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ADMISSIBILITY OF EVIDENCE FOUND BY MARIJUANA DETECTION DOGS

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Just as the attention of the public has become increasingly centered on the illicit drug trade so have law enforcement agents intensified their efforts to cope with the traffic. One of the more effective instruments developed to detect hidden drugs and deter drug abuse has been the dog. Dogs¹ have been trained² within the Department of Defense³ to detect marijuana and heroin. It is the purpose of this article to discuss in brief the difficulties such searches raise when the prosecution attempts to have the resulting evidence admitted at trial and to proffer some suggestions for both defense and trial counsel involved in a marijuana⁴ dog case. At the outset it should be noted that there is a paucity of cases involving narcotics detection dogs.⁵

The typical barracks⁶ dog search approximates the following pattern: A commander—frequently at brigade level—will arrange for a detector dog and handler (usually under the control of the PMO) to search a unit. The decision to search may be made alone or in conjunction with a subordinate commander. The dog and handler are then transported unannounced to the unit where the barracks are either emptied of personnel and guards posted, or the unit members are ordered to stand by their bunks and lockers. Somewhat obviously, the former is to be preferred if the purpose of the search is examination of the barracks and lockers. The dog is walked through the barracks guided by the handler—the importance of whose activities cannot be

overemphasized. The dog should smell everything in its path. While the dog *may* detect airborne scent and follow it to its source, more likely the dog will have to smell the immediate proximity of an area to detect marijuana within it. The dog will, when it believes it has located marijuana, “alert” to the substance by whining, pawing the area, trying to play with the substance, and displaying similar actions. At this point, the officer accompanying the dog team will authorize seizure, or in the case of a container such as a wall locker, will authorize entry and search.

Two threshold questions present themselves: is the given search one that is dependent upon probable cause for legitimacy and, if so, who has actually authorized it? These questions are as old as the law of search and seizure but pose certain peculiarities in this context. A search of public property⁷ or open fields⁸ does not require probable cause nor does seizure of contraband found in plain view.⁹ Yet — may a dog be walked through the middle of a barracks? In the broadest sense, the question is that of the reasonable expectation of privacy by the soldier billeted in the barracks. While he may not expect a dog, he is well aware that his quarters are for many purposes public and open to any member of the command as well as to numerous visitors. While the situation may differ slightly where barracks which are divided into rooms rather than bays, the question is one of degree. It is suggested that

where the individual has no expectation of substantial privacy, no cause is necessary to walk the dog through the area, and any contraband found may be seized.¹⁰ The weight of the policy behind the military's drug suppression program must be considered to be a primary factor involved in the determination not to expand the right of privacy in the military in this setting. Such a determination has already been signaled by a military court.¹¹

On the other hand, intrusion into those areas normally considered private necessitates either probable cause or a shakedown inspection theory. Use of a dog would seem to nullify any attempt at explaining a search as a traditional shakedown inspection devoted to a unit's readiness or health and welfare. However, recent case law indicated that a shakedown inspection may be ordered for the express purpose of finding contraband such as illegal weapons and drugs,¹² and that any contraband seized may be used in subsequent criminal prosecution. Accordingly, if every room and locker were shaken down as in a normal shakedown inspection and the dog was used simply to assist in the shakedown, probable cause, depending upon what the dog actually alerts to, might not be necessary to establish the legality of the search and subsequent seizure. Assuming that this theory fails or that the more normal and economical type of dog search (opening only those lockers and perhaps entering only those rooms the dog alerts to from the outside) is used, probable cause will be necessary¹³ to secure admission of seized evidence at trial.

If probable cause is necessary, the question of command authorization is raised. In the typical barracks dog search counsel will note that a distinct question may be raised as to which commander actually authorized the search. If the company commander was ordered to open any locker the dog alerted to, it is probable that the superior commander was the authorizing officer¹⁴ and any foundation to be laid in court to admit the evidence will, as will be discussed below, have to explore *his* knowledge of the dog's background.

The issue will be one of the discretion available to the authorizing officer. In dog searches as in other search cases, the person authorizing a search must have the power to do so. Practical experience suggests that some commanders may erroneously believe they may delegate their powers to anyone in a most informal manner when dogs are involved. While we are unaware of any dog case that involved search warrants, the question of the ability of a military judge to authorize search of an area or a container that a dog alerts to is obvious and of great interest.

The principal question in regard to marijuana dog use is: can a dog alone supply probable cause to search? When this question was first posed, the official response was a conservative (but hedged) no.¹⁵ In light of recent case law the better answer would seem to be that the dogs can indeed supply probable cause. Only three military appellate cases¹⁶ have dealt with the question however briefly and indirectly. *United States v. Unrue* involved a marijuana dog search of a vehicle after it passed a road-block warning of search by narcotics dogs (an opportunity was supplied before search to drop any drugs into an "amnesty barrel").¹⁷ The dog alerted to the car and its five occupants were disembarked and apprehended. Subsequent body searches revealed heroin in the possession of Unrue. The Court of Military Review held that the dog's alert was sufficient to supply probable cause to *apprehend*. The record of trial¹⁸ indicates that the Brigade Commander who was held by the Court to have actually authorized the search (rather than the Brigade S-2 who was actually in charge of the operation and search) had observed the dog in action and was satisfied as to its reliability in the detection of marijuana. While the difference, if any, between probable cause to apprehend and probable cause to search is unclear in this context (when the dog's alert indicates the probable immediate presence of seizable contraband) and not within the scope of this article, it seems unlikely that a standard of proof that justifies such a severe deprivation of liberty (apprehension) as well as subsequent search

based on the apprehension would be held less strict than a standard that justifies only invasion of privacy.

While the Air Force Court of Review in *United States v. Ponder* specifically did not decide the point, it stated (citing Wigmore's discussion of bloodhound evidence)¹⁹ that assuming arguendo a dog could supply probable cause, the dog would have to be shown to have been "well trained and well tested."²⁰ The Court explicitly noted that a foundation of reliability was required to be shown before the court could proceed to consider the actual search. The Court further held that the dog's reliability had to be made known to the Commander authorizing the search prior to the authorization. In *Ponder* the Commander's general knowledge of the dog training program was held insufficient to justify the search. There is no reason to believe that knowledge of the mere fact that a dog has graduated from a military drug detection course will be held sufficient reason to accept a dog's reliability without further inquiry. In concept the closest thing to marijuana dog searches in prior law has been the use of bloodhound evidence. In the usual case the prosecution has sought to use the fact that a given individual was tracked by a dog to show the identity of the alleged perpetrator. The states have split²¹ on the admissibility of such evidence with the majority of the Southern states accepting it. Those states that have rejected bloodhound evidence seem to have done so primarily on the grounds that a dog is inherently unreliable, and/or is in the position of an expert witness who cannot be cross examined. A distrust of such evidence in view of the lack of scientific evidence to explain the sense of smell has also been evidenced.²² Examination of the cases suggests that the primary reason why states have banned use of bloodhound evidence has been the fear that it unduly impresses juries which may rely on it to deprive a defendant of liberty or life. While of course the law of search and seizure's purpose may be said to protect the privacy of an individual against unreasonable invasion, clearly the consequences of the use of blood-

hound evidence differ from those surrounding admission of evidence found by the marijuana detection dog. In the first, a man's liberty may depend solely on the actions of a dog that cannot be examined. In the second, the consequence is simply a breach of privacy that leads to perfectly good evidence. If sufficient precautions can be taken to prevent unreasonable breaches of privacy, a balancing between the right to privacy, particularly as it exists in the military,²³ against the current necessity to prevent drug use (particularly heroin traffic) should yield a holding that evidence found by dogs is admissible. Such a balancing is, in practical terms, inescapable, and at least one military trial court has already indicated such thinking.²⁴ Certainly detection of a drug's odor by law enforcement agents has long been considered sufficient to supply probable cause to search.²⁵ What is involved here is only the expansion of the doctrine to a tool of law enforcement — a tool which experience has shown, when reasonable precautions are taken, to be an unusually effective one.

The question must then be: what are reasonable precautions? Such safeguards must be the laying of a foundation at trial that shows the dog is in fact reliable and that the commander or magistrate authorizing the search was aware prior to authorization of sufficient facts to convince him of the individual dog's reliability. Such a test is akin to that necessary to legitimize a search based on an informer's testimony or a search based on a mechanical detection instrument.²⁶ In view of the bloodhound cases, it seems unlikely that a good faith reliance on erroneously stated evidence of reliability would support a commander's decision to search.

To support the foundation suggested above, the following requirements should be met by commanders or judges before dog searches are authorized:

- (1) the commander or judge should be briefed in detail as to the general content of the marijuana detection dog course with emphasis placed on how the dog actually detects the drug;

(2) the commander or judge should be briefed by the dog handler (who should keep permanent records to supply the information)²⁷ as to the training and performance of the actual dog to be used—both before graduation and during subsequent live searches and practices. The handler should specify reliability in terms of the type of search (i.e. parcel, building, or vehicle);

(3) if another individual is to conduct the search, instructions should be clear and preferably written. Where the intent is simply to send the dogs to a unit to be used as a subordinate may determine, it is essential that the subordinate's discretion be indicated.

Counsel must bear in mind that investigation into the facts and background of a dog search must be thorough. Pitfalls for both prosecution and defense are numerous. The percentage reliability quoted by a dog handler is usually the number of "finds" of planted marijuana divided by the total number of "plants". It does NOT indicate the number of times the dog has falsely alerted in the absence of the drug. Since the dog will alert to the smell of a drug that has been removed from the area (dead scent) the handler may state that *every* alert of his dog is to past or present contraband. For Fourth Amendment purposes the ability of a dog to detect actual scent as compared with false alerts may be vital. The fact that a dog can find only 10% of planted material only indicates that perhaps 90% of contraband holders will escape detection. Since the fourth amendment protects privacy, one should be more concerned over how many innocent people will have their privacy invaded. Thus the percentage of "true" alerts to total alerts is important. This area has not been adequately explored in dog search cases. Similarly, what effect does the routine alert to dead scent have? Courts that have considered the question have not apparently directed their attention to this matter either.²⁸ If one must have probable cause to believe that contraband is at a given place *now*, as current case law requires, what effect does the dog's possible inability to distinguish and/or signal dead scent to its handler have? Counsel should be further cautioned to care-

fully examine the dog's training. A heroin detection dog, for example, may have been trained to detect materials used to cut heroin rather than to detect heroin proper. Every dog is trained to ignore detractors (i.e. noises, smells, etc.), artificial detractors (substances with smells similar to marijuana) and masking agents (substances such as perfume or gasoline which are used to mask the odor of the contraband) but the degree to which the dog has successfully completed such training will vary with the dog. Dogs generally have short attention spans and are greatly affected by certain working conditions. Contact with a dog's handler is essential to determine a dog's strengths and weaknesses. At the same time counsel should inquire into the background of the handler. It is not impossible for a handler unintentionally or otherwise to cue his dog to give an alert.

Cases involving dog searches and indeed cases that involve animals generally may be expected to occur more frequently in the future. They present a fascinating question as to the interaction between pressing social problems and the developing right to privacy.

Footnotes

1. While dogs of many breeds are used, the working breeds—particularly German Shepherds—seem to be preferred.
2. See U.S. DEP'T OF ARMY, FIELD MANUAL FM 20-20 BASIC TRAINING AND CARE OF MILITARY DOGS (1972); CONARC PROGRAM OF INSTRUCTION 830-F6; Army Reg. No. 190-12 (17 April 1970); U.S. ARMY MILITARY POLICE SCHOOL DEP'T OF SPECIALIZED TRAINING, TRAINER'S GUIDE—MARIJUANA DETECTOR DOGS.
3. Army Marijuana Detection Dogs (MDD) are procured by the USAF Base Procurement Office, Lackland AFB, Texas, and trained for thirteen weeks at the U.S. Army Military Police School, Fort Gordon, GA. Handlers are volunteers from the 4th AIT Brigade, (MP), Fort Gordon, GA.
4. Except where otherwise indicated, use of the term marijuana within this article will include heroin. Marijuana Detection Dogs without further training are unable to detect heroin.
5. See *United States v. Ponder*, 45 C.M.R. 428 (AFCMR), *petition denied*, — U.S.C.M.A. —, 45 C.M.R. 928 (1972); *United States v. Unrue*, 72-16 JALS 3 (ACMR 1972); *United States v. Smith*, — C.M.R. — (NCOMR 1972). Research,

- including an Air Force LITE computer search, has failed to indicate other cases, military or civilian on point. We believe, however, that a number of special courts-martial have ruled on dog searches. See e.g. note 27 *infra*.
6. Dogs may be used for virtually any type of search though the categories of building, vehicle, and parcel are often used. Believing that building searches generally present the most problems and subsume within them the problems presented by other types of searches, we have chosen to address ourselves only to building searches.
 7. Cf. *United States v. Weshenfelder*, 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971); Army Reg. No. 190-22, para. 2-2(d) (12 Jun 1970).
 8. See e.g. *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, 1969 (Rev. ed.), para. 152; *Hester v. United States*, 265 U.S. 57 (1924) but see *United States v. Burnside*, 15 U.S.C.M.A. 326, 35 C.M.R. 298 (1965). In *Dilger v. Commonwealth*, 88 Ky. 550, 11 S.W. 651 (1889), two policemen were walking by a building when they heard screams from inside the building. The policemen rushed inside and arrested the defendant, who had been beating his mistress. The Court upheld the arrest on the theory that the offense was committed in the officer's presence. The Court felt that the information gained through the sense of hearing justified the intrusion into the building. In *Burnside*, the Court assumed that the backyard was a protected curtilage but justified the officer's entry into the backyard on the basis of their plain view of stolen property in the back yard. Perhaps the Court would permit an intrusion into a protected area where the dog's alert in an unprotected, open area furnishes probable cause to believe that contraband is located in a protected area such as a footlocker.
 9. See e.g. *United States v. Coleman*, 32 C.M.R. 522 (ABR 1962).
 10. Cf. *United States v. Sumner*, 34 C.M.R. 850 (AFBR 1964); *United States v. Ferrell*, 41 C.M.R. 452, 455 (ACMR 1969).
 11. See Memorandum Opinion of Colonel Reid W. Kennedy, Military Judge, in *United States v. Unrue*, GCM convened by the CG, 197th Infantry Brigade, Fort Benning, Georgia (filed 29 Nov 1971).
 12. See Gilligan, *Inspections*, *THE ARMY LAWYER*, Vol. 2, No. 11 (Nov 1972) at 11, and cases cited within. See generally Hunt, *Inspections*, 54 MIL. L. REV. 225 (1971).
 13. Though unlikely in our opinion, we do not foreclose the possibility of a form of implied consent if members of a unit are given advance warning of the future use of dogs. Of more interest is the possibility of apprehension of an individual after a dog's alert and subsequent search pursuant to lawful apprehension. See *United States v. Unrue*, *supra* note 5.
 14. *United States v. Unrue*, *supra* note 5, at footnote 3.
 15. DAJA-MJ 1971/9121, 13 Oct. 1971.
 16. See note 5 *supra*.
 17. In view of the case's posture, consent to search was not at issue.
 18. Record, pp. 12, 13, *United States v. Unrue*, 12 Nov 1971, as cited in Government Appellate Reply Brief. The Army Court of Military Review, though holding the officer conducting the search not to be a proper delegatee of the Commander's power to search, did not discuss this issue in its opinion.
 19. WIGMORE, *EVIDENCE*, § 177.
 20. *United States v. Ponder*, 45 C.M.R. 428, 434 (AFCMR 1972).
 21. See generally Annot., 18 A.L.R. 3d 1221 (1968).
 22. Query what effect odor detection devices developed for use in Vietnam may have.
 23. See e.g. Ally, *Overseas Commander's Power to Regulate the Private Life*, 37 MIL.L.REV. 57 (1967); Murphy, *The Soldier's Right to a Private Life*, 24 MIL. L. REV. 97 (1964); Webster, *The Citizen-Soldier in the Age of Aquarius: Does He Have a Private Life?*, 27 JAG. J. 1 (1972).
 24. See note 11 *supra*.
 25. See e.g., McNeil, *Recent Trends in Search and Seizure*, 54 MIL. R. REV. 83, 93 and cases cited at note 39 (1971).
 26. A special court-martial tried at Fort Carson, Colorado, some two years ago, involved a marijuana dog search of a barracks divided into semi-private rooms. The dog entered a room and alerted to a wall locker. The Commander, who had accompanied the search team, authorized search of the locker. Marijuana was found. The Military Judge at the subsequent trial denied the defense motion for appropriate relief to suppress the marijuana holding that the dog had in effect been shown to have been a reliable informant giving probable cause to search. The defendant was convicted (material courtesy of the Office of the SJA, Fort Carson). See also note 11 *supra*.
 27. Army Reg. No. 190-12, para. 3-1(d) (17 April 1970).
 28. The facts in *Unrue* did not raise this point directly as the dog's reaction in that case was shown to be different to dead scent from its reaction to "live" scent.