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### Appellate Division, Third Department - People v. Devone

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**SUPREME COURT OF NEW YORK  
APPELLATE DIVISION, THIRD DEPARTMENT**

People v. Devone<sup>1</sup>  
(decided December 24, 2008)

Damien Devone was arrested for two counts of criminal possession of a controlled substance.<sup>2</sup> Police found Devone to be in possession of cocaine after a police dog detected the presence of drugs during a walk around of the exterior of a car, in which he was a passenger, during a routine traffic stop.<sup>3</sup> The Schenectady County Court suppressed the evidence uncovered by police officers and the State appealed.<sup>4</sup> Devone alleged that the use of the police dog constituted an unlawful search under both the Fourth Amendment to the United States Constitution<sup>5</sup> and under Article I section 12 of the New York Constitution.<sup>6</sup>

Police officers observed Troy Washington talking on his cellular phone while driving and, as a result, conducted a routine traffic stop; Devone was a passenger in the car.<sup>7</sup> The officers conducting the traffic stop were a New York State Trooper and a Schenectady County Police officer.<sup>8</sup> They were working together on a task force entitled “Operation Impact,”<sup>9</sup> a program that uses “intelligence-driven policing strategies . . . to target violent crime in high-crimes

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<sup>1</sup> 870 N.Y.S.2d 513 (App. Div. 3d Dep’t 2008).

<sup>2</sup> *Id.* at 515.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See*, U.S. CONST. amend. IV, states, in pertinent part: “The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.”

<sup>6</sup> *See*, N.Y. CONST. art. I, § 12, states, in pertinent part: “The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated;” *Devone*, 870 N.Y.S.2d at 515.

<sup>7</sup> *Id.* at 514. New York State statute 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 2009).

<sup>8</sup> *Devone*, 870 N.Y.S.2d at 514.

<sup>9</sup> *Id.*

areas in Upstate [New York] and on Long Island.”<sup>10</sup> In their patrol car they had a dog trained in detecting the presence of narcotics, which accompanied them during routine patrol.<sup>11</sup>

During the traffic stop, Washington failed to produce a driver’s license or the car’s registration, nor could he provide the officers with a response as to where he was going.<sup>12</sup> Upon further questioning, Washington told the officers “the car was registered to his cousin,” however, he stated that “he did not know his cousin’s name.”<sup>13</sup> When the officer “asked where his cousin was, he pointed to the defendant.”<sup>14</sup> The officers then learned through computer verification that “while the car had not been reported as stolen, it was not registered to [the] defendant.”<sup>15</sup> A computer check also revealed that Washington did have a driver’s license, and that it was possible the car was being driven legally.<sup>16</sup>

Despite the fact that Devone may have been driving legally, his responses to routine questioning caused the police officers to become suspicious of Washington and Devone.<sup>17</sup> As a result of such suspicion, the officers decided to have the narcotics-detecting dog walk around the car.<sup>18</sup> During the walk, the police canine alerted to the presence of drugs in the car.<sup>19</sup> The officers opened the car door to allow the canine find the specific location of the drugs.<sup>20</sup> While inside, the police dog signaled to the armrest console, to which the officers found cocaine.<sup>21</sup> Washington and Devone each were charged with “criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.”<sup>22</sup>

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<sup>10</sup> David A. Paterson, Governor, State of New York, State of the State Address: Our Time to Lead (2009) (explaining the details of “Operation Impact”).

<sup>11</sup> *Devone*, 870 N.Y.S.2d at 514.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 514-15.

<sup>15</sup> *Id.* at 515.

<sup>16</sup> *Devone*, 870 N.Y.S.2d at 515.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Devone*, 870 N.Y.S.2d at 515.

<sup>22</sup> *Id.* For the statutory requirements of criminal possession of a controlled substance in the third degree see N.Y. PENAL LAW § 220.16 (McKinney 2009). For the statutory re-

At trial, Devone sought to have the evidence of cocaine suppressed, alleging that the search by the dog was unlawful.<sup>23</sup> The county court suppressed the evidence, holding that because the police officers only had a founded suspicion that criminal activity was afoot, they only had the right to obtain consent from the occupants to search the car.<sup>24</sup> The court concluded that to satisfy the New York Constitution there must be a “higher showing of a reasonable suspicion” to warrant a “canine sniff of the car’s exterior” and no such suspicion existed.<sup>25</sup>

The State appealed, alleging that the police officers were within the bounds of the state constitution to allow the police dog to walk around the exterior of the car to detect the existence of drugs.<sup>26</sup> The Appellate Division, Third Department agreed, holding that a founded suspicion justifies a canine sniff of the car’s exterior to search for drugs.<sup>27</sup> The court concluded that the “diminished expectation of privacy” in a car and the unobtrusiveness of a canine sniff did not constitute a violation of defendant’s constitutional rights against unlawful search and seizures.<sup>28</sup>

The issue presented before the court was whether under either the Fourth Amendment or under Article I section 12 of the New York Constitution, a reasonable suspicion is the minimum requirement to warrant the use of a police dog to walk around a car during a routine traffic stop in an effort to find drugs.<sup>29</sup>

The standard for the use of a canine sniff to detect the presence of drugs under the federal constitution was established in *United States v. Place*.<sup>30</sup> In *Place*, the defendant, Raymond Place, was at the Miami International Airport, standing in line to purchase airline tickets to New York.<sup>31</sup> While Place was in line, police officers became suspicious of his behavior and approached Place as he started walk-

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quirements of criminal possession of a controlled substance in the fourth degree see N.Y. PENAL LAW § 220.09 (McKinney 2009).

<sup>23</sup> *Devone*, 870 N.Y.S.2d at 515.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 516.

<sup>28</sup> *Devone*, 870 N.Y.S.2d at 516.

<sup>29</sup> *Id.* at 514.

<sup>30</sup> *United States v. Place*, 462 U.S. 696 (1983).

<sup>31</sup> *Id.* at 698.

ing towards the gate to board his flight, and requested that he produce his airline ticket and identification.<sup>32</sup> Place complied with this request.<sup>33</sup> Furthermore, police obtained consent from Place to search two bags that he had already checked, however, the officers decided not to search the bags since Place's flight was about to depart.<sup>34</sup> At the conclusion of the inquiry from the police officers, Place made a comment that he had noticed the police officers' presence prior to approaching him.<sup>35</sup> This remark impelled the officers to examine the address tags on Place's checked luggage.<sup>36</sup> Upon inspection, police found that the addresses on the two bags were different, the addresses did not exist, and the telephone numbers Place provided did not belong to him.<sup>37</sup>

Based on this information and other suspicions, the police officers contacted the Drug Enforcement Administration ("DEA") in New York, to alert them of their suspicion.<sup>38</sup> Upon Place's arrival at LaGuardia Airport in New York, DEA agents approached Place and informed him that the information they had received from police officers in Miami suggested that Place was in possession of narcotics.<sup>39</sup> The DEA agents requested Place to consent to a search of his luggage, but he refused.<sup>40</sup> Agents then informed Place that they were taking his luggage to a federal judge in order to obtain a search warrant and while Place was allowed to accompany the agents, he declined to do so.<sup>41</sup> The agents then took Place's luggage to Kennedy Airport where they had a canine police dog, trained in narcotic detection, sniff the luggage.<sup>42</sup> During the sniff, the dog alerted to the presence of narcotics in one of the defendant's bags.<sup>43</sup> Since the search was conducted on a Friday afternoon the agents had to wait until Monday morning to obtain a search warrant from a magistrate judge

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Place*, 463 U.S. at 698.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 698-99.

<sup>40</sup> *Place*, 462 U.S. at 699.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

to allow the search of the bag.<sup>44</sup> They obtained a warrant and as a result of a search of the bag agents uncovered 1125 grams of cocaine.<sup>45</sup> Place was charged with “possession of cocaine with intent to distribute.”<sup>46</sup>

The issue presented before the United States Supreme Court was whether the detainment of Place’s luggage and subsequent exposure to drug detecting dogs, based on a reasonable suspicion that the luggage contained narcotics, violated Place’s Fourth Amendment rights.<sup>47</sup> The Court concluded that due to the uniqueness and the unobtrusive nature of the canine sniff, the “exposure of [Place’s] luggage, which was located in a public place, to a trained canine—did not constitute a ‘search’ within the meaning of the Fourth Amendment.”<sup>48</sup> However, the Court ultimately held that the length of detainment of the defendant’s bags, which was approximately ninety minutes from the initial seizure of Place’s bag at the airport to the time of the canine sniff, rendered the seizure of the bags unreasonable under the Fourth Amendment.<sup>49</sup> Therefore, while a canine sniff of the bags did not constitute a search under the Fourth Amendment, the Supreme Court nevertheless suppressed the evidence resulting from the actual search of the luggage due to the unreasonableness of the detainment of Place’s bags.<sup>50</sup>

In a more recent case, the United States Supreme Court addressed the issue of the use of a canine sniff during a routine traffic stop. In *Illinois v. Caballes*,<sup>51</sup> the defendant was pulled over by a state trooper for speeding.<sup>52</sup> Shortly thereafter, another state trooper accompanied by a “narcotics-detection-dog” arrived at the scene.<sup>53</sup> While the initial police officer was writing the defendant a warning ticket for speeding, the other state trooper had the dog walk around the car to detect the presence of drugs.<sup>54</sup> During the walk around the

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<sup>44</sup> *Id.*

<sup>45</sup> *Place*, 462 U.S. at 699.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 697-98.

<sup>48</sup> *Id.* at 707.

<sup>49</sup> *Id.* at 709-10.

<sup>50</sup> *Place*, 462 U.S. at 707, 710.

<sup>51</sup> (*Caballes II*), 543 U.S. 405 (2005).

<sup>52</sup> *Id.* at 406.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

dog alerted to the trunk.<sup>55</sup> Police searched the trunk and found marijuana, and the defendant was arrested.<sup>56</sup>

The defendant was convicted on drug charges and sentenced to twelve years in prison and a fine of over \$200,000.<sup>57</sup> The defendant sought to have the marijuana suppressed alleging that the search by the police was unlawful.<sup>58</sup> The trial court denied the motion, holding that the use of the canine to detect drugs did not cause an unreasonable delay to the traffic stop, considering that from the time the defendant was pulled over to the time the drugs were found only ten minutes had elapsed.<sup>59</sup> Furthermore, the trial court held that the alert by the police dog, indicating the presence of drugs, “was sufficiently reliable to provide probable cause” to allow the police to conduct the search of defendant’s car.<sup>60</sup> The appellate court affirmed the trial court’s ruling, however, the Illinois Supreme Court reversed.<sup>61</sup> There the court held that there was insufficient evidence to suggest that the defendant was engaged in drug activity to warrant the use of a police dog to detect the presence of drugs.<sup>62</sup> The use of such dog unjustifiably turned a “routine traffic stop into a drug investigation.”<sup>63</sup> Therefore, the court concluded that the use of the dog resulted in a constitutional violation.<sup>64</sup>

In a six to two decision, the Supreme Court reversed the Illinois Supreme Court, concluding that the use of a police dog to reveal the presence of drugs did not violate defendant’s Fourth Amendment rights.<sup>65</sup> Writing for the majority, Justice Stevens noted that while the initial seizure during the routine traffic stop was lawful, such seizure could “become unlawful if it is prolonged beyond the time reasonably required to complete [the traffic stop].”<sup>66</sup> In other words, if the canine sniff of the car’s exterior took longer than what was rea-

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<sup>55</sup> *Id.*

<sup>56</sup> *Caballes II*, 543 U.S. at 406.

<sup>57</sup> *Id.* at 407.

<sup>58</sup> *See id.*

<sup>59</sup> *Id.* at 406-07.

<sup>60</sup> *Id.* at 407.

<sup>61</sup> *Caballes II*, 543 U.S. at 407.

<sup>62</sup> *Illinois v. Caballes (Caballes I)*, 802 N.E.2d 202, 204 (Ill. 2003).

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 205.

<sup>65</sup> *Caballes II*, 543 U.S. at 410 (noting that Chief Justice Rehnquist did not take part in the decision).

<sup>66</sup> *Id.* at 407.

sonably required to issue a warning ticket to the defendant, his Fourth Amendment rights would be violated.<sup>67</sup>

The Court accepted the lower court's conclusion that the defendant was not subjected to an unreasonably prolonged seizure.<sup>68</sup> The time taken to conduct the investigation and uncover the presence of drugs was justified by the nature of the traffic stop.<sup>69</sup> While both the United States Supreme Court and the Illinois Supreme Court agreed that there was not a prolonged investigation, the courts differed as to the constitutionality of the actual dog sniff.<sup>70</sup> Justice Stevens held that a dog sniff conducted "in a reasonable manner" does not cause a legal traffic stop to become unlawful "unless the dog sniff itself infringed" upon the defendant's privacy interests.<sup>71</sup> Since no person can have a legitimate privacy interest in possessing illegal contraband, the Court concluded that a dog sniff that only detects the presence of narcotics does not infringe upon the privacy interest of an individual.<sup>72</sup> No legitimate privacy interests are implicated because the presence of any lawful items will "remain hidden from public view."<sup>73</sup> Since there was not an infringement on the defendant's privacy interest, nor was there an unreasonably prolonged seizure, the Supreme Court upheld the use of a dog sniff to determine the presence of illegal narcotics, finding no Fourth Amendment violation.<sup>74</sup>

The New York courts have dealt with similar issues dealing with the legality of a dog sniff under the New York Constitution. In *People v. Dunn*,<sup>75</sup> the police received information alleging that drugs were being kept in the defendant's apartment.<sup>76</sup> Based on the information, the police had a narcotics detecting dog sniff the outside of the apartment.<sup>77</sup> The dog alerted to the presence of drugs and based on the reaction from the dog and other information police obtained a

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 408.

<sup>69</sup> *Id.*

<sup>70</sup> *Caballes II*, 543 U.S. at 408.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 408, 410.

<sup>73</sup> *Id.* at 409 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)) (internal quotation marks omitted).

<sup>74</sup> *Id.* at 408, 410.

<sup>75</sup> *People v. Dunn*, 564 N.E.2d 1054 (N.Y. 1990).

<sup>76</sup> *Id.* at 1055.

<sup>77</sup> *Id.*



warrant to search the apartment.<sup>78</sup> As a result of the search, police found a large quantity of drugs and two handguns.<sup>79</sup> The police then obtained another search warrant for a second apartment belonging to the defendant, where the police also found drugs and drug paraphernalia.<sup>80</sup>

Upon indictment for the possession of the contraband, the defendant sought to suppress all evidence that had been seized during the search of his apartments'.<sup>81</sup> He alleged that the use of the dog to detect the presence of drugs outside of his apartment "constituted an unlawful warrantless search unsupported by probable cause."<sup>82</sup> The trial court denied the defendant's motion to suppress and the defendant was convicted.<sup>83</sup> The Appellate Division affirmed, holding in a plurality decision that the dog sniff did not constitute a search "within the meaning of either the Federal or . . . State Constitution."<sup>84</sup> Although the Appellate Division concluded that a dog sniff did not constitute a search, it nevertheless held that police had a reasonable suspicion that would have warranted a search.<sup>85</sup>

The New York Court of Appeals upheld the decision; however, it rejected the conclusion that use of a narcotic-detecting dog does not constitute a search.<sup>86</sup> In doing so, the New York Court of Appeals declined to apply the United States Supreme Court's holding in *Place* to the New York Constitutional protection against unreasonable search and seizures.<sup>87</sup> The New York Court of Appeals held that the decision in *Place* "undercut[s] the right of our citizens to be free from unreasonable government intrusions" and therefore will not be followed by the New York courts.<sup>88</sup> Thus, the court concluded that the use of the narcotic-detecting dog outside the defendant's apartment intruded "into an area where an individual has a reasonable expectation of privacy" and therefore constituted a search under the

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Dunn*, 564 N.E.2d at 1055-56.

<sup>81</sup> *Id.* at 1056.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Dunn*, 564 N.E.2d at 1056.

<sup>86</sup> *Id.* at 1058-59.

<sup>87</sup> *Id.* at 1057.

<sup>88</sup> *Id.*

New York Constitution.<sup>89</sup>

The *Dunn* court also held, however, that due to the unobtrusiveness and “its significant utility to law enforcement authorities,” the use of a canine dog for drug related investigations may be conducted without probable cause or a warrant so long as there is a reasonable suspicion that illegal contraband is present in a residence.<sup>90</sup> The New York Court of Appeals concluded that there was a reasonable suspicion to warrant the use of a dog sniff to detect the presence of drugs and that the defendant’s New York Constitutional rights were not violated.<sup>91</sup>

Therefore, while *Dunn* held that the use of a dog to detect the presence of narcotics outside an individual’s apartment did constitute a search under the New York Constitution,<sup>92</sup> the New York Court of Appeals concluded that a reasonable suspicion is required to conduct a search.<sup>93</sup>

In *People v. Offen*,<sup>94</sup> the New York Court of Appeals extended the holding in *Dunn* and upheld the use of a narcotic-detecting dog, basing its holding on police’s reasonable suspicion.<sup>95</sup> In *Offen*, based on information that defendant was receiving packages containing drugs through UPS and other carrier companies, the police had a canine dog sniff the exterior of one of the suspicious packages.<sup>96</sup> The dog alerted the presence of narcotics and police then conducted an X-ray scan of the package, which revealed potential illegal contraband.<sup>97</sup> Upon the execution of a search warrant, police found drugs in the packages.<sup>98</sup>

The defendant alleged that the canine sniff violated his state constitutional rights; however, the New York Court of Appeals rejected the defendant’s argument.<sup>99</sup> Relying on the holding in *Dunn* the court concluded that “despite the absence of a warrant or probable

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<sup>89</sup> *Id.* at 1058.

<sup>90</sup> *Dunn*, 564 N.E.2d at 1058.

<sup>91</sup> *Id.* at 1059.

<sup>92</sup> *Id.* at 1058.

<sup>93</sup> *Id.*

<sup>94</sup> 585 N.E.2d 370 (N.Y. 1991).

<sup>95</sup> *Id.* at 372.

<sup>96</sup> *Id.* at 371.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.*

<sup>99</sup> *Offen*, 585 N.E.2d. at 371-72.

cause” the use of a narcotic-detecting dog did not violate defendant’s state constitutional right because there was “sufficient information to support a reasonable suspicion that the package contained contraband.”<sup>100</sup>

The Fourth Department addressed the legality of a dog sniff with regards to an individual’s car during a traffic stop in *People v. Estrella*.<sup>101</sup> In *Estrella*, the defendant was subjected to a traffic stop for having heavily tinted windows.<sup>102</sup> During the stop, the police had a narcotics-detecting dog sniff the exterior of his car.<sup>103</sup> The dog alerted to the presence of drugs and police obtained a warrant to search the car, where they uncovered the drugs.<sup>104</sup>

The defendant challenged the issuance of the warrant based on the use of the narcotic-detecting dog.<sup>105</sup> The Appellate Division upheld that trial court’s decision, holding that “the use of a narcotics-detecting dog to sniff the exterior of the vehicle during a lawful stop of his vehicle did not violate [the defendant’s] constitutional right to be protected from unlawful search and seizure.”<sup>106</sup> On appeal, the New York Court of Appeals upheld the ruling; however, the court addresses a different issue.<sup>107</sup>

While the *Esstrella* court concluded that the use of a dog to detect the presence of drugs did not violate the defendant’s constitutional rights, the court failed to discuss the level of suspicion required to conduct such a search.<sup>108</sup> In other words, the court did not specify whether reasonable suspicion was necessary for police to conduct a search by a dog sniff, or merely a founded suspicion.<sup>109</sup>

Relying on *Caballes*, the *Devone* court quickly dismissed the defendant’s claim that his Fourth Amendment rights were violated.<sup>110</sup> Devone made no allegations that he was subjected to an unreasonably

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<sup>100</sup> *Id.* at 372.

<sup>101</sup> *People v. Estrella*, 851 N.Y.S.2d 793 (App. Div. 4th Dep’t 2008), *aff’d*, 893 N.E.2d 134 (N.Y. 2008).

<sup>102</sup> *Id.* at 794. See N.Y. VEH. & TRAF. LAW § 375 (1) (b) (McKinney 2009).

<sup>103</sup> *Id.* at 795.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.* at 795-96.

<sup>106</sup> *Estrella*, 851 N.Y.S.2d at 795 (citing *Caballes I*, 543 U.S. at 409).

<sup>107</sup> *People v. Estrella*, 893 N.E.2d 134, 135 (N.Y. 2008).

<sup>108</sup> *Devone*, 870 N.Y.S.2d at 516.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

prolonged traffic stop; any such argument would be without merit, since the narcotic detecting dog was already present in the police officer's car.<sup>111</sup> The length of the stop was justified by the fact that police had to verify certain information as a result of the inconsistencies of the driver's statements that he made to police.<sup>112</sup>

While there was no valid claim under the Federal Constitutional, given New York's broader protections against searches and seizures under Article I section 12 of the New York Constitution, the *Devone* court was inclined to consider New York's constitutional analysis.<sup>113</sup> While the holding in *Dunn* did not require probable cause or a warrant to conduct a dog sniff of the outside of a residence, the court did require that there be a reasonable suspicion that illegal contraband is present in a residence.<sup>114</sup> However, the *Devone* court refused to extend the decision in *Dunn* to encompass automobiles.<sup>115</sup>

Instead, the court relied on the holding in *People v. Yancy*,<sup>116</sup> which concluded that occupants in a car have a "diminished expectation of privacy," and that there is "an exception to the general rule that a warrantless search is per se unreasonable" when it comes to automobiles.<sup>117</sup> Based on this holding, the *Devone* court reasoned that the same standard used by the courts regarding the search of homes does not apply to vehicles.<sup>118</sup> Therefore, the court refused to require a reasonable suspicion to warrant the use of a narcotic detecting dog as was required in *Dunn*.<sup>119</sup>

The *Devone* court did, however, rely on the conclusion in *Dunn* that a dog sniff "is far less intrusive than a full-blown search."<sup>120</sup> Therefore, taking the holding in *Yancy* together with the court's holding in *Dunn*, the *Devone* court concluded that because of the "diminished expectation of privacy" in a car and the unobtrusiveness of a dog sniff, there need only be a founded suspicion to warrant

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Devone*, 870 N.Y.S.2d at 515 (citing *Dunn*, 564 N.E.2d at 1057-58).

<sup>114</sup> *Dunn*, 564 N.E.2d at 1058.

<sup>115</sup> *Devone*, 870 N.Y.S.2d at 516.

<sup>116</sup> 654 N.E.2d 1233 (N.Y. 1995).

<sup>117</sup> *Id.* at 1236.

<sup>118</sup> *Devone*, 870 N.Y.S.2d at 515.

<sup>119</sup> *Id.* at 516.

<sup>120</sup> *Id.* (quoting *Dunn*, 564 N.E.2d at 1058).

the use of a dog sniff to conduct a search of the exterior of a car.<sup>121</sup> Once the dog alerts to the presence of illegal contraband, given the New York Court of Appeals holding in *People v. Gathogo*,<sup>122</sup> police then have probable cause to conduct a search of the interior of the car.<sup>123</sup>

Thus, the appellate court rejected the lower court's holding that reasonable suspicion is required to use a dog sniff of the exterior of the car in order to satisfy the New York Constitution.<sup>124</sup> While the lower court held that based on founded suspicion, police had the right to request the consent from the occupants to search the car, the appellate division concluded that this lower level of suspicion allows for the use of a dog to sniff the exterior of the car, so long as the initial traffic stop is lawful and is not unreasonably prolonged, as required under the United States Constitution.<sup>125</sup>

The *Devone* court supported its holding by quoting the court in *Estrella*, which concluded that the use of a narcotics detecting dog did not constitute a violation of the defendant's constitutional right against unlawful searches and seizures.<sup>126</sup> The *Devone* court inferred that the *Estrella* court used a level of suspicion lower than a founded suspicion to reach its conclusion.<sup>127</sup>

The decision in *Devone* is troubling. The court clearly distinguished reasonable suspicion from founded suspicion, finding that founded suspicion is a lower level threshold for searches and seizures, and that there need only be a founded suspicion to warrant the use of a dog sniff on the exterior of a car.<sup>128</sup> This conclusion, however, is not supported by any case law. While there have been a few recent trial court and appellate court decisions holding that a founded suspicion warrants the use of a narcotic-detecting dog,<sup>129</sup> there is no

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<sup>121</sup> *Id.*

<sup>122</sup> 715 N.Y.S.2d 459 (App. Div. 3d Dep't 2000) (concluding that once a narcotic detecting dog alerts to the presence of drugs, police have probable cause to search the car).

<sup>123</sup> *Devone*, 870 N.Y.S.2d at 516.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 516; *Caballes I*, 543 U.S. at 407.

<sup>126</sup> *Devone*, 870 N.Y.S.2d at 515-16.

<sup>127</sup> *Id.* at 516 ("Since there was a founded suspicion here, we need not address whether a lesser showing-such as applies to the 4th Amendment and arguably was applied in *People v. Estrella*—would satisfy the NY Constitution.").

<sup>128</sup> *Id.*

<sup>129</sup> See, e.g., *People v. Adams*, No. 1007N/09, 2009 WL 3068401, at \*7 (Sup. Ct. Nassau County Sept. 24, 2009) (holding that police had a "founded suspicion that there were drugs

case law from the New York Court of Appeals supporting this holding.

The four-level test set forth in *People v. De Bour*<sup>130</sup> is essential to the proper determination of *Devone*.<sup>131</sup> This four-level test evaluates police encounters with individuals in public places.<sup>132</sup> The first level allows police to request information from an individual “when there is some objective credible reason for that interference not necessarily indicative of criminality.”<sup>133</sup> Level two is the “common-law right to inquire” which is permissible when police have a “founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure.”<sup>134</sup> The third level is based on the police officer’s reasonable suspicion that an individual “has committed, is committing or is about to commit a felony or misdemeanor.”<sup>135</sup> Under these circumstances, a police officer may forcibly stop and detain that individual for questioning.<sup>136</sup> Furthermore, under this third level, the officer has the right to frisk the individual if “the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed.”<sup>137</sup> The fourth and final level requires that police have probable cause that an individual “has committed a crime, or offense in his presence” in order to make an arrest and take an individual into custody.<sup>138</sup>

Thus, the New York Court of Appeals has held that a “founded suspicion that criminal activity is afoot” may give rise to a “common-law right to inquire,” and this right does not permit police to violate the Constitution.<sup>139</sup> Furthermore, courts have “consistently

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in the vehicle” permitting the use of a “canine sniff of the exterior of the vehicle”); *see also* *People v. Abdur-Rashid*, 883 N.Y.S.2d 644, 646-47 (App. Div. 3d Dep’t 2009) (holding that police had a “founded suspicion that criminality was afoot” to warrant the use of a canine dog to detect the presence of drugs in a car).

<sup>130</sup> 352 N.E.2d 562 (N.Y. 1976).

<sup>131</sup> *See id.* at 571-72.

<sup>132</sup> *Id.* at 572.

<sup>133</sup> *Id.* at 571-72.

<sup>134</sup> *Id.* at 572.

<sup>135</sup> *De Bour*, 352 N.E.2d at 572.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*; *People v. Cantor*, 324 N.E.2d 872, 878 (N.Y. 1975).

limited this power when it has been exercised solely on the basis of vague suspicion or as a means of harassment.”<sup>140</sup> While merely requesting general information about an individual’s identity, destination, and other unobtrusive information does not require any level of suspicion by police, once an officer begins to inquire about the possibility of criminal activity, “ ‘the encounter has become a common-law inquiry that must be supported by founded suspicion that criminality is afoot.’ ”<sup>141</sup>

Therefore, the New York Court of Appeals has extended founded suspicion to apply only to the common law right of inquiry. The *Devone* court agreed with the lower court that police had a founded suspicion that criminal activity was present.<sup>142</sup> However, the courts differed as to the application of the founded suspicion.<sup>143</sup>

The lower court concluded that a founded suspicion only amounted to “a general common-law right to inquiry,” allowing police to request that they be able to search the interior of the car.<sup>144</sup> The trial court was unwilling to allow the use of a canine sniff based merely on founded suspicion and instead required that there be a reasonable suspicion that criminal activity is present.<sup>145</sup>

Based on prior case law, the trial court was correct in its holding. However, the appellate division rejected the trial court’s findings and gave unprecedented authority to police. The reasoning in *Devone* is incompatible with other decisions from the New York Court of Appeals. The New York Court of Appeals has required that there be a reasonable suspicion to warrant the use of a canine dog sniff in circumstances other than a residence, such as in *Offen*, where the court extended the holding in *Dunn* to packages shipped through the mail.<sup>146</sup> Therefore, the *Devone* court was erroneous in its decision to limit the holding in *Dunn* to apply only to apartments.

While the *Devone* court held that police had a founded suspicion that criminal activity was present, based on the four-level test set forth in *De Bour*, the police were only permitted to obtain “explana-

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<sup>140</sup> *Cantor*, 324 N.E.2d at 878.

<sup>141</sup> *People v. Battaglia*, 655 N.E.2d 169, 170 (N.Y. 1995) (quoting *People v. Hollman*, 590 N.E.2d 204, 210 (N.Y. 1992)).

<sup>142</sup> See *Devone*, 870 N.Y.S.2d at 516.

<sup>143</sup> See *id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *Offen*, 585 N.E.2d at 372.

tory information” from the occupants in the vehicle.<sup>147</sup> They were not permitted to conduct a search using a narcotic-detecting dog.<sup>148</sup>

While there is little case law in New York addressing the constitutionality of the use of narcotic-detecting dogs on the exterior of vehicles,<sup>149</sup> the holding in *Devone* is flawed. The idea that there need only be a founded suspicion to conduct a search using a narcotic-detecting dog is inconsistent with New York case law and contrary to the New York Constitution. While such a search may be valid pursuant to the Fourth Amendment to the United States Constitution, the *Devone* court should have invalidated the search under Article I section 12 of the New York Constitution.

Gregory Zak

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<sup>147</sup> *Devone*, 870 N.Y.S.2d at 516.

<sup>148</sup> See *De Bour*, 352 N.E.2d at 572. Under the holding in *Dunn* the use of a canine dog sniff of an individual’s apartment constituted a search under the N.Y. Constitution. *Dunn*, 564 N.E.2d at 1058.

<sup>149</sup> See *People v. Cohen*, No. 2009-025, 2009 WL 3364578 at \*5 (St. Lawrence County Ct. Oct. 19, 2009).



