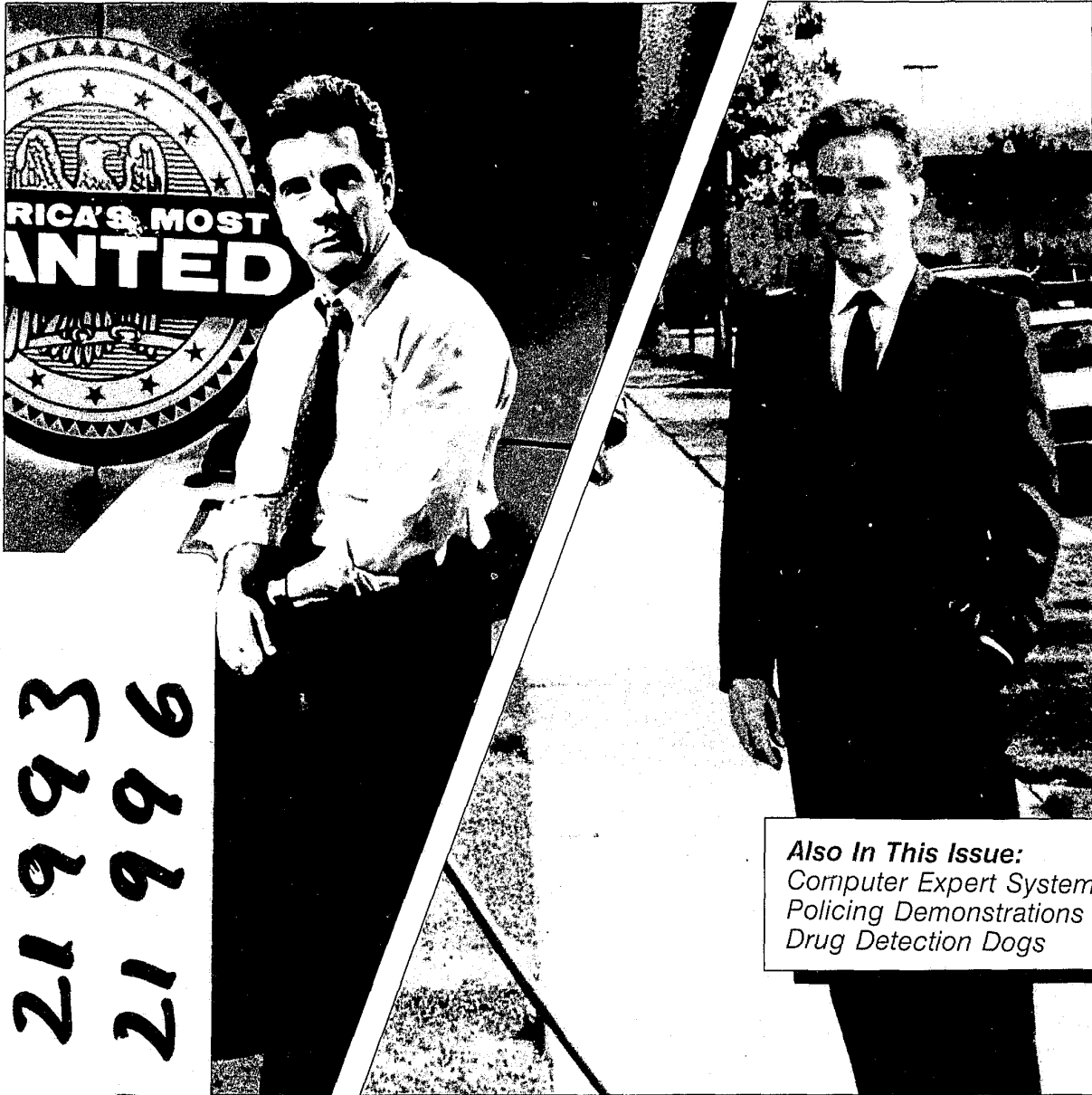




FBI

August 1989

Law Enforcement Bulletin



1 21 993
1 21 996

Also In This Issue:
Computer Expert Systems
Policing Demonstrations
Drug Detection Dogs

ime Television

Contents

August 1989, Volume 58, Number 8

Features

121993

1 Crime-Time Television

By Scott A. Nelson

121994

12 Expert Systems for Law Enforcement

By Roland Reboussin and Jerry Cameron

121995

18 Policing Demonstrations

By Robert J. Johnston, Jr., and Lawrence F. Loesch, Jr.

121996

26 Hounding Drug Traffickers: The Use of Drug Detection Dogs

By Kimberly A. Kingston

Departments

10 The Bulletin Reports

U.S. Department of Justice
National Institute of Justice

121993-
121996

17 Book Review

24 Police Practices

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by

FBI Law Enforcement Bulletin

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

FBI

Law Enforcement Bulletin

United States Department of Justice
Federal Bureau of Investigation
Washington, DC 20535

William S. Sessions, Director

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law of the Department of Justice. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget.

Published by the Office of
Public Affairs,
Milt Ahlerich, Assistant Director

Editor—Stephen D. Gladis
Managing Editor—Kathryn E. Sulewski
Art Director—John E. Ott
Production Manager—Andrew DiRosa

The Cover: Featured on the cover are John Walsh, host of "America's Most Wanted," and Robert Stack, host of "Unsolved Mysteries." See article p. 1.

The FBI Law Enforcement Bulletin (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Ave., N.W., Washington, DC 20535. Second-Class postage paid at Washington, DC. Postmaster: Send address changes to Federal Bureau of Investigation, FBI Law Enforcement Bulletin, Washington, DC 20535.



Hounding Drug Traffickers

The Use of Drug Detection Dogs



By

KIMBERLY A. KINGSTON, J.D.
*Special Agent
Legal Counsel Division
FBI Academy
Quantico, VA*

His early years were difficult. He was shuttled from one temporary home to the next, always in trouble, never properly cared for or loved. He seemed destined to fail until he stumbled into a career with the Orange County, CA, Sheriff's Office. In the 6 years that he has been with the sheriff's office, he has played a significant part in confiscating over \$52 million worth of drugs, \$14 million in cash proceeds from drug sales, and several million dollars worth

of drug-related assets. In recognition of his monumental contribution to the war on drugs, he has received no less than 12 official commendations. His name is Winston — and he is no ordinary policeman. In fact, he is not a man at all. He is a dog.¹

Dogs like Winston have become very common weapons in the struggle against drug trafficking. The dogs' highly developed olfactory senses have proven invaluable to law enforcement officers, and courts have recognized

the evidentiary value of a well-trained drug detection dog.² There is no doubt that these dogs have a significant role in law enforcement, and that role can be enhanced by law enforcement's awareness of fourth amendment proscriptions concerning the use of detection dogs.

This article discusses recent Supreme Court and lower court cases establishing fourth amendment guidelines for the use of specially trained dogs in the following areas: (1) Public places, (2) third-

party controlled areas, (3) private residences, and (4) motor vehicles. Adherence to these guidelines will help to ensure the admissibility of evidence discovered as a result of dog sniffs and the continued vitality of drug detection dogs in law enforcement.

SUPREME COURT ENDORSES USE OF DOGS IN PUBLIC PLACES

The role of detection dogs in law enforcement has been made more secure by the decision of the U.S. Supreme Court in the case of *United States v. Place*.³ In *Place*, law enforcement officers at New York's LaGuardia Airport lawfully detained defendant on a reasonable suspicion that he was carrying a controlled substance.⁴ When defendant refused to consent to a search of his luggage, the officers gave him the opportunity to accompany his luggage to the office of a Federal judge where a search warrant would be sought. Defendant declined the offer but requested and received a telephone number where the officers could be reached. After defendant left the premises, his luggage was taken to Kennedy Airport where, 90 minutes after the initial detention, it was subjected to a "sniff test" by a trained narcotics detection dog. In response to the dog's positive reaction to one of the bags, a search warrant was secured. The subsequent search of the bag revealed a substantial quantity of cocaine. The defendant was later arrested and indicted for possession of cocaine with intent to deliver.

After the district court denied defendant's motion to suppress the evidence seized from his luggage,⁵ defendant entered a plea of guilty

Special Agent Kingston



“
**Drug detection dogs
are extremely effective
weapons to use in the
war on drugs.**
”

but reserved the right to appeal the denial of his suppression motion. On review, the U.S. Court of Appeals for the Second Circuit reversed on the grounds that the lengthy detention of defendant's luggage exceeded permissible limits and consequently amounted to a seizure in violation of the fourth amendment.⁶ The U.S. Supreme Court affirmed.

Although unnecessary to the resolution of the dispute in *Place*,⁷ a majority of the Court took the opportunity to address the constitutionality of "dog sniffs."⁸ Specifically, the Court considered whether the use of a dog to detect odors emanating from defendant's luggage constituted a search requiring compliance with fourth amendment dictates.⁹ The Court engaged in a two-step analysis to determine whether the officer's actions violated any expectation of privacy that was both subjectively and objectively reasonable.¹⁰

Finding first that the defendant had a subjective expectation of privacy in his luggage, the Court then considered the more important question of whether that ex-

pectation of privacy was objectively reasonable. In other words, did the use of the dog violate any expectation of privacy that society as a whole was willing to recognize and protect? Of particular significance to the Court was the fact that the dog sniff did not require the opening of defendant's luggage.¹¹

"[T]he 'dog sniff' does not expose noncontraband 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 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."¹²

In view of the limited intrusiveness of this dog sniff which only revealed one thing (i.e. whether there was contraband in the item tested), the Court concluded that this single fact is something society is not willing to protect. Consequently, under the circumstances present in *Place*, the use of a trained dog, although foiling defendant's subjective expectation of privacy, did not violate any objectively reasonable expectation of privacy and, therefore, was not a search under the fourth amendment.

In *Place*, the Court did not go so far as to say that no dog sniff would ever be considered a search. Rather, the Court was careful to limit the impact of its decision by narrowly concluding that "the exposure of [defendant's] luggage, which was located

LOWER COURT CASES

As a result of the limited application of the Court's pronouncement in *Place*, lower courts have had to consider anew the constitutionality of using specially trained dogs in other than public places. Some of these courts have continued to hold that the dog sniff is not a search,¹⁴ while other courts have held to the contrary.¹⁵ The distinguishing factor appears to be the degree of privacy the individual defendants have had in the "other than public places." For example, if the nonpublic place where the dog sniff occurs is controlled by a third party and the defendant has no reasonable expectation of privacy in the area, then the sniff of defendant's property found at that location does not constitute a search. However, if the dog sniff takes place in an area where defendant has a reasonable expectation of privacy, such as his home or automobile, then the sniff does amount to a search and it

senger's luggage to a sniff test once it has been entrusted to the care of a third-party common carrier.

Benny Lovell's nervous appearance¹⁷ piqued the interest of U.S. Border Patrol Agents at the El Paso International Airport. The agents observed Lovell for the brief time it took him to check his luggage with a skycap and walk to the airline terminal and noted that he was visibly shaking and frequently glanced over his shoulder. The agents decided to remove Lovell's luggage from the airline conveyer belt and to subject the bags to a dog sniff.¹⁸ After a positive alert from a trained narcotics detection dog, a search warrant was obtained. Pursuant to the warrant, agents opened Lovell's luggage and found 68 pounds of marijuana. Lovell was subsequently arrested and charged with possession of a controlled substance with intent to distribute.

Prior to trial, Lovell moved to suppress all the evidence obtained from his luggage on the grounds that the bags had been seized and then searched in violation of his fourth amendment rights.¹⁹ The U.S. Court of Appeals for the Fifth Circuit was asked to decide whether: 1) The removal of Lovell's bags from the airline conveyer belt was a seizure under the fourth amendment, and 2) whether the sniff²⁰ of the luggage was a search.²¹

In response to the first query, the court distinguished between luggage taken from the custody of a traveler and luggage taken from the custody of a third-party common carrier. Finding the latter to be much less intrusive, the court

“

... if the dog sniff takes place in an area where defendant has a reasonable expectation of privacy ... then the sniff does amount to a search....

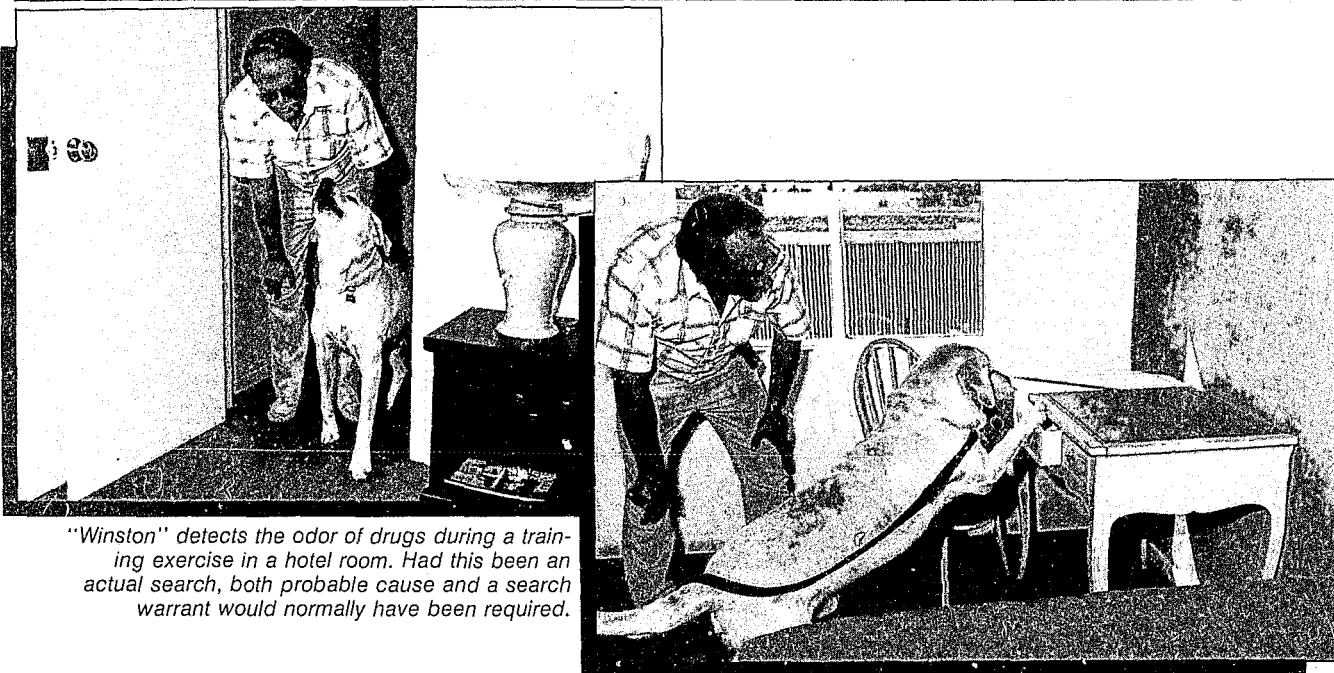
”

in a public place, to a trained canine — did not constitute a 'search' within the meaning of the Fourth Amendment."¹³ The obvious implication of the Court's narrow ruling is that if the location of the article subjected to the dog sniff was changed, then the conclusion that the sniff was not a search could also change.

must be reasonable under the fourth amendment. The following cases demonstrate this distinction and illustrate different courts' approaches to the legality of dog sniffs in various nonpublic places.

Third-Party Controlled Areas

In *United States v. Lovell*,¹⁶ the Fifth Circuit Court of Appeals upheld the legality of law enforcement officers subjecting a pas-



"Winston" detects the odor of drugs during a training exercise in a hotel room. Had this been an actual search, both probable cause and a search warrant would normally have been required.

concluded, "... momentary delay occasioned by the bags' removal from the conveyer belt was insufficient to constitute a meaningful interference with Lovell's possessory interest in his bags. As a result, the Agents' actions did not constitute a seizure."²²

The court also rejected defendant's contention that the sniff of his luggage was a search. The court began by recognizing that "when airport security concerns are not implicated, every passenger who has luggage checked with an airline enjoys a reasonable expectation of privacy that the contents of that luggage will not be exposed in the absence of consent or a legally obtained warrant."²³ Nonetheless, the court concluded that the passenger's reasonable expectation of privacy did not extend to the airspace surrounding the luggage; the use of a drug detection dog to sniff luggage in the custody of a common carrier

is not a search and, therefore, neither probable cause nor a reasonable suspicion is required to justify the action.²⁴

Lovell is just one of many cases holding that the use of a drug detection dog to sniff items placed in the care and custody of third parties is not a search under the fourth amendment. The same result has been reached in cases where dogs have been used to detect the odor of drugs emanating from safe deposit boxes,²⁵ packages shipped through Federal Express,²⁶ cargo stored in the facilities of a private carrier,²⁷ and parcels traveling in the U.S. mail.²⁸ The common thread running through each one of these cases is that the particular defendants involved had no reasonable expectation of privacy in the area in which the drug detection dog was used and, therefore, the dog sniff was not subject to fourth amendment constraints.

Private Residences

Law enforcement officers may desire to use a detection dog in areas where there is unquestionably a reasonable expectation of privacy, such as sniffs of a person,²⁹ a private home, or hotel room. Using a dog under such circumstances generally implicates a person's reasonable expectation of privacy³⁰ requiring prior judicial authorization or other appropriate justification under one of the exceptions to the warrant requirement.

For example, in *United States v. Thomas*,³¹ the Second Circuit Court of Appeals held that simply using a dog to detect odors emanating from defendant's apartment constituted a search, even though no entry into the premises was made. In *Thomas*, the defendant claimed that the warrantless use of a drug-trained dog outside his apartment to detect odors originating from within was an illegal

search that tainted the subsequently issued warrant. The court acknowledged the precedent established in *Place*, but noted that the use of a dog to detect odors in a suitcase is quite different than using a dog to reveal the contents of an individual's home. Emphasizing the fact that an individual has a heightened privacy interest in his dwelling place, the court made the following statement:

"[A] practice that is not intrusive in a public airport may be intrusive when employed at a person's home. Although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, it remains a way of detecting the contents of a private, enclosed space. With a trained dog police may obtain information about what is inside a dwelling that they could not derive from their own senses. . . . Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation."³²

In keeping with this rationale, the court in *Thomas* concluded that the use of a dog to detect the odor of drugs coming from defendant's apartment was a search which required both probable cause and a search warrant.³³

Motor Vehicles

The *Lovell* and *Thomas* cases illustrate two diametrically opposed situations. In *Lovell*, the

defendant had no expectation of privacy in the area where the dog sniff occurred, while in *Thomas*, the defendant's privacy interest was extremely high. Dog sniffs may also occur in motor vehicles³⁴ or other areas where defendants are afforded a reduced expectation of privacy.

“
... courts have
recognized the
evidentiary value of a
well-trained drug
detection dog.”

For example, in *United States v. Whitehead*,³⁵ law enforcement officers noticed defendant as he arrived at the Miami, FL, Amtrak Station 10 minutes before the scheduled departure of the morning train to New York City. Defendant called attention to himself by carefully scanning the front of the station before entering. The officers initiated an investigation by speaking to the taxi driver who drove defendant to the station and the ticketing agent who sold defendant his ticket. The taxi driver advised that defendant had been picked up at a Miami hotel well known to the officers as a common meeting place for drug traffickers. The ticketing agent informed the officers that defendant paid cash for a first-class sleeping car ticket to New York, the reservation for which had been made only a few hours before. With this knowledge, the officers approached defendant, and after identifying themselves, asked to

speak with him. Although defendant agreed to talk to the officers, he immediately broke into a profuse sweat. When asked to identify himself, defendant produced a pair of military dog-tags, but claimed to have no other identification. In response to further questioning, defendant advised that he had been in Miami for 2 days to play tennis with friends. The officers then informed defendant that they were conducting a narcotics investigation and asked for consent to search defendant's bags. When defendant denied his consent, he was permitted to board the train with no further interruptions.

After defendant's departure, the officers in Miami contacted Amtrak officers who boarded the train when it made a scheduled stop in Washington, DC. More officers boarded the train in Baltimore and with them were two drug-trained dogs. One of the officers knocked on defendant's door. When the door was opened, the officer identified himself and was given consent to enter. Once inside, the officer asked for permission to search defendant's bags. Defendant again broke into a profuse sweat and asked what would happen if he objected. The officer indicated he had dogs available to sniff the luggage. At that point, defendant told the officer to "bring on your dogs."³⁶ The dogs were brought into the roomette, where they both alerted to one of defendant's bags. Defendant and his luggage were detained while a warrant was obtained. The subsequent search of the suitcase revealed 3 kilograms of cocaine.

Prior to trial, defendant moved to suppress the cocaine found in his luggage on the grounds that the dog sniff of his luggage, which was located in his roomette, was an unlawful search under the fourth amendment. The trial court rejected this motion and found defendant guilty of possessing cocaine with intent to distribute. On appeal, defendant renewed his fourth amendment claim.

Recognizing that the roomette in question was not a "public place," the U.S. Court of Appeals for the Fourth Circuit first considered whether the roomette was the equivalent of defendant's home or hotel room where his expectation of privacy is heightened, or instead more akin to a motor vehicle where the privacy interest is diminished. After pointing out that trains, like cars, are subject to pervasive government regulation and their mobility creates the same "law enforcement exigency ... and ... potential for immediate flight from the jurisdiction,"³⁷ the court made the following observation:

"Whitehead's roomette was moving swiftly in interstate transit. Whitehead's status therein was that of a passenger, not a resident. Although Whitehead had no ability to direct the train's movement, its continuing journey imposed practical constraints on the officers' ability to mount a full-fledged investigation within jurisdictional boundaries. Moreover, Whitehead could leave the train at any stop, and unlike a hotel guest, he had no authority to remain on the train once it reached its destination."³⁸

Based on these observations, the court rejected defendant's contention that the roomette was the functional equivalent of a hotel room or a temporary home that deserved the most scrupulous protection under the fourth amendment.

The court's review, however, did not end there. Defendant countered with the argument that even though motor vehicles are given less protection under the fourth amendment, probable cause is still required to justify the warrantless search of such vehicles. Again, the court disagreed. Because the dog sniff is so much less intrusive than a traditional search, the court reasoned that a prior showing of probable cause was unnecessary. Instead, the court found that such a limited and discreet intrusion as is caused by a dog sniff could be justified on the basis of a reasonable suspicion. In light of the facts known to the investigating officers in *Whitehead*, the court found that

“

... the use of a drug detection dog to sniff items placed in the care and custody of third parties is not a search under the fourth amendment.

”

a reasonable suspicion existed at the time the dog sniff was conducted.

Many cases have adopted the rationale used in *Whitehead* and have upheld the use of dogs to detect drugs in motor vehicles when a reasonable suspicion can be articulated.³⁹ The fact that a warrant based on probable cause is

not required is attributable in large part to the reduced expectation of privacy attached to motor vehicles.

CONCLUSION

Drug detection dogs are extremely effective weapons to use in the war on drugs. Traffickers have attempted to thwart the efforts of these dogs by packaging drugs in containers filled with moth balls and garlic.⁴⁰ When these attempts at concealment failed, drug cartels, acting out of fear, actually put contracts out on the lives of certain detection dogs.⁴¹ The fear exhibited by the drug traffickers is itself a reward to the law enforcement community because it means that a weapon that works has been found.

To keep this weapon working, law enforcement officers must be careful to use detection dogs within the boundaries set by the courts. Those boundaries can be summarized as follows:

- If the dog is used to sniff an area where the defendant has an extremely high expectation of privacy, then a warrant based on probable cause or an exception to the warrant requirement is a prerequisite;
- If the sniff is to occur in an area of reduced expectation of

privacy, then a mere showing of reasonable suspicion is all that is required; and

- If the dog is used to sniff an item located in a public place or a place controlled by a third party, then no search will occur and fourth amendment proscriptions regarding searches need not be a concern.

Although other constitutional considerations may arise, such as the level of suspicion needed to seize luggage from a traveler⁴² or the amount of time an item may be detained prior to conducting a sniff test,⁴³ law enforcement officers can help insure the legality of the dog sniff itself by staying within these boundaries.

Footnotes

¹Fleming, "Winston's Last Chance," *Reader's Digest*, November 1988, pp. 100-4.

²An alert by a well-trained detection dog is normally sufficient to establish probable cause. *See, e.g., United States v. Race*, 529 F.2d 12 (1st Cir. 1976); *see also*, Comment, 13 *San Diego L. Rev.* 410 (1976).

³103 S.Ct. 2637 (1983) (hereinafter cited as *Place*).

⁴Reasonable suspicion had previously been established by officers who had talked to Place before he boarded his plane for New York.

⁵Defendant's suppression motion claimed that the warrantless seizure of his luggage violated his fourth amendment rights.

⁶*United States v. Place*, 660 F.2d 44 (2d Cir. 1981). For a review of the proper scope of an investigative detention, see Hall, "Investigative Detention: An Intermediate Response," *FBI Law Enforcement Bulletin*, November 1985, December 1985, and January 1986.

⁷Because a majority of the Supreme Court found that the 90-minute detention of defendant's luggage was too long, and therefore, an unreasonable seizure under the fourth amendment, there was no need for the Court to address the "dog sniff" question. *See* Justice Brennan's concurring opinion in *Place*, 103 S.Ct. 2637 at 2646 (Brennan, J., concurring).

⁸The concurring Justices chastised the majority for being "unable to resist the pull to decide the constitutional issues on a broader basis than the record before it imperatively requires," *Id.* quoting *Street v. New York*, 394 U.S. 576, 581 (1969).

⁹U.S. Const. amend. IV reads: "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 person or things to be seized."

¹⁰This two-step test for determining the existence of a reasonable expectation of privacy was first announced by the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967).

¹¹*Place*, *supra* note 3, at 2644.

¹²*Id.*

¹³*Id.* at 2645.

¹⁴*See, e.g., Gamble v. State*, 473 So.2d 188 (Ala. App. 1985); *State v. Snitkin*, 681 P.2d 980 (Sup. Ct. Hawaii 1984); and *Stout v. State*, 688 S.W.2d 188 (Tex. App. 1985).

¹⁵*See, e.g., United States v. Tartagura*, 864 F.2d 837 (D.C. Cir. 1989); *Crosby v.*

unreasonable in its execution as to cross the bounds of constitutional propriety, we are not confronted by such a process here."

¹⁶*Lovell*, *supra* note 16, at 916.

¹⁷*Id.* 913.

¹⁸*Id.*

¹⁹*See, e.g., Strout v. State*, 688 S.W.2d 188 (Tex. App. 1985) and *State v. Boyce*, 723 P.2d 28 (Wash. App. 1986).

²⁰*See, e.g., Gamble v. State*, 473 So.2d 1188 (Ala. App. 1985).

²¹*See, e.g., State v. Snitkin*, 681 P.2d 980 (Sup. Ct. Hawaii 1984).

²²*See, e.g., State v. Kesler*, 396 N.W.2d 729 (Sup. Ct. N.D. 1986).

²³In *State v. Boyce*, 723 P.2d 28 (Wash. App. 1986), the court held that a canine sniff of a person or of objects being carried by the person is "... offensive at best and harrowing at worst to the innocent sniffer" and requires a reasonable suspicion. *Id.* at 31 n. 4.

²⁴*See* note 10, *supra*.

²⁵757 F.2d 1359 (2d Cir. 1985), *cert. denied*, 474 U.S. 819 (1985).

²⁶*Id.* at 1366-7.

²⁷Although the court found that the warrantless use of the detection dog was a fourth amendment violation, it refused to suppress the evidence. Rather, the court found that since the subsequently issued warrant was executed in good faith, and pursuant to the Supreme Court's decision in *United States v. Leon*, 104 S.Ct. 3405 (1984), the exclusionary rule need not apply.

²⁸For cases involving dog sniffs of motor vehicles, *see United States v. Tartagura*, 864 F.2d 837 (D.C. Cir. 1989); *United States v. Stone*, 866 F.2d 359 (10th Cir. 1989); *United States v. Hardy*, 855 F.2d 753 (11th Cir. 1988); *United States v. Dicesare*, 765 F.2d 890 (9th Cir. 1985); and *O'Keef v. State*, 376 S.E.2d 406 (Ct. of App. Ga. 1988).

²⁹849 F.2d 849 (4th Cir. 1988).

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*See* note 34, *supra*.

³⁴*See* note 1, *supra*.

³⁵*Id.*

³⁶*See* note 6, *supra*.

³⁷*Id.*

“ Many cases ... have upheld the use of dogs to detect drugs in motor vehicles when a reasonable suspicion can be articulated. ”

State, 492 So.2d 1152 (Fla. App. 1986); and *Commonwealth v. Johnston*, 530 A.2d 74 (Pa. Sup. Ct. 1987).

³⁸849 F.2d 910 (5th Cir. 1988) [hereinafter cited as *Lovell*].

³⁹*Lovell's* nervousness was evidenced by his shaking, his fumbling, his erratic hand writing and a "toothpick in his mouth ... was going 90 miles an hour." *Id.* at 911.

⁴⁰Prior to the dog sniff, the agents compressed the sides of the suitcase and both got a faint smell of talcum powder and a strong odor of marijuana. The court found no fault with the agents' actions. *Id.*

⁴¹After the district court refused to suppress the evidence, *Lovell* entered a conditional plea of guilty and reserved the right to appeal the denial of his suppression motion. *Id.* at 912.

⁴²Because the agents sniffed the luggage prior to bringing in a detection dog, the court focused its attention on the legality of the human sniff.

⁴³The court also considered whether squeezing or "prepping" the bag was a fourth amendment violation. On this issue, the court stated, "... while we could hypothesize a 'prepping' process so violent, extreme and

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.