

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

UNITED STATES OF AMERICA, )  
 )  
v. ) Criminal Action No. 7:11CR00057  
 )  
HERBERT GREEN, ) **MEMORANDUM OPINION**  
 )  
Defendant. ) By: Hon. Glen E. Conrad  
 ) Chief United States District Judge

This case is presently before the court on the second motion to suppress filed by counsel on behalf of the defendant, Herbert Green, and the defendant's pro se motion to suppress. For the reasons set forth below, both motions will be denied.

**Background**

On the morning of March 17, 2011, Trooper Darryl Johnson of the Virginia State Police observed Green driving northbound on Interstate 77, near the town of Wytheville, Virginia. The windows of Green's vehicle appeared to be excessively tinted. As Johnson moved closer to the vehicle, he also noticed that the vehicle's license plate was partially obscured. At approximately 10:08 a.m., Johnson effectuated a stop of Green's vehicle. The audio and video recording equipment in Johnson's patrol car captured the traffic stop on tape.

At approximately 10:11 a.m., Johnson contacted his partner, Trooper Brian Dillon, and asked him to assist with the traffic stop. During the course of the stop, Dillon's drug detection dog, "Bono," performed a free air sniff of the vehicle. Bono alerted to the vehicle's rear passenger panel.

Based on Bono's positive alert, the troopers conducted a search of the defendant's vehicle. During the search, the troopers located a large duffle bag in the rear portion of the

vehicle, which contained over one kilogram of cocaine and approximately \$7,000.00 in United States currency.

On August 4, 2011, a grand jury in the Western District of Virginia returned an indictment against Green, charging him with possession with intent to distribute 500 grams or more of a mixture or substance containing cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B).

On November 4, 2011, Green's retained counsel moved to suppress the evidence seized from his vehicle on the basis that the traffic stop was unreasonable in its scope and duration, and that the delay was not justified by reasonable suspicion of criminal activity. Following a hearing, the court denied the motion on December 21, 2011.

Thereafter, Green's retained counsel moved to withdraw from the case. The court granted the motion and appointed the Office of the Federal Public Defender to represent Green in all further proceedings.

After receiving Bono's field utilization reports, Green's appointed counsel filed a second motion to suppress, claiming that Bono's track record in the field was not sufficiently reliable for his positive alert to provide probable cause to search Green's vehicle. The court held a hearing on the second motion on June 5, 2012. During the hearing, the defendant tendered a pro se motion to suppress, in which he challenges the authenticity of the video recording of the traffic stop.

## Motions to Suppress

### **I. Second Motion Filed by Counsel**

#### **A. Summary of the Evidence**

During the hearing on the defendant's second motion to suppress, the government first presented testimony from Trooper Dillon, who has worked as a narcotics canine handler since 2002. He began working with Bono in 2007, when they completed a thirteen-week drug detection course for dogs and dog handlers at the Virginia State Police training academy in Richmond. After the course, Bono passed a certification test before going out on the street with Dillon. In order to keep their certification current, Trooper Dillon and Bono must complete four hours of training each week and twenty hours of in-service training each month. Dillon and Bono have been re-certified as a team every year since 2007. Dillon testified that Bono has maintained a 100 percent success rate in the controlled training environment.

Dillon explained that a drug detection dog's alert is an unusual reaction to the odor of narcotics, and that it is a natural response that cannot be trained. Dillon emphasized that it is the odor, as opposed to the presence of narcotics, that Bono and other dogs are trained to detect. Bono has been trained to detect the odors of a number of drugs, including cocaine, heroin, marijuana, methamphetamine, Ecstasy, and some prescription medications.

The government also presented testimony from Senior Trooper Sydney Scott Settle, who works as a canine trainer for the Virginia State Police. Trooper Settle confirmed that Bono has passed all of his yearly certification tests, including his most recent test in April of 2012.

When asked about positive alerts in the field that failed to lead to the discovery of drugs, Trooper Settle explained that this may occur when drugs were previously present and the odor

remained after the drugs were removed. He indicated that the Virginia State Police's certification test does not involve residual odor scenarios, but that Bono's training includes exercises involving residual odors, such as empty canvas bags that have been exposed to narcotics. Settle opined, based on his experience training Bono, that Bono is a reliable drug detection dog.

The government introduced Bono's certification and training records as exhibits, along with the reports completed by Trooper Dillon after Bono has been utilized in the field. Those reports indicate that, between October 29, 2007 and March 17, 2011, Bono was utilized on approximately 45 occasions during which he did not alert to the odor of narcotics. On one of those occasions, a vehicle was searched and six grams of marijuana were found inside. The reports also indicate that, during the same period, Bono alerted to the presence of a narcotics odor on approximately 85 occasions. On 22 of those occasions, drugs were found following Bono's alert.

## **B. Discussion**

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Probable cause exists when, after considering the totality of the circumstances, there is a "fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). "The probable cause standard does not demand any showing that such a belief be correct or more likely true than false." Simmons v. Poe, 47 F.3d 1370, 1379 (4th Cir. 1995). Instead, it is "a practical, nontechnical conception that deals with the factual and practical considerations of everyday life

on which reasonable and prudent men, not legal technicians, act.” United States v. Humphries, 372 F.3d 653, 657 (4th Cir. 2004) (internal citation and quotation marks omitted).

The United States Court of Appeals for the Fourth Circuit has held that “[t]he detection of narcotics by a trained dog is generally sufficient to establish probable cause” to search a vehicle. United States v. Robinson, 707 F.2d 811, 815 (4th Cir. 1983); see also United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994) (“When the dog ‘alerted positive’ for the presence of drugs, the officer was given probable cause for the search that followed.”). Although there is no binding Fourth Circuit precedent that “specifically address[es] what, if any, evidence of a drug dog’s reliability must be offered,” United States v. Christian, 452 F. App’x 283, 285 (4th Cir. 2011), the Court has indicated in an unpublished decision that there must be “some indicia of reliability.” See United States v. Wu, 217 F. App’x 240, 245 (4th Cir. 2007) (“Of course, implicit in our statement in Robinson is the assumption that a drug dog’s positive alert for contraband must possess some indicia of reliability for the alert to establish probable cause.”).

In Wu, police officers obtained a search warrant for the defendant’s residence based upon an affidavit describing a drug detection dog’s positive alerts to packages delivered to a United Parcel Service office less than two months apart. Id. at 241-243. After the dog alerted to the first package, it was opened pursuant to a search warrant, and stolen goods, but no drugs, were discovered inside. Id. at 242. Likewise, after the dog alerted to the second package, a warrant was obtained, and stolen goods, but no drugs, were discovered inside. Id. Although law enforcement officers did not find narcotics in either of the packages, the contents ultimately led to convictions for credit card fraud and use of unauthorized credit cards. Id. at 243. Wu filed a motion to suppress all evidence seized from the packages and his home, claiming that the

government lacked probable cause for the searches because they had not demonstrated the dog's "reliability as a drug-detection dog." Id. The district court conducted a hearing and ultimately denied Wu's motion. Id.

On appeal, the Fourth Circuit affirmed the district court's denial of Wu's motion to suppress. After observing that a drug dog's positive alert for contraband must possess "some indicia of reliability," the Court emphasized that its "sister circuits have held that a search warrant based on a positive alert by a drug dog is sufficient on its face to establish probable cause if the affidavit supporting the warrant states that the dog is trained and certified to detect controlled substances." Id. at 245. Based on its review of the record, the Fourth Circuit ruled as follows:

Assuming that evidence of a drug dog's training and certification is needed to establish the dog's reliability, such evidence was clearly present in the instant case. Aside from providing accounts of Cody's positive alerts to the packages, the affidavits supporting both the May 9 and June 27 warrants described in some detail Cody's training and certification as a drug-detection dog, including describing how Trooper Barger and Cody had completed 240 hours of instruction from March 2004 through May 2004 and noting that Barger and Cody had completed one re-certification session on January 14, 2005 to "confirm narcotics detection ability."

We believe that this evidence of Cody's training and certification was enough by itself to establish Cody's reliability so that his positive alerts for controlled substances established probable cause for both the May 9 and June 27 searches. Probable cause only requires "fair probability" that contraband will be found in a certain place, and Cody's positive alerts to the packages in both searches clearly established a fair probability that the packages contained controlled substances, given his training and certification as a drug-detection dog.

In addition to reviewing the evidence of Cody's training and certification, however, the district court also heard testimony from Trooper Barger, Cody's handler, about Cody's performance statistics and his field experience from March 2005 to May 2005. The district court found that Cody had demonstrated an impressive degree of accuracy in training exercises, and based on its review of Cody's past field sniffs, the court found that Cody was accurate approximately

67% of the time in the field when sniffing for narcotics. While we believe that this factual finding was unnecessary for the district court to have concluded that probable cause existed for the searches given the evidence of Cody's training and certification, it serves to bolster the court's determination that Cody was sufficiently reliable for his positive alerts to establish probable cause for the May 9 and June 27 searches.

Id. at 245-246 (internal citations omitted).

The Court then rejected Wu's argument that Cody was unreliable because he had alerted to the presence of narcotics when none were present. Id. at 246. In so doing, the Fourth Circuit emphasized as follows:

That Cody positively alerted to the presence of a controlled substance when none were found certainly is a factor to be considered under the totality of the circumstances in determining whether probable cause existed for the June 27 search, but the reliability of a drug-detection dog does not rise or fall on the basis of one sniff. Cody had proven very accurate in sniffs during his training. Moreover, factoring the May 9 alert into the district court's original calculation of Cody's accuracy rate, Cody would still have been "correct" six times and "incorrect" four times, rendering an accuracy rate of 60%. Because the probable cause-standard does not require that the officer's belief be more likely true than false, an accuracy rate of 60% is more than reliable enough for Cody's alert to have established probable cause.

Id. (internal citations omitted).

Although the Wu opinion was unpublished, and, consequently, is not binding precedent, this court, as have others, finds its analysis persuasive. See United States v. Wilson, 278 F.R.D. 145, 153 (D. Md. 2011); United States v. Hearns, 2010 U.S. Dist. LEXIS 109242, at \*24 (D. S.C. Oct. 13, 2010); United States v. Brooks, 589 F. Supp. 2d 618, 628 (E.D. Va.), aff'd, 376 F. App'x 300 (4th Cir. 2010); United States v. Ng, 2007 U.S. Dist. LEXIS 81263, at \*7 (W.D. N.C. Oct. 16, 2007). Considering the totality of the circumstances in this case, as the Fourth Circuit did in Wu, the court is constrained to conclude that Bono was sufficiently reliable for his positive alert to establish probable cause for the search of Green's vehicle.

As set forth above, the government provided extensive evidence regarding Bono's training and continuing certification. Bono and Trooper Dillon have been re-certified as a team every year since 2007, and Bono has maintained a 100 percent success rate during training and re-certification exercises. Although the court tends to agree with the defendant that the fact that a dog has performed satisfactorily in a controlled training environment should not give rise to a presumption of reliability in the field, it is nonetheless clear from the existing case law that a dog's training and certification is a key component of the reliability analysis. See Wu, 217 F. App'x at 245; see also United States v. Villa, 348 F. App'x 376, 379 (10th Cir. 2009) (emphasizing that [a] drug-detection dog's reliability is primarily established by the dog's training and certification"); United States v. Sentovich, 677 F.2d 834, 838 n. 8 (11th Cir. 1982) (endorsing the view that a dog's training can provide sufficient proof of reliability). It is likewise clear from the record that this component favors the government in this case.

The record also includes reports of Bono's performance in the field. While these reports suggest that Bono has been less accurate in an uncontrolled environment, his performance has not been so deficient as to undermine the existence of probable cause. In some of the field cases in which Bono alerted but drugs were not found, there was reason to believe that drugs had been in the vehicle or other location searched, and that it still contained the odor of narcotics. See Brooks, 589 F. Supp. 2d at 630-31 ("The fact that no drugs were found in Defendant's vehicle is a factor for the Court to consider, but it does not preclude a finding of probable cause in light of the testimony regarding Debo's reliability and the fact that drug dogs alert in the presence of an odor - even if the controlled substance is no longer present at the site of the alert."). For example, in fourteen of the false positive cases, officers had direct evidence that drugs or drug

users had recently been in the vehicle searched, such as an admission from an occupant. A number of the other false positive reports reference indirect evidence of drug trafficking, such as large sums of cash and evidence that a vehicle had been used earlier during a drug deal.

Taking into account the false positive cases in which there was reason to believe that drugs had been in the vehicles, and giving due consideration to the large percentage of occasions in which Bono did not alert, the court is of the opinion that Bono was accurate at least 50 percent of the time when sniffing for narcotics in the field. Although Bono “may not be a model of canine accuracy,” his field performance record is “only one of the factors [the court] consider[s] in the totality of the circumstances calculation.” United States v. Donnelly, 475 F.3d 946, 955 (8th Cir. 2007). When considered in conjunction with his degree of training, his performance during training and re-certification exercises, and the testimony from Trooper Dillon and Trooper Settle regarding their familiarity with Bono and their confidence in his performance, the court concludes that the record is sufficient to establish Bono’s reliability and, thus, that his positive alert provided probable cause to search the defendant’s vehicle. As set forth above, probable cause only requires a “fair probability” that contraband will be found in a particular place. See Gates, 462 U.S. at 238. In light of this standard, and based on the totality of the circumstances, the court is of the opinion that Bono’s positive alert satisfied this requirement. For these reasons, the second motion to suppress filed by counsel must be denied.

## **II. Pro Se Motion to Suppress**

The defendant has also filed a pro se motion to suppress in which he challenges the authenticity of the video recording of the traffic stop, which was produced by the government in

response to the defendant's first motion to suppress.\* Although the defendant summarily alleges that the video "doesn't include all that transpired," he has failed to point to anything that would create a question as to the recording's authenticity. Accordingly, the defendant's pro se motion to suppress must be denied.

### **Conclusion**

For the reasons stated, the court will deny the pending motions to suppress. The Clerk is directed to send certified copies of this memorandum opinion and the accompanying order to all counsel of record.

ENTER: This 28th day of June, 2012.

/s/ Glen E. Conrad  
Chief United States District Judge

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\* Both former counsel and current counsel have declined to pursue this motion on the defendant's behalf.