Garden State CLE presents:

Police Dogs & Searches under New Jersey Law

Lesson Plan

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I. Foundational Constitutional Principles

Article I – paragraph 7 – New Jersey Constitution of 1947

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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

Amendment IV – United States Constitution

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1.) Under both constitutional provisions, only one type of search is banned: one that is unreasonable.

2.) A search is reasonable when it occurs either under judicial authority (search warrant) or under one of the well-delineated exceptions to the warrant requirement provided by the United States Supreme Court (consent, incident to arrest, automobile, exigent circumstances, etc.).

3.) Thus, the obligation of the police to act reasonably is implicated when they engage in activities that constitute a search or seizure within the meaning of the 4th Amendment (or Article I, paragraph 7).

4.) Reasonable police conduct means:

a. The police conducted the search or seizure under the authority of a judicially approved warrant; or

b. The police conducted the search under circumstances that objectively fit within one of the recognized exceptions to the warrant requirement; and

c. The police conduct during the search was reasonable (e.g. use of force under the totality of the circumstances: State v. Ravotto, 169 NJ 277 (2001) or unreasonable delay following lawful traffic stop).

5.) If the law enforcement activity is not a search within the meaning of the 4th Amendment, the police have no obligation to act reasonably. (example: State v. Sloane, 193 NJ 423 (2008) (NCIC)).

6.) Generally speaking, a search occurs within the meaning of the 4th Amendment when:

a. It occurs in an area where society is prepared to recognize a legitimate expectation of privacy; (compare home, automobile vs. NCIC look-up or jail setting).

b. It involves a trespass to private property. (e.g United States v. Jones, 132 US 945 (2012); Florida v. Jardines, 133 S. Ct. 1409 (2013))

II. Forensic Searches by Trained Police Dogs – In general

1. Is the use of a trained police dog a search within the meaning of the 4th Amendment?

The answer appears to depend on the area being searched.

a.) Residences – The use of a police dog in the residence or on the property (curtilege – not open fields) of a person is now considered to be a search within the meaning of the 4th Amendment. (Florida v. Jardines, 133 S. Ct. 1409 (2013)).

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b.) Motor Vehicles during traffic stop (federal – not a search) – The use of a police dog during the course of a motor vehicle stop is not a search within the meaning of the 4th Amendment. (Illinois v. Caballes, 543 US 405 (2005) is based upon no reasonable expectation of privacy in drug contraband, diminished expectation privacy & no effect on length of the stop.)

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c.) Motor Vehicles during traffic stop (New Jersey – reasonable suspicion required) –"The test of a justifiable use of a drug-sniffing dog is reasonable suspicion—the same test applicable to justify a request for consent to search." State v. Elders, 386 NJ Super. 208, 228 (App. Div. 2006).

d.) Luggage (federal – not a search) – United States v. Place, 462 US 696, 706-707 (1992).

The Fourth Amendment "protects people from unreasonable governmental intrusions into their legitimate expectations of privacy. We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose non-contraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment.

e.) Luggage – (New Jersey – reasonable suspicion required) State v. Cancel, 256 NJ Super. 430, 435 (App. Div. 1992).

"We initially observe that there was a reasonable basis for suspecting that luggage on a flight from Arizona to Newark would contain marijuana. Without contradiction, the State presented evidence that flights from Texas and Arizona were being used increasingly to transport marijuana into New Jersey. This evidence was sufficient to satisfy the modest level of reasonable suspicion needed to justify the un-intrusive use of dogs to sniff all luggage on such flights for narcotics. Moreover, the police used the dog to sniff for narcotics before defendant was in any way detained. Thus it cannot be said that she was detained without reasonable suspicion. Had she been detained without reasonable suspicion until a narcotics-sniffing dog was brought to the scene an argument could have been made that the detention was unlawful and the evidence later uncovered [could have been] suppressed. However, a person who is not delayed while a dog sniffs luggage that she had surrendered to a common carrier cannot claim that she has been unlawfully detained without reasonable suspicion because she has not been detained at all."

[See also State v. Stovall, 170 NJ 346 (2002)]

f.) For airports that constitute borders (like Newark Liberty), see

State v. Green, 346 NJ Super. 87 (App. Div. 2001)

United States v. Ramsey, 431 US 606, 619 (1977)

"Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be reasonable by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself."

III. Dog Alerts Establishing Probable Cause

Generally, an alert from a well-trained dog will establish probable cause to believe that contraband is secreted where the dog has indicated. State v. Cancel, 256 NJ Super. 430, 433-434 (App. Div. 1992).

Florida v. Harris, 133 S. Ct. 1050, 1057 (2013)

For that reason, evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs. After all, law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources.

IV. Competency – Challenges to Training of Dog or Officer

Florida v. Harris, 133 S. Ct. 1050, 1057-1058 (2013)

A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings. Indeed, evidence of the dog's (or handler's) history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant, as the Solicitor General acknowledged at oral argument. See Tr. of Oral Arg. 23–24 ("[T]he defendant can ask the handler, if the handler is on the stand, about field performance, and then the court can give that answer whatever weight is appropriate"). And even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions.

In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

V. Open-air sniff vs. Vehicle entry

Our cases have held that an open-air sniff by a drug-detection dog does not intrude upon the privacy rights of a defendant and does not require a warrant provided that the police have reasonable and articulable suspicion of criminal activity. But open-air sniff does not mean that the dog can enter the passenger compartment of a vehicle. The dog's entry may, in fact, be more intrusive and a violation of the rights of an owner or driver of a car than entry by police officers. The K–9 officer in this case testified that he warned M.C. about the possibility of [the dog] damaging the car by scratching and biting, the dog's manner of alerting to the scent of illegal drugs.

Before the police allow a dog to enter the interior of a car, they must meet the same requirements that would allow the police themselves to enter and search. If they have no warrant, the police need either knowing and voluntary consent, or probable cause and exigent circumstances to conduct a motor vehicle search. In this case, the officer saw marijuana residue and cigar wrappers in the passenger area, and the dog alerted outside the vehicle, next to the open passenger side door, before the officers had the dog enter the vehicle to search. We agree with the lower court's conclusion that the police had probable cause to believe that the interior of the car contained evidence of criminal offenses.

VI. Threats to Summon Police Dog

Two issues flow from threat, both of which will impact on a subsequent consent: coercion and undue delay:

Review: Elements of a consensual search (Voluntary, time, location, withdrawal, presence, etc.)

a.) Coercion on the issue of consent:

[In general]

> **We recognize that defendant asserts that the questioning of Baum, and in particular the officer's tone and his reference to the drug-sniffing dog. FN5. We decline the invitation to consider whether the reference to the dog was so unduly coercive as to be constitutionally infirm. By the time the officer said that he could have a dog brought to the scene, he had discovered that Baum did not have a valid license and Baum had already admitted that some of her earlier responses were false and that they had been involved in illegal use of narcotics earlier in the day. On this record and in light of defendant's lack of standing, we need not address this argument.**

State v. Baum, 199 NJ 407, 426 (2009).

[In Racial Profiling]

That figure indicates that nearly ninety-five percent of detained motorists granted a law enforcement officer's request for consent to search. What is more compelling is that those motorists granted consent after officers used tactics such as the following:

> **Extended detention and questioning regarding issues not related to the reason for the stop, such as "How much money do you have in your pocket?" and "Why are you riding around on the New Jersey Turnpike?" ...;**
>
> **The use of intimidating statements to obtain consent to search (such as "... the drug dog's on the way," and "... once the drug dog gets here, everybody gets arrested," ....); and**
>
> **The use of "hypothetical" consent requests, a violation of both policy and the decree, such as "if I asked for consent to search your car, would you sign it?"**

Yet, despite the frequency with which consent to search is given, the vast majority of motorists subjected to consent searches following traffic stops are not charged with any violation. The Attorney General's *Interim Report* indicates that four out of every five persons who submit to consent searches are innocent of any wrongdoing. With only a twenty-percent rate of crime detection among randomly targeted motorists, the effectiveness of roadside consents as a law enforcement technique is undermined and clearly does not outweigh the citizen's state constitutional interest in remaining secure from intrusion.

State v. Carty, 170 NJ 632, 645 (2002).

[As a correct statement of law]

After the dog signaled that the defendant's luggage contained narcotics, the officers requested her to consent to their inspecting its contents, "advising her that she could refuse but that if she did they would detain her until they obtained a search warrant."We held that the dog's admittedly reliable reaction, combined with a false name on the defendant's luggage, gave police probable cause both to arrest her and to obtain a valid search warrant for the luggage. *Ibid.* "[T]he officers' comment to defendant that she would be detained while they obtained a search warrant was a fair prediction of events that would follow, not a deceptive threat made to deprive her of the ability to make an informed consent." That conclusion is comparable to the situation before us.

The point is that both in *Carty* and here, law enforcement officers informed a suspect that they would do what they were lawfully entitled to do. In *Cancel,* police officers were lawfully entitled to obtain a search warrant based on probable cause. Here, the officers were lawfully entitled to bring in a drug-sniffing dog based on reasonable suspicion.

We are satisfied that the troopers had articulable and reasonable suspicion to justify calling for a dog, just as they were justified in asking for [the defendant's] consent to search the disabled vehicle. Because the trooper had the right to call for a drug-sniffing dog, his advice to [the defendant] was "a fair prediction of events that would follow, not a deceptive threat made to deprive [him] of the ability to make an informed consent." That [the defendant] changed his mind about signing the consent form and agreed in writing to the search immediately after facing the likelihood that the troopers would bring a dog, does not make his consent involuntary.

State v. Elders, 386 NJ Super. 208, 229-230 (2006).

b.) Undue delay

As a general principle, police may question the occupants of a motor vehicle during a valid stop on issues unrelated to the stop without violating the Fourth Amendment provided that the questioning does not extend the duration of the stop. State v. Hickman, 335 NJ Super. 623, 636 (App. Div. 2000).

There is no bright-line rule for the permissible length of an investigatory detention; all of the surrounding circumstances are relevant factors. *See*. The scope of the intrusion, such as whether the individual is handcuffed, subjected to fear or humiliation, placed in a police car, removed to police headquarters, or isolated from others, as well as whether the delay exceeded the necessities of legitimate investigation, are all important factors In *Dickey,* [the Court] held that the defendant's detention was overly intrusive and constituted a de facto arrest that required probable cause, not merely reasonable suspicion. The defendant, a passenger in a car that was stopped by a state trooper, was transported to the State Police barracks and effectively confined there; he ultimately consented to a search more than four hours after the traffic stop.

***State v. Dickey,* 152 *N.J.* 468, 476–77 (1998) [4-hour delay to have dog inspect the vehicle at state police barracks and alerted on trunk, followed by signing a consent to search form.]**

We hold, under the unique facts involved, that defendant and his co-defendant were detained for an unreasonable length of time, and that the search exceeded the scope for which it was authorized because it was conducted outside the presence of the person consenting to the search and, in any event, at a remote time and location. In essence, the consent did not authorize the detention that occurred in this case.

State v. Hampton, 333 NJ Super. 19, 26 (App. Div. 2000) [Dog exposed to brief case in found in truck.]

VII. Standing (Abandoned Property)

State v. Carvajal, 202 NJ 214 (2010)

At that point, the detective entered the bus, introduced himself to the fifteen to twenty remaining passengers, and told them he was conducting an investigation and needed to verify their luggage by checking their claim tickets. After the passengers verified their luggage, only one large duffel bag remained unclaimed. The detective then asked defendant if the bag belonged to him, and he replied, "No."

A K–9 drug-detecting dog, transported to the scene, then "trained" on luggage brought inside the bus depot and "signaled" to the unclaimed duffel bag. Because of the dog's reaction to the duffel bag and because it "appeared to have been abandoned," Detective Laurencio, assisted by another detective, searched the bag. Carefully stashed away inside a comforter and several layers of plastic and brown bags were sixty-five rubber pellets. Each pellet contained .40 ounces of heroin; the total stash of heroin weighed twenty-six ounces. A backpack also was removed from the duffel bag. The contents of the backpack revealed a Sanitas Columbian health card in the name of Pablo Carvajal and a Washington Mutual business card with an account number.

The State satisfied its burden of proving by a preponderance of the evidence that the duffel bag was abandoned. Defendant denied having any possessory or ownership interest in the duffel bag, and the police attempted to identify other potential owners before conducting the search of the bag. Defendant therefore had no standing to challenge the warrantless search of the bag. We affirm the judgment of the Appellate Division, which upheld the trial court's denial of defendant's motion to suppress.