

**PEOPLE V. DEVONE: NEW YORK OFFERS
DRIVERS MORE PROTECTION FROM
WARRANTLESS CANINE-SNIFF
SEARCHES . . . OR DOES IT?**

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INTRODUCTION

The U.S. Supreme Court directly addressed the constitutionality of using drug-sniffing canines for the first time in 1983, holding that a “search” under the Fourth Amendment did not take place when police used a canine to sniff a person’s luggage at an airport.¹ The Court revisited the issue in 2005, unanimously concluding again that a police officer’s use of a canine to sniff the exterior of a driver’s vehicle to locate hidden narcotics did not constitute a “search” within the meaning of the Fourth Amendment.² The result of these decisions is that under federal law police generally do not need any level of suspicion to use canines to sniff for drugs. However, the New York Court of Appeals, through its continued commitment to provide greater state constitutional protection from unreasonable searches, has decided to the contrary. In *People v. Devone*, the Court of Appeals decided “whether a canine sniff of the exterior of a lawfully stopped vehicle constitutes a search under Article I, Section 12 of our State Constitution and, if so, what level of suspicion is required before law enforcement can conduct that search.”³ In a 4-3 decision, the court found that a canine sniff does amount to a “search,” thus triggering the protection of the state constitution.⁴ Despite this, the court held that “reasonable suspicion” is not required, but instead, police need only a “founded suspicion that criminal activity is afoot” before such a search can take place.⁵

I. THE FACTS OF *PEOPLE V. DEVONE*

People v. Devone, decided this summer, was a combination of two cases with similar sets of facts. In the first case, two police officers pulled a vehicle over when they noticed the driver was using his cell phone.⁶ The driver could not produce a driver’s license or registration for the vehicle.⁷ When asked who owned the vehicle, the driver said it was his cousin’s, but that he did not know his cousin’s name. He then pointed to the man sitting in the front passenger’s seat, indicating that the person was his

¹ *United States v. Place*, 462 U.S. 696 (1983).

² *Illinois v. Caballes*, 543 U.S. 405 (2005).

³ *People v. Devone*, 931 N.E.2d 70, 71 (N.Y. 2010).

⁴ *Id.* at 74.

⁵ *Id.* at 73.

⁶ *Id.*

⁷ *Id.*

cousin.⁸ When the police called in the license plate, they learned that the vehicle belonged to a female, but was not reported stolen.⁹ Based on the inconsistent answers provided by the driver, the police officers decided to use the canine they had in their police vehicle to sniff the exterior of the car for narcotics.¹⁰ The dog quickly alerted the officers that drugs were inside the vehicle.¹¹ When the officers opened the passenger side door, the dog immediately began scratching at the console.¹² Inside, the officers found crack cocaine.¹³ Ultimately, the case made it to the Appellate Division, where the Third Department held the officer had conducted a search, but that “the police needed only founded suspicion as opposed to a reasonable suspicion to conduct a canine sniff of the vehicle’s exterior.”¹⁴

In the second set of *Devone* facts, a police officer pulled over a vehicle that was missing its front license plate.¹⁵ The officer issued the driver a ticket for the missing license plate, and for an expired inspection sticker. Forty-five minutes later, the same driver was pulled over by another officer who noticed the missing license plate and also that sticks and twigs were protruding from the front bumper.¹⁶ The officer ran the license plate and the report incorrectly showed that the driver did not have insurance.¹⁷ The officer then questioned the passenger of the vehicle, who gave an unbelievable and “implausible” story about a minor accident they had been in.¹⁸ Meanwhile, the officer noticed that the driver, who was standing outside the vehicle, was acting nervous and kept looking at the officer’s canine in the police car.¹⁹ The officer decided to run a sniff search of the vehicle using the canine.²⁰ The canine located a duffle bag in the trunk that contained bags of crack cocaine.²¹ Once again, the Third Department concluded that a search had occurred and that “the officer properly conducted an exterior canine sniff of the vehicle

⁸ *Id.*

⁹ *Id.* at 72.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

based upon ‘a founded suspicion that criminality was afoot.’”²²

II. THE DECISION

In a brief opinion addressing both sets of facts, the Court of Appeals reiterated that in New York, inquiries as to whether a “search” has taken place should mainly focus on what expectation of privacy the defendant had at the time of the search.²³ This analysis is markedly different from the approach taken by the U.S. Supreme Court in analyzing the use of canines for sniffing out drugs.²⁴ In the U.S. Supreme Court case, *United States v. Place*, police used a canine to sniff luggage carried by a suspect in order to detect drugs.²⁵ Holding that a “search” had not taken place, the Supreme Court reasoned:

[T]he sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.²⁶

The Court reiterated this determination in *Illinois v. Caballes* in 2005, concluding that “[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”²⁷ Thus, the Supreme Court has clearly made the invasiveness of the intrusion the determinative factor. The New York Court of Appeals took a different approach in *Devone*. Citing *People v. Dunn*,²⁸ one of its previous canine sniff-search decisions, the court explained: “[T]he

²² *Id.* at 73 (quoting *People v. Abdur-Rashid*, 883, N.Y.S.2d 644, 648 (App. Div. 2009)).

²³ *Id.*

²⁴ *Id.*; *United States v. Place*, 462 U.S. 696, 707 (1983).

²⁵ *Place*, 462 U.S. at 698–99.

²⁶ *Id.* at 707.

²⁷ *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). Noticeably missing from the *Devone* decision is any discussion or reference to the U.S. Supreme Court decision in *Caballes*, especially considering the fact that the Court does address the older Supreme Court case of *United States v. Place*.

²⁸ 564 N.E.2d 1054 (N.Y. 1990). In *Dunn*, police used canines to sniff the hallway of an apartment building in order to detect drugs within one of the apartments. *Id.* at 1058. The court in that case also found that a “search” had taken place. However, it explained that there is a higher expectation of privacy in one’s home than in one’s vehicle while travelling on a public road or in luggage carried at an airport. *Id.*

fact that a given investigative procedure can disclose only evidence of criminality should have little bearing on whether it constitutes a search.”²⁹ Instead, “the analysis should focus on whether there has been an intrusion into an *area* where an individual has a reasonable expectation of privacy.”³⁰ The court went a step further to highlight its’ differing approach by citing another of its decisions, *People v. Price*.³¹ The facts of *Price* were very similar to *Place*. Officers had commanded a canine to search a suspect’s luggage which turned up cocaine.³² Holding that no search had taken place, the court reasoned that people have a minimal expectation of privacy in luggage “placed in the hands of a common carrier.”³³

Since the court concluded that a search had taken place in both sets of facts in *Devone*, the state constitution requires that police officers be able to articulate a level of suspicion. The court affirmed the Appellate Division’s standard, holding that officers only need a “founded suspicion” that “criminality” is “afoot.”³⁴ A “reasonable suspicion”—the more demanding standard required before canines can be used to sniff the exterior of a home³⁵—is not necessary because there is a “diminished expectation of privacy attributed to individuals and their property when traveling in an automobile.”³⁶ The court concluded by stating that both sets of defendants did in fact provide officers with a “founded suspicion” that “criminal activity” was “afoot.”³⁷

III. PRACTICAL AND LEGAL EFFECT OF *DEVONE*

The fact that the New York Court of Appeals found that a search had taken place demonstrates that more personal constitutional protection from intrusive police searches is available to drivers in New York than under federal law. However, even though police officers in New York will need a “founded suspicion” of “criminality” before they may use canines, *Devone* leaves unanswered the practical question of how

²⁹ *Devone*, 931 N.E.2d at 73 (citing *Dunn*, 564 N.E. at 1057).

³⁰ *Id.* (citing *Dunn*, 564 N.E.2d at 1058) (emphasis added) (internal citations omitted).

³¹ *Id.*

³² *People v. Price*, 431 N.E.2d 267, 269 (N.Y. 1981).

³³ *Devone*, 931 N.E.2d at 73–74.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 74 (quoting *People v. Yancy*, 654 N.E.2d 1233, 1236 (N.Y. 1995)).

³⁷ *Id.*

“founded” must the suspicion be. The New York case law backing this standard is scarce and some find the decision in *Devone* troubling and even flawed.³⁸ For example, the officer in the second set of *Devone* facts had a “founded suspicion” because of “the condition of defendant’s vehicle, the unusual travel plans of defendant[s], and defendant’s ‘nervous’ behavior.”³⁹ Would it be enough if a driver was just acting very nervous? Would that give an officer the cause necessary to use a drug-sniffing canine? Furthermore, what does a missing license plate, expired insurance, or the ownership of the vehicle have to do with drugs?

These shortcomings of the “founded suspicion” standard were explained in the three-judge dissent to *Devone*. Writing for the dissenters was Judge Ciparick, who said, “the majority allows such a search without requiring any suspicion of illegal drug activity. Without a nexus between the suspicion held by the police and the capability of the canine,” the police probe into the driver’s vehicle “is but a fishing expedition.”⁴⁰ What Judge Ciparick points out is that under the majority’s rule, the suspicion of criminality that an officer must have does not have to be related at all to the purpose of the canine sniff-search, which is to locate illegal drugs. In the first set of facts in the *Devone* case, the police officer was clearly investigating the ownership of the vehicle, but decided to do a drug-search using the canine.⁴¹ The fact that no “nexus” is required, coupled with the fact that “[i]n New York, the permissible reasons for stopping a vehicle range from a violation of the Vehicle and Traffic Law to a roadblock,” creates a situation where police officers have a great deal of freedom and can be tempted to “skirt the line between legal and illegal searches.”⁴²

CONCLUSION

Thus, *Devone* is a double-edged sword. It provides a defendant in New York with a defense to the admission of key evidence that

³⁸ See Gregory Zak, *Annual New York State Constitutional Issue: Search and Seizure: Supreme Court of the New York Appellate Division, Third Department*, 26 *TOURO L. REV.* 821, 832–35 (2010).

³⁹ *Devone*, 931 N.E.2d at 74.

⁴⁰ *Id.* at 76 (Ciparick, J., dissenting).

⁴¹ *Id.* at 72.

⁴² 1-20 MATTHEW BENDER & CO., INC., *NEW YORK CRIMINAL PRACTICE*, § 20.04 (2010); see generally Nina Paul & Will Trachman, *Fidos and Fi-don'ts: Why the Supreme Court Should Have Found a Search in Illinois v. Caballes*, 9 *BOALT. J. CRIM. L.* 1 (2005).

would be used in a drug conviction. However, it will surely not be difficult for police officers to overcome the requisite “founded suspicion” of any “criminality” standard. As a result, it seems clear that the decision in *Devone* will encourage, rather than inhibit, the use of canine sniff-searching by police officers on the roadways. Drug interdiction task forces could employ such canines at all checkpoints and canines may even become a regular sight at all traffic stops. This increased use of canines will surely push the constitutional boundaries of the *Devone* decision in the near future and hopefully lead to a more workable definition of “founded suspicion.”