

VOIR DIRE: DRUG DETECTION DOGS

Robert Farb, UNC School of Government (March 2015)

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I. **Legal Background.** A voir dire on the qualifications of a drug detection dog typically will be held when a defendant makes a motion to suppress evidence alleging a Fourth Amendment violation in conducting a search and seizure in which the dog led a law enforcement officer to the discovery of illegal drugs. In *Florida v. Harris*, 568 U.S. ___, 133 S. Ct. 1050 (2013), the Court held that when a trained and certified drug dog alerts on a vehicle, that normally provides probable cause to search the vehicle even if there are no records proving that the dog has previously performed well at detecting drugs in the field. The state showed at the suppression hearing that the dog had completed a 120-hour law enforcement training course, and the dog had previously been certified by a private dog training and testing company, although the certification was not legally required. And 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—the first alert resulted in a search that produced 200 pseudoephedrine pills, 8,000 matches, and other ingredients for manufacturing methamphetamine, but no methamphetamine or other narcotics. The second alert at a later date with this defendant resulted in not finding any narcotics. Thus the defendant concluded that 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 asserted that the dog likely alerted to the defendant's vehicle based on a residual odor of methamphetamine.

The Court held that the officer had probable cause to search the defendant's vehicle, based on the following analysis. Probable cause looks at the totality of circumstances and not rigid rules, bright-line tests, or mechanistic inquiries. The Florida Supreme Court in this case erroneously had created a strict evidentiary checklist, such as a dog's field performance records, to assess the drug-detection dog's reliability. Field performance data is imperfect because it may understate a dog's false negative alerts (the dog's failure to alert usually will result in no search being conducted and so no drugs will be found even if present) and may overstate a dog's false positive alerts—because, for example, a search based on an alert may fail to reveal 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 sufficient to show the dog's alert established probable cause. The defendant may contest the training and testing standards by presenting fact or expert witnesses or by challenging the particular alert—for example, by showing that the officer cued the dog to alert. In this case, however, the state's evidence about the dog's training and proficiency in finding drugs amply supported a finding of probable cause.

There are no significant post-*Harris* North Carolina cases on qualifying a drug detection dog, so this is an evolving area of law. (There is an older case, *State v. McDaniels*, 103 N.C. App. 175, 190 (1991), *affirmed per curiam*, 331 N.C. 112 (1992), that found probable cause based on a drug dog's alert and other incriminating factors.) The *Harris* ruling will likely have an influential impact on the development of North Carolina case law.

For information about the law of searches and seizures involving the use of drug detection dogs, see ROBERT L. FARB, *ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA* 186, 273-76 (4th ed. 2011), and its 2014 supplement at 32, 44.

II. Findings of Fact. Findings of fact must be supported by a preponderance of the evidence. The trial judge should include all relevant facts, and be sure those facts support the conclusions of law. Findings of fact may address:

1. The dog's drug detection initial training and any re-training, including continuous training.
2. The dog's drug detection certification and any re-certification.
3. The officer's initial training in drug detection and any later re-training.
4. The officer's initial training with this particular dog and any later joint re-training.
5. The officer's drug detection experience with this particular dog.
6. Any records that document the training and certifications of the dog and officer.
7. The dog's performance in the field, including presence or absence of alerts and discoveries of drugs.

III. Conclusions of Law. Sample language for the trial judge's conclusion of law:

Based on the totality of circumstances considering the training, experience, and performance of the drug detection dog and the officer who handled the dog, the drug detection dog's reliability was [sufficient] [insufficient] to allow evidence involving the dog to be admitted.

Note: The admissibility of drug detection evidence in some cases may be subsumed in the ultimate determination of whether a search or seizure was valid under the Fourth Amendment, such as whether there was probable cause to conduct a search. If so, the conclusions of law would need to be modified in an order granting or denying a motion to suppress.

IV. Order. Sample language for the trial judge's order:

It is now therefore ordered that the defendant's objection to the drug dog detection evidence is [overruled] [allowed] and that the evidence [is] [is not] competent in the pretrial and trial proceedings [delete "pretrial" or "trial" if appropriate] of this case.

The Note included in Section III above may be equally applicable to the wording of the Order.