



LGIT'S ROLL CALL REPORTER **MAY 2006**

CANINE'S INSTINCTIVE INTRUSION INTO VEHICLE'S OPEN WINDOW DURING NARCOTICS SCAN DID NOT VIOLATE FOURTH AMENDMENT

QUESTION: Did a canine scan of a motor vehicle violate the Fourth Amendment when, during the scan, the dog, on his own, poked his head through an open window of the vehicle and then immediately alerted?

ANSWER: No. The canine's brief and instinctive intrusion into the open window of the vehicle did not transform the scan into an illegal interior search.

CASE: *Cruz v. State*, No. 1417, September Term, 2005
Maryland Court of Special Appeals, Decided April 4, 2006

In *Cruz v. State*, the Court of Special Appeals determined that a canine scan of a motor vehicle did not constitute an illegal search under the Fourth Amendment when, during the scan, the dog poked his head through an open window of the vehicle and then immediately alerted.

The facts in *Cruz* established that, on February 25, 2005, at approximately 12:47 p.m., Maryland State Police Sergeant Mike Lewis observed a 2005 Chevy Trailblazer traveling southbound on Interstate 95 directly behind a pickup truck. Sergeant Lewis initially thought that the Trailblazer was likely being towed because it was following so closely behind the pickup. Sergeant Lewis stopped the Trailblazer for following too closely, and made contact with its driver. Cruz, the Trailblazer's driver and sole occupant, produced a Massachusetts driver's license.

As Cruz surrendered his license, Sergeant Lewis noticed that his hands were trembling badly and that Cruz avoided all eye contact. When asked for the registration card, Cruz responded that the vehicle was rented. While Cruz looked for the rental agreement, Sergeant Lewis observed that Cruz's chest was palpitating and that the carotid pulse on the right side of his neck was pounding. Cruz found the rental agreement and gave it to Sergeant Lewis. The agreement indicated that the vehicle had been rented at 6:00 a.m. that morning at Boston's Logan Airport and had to be returned the following morning. When he peered through the Trailblazer's tinted glass, Sergeant Lewis saw no luggage. He saw one cardboard box marked for a Dremel rotary power tool on the rear cargo floor. The box was taped at one end. Although he did not have adequate probable cause at that juncture to conduct a warrantless search of the vehicle, based upon his observations, Sergeant Lewis requested a certified drug detection canine handler to scan the Trailblazer to determine if it contained any narcotics.

Just minutes later, Trooper Joseph Catalano, a drug dog handler, responded with Bruno, a yellow Labrador Retriever certified in the detection of controlled dangerous substances. Trooper Catalano arrived approximately eight minutes after the traffic stop. Cruz was asked to step away from the vehicle so the canine scan could be safely conducted. Bruno was then given the command to seek. Bruno immediately went to one of the vehicle's rear corners and stopped. This behavioral change prompted Trooper Catalano to pull him around, to give him a "second chance". Bruno then moved quickly down the side of the Trailblazer and positioned himself below the open right rear window. Then, without any prompting from his handler, Bruno jumped onto the vehicle, placing his paws on the sill of the open window. Although it was unclear from the footage from Sergeant Lewis's patrol car videotape, the Court assumed from witness testimony that Bruno put his head through the open window, and then passively alerted for the presence of narcotics inside the vehicle by immediately sitting down beneath the window. Trooper Catalano then opened the vehicle's right rear door and put Bruno inside. Sergeant Lewis then opened the Trailblazer's tailgate and removed the cardboard box, the only item he saw in the vehicle. Inside the box were 5,370 grams (5.3 kilograms) of cocaine. Cruz was arrested and advised of his *Miranda* rights.

Prior to his trial, Cruz moved to suppress the evidence seized from the Trailblazer, arguing that the State had crossed the line of a permissible canine scan when the dog put his head through the open window and then alerted to the presence of drugs. The trial court denied the motion, and Cruz subsequently was convicted of importing a controlled dangerous substance into Maryland.

The Court of Special Appeals affirmed the conviction. In doing so, the Court relied on Supreme Court precedent holding that an exterior canine sniff of an automobile that does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics is not a "search" under the Fourth Amendment as no legitimate privacy interests are implicated. In other words, a person cannot reasonably expect that they have a legitimate privacy right in a smell emanated from illegal drugs hidden inside their vehicle. The Court further relied on the numerous Maryland cases holding that a positive alert by a drug dog during an exterior scan of a vehicle gives rise to probable cause to search that vehicle. In light of this precedent, the Court of Special Appeals concluded that Bruno's "brief and instinctive intrusion into the open window of the vehicle did not transform the scan into an illegal interior search." The factors supporting this conclusion were: (1) Trooper Catalano and Bruno were lawfully present at the site of the sniff; (2) the officer and the dog had a right to stand outside the vehicle, which had been lawfully stopped for a traffic offense; (3) the window of the vehicle was already open when Bruno jumped onto the sill; (4) Trooper Catalano never instructed Bruno to jump onto the vehicle; and (5) the videotape showed that Bruno briefly "stood" on his back legs, with his paws upon the door, and then immediately went into a full-alert sit. The Court gleaned from these facts that Bruno had simply responded to the smell he had detected, which was emanating from the open car window.

NOTE: In *Cruz*, the Court emphasized that the dog's "instinctive actions" did not violate the Fourth Amendment. If there had been evidence, however, that the dog's "instinctive actions" were encouraged or enabled by the actions of the troopers, the result may have been different. Such evidence could consist of testimony and/or videotapes establishing that the police rolled down the vehicle's window or asked the defendant to roll down a window, or open a hatchback or tailgate to enable the dog to get a "better sniff", or that the canine handler encouraged the dog to jump in, or on, the vehicle. In the absence of such evidence, courts will likely find that the police remained

within the range of activities they may permissibly engage in when they have reasonable suspicion to believe an automobile contains narcotics.

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