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THE BILL BLACKWOOD
LAW ENFORCEMENT MANAGEMENT INSTITUTE OF TEXAS

FREE AIR CANINE SEARCHES

A Policy Research Project
Submitted in Partial Fulfillment
of the Requirements for the Professional Designation
Graduate, Management Institute

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Texas Department of Public Safety
Midland, Texas
July, 1999

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ABSTRACT

According to various intelligence sources, the El Paso Intelligence Center, U.S. Drug Enforcement agency and U.S. Customs service, drug traffic into the United States, and particularly Texas, is experiencing a constant increase. The primary concern for this State is drug smuggling through the use of motor vehicles, and in particular, the use of commercial motor vehicles. Because of the implementation of the North American Free Trade act this commercial traffic is increasing by leaps and bounds. Statistics obtained from the U.S. Customs service indicate that from fiscal year 1997 to 1998, there was an overall increase in commercial vehicle crossings at the 11 ports of entry between Mexico and Texas, of 11.6%. The importance of this research is to show that DPS Troopers in this State need to use any and all tools available to them for the detection and apprehension of this type of drug traffic at vehicle crossings. The purpose of this paper is to establish a procedure for using canine free air searches properly in this venue. In the event of a search being challenged in court, there is a high probability that the case outcome would be favorable for law enforcement. Historically, dogs have been used in such operations as search and rescue, detection of explosive devices, and other police functions as deemed necessary, with the use of dogs for detection of illegal narcotic substances dating back to approximately 1970. Over the years, case law has been established in the use of the police canines, primarily in searches involving private vehicles, persons, places such as school buildings, lockers, etc., but no case law exists for use in conducting 'free air searches' at or near commercial motor vehicles. Background for this paper was obtained through researching existing case law, articles from law reviews and law journals, and articles from other sources. After researching the material, it is concluded that the majority of legal objections to the use of the canine for free air sniff's (searches), are directed toward private conveyances, or private individuals, and none have been directed toward the use of dogs in the searching of commercial motor vehicles. Through proper training techniques, good solid canine search procedures can be developed that will, in turn, stand up to any litigation, and thus make the use of the canine more effective in the 'War Against Drugs'.

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Introduction

The purpose of this research is to establish a procedure of using drug-detecting canines in the detection and apprehension of illegal drugs being transported by means of commercial motor vehicles in or through the State of Texas. The primary beneficiaries of this procedure would be Troopers in the License & Weight (L&W) service; those Troopers charged by policy with the enforcement of all commercial motor vehicle laws. Results of these procedures would also carry over to the Highway Patrol service, as they are also involved in the enforcement of commercial vehicle laws.

With the onset of the North American Free Trade Act (NAFTA), there is an ever-mounting increase in commercial motor vehicle traffic. With this increase in traffic is an excellent opportunity for would-be smugglers to import their contraband into the state. Intelligence information comes in almost on a daily basis showing the ingenuity of these smugglers in finding new ways to conceal their illicit cargo. Because of the authorized personnel strength of the L&W service, these sheer numbers of trucks moving back and forth across the border preclude being able to check the majority of them. Adding to this difficulty is the lack of any State facilities at the U.S. border crossings with Mexico, other than U.S. Customs ports of entry. The L&W presence at these crossings is minimal, primarily due to the physical limitations at each of the locations. The best opportunities for the thorough checking of these vehicles are away from the border at L&W safety checkpoint locations. Under Federal law (49 CFR 390), Texas statute (TTC, 644.103) and by Department of Public Safety rule (TAC, 3.62), any L&W Trooper may stop any commercial motor vehicle to conduct safety checks, without the establishment of probable cause.

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This research is intended to be presented to Department of Public command staff officers. This will possibly help establish guidelines for the use of canines in conducting "free air" searches at any of the safety checkpoints that may be set up by either a Trooper individually, or by a group of Troopers acting in concert with each other. "Free air" searches are those where a canine handler and the canine walk around a stopped vehicle and the canine merely sniffs the open air around the vehicle, making no intrusion into any portion of the vehicle. As no case law exists for these particular applications, it is important the Troopers have a good set of guidelines for them to follow. The expected result of these searches, with the finding of contraband and resulting conviction of the individual involved, is that at some point in the future one of these cases will be appealed to higher courts, and the question of the 'free air search', as it applies to commercial motor vehicles, will be addressed by the court. Hopefully, with proper guidelines in place, this question will result in favorable rulings toward the use of canines in this type operation.

Information used in the preparation of this paper comes from several sources. First, legal background for the use of any search technique comes from the law itself, and from court cases, which arise through the use, or misuse, of a particular technique. Numerous court cases that dealt with the issue of using canines in searches were consulted. Next, there were a number of articles from professional and legal journals that dealt with searches, these in particular addressing the issue of canines and "free air searches". Last, several of the larger police departments in Texas were polled, along with several Federal agencies, to find what, if any, existing policies may be in place regarding the use of canines in drug searches. Of necessity, the larger departments were consulted

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because these departments were the only agencies with established units that perform the same functions as the License & Weight service in the Department of Public Safety.

Historical & Legal Context

Intelligence information from various sources, El Paso Intelligence Center (EPIC), the U.S. Drug Enforcement Agency (DEA), and U.S. Customs service indicate that drug traffic coming into the United States from foreign sources is increasing at an alarming rate (EPIC Bulletin, 1999). The majority of this drug traffic for Texas is obviously in and through the Republic of Mexico. Historically, the use of canines for 'free air' drug detection has been primarily in the Federal system of enforcement. The U.S. Customs service, due to their presence at the international border, and the U.S. Border Patrol, at immigration checkpoints away from the border, have used the 'free air' sniff for several years. In recent years, more use has been made of canines in local law enforcement and, even more recently, in State law enforcement. This use of narcotics detection dogs in law enforcement has been helped with several major court decisions. Chief among these decisions is *US v. Place*, 1983. In this decision Justice Sandra Day O'Connor delivered the opinion of the court, stating in part, that even though each person possesses privacy interests in the contents of personal luggage, a 'canine sniff' by well trained narcotics canines does not present itself as a search, under the definition of the law. These sniffs of unopened luggage located in a public place only disclose the presence or absence of narcotics, a contraband item. It ensures that the owner of the property isn't embarrassed or inconvenienced, as he might be if less discriminate or more intrusive methods were used. Although the Court held that the seizure of the luggage in

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this case was not reasonable under the Fourth Amendment, they used the fact that the luggage was held for 90 minutes to be unreasonable, not the canine sniff. An article from the FBI Law Enforcement Bulletin, authored by FBI Special Agent Kimberly A. Kingston, J.D. (Kingston, 1991), states - "In *Place*, the Court did not go so far as to say that no dog sniff would ever be considered a search. Rather, the Court was careful to limit the impact of its decision by narrowly concluding that 'the exposure of [defendant's] luggage, which was located in a public place, to a trained canine - did not constitute a 'search' within the meaning of the Fourth Amendment (Kingston, 1991). In a supporting case, *US v. Dovali-Avila*, 1990, the Fifth Circuit Court of Appeals, upholding a conviction of the defendant, held that "(1) 'dog sniff' does not constitute search whether it occurs at primary border checkpoint or at secondary checkpoint, and (2) 'dog alert' is sufficient to create probable cause to conduct warrantless vehicle search."

Clearly there is some disagreement over whether sniffing constitutes a search under the Fourth Amendment. One of the most frequently used cites is *Katz v United States*, 1967. In *Katz*, the defendant was convicted of interstate wire communication of bets or wagers. The government's activities in the case included a warrantless recording of the defendant's end of telephone conversations by microphones placed on top of, but not penetrating, a public telephone booth. The argument for the petitioner is that his constitutional right to privacy was violated by the government's interception of conversations, which were deemed to be private. The government's contention was that these conversations emanated from within the phone booth, and were available for anyone to hear. The Court held that this interception of telephone conversations

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constituted a 'search and seizure' under the Fourth Amendment, and the judgement was reversed.

Opponents of the canine sniff search would prefer that the Court use *Katz* as the basis for deciding whether the sniff is legal under the Fourth, rather than use *Place*. These opponents would have the Court compare the olfactory senses, which a canine possesses naturally, to electronic listening devices. Part of their argument is this: While there is no dispute that if an officer is in a location where he is legally entitled to be, and while there is also no argument that the mere presence of a canine would also be legal, the fact that the officer is not able to smell the odor of an illegal substance such as marijuana or cocaine, and the canine is able to detect it and alert on its presence, should not be allowed under *Katz*. These opponents in effect are saying that the dog has been trained specifically to detect these odors, and because of this specialized training should be compared to some type of machine specially constructed for detecting contraband.

The fact is that to these canines, it is a game. They have always been able to detect this type of odor and required no training whatsoever to learn how to detect it (Benson, 1991). What the training does, however, is to reward the canine for detecting certain odors. Benson likens the detection of odors to responding to certain commands. As the director of one of the registered canine training centers, Global Training Center, director Jim Nelson states: "Say that a dog is trained to respond to a certain command, and that is the only thing he is rewarded for. So when he hears that command he responds and gets his ball, which is his reward" (Benson, 1991). Clearly then, the training only instills into the canine that by responding to certain odors, he will then get a reward for his discovery.

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Most recently, the Supreme Court has endorsed the use of canines in public places (Place, 1983). Law enforcement officers must be careful to use these canines within certain boundaries set by the courts. One area of concern where the courts have specifically restricted the use of canines is against the body of persons (Horton v. Goose Creek, 1982). Also, if dogs are used in areas where defendants have a high expectation of privacy, then a warrant or consent to search should be used. If the sniff is to be used in areas of reduced expectations of privacy, then reasonable suspicion of illegal activity is all that is required. If the dogs are used to sniff in public areas or areas controlled by third parties, then no search warrant is needed.

One of the key issues in the use of the canine teams, is whether or not they are allowed to be present at and during normal L&W activities. In order for a canine to be present, legally, the activities that the L&W Trooper are conducting must, at the time they are being conducted, be legal in and of themselves.

The trucking industry is a highly regulated industry, a business conducted by using the public highways of this country. Because of the nature of this business, courts have generally held that these commercial vehicles do not have the same expectation of privacy granted to automobiles operated by private citizens. Companies own the vast majority of these commercial vehicles, and the drivers are merely employees. Congress has mandated, through the National Surface Transportation Act, and Federal Motor Carrier Safety regulations (FMCSR), that any vehicles subject to these regulations be operated and maintained in a safe manner. Written into the FMCSR is language that specifically states that any vehicles subject to these regulations are also subject to being stopped and inspected for compliance at any time, by any officer authorized under the

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regulations to enforce them. This inspection also includes any enclosed areas of the vehicle, such as the entire cab and cargo areas. Congress also mandated that individual state legislatures either adopt these regulations as written, or write legislation that is comparable. The State of Texas opted to adopt the regulations as written, and designated the Texas Department of Public Safety (DPS) as the lead agency in enforcement. Under the Texas Administrative Code (TAC), the L&W service was designated as the lead enforcement arm. Because of the authority bestowed upon DPS, and more specifically, the L&W service, when a Trooper conducts a stop on a commercial vehicle for enforcement of the FMCSR, he is duly authorized to do so. The Trooper is not required, under the FMCSR, to observe any violation the vehicle may have committed prior to stop or establish probable cause for the stop. Because the stop is legal, and the vehicle and driver are detained only as long as necessary to conduct an inspection, the mere presence of the canine is also legal. During the time the Trooper takes to conduct this inspection, the canine can easily be used to conduct any 'free air' search around the vehicle. As discussed previously, in *Dovali-Avila*, the courts have said that a canine sniff does not constitute a search, whether it occurs at a primary border checkpoint or at a secondary checkpoint. If the canine does alert, then also, under *Dovali-Avila* this is sufficient probable cause to then conduct a warrantless search.

Review of Practice

Illegal drug trafficking in Texas has become so severe that it is considered to be one of the most critical crime problems in the state (EPIC Bulletin, 1999). This is made more difficult because of the common border the state shares with Mexico. There is an

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approximate border length of about 1,250 miles. Along this border there are 22 international ports of entry. In between these ports are vast areas that are uninhabited that provide easy access for smugglers into the United States. Also, along with these ports of entry, is a coastline of 624 miles, much of that offering safe entry points for drug carrying ships smuggling illegal drug cargo from Mexico or other Latin American countries. Once this cargo, cocaine, heroin, and marijuana arrive into the state, either through or between legal ports of entry, the drug is often concealed in commercial and passenger vehicles. The drug is generally transported along the Texas highways to large cities such as Dallas, Houston, or San Antonio, where it is broken up into smaller lots and then shipped to other points in the United States. Because of U.S. proximity to foreign countries that grow the illegal crops, then manufacture and ship them, this causes Texas law enforcement personnel great concern. Also, of great concern, is the use of commercial vehicles for transport purposes.

As commercial traffic has increased into the United States, this shipment of drugs in commercial cargo, instead of using individual couriers has become a very popular method of transporting among the traffickers (EPIC Bulletin, 1999). This does have its drawbacks, however. The traffickers require some type of 'legal' infrastructure to handle the loads, and these traffickers then lose physical control over these drugs as they travel by this commercial transport system. These loaded commercial vehicles using 'legal' cover loads use drivers who may or may not be aware of the contents of their loads. These pose overwhelming investigative and search obstacles for any criminal interdiction efforts. It is at this point that the L&W Trooper in combination with a drug-detector canine can be most effective.

This Department enjoys a somewhat unique situation, in that, with few exceptions, it almost exclusively enforces the U.S. Dept. of Transportation's Federal Motor Carrier Safety Regulations within the State of Texas. There are scattered cities throughout the state that do enforce these regulations, but as a general rule, and with few exceptions, their enforcement efforts are sporadic and not highly organized.

In this regard, there are, to date, six large cities and several smaller cities in Texas, that have Motor Carrier Safety Units with the capabilities and authority to stop commercial vehicles and inspect them for safety violations. The smaller cities were looked at for use of drug detector canines, but none possess either the manpower or resources to incorporate this type of asset into their enforcement efforts. The larger cities are: El Paso, Dallas, Austin, San Antonio, Houston, and Laredo. All of these cities have canine units, but not necessarily drug detector canines. None of the cities routinely use dogs in conjunction with the operations of their motor carrier safety enforcement officers. Their policies in place for use of drug detector canines are geared toward non-commercial vehicles and require that the officers have probable cause to conduct a search, or have consent to search by the vehicle owners. Also, by the time most of the commercial traffic is seen by these officers, these commercial vehicles have already dropped off their shipments of illicit cargo.

Other agencies looked at for comparative purposes were the U.S. Customs service and the U.S. Border Patrol. The canines used by Customs personnel were eliminated, however, because of their unique use at the international border. Special Federal law exists, permits, and in fact, charges the Customs service with preventing the importing of contraband into this country, thus giving Customs canines special searching privileges

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not lawfully available to any other agency. The U.S. Border Patrol, on the other hand, has an operation that closely parallels the operation of the L&W service. They have checkpoints away from the border, and routinely stop all vehicles that traverse the highway. This type of operation is almost identical to that performed by the Department of Public Safety's L&W service. Border Patrol policy says that a canine can be used to perform 'free air' sniffs of inanimate objects (vehicles) in a public place without consent. The policy also states that a canine sniff of the exterior of a vehicle is secondary during an ongoing immigration inspection, and must not cause additional delay. A positive alert or indication by the canine is sufficient to support a search and seizure warrant and arrest.

Likewise, through the enforcement of the Federal Motor Carrier Safety regulations, the L&W Troopers are legally able to detain commercial vehicles and check them for safety violations. It is at this point that the drug dog would be most effective. During the time it takes for a safety check, a canine can easily perform a sniff of the exterior of the vehicle, not causing undue delay for the driver or the vehicle. In both cases, the U.S. Border patrol checkpoint and the License & Weight safety checkpoint, *Dovali-Avila* clearly states that at a 'secondary checkpoint', a sniff still would not be considered a search under the Fourth Amendment.

Discussion of Relevant Issues

Canine/handler teams should be strategically placed throughout the state with overlapping areas of responsibility. These teams should be subject to call out and their primary function should be to conduct Department searches. For proper control, all of

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the canines used in the canine program must be owned by the Department of Public Safety.

There should be a State canine program coordinator who will be responsible for the overall management of the program, under the direction of the Traffic Law Enforcement division chief. He should be responsible for assisting the Chief in developing criteria for selection of the handler/canine teams. He should train and direct the regional canine training coordinators in training policies and procedures for the teams; maintaining certification standards through evaluation of teams, and make recommendations related to certification, decertification, and recertification of teams.

The Regional training coordinators should be appointed and responsible for maintaining the training standards taught during the initial phase. They should serve as liaison between the state coordinator and the handler's in-line supervisors. They should coordinate all training within their respective regions, coordinating through the in-line supervisors, the training and certification schedules. . He should also make sure that all training tools, such as drug substances, are properly stored and separated to prevent scent contamination, and are accounted for and replaced when needed.

Also included in the program must be the In-line Supervisors of the canine teams. These supervisors are responsible for immediate supervision and any logistic support for the teams. They must be willing to make allowances for care of the canine, as well as any maintenance, training, certification or special assignments that crop up. They must approve all appropriate requests made for the handlers. He is responsible for checking and routing all reports related to the program through the proper channels.

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All handlers must have law enforcement experience. They must possess a strong physique along with good coordination and balance. They must be willing to commit spare time to the care of the canine, and must enjoy working with animals, particularly canines (Benson, 1991). They must maintain reliable detection capability through an ongoing training program. They must document all such training, and especially certification sessions, for use in validating the credibility of the canine. They should report any changes in the performance of the canine to the regional training coordinator and the State program coordinator. They should ensure that all searches with the canine are in compliance with law and policies of the Department. They should be responsible for making the final decision regarding the utilization of the canine, based on what he sees as factors that involve the safety of the canine and everyone involved.

Canine teams may be requested by the L&W service for use at their weigh strip operations or any special operations that are conducted. Many of these operations are planned events, so sufficient notice should be given to the handler/canine teams in order to assist their immediate supervisors in scheduling. When canine teams are present and a search results in the finding of drugs, currency, and/or contraband, it will be the responsibility of the requesting trooper, and not the canine handler, to properly tag evidence, complete all investigative reports and file the proper charges

Another key issue and concern is the reliability of the canine and handler. It is important that the initial training be done only at recognized and approved schools, such as the U.S. Customs training facility for canines, in Mount Royal, Virginia. Following this initial phase, the canine must be stimulated and trained on an almost daily basis. This makes the relationship between the handler and the canine extremely important. If

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the handler loses interest in this training cycle, then the reliability of the canine will come into question. Also, importantly, if the canine develops behaviors or traits that are not conducive to that which is proper for this type of operation, then the handler must take the responsibility for informing his superiors of these changes. It is important that the handler not think of the canine as his family pet, but a trained working member of an important team.

Initial cost of the canine and training is expected to be substantial, but over the long run, these more than will be recovered. The average cost of purchasing, training, and maintaining a canine is approximately \$6,000. Even a small seizure of 200 lbs. of cocaine at a checkpoint has an extremely high net worth, in the neighborhood of \$6.5 million. The average life span of a canine in law enforcement is estimated at between six to eight years. During this period of time, a well-trained canine and handler combination can be expected to intercept and curtail the flow of a substantial quantity and dollar amount of illegal drugs. Also, not the least of which, a large increase in the amount of seized drugs funds can be expected, which can be split between cooperating agencies and put to use against the very organizations that generated them.

Conclusion / Recommendations

The purpose of this research was to establish guidelines for use in conducting vehicle searches on commercial vehicles with the use of drug detector canines. Absent any procedures for the use of canines, it was the purpose of this paper to only set out general guidelines for implementing a program. Illegal drug trafficking in Texas has become an extremely critical problem, not only for residents in this state, but as a

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gateway for the movement of illegal drugs into the entire United States. Because of the common border we share with the source of these illegal drugs, Mexico, and because of the length of this border, we have an obligation to use any and all methods to curtail this flow. Not only do illegal drugs flow in across the border, but into ports along the Texas coast as well. With 624 miles of coastline, this presents an excellent opportunity to bring drugs into this country virtually undetected. When these drugs are then shipped out, the smugglers are more and more beginning to use commercial vehicles to transport them in larger quantities, concealed within a 'legal' load. These commercial vehicles are extremely difficult to search because of their size and configuration, so they require any help that is available. This primary help is readily available in a trained drug detector canine. Because this Department has not employed this type of unit in the past, it is important that proper guidelines be put in place for the training and use of canines. Little case law exists in Texas State courts over the use of a canine free air search, so every effort should be made to properly train, certify, and use this canine in a manner that will obtain favorable court rulings.

The ultimate goal is to curtail the flow of illegal drugs and money through the use of these canines, and if that means having some of the cases appealed to higher courts, then so be it. Through proper documented training of canines, proper searches, proper evidence handling, and adherence to legal, well-established Department policies, these favorable court rulings can be obtained. It is my conclusion that by setting proper guidelines in place, and adhering to them, the use of these canines will be on solid legal ground.

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