IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell - Judicial Assistant

CASE NUMBER: CR 82007 0878

Date: October 24, 2008

TITLE:	COUNSEL:
STATE OF ARIZONA	David B. Loder, Esq. Deputy Yavapai County Attorney
(Plaintiff)	(For Plaintiff)
vs.	
JACQUELYN MARCY WRIGHT	David Bednar, Esq. 121 E. Birch Avenue, Suite 409 Flagstaff, AZ 86001-4621
(Defendant)	(For Defendant)

UNDER ADVISEMENT RULING ON MOTION TO SUPPRESS

The Court has considered the Defendant's Motion to Suppress and Exhibit B to the Motion (the report of Steven D. Nicely), the State's Response and Supplemental Response containing the report of Dave Reaver, the Defendant's Reply and Exhibit A to the Reply (rebuttal report of Steven Nicely), the testimony and other evidence presented at the hearing, and the memoranda and arguments of counsel.

The Defendant advances two grounds for suppressing the evidence: (1) the officer who initiated the traffic stop lacked reasonable suspicion to conduct the stop;[1] and (2) the handler/canine team was not sufficiently reliable to provide probable cause to search the Defendant's vehicle. Although the Defendant has alleged violations of both the United States and Arizona Constitutions, the specific authority cited by the parties is based on the Fourth Amendment to the United States Constitution.

A. REASONABLE SUSPICION

The Court notes that the State has not argued that the traffic stop was based on either probable cause or reasonable suspicion deriving from the investigation and surveillance of the Defendant preceding the stop. Although the standard for determining the existence of either probable cause or reasonable suspicion is an objective standard, the testimony at the hearing

1 After the Supreme Court decision in *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89, 95 (1996) some courts have considered the question of the appropriate standard to apply in determining the constitutionality of a traffic stop -- reasonable suspicion or probable cause. *See State v. Styles*, 665 S.E.2d 438, 439-41 (N.C.2008). Arizona Courts apply the reasonable suspicion standard. *State v. Livingston*, 206 Ariz. 145, 147-48, 75 P.3d 1103, 1105-06 (App.2003).

indicated that the officers believed that it was necessary to conduct a valid "pretextual" traffic stop for purposes of advancing their investigation of the Defendant at that time. In any event, the evidence presented at the hearing did not demonstrate probable cause or reasonable suspicion for a stop based solely on the investigation and surveillance which preceded the observations of the Defendant's driving.

In the written response filed on August 5, 2008, the State maintains that Deputy Shrum's stop of the Wright vehicle was properly based on Detective Dartt's and Sergeant Rouselle's observation of an unsafe lane change by Defendant Wright in violation of A.R.S. § 28-729, which provides in part as follows:

> If a roadway is divided into two or more clearly marked lanes for traffic, the following rules in addition to all others consistent with this section apply:
> 1. A person shall drive a vehicle as nearly as practicable entirely within a single lane and shall not move the vehicle from that lane until the driver has first ascertained that the movement can be made with safety.

At the evidentiary hearing Sergeant Rouselle testified regarding what could be an additional basis for conducting the traffic stop; Rouselle testified that at one point he paced the Wright vehicle at 85 miles per hour.

The Defendant denies that she made an unsafe lane change and was speeding. The Defendant also asserts that even if she had committed any driving violations, the violations were caused by the "dangerous and threatening" driving of Detective Dartt and Sergeant Rouselle.

The basic legal principles applicable to the issue of reasonable suspicion in the context of traffic stops have been stated as follows:

> An investigatory stop of a vehicle constitutes a seizure under the Fourth Amendment. *State v. Richcreek*, 187 Ariz. 501, 505, 930 P.2d 1304, 1308 (1997) ("When the blue lights on the patrol car begin to flash, the person followed does not feel free to ignore them and drive on."). Thus, an officer may only conduct such a stop if the totality of the circumstances "raise[s] a justifiable suspicion that the particular individual to be detained is involved in criminal activity." *State v. Graciano*, 134 Ariz. 35, 37, 653 P.2d 683, 685 (1982). This "reasonable suspicion" requirement for an investigatory stop, first articulated in *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), falls short of the probable cause standard required for an arrest . . . . [(citations in original)]
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> [The] assessment of reasonable suspicion is based on the totality of the circumstances, considering such objective factors as the suspect's conduct and appearance, location, and surrounding circumstances such as the time of day, and taking into account the officer's relevant experience, training, and knowledge. . . . [(citations omitted)]

State v. Fornof, 218 Ariz. 74, 179 P.3d 956, 956 (App.2008).

> Although "reasonable suspicion" must be more than an inchoate "hunch," the Fourth Amendment only requires that police articulate some minimal, objective justification for an investigatory detention. *See United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (noting that reasonable suspicion represents a "minimal level of objective justification" that is "considerably less than proof of wrongdoing by a preponderance of the evidence")." [(citations in original)]

State v. Teagle, 217 Ariz. 17, 23-24, 170 P.3d 266, 272-73(App.2007).

> An investigatory stop of a motor vehicle constitutes a seizure under the Fourth Amendment. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). Because such stops are less intrusive than arrests, officers need not possess probable cause to justify them. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 881, 95 S.Ct. 2574, 2578 2580, 45 L.Ed.2d 607, 614, 616 (1975). Rather, they need only possess a reasonable suspicion that the driver has committed an offense. *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 3149-50, 82 L.Ed.2d 317, 334 (1984); *Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, ¶ 27, 54 P.3d 355, ¶ 27 (App.2002). Under this standard, the officer must possess " 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' " *Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778, *quoting United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1996). When officers make traffic stops based on facts that neither constitute a violation of the law nor constitute reasonable grounds to suspect the driver has committed an offense, they run afoul of the Fourth Amendment requirement that they possess objectively reasonable grounds for the intrusion. *United States v. Mariscal*, 285 F.3d 1127, 1130-33 (9th Cir.2002); United States v. Lopez-Soto, 205 F.3d 1101, 1105-6 (9th Cir.2000); *United States v. Lopez-Valdez*, 178 F.3d 282, 289 n. 6 (5th Cir.1999); *United States v. Miller*, 146 F.3d 274, 279 (5th Cir.1998). [(citations in original)]

State v. Livingston, 206 Ariz. 145, 147-48, 75 P.3d 1103, 1105-06 (App.2003). These are the principles which guide the Court's consideration of the two grounds asserted by the state as bases for the existence of reasonable suspicion – speeding as determined by "pacing" and unsafe lane change.

(1) Speeding as determined by "pacing."

Sergeant Rouselle testified that Ms. Wright "fluctuated her speed," with a "range of speed up to 85, down to 55." Rouselle also testified that his report indicated that he paced the Defendant's vehicle at 85 miles per hour in a 75 mile per hour zone and that he did this prior to the Defendant cutting him off.

The evidence presented at the hearing did not establish that Sergeant Rouselle had reasonable suspicion to justify a stop based on speed. Without suggesting that the following list is either required or exhaustive, no testimony or evidence was presented as to any of these circumstances:

> (1) The officer's training with regard to visual estimation of vehicle speed or the proper method for pacing vehicles;
> (2) The manner in which the pacing was conducted. There was no discussion of the distance over which the pacing was done and no discussion of the traffic conditions during the time of the pacing.
> (3) The accuracy of the speedometer in the officer's vehicle and whether the speedometer had been calibrated. In fact, there appears to be some uncertainty as to what vehicle was being driven by Rouselle at the time of the stop.

Speaking in general, if an officer testifies that he paced a vehicle at 85 miles per hour in a 65 mile per hour zone, it could be within a court's discretion to determine that reasonable suspicion for a stop based on speed is present even in the absence of evidence going to the basic, foundational circumstances or information listed above. A trial court cannot speculate as to the existence or non-existence of such basic, but crucial, foundational facts. In any event, the situation here involved an alleged speed of 85 miles per hour in a 75 mile per hour zone, and this Court finds that the State has not established, by the level of proof required by the Fourth Amendment, the presence of unlawful speed as a basis for the stop.

(2) Unsafe lane change.

Sergeant Rouselle testified that he followed the Defendant "quite a ways" and she caught up to a tractor-trailer rig. Rouselle testified that he was "in the lane next to her and she cut me off." According to Rouselle, Wright got very close to the rig and cut into his lane. Wright was so close that Rouselle could not see her rear bumper, and they were travelling approximately 70 or 75 miles per hour at the time of the lane change. In response to a question by the Court, Sergeant Rouselle testified that he did not remember whether Ms. Wright signaled the lane change. As mentioned above, Wright denies that she made an unsafe lane change, but in her motion she also argues that, if any such maneuver had occurred, it was the result of the officers' "dangerous and threatening maneuvers" made "in an attempt to create the necessary reasonable suspicion for the stop."

Fourth Amendment jurisprudence recognizes the important governmental interests and the significant intrusion into a person's privacy that are implicated when a traffic stop is conducted. The general principles applicable to determining the constitutional validity of such intrusions were announced by the United States Supreme Court forty years ago.

> [T]he notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.' Camara v. Municipal Court, 387 U.S. 523, 534-535, 536-537, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? *Cf.* Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); Beck v. State of Ohio, 379 U.S. 89, 96-97, 85 S.Ct. 223, 229, 13 L.Ed.2d 142 (1964). Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, e.g., *Beck v. Ohio*, supra; Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960); Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). And simple "'good faith on the part of the arresting officer is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." Beck v. Ohio, supra, at 97, 85 S.Ct. at 229. [Citations in the original)]

Terry v. Ohio, 392 U.S. 1, 20-22, 88 S.Ct. 1868, 1879-80, 20 L.Ed. 889 (1968).

In the present case, this Court is left with some questions about the lane-changing incident. Ms. Wright described what could be considered erratic driving by the officers. She spoke of Sergeant Rouselle approaching very rapidly from behind and cutting her off even though there was a semi directly in front of her vehicle. She testified that she was "boxed in" behind the semi due to the driving maneuvers of Detective Dartt, who was driving a gray pickup truck. Although Detective Dartt

and Sergeant Rouselle dispute Ms. Wright's contention that Sergeant Rouselle was not behind the Wright vehicle after he first approached from behind and moved in front of her, the officers did not directly refute the general characterization of their driving portrayed by Ms. Wright. Driving on an interstate highway in inclement weather, on steep grades, and with truck traffic present can be difficult in any event; if the Defendant perceived what she believed to be threatening and erratic driving behavior by persons not known by her to be police officers, an objective assessment of the reasonableness of her driving behavior is further complicated. Furthermore, Sergeant Rouselle did not or could not provide basic details and circumstances of the unsafe lane change; for example: whether he had to brake in order to avoid a collision; whether he continued to accelerate or to maintain speed toward a car signaling a lane change being made in order to pass a slow-moving truck; whether he had been traveling in Wright's "blind spot"; whether he was only trying to be in a position to observe or pace the Wright vehicle or, rather, whether he was positioning his vehicle in a manner that could, in effect, increase the potential for the Defendant committing a traffic violation.

In the language from *Terry v. Ohio* quoted above, the Supreme Court contemplates meaningful judicial scrutiny of the reasonableness of a seizure in light of the particular circumstances. One important circumstance is the pretextual nature of the stop. By definition, officers conducting a pretextual stop are motivated to find an "objective" reason to stop a vehicle for actual reasons unrelated to driving behavior; thus, they are not acting on essentially random observations of suspicious or illegal driving. Because of this factor, specific details of the basis for the stop could be especially important when considering pretextual traffic stops. As noted by the Arizona Court of Appeals,

> In evaluating the reasonableness of a stop, the trial court must evaluate the totality of the circumstances. . . . For this reason, seemingly small factual distinctions can affect a court's conclusions as to the reasonableness of a stop. . . ." [Citations omitted)]

State v. Livingston, 206 Ariz. at 148, FN1, 75 P.3d at 1106, FN1. Here, some of the pertinent particular circumstances arguably were not presented to the Court in a manner that would permit distinguishing what could amount to important small factual distinctions.

From the few circumstances of the lane change that were described, this Court concludes, however, that the collective knowledge of law enforcement was sufficient to constitute reasonable suspicion to stop the Wright vehicle for that asserted reason. This Court finds that Sergeant Rouselle's testimony as to the occurrence of an unsafe lane change was credible. The officer essentially described an incident where Ms. Wright abruptly steered her vehicle into his lane of travel. Rouselle provided some detail going to the nature of this driving maneuver when he indicated that he could not see the bumper of the Wright vehicle after the lane change. After observing Sergeant Rouselle and Detective Dartt, who testified he had also witnessed the unsafe lane change, this Court believes the officers' testimony to the effect that they witnessed what was technically an unsafe lane change by the Defendant.

In making what is essentially a determination of credibility, this Court notes that the Defendant maintained in her testimony that an unsafe lane change incident did not occur; she did not provide details that would substantiate her alternative argument that the driving behavior of the officers improperly created the appearance of an unsafe lane change.[2] Ms. Wright testified that after

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2 In its response, the State questions the Defendant's argument in this regard by noting that the cases cited by the Defendant do not involve vehicle stops. There is, however, authority for the Defendant's argument in the context of vehicle stops. *See United States v. Ochoa*, 4 F.Supp.2d 1007, 1012 (D.Kan.1998) ("When Ochoa briefly drifted onto the shoulder, another vehicle was following her too closely with a patrol car maintaining a position directly beside it. A reasonable driver might have been distracted by the commotion and looked to see what was going on, briefly drifting partially onto the shoulder. In fact, in view of Trooper Rule's testimony which reflects a clear intent to find some reason to pull over both cars, the court must consider the impact of the officers positioning their vehicle beside the Toyota, which may have startled Ochoa into crossing onto the shoulder

Sergeant Rouselle's vehicle approached rapidly from behind and cut **her** vehicle off, Rouselle did not again trail her vehicle. When the question is presented in this fashion, the Defendant essentially argues either that the officers' testimony about the lane change is, as characterized by the State, pure fabrication or that somehow she just did not observe such an incident. This Court finds that the officers clearly did not fabricate the incident and that they possessed, even in this pretextual-stop context, reasonable suspicion to conduct a traffic stop of the Wright vehicle based on an unsafe lane change.

B. RELIABILITY OF THE HANDLER/CANINE TEAM

The State argues that the certification of the dog and the records produced establish reliability, as confirmed by its expert witness. The State essentially argues that because of the dog's capacity to detect residual odors, "real world" records are not material. The Defendant asserts, through her expert, that the records do not establish that the dog was sufficiently reliable. The parties have not cited any Arizona cases dealing specifically with the issue of the methods and standards for determining the reliability of drug-detection dogs.

The determination of whether Aros, the narcotics dog used in this case, was sufficiently reliable to provide probable cause to search the Wright vehicle involves questions relating to the capacity of these "trained"[3] dogs to detect "residual" odors. The Defendant relies heavily on the case of *Matheson v. State* and the highly-regarded LaFave treatise as authority for the arguments that (1) "the fact that a dog has been trained and certified, standing alone, is insufficient to give officers probable cause to search based on the dog's alert" and (2) the "'track record" of the dog up until the search" is a critical factor in the determination of reliability. 870 So.2d 8, 14-15 (Fla.App.2003). However, in *State v. Nguyen*, 157 Ohio App.3d 482, 811 N.E.2d 1180 (2004) the Ohio court of appeals discusses at considerable length the approaches of various courts to the question of determining reliability of drug-detection dogs and the importance of the problem of residual odor. The court in *Nguyen* stated that "[c]ourts are . . . reticent in placing too much emphasis in real world reports because of a trained dog's ability to alert to residual odor." *Id.*, 157 Ohio App.3d at 495, 811 N.E.2d at 1190. The *Nguyen* court adopted what it asserted to be the majority view that "real world reports are immaterial" to the question of the reliability of narcotics dogs and held as follows:

> [P]roof of the fact that a drug dog is properly trained and certified is the only evidence material to a determination that a particular dog is reliable. Proof that a drug dog is properly trained and certified may be established by means of testimony or through documentary proof.

Id., 157 Ohio App.3d at 500, 811 N.E.2d at 1194. As mentioned above, this Court does not have specific guidance from Arizona appellate courts as to the significance of residual odor and other legal considerations in determining the reliability of drug-detection dogs. In the context of the present case, however, this Court determines that the real world record (or "track record") is material to the question of the dog's reliability as this record relates to the certification and training of this dog.

On one level the Court could determine the question of the reliability of the drug-detection dog, Aros, by evaluating the weight to be assigned to the testimony of the two experts appearing at the evidentiary hearing – Sergeant Martin Lepird of DPS for the State and Steven Nicely for the Defendant. In determining that Mr. Nicely was the more "credible" expert witness, this Court is in no manner suggesting or insinuating that the testimony of Sergeant Lepird was in any manner untruthful. This Court notes the following factors as supporting its determination that Mr. Nicely's

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or committing some other minor traffic violation. . . ."). Defendant Wright has alleged but has not demonstrated that such a situation existed in this case. Of course, the State has the burden of proof in demonstrating the lawfulness of the stop.

3 As the Florida court of appeals notes in *Matheson v. State, infra.*, "conditioned" is a more accurate term than "trained" to use to describe the process whereby a reliable narcotics dog is developed.

testimony and opinion are highly credible: the comprehensiveness of Mr. Nicely's reports, which reflect his knowledge, experience and his thorough analysis of this case; his extensive background in training dogs; and the logic of his testimony setting forth his reasons and explanations for his opinion that Aros was not shown to be sufficiently reliable. This Court's primary reason for concluding that the dog was not sufficiently reliable, however, is based on concerns this court has regarding the certification process.

The value of a trained narcotics dog in the context of motor vehicle searches is the dog's capability of detecting and alerting to the presence of illegal drugs in a vehicle. Because courts hold that a dog "sniff" of the exterior of a vehicle, in itself, does not constitute a search and hold that the alert of a properly trained narcotics dog constitutes probable cause to search an entire vehicle, it is crucial that a dog is able to discriminate, to a sufficient degree of reliability, between vehicles which do contain (or have contained) illegal drugs and those which do not. *See Illinois v. Caballes*, 543 U.S. 405, 410, 125 S.Ct. 834, 838, 160 L.Ed.2d 842 (2005); *State v. Teagle*, 217 Ariz. 17, 27 (FN7), 170 P.3d 266, 276 (FN7) (App.2007). The certification and training records, as corroborated by the "real world" records as summarized to the Court, do not substantiate that this dog possessed this vital trait to a sufficient degree at the time of the search of the Wright vehicle.

The 2007 certification form (Exhibit 8) for Deputy Shrum and the narcotics dog Aros indicates that the dog "passed" by properly alerting to drugs in six locations, one of which involved drugs (cocaine) located inside a vehicle. The other five locations were either "vehicle outside" or "building" locations. The evaluator's comments state in part: "1 hit blank car, handler's pattern too slow." After considering this data and other details of the certification process in general, Mr. Nicely believes that this certification does not demonstrate that the dog was sufficiently reliable, but Mr. Nicely believes that the six finds with one false alert suggest an accuracy rate of 86% (the six "finds" divided by the total 7 "opportunities," which includes the one "false alert").

It would seem to this Court that a **valid** certification accuracy rate of 86% would probably be sufficient to establish the reliability of a narcotics dog. Based on the evidence presented, this Court questions, however, whether the certification process was valid, aside from Mr. Nicely's concerns with the various details of the testing such as quantity of drugs, height of location where the drugs were hidden, and weather conditions. What causes this Court to question the validity of the certification process in this case, at least as it is has been presented, may be stated as follows: The dog was apparently presented with one scenario involving a "blank" vehicle (one containing no drugs, or presumably, no residual odor of drugs), and the dog incorrectly indicated drugs were present. If this was the only blank or clean vehicle test, there would be a 0% accuracy rate in situations where the dog is directed to a "blank" vehicle. If, as Mr. Nicely believes, the false alert was due to Deputy Shrum's inadvertent or unconscious "cueing" of the dog, the implications are obvious; based on what Mr. Nicely refers to at the "Clever Hans Phenomenon," the dog would routinely alert on vehicles that Deputy Shrum believed to contain drugs, whether or not drugs were actually present.

Even if the false alert by Aros during the certification evaluation was not the result of cueing by the handler, is there any substantiation that the dog can adequately discriminate between vehicles which do and do not contain drugs? It would seem that there should have been additional, blank-vehicle trials to determine whether Aros would make this crucial distinction. If, for example, the dog had been directed to five blank vehicles and only alerted on one, this fact, along with the successful trials where the dog correctly alerted to the presence of drugs, may have established reasonable reliability. When the Court recently announced its imminent ruling, the attorneys were asked whether there was evidence that other blank-vehicle tests were conducted during the certification process, and it was confirmed that there was no other evidence of such tests. This point is very significant to the Court's ruling – the assumption that the total number of sniffs during certification was seven. The Court also notes that even though the parties stipulated that Mr. Dave Reaver's report would not be considered, this Court has deemed it appropriate to reject that stipulation and consider Mr. Reaver's report, which responds to the Nicely report. The Reaver report does not dispute Mr. Nicely's opinion

that the false alert during the certification resulted from cueing, nor does the Reaver report discuss how to correct that problem and how any correction should be documented so as to confirm the reliability of the dog.

The real world records could tend to confirm the concern that this dog is being cued or may not be able to discriminate between loaded and blank vehicles. From his review of the records, Mr. Nicely concluded that

> [a]t the time of this seizure there was a 100% probability that the dog would respond during a vehicle stop, and a 42% probability drugs would actually be seized. Overall the dog has a 98% probability it will respond, with a 66% [sic] that drugs will actually be seized. What is concerning about this team is the fact that when probable cause is needed for vehicle searches, it is obtained. The probability of this dog not responding at the time of this incident when probable cause was needed is 0%.

Exhibit B to Motion to Suppress – Nicely Report, p. 2.

Deputy Shrum's and the State's explanation for the fact that the dog alerts nearly 100% of the time a sniff is conducted is the presence of residual odor. If in fact virtually all of the vehicles searched either actually contained drugs or emitted residual odor, which would be detected by and alerted to by a narcotics dog, it is hard to see why a dog would be necessary unless it would be to narrow the focus for locating the drugs. As noted by Mr. Nicely, for the time frame examined, once the deputy decided to conduct a dog sniff there was a 98% chance that the dog would alert. Without strong statistical or other evidence suggesting that it is typical for trained drug-detection dogs to alert on virtually all vehicles under sufficiently similar conditions, this Court is hesitant to accept residual odor as a nearly universal explanation for this behavior. Furthermore, neither the certification record nor the training records indicate any testing or training of this dog with regard to residual odor or "dead scents." According to the information provided, the deputy apparently theorized the presence of residual odor on an ad hoc basis when a post-sniff search did not result in the locating of drugs. If residual odor is such an important factor in understanding why a dog alerts on ostensibly clean locations, it would seem that tests would be done in a controlled setting. A number of questions appear appropriate, for example: are some dogs capable of distinguishing, at least to some degree, between "active" and residual odors; does the type and quantity of a drug have any effect on whether a dog will "hit" on a residual odor; how long after a particular quantity of drug is removed from a location will a drug alert to that area? Arranging tests and training relating to residual odor would seem to be both an appropriate component of assessing the reliability of a narcotics dog and one aspect of analyzing possible reasons for apparent false alerts.

The significance of residual odor to the question of reliability of narcotics dogs has not been fully explored in this hearing. There is a fundamental legal issue presented here that has not been addressed by Arizona appellate courts. The issue is whether a dog detecting residual odors of drugs that have been removed from a vehicle hours, days or weeks before the dog sniff is conducted is a reliable tool for providing probable cause to search that vehicle, a vehicle which no longer contains contraband. As mentioned above, some courts take the view that because of the problem of residual odor, real world records are not material and therefore not even discoverable in a typical case. Such courts obviously take the view that an alert to residual odor is an acceptable basis for probable cause. The present case illustrates that, regardless of the ultimate determination of this issue, in some cases discovery and examination of the real world records are appropriate. The certification records of this dog suggest a possible problem – the dog was being cued or had a tendency to alert on blank vehicles. The real world records substantiate this concern unless it is accepted that actual drugs or residual odor was present in virtually all of the vehicles searched. Even if residual odor accounted for almost all of the false alerts in the field, however, what caused the false alert during the certification process if not cueing or some improper procedure that had to be corrected?

This court is concerned with the deputy's explanation for why the dog exhibited what evaluator E.M. Nicks determined to be a false alert on a blank vehicle. The deputy testified that, contrary to what the representative of the certifying agency determined, the dog did not make a false alert; rather, the supposed blank vehicle in fact contained or emitted residual odor. Thus, according to the deputy the dog made no "errors" during the evaluation. This assertion would seem to suggest that the deputy is essentially questioning the competence of the certifying agency. In any event, there appear to be two possibilities: either the certifying agency did not conduct a proper evaluation, which is being suggested by the deputy and the Defendant, or there is an indication that the deputy may be reluctant to recognize a significant problem in the performance of the handler/canine team. Either option is detrimental to the argument that the dog has been shown to be sufficiently reliable.

The Court has also considered the training logs admitted at the hearing as Exhibits 2 through 7. These records show virtually perfect performance by the dog in the training context. Over the six separate training days reflected in these records the dog never missed making a proper alert and never falsely alerted to 44 clean or blank vehicles. Thus, the one recorded time that Aros alerted to a clean vehicle in a controlled setting was during the certification process. It was noted in this proceeding that unintentional cueing can occur when the handler is the person who places or hides the drugs during training sessions. Knowledge of which vehicles or other locations do or do not contain drugs can affect the way the handler conducts the sniff. The training records apparently reflect that Deputy Shrum was the only person present for the training sessions except for one day (October 8, 2007 – Exhibit 2). Thus, the training procedure was apparently not designed in the manner best suited to detect and, if necessary, correct any cueing problem. Furthermore, the day that another person, Officer Ekholm, was present, the dog was not directed to any clean vehicles or, for that matter, to any vehicles. The records for that day, October 8, 2007, do reflect that there was a "forced false alert & correction training," and the records for October 14, 2007, reflect a "pass" for "tried to false alert on car." This Court cannot conclude from those two entries, however, that any cueing or other false-alert problem was corrected.

In summary, based on a consideration of the evidence presented in this specific matter, the Court concludes that the State has not shown that the drug-detection dog was sufficiently reliable at the time of the search of the Defendant's vehicle.

For the reasons set forth above,

IT IS ORDERED ***granting*** the Motion to Suppress.

DATED this 24th day of October, 2008.

Warren R. Darrow

Warren R. Darrow
Superior Court Judge