

NEW YORK COURT OF APPEALS ROUNDUP

USE OF POLICE DOGS CONSTITUTES SEARCH IMPLICATING FOURTH AMENDMENT PROTECTIONS

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In *People v. Butler*, the Court of Appeals recently decided an issue of first impression concerning the use of police dogs to detect the presence of illegal drugs on a suspect's body. In a unanimous opinion written by Judge Anthony Cannataro, the court ruled that the use of a narcotics-detecting dog to sniff a suspect's body for evidence of a crime constitutes a search for purposes of the Fourth Amendment.

In March 2017, two police officers observed what they believed to be a drug transaction taking place in the defendant's vehicle in a parking lot known for drug activity. The police officers followed the defendant's car when he pulled out of the parking lot and, after seeing him execute an evasive U-turn and drive through a stop sign, the police officers stopped defendant's car. The defendant admitted that he did not have a driver's license and provided what the police believed to be an inconsistent explanation as to where he had come from and where he was going. When the defendant stepped out of his vehicle, he appeared nervous and the police officers noted a bulge in his pocket and asked him how much cash he had. Defendant responded that he had \$1,000 and, when the police officers asked if he consented to a search of his vehicle, he refused.

One of the police officers then retrieved a Belgian Malinois named Apache from one of the police vehicles to conduct a sniff search of the vehicle. As the dog approached the defendant's vehicle and was six to eight feet from the defendant, the dog started to pull toward the defendant—which indicated that the dog is “in odor” and had caught a scent of narcotics. The police then redirected the dog to the defendant's vehicle and the dog jumped into the driver's seat and again indicated that it had caught a scent of narcotics.

The police extended the leash and allowed the dog to walk around the defendant, and the dog put its nose in the defendant's “groin/buttock region” and then sat, which indicated to the police officers that it had located actual narcotics rather than just a scent. When one of the officers said “[t]he dog has got something,” the defendant ran. As the police chased the defendant, they noticed him reach into his pants as he was running and, after the officers caught the defendant and conducted a search of the surrounding area, they recovered a plastic bag containing 76 glassine envelopes of heroin. The defendant admitted that the heroin belonged to him, and was charged with criminal possession of a controlled substance in the third degree, tampering with physical evidence, and obstructing governmental administration in the second degree.

The defendant moved to suppress the evidence of the seized heroin as the product of an illegal search of the defendant's person and of his vehicle. The trial court denied the motion, finding that the police officers had a founded suspicion of criminal activity that justified the sniff search of the vehicle and that the sniff of the defendant's person was not a search because there is no expectation of privacy in the air surrounding a person. 196 A.D.3d 28, 29 (3rd Dep't 2021). The court also found that the defendant had voluntarily discarded the drugs during his flight from the officers and accordingly abandoned any right to challenge their seizure.

The defendant plead guilty to the possession and tampering charges and was sentenced to a prison term of four years with two years of post-release supervision.

The defendant appealed his conviction and the Appellate Division, Third Department affirmed in a divided opinion. The majority found that the dog's sniff of the defendant's person did constitute a search implicating the Fourth Amendment and that this type of search requires only a reasonable suspicion of criminal activity since it represents a minimal intrusion compared to a full blown search of a person.

The majority concluded that the search was not unreasonable under this standard and also found that by discarding the heroin as he was being pursued by the police, the defendant abandoned any right to challenge the seizure of that evidence. Accordingly, the majority found that the suppression motion had been properly denied.

One justice concurred in the result and agreed with the majority that the dog sniff constituted a search but argued that the Third Department lacked jurisdiction under CPL 470.15(1) to determine whether the search was justified or determine the proper legal standard for that inquiry because those issues had not been decided adversely against the defendant below. The justice would have affirmed, though, based on the defendant's abandonment of the drugs.

Another justice dissented—agreeing with the majority that the sniff represented a search but finding that it required probable cause and finding that there was no probable cause here—and granted leave to appeal to the Court of Appeals.

The court noted that this was an issue of first impression in New York and with respect to the U.S. Supreme Court, but found that a series of Supreme Court decisions addressing challenges to the use of narcotics-detecting dogs by law enforcement in a variety of other contexts provided guidance as to the correct result here. The court analyzed a number of those Supreme Court decisions including:

United States v. Place, 462 US 696 (1983), in which the court held that a dog's sniff of the outside of an airline passenger's suitcase for the presence of illegal drugs did not constitute a search under the Fourth Amendment given the limited intrusiveness and given the fact that it only discloses the presence or absence of contraband;

Illinois v. Caballes, 543 US 405 (2005), in which the court found that the use of a dog to sniff the exterior of a vehicle during a lawful traffic stop does not constitute a search because it generally does not implicate legitimate privacy interests; and

Florida v. Jardines, 569 US 1 (2013), in which the court found that a dog's sniff of a homeowner's porch to determine if drugs were present inside the residence *did* represent a search within the meaning of the Fourth Amendment because the police were physically intruding upon an area that is protected as part of the house itself.

The Court of Appeals applied these precedents and ruled that, even accepting the trial court's conclusion that the dog did not come into actual physical contact with the defendant, the use of a dog to sniff a suspect's body to detect the presence of narcotics constitutes a search. The court noted that people have a significant interest in the security and integrity of their bodies that is protected from unreasonable government intrusion by the Fourth Amendment even in the absence of direct physical contact. It noted that, unlike inanimate objects like closed suitcases or automobiles, sniffing a person's body is much more intrusive and, if the court were to hold otherwise, it would effectively be sanctioning law enforcement to roam the street with police dogs arbitrarily sniffing individuals for evidence of crimes.

Accordingly, the court concluded that a police dog's sniff of a person's body for the purpose of detecting the presence of narcotics constitutes a search implicating that person's Fourth Amendment rights.

It did not, however, rule on the appropriate standard governing the reasonableness of such a search. The court agreed with the concurring Third Department Justice that the Appellate Division lacked jurisdiction under CPL 470.15(1) to consider that issue because it had not been decided adversely against the defendant by the trial court.

The court, though, did not agree with that justice that the defendant's disposal of the drugs as he fled abandoned his right to challenge its seizure. Accordingly, the court reversed the Third Department's order and remitted the case back to the trial court for further proceedings.

So, it is now clear that the use of drug-sniffing dogs to detect the presence of narcotics on a suspect's person constitutes a search in New York that implicates Fourth Amendment protections, but the standard to be applied in determining the reasonableness of those searches will have to await further decisions.

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