Supreme Court: Alert by a Trained or Certified Drug Dog Normally Provides Probable Cause

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Yesterday, the Supreme Court decided Florida v. Harris, holding that when a trained and certified drug dog alerts on a vehicle, that normally provides probable cause to search the car, even if there are no records proving that the dog has previously performed well at detecting drugs in the field. I mentioned *Harris* in my Supreme Court preview, here, and in a long prior post about the reliability of drug-sniffing dogs, here, so I have been awaiting the opinion.

Facts. The case arose when a Florida K-9 officer executed a routine traffic stop on the defendant's truck. The defendant appeared nervous and there was an open beer can in the vehicle, so the officer asked for consent to search. The defendant refused. The officer walked his drug dog around the vehicle and the dog alerted. The officer searched based on the alert; he found no drugs but did find 200 pseudoephedrine pills, 8,000 matches, and other ingredients for manufacturing methamphetamine. The defendant was arrested and charged based on possession of those ingredients. Later, while the defendant was out on bail, the officer stopped him again for a traffic violation, the dog alerted again, and the officer searched again, but found nothing of interest in the vehicle.

Motion to suppress. In court, the defendant moved to suppress the pseudoephedrine and other items found in the initial search. The state showed that the dog had completed a 120-hour police-run training course; that the dog had previously been certified by a private dog training and testing outfit, though this certification was not required by law; and that the officer and the dog undertook various refresher training from time to time, during which the dog performed well.

The defendant argued that while the dog may have been trained in drug detection, his certification had expired and his performance in the field was poor, as reflected in his two alerts on the defendant's narcotics-free vehicle. Thus, the defendant maintained, the dog's alerts did not provide probable cause to search. The officer admitted that he did not keep complete records of the dog's field performance, but argued that the dog likely alerted to the defendant's vehicle based on a residual odor of methamphetamine.

Lower court rulings. The trial court denied the motion and, after the defendant pled no contest and appealed, an intermediate appellate court affirmed. The Florida Supreme Court reversed, ruling that records reflecting how often the dog "alerted in the field without illegal contraband having been found" were necessary to determine whether the dog's alert provided probable cause.

Supreme Court ruling. The United States Supreme Court granted certiorari and again reversed. The Court unanimously held that:

- Probable cause must be assessed using common sense and under the totality of the circumstances
- Requiring a checklist of particular evidence, such as a dog's field performance records, is the inconsistent with a totality-of-the-circumstances approach
- Field performance data is imperfect because it may understate a dog's false negatives (as the dog's failure to alert usually will result no search being conducted and so no drugs will be found even if they are present) and may overstate a dog's false positives (because, for example, a search based on an alert may fail to reveal

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drugs that are present but well hidden)
- Controlled testing of dogs is a "better measure" of their reliability, so if the state can show that a dog performs well at detecting drugs in a controlled setting, and a defendant fails to contest that showing, that is enough to show that the dog's alert provides probable cause
- The defendant may contest such a showing by contesting the training and testing standards, by presenting fact or expert witnesses, or by contesting the particular alert (for example, by showing that the officer cued the dog to alert)
- In this case, the state's evidence about the dog's training and proficiency in finding drugs amply supported a finding of probable cause, and the defendant's response was focused on only two alerts, which may have been explained by residual odors and were, in any event, hindsight

Further litigation? I suspect that the Court's opinion will spark litigation about drug dogs, because it provides a framework for presenting and analyzing challenges to dog alerts. And the Court's opinion leaves plenty of questions unanswered. For one thing, it refers to training or certification conducted by a "bona fide" organization without explaining how to know whether an organization is "bona fide." How extensive must the organization's testing be? How realistic? How much experience must the organization have? My understanding is that the field of drug dog training and testing isn't regulated or standardized, so there may be great variability between programs.

Further reading. Perhaps along similar lines, professor Orin Kerr's reaction to the opinion is that "the Court . . . said there is no particular test [for probable cause] and then created a particular test: Certification from a 'bona fide' organization . . . or 'recent[] and successful[]' completion of a training program creates a presumption of probable cause." SCOTUSBlog's summary of the case is here. The *Washington Post* covers it here.

The Court has not yet ruled on the other drug dog case it heard this Term, Florida v. Jardines, involving the use of a drug dog to sniff the front door of a residence. Stay tuned.

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