2005

The Sui Generis Infallible Sniffing Dog and Other Legal Fictions: Illinois vs. Caballes

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The *Sui Generis* Infallible Sniffing Dog And Other Legal Fictions: *Illinois v. Caballes*

By **Jerry E. Norton***

Every frequent reader of judicial opinions has had the experience. Reading an opinion, one is struck by the unreality of the discourse. It is as though Doctor Pangloss, Voltaire's character from his tale *Candide*, is writing his declamation "all is for the best in the best of all possible worlds." Contrary evidence, although present, is categorically rejected.

Reading the Supreme Court's decision in *Illinois v. Caballes*,[1] released January 24, 2005, provokes just such a Pangloss comparison. In *Caballes*, a majority of the Court reaffirmed its conclusion that an intrusive investigative technique is not a "search" and is therefore outside the protection of the Fourth Amendment. The Court based its conclusion solely on its faith that the technique exposes only contraband, never innocent private information. The Court refused to consider evidence that the technique is in fact flawed. It refused to consider the evidence because 20 years earlier it concluded without either evidence or argument that the technique was reliable.

> *"A canine sniff by a well-trained narcotics-detection dog is 'sui generis' because it 'discloses only the presence or absence of narcotics, a contraband item.'"*
>
> Justice John Paul Stevens

Roy Caballes' journey to the United States Supreme Court began on Interstate 80 in LaSalle County, Illinois, in November 1998.[2] An Illinois State Police Trooper stopped Caballes for driving six miles over the posted 65 miles per hour speed limit. The trooper requested of the dispatcher a confirmation of Caballes' driver's license and information on his prior criminal record. The dispatcher reported that Caballes had two prior arrests for marijuana distribution. The trooper asked Caballes for permission to search the trunk of his car, which Caballes refused. A second Illinois State Trooper, assigned to the Illinois State Police Drug Interdiction Team, overheard these radio transmissions and told the dispatcher that he was going to the scene of the stop to conduct a canine sniff.

Meanwhile, the stopping officer concluded that he had no basis for further investigation, so he started writing a warning ticket. However, he permitted himself to be distracted by a radio call on an unrelated matter, so that he was still writing the ticket when the canine unit arrived. The officer walked a drug-detection dog around Caballes' car, and the dog "alerted" at the car trunk. The stopping officer opened and searched the car trunk, finding marijuana. Caballes was charged with cannabis trafficking. He moved to suppress the cannabis found in the trunk of his car, but his motion was denied. The appellate court affirmed.

The Supreme Court of Illinois reversed,[3] holding that marijuana found in the trunk of Caballes' car was obtained in violation of the Fourth Amendment as applied by the United States Supreme Court in *Terry v. Ohio*.[4] In reaching the conclusion that the search exceeded that allowed in *Terry*, the Illinois Court relied on a principle it had more fully explored in its 2002 decision in *People v. Cox*.[5] As restated in *Caballes*, the principle is that, in assessing the reasonableness of a stop, not only the justification at its inception must be considered, but also the court should consider "(2) 'whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' "[6] Of its ruling in *Cox*,

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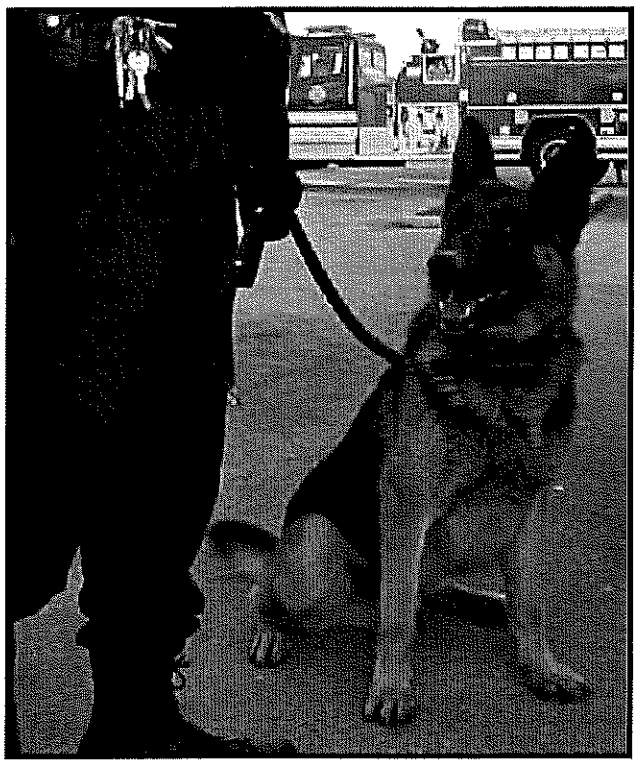
the Illinois court said, "We emphasized that the sniff was impermissible without 'specific and articulable facts' to support the stopping officer's request for the canine unit."[7] While the stopping officer in *Caballes* did not request the canine unit as in *Cox*, the Illinois Supreme Court believed that "the overall effect remains the same. As in *Cox*, the police impermissibly broadened the scope of the traffic stop in this case into a drug investigation . . ."[8] Thus the Illinois Supreme Court ruled that whenever a minimally intrusive highway stop is expanded into a full drug-sniffing dog investigation, there must be some reasonable basis for that expansion.

The United States Supreme Court reversed the decision of the Illinois Supreme Court. Speaking for the majority of the Court in a very brief opinion, Justice Stevens ignored the *Terry* basis for the Illinois Court decision. It relied instead on a 1983 Supreme Court decision, *United States v. Place*, holding that a dog sniff is not a search and therefore not subject to the Fourth Amendment.[9] "In [*Place*] . . . we treated a canine sniff by a well-trained narcotics-detection dog as 'sui generis' because it 'discloses only the presence or absence of narcotics, a contraband item.' "[10] "Accordingly, the use of a well-trained narcotics-detection dog - one that 'does not expose non-contraband items that otherwise would remain hidden from public view,' . . . during a lawful traffic stop, generally does not implicate legitimate privacy interests."[11] Efforts by the Respondent to argue the unreliability of dog sniffs were summarily turned away. "[T]he record contains no evidence or findings that support his argument."[12] The majority agreed with the Illinois Supreme Court's *Cox* decision in one regard. "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."[13] Time, however, seemed to be the only factor Justice Stevens would consider.



At this point the *Caballes* decision may simply be explained as a reaffirmation of a 20-year-old precedent. But that precedent, *United States v. Place*, is itself a questionable decision. In *Place*, a narcotics dog sniffed luggage at Kennedy Airport. The Supreme Court held, however, that the evidence should have been suppressed. The ruling of the Supreme Court was that the retention of the luggage for more than 90 minutes exceeded that permissible in a *Terry* stop.[14] Thus, the Court found that it exceeded the scope of *Terry*, the point that the Illinois Supreme Court used in deciding *Caballes*!

However, the majority in *Place* went on to rule that a canine sniff is not a "search."[15] Since the issue in *Place* was the detention of the luggage for 90 minutes, the question of the dog sniff being a search for Fourth Amendment purposes was purely dictum. As Justice Blackmun said in his concurrence, "The Court has no need to decide the issue here."[16] Justice Brennan agreed and added that the dog sniff issue was neither briefed nor argued before the Court in *Place*.[17]

Thus, without either brief or argument, the Court concluded in 1983 and reaffirmed without reexamination in 2005 that "a canine sniff by a well-trained narcotics-detection dog is '*sui generis*' because it 'discloses only the pres-

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ence or absence of narcotics, a contraband item.' "[18] The Respondent in *Caballes* tried to challenge the conclusion that dog sniffs are as reliable as the majority seems to assume. If these dogs are not particularly reliable, the "alerts" may be caused by private sources other than contraband. Dissenting in *Caballes*, Justice Souter said, "What we have learned about the fallibility of dogs in the years since *Place* was decided would itself be reason to call for reconsidering *Place*'s decision against treating the intentional use of a trained dog as a search."[19] After a review of cases, he concludes, "The infallible dog . . . is a creature of legal fiction."[20] He argues that, if the Court is to be consistent in saying that a dog sniff is not a search, then the Fourth Amendment will have nothing to do with the police use of them. Police dogs could be indiscriminately used to sweep cars on the street, in parking lots or stopped at traffic lights and even pedestrians on sidewalks.

Justice Souter also joined in a separate dissent written by Justice Ginsburg. In this dissent, Justice Ginsburg returned to the argument raised by the Illinois Court. The question isn't only whether or not a dog sniff is a search, but also whether subjecting a motorist to these dogs impermissibly broadens the scope of the traffic stop under *Terry v. Ohio*. And in assessing the scope of the stop, time is not the only issue. "In applying *Terry*, the Court has several times indicated that the limitation on 'scope' is not confined to the duration of the seizure; it also encompasses the manner in which the seizure is conducted."[21] She agreed with the Illinois Supreme Court that the use of dogs might fail the second *Terry* inquiry. "Even if the drug sniff is not characterized as a Fourth Amendment 'search' . . ., the sniff surely broadened the scope of the traffic-violation-related seizure."[22] "Under today's decision, every traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population."[23]

> *"What we have learned about the fallibility of dogs in the years since Place was decided would itself be reason to call for reconsidering Place's decision against treating the intentional use of a trained dog as a search."*
>
> Justice David Souter

As in Voltaire's *Candide*, the majority of the Court apparently accepts the belief that police dogs will detect contraband, and only contraband, as an article of faith, as Pangloss accepted his fate in "the best of all possible worlds." As Pangloss might have put it, "A sniffing dog is reliable because the Court would not have said it is if it were not true. Evidence is unnecessary."[24] Surely subjecting people to the degradation of having their persons and property targeted for obvious public humiliation deserves more than just an uncritical citation to dictum in an earlier case, unsupported by either briefs or arguments.

The uninvited attention of dogs was obviously degrading and cruel in the photographs we saw of Abu Ghraib prison. Narcotic-detection dogs are not degrading to the same degree, but they are not such minimal intrusions on the dignity and the legitimate privacy interests of the individual that we should simply ignore the possibility that they are not reliable enough in every setting to justify the cost in human dignity. At least, the potential issues of dignity and privacy merit a more conscientious review of the Fourth Amendment issues than the Supreme Court gave us in *Illinois v. Caballes* or *United States v. Place*.

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1. *Illinois v. Caballes,* 125 S. Ct. 834 (2005).
2. This factual background is drawn from the decision of the Illinois Supreme Court in *People v. Caballes*, 207 Ill. 2d 504, 802 N.E.2d 202 (2003).
3. *Id.*
4. *Terry v. Ohio*, 392 U.S. 1 (1968).
5. *People v. Cox*, 202 Ill. 2d 462, 782 N.E.2d 275 (2002).
6. *People v. Caballes*, supra n.2, 207 Ill. 2d at 508, N.E.2d at 204.
7. *Id.* at 509
8. *Id.* at 510; *Cox*, 202 Ill. 2d at 472. In both the *Cox* and the *Caballes* cases, Justice Thomas filed dissenting opinions in which he spoke for three of the seven Illinois

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Supreme Court members.
9. *United States v. Place*, 462 U.S. 696 (1983).
10. *Caballes,* 125 S. Ct. at 838.
11. *Id.*
12. *Id.*
13. *Citing United States v. Jacobsen*, 466 U.S. 109 (1984).
14. *Place*, 462 U.S. at 709-710.
15. *Id.* at 707.
16. *Id.* at 723 (Blackmun, H. concurring).
17. *Id.* at 710 (Brennan, J. concurring).
18. *Caballes*, 125 S. Ct. at 838.
19. *Id.* at 839. (Souter, D. dissenting).
20. *Id.*
21. *Id.* (Ginsburg, R. dissenting).
22. *Id.*
23. *Id.*
24. "Well, my dear Pangloss," said Candide to him, "when you were hanged, dissected, severely beaten, and tugging at the oar in the galley, did you always think that things in this world were for the best?"

"I am still of my first opinion," answered Pangloss; "for as I am a philosopher, it would be inconsistent with my character to contradict myself; . . . ."

Voltaire, *Candide*, Chapter XXVIII.

The Debate Over Consumer Arbitration Clauses

By **Emily Rozwadowski**

Predispute arbitration clauses are often used by businesses in contracts with other businesses. These clauses require the parties to settle disputes in arbitration rather than in court. However, these clauses are now being added by businesses into their contracts with consumers. These clauses also require consumers to settle disputes in arbitration. In addition, the clauses often preclude consumers from bringing class action lawsuits.

Proponents of arbitration say there are many advantages to the system. Arbitrations are kept confidential, are governed by a national set of procedures, and require limited discovery. Proponents argue that predispute arbitration clauses are not necessarily unfair to consumers. Arbitration lowers a business's costs and these costs will be passed on to other consumers.

The use of arbitration clauses in consumer contracts, however, is controversial. Opponents of arbitration clauses in consumer contracts say that the high cost of arbitration may prevent consumers from seeking redress. In addition, many clauses preclude class action suits, which opponents say is harmful to consumers.

"In general, I believe mandatory arbitration clauses are unfair," said Jean Sternlight, Saltman Professor, University of Nevada-Las Vegas, Boyd School of Law, and director, Saltman Center for Conflict Resolution. "People haven't entered into them in a knowing, voluntary, and intelligent way."

Sternlight argues that arbitration clauses are harmful to consumers because they are imposed on consumers without the consumers' consent. "Because of the way the clauses are imposed, companies can construct them in a way that is beneficial to them," Sternlight said.

Professor Mark Budnitz, a law professor at Georgia State University College of Law, also believes arbitration clauses in consumer contracts are unfair because arbitrators are not required to follow consumer protection laws, there is no jury trial, and there is no way for the consumer to appeal the award. Budnitz also believes the clauses are unfair because arbitration proceedings are kept private.

"Companies can hide their misdeeds because arbitration proceedings are secret,"

Arbitration, *continued on page 15*