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United States District Court,
N.D. Ohio,
Western Division.
UNITED STATES of America, Plaintiff
v.
James RHEE, Defendant.

No. 3:12CR2.
Filed May 28, 2014.

Alissa M. Sterling, Office of the U.S. Attorney, Toledo, OH, for plaintiff.

Jeffrey M. Gamso, Neil S. McElroy, Toledo, OH, for Defendant.

ORDER

JAMES G. CARR, Senior District Judge.

***1** This is a criminal case in which a grand jury has charged defendant James Rhee with possessing 5.9 kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. § 841.

Pending is Rhee's motion to suppress the cocaine, which he contends authorities seized during an unconstitutional search of his car. (Doc. 45).

For the following reasons, I deny the motion.

Background

A. The Traffic Stop

Rhee's case arises out of a traffic stop on the Ohio Turnpike on December 22, 2011.

On that date, Trooper Ryan Stewart of the Ohio Highway Patrol was on routine patrol in Lucas County, Ohio, near milepost 53 of the Turnpike.

Around 11:15 that morning, Stewart saw a black SUV, which was traveling eastbound in the right-hand lane of traffic, slow down as it passed his patrol car. The trooper thought this suspicious: the SUV was already traveling in the slower lane of traffic, and the driver appeared rigid and did not look in Stewart's direction while passing his marked vehicle.

Stewart pulled onto the Turnpike and followed the vehicle for several miles, during which time Stewart confirmed that the SUV was traveling in excess of the posted speed limit. Accordingly, Trooper Stewart activated his warning lights and stopped the SUV.

Stewart approached the SUV on the passenger side and questioned the driver, who identified himself as James Rhee. After Rhee produced a commercial driver's license, Trooper Stewart returned to his vehicle and ran a computer check. He discovered that Rhee's driving privileges were suspended.

Trooper Stewart then radioed his partner, Stacy Arnold, and asked her to perform a "canine walk around" on Rhee's vehicle. (Doc. 56 at 14). Trooper Arnold arrived shortly thereafter, accompanied by Rony, a drug-sniffing dog.

Arnold, who had worked as an Ohio Highway Patrol trooper for eighteen years—including the past ten years as a canine handler—testified she had Rony perform a "free sniff" of Rhee's car. During the free sniff, Arnold walked Rony around the SUV without directing his attention to any particular area.

Trooper Arnold then directed Rony to perform a "detailed sniff," where she "present[ed] certain seams on the vehicle that [she] wants [Rony] to check."

(Doc. 56 at 121–122).

During the detailed sniff, Rony "alert[ed] to the rear trunk seam" of the SUV. (*Id.* at 122). An alert means that there is a noticeable change in Rony's behavior. Here, Trooper Arnold saw Rony pause momentarily near the left rear-end of the SUV, then walk toward the rear license plate, square his body toward the vehicle, and turn his head to the side.

After Rony alerted, he began scratching the rear of the SUV with his paw. Trooper Arnold explained that this behavior meant Rony "indicated" on the vehicle: he had smelled one of the odors—cocaine, marijuana, methamphetamine, heroin, and their derivatives—he had been trained to detect. (*Id.* at 124).

The troopers then searched Rhee's SUV and discovered six individually wrapped bundles of cocaine secreted behind the rear wheel wells.

B. Rony's Training and Certification

***2** Rony is a four-and-a-half-year-old German Shepard who received his initial training at Excel K–9, a canine service in Cleveland. At Excel K–9, Rony successfully completed a three-week course in narcotics detection.

Thereafter, Rony began training exclusively with Trooper Arnold. In May, 2009, the North American Police Work Dog Association certified Rony and Trooper Arnold in the detection of narcotics odors. The four-week program involved "scenario-based training" where a trainer:

> may place a known narcotic odor that the dog is trained to detect within a vehicle or a room or a locker and then unknown to the handler. The handler has to utilize the canine within that specific area to see if the dog will pick up on that substance.

(Doc. 56 at 90).

Rony's training focused on detecting the odors associated with controlled substances, rather than on the controlled substances themselves. For that reason, Trooper Arnold acknowledged, it is possible that Rony may detect the "lingering odors" of narcotics even when no narcotics are in fact present in a given area. (*Id.* at 90).

After earning their initial certification, Trooper Arnold and Rony earned a re-certification in 2010 and 2012. These certifications established that Rony was qualified to detect the odors of cocaine, heroin, methamphetamine, marijuana, and their derivatives.

Besides the formal certification process, Trooper Arnold and Rony undergo sixteen hours of in-house training per month. (*Id.* at 102). They also receive quarterly training with a master canine trainer in Columbus, Ohio.

At the hearing, both I and defense counsel questioned Trooper Arnold about Rony's performance in the field. In particular, we sought information about how often Rony indicates on a vehicle that does not contain narcotics.

However, Trooper Arnold testified that she was unable to answer these questions. Indeed, she claimed she could not even guess how often an indication precipitated a search that turned up no drugs.

C. Expert Testimony

I called Dr. Lisa Lit as the Court's witness. Dr. Lit is an Associate Project Scientist in the Department of Animal Science at the University of California, Davis. She has conducted extensive research in the field of canine cognition and is also a former canine trainer.

Dr. Lit criticized Rony's certification process on the ground that it did not employ double-blind protocols, in which neither the training officer nor the

canine handler knows whether a scent-bearing object is present in a particular vehicle or area.

Dr. Lit then opined that a handling officer's belief that drugs may be present in a given area can adversely affect a dog's ability to identify the odor of narcotics.

In a study that she co-authored, Lit concluded that two factors may explain the large number of false alerts identified by canine-handlers: "(1) handlers were erroneously calling alerts on locations at which they believed [a] target scent was located or (2)[a] handler['s] belief that [a] scent was present affected their dogs' alerting behavior so that dogs were alerting at locations identified by handlers." (Doc. 77 at 7); *see also* Lit, Schweitzer, & Oberbauer, *Handler beliefs affect scent detection dog outcomes*, 14 Anim. Cog. 387 (2011).

***3** Finally, given that the Ohio Highway Patrol did not keep records of Rony's field performance, Dr. Lit testified that it was impossible to opine whether Rony can reliably detect the odor of narcotics.

Discussion

The gravamen of the suppression motion is that Rony's "indication" on the rear of Rhee's SUV did not give police probable cause for a search.[FN1] Rhee contends that, without knowing how often Rony indicated on a vehicle that contained no narcotics, Rony's indication is insufficient to justify a search.

> FN1. Rhee does not challenge the lawfulness of the stop, which, in any event, I determined was lawful (given the evidence that Rhee was speeding) and reasonable in length (roughly twenty minutes). (Doc. 56 at 165–168).

"A police officer has probable cause to conduct a search when the facts available to him would warrant a person of reasonable caution in the belief that contraband or evidence of a crime is present." *Florida v. Harris*, ——U.S. ——, 133 U.S. 1050, 1055 (2013).

Probable cause "is a practical, nontechnical conception," *Beck v. Ohio*, 379 U.S. 89, 91 (1964), and its existence depends on the totality of the circumstances, *Illinois v. Gates*, 462 U.S. 213, 230–231 (1983).

The Supreme Court's decision in *Harris* has largely cut the legs out from under Rhee's position.

In *Harris*, the Court emphasized that "in most cases," "records of a dog's field performance have relatively limited import":

> Errors may abound in such records. If a dog on patrol fails to alert to a car containing drugs, the mistake usually will go undetected because the officer will not initiate a search. Field data thus may not capture a dog's false negatives. Conversely (and more relevant here), if the dog alerts to a car in which the officer finds no narcotics, the dog may not have made a mistake at all. The dog may have detected substances that were too well hidden or present in quantities too small for the officer to locate. Or the dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person. Field data thus may markedly overstate a dog's real false positives.
>
> *Harris, supra*, 133 S.Ct. at 1057.

Given those problems, *Harris* held that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert":

> If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of

> formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs. After all, law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources.
>
> *Id.*

At the same time, the Court also emphasized that a defendant must have the opportunity to challenge the dog's reliability.

***4** In particular, the Court noted a defendant could, *inter alia:* 1) cross-examine the testifying officer; 2) call his own expert witness; 3) contest the adequacy of the dog's training or certification; and 4) inquire whether "circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions." *Harris, supra,* 133 S.Ct. at 1057–1058.

Here, Rhee's attack on the search does not pass muster after *Harris.*

First, two bona fide organizations—the North American Police Work Dog Association and the Ohio Peace Officer Training Academy—certified that Rony can reliably detect the odor of narcotics. Those certifications are sufficient for me to find probable cause for the search, and to conclude that Rony's "skills were not those of an ordinary housepet." *U.S. v. Trapp,* 2014 WL 1117012, *9 (D.Vt.).

Even peering beyond the fact of Rony's certifications, I note that certain training records indicate Rony alerted more than ninety percent of the time when a scent-bearing object was present. (Doc. 72 at 11–13).

To be sure, Dr. Lit faulted Rony's training program because it did not use double-blind protocols. However, even Dr. Lit conceded that such protocols are "pretty unusual." (*Id.* at 9). Indeed, not even Dr. Lit employed double-blind protocols in her own study. (*Id.* at 50).

And "while double-blind training maybe [*sic*] ideal, there is insufficient evidence in the record to demonstrate that [Rony's] training did not adequately prepare [him] to detect the odor of narcotics." *U.S. v. Guyton,* 2013 WL 2394895, *8 (E.D.La.).

Second, nothing about the circumstances of this particular stop undermined the reliability of Rony's indication.

To begin, there were no weather-related issues affecting Rony's free and detailed sniffs. *Cf. Harris, supra,* 130 S.Ct. at 1055 (unusual conditions may undermine reliance on dog sniff to establish probable cause).

Nor is there any evidence that Trooper Arnold cued Rony to alert or indicate on Rhee's vehicle. On the contrary, even Dr. Lit agreed that the trooper tried to move Rony past the SUV's rear area, but that Rony remained intensely interested in that area. *U.S. v. Poole,* 2013 WL 3808243, *10 (N.D.Iowa) (fact that handler did not cue dog to alert on vehicle supported reliability of dog sniff).

And while Dr. Lit had not seen any video of Rony's performance during other traffic stops (because the Ohio Highway Patrol does not keep such records), she agreed that Rony's behavior here—"[t]he tail curled over his back, the acute interest in the back of the vehicle"—"was consistent with a dog recognizing his trained odor." (Doc. 72 at 29).

Finally, the absence of records of Rony's field

performance does not undermine the case for probable cause.

As the Court explained in *Harris*, in most cases "records of a dog's field performance ... have relatively limited import." *Harris*, *supra*, 133 S.Ct. at 1056.

***5** Rhee argues I should give the field records here—or, more accurately, their absence—great weight, given Trooper Arnold's supposedly "evasive" testimony about Rony's field performance. Rhee contends that Arnold's inability even to guess how often Rony indicated on a vehicle that did not contain narcotics was cover for the alleged high rate of false positives.

I reject that argument for two reasons. First, after hearing Trooper Arnold testify on this point, I found her credible and concluded she was "testifying honestly. She just doesn't know. She's not being evasive." (Doc. 56 at 177). Thus, there is no foundation to Rhee's argument that the trooper was attempting to conceal a high false-positive rate.

Second, even if I were inclined to agree with defendant's view of Arnold's testimony—and thus find that Rony had a high rate of false positives—such evidence would not, for the reasons outlined in *Harris*, be particularly probative.

Indeed, a false positive may mean only that Rony detected the lingering odor of narcotics in a vehicle from which those narcotics had been recently removed. Or Rony "may have detected substances that were too well hidden or present in quantities too small for [Trooper Arnold] to locate." *Harris*, *supra*, 133 S.Ct. at 1056.

Because such data may "overstate a dog's real false positives," "[t]he better measure of a dog's reliability thus comes away from the field, in controlled testing environments." *Id.* at 1057. And as discussed above, Rony has received proper training to detect the odor of narcotics.

Having reviewed the evidence in light of *Harris*, I find that Rony's alert and indication gave the troopers probable cause to search Rhee's vehicle. *U.S. v. Hill*, 195 F.3d 258, 273 (6th Cir.1999) ("It is well-established in this Circuit that an alert by a properly-trained and reliable dog establishes probable cause sufficient to justify a warrantless search of a stopped vehicle.").

Conclusion

For the reasons set forth above, it is

ORDERED THAT defendant's motion to suppress (Doc. 45) be, and the same hereby is, denied.

So ordered.

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