



COLORADO'S LEGALIZATION OF MARIJUANA AND ITS IMPACT ON TRAFFIC STOP CANINE SNIFFS

December 2017

For duplication & redistribution of this article, please contact Law Enforcement Risk Management Group by phone at 317-386-8325.
Law Enforcement Risk Management Group, 700 N. Carr Rd. #595, Plainfield, IN 46168

Article Source: http://www.llrmi.com/articles/legal_update/2017_people_v_mcknight.shtml

©2017 [Brian S. Batterton](#), J.D., Legal & Liability Risk Management Institute

On July 13, 2017, the Colorado Court of Appeals decided *the People v. McKnight*ⁱ, in which the court discussed the impact the impact of Amendment 64 of the *Colorado Constitution* as it relates to canine sniffs of vehicles and whether a canine alert provides probable cause to search a vehicle. The relevant facts of *McKnight*, taken directly from the case, are as follows:

At the suppression hearing, Officer Gonzales testified that he saw a truck parked in an alley. The truck left the alley and eventually parked outside of a house for about fifteen minutes. This house, according to Officer Gonzales, had been the subject of a search roughly seven weeks earlier that had turned up illegal drugs. When the truck drove away, Officer Gonzales followed it, saw it turn without signaling, and pulled it over.

McKnight was driving the truck. Officer Gonzales said he recognized McKnight's passenger from previous contacts with her, "including drug contacts" involving the use of methamphetamine. But when asked on cross-examination at what time, to his knowledge, the passenger had last used methamphetamine, Officer Gonzales declined to speculate about that and conceded that he was "just aware that at some point in the past she had been known to [him] as a user of methamphetamine."

At Officer Gonzales' request, Sergeant Folks came to the scene with his certified drug-detection dog, Kilo. Kilo is trained to detect cocaine, heroin, ecstasy, methamphetamine, and marijuana. He indicates that he has detected the odor of one of these substances by exhibiting certain behavior — barking, for example. His indicative behavior, however, does not vary based on the particular substance or amount of the substance he has detected.

When Sergeant Folks deployed Kilo to sniff McKnight's truck, Kilo displayed one of his trained indicators. Officers then told McKnight and the passenger to get out of the truck, searched it, and found a "glass pipe commonly used to smoke methamphetamine."ⁱⁱ

©2017 Article published in the free LLRMI E-Newsletter

Link to article online: http://www.llrmi.com/articles/legal_update/2017_people_v_mcknight.shtml
<http://www.llrmi.com> | <http://www.patctech.com>

McKnight was charged with possession of a controlled substance and possession of drug paraphernalia. He filed a motion to suppress the evidence and argued that the police violated his constitutional rights by conducting a canine sniff without reasonable suspicion of drug possession and searching his truck without probable cause. The trial court denied the motion to suppress and the case went to trial, where McKnight was convicted of both counts. McKnight then appealed the denial of his motion to suppress to the Colorado Court of Appeals.

On appeal, the two primary issues before the court were as follows:

- Whether reasonable suspicion was required in order to conduct a canine sniff of McKnight's vehicle?
- Whether the positive canine alert provided probable cause to conduct a search of McKnight's truck?

The court of appeals first set out to determine if the canine sniff was a "search" under the Fourth Amendment. This is important in order to resolve the first issue, particularly whether reasonable suspicion was required to conduct a canine sniff of McKnight's truck because, if the sniff is not a "search" under the Fourth Amendment, then no reasonable suspicion is required. Generally, a "search" occurs when an officer does action that intrudes into a person's legitimate expectation of privacy. Whereas, if an officer does not intrude into a legitimate expectation of privacy, then no "search" has occurred for the purposes of the Fourth Amendment. The court stated

Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)). **Any interest in possessing contraband is not legitimate. *Id.* And so official "conduct that *only* reveals the possession of contraband" does not compromise any legitimate privacy interest. *Id.* Applying that reasoning, the United States Supreme Court has held that employing a well-trained drug-detection dog during a lawful traffic stop does not implicate the Fourth Amendment because that is not a search. *Id.* at 409-10. Likewise, our supreme court has held that such a sniff is not a search under our state constitution. *People v. Esparza*, 2012 CO 22, ¶ 6.**

Indeed, in *People v. Mason*, 2013 CO 32, the supreme court said:

It is now settled that walking a trained narcotics detection dog around a car that has not been unlawfully stopped or detained does not implicate the protections of either the Fourth Amendment or Article II, section 7 of the state constitution.ⁱⁱⁱ

In other words, when a canine sniff only reveals the presence of **illegal** drugs, the sniff does not compromise a person's legitimate expectation of privacy under the U.S. Constitution or the state constitution. However, in spite of the rules from *Ceballes and Esparza*, the argument put forth by was that those cases were based on situations where the possession of marijuana was illegal. However, in

Colorado, based on Amendment 64, possession of an ounce or less of marijuana for personal use is not illegal. As such, McKnight argued that the canine sniff, which does not distinguish type or quantity of drugs, actually could reveal the presence of a **legal** substance, in which he would have a legitimate expectation of privacy. The court of appeals stated

Because Amendment 64 legalized possession for personal use of one ounce or less of marijuana by persons twenty-one years of age or older in Colorado, it is no longer accurate to say, at least as a matter of state law, that an alert by a dog which can detect marijuana (but not specific amounts) can reveal only the presence of "contraband." A dog sniff could result in an alert with respect to something for which, under Colorado law, a person has a legitimate expectation of privacy, i.e., the possession of one ounce or less of marijuana for personal use.

Because a dog sniff of a vehicle could infringe upon a legitimate expectation of privacy solely under state law, that dog sniff should now be considered a "search" for purposes of article II section 7 of the state constitution where the occupants are twenty-one years or older.^{iv} [emphasis added]

Thus, the Colorado Court of Appeals held that, since a canine sniff could intrude on a person's legitimate expectation of privacy, based on state law, that sniff is now considered a search for the purposes of the state constitution.

Therefore, regarding the issue of whether reasonable suspicion was needed to conduct a canine sniff of a vehicle, held that it was required. The court stated

[W]e conclude that "reasonable suspicion" is the state constitutional standard which applies to searches effected by dog sniffs of the exterior of a vehicle.^v

With this new rule in mind, the court of appeals set out to decide if the police had reasonable suspicion to conduct a canine sniff in McKnight's case.

As a review of the "reasonable suspicion" standard, the court stated

The reasonable suspicion standard requires "considerably less than proof of wrongdoing by a preponderance of the evidence and is less demanding even than the 'fair probability' standard for probable cause." *People v. Polander*, 41 P.3d 698, 703 (Colo. 2001) (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)). It is satisfied if "the police have specific and articulable facts, greater than a mere hunch, to support' their belief that the person to be stopped is or may have been involved in criminal activity." *People v. Huynh*, 98 P.3d 907, 912 (Colo. App. 2004) (quoting *Boylan*, 854 P.2d at 812).

In considering whether reasonable suspicion exists, the court looks at the totality of the circumstances, the specific and articulable facts known to the officer at the time of the encounter, and the rational inferences to be drawn from those facts. *People v. Garcia*, 251 P.3d 1152, 1158 (Colo. App. 2010).^{vi} [emphasis added]

The two factors that the state argued provided reasonable suspicion to conduct a canine sniff of McKnight's truck were (1) that McKnight was parked near a house where illegal drugs were located seven weeks prior, and (2) McKnight's passenger had used methamphetamine in the past, although no specific information regarding her drug use was in evidence. The court noted that the police did not see McKnight go into the house and did not see anyone from the house go to McKnight's vehicle. In light of this, the court held

Because, in our view, the police lacked the requisite reasonable suspicion to subject McKnight's truck to a dog sniff, the dog sniff was invalid, and the methamphetamine recovered as a result thereof should have been suppressed.^{vii}

Therefore, they reversed the denial of the motion to suppress. This was the opinion of Judge Daily and Judge J.J. Berger, two of the three judges on the panel that heard this case.

However, it is also important to examine the second issue, in this case, particularly whether the positive canine alert on McKnight's truck provided, in addition to other relevant facts, provided probable cause to search McKnight's truck. In a concurring opinion, Judge J. Jones wrote

Courts have recognized that an alert from a dog trained to detect several substances, including marijuana, by itself may amount to probable cause justifying a search of a vehicle. *Florida v. Harris*, 568 U.S. 237, 246-47 (2013); *People v. Esparza*, 2012 CO 22, ¶ 12. But is that still true for purposes of article II, section 7 of the Colorado Constitution, given that state law now generally allows anyone who is at least twenty-one years old to possess small amounts of marijuana for personal use? I consider that question, which our supreme court did not address directly in *People v. Zuniga*, 2016 CO 52, and *People v. Cox*, 2017 CO 8, and conclude that such a dog's alert alone no longer supplies probable cause where the occupants of the vehicle are twenty-one years or older and the officer conducting the search is not a federal officer.^{viii} [emphasis added]

Judge Jones explained that probable cause to search a vehicle is based on the "totality of the circumstances" and there must exist a "fair probability [] that a search of a particular place will reveal evidence of a crime."^{ix} Judge Jones further explained that the legalization of marijuana of an ounce or less for a person 21 or older created "far more ambiguity" as to whether the person is committing a crime but clarified this same level of ambiguity did not exist when marijuana was legal for only medicinal purposes, and that was merely an "affirmative defense" to the possession of marijuana.^x

As such, Judge Jones concluded that a canine alert alone does not provide probable cause to search a vehicle when the occupants are 21 years old or older and the search is not being conducted by a federal officer (because federal officers enforce federal law and marijuana is still illegal under federal law).

However, the analysis does not end there because the totality of the circumstances (in other words, additional facts), in combination with the canine alert could still support probable cause. However, as previously stated, the additional facts in McKnight's case were (1) that McKnight was parked near a house where illegal drugs were located seven weeks prior, and (2) McKnight's passenger had used methamphetamine in the past, although no specific information regarding her drug use was in evidence.

Additionally, the court noted that the police did not see McKnight go into the house and did not see anyone from the house go to McKnight's vehicle. As such, Judge Jones opined that based on these additional facts, probable cause still did not exist in this case.

Additionally, it is important to note that Judge Berger also opined, in a specially concurring opinion, regarding the absence of probable cause and stated

I agree with Judge Jones' conclusion that probable cause was absent (although it is a very close question).

Therefore, both Judge J. Jones and Judge Berger (2 of 3) held that probable cause was not present based on the canine alert in this case.

ⁱ No. 16CA0050 (2017 COA 93 (Colo. App. 2017))

ⁱⁱ Id. at 4-5

ⁱⁱⁱ Id. at 6-7

^{iv} Id. at 8

^v Id. at 10-11

^{vi} Id. at 11

^{vii} Id. at 12

^{viii} Id. at 17

^{ix} Id. at 19-20

^x Id. at 23