making a routine traffic stop must have further justification to call for a drug-detection dog. *People v. Cox*, 782 N.E.2d 275 (Ill. 2002). The *Cox* court opined that, if it permitted officers to conduct dog sniffs immediately upon making a traffic stop, it would effectively “be endorsing a drug-sniff test at every stop for a traffic violation.” *Id.* at 280-81. Finally, the Minnesota Supreme Court also found that officers must have an articulable suspicion of drug-related activity to conduct a dog sniff after a routine traffic stop. *Minnesota v. Wiegand*, 645 N.W.2d 125, 137 (Minn. 2002).

56. *Illinois v. Caballes*, 125 S. Ct. 834, 836 (2005).

57. *Id.*



around the vehicle.<sup>58</sup> The dog alerted on the vehicle's trunk.<sup>59</sup> Based on this alert, the officers searched the vehicle and found marijuana inside the trunk.<sup>60</sup> The entire stop lasted less than ten minutes.<sup>61</sup>

Caballes was convicted of a drug offense and sentenced to twelve years in prison.<sup>62</sup> The trial judge denied a motion to suppress, holding that the officers had not unnecessarily prolonged the stop and that the dog alert provided probable cause to conduct the search.<sup>63</sup> The state appellate court affirmed this decision, but the Illinois Supreme Court reversed on the grounds that the use of the drug-detection dog unjustifiably enlarged the scope of a routine traffic stop into a drug investigation.<sup>64</sup> The U.S. Supreme Court granted certiorari on the question of "whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."<sup>65</sup>

In a 6-2 decision,<sup>66</sup> the Supreme Court reasoned that because "[o]fficial conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment," there can be no legitimate expectation of privacy in the possession of contraband.<sup>67</sup> Because drug-detection dog sniffs are designed to reveal only the presence or absence of contraband, "[a] dog sniff conducted during a . . . 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."<sup>68</sup>

In this holding, the *Caballes* Court made three important assumptions. First, the Court assumed that the initial traffic stop was legitimate. Had the stop not been legitimate, the Court noted that any subsequent discovery of contraband would be the product of an unconstitutional seizure.<sup>69</sup> Second, the Court assumed that the duration of the traffic stop had not been extended to enable the dog sniff to occur. Had the stop been unreasonably prolonged, any subsequent discovery of contraband would also be an unconstitutional seizure.<sup>70</sup> Third, by accepting the trial court's finding that the dog sniff was

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 836-37.

65. *Id.* at 837.

66. Chief Justice Rehnquist took no part in the decision. *Id.* at 838.

67. *Id.* at 837 (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

68. *Id.* at 838.

69. *See id.* at 837.

70. *Id.*

sufficiently reliable to establish probable cause to search the trunk, the Court assumed that the drug-detection dog itself was well-trained and reliable.<sup>71</sup> *Caballes* therefore suggests that these three conditions must be met to legitimize a dog sniff during a routine traffic stop.

### V. Conclusion

Although courts generally do not consider drug-detection dog sniffs to be searches, the use of dog sniffs nevertheless raises Fourth Amendment concerns. To the extent that these sniffs occur during police-citizen encounters, a Fourth Amendment analysis undoubtedly governs their constitutionality.

First, courts should examine the nature of the police-citizen encounter within which the sniff occurs.<sup>72</sup> Any nonconsensual encounter must be accompanied by a reasonable, articulable suspicion of criminal activity, if not probable cause.<sup>73</sup> If a dog sniff occurs during a nonconsensual police-citizen encounter, such encounter may not be unreasonably prolonged to facilitate the sniff.<sup>74</sup> If a detention is unreasonably prolonged to facilitate the sniff, then the detention, the sniff, and any seizure that may result all violate the Fourth Amendment.<sup>75</sup>

Only if a detention is not unreasonably prolonged will courts move to the second part of the analysis. The second phase depends on whether the dog alerted. Once the dog alerts, officers have probable cause to search — even without a warrant.<sup>76</sup>

The question of whether a canine sniff during a routine traffic stop wholly unrelated to criminal drug activity violated the Fourth Amendment had been an unsettled area of the law until *Illinois v. Caballes*. Thus, *Caballes* finally provides a clear analytical framework within which to review subsequent challenges and issues.

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71. *Id.* at 838.

72. *United States v. Place*, 462 U.S. 696, 703 (1983).

73. *See United States v. Chavira*, 29 F.3d 888 (1993).

74. *State v. Paul*, 2003 OK CR 1, 62 P.3d 389.

75. *See Chavira*, 29 F.3d at 888.

76. *See Place*, 462 U.S. at 696; *Paul*, 62 P.3d at 389.

