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SUPREME COURT OF NEW YORK APPELLATE DIVISION, THIRD DEPARTMENT

People v. Willette[1]
(decided July 12, 2007)

Tylor Willette was pulled over by a New York State Police K-9 Unit for improper license plate illumination.[2] After the police dog sniffed around the outside of Willette's automobile and indicated to the trooper it smelled contraband, Willette's trunk was searched, revealing "approximately nine pounds of marijuana."[3] Willette was arrested and indicted for criminal possession of marijuana in the second degree.[4] At trial, Willette sought to suppress the drugs and certain statements he made on the grounds that they were obtained by an unlawful search and seizure under both the United States Constitution[5] and the New York State Constitution.[6] The trial court granted the motion and dismissed the indictment.[7] On appeal, the Appellate Division, Third Department, reversed, holding that a warrantless "ca-

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[1] 839 N.Y.S.2d 597 (App. Div. 3d Dep't 2007).

[2] People v. Willette, No. 4753, 2006 WL 3751118, at *1 (Essex County Ct. Sept. 22, 2006), *rev'd*, 839 N.Y.S.2d at 597.

[3] *Willette*, 839 N.Y.S.2d at 598.

[4] *Id.*

[5] U.S. CONST. amend. IV states, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."

[6] N.Y. CONST. art. I, § 12 states, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause. . . ."

[7] *Willette*, 839 N.Y.S.2d at 598.

nine sniff" conducted around the perimeter of a defendant's car does not offend the state or federal constitutions.[8]

Willette conceded the lawfulness of the initial traffic stop because of the improperly illuminated license plate.[9] The only question was whether the subsequent canine sniff, which led to the search of the defendant's trunk, was proper. After the traffic stop, the trooper proceeded to routinely request the defendant's license and registration.[10] Willette explained that his license was restricted to use for his commute to and from work, and admitted he was not actually commuting during that particular trip.[11] The trooper then returned to his cruiser to run license and registration checks, and write up the violations: driving in violation of his restricted license; improper license plate illumination; and illegally tinted windows.[12] The second time the trooper approached Willette's car, he asked him to step out of the vehicle, notified him that his canine partner would sniff around the outside perimeter, and that he would conduct an inventory search; at trial, he claimed to have smelled the scent of marijuana.[13] In response to the defendant's nervous reaction, the trooper asked him if there was a problem, to which the defendant swore and then replied

[8] *Id.* at 600.
[9] *Id.* at 598.
[10] *Id.*
[11] *Id.*
[12] *Willette*, 839 N.Y.S.2d 598.
[13] *Willette*, 2006 WL 3751118, at *2. The trooper's testimony was inconsistent and contradictory as to whether he smelled the marijuana before or after he began the search. While it is undisputed that the officer did not tell the defendant that he smelled marijuana, it is unclear whether the officer informed the defendant of his intention to perform the inventory search before or after the canine sniff. *Id.*

"nine pounds."[14] The canine's behavior alerted the trooper to the scent of drugs in the trunk, within which was a hockey bag containing sealed bags filled with marijuana.[15]

The trial court concluded the search of Willette's vehicle violated his constitutional rights, reasoning the police officer had no "reasonable grounds to believe the [d]efendant was guilty of a crime rather than merely a traffic infraction."[16] Accordingly, both the canine sniff and inventory search exceeded the trooper's authority, and all the evidence obtained pursuant to those searches was deemed "the product of excessive detention [which] must be suppressed."[17] In contrast, the appellate division concluded that the canine sniff and the subsequent search of the trunk did not violate the Fourth Amendment because it did not prolong the duration of the stop.[18] The court reasoned that the Fourth Amendment does not require the police officer to have probable cause before performing the canine sniff so long as the initial traffic stop was lawful and the canine sniff was performed contemporaneously with the trooper's originally lawful conduct.[19] That is, a canine sniff during a routine traffic stop does not per se run afoul of the Fourth Amendment. Therefore, so long as the detainment is independently lawful, the canine sniff alone will not infringe on a person's Fourth Amendment rights.

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[14] *Id.* at 4-5.

[15] *Willette*, 839 N.Y.S.2d at 598.

[16] *Willette*, 2006 WL 3751118, at *4.

[17] *Id.*

[18] *Willette*, 839 N.Y.S.2d at 599. Because Willette could not legally drive the car away, due to the commuting restrictions on his license, the car had to be towed and impounded. Therefore, this traffic stop was, by its nature, significantly longer than an average traffic stop and ticket issuance would normally last. *Id.*

[19] *Id.*

Furthermore, the *Willette* court determined that the canine sniff did not amount to a search under the New York State Constitution.[20] The court relied on the New York Court of Appeals' decision in *People v. Dunn*,[21] which focused on an individual's "reasonable expectation of privacy" to determine whether a canine sniff would constitute a search.[22] The *Willette* court reasoned that because the defendant was driving an automobile in violation of his license restrictions, thereby subjecting it to "impoundment and an inventory search," any expectation of privacy was diminished to the extent that the canine sniff did not amount to a search.[23]

In addressing the federal constitutional issue, the *Willette* court relied on *Illinois v. Caballes*.[24] In *Caballes*, the defendant was stopped for speeding and while one officer was writing out a speeding ticket, a second officer had arbitrarily performed a canine sniff search around his car.[25] The search ultimately led to the discovery of marijuana in the trunk and a criminal sentence that included a twelve-year period of imprisonment and a hefty fine.[26] The question presented to the Supreme Court was, "[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."[27] The Court held canine sniffs do not constitute a search under the

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[20] *Id.*
[21] 564 N.E.2d 1054 (N.Y. 1990).
[22] *Dunn*, 564 N.E.2d at 1058.
[23] *Willette*, 839 N.Y.S.2d at 599.
[24] 543 U.S. 405 (2005).
[25] *Caballes*, 543 U.S. at 406.
[26] *Id.* at 407.
[27] *Id.*

Fourth Amendment, and therefore do not require "reasonable, articulable suspicion."[28] The *Caballes* holding is based on two precepts. First, a traffic stop that is initially lawful must also continue to be lawful for the duration of the seizure.[29] Second, a person in possession of contraband is afforded no Fourth Amendment protection with respect to that item.[30]

The first precept has two parts: the initial basis for detainment must be lawful; and the duration of the detainment must not exceed its bounds.[31] In both *Caballes* and *Willette*, the initial detainment was concededly lawful.[32] In both these cases the courts are concerned instead with the continuing legality of the detainment. Implicitly, the continuing legality of a lawful seizure could only be disturbed by the violation of a protected right. In other words, the continued detainment must correspond with its original basis.[33] Thus, the question becomes whether a canine sniff exceeds the legitimacy of the stop. The *Caballes* Court addressed this issue by asserting the second precept.

The second precept—that a person in possession of something which he has no legal right to possess is afforded no Fourth Amend-

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[28] *Id.* at 410.

[29] *See id.* at 407. The court reasoned a seizure that begins lawfully can become unlawful if it unreasonably infringes on a constitutionally protected interest. This would include situations in which the seizure carries on past a reasonable time necessary to accomplish its initial aim. For example, a two hour traffic stop would be unlawful. *Id.*

[30] *Caballes*, 543 U.S. at 408 (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984) ("[G]overnmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.' ")).

[31] *See id.* at 407.

[32] *Id.*; *Willette*, 839 N.Y.S.2d at 598.

[33] Of course, an initial traffic stop may give rise to a new and independent basis for detainment, which would then create its own legitimate bounds of detainment.

ment protection with respect to that item—is derived in part from the Court's application and extension of the decision in *United States v. Place*.[34] In *Place*, the Court dealt with the broader issue of whether canine sniffs constitute "searches" within the meaning of the Fourth Amendment.[35] The Court reasoned, "The Fourth Amendment 'protects people from unreasonable government intrusions into their legitimate expectations of privacy,' "[36] focusing on the degree of expected privacy with respect to the area being searched. In *Place*, Drug Enforcement Agency officials conducted a canine sniff of Place's luggage after he landed at LaGuardia Airport.[37] Although acknowledging people have a legitimate expectation of privacy over the contents of their personal luggage, the Court concluded that the non-intrusive nature of a canine sniff, disclosing only the presence or absence of something, makes it relatively unique; "[i]n these respects the canine sniff is sui generis."[38] Because the canine sniff is limited to the disclosure of contraband, without any other intrusion, no Fourth Amendment rights are implicated.[39]

Thus, when the Court addressed the issue of whether a canine sniff infringes upon the legality of an otherwise lawful traffic stop in

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[34] 462 U.S. 696 (1983).

[35] *Place*, 462 U.S. at 697-98.

[36] *Id.* at 706-07 (quoting United States v. Chadwick, 433 U.S. 1, 7 (1977)).

[37] *Place*, 462 U.S. at 698-99.

[38] *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 . . . .").

[39] *Id. See also Jacobsen*, 466 U.S. at 123. The *Jacobsen* Court reaffirmed the *Place* rationale by holding that no legitimate privacy expectation was compromised when a governmental authority performed a "search" using a test that only revealed whether a substance is cocaine and no other private fact; the test did not amount to a search under the Fourth Amendment. *Id.*

Caballes, it concluded that it does not. Because a well-trained canine discloses only the presence or absence of the smell of illicit material, and "no other arguably 'private' fact,"[40] the Fourth Amendment is not implicated, and it therefore does not affect an otherwise lawful traffic stop.[41] Thus, although the *Place* Court articulated this rule in a narrow context, it has had broad application.[42] Hence, in *Place* and, by extension *Caballes*, a canine sniff is not generally considered a search within the scope of the Fourth Amendment.

However, the dangers and shortcomings of the *Place-Caballes* canine sniff rule are exemplified in Justice Souter's and Justice Ginsburg's rigorous dissenting opinions.[43] The most obvious danger that both Justices point out is the Orwellian quality of the rule's application.[44] Justice Souter argued *Place*'s holding was based on the notion that the canine sniff is sui generis, and *that* classifica-

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[40] *Id.* at 123.

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

[42] *Compare Place*, 462 U.S. at 707 (holding a canine sniff performed on the defendant's luggage for narcotics in a public airport did not offend Fourth Amendment rights), *with Jacobsen*, 466 U.S. at 123 (holding governmental conduct that only discloses contraband items and "no other arguably 'private' fact, compromises no legitimate privacy interest" and does not infringe upon Fourth Amendment protections), *and Caballes*, 543 U.S. at 410 (holding that the defendant, who had been pulled over for speeding, was legitimately subjected to a canine sniff of his car).

[43] *See Caballes*, 543 U.S. at 410-17 (Souter, J., dissenting); *id.* at 417-25 (Ginsburg, J., dissenting).

[44] *See, e.g.*, *Caballes*, 543 U.S. at 411 (Souter, J., dissenting).

> [A]n uncritical adherence to *Place* would render the Fourth Amendment indifferent to suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks; if a sniff is not preceded by a seizure subject to Fourth Amendment notice, it escapes Fourth Amendment review entirely unless it is treated as a search.

See also id. at 422 (Ginsburg, J., dissenting) ("Today's decision . . . clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. . . . Nor would motorists have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green." (internal citations omitted)).

tion in turn rested primarily on the assumption that canine sniffs are infallible—that they expose only the presence or absence of contraband, without error.[45] Time, however, has proven this assumption to be false. Numerous studies and statistics have shown that dog sniffs do return false positives,[46] and thus "[t]he infallible dog . . . is a creature of legal fiction."[47] Hence, the argument posed in *Place*—that because sniff dogs reveal only the presence or absence of illegal substances, the sniff does not infringe on legitimate privacy interests and therefore should not be considered a search—is invalid.[48] Logically and realistically, canine sniffs are actually just searches that provide police with information "about the contents of private spaces . . . ."[49] As such, "[i]t makes sense, then, to treat a sniff as the search that it amounts to in practice, and to rely on the body of our Fourth Amendment cases . . . in deciding whether such a search is reasonable."[50]

Justice Ginsburg argued the basis of the seizure and any ensuing searches should be reasonably related in scope to the purpose of the initial detainment or investigation.[51] Justice Ginsburg emphasized that the Court has often applied *Terry v. Ohio*,[52] to "indicate[] that the limitation on 'scope' is not confined to the duration of the

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[45] *Id.* at 410 (Souter, J., dissenting).

[46] *Id.* at 412 ("Indeed, a study cited by Illinois in [*Caballes*] for the proposition that dog sniffs are generally reliable shows that dogs in artificial testing situations return false positives anywhere from 12.5 to 60% of the time . . . ." (internal quotations omitted)).

[47] *Id.* at 411.

[48] *Caballes*, 543 U.S. at 411 (Souter, J., dissenting).

[49] *Id.* at 413.

[50] *Id.* at 414.

[51] *Id.* at 419 (Ginsburg, J., dissenting) (discussing application of stop-and-frisk standards to canine sniff searches).

[52] 392 U.S. 1, 20, 27-28 (1968) (articulating stop-and-frisk standards).

seizure; it also encompasses the manner in which the seizure is conducted."[53] Thus, in *Caballes*, though the canine sniff may not have prolonged the stop is inconsequential, the focus should have been on whether the canine sniff was "reasonably related in *scope* to the circumstances which justified the interference [traffic stop] in the first place."[54] Accordingly, because the defendant was pulled over for speeding but subjected to a canine sniff search for drugs, without any probable cause or reasonable suspicion of narcotics, it impermissibly broadened the scope of the investigation, such that it exceeded the bounds of the police officer's authority and offended the defendant's Fourth Amendment rights.[55]

When comparing the merits of the arguments posed by the majority and dissenting opinions in *Caballes*, it is clear which side is stronger. The tenability of the notion that canine sniffs are a unique form of search is paramount to the majority's position. However, while Justice Souter refutes its plausibility with evidence and statistics proving its fallibility, the majority only alludes to the absence of such evidence in the record.[56] The majority also faults the defense for not stipulating that it is the erroneous canine alert that is in and of itself a Fourth Amendment infraction, and from this concludes the canine alert actually provided probable cause to justify a complete search of the defendant's trunk.[57] However, this conclusion is erro-

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[53] *Caballes*, 543 U.S. at 419 (Ginsburg, J., dissenting).

[54] *Id.* at 420 (internal citation and quotations omitted).

[55] *Id.* at 420-21.

[56] *Id.* at 409. *But see id.* at 412 (Souter, J., dissenting) (citing case law supporting the fallibility of canine sniff alerts and citing to Petitioner's Reply Brief).

[57] *Id.* of 409.

neous, because it simply evades the issue; the issue remains the lawfulness of the use of the canine, not whether the canine alert established probable cause to search the trunk. Also, a failure to explicitly argue the canine sniff is the actual cause of the Fourth Amendment violation should not be dispositive; although it is not explicitly stated in the record, it is implicit in the entire argument and the context of the case.[58]

Interestingly, the disparity in strength between the majority's position and Justice Souter's position,[59] and the majority's erroneous-yet-critical reliance on the premise that canine sniffs are unique in their unobtrusiveness, is exemplified in their analysis of the precedent established in *Kyllo v. United States*.[60] In *Kyllo*, the United States Supreme Court decided the issue of "whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a search within the meaning of the Fourth Amendment."[61] The defendant, Danny Kyllo, was suspected of growing marijuana in his home.[62] Because growing marijuana indoors typically requires the use of high-intensity lamps, federal agents, without a warrant, used a thermal-imaging device to detect the various patterns and gradations of heat emanating

[58] The issue framed by the majority is "[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." *Caballes*, 543 U.S. at 407.

[59] The majority's position is that canine sniffs are a unique form of unobtrusive search that should be considered sui generis, while Justice Souter's position is that such a claim is untenable and unsupported.

[60] 533 U.S. 27 (2001).

[61] *Kyllo*, 533 U.S. at 29 (internal quotations omitted).

[62] *Id.*

from the home.[63] The scan detected suspiciously high levels of heat, and based on those findings, the federal agents obtained a warrant to search Kyllo's home, ultimately finding the marijuana plants they suspected.[64] Kyllo moved to suppress the evidence seized on the grounds the detection of heat waves by thermal imaging constituted a warrantless search of his home and was unlawful.[65] The lower courts denied his motion.[66] The Supreme Court, however, reversed and held that because the thermal scanner used by the federal agents was not the kind of technology generally available to the public, its use constituted the search of a home, and thus "is presumptively unreasonable without a warrant."[67] Justice Souter recognized that the key to the determination in *Kyllo* was the fact that the thermal-imaging device was capable of revealing other lawful activity and legitimately private facts. He drew a direct analogy to *Caballes*—the drug-detection dog is also a device, akin to the thermal-imaging device, which is not in general public use and may obtain information not capable of being perceived by human senses, but is capable of revealing other private and lawful facts in the process.[68] On the other hand, the *Caballes* majority harmonized *Kyllo* by distinguishing information about private items in the home from the contents of a vehicle's trunk.[69] Justice Souter drew a direct analogy to the precedent while

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[63] *Id.*

[64] *Id.* at 30.

[65] *Id.*

[66] *Kyllo*, 533 U.S. at 30-31.

[67] *Id.* at 40.

[68] *Caballes*, 543 U.S. at 413 n.3 (Souter, J., dissenting).

[69] *Id.* at 409-10 (majority opinion). By arguing the lawful and private contents of a trunk are categorically distinct from those in the home, the majority essentially concedes that a ca-

the majority finds it sufficient to assert that they are categorically different situations.

While Justice Souter's dissent attacked the majority opinion on its own terms, Justice Ginsburg contended that the canine sniff was unconstitutional regardless of its classification. According to Justice Ginsburg, a canine sniff conducted arbitrarily during a traffic stop is unlawful not because of its potential to reveal legitimately private items, but because it broadens the scope of the "traffic-violation-related seizure" to that of a drug investigation without any cause.[70] The majority simply discarded this argument, and concluded that "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner."[71]

Given the Supreme Court's holding in *Caballes*, it is apparent that the *Willette* court correctly held that the canine sniff of Willette's car did not amount to a Fourth Amendment violation. The same cannot be said for the *Willette* court's state constitutional determination. A careful look at the *Willette* court's reasoning casts suspicion on its conclusion. In its New York constitutional analysis, the *Willette* court appropriately relied on the Court of Appeals' decision in *People*

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nine sniff can disclose private and lawful facts. This appears to contradict the premise that canine sniffs are substantially unobtrusive.

[70] *Id.* at 420-22 (Ginsburg, J., dissenting). *See also* People v. Caballes, 802 N.E.2d 202, 205 (Ill. 2003) (quoting People v. Cox, 782 N.E.2d 275, 281 (Ill. 2002)) (holding that "a canine sniff . . . performed without 'specific and articulable facts' to support its use, unjustifiably enlarging the scope of a routine traffic stop into a drug investigation"); *Willette*, 2006 WL 3751118, at *4 (holding that "a defendant's nervousness alone does not provide a basis for reasonable suspicion of criminality . . . [and], absent probable cause to believe criminality is afoot further detention of a motorist violates the motorist's constitutional rights").

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

v. Dunn.[72] In *Dunn*, the Court of Appeals addressed whether the use of canines to detect drugs in a person's apartment falls within the purview of the Fourth Amendment or the analogue under the New York State Constitution.[73] The court conceded, though there is a heightened sense of personal privacy in one's home, there was still no Fourth Amendment violation because the controlling factor under *Place* is that the " 'canine sniff' reveals only evidence of criminality," material to which an individual has no legitimate possessory rights.[74] On the other hand, the Court of Appeals refused to adopt the same rationale as a matter of state constitutional law. At the outset, the court mentions that "in the past . . . [it] has not hesitated to interpret article I, § 12 independently of its Federal counterpart when the analysis adopted by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free from unreasonable government intrusions."[75] The court first reasoned that "the fact that a given investigative procedure can disclose only evidence of criminality should have little bearing on whether it constitutes a search."[76] The court explained, despite the non-intrusive and discriminate nature of the search, ultimately it reveals "the contents of a private place."[77] Instead, the analysis should focus on whether the person has a "reasonable expectation of privacy" in the area sought to be in-

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[72] 564 N.E.2d at 1054.

[73] N.Y. CONST. art. I, § 12; *Dunn*, 564 N.E.2d at 1055.

[74] *Dunn*, 564 N.E.2d at 1056-57.

[75] *Id.* at 1057 (citing People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985); People v. Gokey, 457 N.E.2d 723 (N.Y. 1983); People v. Johnson, 488 N.E.2d 439 (N.Y. 1985)).

[76] *Dunn*, 564 N.E.2d at 1057.

[77] *Id.*

vaded by the search.[78] As such, it is evident a canine sniff outside of a person's apartment *does* constitute a search; "[t]o hold otherwise . . . would raise the specter of the police roaming indiscriminately through the corridors of public housing projects with trained dogs in search of drugs. Such an Orwellian notion would be repugnant under our State Constitution."[79]

Because the court determined the canine sniff was a search under the New York Constitution, the court next addressed what degree of protection was warranted.[80] Given that "a canine sniff is far less intrusive than a full-blown search of a person's home," and its great utility to the police force, the court concluded canine sniffs should not be given the same level of protection as a "full-blown" search.[81] However, because the scent originated from a private place, and could only be detected through the use of a hyper-sensitive detection device (in this case, a trained canine's nose), a person can reasonably expect that the scent will not be exposed to a person of ordinary senses.[82] Thus, the court compromised by weighing the reasonable expectation of privacy people have over the contents of their apartment against the significant utility of canine sniffs to law enforcement.[83] Canine sniffs may be used without a warrant or probable cause, provided that the police have a *reasonable suspicion* a

[78] The Court of Appeals' focus is on the "*reasonable* expectation of privacy." *Id.* at 1058. The *Caballes* court focused on the "*legitimate* privacy interests." *Caballes*, 543 U.S. 409.

[79] *Dunn*, 564 N.E.2d at 1057 (citing People v. Dunn, 553 N.Y.S.2d 257, 266 (App. Div. 4th Dep't 1990) (Lawton, J., concurring)).

[80] *Dunn*, 564 N.E.2d at 1057.

[81] *See id.* at 1058.

[82] *Id.*

[83] *Id.*

residence contains illicit contraband.[84]

Although *Dunn* requires a reasonable suspicion to perform a canine sniff of a person's home, the *Willette* court recognized that the Court of Appeals has not yet addressed the issue of canine sniffs with respect to automobile searches.[85] However, in *People v. Price*,[86] the Court of Appeals held a canine sniff of an airplane passenger's luggage does not constitute a search under the Fourth Amendment.[87] Thus, the *Willette* court relied on *Dunn* and *Price* to define the two extremes: "a sniff of luggage at an airport . . ." on the one hand, and a sniff "outside of a person's residence . . ." on the other. The court determined the search at hand fell somewhere in between.[88] The *Willette* court ultimately relied on *People v. Yancy*[89] in its decision. In *Yancy*, the Court of Appeals explained:

> 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 at-

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[84] *Id.*

[85] *Willette*, 839 N.Y.S.2d. at 599.

[86] 431 N.E.2d 267 (N.Y. 1981).

[87] *Price*, 431 N.E.2d at 269. Note that *Price* was decided nine years before *Dunn* and *Place*. However, it is still good law and there is no reason to think that the Court of Appeals would not reaffirm its decision were it presented with similar facts today. In *Dunn*, the court noted that their focus in the *Price* decision was very unlike that of the *Place* Court.

> [W]e, unlike the *Place* court, primarily focused on the reduced expectation of privacy that a person has with regard to the luggage he places in the hands of a common carrier. Nowhere in *Price* did we even intimate that the investigative tool employed there did not constitute a search because it could disclose only the presence or absence of contraband.

Dunn, 564 N.E.2d at 1057 (citations omitted).

[88] *Willette*, 839 N.Y.S.2d at 599.

[89] 654 N.E.2d 1233 (N.Y. 1995).

> tributed to individuals and their property when traveling in an automobile.[90]

Based on this principle and because the defendant was driving in violation of his restricted-use license, the *Willette* court concluded that the defendant's expectation of privacy was lowered enough that a canine sniff could be conducted without any reasonable suspicion.[91]

The *Willette* court's analysis is questionable in the first instance because of its application of *Yancy*. The decision in *Yancy* was highly fact specific. For example, the issue in *Yancy* was whether the arresting officer had probable cause to justify the warrantless search of Yancy's car, not whether a warrantless search is justified without any probable cause at all (the issue in *Willette*).[92] The defendant in *Yancy* was stuck in gridlock traffic on his way into the Lincoln Tunnel, and was approached by a Port Authority officer directing traffic.[93] As the officer approached the car, he noticed an opened bag in the passenger compartment appearing to contain vials of cocaine.[94] The officer pulled the defendant's car over and proceeded to question the defendant; the defendant responded with more incriminating statements.[95] The officer subsequently searched the defendant's car and discovered the incriminating evidence.[96] The court reasoned:

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[90] *Yancy*, 654 N.E.2d at 1236.

[91] *Willette*, 839 N.Y.S.2d at 599-600.

[92] *Yancy*, 654 N.E.2d at 1234.

[93] *Id.* at 1235.

[94] *Id.*

[95] *Id.* Specifically, when the officer asked Yancy "what was in the bag," Yancy replied "bottles," which the officer understood to be drug trade slang for vials of cocaine. *Id.*

[96] *Yancy*, 654 N.E.2d at 1235.

> [T]he officers' incidental observation of hundreds of separately packaged empty vials and caps in open view following a valid automobile stop; the officers' respective experience in narcotics investigation and drug detection, which allowed them to surmise that defendants possessed a large quantity of empty vials for something other than personal use; and, each defendant's responses and conduct subsequent to the stop for the traffic infraction provide evidentiary support for the . . . [findings] that there was probable cause.[97]

In contrast to *Willette*, the initial seizure in *Yancy* was due to drug suspicion, and not a traffic violation. Furthermore, the contraband items were not concealed in the defendant's trunk, but were in the back seat, in plain view. The search did not require a canine's sensory perception. Moreover, the officer saw enough evidence to establish probable cause, whereas in *Willette* the officer arguably did not have any basis whatsoever to conduct the canine sniff.[98] Although the court in *Willette* only relies on *Yancy* to support the proposition that there is a reduced sense of privacy in an automobile, the *Willette* holding suggests more: that an officer may lawfully, without any basis, conduct a canine sniff during a routine traffic stop—a proposition which is far removed from that which the court alluded to in *Yancy*. The court draws a conclusion based on two very fact specific situations, which, although tenable, does not follow the Court of Appeals' reasoning in *Dunn*.

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[97] *Id.* at 1236.

[98] *See supra* note 13 (noting how the trial court had serious doubts as to whether the officer had even smelt any marijuana before he searched the vehicle).

Juxtaposing *Dunn* with *Caballes* gives us an idea of how the New York Court of Appeals would likely rule on the issue of canine sniffs in the context of automobiles. Comparing the reasoning in *Dunn* with that of the Supreme Court in *Caballes*, it is clear that the *Dunn* court takes a position akin to that of the *Caballes* dissenters. Like Justice Souter, the *Dunn* court rejected the notion that canine sniffs are sui generis; the court agreed that sniffs reveal the "contents of a private place," and therefore subject it to Fourth Amendment restrictions.[99] As such, the Court of Appeals required at least a reasonable suspicion to conduct a canine sniff of a person's residence.[100] Moreover, although the *Dunn* court's reasoning differs from Justice Ginsburg's, the result is exactly the same. In fact, because the court requires an officer to have a reasonable suspicion as a basis for the canine sniff, it inherently addresses Justice Ginsburg's concerns. Justice Ginsburg's argument goes to the issue of a canine sniff conducted with no basis at all, during a routine traffic stop.[101] When the officer has a reasonable suspicion, the subsequent search is inherently related in scope to that which the officer is suspecting.

Considering how the *Dunn* court's reasoning aligned with the *Caballes* dissent, it is reasonable to conclude that in a gray area such as that of *Willette*, the Court of Appeals would rule to safeguard protection from searches. This conclusion is buttressed by the fact that the *Dunn* court's primary concern was protection of its citizens from

[99] *Dunn*, 564 N.E.2d at 1057.

[100] *Id.* at 1058 ("[W]e conclude that [a drug detection dog] may be used without a warrant or probable cause, provided that the police have a reasonable suspicion that a residence contains illicit contraband.").

[101] *Caballes*, 543 U.S. at 420-21.

unfettered governmental intrusion of their privacy. Willette, was pulled over for a routine traffic stop. Although he was violating restrictions on his license, thereby subjecting him to an inventory search, there is no claim the officer had any reasonable basis to perform a canine sniff for drugs. This elicits the concerns of both Justices Ginsburg and Souter. Although the *Willette* court's reasoning focused on the defendant's reduced expectation of privacy, it never addressed the issue of the officer's absence of reasonable suspicion to perform the canine sniff. Is a reduced expectation of privacy alone enough to justify a warrantless, suspicionless search? Moreover, without basing the sniff on reasonable suspicion, Justice Ginsburg's concerns arise—the sniff exceeded the scope of the initial lawful seizure. The court does not address these points. While the *Willette* court explicitly left open the question of whether the New York Constitution ever requires a reasonable suspicion to conduct a canine sniff search of automobiles,[102] its holding supports an answer in the negative. The ruling in this case will inevitably be used to support both propositions and thus, it may serve as a catalyst to bring the issue before the Court of Appeals.[103]

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[102] *Willette*, 839 N.Y.S.2d at 599.

[103] When the issue does come before the Court of Appeals, it will not be via *Willette*. People v. Willette, 874 N.E.2d 762 (N.Y. 2007) (denying leave to appeal).