

## **Supreme Court Supports Use of Canines** **as Sufficient Probable Cause**

*Florida v. Harris*

On February 19, 2013, the United States Supreme Court came down with its second decision issued on the same day involving the procedures and practices of law enforcement. This decision, however, is definitely one for the law enforcement “win column.” In fact, law enforcement drug detection dog handlers might want to consider throwing the United States Supreme Court a treat for this one. In *Florida v. Harris*,<sup>1</sup> the United States Supreme Court held that courts must apply a flexible, practical, and “common-sensical” standard of probable cause, considering the totality of the circumstances, to determine the reliability of a drug detection dog.

In *Harris*, the Supreme Court considered the standard courts should utilize when determining whether the “alert” of a drug detection dog during a traffic stop provides law enforcement officers probable cause to search the vehicle. In *Harris*, the Florida Supreme Court held that the State must present an exhaustive collection of records, including a record of the dog’s performance in the field, to establish the dog’s reliability. The United States Supreme Court found this demand inconsistent with the “flexible, common-sense standard of probable cause” and reversed the lower court’s decision that the officer did not have probable cause to search the suspect’s vehicle.

On June 24, 2006, K-9 Officer William Wheatley, of the Liberty County, Florida Sheriff’s Office, was on patrol with his canine, Aldo, a German shepherd trained in the detection of certain narcotics. During his shift, Officer Wheatley pulled over Clayton Harris’s truck for an expired license plate. As he approached the vehicle, the officer observed Harris acting “visibly nervous, unable to sit still, shaking, and breathing rapidly.” Officer Wheatley asked Harris for consent to search his vehicle but Harris refused. The officer returned to his vehicle and retrieved Aldo to walk around Harris’s truck for a “free air sniff.” Aldo alerted at the driver’s side door handle, signaling the detection of drugs. As a result, Officer Wheatley search Harris’s vehicle. While the search did not reveal any drugs Aldo was trained to detect, it did reveal 200 loose pseudoephedrine pills, 8,000 matches, a bottle of hydrochloric acid, two containers of antifreeze, and a coffee filter full of iodine crystals – all ingredients for making methamphetamine. After receiving proper *Miranda* warnings, Harris admitted to routinely “cooking” methamphetamine at his house and stated he could not go “more than a few days without it.” The State charged Harris with possession of pseudoephedrine for use in manufacturing methamphetamine. While out on bail, Harris was again pulled over by Officer Wheatley and Aldo for a broken tail light. After sniffing the exterior of Harris’s vehicle, Aldo again alerted at the driver’s side door handle. Officer Wheatley searched the vehicle but did not discover any drugs or paraphernalia. At trial, Harris moved to suppress the evidence found in his vehicle on the grounds that Aldo’s two alerts did not provide Officer Wheatley probable cause to conduct the search.

At the trial, Officer Wheatley testified extensively about his and Aldo’s training, including Aldo’s completion of a 120-hour narcotics detection course offered by the Florida Police Department. Furthermore, evidence established that Aldo received certification from a private company that specializes in testing and certifying drug detection dogs. Officer Wheatley also testified that he and Aldo performed four hours of training exercises each week to maintain their skills. During this weekly training, Wheatley would hide drugs in

certain vehicles or buildings while leaving others “blank” to determine whether Aldo “alerted” at the appropriate places. The training logs showed that Aldo always found the hidden drugs and that he performed “satisfactorily (the higher of two possible marks) during the training each day. Defense counsel did not contest the quality of Aldo’s training but rather, focused on his certification and performance in the field, particularly the two stops of Harris’s vehicle. Officer Wheatley acknowledged that he did not keep complete records of Aldo’s performance in all traffic stops or other field work. He only kept records of Aldo’s alerts resulting in arrests. Officer Wheatley, however, defended both of Aldo’s alerts at Harris’s vehicle and stated that it was likely that Harris had transferred the odor of methamphetamine to the door handle and Aldo responded to the residual traces.

The trial court concluded that Officer Wheatley had probable cause to search Harris’s vehicle and denied the motion to suppress. The intermediate state court affirmed the trial court’s ruling. The Florida Supreme Court, however, reversed the trial court’s decision, holding that Officer Wheatley did not have probable cause to search Harris’s truck. In so holding, the Florida Supreme Court stated that the State needed to provide a wider array of evidence to establish Aldo’s reliability, specifically: “[T]he State must present . . . the dog’s training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog’s reliability.” In particular, the Florida court stressed the need for evidence of the dog’s performance history, “including records showing how often the dog has alerted in the field without illegal contraband having been found.” Without this data, the Florida court determined, Wheatley could never have the requisite cause to believe the dog’s alerts were reliable to establish probable cause.

A police officer has probable cause to conduct a search when he has reasonable belief that contraband or evidence of a crime is present. The United States Supreme Court has established that the “[t]he test for probable cause is not reducible to ‘precise definition or quantification.’”<sup>2</sup> Further, when evaluating whether probable cause exists, the Supreme Court has consistently looked to the “totality of the circumstances.”<sup>3</sup> The Supreme Court has rejected “rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach” in determining the existence of probable cause.

The Supreme Court found that the Florida court “flouted this established approach to determining probable cause” by creating a strict evidentiary “check list” to assess the reliability of the drug detection dog. The practice of focusing on the dog’s field records of “hits” and “misses” would make it impossible for the State to ever establish proof of reliability absent these records, regardless of the amount of additional proof offered to establish reliability, e.g. training and certification.

The Supreme Court further discussed the difficulties in establishing “misses” in the field as they would usually go undetected because the officer would not conduct a search. The Court further pointed out that just because a dog alerts to a vehicle that contains no evidence of narcotics at that time does not mean the dog has made a mistake. Many times narcotics can be hidden in an area undetected by officers, present in quantities too small to detect, or the dog may have alerted to the residual odor of drugs previously in the vehicle or on the occupant.

The Supreme Court found that the better indicator of reliability is a drug detection dog's performance in a controlled testing environment. The Court stated that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert." The Court pointed out that after all, law enforcement agencies maintain a strong interest to adequately train and certify it dog's because only accurate dog's can locate contraband without "incurring unnecessary risks or wasting limited time and resources."

The Supreme Court pointed out, however, that a defendant must have the opportunity to challenge the reliability of the dog by questioning, for example, the adequacy of the dog's training and certification. The Court found that "if the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause." If the defendant challenges the reliability of the dog, then the court must weigh the competing evidence when making its determination.

The Court found the determination of probable cause in this type of case the same as any other inquiry into the existence of probable cause. The question is "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets this test."

In *Harris*, the court record indicates that the State introduced ample evidence regarding the extent and success of Aldo's training and certification, as well as his satisfactory weekly training sessions. Since the defense failed to rebut the State's case, Officer Wheatley had probable cause to search Harris's vehicle.

This case has made it clear that proper training, certification, and the documentation of those activities is essential to establish a drug detection dog's reliable. It appears that the Supreme Court weighed heavily in favor of testing conducted in a controlled environment as that scenario may best indicate a dog's incidents of false positive alerts. The Court further weighed the degree of training – in Aldo's case a 120-hour program in narcotics detection and certification from a privately owned company with expertise in the field – as well as maintaining proficiency through standard weekly training of the officer and the dog. The existence of these complete records and the dog's level and satisfactory performance of the initial training and certification, including performance in weekly training sessions, is adequate to establish the reliability of the drug detection dog to establish probable cause.

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<sup>1</sup> \_\_\_ S. Ct. \_\_\_, 2013 WL 598440 (U.S. Fla. 2013)

<sup>2</sup> *Maryland v. Pringle*, 540 U.S. 366 (2009)

<sup>3</sup> *Illinois v. Gates*, 462 U.S. 213 (1983)