LEGAL UPDATE

City of Madison

Winter 2005 Lieutenant Victor Wahl

K9 Sniffs of Vehicles

Ill*inois v. Caballes*, No. 03-923 (2005); Decided January 24, 2005, by the United States Supreme Court.

In *Caballes*, an Illinois State Trooper stopped a vehicle for speeding. The trooper believed that the driver—Caballes—was involved in drug activity (although he did not have reasonable suspicion or probable cause to believe so; the only justification for the traffic stop was the speeding violation). As the trooper was completing a warning ticket, another trooper arrived at the scene with his drug-detection K9. The second trooper walked his dog around the exterior of Caballes' vehicle, and the dog alerted at the trunk. The troopers searched the trunk as a result of the dog's alert, and discovered marijuana. Caballes was convicted of a drug offense and sentenced to 12 years in prison.

Caballes appealed his conviction, claiming that the trooper's use of a K9 to sniff the exterior of his vehicle was a violation of the Fourth Amendment. Caballes claimed that it was improper for the trooper—pursuant to a simple traffic stop and without any reasonable suspicion of criminal activity—to run the K9 around the exterior of his vehicle. The Illinois Supreme Court agreed with Caballes, and reversed his conviction. The Illinois court ruled that using the dog—without any reasonable suspicion of drug activity—impermissibly enlarged the scope of the traffic stop into a drug investigation.

The State of Illinois appealed the case to the U.S. Supreme Court, who reversed the Illinois decision. By a 6-2 majority, the Court concluded that the troopers had acted properly, and Caballes' conviction was reinstated.

The court first addressed whether the dog sniff infringed upon Caballes' privacy interests. The court has previously ruled that, in general, a dog sniff is not considered a search under the 4th Amendment. The *Caballes* court repeated this position, stating:

> [T]he use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,"—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectation does not rise to the level of a constitutionally cognizable infringement.

So, the general principle that a dog sniff made from a public place will generally not be considered a search remains true. The other relevant issue, however, is the duration of the stop.

Recall that the duration of a traffic stop (or *Terry* stop) is limited; the stop cannot be prolonged beyond the time necessary to carry out the purpose of the stop. In *Caballes*, the court concluded that "the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop."

If the dog sniff had prolonged the duration of Caballes' traffic stop beyond that time justified by the traffic stop itself (the time necessary to check the driver's DL status, vehicle registration, complete a citation, etc.), then the sniff would have been impermissible. Wisconsin courts have ruled that even a very minor extension (five minutes) of a traffic stop duration to perform a dog sniff is impermissible. Of course, these are cases where the officer only has reasonable suspicion for the traffic offense. If an officer has reasonable suspicion of drug or other criminal activity, then the permissible duration of a stop will likely be longer. Notably, courts have given officers considerable leeway in waiting for a K9 to do a sniff on traffic stops where reasonable suspicion of drug activity is present.

Because the dog sniff of Caballes' vehicle did not infringe upon a legitimate privacy interest, and because the dog sniff did not prolong his detention (which was justified only by the traffic violation), his arrest and conviction were proper.

Note that MPD K9 handlers will not routinely perform dog sniffs of stopped vehicles unless some reason for the sniff is present. It is not required that reasonable suspicion of drug activity be present, just an articulable reason for performing the sniff. This is analogous to MPD's policy on consent searches (officers are not to request consent to search on traffic stops unless some reason for the request/search is present).

Terry Stops—Seizures

***State v. Young*, No. 02-1213 (2004); Decided November 17, 2004 by the Wisconsin Court of Appeals.**

[Thanks to Officer Matt Tye for submitting this summary]

In *Young,* a Kenosha police officer observed a parked vehicle in the City's bar district with five people in it. The officer drove around the area and returned 5 to 10 minutes later, observing the same vehicle. The officer activated his emergency lights and parked behind the suspect car. The officer then saw a subject (Young) exit the backseat of the vehicle and begin to walk away. The officer ordered Young to get back into the car , but Young looked at the officer and then began to run toward a nearby house. The officer pursued Young catching him on the porch of the house. A

struggle ensued during which Young threw his coat off toward the door of the house. Young was eventually controlled and handcuffed by the officer. The officer then retrieved the coat discovering marijuana in the coat.

Young was charged with possession of THC, resisting an officer and obstructing an officer. Young sought to suppress all the evidence resulting from the officer's pursuit of him, arguing that the officer did not have the requisite reasonable suspicion to detain the vehicle and its occupants under *Terry*. The trial court denied Young's motion, ruling that the officer did have reasonable suspicion to detain the vehicle.

Young appealed, using the same reasoning he argued to the trial court. For the purpose of their decision, the Court of Appeals assumed that the officer *did not* have the requisite reasonable suspicion for the stop under *Terry*. However, the Court of Appeals held that Young was not seized under the Fourth Amendment because he did not submit to the officer's show of police authority, and that therefore the evidence was not the fruit of an illegal seizure (so it was admissible).

The appellate court relied on a U.S. Supreme Court decision, *California v. Hodari D.*, 499 U.S. 621 (1991), in reaching its conclusion. In *Hodari D.*, officers saw four or five youths around a parked car in a high crime area. Upon seeing the officers the youths ran away and the car left at a high rate of speed. The officers caught Hodari, one of the youths, after a foot pursuit. Just prior to being caught by officers, Hodari threw a rock of crack cocaine. Prosecutors conceded that the police did not have reasonable suspicion under *Terry* to justify stopping Hodari. The issue before the U.S. Supreme Court was whether Hodari had been seized for Fourth Amendment purposes at the time he dropped the drugs.

The U.S. Supreme Court held that "An arrest requires *either* physical force...*or*, where that is absent, *submission* to the assertion of authority." *Hodari D.*, 499 U.S. at 626. Hodari had thrown the cocaine before he was apprehended and had not submitted to police authority prior to throwing the cocaine; therefore, the cocaine was not the fruit of a seizure.

The *Young* court concluded that the police did not apply any physical force against Young prior to the actual capture. And, like Hodari D., Young did not submit to police authority. The Court of Appeals concluded that the core holding of *Hodari D.*, governs *Young*; namely, "unless the suspect has yielded to the show of police authority, thereby producing a seizure under the Fourth Amendment, the suspect will not be heard to argue for suppression of evidence as a remedy for an illegal *Terry* detention."

There is potential for further development on this case; a petition for review has been filed with the Wisconsin Supreme Court. In addition, while the appellate court did find for the State, they expressed concern over the U.S. Supreme Court's reasoning in *Hodari D.* and asked the Wisconsin Supreme Court to re-visit the subject.

Arrests

***Devenpeck v. Alford*, No. 03-710 (2005) Decided December 13, 2004, by the United States Supreme Court.**

In *Devenpeck*, a subject (Alford) stopped to assist a stranded motorist. Alford's vehicle was equipped with "wig-wag" headlights that he activated as he pulled to the side of the road. When a Washington State Patrol officer drove by in the opposite direction, he turned around to assist as well. By the time the officer pulled up, Alford had driven away. The motorists told the officer that Alford had given them the impression that he was an officer (which he was not), so the officer pursued Alford's vehicle and stopped it. Alford had a police scanner and handcuffs sitting next to him in the car, and claimed that his flashing headlights were caused by a car alarm. During the course of the contact, the officer observed a tape recorder on Alford's passenger seat that was recording the encounter. The officer stopped the tape and placed Alford was under arrest for a violation of Washington's privacy act. After some discussions with a supervisor and a county prosecutor, Alford was booked under that charge.

At the time of the incident, a Washington State Court of Appeals decision clearly established that Alford's recording his conversation with the officer was not a crime. The charge was dismissed, and Alford sued the officers involved. The officers conceded that they did not have grounds to arrest Alford for a violation of Washington's privacy act. However, the officers argued that they did have probable cause to arrest Alford for two other offenses: impersonating a law-enforcement officer and obstructing a law-enforcement officer. The 9th Circuit Court of Appeals rejected this argument, ruling that those offenses were not "closely related" to the charge Alford was arrested for, and that therefore Alford's arrest was unconstitutional.

The officers appealed the case, and the U. S. Supreme Court unanimously reversed the decision of the 9th Circuit. The Court pointed out that

> [A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause…that is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.

An officer's subjective motivation in making an arrest, or an officer's articulated grounds for an arrest, are not relevant to whether the arrest was supported by probable cause. The standard is whether – from an objective standard – the officer possessed sufficient probable cause for the arrest.

The *Devenpeck* decision comports with the Court's prior precedent addressing Fourth Amendment analysis; the relevant inquiry is an objective one. So, if an officer articulates a reason for an arrest that later turns out to be invalid, the arrest will still be lawful if, analyzed objectively, probable cause to arrest – for some offense – existed.