IN THE IOWA DISTRICT COURT FOR CEDAR COUNTY

STATE OF IOWA,

Plaintiff,

vs.

PAUL BRUCE COUGHLIN,

Defendant.

No. FECR017152

RULING ON MOTION TO SUPPRESS

On November 1, 2002, the defendant's Motion To Suppress filed on August 8, 2002, came on for evidentiary hearing. The defendant, ("Coughlin"), was represented by Attorney Leon Spies. The State filed a Resistance To Motion To Suppress on August 15, 2002, and Additional Authority In Support Of Resistance To Motion To Suppress on October 31, 2002. Coughlin filed a Memorandum In Support of his Motion To Suppress Evidence on November 1, 2002, to which the State filed Additional Points And Authorities on November 5, 2002. The State was represented by Assistant County Attorney Sterling Benz.

The motion grows out of a stop of Coughlin's vehicle on Interstate 80 in Cedar County, Iowa, on June 27, 2002, for speeding. When Trooper Stammeyer of the Iowa State Patrol, who stopped Coughlin's car, leaned inside the vehicle to discuss the speeding infraction with Coughlin, he smelled fresh, not burnt, cannabis. Fresh cannabis has a very distinct odor, and Stammeyer was certain the smell

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was from fresh cannabis. (No issue regarding Stammeyer's expertise in drug detection or drug trade issues was raised at the hearing, because he has had extensive training in interdicting drugs and has been involved in 200 - 300 arrests for drug-related activities. Seven to eight of those arrests involved major interdiction incidents in some of which cannabis was found. In 1990, Stammeyer was certified as a drug recognition expert by the State of Iowa.) As he conversed with Coughlin, Stammeyer was told he had started his journey in Denver, Colorado, an area Stammeyer knew was a distribution point for controlled substances.

When Stammeyer returned to his vehicle to determine the validity of Coughlin's driver's license, he learned Coughlin had a prior criminal history for controlled substances. He also was aware the Michigan license plates on the car were from the Detroit, Michigan area, a known distribution point for drugs. Coughlin contacted Trooper Neville, the ISP canine unit in the area, and requested him to have his dog, "Baron", a Belgian Malamute, conduct an exterior vehicle canine search. Before Trooper Neville arrived, Stammeyer issued Coughlin a citation for speeding. When he gave the citation to Coughlin, he again smelled the moderate odor of fresh cannabis. He was very certain of

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the identity of the scent he detected. Upon being asked, Coughlin stated he had no cannabis in the car. Coughlin also told Stammeyer he had no prior arrest for controlled substances. Coughlin's denial of prior arrests occurred before the canine search, about the time Stammeyer told him he smelled fresh cannabis in his car.

Before Baron conducted his walk-around of the vehicle, Coughlin relocated to Stammeyer's vehicle, where he once again denied any prior arrests. After Neville conducted his canine walk-around with Baron, he secured Baron in his car and informed Stammeyer Baron had shown interest in and "alerted" at the rear of the vehicle.

Stammeyer returned to his vehicle and asked Coughlin for permission to search his car. Coughlin denied his request. Stammeyer then informed Coughlin he knew of his prior criminal history, which Coughlin then confirmed. Coughlin then was told by Stammeyer there was probable cause to search his vehicle, at which point he Mirandized Coughlin. The search of the vehicle disclosed approximately 25.8 pounds of fresh cannabis.

In addition to the odor Stammeyer detected and Coughlin's failure to tell him the truth on two occasions about his prior criminal history, Stammeyer noticed Coughlin was nervous in the car; his right leg was

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bouncing. After Baron's walk-around and a discussion with Neville, Stammeyer decided from all of the circumstances confronting him, probable cause existed to search Coughlin's vehicle.

Although Coughlin challenges whether probable cause existed to search his vehicle, the major thrust of his argument at the hearing was that Baron neither "alerted", nor "indicated" during the walk-around of his vehicle. This Court is convinced that even if Coughlin's contentions regarding Baron are correct, Stammeyer still had probable cause to search Coughlin's vehicle. The Court finds, however, based upon the evidence presented, Baron both "showed interest" and "alerted" during the walk-around of Coughlin's SUV.

Baron did not "indicate" during the walk-around. In other words, he did not pinpoint the strongest area of scent emanating from the vehicle by either biting, barking, or scratching at a specific location on the vehicle. When Baron "alerted", however, Neville knew his canine was scenting narcotics. Baron would not obey Neville, he began breathing more heavily and became more nasal, and he turned his body in a perpendicular fashion toward the vehicle between the driver's side rear back door and wheel well. Baron exhibited similar behavior at other points around the

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vehicle. The dog did not "indicate," however, because the vehicle was parked at the side of a busy interstate highway, and it was windy outside. When vehicles, particularly semis, passed by, additional gusts of wind occurred, diffusing the cannabis scent. Neville knew Baron's failure to "indicate" meant the quantity of the drug scent was either excessive or minimal, or, it was too windy for Baron to locate the main source of the scent.

During January of 2002, Baron was deployed on 67 occasions. His behavior indicated narcotics scent on 24 occasions. On 23 of those occasions, narcotics were found. Of course, the fact that narcotics were not found on the 24th occasion does not mean narcotics had not been present at one time. The canine never can tell whether narcotics actually are present, all it can do is "inform" its handler there is a scent of narcotics.

The defendant's expert, Dr. Dan J. Craig from San Antonio, Texas, testified Baron's records set forth on State's Exhibit 2 and 3 demonstrate Baron is not a reliable drug detector canine. The main thrust of Dr. Craig's testimony was that Baron was unreliable in the instance involving Coughlin's car because he did not make his final response of "indicating" as he was trained to do. Since Baron didn't "indicate", Dr. Craig concluded his behavior

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could not reliably be said to show he had scented drugs during the walk-around.

The State's expert witness, Wendell Nope, agreed Baron did not "indicate" during the walk-around, but he said Baron's records show he is a highly reliable drug detector canine. He testified Neville was skillful in handling Baron during the walk-around, and Baron did "alert" at the rear quadrants of both the driver and passenger sides of the vehicle.

Nope stated Baron had not been coerced by his handler. Based upon his observation of the walk-around, he believes Baron smelled the odor of cannabis as he was trained to detect. Nope testified although all dogs generally alert in the same manner, each individual dog's alerting and indicating behavior is slightly different and the dog's handler would be more able to detect alerting behavior than someone who was not familiar with the dog.

Nope has spent far more time than Craig in training and handling drug detector dogs. As a matter of fact, Craig never has trained or handled a drug detecting dog. Nope, on the other hand, is a teaching judge employed by the Utah Police Academy Training Facility. As a teaching judge, he has attained the highest level of accreditation awarded for training and handling drug detector canines.

He has been a handler, a department instructor, a school or facility instructor, a police dog judge, and, finally, a teaching judge. He is certified to create new technology or training for new uses in canine detection. He has evaluated well over 1,000 trained drug dogs.

Mr. Nope is more expert in the area of drug detection canines that Dr. Craig. The method used to train drug detection dogs in Utah where he is responsible for such training, has been used to train approximately 25 percent of the more than 10,000 police dogs across the United States. Dr. Craig has far less experience with dogs.

The defendant relies particularly on the case of United States v. Jacobs, 986 F.2d 1231 (8th Cir. 1993) and United States v. Heir, 107 F.Supp.2d 1088 (D.C. Neb.) to support his case. Subsequent to Jacobs, the 8th Circuit Court of Appeals decided United States v. Martinez, 78 F.3d 399 (8th Cir. 1996), in which it stated:

> In United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir. 1993), we invalidated a search warrant because the police failed to tell the magistrate relevant information about a drug sniff. The police said that a drug dog "exhibited an interest" in a package, but they did not tell the magistrate that the dog failed to alert on the package. . . We held that the police violated Franks v. Delaware, 438 U.S. 154, 155-56 . . . (1978), because the omission was made with at least a reckless disregard for whether it made the warrant application misleading, and we further held that the evidence

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> had to be suppressed because the application did not establish probable cause when it was supplemented with the omitted material. . . .

The magistrate was not told in Jacobs a second dog called to examine the package involved failed to alert or show an interest in it.

No such failure either to inform the magistrate or on Baron's part occurred in this case. In addition, the other circumstances existing in this case were not present in Jacobs. In Jacobs, only the dog's behavior led to the issuance of the warrant. It was the omission of the police to fully inform the magistrate regarding the dog's questionable alerting behavior, the failure of the second dog to alert or show interest, and the absence of other circumstances to support the issuance of a warrant which was objected to by the Jacobs court.

In Heir, experts testified the dog's "alert" behavior could easily be attributed to the handler's "cueing" of the animal during the walk-around of the car. The Heir court held alerting behavior alone is too subjective a standard to establish probable cause without an objectively observable "indication" by the dog.

In the instant case, there was a good deal more than Baron's alerting behavior which provided probable cause to search Coughlin's car. This Court is not called upon,

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therefore, either to agree or disagree with the Nebraska court that alerting without indicating behavior alone could or could not provide probable cause to search. This Court suspects, however, a bright line, per se test holding alerting without indicating behavior alone does not provide probable cause to search an automobile for drugs is overbroad. In such situations, weather conditions, the canine's prior history, the intensity of the dog's behavior, and the handler's expertise probably should be considered on a case-by-case basis where the dog's actions provide the sole basis for a warrantless search.

Wherefore, the defendant's Motion To Suppress is overruled.

Dated: November 7, 2002.

Patrick J. Madden, Judge
Seventh Judicial District of Iowa

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy [illegible] U.S. Mail, postage prepaid in envelopes [illegible] each of the attorneys of record herein at their respective addresses [illegible] on

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