DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2005

STATE OF FLORIDA,
Appellant,

v.

JAMES RABB,
Appellee.

No. 4D02-5139

[September 14, 2005]

ON REMAND FROM THE UNITED STATES SUPREME COURT

PER CURIAM.

On remand from the United States Supreme Court, we revisit our opinion in *State v. Rabb*, 881 So. 2d 587 (Fla. 4th DCA 2004). *See Florida v. Rabb*, 125 S. Ct. 2246 (2005). As directed, we engage in further consideration of this case in light of *Illinois v. Caballes*, 543 U.S. ___, 125 S. Ct. 834 (2005). In *Caballes*, the Court held: "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." 125 S. Ct. at 838. Our further consideration does not sway us from our original conclusion that the trial court's order granting the motion to suppress in this case should be affirmed. We stand by our initial opinion in this case and write only to re-emphasize our analysis and add a discussion of *Caballes*.

Fourth Amendment jurisprudence has not developed in a vacuum, largely because in its protection of people from unreasonable searches and seizures by the government, the degree of protection to be afforded "requires reference to a 'place.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The answers to Fourth Amendment questions are highly "situation-sensitive," *Caballes*, 125 S. Ct. at 846 (Ginsburg, J., dissenting), because the situation provides the context necessary to determine whether an individual has a "constitutionally protected reasonable expectation of privacy." *See California v. Ciraolo*,

476 U.S. 207, 211 (1986)("The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'")(citation omitted). While Fourth Amendment decisions involve a myriad of other factors and guiding principles, it is the place and situation in which they arise that gives direction to judicial analysis.

In the present case, there are significant place and situation differences from *Caballes*. The dog sniff occurred at the exterior of Rabb's home, the most sacred of places under Fourth Amendment jurisprudence. In fact, the Fourth Amendment draws "a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 589 (1980). *Caballes*, on the other hand, does not involve a home, but rather a vehicle lawfully stopped by law enforcement while traveling along a public interstate highway. 125 S. Ct. at 836. Throughout the history of the Fourth Amendment, vehicles on public roads have not been granted the deference afforded to homes. This is so for several reasons: the ready mobility of vehicles, the fact that the interiors of vehicles are generally in plain view of those passing by, and the reality of "pervasive regulation" of vehicles by government, all of which result in a decreased expectation of privacy. *See California v. Carney*, 471 U.S. 386, 390-392 (1985). The case on which *Caballes* relies, *United States v. Place*, 462 U.S. 696 (1983), also does not involve a home. Rather, it involves luggage in an airport. *Place*, 462 U.S. at 699. It is without doubt that any legacy of protection of such items in such a public location has been eroded to nearly the point of non-existence in a post-9/11 world and that the individual's expectation of privacy cannot be conceived of as more than minimal in today's airports with their luggage screenings, passenger scans, and pat-down searches.

Juxtaposed against the realities of travel by car and plane, the home stands strong and alone, shrouded in a cloak of Fourth Amendment protection because a home is not movable, on display to the public (at least as far as its interior), nor pervasively regulated by government. We believe that a dog sniff at the exterior of a home should not be permitted to uncloak this remaining bastion of privacy, which is the most sacred of places under Fourth Amendment jurisprudence.

To this end, we re-emphasize our discussion of *Kyllo v. United States*, 533 U.S. 27 (2001), in our initial opinion. In that discussion, we emphasized that what the dog detects, that is the quality or quantity of information, is not the Fourth Amendment concern. *Rabb*, 881 So. 2d at 592-593. The Fourth Amendment concern is that the government

endeavored at all to employ sensory-enhancing methods to cross the firm line at the entrance of a home. *Id.* at 593. This is because once that line is breached by a dog's nose or a thermal scanner, it brings an onslaught of probing government eyes in its wake, and the formerly intimate details of that home become open to public display. This reality, in which other intimate and fully legal details of an individual's life could be revealed, again sets the present case apart from *Caballes* and *Place*. Vehicles on public roadways and luggage in airports are simply different because the privacy to be invaded by government's prying eyes is necessarily limited by the size of the vehicle or bag, plus only the effects of one's traveling life risk exhibition. Once again, the risks to privacy are greatest at the threshold of the home; what may be tolerable on a public roadway or in an airport may not necessarily be countenanced at a home. After all, "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37.

Furthermore, the record does not support the dissent's conclusion that "[t]he dog was trained to detect only contraband." At best, the record includes contradictory testimony from Detective Taranu regarding Chevy's training and expertise. Taranu first testified that when Chevy alerts and contraband is not found, the alert is recorded as one to an "[u]nknown odor, because we don't know which type of substances that he alerts to, that he was trained to detect." Taranu later testified that Chevy would alert only to drugs, and not to a female dog in heat, food, or other stimuli. Additionally, the trial court never made a finding that Chevy was reliable or trained to detect only contraband, likely because Rabb did not posit a challenge to Chevy's training and experience as a basis for suppression. In sum, Taranu's testimony suggests that Chevy's abilities are uncertain and places in doubt his reliability, so that *Caballes*, which involved a dog characterized as a "well-trained narcotics-detection dog," is again distinguishable from the case at bar. 125 S. Ct. at 838.

Our conclusion that the motion to suppress was properly granted in this case also is not the novel one creating a "residence exception" that the dissent suggests. It does not create a "residence exception" where heightened protection of the home shares a legacy equal in length to that of the Fourth Amendment itself. Additionally, it is not a novel departure from the precedent of the United States Supreme Court, by which this Court is bound under Article I, Section 12 of the Florida Constitution. The holdings in *Caballes* and *Place* may be based on what the dog detects, but the dog sniffs in those cases occurred in very different places

from the home in the present case. The United States Supreme Court has yet to address the intersection of the logic of *Caballes* and *Place* with the historical protection of the home and *Kyllo*. Just as *Kyllo* did not pass on the constitutional permissibility of thermal scans of vehicles, *Caballes* did not pass on the constitutional permissibility of dog sniffs of homes. *See Caballes*, 125 S. Ct. 842 (Souter, J., dissenting) ("The Court today does not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog's walk around a stopped car."). In a "situation-sensitive" Fourth Amendment world, this is all the difference. Article I, Section 12 of the Florida Constitution does not prevent this Court from recognizing this difference and granting heightened protection to a home based on this difference in the absence of United States Supreme Court precedent to the contrary. *See Soca v. State*, 673 So. 2d 24, 26 (Fla. 1996) ("However, in the absence of a controlling U.S. Supreme Court decision, Florida courts are still 'free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution.'") (citation omitted).

In conclusion, and upon consideration of *Caballes*, we affirm the trial court's order granting Rabb's motion to suppress. At the end of the analysis, the Fourth Amendment remains decidedly about "place," and when the place at issue is a home, a firm line remains at its entrance blocking the noses of dogs from sniffing government's way into the intimate details of a person's life. If that line should crumble, one can only fear where future lines will be drawn and where sniffing dogs, or even more intrusive and disturbing sensory-enhancing methods, will be seen next.

Affirmed.

GUNTHER and FARMER, JJ., concur.
GROSS, J., dissents with opinion.

GROSS, J., dissenting.

The United States Supreme Court remanded this case "for further consideration in light of *Illinois v. Caballes*, 543 U. S. ____, 125 S. Ct. 834 (2005)." *Florida v. Rabb*, 125 S. Ct. 2246 (2005). The Supreme Court's analysis in *Caballes* leads to the conclusion that the order suppressing evidence should be reversed. *See State v. Rabb*, 881 So. 2d 587 (Fla. 4th

DCA 2004) (Gross, J., dissenting); *see also Fitzgerald v. State*, 864 A.2d 1006 (Md. 2004) (agreeing with dissent in *Rabb*).

Caballes involved the dog sniff of the exterior of a car during a traffic stop. *See Caballes*, 125 S. Ct. at 843. The Supreme Court assumed that "the officer conducting the dog sniff had no information about [the defendant] except that he had been stopped for speeding." *Id*. at 837. The duration of the traffic stop was not longer than the time reasonably required to issue a warning ticket for the speeding infraction. *See id*.

The Supreme 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." *Id*. at 838. The Court reasoned that a well-trained narcotics detection dog will alert only to the presence of contraband, in which there is no legitimate privacy interest, and not to "'noncontraband items that otherwise would remain hidden from public view.'" *Id*. (quoting *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637 (1983)).

The Court distinguished *Caballes* from *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038 (2001), which involved the use of a thermal-imaging device to detect the growth of marijuana in a home. Crucial in *Kyllo* "was the fact that the device was capable of detecting lawful activity," unlike a trained dog. *Caballes*, 125 S. Ct. at 838.

In this case, the dog's presence at the front door of Rabb's residence did not violate the constitution. There was no challenge to the dog's training or experience. The dog was trained to detect only contraband. Neither *Place* nor *Caballes* turn on the location of a dog sniff. Central to each case is the fact that a dog sniff detects only contraband, in which there is no legitimate expectation of privacy. The reaffirmation of the *Place* analysis in *Caballes* leads to the conclusion that no constitutional violation occurred here.

It is true that *Caballes* involves a dog sniff of a car, and not a private residence. It is important to remember that this case involves a search conducted pursuant to a warrant. The dog sniff, combined with other information, gave the magistrate a substantial basis for finding probable cause that contraband existed in the house. Instead of creating a "residence exception" to *Place* and *Caballes*, the concern that a home is entitled to greater constitutional protection than a car is better addressed by establishing a rule that a search warrant not issue on a dog sniff

alone, but that a canine alert be accompanied by other information supporting probable cause before a warrant can issue.

This court is required by the Florida Constitution to construe the right against unreasonable searches and seizures "in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const. To adopt the majority's view is to create a novel fourth amendment rule that the propriety of a dog sniff is analyzed differently based on the location of the dog, an approach that the Supreme Court has yet to adopt. In this case, affirming the motion to suppress is an example of the humble tail wagging the constitutional dog.

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Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Ilona M. Holmes, Judge; L.T. Case No. 02-7671CF10A.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Claudine M. LaFrance, Assistant Attorney General, Wes Palm Beach, for appellant.

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Not final until disposition of timely filed motion for rehearing.