"THE FEDERAL CORNER"

Did Lex Really Sniff Out the Drugs or Did He Just Want a "Giftee?"

Buck Files

Unless you are the very best or the very worst at what you do, there is always someone above you or below you on the competency totem pole. This is true without regard to one's profession or job. Whether it's doctors or lawyers or dentists on the one hand or welders or painters or mechanics on the other, it's a fact of life. For example, we all know a surgeon whom we would want to take care of us in the event of an emergency -- and we know another surgeon whom we would never want in the operating room with us.

I had never considered this before, but the same is true of drug dogs. Some are better at what they do than others. This truism came to mind this morning when I read an Associated Press newspaper article on an Illinois drug dog, Lex. As soon as I got to the office, I went to my computer and downloaded *United States v. Bentley*, ___ F.3d ___, 2015 WL 4529024 (7th Cir. July 28, 2015) [Panel: Chief Judge Wood and Circuit Judges Flaum and Manion (Opinion by Wood)]. What I found was an opinion that is both interesting to read and instructive on the law. Enjoy!

My Synopsis of the Facts

Aaron Veerman, an officer with the Bloomington, Illinois police department was working traffic on Interstate 55. For a reason not mentioned in the opinion, he observed a Chrysler Pacifica parked at a convenience store and ran a license check on it. Veerman was advised that the car was registered to a Tonya Smith of Kankakee, Illinois, and that her driver's license had expired *18 years earlier*. [Note: A little unusual!]

Veerman followed the car on Interstate 55 until the driver committed a lane violation. He signaled for the driver to pull over. When he did, Veerman went to the Pacifica and found that the driver was Larry Bentley. Veerman engaged in the usual conversation and Bentley gave inconsistent statements about where he lived and what his relationship was with Tonya Smith. Bentley also said that he had "a couple hundred dollars" with him. Another police officer, Nikolai Jones, came to the scene and observed a spare tire in the back seat of the car. Veerman and Smith conferred and decided to seek the help of a drug dog.

Officer Justin Shively brought Lex, a (*supposedly*) trained drug dog to the scene. The officers asked Bentley to get out of the car and to permit the officers to search him while Lex was sniffing about the car. Bentley agreed and the officers found a cell phone, nine money orders for the total of $5,600 and a wallet that contained three more money orders that added up to an additional $900. While the officers were conducting their

search, Lex alerted to drugs in the Pacifica. The officers searched the vehicle and found nearly 15 kilograms of cocaine in a trap compartment.

Bentley was indicted for a violation of 21 U.S.C. § 841 (a)(1). In the district court, his lawyer filed a motion to suppress the evidence seized during the traffic stop. Judge James E. Shadid, Chief Judge of the United States District Court for the Central District of Illinois, denied the motion to suppress. Judge Shadid found that Veerman had probable cause and reasonable suspicion to stop Bentley even though he did not see who the driver was. Veerman did know that the owner of the vehicle did not have a valid driver's license and he had observed a traffic violation. Judge Shadid also found that Lex was reliable enough as a drug dog to establish probable cause. A jury convicted Bentley and Judge Shadid sentenced him to 240 months confinement, followed by 10 years of supervised release. Bentley gave notice of appeal.

Chief Judge Wood's opinion contains, in part, the following:

> [Dog Alerts & Probable Cause]
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> We now turn to Bentley's challenge to the use of the drug-detection dog. An alert from an adequately trained and reliable dog is sufficient to give rise to a finding of probable cause. *United States v. Washburn,* 383 F.3d 638, 643 (7th Cir.2004).
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> [The Government's Unnecessary Concession]
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> The government conceded that the police lacked probable cause to search Bentley's vehicle if we disregard Lex's alert. In so doing, it may have acted too hastily: before Lex alerted, the police already knew that Bentley could not keep his story straight, that the spare tire was in an odd place, and that the search of Bentley's person (done with his permission) had turned up far more money than Bentley had admitted to having. If Bentley can show that Lex was not adequately trained and reliable, this would weaken the case for probable cause, but we nonetheless would need to consider the totality of the circumstances before finding that the search of the car was unconstitutional.
>
> [Bentley's Point Number One]
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> In pressing his challenge to the dog's alert, Bentley makes two principal points. First, he contends that Lex's past performance in the field suggests he is particularly prone to false positives (*i.e.,* signaling to his handler that there are drugs in a vehicle when there are not). He has a point. Lex alerts 93% of the time he is called to do an open-air sniff of a vehicle, and Lex's overall accuracy rate in the field (*i.e.,* the number of times he alerts and his

human handler finds drugs) is not much better than a coin flip (59.5%).

[Supreme Court and Seventh Circuit Authority]

The Supreme Court, however, recently rejected a proposed rule that would have treated the dog's field record as a "gold standard." To the contrary, it said, the record is of "relatively limited import." *Florida v. Harris*, ——U.S. ——, ——, 133 S.Ct. 1050, 1056, 185 L.Ed.2d 61 (2013); see also *United States v. Funds in Amount of $100,120.00*, 730 F.3d 711, 724 (7th Cir.2013) (recognizing that *Harris* changes the district judge's analysis). Instead, "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert." *Harris*, 133 S.Ct. at 1057. In order to assess whether the police adequately trained their dog, the *Harris* Court instructed trial judges to hold a probable-cause hearing:

> If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence.

Id. at 1058. The Court did not, however, suggest what weight courts should give to different types of evidence, nor did it offer any tie-breakers for district courts to use.

[Judge Shadid Followed the Law]

The district judge dutifully followed the *Harris* Court's instructions: he let the government submit evidence about Lex's training. That evidence included the dog's success rates in controlled settings as well as testimony from the dog's handler and the training institute's founder. The judge also allowed Bentley to challenge those findings, to cross-examine the handler and the Canine Training Institute's (CTI) founder, and to put on his own expert witness. The judge then weighed all the evidence, decided to credit the government's experts over Bentley's, and decided that Lex's alert was reliable enough to support probable cause. Our review of a district court's choice between one version of the evidence and another is typically very deferential (even if experts are involved), and we are given no reason to deviate from that approach here.

[The Court's "Atta-boy" to Bentley's Lawyer]

We acknowledge that Bentley put on a good case. He presented a fair amount of evidence that Lex was at the back of the pack. The head of CTI, the company that trained Lex, was embarrassed by Lex's 93% alert rate in the field: "Well, I don't like to see that he indicated at that high of a rate." He went on to testify (consistently with the government's theory) that the dog's rate is so high because there is embedded bias in his use: Lex is called only when the police already suspect that drugs may be present. He added, "I understand that the way that they are actually deploying the dogs in Bloomington, not to do general interdiction but specifically when there is suspicion that made me feel more comfortable." Bentley also brought out that long after the 2010 traffic stop, Lex was removed from the field for two weeks in April 2012 after he failed two simulated vehicle searches. Bentley rightly points out that Lex *is* smart. Shively testified that he rewards Lex every time the dog alerts in the field. Presumably the dog knows he will get a "giftee" (a rubber hose stuffed with a sock) every time he alerts. If Lex is motivated by the reward (behavior one would expect from any dog), he should alert *every* time. *This giftee policy seems like a terrible way to promote accurate detection on the part of a service animal, lending credence to Bentley's argument that Lex's alert is more of a pretext for a search than an objective basis for probable cause.* [Emphasis added]

[59.5% Accuracy is Good Enough]

Even if we were to ignore *Harris* and focus on Lex's 59.5% field-accuracy rate, though, that rate is good enough to support a finding of his reliability and thus to allow his alert to constitute a significant piece of evidence supporting the ultimate conclusion of probable cause. In the past, we have concluded that a 62% success rate in the field is enough to prevail on a preponderance of evidence, and we have gone on to note that " 'probable cause' is something less than a preponderance." *United States v. Limares*, 269 F.3d 794, 798 (7th Cir.2001) (citation omitted). Other circuits have accepted field detection rates less than Lex's 59.5%. See, *e.g., United States v. Holleman*, 743 F.3d 1152, 1157 (8th Cir.2014) (57%); *United States v. Green*, 740 F.3d 275, 283 (4th Cir.2014) (43%). This should not become a race to the bottom, however. We hope and trust that the criminal justice establishment will work to improve the quality of training and the reliability of the animals they use, and we caution that a failure to do so can lead to suppression of evidence. We will look at all the circumstances in each case, as we must.

[Bentley's Point Number Two]

Bentley's second argument that Lex is an unreliable source of probable cause hinges on the allegedly poor quality of the school that trained him

and his handler. This argument cannot get off the ground. Bentley concedes that there are no national standards by which we can judge the training Lex received at CTI. Moreover, there is evidence in the record that CTI modeled its certification standards after the leading national associations in the field.

[The Court's Conclusion]

The district judge did not err when he found Lex to be reliable for purposes of contributing to a probable cause determination based on his training records, his 59.5% field rate, and CTI's curriculum. Lex's mixed record is a matter of concern, but under *Harris's* totality-of-the-circumstances test, we have no reason to override the district court's determination.

My Thoughts

- We've all had the dog alert-and-sniff cases and have wondered about how the dog *knew* that there were drugs in the vehicle. Because we do not speak dog and dogs do not speak human, it's impossible to *confront* the dog on this issue. Law enforcement officers who work with drug dogs expect us to make a leap of faith as to the competency of their dogs.
- Unfortunately, whether we do or do not make a leap of faith makes absolutely no difference because of *Florida v. Harris*. Judge Shadid, though, gave us a road map to follow in the manner in which he presided. Bentley's lawyer was given the latitude to present all the evidence that he had to the court -- and he did an excellent job in doing this.
- So what is the lesson? If Lex or Fang or Killer alerts to the drugs in your client's vehicle, the officers are going to have probable cause to search it. The dog wins.