



Written by [Jack Kenny](#) on October 31, 2012

Has the Fourth Amendment Gone to the Dogs?

How far may police officers with drug-detecting canines go in sniffing around the outside of a home before obtaining a search warrant? How reliable is a dog's nose in determining probable cause to search a vehicle for contraband? Those are questions that were headed for the [U.S. Supreme Court](#) on Wednesday, as the justices prepared to hear two appeals from the state of Florida over decisions by that state's Supreme Court to suppress evidence of drug crimes on Fourth Amendment grounds.



In the first case, [Florida v. Jardines](#), police, acting on a tip from a citizen "crime-stopper," brought a drug-sniffing Labrador retriever to the door of a resident in the Miami area believed to be growing marijuana inside the house. The dog sniffed at the base of the door, then sat down, a signal that he had detected the odor of the contraband drug. Police then obtained a search warrant and found marijuana plants inside. Joelis Jardines was arrested and charged with possessing more than 25 pounds of marijuana and with stealing the electricity to grow it.

In ruling the search unconstitutional, the Florida Supreme Court held that the pre-warrant sniffing at the door was an "unreasonable government intrusion into the sanctity of the home." The court cited a 2001 ruling by the U.S. Supreme Court that banned the warrantless use of heat-sensing thermal imagers outside the home to detect the probable growing of marijuana inside. Writing for the court in that 5-4 decision, Justice Antonin Scalia said that when the government uses a device "not in general public use" in the surveillance of a home, "the surveillance is a 'search' and is presumptively unreasonable without a warrant."

It surely may be argued that the sensitive nose of a dog trained in drug detection is a device "not in general public use." And it may be a stretch for the state to maintain that bringing a dog to the door of a home to sniff for the scent of an illegal drug is not a search.

Wednesday's other dog sniffing case, [Florida v. Harris](#), is a bit more complicated, involving the search of a vehicle rather than a home. Clayton Harris was stopped by a police officer near Bristol, Florida, because of an expired tag on his pickup truck. Police spotted an open beer can in a cup holder and observed that Harris was acting nervous, shaking, and breathing heavily. When Harris refused permission to search the vehicle, the officer led a drug-detecting German shepherd around the truck. The dog became excited when approaching the door handle on the driver's side and sat down as a signal to the officer. Police then searched the truck and found 200 pseudoephedrine pills and 8,000 matches, ingredients for the making of methamphetamine, a banned substance.

Harris pleaded nolo contendere, maintaining his right to appeal. The Florida Supreme Court voided the search and the evidence obtained, finding that the state had not demonstrated the dog's reliability as a drug detector by showing evidence of his training, certification, and performance, or of his handler's experience.

In an amicus brief filed in support of Harris, 34 law professors argued against what they called "an



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over-generalized assertion — all trained or certified drug-detection dogs are reliable in the field.”

The issue of drug-sniffing canine’s reliability goes to the heart of the question of whether the dog’s indication of the presence of contraband provides probable cause for a search. In a 2005 case, [Illinois v. Roy I. Caballes](#), the U.S. Supreme Court upheld the search of a vehicle after a motorist had been stopped for speeding. Probable cause for the search was based solely on a dog’s indication of contraband in the trunk. Writing for the court’s 6-2 majority, Justice John Paul Stevens argued the difference between that case and the earlier decision regarding the use of the thermal imager was that the imaging device could also reveal lawful activities within the home that are subject to an expectation of privacy. The sniffing dog’s signals to the police would reveal only the presence of illegal substances, Stevens said.

“A dog sniff during a concededly legal traffic stop that reveals no information other than the location of a substance that no individual has a right to possess does not violate the Fourth Amendment,” he wrote.

Justice David Souter argued in his dissenting opinion that the reliability of the drug-sniffing dogs was not sufficient to establish probable cause for a search. A study submitted by Illinois to establish the reliability of the dog sniffs, he wrote, showed in fact that in artificial testing situations, the dogs erroneously indicated the presence of illegal drugs from 12.5 to 60 percent of the time, depending on the length of the search. “The infallible dog,” Souter wrote, “is a legal fiction.”

Both the retired Souter and the deceased Stevens are no longer present on the court to carry on that debate. But other evidence of uncertainty over the accuracy of canine detection has been discovered since that 2005 decision. Writing in Reason.com last year, Jacob Sullum cited a *Chicago Tribune* study of records of traffic stops in the Chicago suburbs between 2007 and 2009. Police discovered drugs or drug paraphernalia in only 44 percent of the cases in which dogs had alerted them to the presence of contraband. The reasons for the errors may be as varied as poor training, unconscious signals given by the handler, or scents lingering from drugs carried by a previous owner or passenger of the vehicle, Sullum wrote.

The Fourth Amendment’s guarantee of the “right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures” appears to be broad enough to cover a person in his or her automobile, “movable possessions” being one of the definitions of “effects.” The requirement of probable cause for the issuance of a search warrant and the requirement that the warrant describe the “place to be searched, and the persons or things to be seized,” are based on the experience in colonial America of officers of the king, bearing “writs of assistance,” subjecting the colonists to random searches for whatever incriminating evidence might be found, whether or not there had been any reasonable grounds for suspicion. That the requirements of the amendment could be negated by the sniff of a dog is something not likely anticipated by the authors of the Bill of Rights.

Yet at least 23 states, [Reuters reported](#), have joined Florida’s appeal to uphold the state’s searches of both Jardines’ home and Harris’ pickup truck, calling the drug-detecting dogs “essential weapons” in the fight against the production and sale of illegal drugs. Such a heavy reliance on such uncertain “weapons,” however, could pose dangers to both life and liberty.

“If courts are putting their faith in ‘certified dogs’ that are wrong most of the time,” [wrote](#) Sullum, “the upshot could be a lot of legally unjustified home invasions.”



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