

Membership Magazine October, 2022



SELFDEFENSEFUND.COM • SELFDEFENSEFUND.COM • SELFDEFENSEFUND.COM • SELFDEFENSEFUND.COM • SELFDEFENSEFUND.COM



**WHEN CAN
POLICE USE
SNIFFER
DOGS?**

IN THIS NEWSLETTER WE WILL TALK ABOUT SNIFFER DOG SEARCHES OF YOUR HOME AND YOUR VEHICLE - MEDICAL MARIJUANA AND THE MURKINESS OF “CONTRABAND.”

IN YOUR HOME

The Supreme Court ruled (3-26-2013) that police cannot bring drug-sniffing police dogs onto a suspect's property to look for evidence without first getting a warrant for a search, a decision which may limit how investigators use dogs' sensitive noses to search out drugs, explosives and other items hidden from human sight.

The high court split 5-4 on the decision to uphold the Florida Supreme Court's ruling throwing out evidence seized in the search of Joelis Jardines' Miami-area house. That search was based on an alert by Franky the drug dog from outside the closed front door.

Justice Antonin Scalia said a person has the Fourth Amendment right to be free from the government's gaze inside their home and in the area surrounding it, which is called the curtilage.

“The police cannot, without a warrant based on probable cause, hang around on the lawn or in the side garden, trawling for evidence and perhaps peering into the windows of the home,” Justice Antonin Scalia said for the majority. “And the officers here had all four of their feet and all four of their companion's, planted firmly on that curtilage – the front porch is the classic example of an area intimately associated with the life of the home.”

He was joined in his opinion by Justices Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan.

The four justices who dissented were Chief Justice John Roberts, Justice Stephen Breyer, Justice Anthony Kennedy and Justice Samuel Alito.

It's not trespassing when a mail carrier comes on a porch for a brief period, Alito said. And that includes “police officers who wish to gather evidence against an occupant,” Alito said. “According to the court, however, the police officer in this case, Detective Bartelt, committed a trespass because he was accompanied during his otherwise lawful visit to the front door of the respondent's house by his dog, Franky.

Alito also said that the court's ruling stretches expectations of privacy too far. “A reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those odors remaining within the range that, while detectable by a dog, cannot be smelled by a human.”

It was not the dog that was the problem, Scalia said, “but the behavior that here involved use of the dog.”

“We think a typical person would find it `a cause for great alarm' to find a stranger snooping about his front porch with or without a dog,” Scalia said. “The dissent would let the police do whatever they want by way of gathering evidence so long as they stay on the base path, to use a baseball analogy – so long as they `stick to the path that is typically used to approach a front door, such as a paved walkway.' From that vantage point they can presumably peer into the house with binoculars with impunity. That is not the law, as even the state concedes.”

Thousands of dogs are used by governmental organizations around the United States to track criminals, sniff out illegal items like explosives at airports and search wreckage sites like bombed buildings and hurricane or earthquake-destroyed homes for injured people.

On the morning of Dec. 5, 2006, Miami-Dade police detectives and U.S. Drug Enforcement Administration agents set up surveillance outside a house south of the city after getting an anonymous tip that it might contain a marijuana growing operation. Detective Douglas Bartelt arrived with Franky and the two went up to the house, where Franky quickly detected the odor of pot at the base of the front door and sat down as he was trained to do.

That sniff was used to get a search warrant from a judge. The house was searched and its lone occupant, Jardines, was arrested trying to escape out the back door. Officers pulled 179 live marijuana plants from the house, with an estimated



street value of more than \$700,000.

Jardines was charged with marijuana trafficking and grand theft for stealing electricity needed to run the highly sophisticated operation. He pleaded not guilty and his attorney challenged the search, claiming Franky's sniff outside the front door was an unconstitutional law enforcement intrusion into the home.

The trial judge agreed and threw out the evidence seized in the search, but that was reversed by an intermediate appeals court. In April a divided Florida Supreme Court sided with the original judge.

That ruling was upheld by the Supreme Court's decision, the latest in a long line of disputes about whether the use of dogs to find drugs, explosives and other illegal or dangerous substances violates the Fourth Amendment protection against illegal search and seizure. The court has OK'd drug dog sniffs in several other major cases. Two of those involved dogs that detected drugs during routine traffic stops. In another, a dog hit on drugs in airport luggage. A fourth involved a drug-laden package in transit.

The difference in this case, the court said, is that Franky was used at a home.

"A drug detection dog is a specialized device for discovering objects not in plain view (or plain smell)," Kagan wrote in a concurring opinion. "That device here was aimed at a home – the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects. Was this activity a trespass? Yes, as the court holds today. Was it also an invasion of privacy? Yes, that as well."

This is the second decision in 2013 on the use of drug-sniffing dogs by police. The court unanimously ruled earlier in another Florida case that police don't have to extensively document the work of drug-sniffing dogs in the field to be able to use the results of their work in court. The case was *Florida v. Jardines*, 11-564.

DOG SEARCH OF YOUR VEHICLE

In *Illinois v. Caballes*, the Supreme Court ruled that police do not need reasonable suspicion to use drug dogs to sniff a vehicle during a legitimate traffic stop. This decision stems from the case of Roy Caballes, who was pulled over for speeding and subsequently arrested for marijuana trafficking after a drug dog was brought to the scene and alerted on his vehicle. The Illinois Supreme Court reversed his conviction, finding that a drug sniff was unreasonable without evidence of a crime other than speeding. But in a 6-2 ruling, the Court held that the Fourth Amendment is not implicated when police use a dog sniff during the course of a legal traffic stop. Justice Stevens wrote the Opinion of the Court, finding that since dog sniffs only identify the presence of illegal items – in which citizens have no legitimate privacy interest – the Fourth Amendment does not apply to their use.



WHAT THIS RULING MEANS FOR YOU

The Caballes ruling authorizes police to walk a drug dog around the vehicle during any legitimate traffic stop. If the dog signals that it smells drugs, police then have probable cause to conduct a search. However, the ruling does not allow police to detain you indefinitely until dogs arrive. The legitimacy of the traffic stop still depends on its duration. Basically, if police can't bring a dog to the scene in the time it takes to run your tags and write a ticket, the use of the dog becomes constitutionally suspect. So if you're pulled over and police threaten to call in the dogs, you are not required to consent to searches.

Usually, the officer won't have a police dog on hand and he needs reasonable suspicion to detain you while waiting for the drug dog. Before the dog arrives, you have the right to determine if you can leave by asking "Officer, am I free to go?" If the officer refuses and detains you until the dogs come, you have the right to remain silent and refuse to consent to any searches. If a dog arrives, you have the right to refuse to consent to a dog sniff, even if the officer claims you have to. Be aware that unlocking your car at the officer's request or handing the officer your keys is the same as consenting to a search. You always have the right to refuse by stating "Officer, I don't consent to any searches." (Repeat, if necessary.) If a judge determines that the officer had no justification to detain you until the dog arrived, any evidence discovered by the dog may be thrown out in court.

WHAT THIS RULING DOES NOT DO

Caballes does not constitute a significant change in the constitutionality of dog sniffs. This case essentially clarifies previous rulings in which the Court was reluctant to apply the Fourth Amendment to the use of drug dogs. The ruling also does not apply to the use of police dogs in situations other than legitimate traffic stops. For example, suspicion-less dog sniffs in parking lots or on sidewalks are not authorized by Caballes, and the Court has found random drug checkpoints unconstitutional. Nonetheless, the Court's "no privacy interest in contraband" doctrine is a nasty one, but it might open up possibilities for future legal challenges.

POSSIBLE LEGAL CHALLENGES TO CABALLES

The Supreme Court recently agreed to hear a case that casts doubt on the effectiveness of drug dogs to generate probable cause for a vehicle search. In *Florida v. Harris*, the Florida Supreme Court ruled that a drug dog's reliability record must also be considered to determine probable cause. The case will provide long-due scrutiny to the legal assumption that dogs are reliable contraband indicators. In their dissenting opinion of Caballes, Justices Souter and Ginsburg pointed to studies showing that drug dogs frequently return false positives (12.5-60% of the time, according to one study). A recent Chicago Tribune field study revealed that drug dogs are more often wrong than they are right when alerting for drugs in vehicles. (Worse, police often train their dogs to falsely "alert" on suspected vehicles.) A high court ruling in favor of Harris would effectively overturn Caballes, because a dog "alert" would no longer be enough to justify a vehicle search.

MEDICAL MARIJUANA AND THE MURKINESS OF "CONTRABAND"

17 states and the District of Columbia have legalized the use of medical marijuana for citizens with a doctor's recommendation. As such, the Caballes "contraband" distinction fails in states such as California or Colorado where hundreds of thousands of people are legally authorized to possess and use it. After all, if police dogs are regularly alerting on substances that are no longer illegal, that flips the "no privacy interest in contraband" doctrine on its head. For example, a vehicle search resulting from a drug dog alerting for marijuana in Mendocino or Boulder is unconstitutional under Caballes.

The odor of marijuana can no longer be probable cause, because prior to the search it's impossible for an officer (or a drug dog) to know whether or not the detected marijuana is contraband or not. While this defense might not work in federal courts — which have yet to recognize the legal standing of medical marijuana — it could be used to challenge dog searches in states that have legalized medical marijuana.

THE CONSTITUTION OF THE UNITED STATES
WE THE PEOPLE
THE SECOND AMENDMENT.

*“The right of the people
to keep and bear arms
shall not be infringed.”*



MISSION STATEMENT

The SDF is a fund sponsored by membership in the Association For Legal Gun Defense, with litigation “junk yard dog” attorneys in all 50 states providing our members with an aggressive attack-dog style criminal or civil defense for the use of any weapon in self-defense.

CONTACT INFORMATION

Mail Office Number: 682-238-8161 | Email: sdfmembers@gmail.com

Author Opinion & Advertiser Disclaimer

The views and opinions expressed in the SDF Perspective magazine are those of the authors and do not necessarily reflect the official policy or position of the association and/or officers, employees, successors, assigns, or advertisers. Any published text and/or advertised content provided by the magazine writers, freelance authors, and/or advertisers are of their opinion only.

Legal Disclaimer

The content in this magazine are for general informational purposes only and are not for the purpose of providing legal advice. You should contact an attorney directly to obtain advice with respect to any particular issue or problem. Your use of or interpretation of the articles, opinions expressed, advertisements, or click through on any of the e-mail and/or links contained within this magazine do not create an attorney-client relationship and the recipient and/ or reader of this publication.

How to submit an article for publication

SDF PERSPECTIVE SUBMISSION GUIDELINES

Submit an Article or Cartoon

We accept articles or cartoons related to self-defense, gun review topics, patriotic, as well as submissions on any related aspect of the law.

Where to submit

E-mail submissions (Word documents (.doc, .docx, attached to your e-mail message) submit to **sdfmembers@gmail.com**

Word count and specifics

Submit 1,000 words or less, unless other arrangements are made with the editor. Include a brief bio at the end of every submission, describing who you are and how you can be contacted. Include your name, mailing address and phone with all submissions. Include a photo of yourself for use online with your bio. We do not guarantee your submission will be published. Cartoon 3.625" X 4.75" PDF File.

Deadlines

Submissions are due on the 10th day of the month two months prior to the month of publication (January 10 for the March edition, for example).

Letters to The Editor

We welcome feedback from our readers via e-mail to sdfmembers@gmail.com. Include your name, address and phone number. Letters may be edited for clarity or length. We do not guarantee their publication.

The Fine Print

By submitting your article or cartoon, you certify that you wrote the subject matter and that it does not contain content shared without the permission of another author. Submitting an article or cartoon does not guarantee publication. SDF reserves the right to edit article text submissions. All copyrights remain with the author. The publisher assumes no liability for unsolicited art, photos, manuscripts or other material. There is no remuneration paid for any submitted or published cartoon or article.

Articles vs. Advertising

Many of our articles are written by professional practitioners about their own field of practice. We hope that an engaging well-written piece will encourage readers to naturally want to find out more and the way to do this may be through visiting their website etc. We discourage you from using an article to heavily promote your own work or events.

