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Marijuana Dog Searches After *United States v. Unrue*

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It appears from field reports that the use of marijuana detector dogs has become more commonplace throughout Army installations. Accordingly, an increasing number of Judge Advocates are encountering the numerous legal and practical difficulties connected with

dog searches. In our first article¹ we discussed the nature of such searches and while we briefly touched on the question of their legal foundation we chose not to address ourselves in depth to the nature of the intrusion itself.² In view of the recent decision of the Court of Military Appeals in *United States v. Unrue*,³ it now appears appropriate to examine the nature of dog searches within the Fourth Amendment context. Consideration of applicable civilian case law is essential to a proper understanding of *Unrue*.

The threshold question within this area is of course the very nature of the dog's intrusion. In the use of a dog *per se* a search within the ambit of the Fourth Amendment, and if so, is it an unreasonable one? In the abstract a strong case can be made that the use of a detector dog is not a "search." The supporting argument would maintain that: firstly, the presence of the dog as it is usually employed (e.g., in barracks; at gates where vehicles normally must pause) is not improper as long as it remains in an area where there is a minimal expectation of privacy (e.g., the "common" areas of a barracks); and secondly, the "operation" of the dog is not a search because its detection of odors is the equivalent of plain view (i.e., plain smell)⁴ which is not considered a search.⁵ Thus a seizure would result without a constitutionally prohibited search. This approach to the problem, while of academic interest, appears to be of little value to the practicing counsel in the field in light of civilian precedents. The closest analogue to the dog search seems to be the magnetometer "search" of airline passengers pursuant to the anti-hijacking program. The basic content of the hijacking prevention program is well known. Airline passengers who match a secret physical and psychological profile are noted.

All passengers will have their carry-on hand baggage searched (physically and/or by X-ray device) and will pass through a metal detecting magnetometer. Persons matching the profile who yield positive magnetometer readings will be searched.⁶

While usually only those persons matching the FAA profile are searched after a positive magnetometer reading, it appears that the profile "match" need not be a necessary prerequisite. Indeed, even the magnetometer search has been held unnecessary by some Circuits.⁷ Most of the airline case holdings have been based on implied consent of the passengers and/or the peculiar border-like nature of the airline search. A number, however, have dealt expressly with the questions of the nature and legality of the magnetometer search.

Without exception, those cases that have dealt with the question⁸ have held that the magnetometer search is indeed a search within the meaning of the Fourth Amendment. The marijuana dog search is sufficiently similar to the magnetometer search that it would be fruitless at this stage to argue another conclusion. What must then be considered is the question of the search's reasonableness.

The principal civilian case on the subject is *United States v. Epperson*.⁹ In *Epperson*, the defendant went through a magnetometer¹⁰ at Washington's National Airport. After the device gave a positive reading, the defendant was searched. The search yielded a pistol. At trial *Epperson* challenged the magnetometer use alleging illegal search. The Fourth Circuit held that the magnetometer *was* a search within the meaning of the Fourth Amendment but also held that it was a *reasonable* one that did not require probable cause. After a discussion of *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *Terry v. Ohio*, 392 U.S. 1 (1968), the Court concluded that unusually pressing circumstances (threat of hijacking), minimal violation of privacy, and insufficient time to obtain a warrant all compelled a holding that the search was a reasonable one. *Epperson* was cited with approval by the Second Circuit in *United States v. Bell*.¹¹ In *Bell*, the Court stated:

(the) contention of appellant that the use of the magnetometer constituted an unreasonable search is baseless. None of the personal indignities of the frisk discussed by Chief Justice Warren in *Terry* . . . are

here present. In view of the magnitude of the crime sought to be prevented, the exigencies of time which clearly precluded the obtaining of a warrant, the use of the magnetometer is in our view a reasonable caution.¹²

Judge Friendly, concurring, went a good deal further, suggesting that a search designed to prevent crime was clearly distinguishable from a search designed to find evidence of past-completed crime. The Third Circuit¹³ has also followed *Epperson*, although attempting to limit its opinion somewhat more specifically to the hijacking context than have other courts. The most recent case to present an in-depth examination of the entire airport search problem is *United States v. Davis*.¹⁴ *Davis*, unlike the previously noted cases, did not involve a magnetometer search, but rather a simple search of the defendant's briefcase which yielded a loaded gun. At trial *Davis* moved to suppress the weapon. In an unusually lengthy and scholarly opinion the Court rejected the Government's contentions that the search could be justified either as a *Terry* type frisk or because *Davis* did not have a reasonable expectation of privacy with respect to his carry-on luggage. The Court specifically pointed out that even if Justice Harlan's concurrence in *Katz* was accepted,¹⁵ that did not mean that "any kind of governmental intrusion is permissible if it has occurred often enough."¹⁶ Having rejected these arguments, the Ninth Circuit used¹⁷ the Supreme Court cases on administrative inspections¹⁸ to supply the proper standards for airport searches. The court then stated:

The essence of these decisions is that searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched.

The Court conceded that such searches would detect contraband and lead to apprehension of law violators but believed that this conse-

quence did not alter the essentially administrative nature of the screening process. The Court strongly warned all concerned that if the airport search were to be subverted into a general search for evidence of any crime it would exclude the proffered evidence. *Davis*, like the other cited precedents, attempts to walk a thin line clearly using a balancing test with the threat of explosion and death sharply tilting the scales.

To date four circuits, and possibly a fifth,¹⁹ have accepted the *Epperson* conclusion. The marijuana dog search is sufficiently similar to the magnetometer search to allow it to partake of the same rationale, if one makes the basic assumption that the Army's drug problem approximates the hijacking threat. While perhaps hard to accept, this proposition has apparently been accepted by the Court of Military Appeals.²⁰ More importantly, the argument can be made that the use of a marijuana detector dog which is primarily used against property²¹ represents a lesser intrusion into an individual's privacy than a magnetometer²² which is used primarily to search the person.²³ The lesser intrusion into privacy may outweigh the smaller probability of immediate harm²⁴ caused by drugs.

Before turning to consideration of the military precedents, it is interesting to examine the only civilian case that, to our knowledge, has considered the use of marijuana detector dogs. *People v. Furman*,²⁵ involved a confidential informant who supplied a U.S. Marshal with a tip that an individual of specific description would attempt to leave the San Diego Airport on a given flight to Portland, Maine, and that he might *possibly* have drugs. The information was transmitted to a state narcotics agent who went to the airport at the appropriate time. After verifying all of the informant's specific information, the agent had a marijuana dog borrowed from Customs walk around in the airline baggage area.²⁶ The dog alerted to a suitcase belonging to the defendant. The defendant was detained and the dog alerted to a second suitcase he was carrying. The suitcases were then opened yielding

a total of 46 kilograms of marijuana. The Court found that the dog's alert, when considered along with the informant's information, was enough to supply probable cause to search. The Court stated:

Adequate foundation was laid establishing the reliability of Link (the dog) as an investigative device. Evidence of Link's high level performance and great degree of accuracy in detecting marijuana odors justified reliance on Link's reactions as corroboration of the informant's tip. Although we are aware of no reported cases involving the use of dogs as marijuana detectors, their use in tracking fugitives has long been admissible in evidence to show an accused was the doer of a criminal act. . . . The officers as reasonably prudent men were justified in the search and seizure.²⁷

Thus even if probable cause were to be required in dog searches (as indeed may be required in situations where regulatory type searches are inapplicable) there is some civilian precedent for the dog's ability to supply probable cause.

With the civilian cases as a proper foundation it is appropriate to turn to the military case law. There is at present only one case on point, *Unrue*. Arguably, however, a proper understanding of *Unrue* requires an understanding of yet another military case, *United States v. Poundstone*.²⁸ *Poundstone* involved a U.S. base camp in Vietnam that was experiencing a serious narcotics abuse problem. The battalion commander concerned ordered a search of all battalion vehicles and accompanying personnel passing through the camp gate.²⁹ Thus the commander intended to stop the importation of drugs into his area. *Poundstone* was searched after the truck he was riding in was stopped. Having been found to have heroin in his pockets, he challenged the search in court. The decision of the Court of Military Appeals consisted of three individual opinions. Judge Quinn's lead opinion contained the following language illustrative of the entire opinion:

Whether denominated a search or an "administrative investigation," other types

of examination of the person or his property, although not based upon probable cause, are not violative of the protection against unreasonable search. . . . When such action is "crucial part of the regulatory scheme" of a Government program and presents only a limited threat to the individual's "justifiable expectations of privacy," the Government may lawfully enter private property without probable cause. . . . In every case of detention of person or property the standard of measurement of the Government's action is the rule of reason.³⁰

Judge Darden limited his concurrence to gate searches, stating, however, that "(t)his Court has long recognized 'the commanding officer's traditional authority to conduct a search in order to safeguard the security of his command.'" ³¹ Judge Duncan, in dissent, suggested that the Court's opinion would not allow servicemen a reasonable expectation of privacy from inspection anywhere on an installation and that proof of military exigency would not need to be shown according to the majority's opinion.³² The extent of the *Poundstone* holding is difficult to determine. The case is too easily distinguishable from any other set of facts,³³ and by traditional analysis much of the opinion can be branded "dictum." Yet it clearly revealed that two of the Court's judges preferred to expand the traditional limits on inspections when dealing with narcotics. With *Unrue* the Court's direction becomes clearer.

Unrue arose at Fort Benning. Because of what was considered to be a serious drug problem, the 197th Infantry Brigade set up two mobile checkpoints within its area. At the first point, drivers' licenses were checked and the attention of vehicle occupants directed to a sign reading, "Attention, narcotics check, with narcotics dogs. Drop all drugs here and no questions asked. Last Chance." An "amnesty" barrel was located under the sign. The car in which *Unrue* was riding was stopped at both points. At the second, a marijuana detector dog was walked around the car. The dog alerted and the passengers were apprehended, disembarked and searched. Heroin was found in *Unrue*'s wallet (vegetable mat-

ter, presumably marijuana, was found underneath one of the car seats). The dog's alert, according to lower Court opinions, was the basis for finding probable cause to *apprehend*, with the search of the person being based on search incident to lawful apprehension. *Unrue* is not a clear opinion. Judge Quinn, joined by Judge Darden, first holds that a gate search theory will not justify the search stating that, even if a gate search is justified without probable cause, the road block did not constitute a proper gate search. After finding that Unrue did not consent to the search, Judge Quinn holds that a commander may, in cases of "military necessity" (defined by the Judge as whatever in light of all the circumstances is reasonable) be required "to maintain regulatory systems which necessitate inspection of persons and private effects without consent." The types of military necessity, says Judge Quinn, are searches to protect the security of a command (he does not define "security") and inspections to effectuate a proper military regulatory program. In his view, the drug problem at Fort Benning was³⁴ so serious as to constitute a serious threat to morale, capability, and health. Judge Quinn cites the anti-hijacking program for the proposition that the number of instances of prohibited conduct does not alone determine the degree of danger and need and means to oppose it. In its later paragraphs, the opinion suggests implied consent to the dog search because of the posted notice. The Court discusses the use of technical devices to augment human senses assuming for purposes of the opinion that *Katz* prevents "Orwellian" surveillance using sophisticated technological devices. At the same time, however, the Court seems to imply that the detector dog is a proper augmentation or extension of human senses.³⁵ Abandoning the discussion, Judge Quinn simply points out (after having said that the use of the dog "to detect odors . . . that a human inspector could not detect through his own sense of smell was not unreasonable") that, in his opinion, by the time Unrue's car reached the second checkpoint, "any justifiable expectation of privacy as to odors emanating from it was just 'not of

impressive dimensions.'" Judge Quinn concludes, somewhat surprisingly, by citing our earlier article as authority that the dog, having been proved capable, was sufficient to supply probable cause to *search*. The conclusion is surprising in that the facts only show that the dog supplied probable cause to *apprehend*. The difference between cause to apprehend and cause to search may be of little practical importance, but constitutes slippage in an unsettled area of the law. The earlier part of Judge Quinn's opinion would justify a regulatory search without dogs. Why then is there the special effort to hold that the dogs may supply probable cause? One possible explanation exists. The Court may have adopted the same reasoning used in the airline search cases discussed previously, making the decision that the drug problem approximated the hijacking threat. Having accepted a balancing test that weighs personal privacy against the Government's interests in having combat ready troops, the Court may be saying that, in order to minimize the intrusion into personal privacy of the soldier, a dog that is sufficiently reliable to supply probable cause must be used. Thus the Court would be sharply limiting a rationale that would otherwise appear to allow virtually unlimited drug "shake-downs" in barracks and vehicles. If this is indeed the true holding of *Unrue*, the defense counsel in a dog case must either contest the existence of "military necessity," or must attack the dog's reliability or other facts of the case.³⁶ Query: Is the drug problem to be judged by conditions Army-wide, installation-wide, or unit-wide? What is the proper community?

What then of the barracks search for marijuana, or indeed for any contraband? As indicated previously there is authority in *Poundstone* and *Unrue* for regulatory searches designed to cope with problems that threaten the unit's security or mission. Limiting *Unrue* somewhat to its facts, the barracks search for drugs using a sufficiently reliable dog appears perfectly proper regardless of the barracks configuration. At some point, however, we expect that the individual's expectation of pri-

vacy will become paramount, and probable cause will become necessary. For example, if a commander suspects a specific individual of drug abuse, there is no authority that we are aware of which would allow a search of the individual or his belongings without probable cause (unless as in *Furman* the dog is properly in the area, in which case the "plain smell" problem must be faced). While the search of lockers seems justified, there is no way of predicting just how far such preventive inspections may lawfully go unless *Poundstone* is accepted without reference to its combat setting. *Unrue* will allow stops and vehicle searches by marijuana dogs on an installation plagued by drug abuse, but what of vehicles containing civilians? Should the status of an individual matter? Are BEQ's or BOQ's qualitatively different from barracks? If not, what of family quarters on post? Similarly, questions as to the necessity for commander's authorization to search (or judge's warrant) arise. Inspections, depending upon regulation, do not require probable cause or necessarily specific authorization from a unit commander.³⁷ Can a platoon sergeant expand the traditionally informal "health and welfare" inspection to include use of a marijuana dog without his commander's express authorization? The answers are far from clear and hopefully will not arise if commanders are properly counseled by local judge advocates.

Poundstone and *Unrue* arguably represent something new in military criminal law. While they present problems far beyond the scope of this article, they do suggest that evidence detected by dogs is here to stay. It will be for later cases, military and civilian (including the predictable federal habeas corpus petitions) to answer the questions raised within. A trend in the law, military and civilian, appears to be taking shape. As the age of the draft-free (perhaps publicity-free) modern volunteer Army dawns, judge advocates have no choice but to ponder the possible interpretations of "reasonableness" and "military necessity." Where indeed will "reasonable" means³⁸ to search stop and 1984 begin?³⁹

Footnotes

1. Lederer and Lederer, *Admissibility of Evidence Found by Marijuana Detection Dogs*, THE ARMY LAWYER, DA Pam 27-50-4 (April 1973), 12, hereinafter cited as Lederer & Lederer.
2. See Kingman, *Marijuana Detection Dogs as an Instrument of Search: The Real Question*, THE ARMY LAWYER, DA Pam 27-50-5 (May 1973), 10.
3. — U.S.C.M.A. —, 47 C.M.R. —, 14 Cr.L. 2028 (No. 26,552, 21 Sep. 1973) hereinafter cited as *Unrue*. This case is digested at 73-12 JALS 1 (DA Pam 27-73-12).
4. The plain smell doctrine depends on the fact that what is detected is actually particles floating in the air from the original substance. While numerous cases have accepted smell as probable cause to search, Mr. Justice Traynor in *People v. Marshall*, 69 Cal. Rptr. 585, 442 P.2d 665 (Cal. 1968) specifically held that plain smell is not the same as plain view because "(e)ven a most acute sense of smell might mislead officers into fruitless invasions of privacy where no contraband can be found." It appears, however, that this aspect of *Marshall* has been overruled. *Guildi v. Superior Court*, 14 Cr. L. 2001 (Calif. 5 September 1973).
5. See e.g., *Ker v. California*, 374 U.S. 23 (1963); *United States v. Wright*, 449 F.2d 1355 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 947 (1972).
6. See e.g., *United States v. Doran*, 482 F.2d 893 (9th Cir. 1973).
7. *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) hereinafter cited as *Davis*; *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).
8. See, *United States v. Epperson*, 454 F.2d 769 (4th Cir.), *cert. den.*, 405 U.S. 947 (1972) hereinafter *Epperson*; *United States v. Fern*, 14 Cr. L. 2042 7th Cir. 20 Sep. 1973); *United States v. Bell*, 464 F.2d 1180 (3rd Cir. 1972); *United States v. Lopez*, 328 F. Supp. 19077 (E.D.N.Y. 1971); *United States v. Mitchell*, 352 F. Supp. 38 (E.D.N.Y. 1972). *Cf.* *United States v. Miles*, 470 F.2d 1217 (9th Cir. 1973).
9. See note 8 *supra*.
10. Magnetometers detect the presence of metal. They may be of the passive variety in which case they detect changes in the earth's magnetic field caused by the presence of metal; or the active variety which, like x-ray machines, emit waves. Most of the cases cited in note 8 *supra* appear to have used passive magnetometers.
11. See note 8 *supra*.
12. 464 F.2d 667, 673.
13. *United States v. Slocum*, 464 F.2d 1180 (3rd Cir. 1972).
14. See note 7 *supra*.
15. Justice Harlan in *Katz* (389 U.S. 347, 361 (1967)) posited a two stage test: did the person concerned have an actual (subjective) expecta-

- tion of privacy and if so was that expectation one that society is prepared to recognize as reasonable? Davis at 905.
16. Davis at 905.
 17. *Id.* at 908.
 18. *Id.* at note 40 citing *United States v. Biswell*, 406 U.S. 311 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *Camera v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967), and a number of circuit court opinions.
 19. *See United States v. Cyzewski*, 13 Cr.L. 2553 (5th Cir. 29 Aug 1973) involving retrieval and search of suitcases from an aircraft and containing the following language: "(w)e sustain the search because at no point in the authorized security procedure did defendants' innocence become clear to the Marshals."
 20. *See* text at note 24 *infra*.
 21. "Narcotics/contraband detector dogs will not be utilized to search the person of individuals." Para. 3-3(f), AR 190-12, MILITARY POLICE WORKING DOGS (19 Jan. 1973).
 22. Unlike the magnetometer which will detect only masses of metal, legal and illegal in character, a properly trained drug detector dog is specific only for illegal drugs. Thus, in theory the only privacy breached is that of the lawbreaking contraband holder.
 23. It is interesting to note that the Courts have long required search warrants but have seldom required arrest warrants. Is the obvious conclusion correct?
 24. The harm involved within this context is primarily the deleterious effects of drug abuse on combat preparedness and its secondary results. The number of hijacking attempts is astronomically less than the number of drug users. Should this matter?
 25. 30 Cal. App. 3rd 454, 106 Cal. Rptr. 366 (1973).
 26. The Court did not discuss this facet of the case but apparently considered the presence of the dog in the room proper and the use of the dog as not constituting a search. Query: how did the Court escape *People v. Marshall*? *See* note 4 *supra*.
 27. *Furman*, 106 Cal. Rptr. 366, 367.
 28. 22 U.S.C.M.A. 277, 46 C.M.R. 277 (1973), hereinafter cited *Poundstone*.
 29. A warning sign was posted at the gate.
 30. *Poundstone*, 46 C.M.R. 277, 280, quoted without internal citation.
 31. *Id.* at 282. Citing, *United States v. Brown*, 10 U.S.C.M.A. 482, 489, 28 C.M.R. 48, 55 (1959).
 32. *Id.* at 286.
 33. Clearly, *Poundstone* was a combat oriented situation and can be distinguished on that basis alone. However, while such circumstances can be urged as justification for virtually anything, Judge Duncan in dissent pointed out the lack of adequate foundation to justify the Court's conclusion. What is apparent is that the Court has indeed relaxed the requirements for cause to search in combat areas contrary to the suggestion that this would be improper. *See Kingman* article *supra* note 2 at footnote 16.
 34. Judge Quinn indicates that there were about 30 cases a quarter involving drug use and that 100% of "solved" theft cases featured offenders involved with drugs (query: how many cases were "solved?"). Judge Quinn states: "(w)hether a condition is so epidemic as to necessitate Government action to counter the risk of harm that can result from continued lack of control does not, in our judgment, depend upon the number of occasions the condition evidences itself." Unrue at 6. Judge Duncan in dissent points out that no evidence was introduced to show if any of those cases, military and civilian, impacted upon the command's security or ability to perform its mission.
 35. We assume that there is indeed some point where technology cannot be considered an extension of human senses. *Compare, Marshall, supra* at note 4 with *State v. Gallant*, 13 Cr.L. 2507 (Sup. Jd. Ct. Maine, 31 Jul. 1973), sustaining a radiographic examination of a letter that ultimately proved to contain heroin. The location of that point is impossible to determine at present. The Court in Unrue cites *United States v. Wright*, 449 F.2d 1355 (D.C. Cir. 1971), *cert. den.*, 405 U.S. 947 (1972) for the proposition that use of a flashlight by a police officer to illuminate dark places on public streets is perfectly proper. Actually, *Wright* sustained an officer's use of a flashlight to peer into the privacy of an individual's garage raising the question in a more relevant fashion. (However, see the extremely well-written dissent.)
 36. *See Lederer & Lederer*.
 37. Para. 152 MCM (1969) Rev.
 38. Truly reasonable means does include, in our opinion, the use of reliable drug detector dogs if that use is properly limited in scope.
 39. *Cf.* note 19 *supra*.