Steve Nicely (Defense K-9 Expert) Update

By Terry Fleck

Steven Nicely continues to be used throughout the U.S. in Court as a K-9 expert for the defense.

Nicely does very well on the witnesses stand when the prosecution does not at least consult with a K-9 expert, or better still, call their own K-9 expert to rebut him. Nicely rarely is successful when a K-9 expert calls him on his qualifications, bias and pseudo-science theories.

Therefore, if Nicely, or any other defense K-9 expert, is brought into Court, law enforcement must have a K-9 expert in Court to rebut him.

In addition, Nicely focuses on "cueing" and "Clever Hans":

Cueing:

Cueing is the process of giving the dog a hint or guiding suggestion as to where the target odor is. This is why "single blind" (where the result or answer is unknown to the handler) certification is imperative and essential. If the handler does not know the result or answer to the problem, such as in an actual K-9 field deployment or certification, then the handler cannot give the dog a hint or guiding suggestion. In other words, if the handler does not the answer to the deployment, it is *impossible* for him to cue the dog into the answer.

Clever Hans:

Clever Hans was an Orlov Trotter horse that was claimed to have been able to perform arithmetic and other intellectual tasks. After a formal investigation in 1907, it was demonstrated that the horse was not actually performing these mental tasks, but was watching the reaction of his human observers. It was discovered this artifact in the research methodology, wherein the horse was responding directly to involuntary cues in the body language of the human trainer, who had

the faculties to solve each problem. The trainer was entirely unaware that he was providing such cues.

This is another reason why "single blind" certification is essential. To combat Nicely, I suggest the following policy be documented in the K-9 team's yearly (every 12 months) certification:

All certifications were conducted "single blind" (where the result is unknown to the handler). Single blind certification insures that the handler cannot "cue" the dog, as the handler does not know the result. In addition, "double blind" (where the result is unknown to both the handler and evaluator) certification was conducted periodically.

Lastly, these cases may assist the handler, the prosecuting attorney and your K-9 expert in **discrediting and defeating** Nicely:

U.S. v. Winters
U.S. Court of Appeals Eighth Circuit 2010
600 F.3d 963 - April 6, 2010

An alert or indication by a properly trained and reliable drug dog provides probable cause for the arrest and search of a person or for the search of a vehicle.

A drug detection dog is considered reliable when it has been trained and certified to detect drugs; contrary evidence that may detract from the reliability of the dog's performance properly goes to the credibility of the dog.

In drug prosecution, district court did not abuse its discretion in denying defendant's request for drug dog expert (**Steven Nicely**) to provide testimony on issue of whether drug dog alerted and the reliability of the dog. Request for expert was untimely since it was made well after cross examination of dog's handler at suppression hearing, request was entirely speculative, and reliability of dog's alerts were not dispositive of issue regarding whether there was probable cause to search defendant's vehicle.

Drug dog expert's (**Steven Nicely**) report, who opined that drug dog which alerted to defendant's car was not a well-trained drug detector

dog and that his handler was not well-trained, did not amount to newly discovered evidence as would warrant a new trial. An expert's analysis of handler and dog's training was available to defense long before trial, defendant and his attorneys were not diligent in pursuing issue, though relevant it was doubtful that evidence attacking dog's reliability was material to ultimate issue of probable cause, and there was virtually no likelihood that evidence would result in acquittal upon retrial.

U.S. v. POGHOSYAN
U.S. District Court, D. Kansas.
2010 WL 4568988 - Oct. 28, 2010

"Therefore, in light of these facts, and others, the Courts finds Mr. Nicely's expert testimony to be uncredible, and, thus, disregards it."

U.S. v NANCE
U.S. DISTRICT COURT E.D. TENNESSEE AT KNOXVILLE
REPORT AND RECOMMENDATION No. 3:09-CR-163
September 17, 2010

"Thus, this Court rejects the opinion of Mr. Nicely in determining the reliability and certification of Axel as a drug detection dog."

U.S. v OLIVARES-RODRIGUEZ
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION
2010 U.S. Dist. LEXIS 26908 - March 22, 2010

"The court further finds that although Nicely appears to have considerable experience in the area of dog training, his testimony in this case is not entitled to any weight. Indeed, his statement that he was 99% certain the dog just happened to pick up the boot where the drugs were located without picking up any scent from the drugs was ludicrous."

U.S. v GASTELO-ARMENTA
U.S. DISTRICT COURT, D. NEBRASKA
FINDINGS AND RECOMMENDATION Case No. 8:09CR92
January 21, 2010

"I have given little weight to Mr. Nicely's conclusions about (K-9) Skeen's performance and reliability because, based on the information actually provided in his curriculum vitae and testimony, I am not persuaded that Mr. Nicely has the knowledge, skill, experience, training, or education to evaluate a dog trained to perform the functions required by law enforcement in the State of Nebraska."

U.S. v. FRANCO
U.S. DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION
2009 U.S. Dist. LEXIS 116121 - December 11, 2009

"Having heard this evidence, the court agrees that the level of record keeping proposed by Nicely is not necessary to prove a dog's reliability."

U.S. v LUDWIG
U.S. District Court for the District of Wyoming
Order Denying Defendant's Second Motion to Suppress
Case No. 08-CR-224-D – September 9, 2009

"The Court finds no basis to support Mr. Nicely's speculative theory that Trooper Chatfield prompted Todd to alert during the Ludwig search."

U.S. v PROKUPEK
U.S. DISTRICT COURT FOR THE DISTRICT OF NEBRASKA
2009 U.S. Dist. LEXIS 72291- August 14, 2009

"The Court does not find the Defendants' expert, Steven Douglas Nicely, credible. His relevant experience is lacking."

U.S. v MUBDI
U.S. DISTRICT COURT W. D. NORTH CAROLINA STATESVILLE DIVISION
SUPPRESSION HEARING DOCKET NO. 5:08-CR-51
August 3, 2009

"Now, assuming, without deciding that Mr. Nicely is an expert in canine training, the court finds that his testimony is convoluted as applied to this case, ill taken and unsupported by the evidence in this case relative to the credible testimony of the officers."

U.S. v. BROOKS
U.S. DISTRICT COURT E. D. VIRGINIA, NORFOLK DIVISION
589 F. Supp. 2d 618 - November 25, 2008

"Although it was clear from his testimony that, in Nicely's opinion, the Virginia State Police fail to adequately document their certification testing procedures, he failed to offer convincing testimony indicating that the actual testing procedures utilized for Debo's training or certification were unreliable."

STATE of NEBRASKA v PASSERINI
District Court of Lancaster County, Nebraska
Motion to Suppress Case Number: CR-07-1180
November 3, 2008

"The Court finds Nicely's testimony to be unpersuasive."