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Court of Appeals of New York: People v. Devone

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COURT OF APPEALS OF NEW YORK

People v. Devone[1]
(decided June 8, 2010)

Damien Devone was indicted for criminal possession of a controlled substance in the third and fourth degree after police used a trained narcotic-sniffing dog to conduct a canine sniff of the exterior of a vehicle, in which he was a passenger.[2] Similarly, Saddiq Abdur-Rashid was indicted for criminal possession of a controlled substance in the first degree after police used a trained narcotic-sniffing dog to conduct a canine sniff of the exterior of his vehicle revealing the presence of narcotics.[3] In a consolidated appeal before the New York Court of Appeals, Devone and Abdur-Rashid challenged the admission of the drugs found as a result of these "searches," alleging that the use of trained narcotic-sniffing dogs to conduct a canine sniff of the exterior of a lawfully stopped vehicle constitutes a search under article I, section 12 of the New York State Constitution,[4] requiring reasonable suspicion.[5] Implicit within this challenge was whether such conduct also implicates the Fourth Amendment to the United States Constitution.[6] The court held that under the New York State Constitution, a canine sniff of the exterior of a lawfully stopped ve-

[1] 931 N.E.2d 70 (N.Y. 2010).

[2] *Id.* at 72.

[3] *Id.* at 73.

[4] Article I, section 12 of the New York Constitution states, in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." *See Devone*, 931 N.E.2d at 73-74 ("[W]hether a canine sniff constitutes a search is necessarily dependent upon whether it constitutes an intrusion into a place where a person has a reasonable expectation of privacy.").

[5] *Devone*, 931 N.E.2d at 71.

[6] The Fourth Amendment to the United States Constitution states, in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." In order for a Fourth Amendment search to occur "a person [must] exhibit[] an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

hicle "constitutes a search requiring founded suspicion that criminal activity is afoot and that, in each of these cases, such founded suspicion was established."[7]

In *People v. Devone*, officers pulled over a vehicle in which Devone was a passenger, after observing the driver talking on a cell phone.[8] The driver, Troy Washington, was unable to produce his license or registration at the time of the stop.[9] He told the officers that the vehicle was registered to his cousin, but claimed that he did not know his cousin's name.[10] When asked where his cousin was, he pointed to Devone, who was sitting in the front passenger seat.[11] After running the vehicle's license number, the officers discovered that the vehicle was registered to a female.[12] While the vehicle had not been reported stolen, the "suspicious inconsistencies" in Washington's answers to the officers' questions, coupled with the fact that the vehicle was registered to a female, led the officers to believe that further investigation was required.[13] The officers ordered Washington and Devone out of the vehicle, retrieved a narcotic-sniffing dog from their SUV, and proceeded to conduct a canine sniff of the exterior of the vehicle.[14]

After sniffing the exterior of the vehicle, the dog alerted the officers to the presence of drugs.[15] The officers then allowed the dog inside to search the interior of the vehicle and the dog began scratching at the center console.[16] The officers searched the center console of the vehicle and found crack cocaine.[17] Devone was arrested and charged with criminal possession of a controlled substance in the third and fourth degree.[18]

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[7] *Devone*, 931 N.E.2d at 71.

[8] *Id.* at 71-72. New York State prohibits the use of a mobile telephone to make a call while the vehicle is in motion. N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2010).

[9] *Devone*, 931 N.E.2d at 72.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Devone*, 931 N.E.2d at 72.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* For the statutory requirements of criminal possession of a controlled substance in the third degree, see New York Penal Law § 220.16 (McKinney 2010). For the statutory requirements of criminal possession of a controlled substance in the fourth degree, see New

Devone made a motion to suppress the drugs as the product of an illegal search, alleging that the use of the narcotic-sniffing dog amounted to an unconstitutional search because it was not supported by reasonable suspicion.[19] After conducting a suppression hearing, the county court held that a canine sniff constituted a search under article I, section 12 of the New York State Constitution requiring reasonable suspicion and that the police, here, lacked reasonable suspicion to conduct the canine sniff.[20] However, the appellate division reversed, holding that "[i]n light of the diminished expectation of privacy in a car as opposed to a home and the fact that 'a canine sniff is far less intrusive than a full-blown search' . . . the presence of a founded suspicion is sufficient to permit a canine sniff of the exterior of a car."[21]

Similarly, in *People v. Abdur-Rashid*, Saddiq Abdur-Rashid was pulled over for operating a vehicle with a missing front license plate.[22] After confirming that the vehicle's insurance was in effect, the officer issued Abdur-Rahsid a ticket for the missing license plate and for operating the vehicle with an expired inspection sticker and then allowed him to proceed on his way.[23] Less than an hour later, Abdur-Rashid was pulled over again for the missing front license plate.[24] The officer also observed that the vehicle "had sticks, twigs and other debris protruding from the front of it."[25] The officer checked the license of the vehicle and confirmed that Abdur-Rashid was the registered owner, however, the results incorrectly showed that the vehicle's insurance was expired.[26]

Abdur-Rashid presented the officer with the ticket that he received from the earlier stop, citing him for the missing license plate and expired inspection sticker, as proof that the prior officer had al-

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York Penal Law § 220.09 (McKinney 2010).

[19] *Devone*, 931 N.E.2d at 72.

[20] *Id.*

[21] 870 N.Y.S.2d 513, 516 (App. Div. 3d Dep't 2008) (quoting People v. Dunn, 564 N.E.2d 1054, 1058 (N.Y. 1990)). The court expressly declined to address whether the search implicated the Fourth Amendment, stating: "Since there was a founded suspicion here, we need not address whether a lesser showing-such as applies to the 4th Amendment . . . would satisfy the N.Y. Constitution." *Id.* at 516.

[22] *Devone*, 931 N.E.2d at 72.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

ready confirmed that his insurance was intact.[27] The officer ordered Abdur-Rashid out of the vehicle while he attempted to reach the first officer to corroborate his story.[28] After failed attempts to reach the first officer by radio and phone, the officer noticed that Abdur-Rashid "started to get a little fidgety and nervous" at the sight of a narcotic-sniffing dog in the officer's vehicle, which further raised his suspicions.[29]

The officer then directed his attention to Abdur-Rashid's passenger, Gayle, who "gave the officer a convoluted tale of being involved in a minor accident upon entering the roadway . . . ."[30] He told the officer "an implausible story that [Abdur-Rashid] picked him up on Long Island, that his job was to keep [Abdur-Rashid] awake en route to Schenectady, and that [Abdur-Rashid] was going to drive back from Schenectady to Brooklyn to drop Gayle off mid-afternoon and then return, alone, to Schenectady later that evening."[31] Between Gayle's suspicious story and Abdur-Rashid's nervous behavior, the officer believed further investigation was required.[32]

The officer ordered Gayle out of the vehicle and retrieved a narcotic-sniffing dog from his vehicle.[33] While circling the exterior of the vehicle, the dog alerted to the presence of drugs.[34] The officer then allowed the dog inside to sniff the interior of the vehicle and the dog again alerted the officer to the presence of drugs near the rear speaker of the passenger side of the vehicle.[35] A search of the trunk revealed a black duffel bag containing two freezer bags of cocaine.[36] Abdur-Rashid was charged with criminal possession of a controlled substance in the first degree.[37]

Following his indictment, Abdur-Rashid moved to suppress

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[27] *Devone*, 931 N.E.2d at 72.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 73.

[31] *Id.*

[32] *Devone*, 931 N.E.2d at 73.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Devone*, 931 N.E.2d at 73. For the statutory requirements of criminal possession of a controlled substance in the first degree, see New York Penal Law § 220.21 (McKinney 2010).

the drugs, alleging that they were the result of an illegal search.[38] After a suppression hearing, the trial court admitted the drugs into evidence concluding that they were the fruits of a lawful search.[39] The appellate division affirmed, "holding that the officer properly conducted an exterior canine sniff of the vehicle based upon 'a founded suspicion that criminality was afoot.' "[40]

The New York Court of Appeals granted appeals in both cases and in a five-to-four decision held that under the New York State Constitution, a canine sniff of the exterior of a lawfully stopped vehicle "constitutes a search requiring founded suspicion that criminal activity is afoot and that, in each of these cases, such founded suspicion was established."[41] In *Devone*, the court held that the officers had a founded suspicion that criminal activity was afoot, justifying the canine sniff, based on the driver's

> inability to produce his driver's license and registration for the vehicle, coupled with his responses that his cousin owned the vehicle, that he did not know his cousin's name, and that [the] defendant was his cousin—together with the fact that the vehicle was registered to a female and not [the] defendant.[42]

Similarly, in *Abdur-Rashid*, the court held that based on the condition of his vehicle, the passenger's explanation of his unusual travel plans, and Abdur-Rashid's nervous demeanor over the presence of a narcotic-sniffing dog in the officer's vehicle, taken in the aggregate, established a founded suspicion that criminal activity was afoot, justifying the canine sniff.[43]

In affirming these convictions, the New York Court of Appeals addressed "whether a canine sniff of the exterior of a lawfully stopped vehicle constitutes a search under article I, section 12 of the New York State Constitution and, if so, what level of suspicion is required before law enforcement can conduct that search."[44] The court

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[38] *Devone*, 931 N.E.2d at 73.

[39] *Id.*

[40] *Id.* (quoting People v. Abdur-Rashid, 883 N.Y.S.2d 644, 646-47 (App. Div. 3d Dep't 2009)).

[41] *Id.* at 71.

[42] *Id.* at 74.

[43] *Devone*, 931 N.E.2d at 74.

[44] *Id.* at 71.

rejected the reasonable suspicion standard in the traffic stop context, explaining that because "there is a 'diminished expectation of privacy attributed to individuals and their property when traveling in an automobile,' . . . law enforcement need only meet a lesser standard before conducting a canine sniff of the exterior of a lawfully stopped vehicle."[45] In reaching its decision, the court emphasized that whether a canine sniff constitutes a search under New York jurisprudence is contingent upon whether it constitutes an intrusion into an area where an individual has a reasonable expectation of privacy.[46] Ultimately, the court held that a canine sniff of the exterior of a lawfully stopped vehicle constitutes a search under article I, section 12 of the New York State Constitution requiring founded suspicion that criminal activity is afoot.[47] Accordingly, both defendants' convictions were affirmed.[48]

The federal standard for using a narcotic-sniffing dog to detect the presence of drugs under the United States Constitution was established in *United States v. Place*.[49] In *Place*, the United States Supreme Court held that the use of drug-sniffing canines does not constitute a search within the meaning of the Fourth Amendment.[50] Therefore, federal precedent provides minimal guidance on the level of suspicion required for police to use this investigative technique in New York because it is not afforded the same level of protection under the Federal Constitution, as it is under the New York State Constitution.[51]

In *Place*, the defendant, Raymond Place, aroused police suspicion while standing in line at Miami International Airport to purchase airline tickets to New York.[52] The officers stopped Place as he approached the gate to board his flight and requested that he produce his airline ticket and identification.[53] Place complied with the offic-

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[45] *Id.* at 74 (quoting People v. Yancy, 654 N.E.2d 1233, 1236 (N.Y. 1995)).

[46] *Id.* at 73-74.

[47] *Id.* at 71.

[48] *Devone*, 931 N.E.2d at 71.

[49] 462 U.S. 696 (1983).

[50] *Id.* at 707.

[51] *Compare Place*, 462 U.S. at 707 (holding that a canine sniff does not constitute a search under the United States Constitution), *with Dunn*, 564 N.E.2d at 1058 (holding that a canine sniff constitutes a search under the New York State Constitution).

[52] *Place*, 462 U.S. at 698.

[53] *Id.*

ers' request and consented to a search of his luggage, but due to his impending flight, the officers decided not to conduct the search.[54] Prior to his departure, however, the officers inspected the address tags on Place's luggage and noted that the addresses on his two bags were different.[55] Further investigation later revealed that neither address existed.[56] Based on this information and their encounter with Place, the officers contacted the Drug Enforcement Administration ("DEA") in New York to alert them about their suspicions of Place.[57]

DEA agents were waiting for Place at LaGuardia Airport in New York when his flight arrived.[58] After Place claimed his luggage, the agents approached him and informed him that based on their own observations and information they had received from officers in Miami, they believed that he was carrying narcotics.[59] When Place refused to consent to a search of his luggage, the agents took his luggage into custody to obtain a search warrant.[60] The agents took Place's luggage to Kennedy Airport where it was subjected to a "sniff test" by a narcotic-sniffing dog that alerted to the presence of narcotics in one of the bags.[61] Because this transpired on a Friday afternoon, the agents retained the luggage until Monday morning to secure a search warrant from a federal magistrate.[62] When the officers finally executed the warrant, they found 1,125 grams of cocaine in Place's luggage.[63]

The issue before the Supreme Court was "whether the Fourth Amendment prohibits law enforcement authorities from temporarily detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics."[64] While the Supreme Court ultimately held that the prolonged detention of Place's bags constituted a Fourth Amendment violation, the Court held that the use of a canine sniff does not consti-

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Place*, 462 U.S. at 698.
[58] *Id.*
[59] *Id.* at 698-99.
[60] *Id.* at 699.
[61] *Id.*
[62] *Place*, 462 U.S. at 699.
[63] *Id.*
[64] *Id.* at 697-98.

tute a search within the meaning of the Fourth Amendment.[65] The Court reasoned that a "canine sniff is *sui generis*,"[66] and that because "this investigative technique is much less intrusive than a typical search," disclosing only the presence or absence of narcotics, it does not transcend the Fourth Amendment.[67]

In *Illinois v. Caballes*,[68] the Supreme Court affirmed its holding in *Place*, confirming that the use of a narcotic-sniffing dog does not constitute a search under the Fourth Amendment.[69] In *Caballes*, the Court addressed the constitutionality of this investigative technique in the context of a traffic stop.[70] The Court held that a canine sniff of the exterior of a lawfully stopped vehicle that does not unnecessarily prolong the encounter, does not implicate the Fourth Amendment because it only reveals the presence or absence of contraband, in which there is no legitimate expectation of privacy.[71]

In *Caballes*, the defendant, Roy Caballes, was pulled over for speeding.[72] A member of the Illinois State Police Drug Interdiction team overheard the dispatch transmission regarding Caballes's seizure and headed over to the scene with a narcotic-sniffing dog.[73] While the initial officer wrote Caballes a warning ticket for speeding, the other officer walked around Caballes's vehicle with the drug-sniffing dog.[74] The dog alerted to the presence of drugs in the trunk and a search uncovered marijuana; Caballes was arrested.[75] The Illi-

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[65] *Id.* at 698. The Court held that the length of the detention of Place's luggage constituted an unreasonable seizure under the Fourth Amendment because "such a seizure can effectively restrain [a] person since he is subjected to the possible disruption of his travel plans." *Id.* at 708-09. The Court reasoned that "when the police seize luggage from the suspect's custody . . . limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention . . . ." *Place*, 462 U.S. at 708-09.

[66] *Id.* at 707 ("We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.").

[67] *Id.* ("This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.").

[68] 543 U.S. 405 (2005).

[69] *Id.* at 409.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 406.

[73] *Caballes*, 543 U.S. at 406.

[74] *Id.*

[75] *Id.*

nois Supreme Court excluded the evidence from trial "concluding that because the canine sniff was performed without any 'specific and articulable facts' to suggest drug activity, the use of the dog 'unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation.' "[76]

The Supreme Court granted certiorari to determine "[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop."[77] The Court confirmed that a canine sniff does not constitute a search within the meaning of the Fourth Amendment.[78] The Court held that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."[79] The Court reasoned that "conducting a dog sniff [does] not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy."[80] Because there is no legitimate expectation of privacy in possessing contraband, the use of a narcotic-sniffing dog to conduct a canine sniff of the exterior of a lawfully detained vehicle does not constitute a search under the Fourth Amendment to the United States Constitution.[81]

While the United States Supreme Court has explicitly ruled that a canine sniff does not constitute a search under the Fourth Amendment to the United States Constitution, the New York Court of Appeals has held that the use of narcotic-sniffing dogs does constitute a search under the New York Constitution.[82] Because of the differing treatment in state and federal precedent, the court in *Devone/Abdur-Rashid* turned to New York jurisprudence for guidance on how to treat a canine sniff of the exterior of a lawfully stopped vehicle.

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[76] *Id.* at 407 (quoting People v. Caballes, 802 N.E.2d 202, 204 (Ill. 2003)).

[77] *Id.*

[78] *Caballes*, 543 U.S. at 410.

[79] *Id. See* United States v. Jacobsen, 466 U.S. 109, 124 (1984) (holding that the possession of contraband is not a legitimate privacy interest).

[80] *Caballes*, 543 U.S. at 408.

[81] *Id.* at 410.

[82] *See Dunn*, 564 N.E.2d at 1055 (holding that a canine sniff conducted outside of a defendant's apartment door constitutes a search requiring reasonable suspicion).

In *People v. Dunn*,[83] the New York Court of Appeals refused to follow *Place* and held that a dog sniff conducted in the hallway of an apartment building constitutes a search under article I, section 12 of the New York State Constitution.[84] Rather than focusing its analysis solely on the fact that a dog sniff only discloses "evidence of criminality," the court also based its decision on "whether there has been an intrusion into an area where an individual has a reasonable expectation of privacy."[85] Therefore, in New York, the location of where a canine sniff is conducted is a determinative factor as to whether the canine sniff constitutes a search and what level of suspicion is required for it to be utilized by law enforcement.[86]

In *Dunn*, officers received a tip that the defendant, Jessie Dunn, was storing drugs in his apartment.[87] Acting pursuant to the tip, officers brought a drug-sniffing dog to the common hallway outside Dunn's apartment door; it immediately alerted to the presence of drugs.[88] The police secured a search warrant for Dunn's apartment and upon execution found marijuana, cocaine, handguns, and drug paraphernalia.[89] Dunn appealed his conviction alleging that the initial canine sniff constituted an unlawful search because it was not supported by probable cause.[90]

The New York Court of Appeals granted leave to determine whether a canine sniff conducted outside of a person's apartment to determine the presence of drugs constitutes a search.[91] The court found that a canine sniff does constitute a search within the meaning

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[83] 564 N.E.2d 1054.

[84] *Id.*

[85] *Id.* at 1057-58 ("Unlike the Supreme Court, we believe that the fact that a given investigative procedure can disclose only evidence of criminality should have little bearing on whether it constitutes a search.").

[86] *Devone*, 931 N.E.2d at 73-74 ("Based on our state jurisprudence . . . whether a canine sniff constitutes a search is necessarily dependent upon whether it constitutes an intrusion into a place where a person has a reasonable expectation of privacy."). *Compare Dunn*, 564 N.E.2d at 1058 (holding that a canine sniff conducted outside of a defendant's apartment door constituted a search requiring reasonable suspicion), *with* People v. Price, 431 N.E.2d 267, 270 (N.Y. 1981) (holding that a canine sniff of a defendant's luggage in an airport did not constitute a search in violation of the Fourth Amendment of the United States Constitution or under the New York State Constitution).

[87] *Dunn*, 564 N.E.2d at 1055.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 1056.

[91] *Id.* at 1055.

of article I, section 12, but due to "the uniquely discriminate and non-intrusive nature of such an investigative device, as well as its significant utility to law enforcement authorities, [the court] conclude[d] that it may be used without a warrant or probable cause, provided that the police have a reasonable suspicion that a residence contains illicit contraband."[92] Because the officers had a reasonable suspicion that there were drugs in Dunn's apartment,[93] they had sufficient justification to conduct the canine sniff.[94] Notably, the court was very specific in its decision about the level of suspicion required for police to use a narcotic-sniffing dog outside a person's residence. Rather than requiring reasonable suspicion alone, the court made it clear that "police have at least a reasonable suspicion *that a residence contains illicit contraband* before this investigative technique may be employed."[95]

In *People v. Price*,[96] the New York Court of Appeals applied a similar analytical framework utilized in *Dunn*, but came to a different conclusion.[97] The court in *Price* held that a canine sniff of a person's luggage does not constitute a search.[98] Therefore, the use of a trained narcotic-sniffing dog is not necessarily synonymous with a search under New York jurisprudence.[99] Privacy expectations are a determinative factor as to whether a canine sniff constitutes a search in New York.[100]

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[92] *Dunn*, 564 N.E.2d at 1058.

[93] While the court ultimately determined that the police had reasonable suspicion to conduct the canine sniff of the common hallway outside of Dunn's apartment based on their knowledge of his drug activities, "[b]y not having timely raised below the question of whether the police were lawfully in the common hallway outside his apartment when the 'canine sniff' was conducted, defendant . . . failed to preserve this issue for . . . review." *Id.* at 1056 n.2.

[94] *Id.* at 1055. The concurring opinion stressed that "in their view the sniff by a trained police dog in the hallway outside defendant's apartment did not constitute a search within the meaning of the Fourth Amendment of the U.S. Constitution or N.Y. Constitution, article I, [section] 12." *Id.* at 1059.

[95] *Id.* at 1055 (emphasis added).

[96] 431 N.E.2d 267.

[97] *Id.* at 270.

[98] *Id.*

[99] *Compare Dunn*, 564 N.E.2d at 1058 (holding that a canine sniff conducted outside of a defendant's apartment door constitutes a search requiring reasonable suspicion), *with Price*, 431 N.E.2d at 270 (holding that a canine sniff of a defendant's luggage in an airport does not constitute a search in violation of the Fourth Amendment of the United States Constitution or under the New York State Constitution).

[100] *Devone*, 931 N.E.2d at 73-74 ("Based on our state jurisprudence . . . whether a canine

In *Price*, an officer at the Los Angeles Airport observed defendants, Leon Price and Carl Parson, purchasing plane tickets to New York in cash, ten minutes prior to departure.[101] The officer also noticed that the men were acting nervous and sweating profusely.[102] Based on the defendants' suspicious behavior, the officer contacted one of his colleagues who escorted a drug-sniffing dog to the baggage area.[103] The dog alerted to the presence of drugs in Price's bag.[104] Instead of searching the luggage, however, the officers contacted the DEA which in turn notified the New York State Police Department.[105] Based on the officer's observation and the dog's positive reaction to the luggage, the officers in New York obtained a search warrant for the defendants' luggage.[106]

After the defendants arrived in New York and claimed their luggage, the DEA officers stopped them and, pursuant to the search warrant, searched their persons and luggage.[107] The search of their luggage uncovered a large quantity of heroin.[108] The defendants were arrested and charged with criminal possession of a controlled substance in the first degree.[109] The defendants moved to suppress the drugs arguing "that the use of the dog by the Los Angeles police constituted a search that was unlawful because it was not authorized by a warrant."[110] Accordingly, the defendants alleged that the dog's reaction could not be used to establish probable cause justifying the issuance of a search warrant in New York.[111]

The New York Court of Appeals granted the appeal to address the issue of "whether the use of a trained dog to indicate the presence of a controlled substance in a passenger's luggage constitutes a search within the purview of the Fourth Amendment [or the New

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sniff constitutes a search is necessarily dependent upon whether it constitutes an intrusion into a place where a person has a reasonable expectation of privacy.").

101 *Price*, 431 N.E.2d at 268.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Price*, 431 N.E.2d at 268.

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Price*, 431 N.E.2d at 268.

York Constitution]."[112] The court began its analysis by applying the two-prong test set forth in Justice Harlan's concurring opinion in *Katz*, stating: "The right to be free from unreasonable searches and seizures protects people from unreasonable governmental intrusion wherever an individual may harbor a reasonable expectation of privacy."[113] The court concluded that the defendants had no reasonable expectation of privacy in the air surrounding their luggage or the odor emanating from it.[114] Whatever legitimate expectation of privacy the defendants may have had relative to their luggage was reduced when they turned it over to a third party, the common carrier responsible for checking luggage for potential safety concerns.[115] Furthermore, the court flat out rejected the notion that the dog sniff itself constituted a search, stating: "Since the dog does nothing more than smell the air surrounding the luggage in order to detect odors emanating from that luggage, there was no intrusion or search of the luggage."[116] Accordingly, there was no violation of the defendants' rights under federal or state law.[117]

The court in *Devone/Abdur-Rashid* followed the same analytical framework it had utilized in *Price* and *Dunn* in determining whether the police's use of a trained narcotic-sniffing dog to conduct a canine sniff of the exterior of a lawfully detained vehicle constituted a search under the New York Constitution.[118] Determinative to the court's decision was "whether [a canine sniff] constitutes an intrusion into a place where a person has a reasonable expectation of privacy."[119] The court noted that "[o]ne clearly has a greater expectation of privacy in one's home than in an automobile, but that does not render the latter interest undeserving of constitutional protection."[120] The court reasoned that "[t]here is a legitimate, albeit re-

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[112] *Id.*

[113] *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 9 (1968)). *See Katz*, 389 U.S. at 361 (Harlan, J., concurring) (establishing the test for determining whether a Fourth Amendment search has occurred).

[114] *Id.* at 269.

[115] *Price*, 431 N.E.2d. at 270.

[116] *Id.* at 269.

[117] *Id.* at 270.

[118] "[T]he analysis should 'focus on whether there has been an intrusion into an area where an individual has a reasonable expectation of privacy.' " *Devone*, 931 N.E.2d at 73 (quoting *Dunn*, 564 N.E.2d at 1058).

[119] *Id.* at 73-74.

[120] *Id.* at 74. *See* New York v. Class, 475 U.S. 106, 112-13 (1986) (explaining that one

duced, expectation of privacy in an automobile."[121] However, the court noted that the expectation of privacy one has in his or her vehicle is certainly greater than the relatively low expectation of privacy that one has in his or her luggage in the hands of a common carrier.[122] Therefore, the court concluded that the use of a narcotic-sniffing dog to conduct a canine sniff on the exterior of a lawfully detained vehicle constitutes a search under article I, section 12 of the New York Constitution.[123] However, the court did not adopt the reasonable suspicion standard it had utilized in *Dunn*.[124]

Striking a balance between *Price* and *Dunn*, the court in *Devone/Abdur-Rashid* declared that while a canine sniff of the exterior of an automobile constitutes a search under article I, section 12 of the New York Constitution, due to the lesser expectation of privacy one has in his or her vehicle, law enforcement need only a founded suspicion that criminality is afoot, as opposed to the more demanding reasonable suspicion standard to utilize this investigative technique.[125] The court explained that "[g]iven [the] diminished expectation of privacy [one has in their car], coupled with the fact that canine sniffs are far less intrusive than the search of a residence and provide 'significant utility to law enforcement authorities' application of the founded suspicion standard in these cases is appropriate."[126]

Therefore, law enforcement officers in New York may utilize a canine sniff of the exterior of any lawfully detained vehicle so long as they have "a founded suspicion that criminal activity is afoot."[127] While this is a rather controversial decision, it is a logical conclusion based on the New York Court of Appeals' precedent and method of analysis in this area. The court has consistently opined that "whether a canine sniff constitutes a search is necessarily dependent upon

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has a lessened expectation of privacy in an automobile due to its function, its lack of ability to escape public scrutiny when traveling on public roads, and the fact that they are subject to pervasive regulations by the state). *But see* Arizona v. Gant, 129 S. Ct. 1710, 1720 (2009) ("Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless important and deserving of constitutional protection.").

[121] *Devone*, 931 N.E.2d at 74.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Devone*, 931 N.E.2d at 74 (quoting *Dunn*, 564 N.E.2d at 1058).

[127] *Id.*

whether it constitutes an intrusion into a place where a person has a reasonable expectation of privacy."[128] Because there is a diminished expectation of privacy in one's car, it logically flows that there should be a lesser showing of suspicion to utilize this investigative technique on the exterior of an automobile than outside one's home.[129]

However, the court did not take steps to narrowly tailor or redefine the founded suspicion standard in this context. Prior to this decision, New York courts have utilized the "founded suspicion that criminal activity is afoot" standard only in regards to law enforcement's "common-law right to inquir[y]."[130] Under the common-law right of inquiry "a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure."[131] Therefore, the court's use of the "founded suspicion" standard to justify a canine sniff of the exterior of an automobile is more of a push towards the federal standard, that the use of narcotic-sniffing dogs does not constitute a search, rather than recognition of the diminished expectation of privacy one has in his or her automobile. By only requiring law enforcement to have the same level of suspicion needed to make an inquiry to conduct a canine sniff of the exterior of a vehicle, it seems counterintuitive to justify the latter as a search. Furthermore, the court's failure to redefine the founded suspicion standard, or at least limit it to suspicions of drug activities, does not discredit such an interpretation.

The decision in *Devone/Abdur-Rashid* is troubling because of the broad implications of the "founded suspicion that criminal activity is afoot" standard set forth by the court. As emphasized by the dissent, prior to this decision, having "a founded suspicion that criminal activity is afoot" would only permit an officer to request to

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[128] *Id.* at 73-74.

[129] *See Yancy*, 654 N.E.2d 1233. In *Yancy*, New York adopted the federal automobile exception to the warrant requirement, stating:

> Warrantless searches of automobiles are already recognized as an exception to the general rule that a warrantless search is per se unreasonable, given the mobility of the vehicle and the corresponding probability that any contraband contained therein will quickly disappear, and the diminished expectation of privacy attributed to individuals and their property when travelling in an automobile.

Id. at 1236 (citing California v. Carney, 471 U.S. 386 (1985)).

[130] People v. De Bour, 352 N.E.2d 562, 572 (N.Y. 1976).

[131] *Id.*

search, not serve as justification for a search itself.[132] Furthermore, the "founded suspicion" standard put forth by the majority in *Devone/Abdur-Rashid* is problematic because it gives police unfettered discretion to conduct canine sniffs of lawfully detained vehicles even when the behavior that raises the officer's suspicion is not directly related to the purpose of utilizing a trained narcotic-sniffing dog.[133] "By way of example, the canine in *Devone* could not assist the officers in ascertaining whether defendant's vehicle was stolen, as originally suspected."[134] However, the court upheld the constitutionality of the search based on the officers' founded suspicion that "criminal activity was afoot" with no mention of whether the officers had suspicions that the defendant was in possession of narcotics.

Perhaps a more appropriate standard would be a founded suspicion that narcotics are in the vehicle or a founded suspicion that narcotic-related criminality is afoot.[135] This would have been a more prudent choice considering the purpose of utilizing a narcotic-sniffing dog is to detect the presence of narcotics. Under the court's ruling in *Devone/Abdur-Rashid*, however, officers in New York are free to utilize a drug-sniffing dog under New York law if police have a founded suspicion that any type of criminal activity is afoot, not just the possession of narcotics. "Without a nexus between the suspicion held by the police and the capability of the canine, the probe sanctioned by the [*Devone/Abdur-Rashid* court] is but a fishing expedition."[136]

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[132] *Id.* at 75 (Ciparick, J., dissenting). *See* People v. Dunbar, 840 N.E.2d 106 (N.Y. 2005) (explaining that police must have founded suspicion in order to request to search a defendant's person or car.); People v. Hollman, 590 N.E.2d 204 (N.Y. 1992) (explaining the distinction between a mere request for information and the common-law right to inquiry, which must be supported by founded suspicion).

[133] *See Devone*, 931 N.E.2d at 76 (Ciparick, J., dissenting) ("Trained canines are capable only of detecting drugs.").

[134] *Id.*

[135] *See Dunn*, 564 N.E.2d at 1055 (requiring "reasonable suspicion *that a residence contains illicit contraband*" for officers to conduct a canine sniff in the common hallway of an apartment building) (emphasis added).

[136] *Devone*, 931 N.E.2d at 76 (Ciparick, J., dissenting).

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