

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)		
)		
Petitioner,)		
)		
v.)	Case No.	SC04-490
)	Lower Tribunal No.	2D00-1611
GARY ALAN MATHESON,)		
)		
Respondent.)		
_____)		

RESPONDENT’S ANSWER BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida

Celene Humphries
Special Assistant Public Defender
Florida Bar Number 0884881
P.O. Box 9000, Drawer PD
Bartow, FL 33831

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

T a b l e o f C i t a t i o n siii
.....iii

S t a t e m e n t o f t h e Case.....1

S t a t e m e n t o f t h e Facts.....3

S u m m a r y o f Argument.....21

Argument.....
..... .23

I. THIS COURT DOES NOT HAVE DISCRETIONARY JURISDICTION TO REVIEW THE SUBJECT DECISION OF THE SECOND DISTRICT COURT OF APPEAL. THE STATE ERRONEOUSLY ASSERTS THAT THIS DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW.....23

II THE SECOND DISTRICT PROPERLY HELD THAT THE STATE FAILED TO PROVE THAT THE K-9 DEPUTY REASONABLY BELIEVED THAT HIS NARCOTICS-DETECTING DOG WAS SUFFICIENTLY RELIABLE AT DETECTING THE PRESENCE OF ILLEGAL NARCOTICS TO BE THE SOLE EVIDENCE OF PROBABLE CAUSE TO BELIEVE THAT ILLEGAL NARCOTICS WERE PRESENT IN THE RESPONDENT’S VEHICLE. WHETHER SUFFICIENT PROBABLE CAUSE EXISTS TO JUSTIFY A SEARCH MUST BE DETERMINED FROM THE TOTALITY OF THE CIRCUMSTANCES, FOCUSING UPON THE FACTS EXISTING AT

HE TIME OF THE SEARCH AS VIEWED IN LIGHT OF THE OFFICER'S KNOWLEDGE AND EXPERIENCE. AS A MATTER OF LAW, AN OFFICER WHO KNOWS ONLY THAT HIS DOG IS TRAINED AND CERTIFIED TO DETECT NARCOTICS LACKS SUFFICIENT EVIDENCE OF THE DOG'S RELIABILITY TO REASONABLY CONCLUDE THAT PROBABLE CAUSE EXISTS TO BELIEVE THAT NARCOTICS WILL BE FOUND IN THE AREA TO WHICH THE DOG ALERTS.....
.....26

Conclusion.....
.....42

C e r t i f i c a t e o f
Service.....42

C e r t i f i c a t e o f F o n t
Compliance.....42

TABLE OF AUTHORITIES

Constitutional Provisions

Art. V, § 3(b)(3), Fla. Const. (1980) 23

Statutes

Section 893.13(6)(a), Florida Statutes (1999) 1

Section 893.147, Florida Statutes (1999) 1

Florida Rules of Procedure

Florida Rule of Appellate Procedure 9.030 23

Cases

Anguilar v. Texas, 378 U.S. 108 (1964) 30

Beck v. Ohio, 379 U.S.89 (1964) 29

Benfield v. State, 160 So. 2d 706 (Fla.1964) 29

Carr v. State, 353 So. 2d 958 (Fla. 2d DCA 1978) 29

Cliett v. State, 722 So. 2d 916 (Fla. 2d DCA 1998) 29

Coney v. State, 820 So. 2d 1012 (Fla. 2d DCA 2002) 36

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 29

Dawson v. State, 518 S.E.2d 477 (Ga. Ct. App. 1999) 39

Dixon v. State, 343 So. 2d 1345 (Fla. 2d DCA 1977) 29

Doctor v. State, 596 So. 2d 442, 445 (Fla. 1992) 29

Doorbal v. State, 837 So. 2d 940, 952 (Fla.) 29

Johnson v. U.S, 333 U.S. 10 (1948) 30

Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003) 2, 23-6

Palmer v. State, 753 So. 2d 679 (Fla. 2d DCA 2000) 29

Stephens v. State, 748 So. 2d 1028 (Fla. 1999) 27-8

State v. Ellison, 455 So. 2d 424 (Fla. 2d DCA 1984) 29

State v. Foster, 390 So. 2d 469 (Fla. 3d DCA 1980) 21, 24-5

State v. Kindle, 782 So. 2d 971 (Fla. 5th DCA 2001) 27-8

State v. Redding, 362 So. 2d 170 (Fla. 2d DCA 1978) 29

United States v. Diaz, 25 F.3d 392 (6th Cir. 1994) 38

United States v. Jeffers, 342 U.S. 48 (1951) 29-30

United States v. Hill, 195 F.3d 258 (6th Cir. 1999) 38

United States v. Outlaw, 134 F. Supp. 2d 807 (W.D. Tex. 2001) 38

<u>United States v. Williams</u> , 69 F.3d 27 (5th Cir. 1995)	38
<u>United Staes v. Ventresca</u> , 380 U.S. 02 (1965)	30
<u>Vetter v. State</u> , 395 So. 2d 1199 (Fla. 3d DCA 1981)	21, 23-4, 26
<u>Warren v. State</u> , 561 S.E.2d 190 (Ga. Ct. App. 2002)	38

STATEMENT OF THE CASE

In this case, a deputy relied exclusively on a drug-detecting dog's positive alert to the Respondent's vehicle to conclude that the vehicle contained illegal narcotics. A search revealed narcotics and paraphernalia.

The State of Florida charged the Respondent with three counts of possession of controlled substance and one count of possession of drug paraphernalia, in violation of sections 893.13(6)(a) and 893.147, Florida Statutes (1999) (V. I, R. 12-16). The Respondent filed a motion to suppress evidence, asserting that his vehicle was searched in violation of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution, and that all evidence resulting from the illegal search should be suppressed (V. I, R. 20). In support, the Respondent alleged that law enforcement officers relied upon a "positive alert" from an unreliable narcotics detection dog to determine that probable cause existed to believe that the Respondent's vehicle contained narcotics and, based thereon, searched the Respondent's vehicle (V. I, R. 20). The trial court conducted a hearing on the motion and denied it (V. IV, T. 1-153; V. V, T. 154-232).

On March 13, 2000, the Respondent pled no contest and specifically reserved his right to appeal the denial of his motion to suppress (V. III, R. 416-7; V. V, T 3-7). The trial court found that the motion was dispositive and imposed sentence (V. III, R

420-6; Vol. V, T 10-11). The Respondent timely filed his notice of appeal on April 12, 2000 (Vol. III, R 427).

In its August 1, 2003, decision, the District Court reversed the trial court's denial of the Respondent's motion to suppress. Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003). The District Court held that the State failed to meet its burden of proving that the drug-detection dog's alert to the Respondent's vehicle provided the K-9 deputy with probable cause to believe that illegal narcotics were present in the vehicle. Id. at 14-5.

On March 5, 2004, the District Court denied the State's motion for rehearing, rehearing en banc, clarification and certification. On March 18, 2004, the State filed its notice to invoke the discretionary jurisdiction of this Court. On August 17, 2004, this Court accepted jurisdiction of this case.

STATEMENT OF THE FACTS

At the hearing on the motion to suppress, the State presented the testimony of Deputy Greco, the dog handler, and evidence consisting of the drug-detecting dog's certification from the United States Police Canine Association and a notebook containing information regarding the dog (V. III, R. 407; Vol. IV, T. 6-69).

The appellate record does not contain a copy of this certificate this exhibit. The clerk of court identified this evidence on the non-jury hearing/motion data sheet as two exhibits for the State, consisting of: (1) "HCSO K-9 'RAZOR' NOTEBOOK;" and (2) 2-pg COPY POLICE DOG ASSOC. Certificate" (V. III, R. 407).

Deputy Greco testified that he relied exclusively on a drug-detecting dog's positive alert to the Respondent's vehicle to conclude that the vehicle contained illegal narcotics (V. IV, T 22-6) . A search revealed hydrocodone tablets, morphine tablets and methamphetamine chips (V. IV, T 28, 61).

Regarding the reliability of his drug-detecting dog's positive alert, Deputy Greco testified that he and Razor participated in one initial thirty-day training course and one week-long annual certification course with the United States Police Canine Association ("U.S.P.C.A.") (V. IV, T. 11-3, 15, 29). Deputy Greco testified that USPCA training involved only marijuana, cocaine and heroine detection (V. IV, T. 19). The program did not include training to detect the substances found in the Respondent's vehicle,

including methamphetamine (V. IV, T. 19, 29). Deputy Greco also testified that the Hillsborough County Sheriff's Office periodically trains him and Razor for detecting methamphetamine, marijuana, heroin and cocaine (V. IV, T. 31). The State elicited very little testimony from Deputy Greco regarding Razor's training (V. IV, T. 11, 13, 15, 29-31).

Deputy Greco testified that he participated in no other training with Razor (T 13). Deputy Greco elaborated on cross-examination, that Razor's training did not include extinction training to condition him to refrain from alerting to residual odors of illegal narcotics (V. IV, T 53-4). Deputy Greco also testified that Razor is not subject to controlled testing to determine whether he alerts falsely (V. IV, T. 55). Deputy Greco also conceded that he is a drug dog handler, not a trainer (V. IV, T. 51). Therefore, he explained that he knows little about the sufficiency of Razor's training to detect illegal narcotics (V. IV, T. 51).

Deputy Greco also testified that he never compiled or maintained a record of Razor's false positive response rate (V. IV, T. 55). He explained that he often leaves the scene of a sniff after advising deputies of Razor's alert and, thus, does not learn whether the alert led to the discovery of illegal narcotics (Vol. IV, T. 55, 59-60). Deputy Greco stated in response to questioning, as follows:

[DEFENSE COUNSEL]: Um, a couple of things.

You do a lot of, um, reports that are already in the exhibit for street activity, let me see what they're referred to, "field activity reports" near the back.

Um, but when you do these reports, if the dog ever alerts or finds something, you don't have a policy of ever finding out whether he - - what it was or whether it was something he's trained to alert on?

A The detectives that are involved in that kind of thing are advised that they need to contact us in the event they do. They don't always; they're not always on top of it. We like to complete supplement reports to anything they do - -

Q Right. But apparently - -

A - - if something is found.

Q - - there aren't any that are, um, with your field activity reports?

A On those use reports; is that what you're referring to? The use reports that we complete?

Q Well, I think they're marked in this exhibit "F.A.R."; so I thought it was a reference to "field activity reports". Um - -

A That's a use report.

Q "K-9 Activity Detection Report" up at the top?

A Yes.

Q They're - - **all of these reports that you provided, don't show any, um, follow-through where you determine whether your dog was even correct?**

A **No. In some case, I have not con - - recontacted [sic] the, um, Detectives.**

(V. IV, T. 59-60) (emphasis added).

The State presented no other evidence to establish that Deputy Grecco reasonably believed that his narcotics-detecting dog was sufficiently reliable at detecting the presence of illegal narcotics to be the sole evidence of probable cause

to believe that illegal narcotics were present in the Respondent's vehicle. The State simply summed up its evidence by saying:

Judge, um, at this point, I'm gonna [sic] proffer to the Court that Razor has been certified, he's handled by a - - deputy whose gone to the - - to school and received a certification with the dog.

He's testified that he has alerted, um, there's nothing in evidence that proves or insinuates that the dog is not properly trained and did not give a valid alert.

And I believe I've, at least at this point facially at least, met my burden of proving to your Honor that the dog is worthy of - - of the probable cause that he provides under the case law.

(V. IV, T 62).

The trial court held that the evidence of the dog's certification was sufficient for the State to meet its burden of establishing a prima facie basis of probable cause, and permitted defense counsel to offer evidence in rebuttal (V. IV, T. 64-6). The following exchange took place:

THE COURT: No. They - - he's certified locally. I - - they've met their burden, as far as I'm concerned. If you wanna put on some testimony to try to dissuade me that they haven't got a properly certified dog, go for it.

That's what this is about. **But as far as I'm concerned, that dog was trained, he's competent, he obviously got the drugs. Isn't that an interesting state of affairs.**

MR. CURRY: Well, it is interesting - -

THE COURT: These drugs - -

MR. CURRY: - - because he - -

THE COURT: - - he just guessed?

MR. CURRY: - - he alerts on the back of a vehicle and they end up searching the, um - -

THE COURT: With drug paraphernalia in it. **I mean, I'm a realist and a very common sense kind of an operator, okay?**

You can operate from whatever base you want, I'm giving you an opportunity to put on this evidence, and I certainly am gonna consider it; but as far as I'm concerned - -

MR. CURRY: We - - we've already stipulated to the lab report in this case.

THE COURT: Right.

MR. CURRY: Which does not show anything - -

THE COURT: **So what was he doing? He just guessed?**

MR. CURRY: - - that dog can alert to on syringes, paraphernalia or anything in the car.

(T 64-6)(emphasis added).

Defense counsel then presented the testimony of two witnesses. First, defense counsel called Razor's trainer, Sergeant Olive, who testified that neither the H.C.S.O.

or U.S.P.C.A. training regimens included training to discourage Razor from alerting to "dead scents," those being residual odors of drugs that are no longer present (T 71-4, 84, 94-7). Sergeant Olive also testified that he is not aware of spontaneous recovery problems in training drug dogs and that he is not aware of "stimulus generalization and training" (T 90-1, 98). In addition, he testified that they do not use a reward schedule for Razor (T 97-8). Instead, they reward him every time he alerts, regardless of what is found (T 89-90).

Defense counsel also presented the expert testimony of Dan Craig, a veterinarian and animal behavior specialist whose background included extensive consultation with the United States military and other agencies regarding the detection dog programs (V. IV, T. 100-2). Dr. Craig testified at length regarding Razor's training. Specifically, he testified that the H.C.S.O. training procedures used with Razor were too simplistic to make him reliable at detecting narcotics for six reasons (V. IV, T. 142-3). First, Razor received inadequate training for searching vehicles (V. IV, T. 143). Second, Razor was not trained with small quantities of drugs (V. IV, T. 143). Third, training officers failed to plant novel odors during Razor's training searches (V. IV, T. 143-4). Fourth, Razor was not subject to controlled negative testing, in which all objects or locations have no drugs present (V. IV, T. 110). Dr. Craig said that this type of testing indicates a false response rate and reveals whether the handler or the dog is guessing (V. IV, T.

110). He added that preventing the handler from knowing whether drugs will be present during a training exercise reveals whether the handler is consciously or unconsciously prompting the dog to alert (V. IV, T. 110). Dr. Craig asserted that this type of testing is essential and should be performed periodically on a random basis (V. IV, T. 110). Fifth, Razor was not given extinction training, which would have discouraged him from alerting to common items that are sometimes associated with drugs, such as plastic bags used for packaging (V. IV, T. 110, 138). Sixth, there was no evidence that Razor's training included "stimulus generalization," which conditions a dog trained on one class of drugs to detect all drugs in that class (V. IV, T. 147-8).

Addressing Razor's USPCA certification, Dr. Craig testified that there were a number of flaws in the U.S.P.C.A. certification procedures that rendered this certification insufficient evidence of Razor's reliability (V. IV, T. 106). First, the U.S.P.C.A. did not perform controlled negative testing (V. IV, T. 107, 109). Second, the U.S.P.C.A. limited the dog's search time to ten minutes, which is shorter than "real world" searches (V. IV, T. 107-8). Third, the U.S.P.C.A. required only a seventy percent proficiency, which Dr. Craig considered insufficient (V. IV, T. 108). Fourth, the U.S.P.C.A. failed to focus on the dog's ability to detect narcotics, but analyzed the ability of the dog and handler as a team (V. IV, T. 108). Therefore, according to Dr. Craig, the U.S.P.C.A. could not truly certify the dog's individual ability to detect

narcotics (V. IV, T. 108). Fifth, Razor was not certified to detect methamphetamine, and his training did not prepare him to reliably detect this substance (V. IV, T. 108).

Regarding Razor's track record, Dr. Craig testified that he reviewed numerous field reports in which Razor alerted, but no narcotics were found (T 128-38). Dr. Craig opined that these reports revealed a twenty-seven to forty percent false response rate (T 126-7, 139-41). In his expert opinion, this rate is unacceptable (T 126-7). As for the possibility that some of these false alerts are examples of Razor responding to the residual odor of drugs that have been removed from the searched area, Dr. Craig explained that these odors dissipate (T 146). Dr. Craig also testified that these instances of Razor's false positive alerts make clear the need for controlled negative testing and extinction training (T 128-38). Based on the field activity reports from before the search of Mr. Matheson's vehicle, Dr. Craig opined that Razor could not be relied upon to validly respond to the existence of contraband in Mr. Matheson's car (T 144).

Dr. Craig finally concluded that, based on his review of all the records available and the testimony of Sergeant Olive and Deputy Greco, Razor was not a reliable drug detector dog when he sniffed Mr. Matheson's vehicle (T 124, 180-3).

In addition, defense counsel also presented the trial court with the transcript of Deputy Greco's deposition. As to the HCSO training, Deputy Greco could not testify

how frequently this training occurred because the Sheriff's Office does not "have a specific schedule set up" (R 66). In addition, Deputy Greco once again testified that he is not a trainer or an evaluator, and that he is not qualified for either (R 42). He also testified that Razor is does not alert for hydrocodone or morphine, two of the substances allegedly found in Mr. Matheson's vehicle (R 12-3, 53).

Throughout the deposition, the State aggressively denied defense counsel the opportunity to explore Deputy Greco's knowledge regarding Razor's training to detect illegal narcotics. Initially, the State did not permit Deputy Greco to give defense counsel Razor's certificate of completion of the drug narcotics program (R 29). When defense counsel attempted to question Deputy Greco about Razor's performance in this certification program, the State prevented further discussion (R 39). The following exchange transpired:

Q Okay. For your state certification, let me see if I've got this right, what was - - did they have a rating, like a percentage or how - -

[THE STATE]: We're not going there. I'm not going to have you asking questions about all the documents he's got when I told you you [sic] can't have the documents that he has.

So, you can certify the question, if you want to. If you want to ask him some general questions about the dog, I don't mind. But, I'm not going to sit here for hours while you pick apart what training he's had, and if he

found the drugs or he didn't find the drugs, et cetera, et cetera.

(R 39).¹ As a result, Deputy Greco was not permitted to testify regarding the specific procedures used to conduct this certification program, such as whether it tested Razor's ability to refrain from alerting to residual odors.

As with the certificate of completion of the narcotics detection program, the State did not permit Deputy Greco to give defense counsel Razor's training records

(R 48-9). The following exchange occurred:

Q Do you follow any Florida Department of Law Enforcement regulations on your - - for your dog's certification or training?

A Yes.

....

Q Okay. Did you bring them today?

A Yes.

Q Does Mr. Leal mind me looking at those?

[THE STATE]: What are these, now, the FDLE - -

[DEFENSE COUNSEL]: Regulations.

[DEPUTY GRECO]: No, these are - - these are our standard operating procedures.

[THE STATE]: Yep, I mind.

....

¹ The State's comment seems to be referring to the procedure set forth in Florida Rule of Civil Procedure 1.310(d), which provides for involving the trial court to resolve controversies during a deposition.

[DEFENSE COUNSEL]: Could you describe what those regulations are?
[THE STATE]: No.

(R 48-9).

When defense counsel attempted to ask Deputy Greco regarding his knowledge of Razor's training, the State aggressively objected to this line of questioning. The following exchange occurred:

Q What - - what do you use to train your dog?
How does that work?

[THE STATE]: No.

. . . .

[THE STATE]: I'm telling you, right now, I'm going to object for the record to any other questions about the training of the dog. Unless, you want to ask him - - I believe, you had asked him what certifications he had.

(R 63-4). When defense counsel tried to elicit more details about Razor's training and about Razor's rate of false positive alerts, the following exchange occurred:

Q How often does it happen? You know, you -

-

A We don't have specific training. We have - - we train. Sometimes, if we - - we train according to time and duty permitting. In other words, I'm on the street. If I'm needed for a call, I'm - - I'm handling a call or I'm on patrol.

If we have time, the Sergeant will set certain days of training. He'll just simply tell you come to the office, we're going to - - we're going to narcotics training.

And he'll set out narcotics. And then, we will run the dog on it.

Q What's the - - what's the longest period of time your dog has gone without training?

A I'd have to look it up. I'd have to look up the training records.

Q Can you give me a - -

[THE STATE]: Rex, that's the last one. If you ask one more question like that, the depo. [sic] is over. Okay? I thought I've been clear about it. You're just trying to push me.

[DEFENSE COUNSEL]: I thought this was general stuff about training. This is - -

[THE STATE]: Nothing more about the training of the dog.

[DEFENSE COUNSEL]: And you don't know what your dog's precise rate of false positives is?

[THE STATE]: That's it. Take it easy, Deputy.

[DEFENSE COUNSEL]: Well, that's just false positives.

[THE STATE]: I don't know what kind of game you fucking [sic] think I'm playing here, Mr. Curry.

[DEFENSE COUNSEL]: It's false positives. That's the issue here.

[THE STATE]: I don't care what it is. I don't think you're entitled to any of this. The dog is certified. Okay. Certify the question.

(R 66-8).²

During his deposition, Deputy Greco also testified that he did not know Razor's

² Again, the State seems to be referring to the procedure set forth in rule 1.310(d).

positive response rate in the field and that the Sheriff's Office did not keep track of this information (R 54-6). During extensive questioning regarding this subject, the following exchange occurred:

Q Do you have with you records showing your positive response rate that you've just described?

A No.

Q Where are those?

A We don't maintain those.

Q Okay. Well, maybe I misunderstood. I thought a moment ago you had indicated you did have some type of record of - -

A I have training records.

Q Those are just training records?

A Uh-huh.

Q You have no records regarding your dog's positive response rate in the field?

A No, I don't have those records.

Q Does anybody have such records? Or are such records made?

A Not that I'm aware of.

Q Okay. So, you don't when you go on calls keep any records of how often your dog responds positively?

A Yeah. Yes. We main - - yeah, we - - I told you, we do maintain our statistics like that.

....

A Yeah, we do - - we have a - - let me try to explain it to you. We do activity. We have an activity sheet that is maintained and done every single day and maintained every month that is totalled.

Q Did you bring those today?

A No.

Q And - - and for Razor, what - - can you tell me anything about his positive response rate in the field?

A No.

Q You wouldn't be able to figure that out?

A Sure.

Q And where are the records maintained?

A There at the Sheriff's Office.

(R 55-7). Deputy Greco further testified that he does not know the success ratio of Razor in the field, as follows:

Q How many cars does your dog search without a find?

A I don't have a specific number.

Q Do you keep records?

A Yeah. There's - - there's a record somewhere.

Q What would that record be called?

A We - - we - - again, we don't keep ratios. We don't keep numbers. We have - - we have paperwork on file, but there isn't a tally.

(R 61). Deputy Greco repeated this fact again, in the following exchange:

Q How many times has it responded or alerted?

A I don't have the exact ratio.

Q How many times had your dog been used to provide probable cause to search?

A I don't have a specific number.

(R 62). Deputy Greco added that he often does not stay at the scene to learn whether the search revealed narcotics:

Q Do you ever follow up to find out what the substance was that your - you think your dog alerted to?

A Sometimes.

Q So, how do you decide when you are going to follow up?

A It depends on how interested in the case I am.

....

A We do a lot of drug narcotics searches. Sometimes, I stay. Sometimes, I'm requested to go to another call. I might do a search, the dog will alert, I'll tell them he alerted, where he alerted and I've got to go.

(R 62).

Defense counsel also supplemented the motion to suppress with copies of Razor's Activity/Detection Reports, which reflect that he has a significant history of alerting where no narcotics are found (R 215-346). In fact, these records reflect that Razor had almost no positive alerts during the time period of Mr. Matheson's search. The State alleged that Mr. Matheson was found in possession of illegal narcotics on May 5, 1999. An activity/detection report for the same day reflects that Razor alerted to another area and no drugs were found therein (R 277-8). Razor alerted seven other times during May (R 277-92). Of his May alerts, only two resulted in illegal narcotics being found in the vehicle (V. II, R. 277-92). The reports for other months also reflect a low accuracy rate (V. II, R. 223-4, 233-4, 237-8, 259-60, 261-2, 293-4, 297-8, 305-6, 307-8, 313-4, 317-8, 327-8, 329-30, 341-2, 345-6). For example, in August, none of the searches following an alert by Razor's revealed illegal narcotics (V. II, R 329-46).

Likewise, in July, 75 percent of the searches following an alert by Razor revealed no illegal narcotics (Vol. II, R. 303-28).

In numerous instances, Razor's activity/detection reports include comments suggesting that Razor was alerting to the odor of narcotics that were recently present, thereby suggesting that he was accurately alerting to the area. The comments are summarized here:

As to an April 7, 1999, search, "Dog gave alert on drivers [sic] door. Tobacco parts located inside. Not marijuana. No illegal narcotics founds. Possible recent use" (R 262).

As to a May 5, 1999, search (same day as Mr. Matheson's search), "Razor alerted at drivers [sic] door and rear passenger door. No drugs found. However indications of drug use found inside vehicle" (R 278).

As to a May 24, 1999, search, "Razor alerted on passenger door. Let inside and alerted on passenger seat. Unable to locate any narcotics. Passenger very nervous upon search. Unknown if poss [sic] concealed elsewhere on passenger's person" (R 286).

As to a May 25, 1999, search, "Razor alerted on Driver's door and passenger seat. Indications of drug use in vehicle, passenger also has priors for drugs. However, no narcotics found" (R 288).

As to another May 25, 1999, search, "Dog alerted on two vehicles. No narcotics found. OCB found 10 lbs marijuana earlier, vehicles poss. used to transport previously" (R 290).

As to an August 12, 1999, search, "Dog alerted on rear hatchback. Driver has extensive record for narcotics violation. Could locate no narcotics" (R 342).

In addition, defense counsel presented the trial court with documents relating to Razor's training programs. One certificate represented that it was awarded for

Deputy Greco and Razor completing a k-9 narcotics detection course sometime around October 21, 1997 (more than one-and-one-half years before this May 1999 search) (R 153, 167). Another certificate represented that Razor completed the narcotics detection training sponsored by the United States Police Canine Association (“U.S.P.C.A.”) on June 12, 1998 (almost a year before this search) (R 39, 152, 166).

However, the U.S.P.C.A. Detector Dog Team Performance Evaluation forms establish that Razor had numerous problems during the certification program (R 363-7). The examiner repeatedly deducted points for Razor’s lack of enthusiasm and for Deputy Greco’s lack of confidence in dog (R 363-7). Points were also deducted for Deputy Greco’s poor handler performance, including keying Razor on the narcotic, not demonstrating an enthusiastic attitude, inconsistent search sequences, not properly controlling Razor and poor leash control (R 364-6). In one case, the examiner commented, “Stepped on foot - too slow causes [sic] frustration and false / al.” (R 363). “False / al.” appears to be false alert.

At the conclusion of the hearing, the trial court denied the motion to suppress, ruling that Razor was trained, competent and reliable (T 225). The trial court then repeated its belief that the presence of methamphetamine in the vehicle confirms the dog’s reliability, stating:

. . . but I don’t have any doubt that this dog was

competent, was reliable, was trained and could - - could alert to, and obviously did alert to . . . methamphetamine, so.

. . . .

. . . . The front of the car, the back of the car, I guess I'm - - I'm too old, because, frankly, **if you take a very common sense approach to this; in the real world, that's what happened. This dog alerted to that drug.**

So I'm going to reject Dr. Craig's opinion for the record, because I, frankly, think his expectations are for perfectionists; and we don't live in that kind of world.

(T 226-7) (emphasis added).

SUMMARY OF THE ARGUMENT

Initially, this Court lacks discretionary jurisdiction to review the Second District Court decision. In this case, the District Court relied on the Third District decision in State v. Foster, 390 So. 2d 469 (Fla. 3d DCA 1980), to hold that the State failed to meet its burden of proving that a drug-detection dog's alert to the Respondent's vehicle provided the K-9 deputy with probable cause to believe that illegal narcotics were present in the vehicle. The District Court relied, in part, on the K-9 deputy's testimony that he did not maintain a record of the drug-detection dog's false alert rate.

In Vetter v. State, 395 So. 2d 1199 (Fla. 3d DCA 1981), the Third District relied upon its decision in Foster to affirm the trial court's finding that the State met its burden where Vetter tendered a plea before the State was able to present evidence of the drug-detecting dog's reliability, and where the affidavit to the search warrant represented that the drug-detection dog had a significant record of positively alerting on vehicles that contained controlled substances.

Accordingly, the decision of the Second District cannot be said to expressly and directly conflict with the Third District decision in Vetter.

Should this Court, nonetheless, conclude that it has discretionary jurisdiction and elect to exercise that jurisdiction, it should affirm the decision of the Second District. The Second District properly held that the State failed to prove that the K-9

deputy reasonably believed that his narcotics-detecting dog was sufficiently reliable at detecting the presence of illegal narcotics to be the sole evidence of probable cause to believe that illegal narcotics were present in the Respondent's vehicle. Whether sufficient probable cause exists to justify a search must be determined from the totality of the circumstances, focusing upon the facts existing at the time of the search as viewed in light of the officer's knowledge and experience. As a matter of law, an officer who knows only that his dog is trained and certified to detect narcotics lacks sufficient evidence of the dog's reliability to reasonably conclude that probable cause exists to believe that narcotics will be found in the area to which the dog alerts.

ARGUMENT

I. THIS COURT DOES NOT HAVE DISCRETIONARY JURISDICTION TO REVIEW THE SUBJECT DECISION OF THE SECOND DISTRICT COURT OF APPEAL. THE STATE ERRONEOUSLY ASSERTS THAT THIS DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW.

In its jurisdictional brief, the State asserts that the decision in Matheson v. State, 870 So. 2d 8 (Fla. 2d DCA 2003), conflicts with Vetter v. State, 395 So. 2d 1199 (Fla. 3d DCA 1981), issued by the Third District Court of Appeal, and that this conflict provides this Court with discretionary jurisdiction to review Matheson. This assertion is wrong. This Court does not have discretionary jurisdiction to review the subject decision of the Second District Court because that decision does not expressly and directly conflict the Third District Court's decision in Vetter on the same point of law. See Art. V, §3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). The Respondent asks this Court to reconsider its preliminary ruling that it has discretionary jurisdiction over this appeal.

Discretionary jurisdiction to resolve conflicts is limited to those cases in which the decision of the district court of appeal expressly and directly conflicts with a decision of the supreme court or of another district court of appeal. It is not enough to show that the district court decision is effectively in conflict with other appellate

decisions.

In this case, the decision in Matheson does not expressly and directly with Vetter. In fact, both decisions cite the same Third District Decision, issued in 1980. In State v. Foster, 390 So. 2d 469 (Fla. 3d DCA 1980), the Third District set forth set forth the following additional factors that must be known in order to establish that a drug detection dog's alert is a sufficient basis for finding probable cause to search:

the exact training the detector dog has received; the standards or criteria employed in selecting dogs for marijuana detection training; the standards the dog was required to meet to successfully complete his training program; the "track record" of the dog up until the search (emphasis must be placed on the amount of false alerts or mistakes the dog has furnished).

The Third District cited Foster with approval when it issued Vetter the following year, stating:

Both sides submitted to the court written (and widely divergent) versions of events leading up to the dog sniff, which bear upon the issues of an illegal stop (vel non) and appellant's purported consent. At pretrial hearing, appellant alleged in addition that the affidavit for warrant contained material misrepresentations concerning the dog Ringo; the affidavit stated: The narcotics detection dog "Ringo" is specially trained in the detection of heroin, cocaine, marijuana, hashish and all of their derivatives. "Ringo" has positively alerted on thirteen consecutive occasions for substances which were subsequently verified to be controlled substances. At no time has Ringo alerted falsely.

Appellant claimed that Ringo's training, or lack

thereof, does not give his alerts that quantum of reliability necessary to constitute probable cause. Two experts in the canine training field testified for appellant to the effect that Ringo's training regimen, and his work routine, precluded an objective demonstration of reliability. . . .

. . . .

Criteria by which to assess the training a narcotics dog has received are collected in our opinion in State v. Foster, 390 So.2d 469 (Fla.3d DCA) (1980) (1980 FLW 2229) (involving a warrantless search). The trial court was not convinced by appellant's experts that Ringo's training was inadequate to establish his reliability; on this record, where a plea was made to the court, and accepted, before the state put on its case for Ringo's training and general reliability, we will not gainsay the decision of the learned trial judge that appellant did not carry his burden.

Citing Vetter's plea to the Court and the Court's acceptance of that plea, which denied the State the opportunity to put on evidence of the drug-detecting dog's reliability, the Third District declined to find the trial court's ruling error.

The subject decision of the Second District Court also cites Foster with approval, stating, "We agree with this list of factors, and we especially join in the Foster court's emphasis on the dog's performance history." Matheson. Unlike Vetter, the State in this case did undertake to establish the drug-detecting dog's reliability. It attempted to do so only by introducing general evidence of his training and his certification. And, unlike Vetter, the K-9 deputy in the subject decision testified that he did not maintain a record of the drug-detection dog's false alert rate.

In fact, the K-9 deputy testified that he often does not learn whether his dog's alert leads to the discovery of contraband because he frequently leaves the scene of a sniff once he advises other deputies of the alert.

Accordingly, it cannot be said that there is an express and direct conflict between the subject decision in Matheson and Vetter.

Should this Court perceive a conflict, it is more aptly defined as an intradistrict conflict within the Third District, between the decisions in Vetter and Foster. Section 3(b)(3) of the Florida Constitution does not allow the supreme court to resolve conflicts within a district court of appeal.

Moreover, even if an argument exists for discretionary jurisdiction on this basis, this Court is not under an obligation to review the subject decision. Discretionary jurisdiction entails only a judicial power to review case. This Court may elect not to exercise that power.

II THE SECOND DISTRICT PROPERLY HELD THAT THE STATE FAILED TO PROVE THAT THE K-9 DEPUTY REASONABLY BELIEVED THAT HIS NARCOTICS-DETECTING DOG WAS SUFFICIENTLY RELIABLE AT DETECTING THE PRESENCE OF ILLEGAL NARCOTICS TO BE THE SOLE EVIDENCE OF PROBABLE CAUSE TO BELIEVE THAT ILLEGAL NARCOTICS WERE PRESENT IN THE RESPONDENT'S VEHICLE. WHETHER SUFFICIENT PROBABLE CAUSE EXISTS TO JUSTIFY A SEARCH MUST BE DETERMINED FROM THE TOTALITY OF THE

CIRCUMSTANCES, FOCUSING UPON THE FACTS EXISTING AT HE TIME OF THE SEARCH AS VIEWED IN LIGHT OF THE OFFICER'S KNOWLEDGE AND EXPERIENCE. AS A MATTER OF LAW, AN OFFICER WHO KNOWS ONLY THAT HIS DOG IS TRAINED AND CERTIFIED TO DETECT NARCOTICS LACKS SUFFICIENT EVIDENCE OF THE DOG'S RELIABILITY TO REASONABLY CONCLUDE THAT PROBABLE CAUSE EXISTS TO BELIEVE THAT NARCOTICS WILL BE FOUND IN THE AREA TO WHICH THE DOG ALERTS.

The Second District Court reversed the trial court's denial of Mr. Matheson's motion to suppress and remanded his case with directions that he be discharged. The Court held that the State failed to meet its burden of proving that Deputy Greco reasonably relied upon his drug-detection dog to provide probable cause to believe that illegal narcotics would be found in Mr. Matheson's car. This ruling was proper and should be affirmed by this Court, should it chose to exercise its discretionary jurisdiction over this case.

Initially, the Second District used the proper standard of appellate review in its consideration of the trial court's denial of the motion to suppress. In reviewing a motion to suppress, an appellate court applies two standards of review. The trial court's findings of fact are reviewed based on the competent, substantial evidence standard. See Stephens v. State, 748 So. 2d 1028 (Fla. 1999); State v. Kindle, 782 So. 2d 971 (Fla. 5th DCA 2001). More specifically, the concern on appeal is whether, after all conflicts in the evidence and all reasonable inferences therefrom have been

resolved in favor of affirming the trial court's decision, there is substantial, competent evidence to support the trial court's ruling. Id.

However, the trial court's application of the law to the facts is a legal question. As such, it is renewed de novo. See Stephens v. State, 748 So. 2d 1028 (Fla. 1999); State v. Kindle, 782 So. 2d 971 (Fla. 5th DCA 2001). This plenary standard affords no deference to the trial court's determination. The Second District properly reviewed the trial court's ruling de novo.

In its decision, the Second District held, as a matter of law, that the mere evidence of a drug-detection dog's certification is insufficient to meet the State's burden to prove that the dog is sufficiently reliable to provide probable cause to justify a search. This Court held that the State must present additional evidence, such as the dog's alert track record or details regarding the dog's training, to meet its burden of establishing that the dog is sufficiently reliable to provide probable cause to believe that narcotics are present. The State did neither here.

Three principles govern the probable cause analysis in this case. First, when police conduct a search without first obtaining a warrant, they initially make the probable cause determination themselves. Therefore, the existence of probable cause must be determined from the totality of the circumstances, focusing upon the facts existing at the time of the search as viewed in the light of the officer's knowledge and

experience. See Benefield v. State, 160 So. 2d 706, 708 (Fla.1964); Cliett v. State, 722 So. 2d 916 (Fla. 2d DCA 1998); State v. Ellison, 455 So. 2d 424 (Fla. 2d DCA 1984); State v. Redding, 362 So. 2d 170 (Fla. 2d DCA 1978); Carr v. State, 353 So. 2d 958 (Fla. 2d DCA 1978); Dixon v. State, 343 So. 2d 1345 (Fla. 2d DCA 1977). Probable cause supports a search only if the facts are such as would warrant a belief by a reasonable man that he has grounds for his action. See Beck v. Ohio, 379 U.S.89 (1964).

Second, the burden was on the State to prove that probable cause existed to believe that Mr. Matheson's vehicle contained illegal narcotics. In this case, Deputy Greco relied exclusively on a drug-detecting dog's positive alert to Mr. Matheson's vehicle to conclude that the vehicle contained illegal narcotics. Mr. Matheson filed a motion to suppress, asserting that the drug-detecting dog was not qualified to provide the deputies with probable cause to believe that illegal narcotics would be found in the vehicle. Having established that the deputies searched without a warrant, the burden shifted to the State to prove by a preponderance of the evidence that the warrantless search was legal. See Palmer v. State, 753 So. 2d 679 (Fla. 2d DCA 2000); Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. Jeffers, 342 U.S. 48 (1951); Doorbal v. State, 837 So. 2d 940, 952 (Fla.), cert. denied, 123 S. Ct. 2647 (2003); Doctor v. State, 596 So. 2d 442, 445 (Fla. 1992).

Third, an appellate court applies a more stringent probable cause standard when reviewing a non-warrant case than it does when determining whether probable cause exists to support the issuance of a warrant. In U.S. v. Ventresca, 380 U.S. 02 (1965), the United States Supreme Court stated that “in a doubtful or marginal case a search under a warrant may be sustained where without one it would fail.” This reflects court’s preference for obtaining warrants because doing so “interposes an orderly procedure” involving “judicial impartiality.” U.S. v. Jeffers, 342 U.S. 48 (1951). Doing so allows a neutral and detached court to make “informed and deliberate determinations on the issue of probable cause.” Anguilar v. Texas, 378 U.S. 108 (1964). In contrast, leaving such a decision to police officers permits hurried decisions by those “engaged in the often competitive enterprise of ferreting out crime.” Johnson v. U.S., 333 U.S. 10 (1948).

At the hearing, the State presented the testimony of Deputy Greco, the dog handler, and evidence consisting of the drug-detecting dog’s certification from the United States Police Canine Association and a notebook containing information regarding the dog.

In this case, Deputy Greco premised his probable cause determination solely on Razor’s alert to the vehicle. Whether Razor’s alert was sufficient to provide Deputy Greco with probable cause to believe that illegal narcotics would be found in

Mr. Matheson's vehicle depends on what Deputy Greco knew about Razor's reliability. The State failed to meet its burden of proving that Deputy Greco reasonably believed that Razor was sufficiently reliable at detecting the presence of illegal narcotics.

First, the State failed to prove that Deputy Greco reasonably believed that his dog had a good track record for alerting to the presence of narcotics. In fact, Deputy Greco testified that he never compiled or maintained a record of Razor's false positive response rate. In addition, he testified that he often leaves the scene of a sniff after advising deputies of Razor's alert and, thus, does not learn whether the alert led to the discovery of illegal narcotics.

Even if we look to deposition of Deputy Greco, it also contains no evidence establishing that Deputy Greco believed that Razor had a good track record for alerting to the presence of illegal narcotics. Once again, Deputy Greco's testimony established that he did not know Razor's positive response rate in the field and that the Sheriff's Office did not keep track of this information. Deputy Greco added that he often does not stay at the scene to learn whether the search revealed narcotics. Therefore, the Second District properly held that the State failed to introduce sufficient evidence establishing that Deputy Greco reasonably believed that his dog had a good track record for alerting to the presence of narcotics.

Second, the State failed to prove that Deputy Greco reasonably believed that Razor was sufficiently trained to detect the actual presence of illegal drugs. Deputy Greco testified that he and Razor participated in one initial thirty-day training course and one week-long annual certification course with the United States Police Canine Association (“U.S.P.C.A.”). Deputy Greco testified that, at the time of the search, Razor was not certified to detect any of the narcotics found in Mr. Matheson’s vehicle. The USPCA training involved only marijuana, cocaine and heroine detection. The program did not include training to detect methamphetamine, which is one of the substances allegedly found in Mr. Matheson’s vehicle. Deputy Greco also testified that the Hillsborough County Sheriff’s Office periodically trains him and Razor for detecting methamphetamine, marijuana, heroin and cocaine. The State elicited very little testimony regarding Razor’s training and specifically did not question Deputy Greco about whether Razor’s training would permit him to detect the small amount of methamphetamine found in Mr. Matheson’s vehicle.

On cross-examination, Deputy Greco testified that Razor’s training did not include extinction training to condition him to refrain from alerting to residual odors of illegal narcotics. Deputy Greco also testified that Razor is not subject to controlled testing to determine whether he alerts falsely. Otherwise, Deputy Greco testified that he participated in no other training with Razor.

Deputy Greco also conceded that he is a drug dog handler, not a trainer. Therefore, he explained that he knows little about the sufficiency of Razor's training to detect illegal narcotics.

Deputy Greco's deposition does not provide anymore basis for establishing that Deputy Greco reasonably believed that Razor was sufficiently trained to detect the presence of illegal narcotics. As to the HCSO training, Deputy Greco could not testify how frequently this training occurred because the Sheriff's Office does not "have a specific schedule set up" (V. IV, T. 66). In addition, Deputy Greco once again testified that he is not a trainer or an evaluator, and that he is not qualified for either. He also testified that Razor is does not alert for hydrocodone or morphine, two of the substances allegedly found in Mr. Matheson's vehicle.

This evidence establishes that the State failed to meet its burden of proving that Deputy Greco reasonably believed that Razor was sufficiently reliable to detect the presence of illegal narcotics. Accordingly, he did not have probable cause to search Mr. Matheson's vehicle.

In its initial brief, the State cites at length to the deposition testimony of Razor's HCSO trainer, Sergeant Olive. The State may not rely upon this deposition to carry its burden of proving the existence of probable cause. This is for two reasons. First, this deposition was not admitted into evidence at the hearing and, therefore, they are

not properly part of the appellate record. It is a fundamental principle of appellate law that an appellate court may not consider matters outside the appellate record. See Thornber v. City of Fort Walton Beach, 534 So. 2d 754, 755 (Fla. 1st DCA 1988). Second, the State's reference to this deposition ignores the probable cause inquiry of this Court. As stated above, the existence of probable cause must be determined from the totality of the circumstances, focusing upon the facts existing at the time of the search as viewed in the light of the officer's knowledge and experience. Sergeant Olive's knowledge about Razor had no bearing on Deputy Greco's probable cause determination on the street. The only issue is what facts did Deputy Greco know that supported his determination that Razor was sufficiently reliable at detecting the presence of illegal narcotics to be the sole evidence of probable cause to believe that illegal narcotics were present in the Mr. Matheson's vehicle.

The State also asks this Court to look to the United States Police Canine Association certificate or the notebook containing information relating to Razor to find a sufficient indication of Razor's reliability to support the officer's probable cause determination. Although the trial court admitted these exhibits into evidence at the suppression hearing, they were not included in the appellate record. Despite the provisions of Florida Rule of Appellate Procedure 9.200(e), the State failed to move that the appellate record be supplemented with these items before the Second District

rendered its decision. Because these exhibits are not included in the appellate record, this Court may not consider the State's assertions regarding their content.³

In addition, these items are irrelevant. As stated above, the question before the trial court was whether the deputy at the scene had a sufficient basis for concluding that probable cause existed to believe that illegal narcotics were present in Mr. Matheson's vehicle. This must be determined from the totality of the circumstances at the scene, focusing upon the facts existing at the time of the seizure as viewed in the light of the officer's knowledge and experience. See Benefield, 160 So. 2d at 708; Cliett, 722 So. 2d 916; Ellison, 455 So. 2d 424; Redding, 362 So. 2d 170; Carr, 353 So. 2d 958; Dixon, 343 So. 2d 1345. All that is relevant is the belief and conclusion of the deputy in support of his determination that probable cause existed. Here, Deputy Greco relied only on his knowledge of Razor's training and on the fact that he was certified.

However, even if this Court looks beyond Deputy Greco's knowledge upon which he based his probable cause determination, the evidence establishes, as a matter of law, that Razor was not a reliable source of probable cause to believe narcotics would be found in Mr. Matheson's vehicle. Razor's records establish that he

³ Mr. Matheson notes that the States record citations often refer to documents filed in support of Mr. Matheson's motion to supplement.

frequently alerted to areas that did not contain illegal narcotics, that he was not conditioned to refrain from responding to residual odors, and that he did not perform well during training.

Addressing Razor's track record first, Razor's Activity/Detection Reports reflect that he has a significant history of alerting where no narcotics are found. In fact, these records reflect that Razor had almost no positive alerts during the time period of Mr. Matheson's search. The State alleged that Mr. Matheson was found in possession of illegal narcotics on May 5, 1999. An activity/detection report for the same day reflects that Razor alerted to another area and no drugs were found therein. Razor alerted seven other times during May. Of his May alerts, only two resulted in illegal narcotics being found in the vehicle. This is merely a twenty-two percent accuracy rate. His success rate is equally abysmal for other months.

In numerous instances, Razor's activity/detection reports include comments suggesting that Razor was alerting to the odor of narcotics that were recently present, thereby suggesting that he was accurately alerting to the area. At most, these comments establish that Razor may be alerting to the residual odor of narcotics that are no longer present. This pattern permits Deputy Greco only a suspicion that narcotics are present. Mere suspicion cannot justify a search. See Coney v. State, 820 So. 2d 1012, 1014 (Fla. 2d DCA 2002); State v. Ellison, 455 So. 2d 424 (Fla. 2d

DCA 1984). And, in this case, it certainly would not because Deputy Greco's suspicion would not be reasonable, given Razor's exceptionally low success rate. However, these same comments by the unsuccessful search officers can be viewed more critically as merely attempts to reconcile the failed search with the dog's alert.

Turning to Razor's training records, they establish that his training was inadequate to ensure his reliability to detect the presence of illegal narcotics. Initially, the documents confirmed that Razor participated in two training programs. One certificate represented that it was awarded for Deputy Greco and Razor completing a k-9 narcotics detection course sometime around October 21, 1997 (more than one-and-one-half years before this May 1999 search). Another certificate represented that Razor completed the narcotics detection training sponsored by the United States Police Canine Association ("U.S.P.C.A.") on June 12, 1998 (almost a year before this search).

However, the U.S.P.C.A. Detector Dog Team Performance Evaluation forms establish that Razor had numerous problems during the certification program. The examiner repeatedly deducted points for Razor's lack of enthusiasm and for Deputy Greco's lack of confidence in dog. Points were also deducted for Deputy Greco's poor handler performance, including keying Razor on the narcotic, not demonstrating an enthusiastic attitude, inconsistent search sequences, not properly controlling Razor

and poor leash control. In one case, the examiner commented, “Stepped on foot - too slow causes [sic] frustration and false / al.” (V. III, R. 363). “False / al.” appears to be false alert.

Therefore, as a matter of law, the State did not present sufficient evidence to establish that Razor reliably detects the presence of illegal narcotics. Instead, the evidence established that Razor and his handler had undergone limited training and that Razor had a significant history of alerting to areas in which no illegal narcotics were found. This was insufficient to meet the State’s burden of showing that Razor was sufficiently reliable to establish probable cause to believe that illegal narcotics are present.

This Court also held that, even if it were to agree that the State’s evidence of Razor’s certification constituted a prima facie showing that Razor was sufficiently reliable to establish probable cause to believe that illegal narcotics are present, this was rebutted by the other evidence introduced by the State, as detailed above, and by evidence introduced by defense counsel. See generally United States v. Hill, 195 F.3d 258, 273 (6th Cir. 1999); United States v. Williams, 69 F.3d 27, 28 (5th Cir. 1995); United States v. Diaz, 25 F.3d 392, 395 (6th Cir. 1994); United States v. Outlaw, 134 F. Supp. 2d 807, 814-6 (W.D. Tex. 2001); Warren v. State, 561 S.E.2d 190, 194-5 (Ga. Ct. App. 2002); Dawson v. State, 518 S.E.2d 477, 481 (Ga. Ct. App. 1999). The

evidence supports this holding. As stated above, the records submitted by the State established that Razor had a poor alert record and that he was insufficiently trained. In addition, defense counsel presented evidence of both facts during its case.

Defense counsel called Razor's trainer, Sergeant Olive, who testified that neither the H.C.S.O. or U.S.P.C.A. training regimens included training to discourage Razor from alerting to "dead scents," those being residual odors of drugs that are no longer present. Sergeant Olive also testified that he is not aware of spontaneous recovery problems in training drug dogs and that he is not aware of "stimulus generalization and training" (V. IV, T. 90-1, 98). In addition, he testified that they do not use a reward schedule for Razor. Instead, they reward him every time he alerts, regardless of what is found.

Defense counsel also presented the expert testimony of Dan Craig, a veterinarian and animal behavior specialist whose background included extensive consultation with the United States military and other agencies regarding the detection dog programs. Dr. Craig testified at length regarding Razor's training. Specifically, he testified that the H.C.S.O. training procedures used with Razor were too simplistic to make him reliable at detecting narcotics for six reasons. First, Razor received inadequate training for searching vehicles. Second, Razor was not trained with small quantities of drugs. Third, training officers failed to plant novel odors during Razor's training searches.

Fourth, Razor was not subject to controlled negative testing, in which all objects or locations have no drugs present. Dr. Craig said that this type of testing indicates a false response rate and reveals whether the handler or the dog is guessing. He added that preventing the handler from knowing whether drugs will be present during a training exercise reveals whether the handler is consciously or unconsciously prompting the dog to alert. Dr. Craig asserted that this type of testing is essential and should be performed periodically on a random basis. Fifth, Razor was not given extinction training, which would have discouraged him from alerting to common items that are sometimes associated with drugs, such as plastic bags used for packaging. Sixth, there was no evidence that Razor's training included "stimulus generalization," which conditions a dog trained on one class of drugs to detect all drugs in that class.

Addressing Razor's USPCA certification, Dr. Craig testified that there were a number of flaws in the U.S.P.C.A. certification procedures that rendered this certification insufficient evidence of Razor's reliability. First, the U.S.P.C.A. did not perform controlled negative testing. Second, the U.S.P.C.A. limited the dog's search time to ten minutes, which is shorter than "real world" searches. Third, the U.S.P.C.A. required only a seventy percent proficiency, which Dr. Craig considered insufficient. Fourth, the U.S.P.C.A. failed to focus on the dog's ability to detect narcotics, but analyzed the ability of the dog and handler as a team. Therefore,

according to Dr. Craig, the U.S.P.C.A. could not truly certify the dog's individual ability to detect narcotics. Fifth, Razor was not certified to detect methamphetamine, and his training did not prepare him to reliably detect this substance.

Regarding Razor's track record, Dr. Craig testified that he reviewed numerous field reports in which Razor alerted, but no narcotics were found. Dr. Craig opined that these reports revealed a twenty-seven to forty percent false response rate. In his expert opinion, this rate is unacceptable. As for the possibility that some of these false alerts are examples of Razor responding to the residual odor of drugs that have been removed from the searched area, Dr. Craig explained that these odors dissipate. Dr. Craig also testified that these instances of Razor's false positive alerts make clear the need for controlled negative testing and extinction training. Based on the field activity reports from before the search of Mr. Matheson's vehicle, Dr. Craig opined that Razor could not be relied upon to validly respond to the existence of contraband in Mr. Matheson's car.

Dr. Craig finally concluded that, based on his review of all the records available and the testimony of Sergeant Olive and Deputy Greco, Razor was not a reliable drug detector dog when he sniffed Mr. Matheson's vehicle.

Accordingly, Second District properly held that Razor's alert could not have given the deputies probable cause to search Mr. Matheson's vehicle.

CONCLUSION

The Respondent asks this Court to conclude that it does not have discretionary jurisdiction to consider this appeal. Should this Court find that such jurisdiction exists, there is no need for it to exercise that jurisdiction to consider the merits of the Petitioner's argument. If this Court chose to exercise jurisdiction, the Respondent asks this Court to affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief has been mailed to opposing counsel, Robert J. Krauss and Susan M. Shanahan, Office of the Attorney General, Concourse Center #4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607, on this 28th day of October 2004.

CERTIFICATE OF FONT COMPLIANCE

I certify that the size and style of type used in this brief is 12-point Courier new, in compliance with Fla. R. App. 9.210(a)(2).

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
863-534-4200

CELENE HUMPHRIES, ESQUIRE
Special Assistant Public Defender
Florida Bar Number 0884881
P.O. Box 9000, Drawer PD
Bartow, FL 33831
813-671-4228

COUNSEL FOR RESPONDENT