

1983 WL 181978 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 25, 1983

***1 RE: Dogs Used In Detection of Drugs and Explosives**

The Honorable J.P. Strom
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221

Dear Chief Strom:

Attorney General Medlock has referred your letter dated July 7, 1983, to me for reply.

You indicated SLED had recently hired a narcotics agent, SA Greg Hentschel, who had background experience in explosives from the Army. In addition, SLED was acquiring two (2) dogs, trained to detect drugs and explosives. You requested information concerning the use of such dogs, especially involving certification and recertification of the dogs and their handlers.

I spoke with SA Hentschel concerning the dogs and their training. He outlined certain procedures recommended by the training school, Drexler of Indiana, regarding the performance of each dog. Specifically, each dog would be run through a number of practice exercises, including obstacle courses and staged drug or explosive searches. The dog's performance, including unsuccessful instances, would be documented. Also, instances where the dog was used in law enforcement situations would be documented. The name of the handler would be identified with the dog in each case.

It would appear from my research that such documentation would be crucial to the admission at trial of evidence seized with the dog's help. Generally, the courts have passed favorably on the use of dogs to detect contraband, where (1) there was at least a reasonable suspicion on the part of law enforcement officers that illegal activity was taking place and contraband (usually narcotics) existed in a certain location, and (2) dogs used in detecting the contraband were trained, and had a history of reliability. The latter could be well demonstrated by documentation of the dog's performance in practice and in the field, with particular handlers.

There appear to be a significant number of reported cases regarding the use of dogs. With your permission, I would like to submit a preliminary report concerning the status of case law as I have found it, and supplement this report as more information comes to light.

The trend seems to be that the courts require at least a reasonable suspicion on the part of the law enforcement officers as stated above, before use of the dog could be accepted. For example, dogs were used to detect drugs in luggage in [U.S. v. Bronstein](#), 521 F.2d 459 (2nd Cir. 1975), cert. den. 424 U.S. 918, 47 L.Ed.2d 324, 96 S.Ct. 1121. In that case, the law enforcement officers had probable cause, based upon information received from reliable informants, to suspect the presence of drugs in the defendant's luggage. In addition, the court held that the defendant had no reasonable expectation of privacy regarding his luggage because it was in a public airline terminal. The work of the dogs to detect the narcotics was held to have enhanced the abilities of the law enforcement officers, and the search and subsequent discovery of narcotics was upheld.

*2 In addition, the use of dogs was held not to be search, but a 'monitoring of the air' in a public area, in [U.S. v. Solis](#), 536 F.2d 880 (9th Cir. 1976). In that case, the officers also had a reasonable suspicion, based upon statements made by a reliable informant, concerning the presence of drugs in a trailer. The court noted experience of the law enforcement agents as to the

common smuggling of drugs in trailers. The dogs' actions were used to further establish probable cause to obtain a search warrant. The warrant was upheld.

And, at least one court has held that a mere odor can be a clue to criminal activity. If an odor indicating illegal activity is detected by a man, there is no question that a search or intrusion has not taken place. Assistance by dogs, with their enhanced ability to detect contraband, is reasonable, especially regarding airline luggage given the need to control the significant rise in illegal drug trafficking. (The same rationale might apply to the transportation of explosives in airline luggage). In so ruling, and also noting the presence of other suspicious circumstances, a search by dogs was upheld in [U.S. v. Sullivan](#), 625 F.2d 9 (4th Cir. 1980), *cert. den.*, — U.S. —, 67 L.Ed.2d 325, 101 S.Ct. 1374. And the Fifth Circuit Court of Appeals has gone a step further, holding that the work of a dog, coupled with the law enforcement agents pressing the side of a suitcase to circulate the air inside, was not intrusive enough to amount to a search and seizure. A subsequent finding of illegal narcotics was upheld. [U.S. v. Viera](#), 644 F.2d 509, (5th Cir. 1981), *cert. den.*, — U.S. —, 70 L.Ed.2d 169, 102 S.Ct. 332.

In three (3) instances courts have addressed the affidavit, or testimony presented by a law enforcement officer regarding the reliability of the dog used in detecting illegal narcotics. In [U.S. v. Klein](#), 626 F.2d 22 (7th Cir. 1980), the court noted with approval the contents of a supporting affidavit for a search warrant which described the reliability of the dog used to detect narcotics. The affidavit stated the dog had graduated from a training school, had been taught to detect narcotics, and had proved reliable in the past. Again, however, the court noted that there existed a reasonable suspicion on the part of the law enforcement officers prior to the use of the dog. That suspicion, plus use of the dog, resulted in probable cause for a search warrant, which was upheld. In [U.S. v. Fulero](#), 498 F.2d 748 (D.C. 1974) the reliability of the dog in detecting narcotics in a package was brought out in testimony of a law enforcement officer at court. The testimony was that the dog had a record of success, in over ten (10) instances covering a period of two (2) years. And finally, in [U.S. v. Watson](#), 551 F.Supp. 1123 (D.D.C. 1982) the court concluded that the use of dogs to detect illegal narcotics had been well established sufficiently over a long period of time for the magistrate to conclude that the dog was reliable, based upon the information in the supporting affidavit, and not require a formal recitation of the dog's 'curriculum vitae'. In that case, suspicious circumstances had arisen concerning letters received by the defendant. A dog was brought in, who detected narcotics in the envelopes. The affidavit by the postal inspector to obtain a search warrant contained no description of the dog's qualification or past performance as a reliable detector of narcotics. However, the inspector did assert that the dog was being handled by an officer from the Police Department's Narcotics Branch.

*3 It should also be noted that when a defendant has consented to a search by law enforcement officers, and those officers bring in a dog, the use of the dog cannot be argued to be a separate search, requiring additional consent by the defendant. [U.S. v. Richards](#), 500 F.2d 1025 (9th Cir. 1974), *cert. den.*, 420 U.S. 974, 43 L.Ed.2d 393, 95 S.Ct. 1118.

While the cases cited above deal with the use of dogs in detecting illegal narcotics, it would appear that the courts have adopted a similar rationale when explosives are concerned. For example, where a reasonable suspicion existed that a suspect was concealing stolen explosives, the use of a trained dog to detect explosives at a storage 'mini-warehouse' was upheld as a legitimate law enforcement practice, and as one of several bases for obtaining a search warrant, in [State v. Quatsling](#), 536 P.2d 226 (Arizona App. 1975), *cert. den.*, 424 U.S. 945. In the statement given to obtain the warrant, officers averred that the dog was reliable, based on training, prior searches, and practice runs.

In conclusion, the trend appears to be to require at least a reasonable suspicion on the part of law enforcement officers that illegal activity is taking place, and that illegal substances are at a particular location, for the subsequent use of dogs in detecting the contraband to be upheld, either as a prerequisite to a search or a basis for a search warrant. Documentation of the dog's training, and his experience, in practice runs and actual searches, will be crucial in establishing the dog's reliability, either in obtaining a search warrant or the admission of evidence at trial.

As further information comes to light, I will keep you informed.

Sincerely yours,

James G. Bogle

Assistant Attorney General

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