

WASHINGTON
ASSOCIATION OF
PROSECUTING ATTORNEYS



MEMORANDUM

To: All Prosecuting Attorneys

From: Pam Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys *plw*

Date: December 4, 2012

Re: Initiative 502 and Canine Alerts

Initiative 502 will require officers to expand their investigations into suspected VUCSA violations. Officers will no longer be able to rely solely upon an alert by any of the narcotic canines currently on patrol.

Initiative 502 decriminalized simple possession of one ounce or less of marijuana by a individual aged 21 or older. Initiative 502 did not decriminalize possession of marijuana with intent to distribute or manufacturing of marijuana—at least as to individuals who have not received a permit or license to do so from the Liquor Control Board.

Currently, canines are trained to detect five substances: marijuana, methamphetamine, heroin, crack cocaine, and cocaine. The canines cannot communicate to their handler which of the five substances they have detected.

The canines can detect minuscule amounts of the five substances. While they are trained using amounts ranging from trace to substantial, the canines cannot communicate to their handler how much of the five substances are present. Thus, a dog that alerts might be alerting to a legal quantity of marijuana.

These limitations, however, are not fatal to a determination of probable cause. Probable cause only requires “a fair *probability* that contraband or evidence of a crime will be found,”¹ not certainty or even a preponderance of the evidence.² Probable cause for arrest and search warrants have routinely

¹*Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983) (emphasis added).

²*Id. Accord State v. Hatchie*, 161 Wn.2d 390, 404, 166 P.3d 698 (2007) (“Probable cause requires more than suspicion or conjecture, but it does not require absolute certainty.”); *State v. Chenoweth*, 160 Wn.2d 454, 475, 158 P.3d 595 (2007) (“A tolerance for factual inaccuracy is inherent to the concept of probable cause.”).

be sustained despite significant canine error rates.³ Probable cause for a search warrant or arrest may be found even when a canine does not alert on a package or container.⁴ The fact that a controlled substance is found that the canine was not trained to detect does not vitiate probable cause.⁵

A narcotics trained canine's alert will still be relevant to the probable cause equation after December 6, 2012. If the suspect is under the age of 21 or the canine was not trained to detect marijuana, a positive alert by a trained and certified dog will be sufficient to establish probable cause for a search warrant.⁶ In all other cases, the officer will need to develop additional evidence to support a belief that: (1) the substance being detected is heroin, methamphetamine, cocaine or crack cocaine; (2) that marijuana is present in an amount greater than one ounce; and/or (3) that the suspect is manufacturing or distributing marijuana.

The "additional evidence" may include but is not limited to: statements made by the suspect, information provided by credible witnesses or informants, a history of convictions based upon substances other than marijuana, a history of probation violations based upon urinalysis that were positive for substances other than marijuana, evidence of impairment, the handler's failure to detect the odor of marijuana, the location of the canine's alert,⁷ indication that the vehicle is carrying excess

³See, e.g., *United States v. Ludwig*, 641 F.3d 1243 (10th Cir.), cert. denied, 132 S. Ct. 306 (2011) (an accuracy rate of 55 to 60 per cent is more than reliable enough to establish probable cause); *United States v. Ohoro*, 724 F. Supp. 2d 1191, 1204 (citing to *United States v. Anderson*, 2010 U.S. App. LEXIS 3541, 2010 WL 597230 at *3 (11th Cir.), cert. denied, 130 S. Ct. 3530 (2010), for the proposition that a dog with "a 55% accuracy rate in finding measurable amounts of drugs" was sufficiently reliable to establish probable cause).

⁴See, e.g., *United States v. Lakoskey*, 462 F.3d 965, 976 (8th Cir. 2006); *United States v. Ramirez*, 342 F.3d 1210, 1212-13 (10th Cir. 2003).

⁵See, e.g. *United States v. Outlaw*, 319 F.3d 701, 704 (5th Cir. 2003) ("That the suitcase the canine alerted to later turned out to contain PCP, a drug the dog was not trained to detect, simply does not vitiate the agent's reasonable suspicion under these facts."); *United States v. Robinson*, 707 F.2d 811, 815 (4th Cir. 1983) ("[The dog's] initial detection [] was sufficient to establish probable cause for a search for controlled substances — the fact that a different controlled substance was actually discovered does not vitiate the legality of the search.").

⁶*State v. Jackson*, 82 Wn. App. 594, 607, 918 P.2d 945 (1996), review denied, 131 Wn.2d 1006 (1997) (an "alert" by a dog trained to detect controlled substances and whose training and track record are known to the police on the scene is sufficient to establish probable cause for the presence of a controlled substance.).

Probable cause for arrest requires evidence that the individual being arrested is personally involved in or responsible for the controlled substance. See generally *State v. Grande*, 164 Wn.2d 135, 187 P.3d 248 (2008). When only one person is present in a vehicle, this requirement is satisfied. When there are multiple people present, additional investigation is required before making a warrantless arrest.

⁷The canines are trained to follow the odor to as close to the source as possible. A canine alert on the front bumper of a vehicle rather than on the trunk or passenger compartment is a possible indication that the substance being detected is unlawful. When relying upon this factor, the handler must disclose any factors that could result in an erroneous identification of the source, such as the ability of an odor to travel through a car's vents.

weight, or apparent false panels or modifications to the vehicle's door panels.

An officer seeking a search warrant based , in part, upon a narcotic canine's alert, must disclose to the magistrate the limitations of the canine due to its pre-Initiative 502 training. The failure to make such a disclosure violates the defendant's constitutional rights and can result in civil liability and/or the suppression of evidence.⁸ A prosecutor's failure to disclose such information can also result in bar discipline.⁹

It is recommended that all post-December 6, 2012, search warrants based, in part, upon a canine that was trained to detect marijuana include the following language:

Canine _____ was trained and certified prior to the effective date of Initiative 502. Canine _____ is trained to detect the presence of marijuana, heroin, methamphetamine, crack cocaine, and cocaine. Canine _____ cannot communicate which of these substances s/he has detected. Canine _____ can detect minuscule amounts of these five substances. Canine _____ cannot communicate whether the detected substance is present as residue or in measurable amounts. Despite these limitations, canine _____'s alert provides probable cause to believe that evidence of a Violation of a Uniform Controlled Substance Act may be found in _____ (Describe location to be searched) _____ when added to these additional facts . . .

⁸See generally *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978); *Chism v. Washington State*, 661 F.3d 380 (9th Cir. 2011), *cert. denied*, ___ S. Ct. ___ (Apr. 16, 2012).

⁹See RPC 3.3(f) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."). This obligation applies even where the prosecutor does not personally appear in court to obtain the warrant. See generally RPC 5.3 (a lawyer shall make reasonable efforts to ensure that an associated nonlawyer's conduct is compatible with the professional obligations of the lawyer).