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**Dogs Are Humans' Best Friend, Not Best Evidence**  
**Focus Column**

**Criminal Law**

**By Daniel Lee Jacobson**

The subject of dog tracking evidence may become the subject of popular discussion because such evidence may be used in the Scott Peterson murder trial.

In Sir Walter Scott's novel "The Talisman," Richard I of England and Phillip II of France argue over, and thus frame a main issue related to, dog tracking evidence. A hound is said to have tracked a thief; at the end of the scent trail, the hound found and pulled off of his horse one Conrade, Marquis of Montserrat.

Phillip: "Surely the word of a knight and a prince should bear him out against the barking of a cur."

Richard: "Royal brother, recollect that the Almighty who gave the dog to be companion of our pleasures and our toils, both invested him with a nature noble and incapable of deceit. He forgets neither friend nor foe; remembers, and with accuracy, both benefit and injury. He hath a share of man's intelligence, but no share of man's falsehood. You may bribe a soldier to slay a man with his sword, or a witness to take life by false accusation; but you cannot make a hound tear his benefactor; he is the friend of man save when man justly incurs his enmity. Dress yonder Marquis in what peacock robes you will, disguise his appearance, alter his complexion with drugs and washes, hide himself amidst a hundred men; I will yet pawn my scepter that the hound detects him, and expresses his resentment, as you have this day beheld." As related in numerous cases, including *People v. Malgren*, 139 Cal.App.3d 234 (1983) (disapproved on an unrelated ground at *People v. Jones*, 53 Cal.3d 1115 (1991); *Buck v. State*, 138 P.2d 115 (1943), and originally in *Blair v. Commonwealth*, 181 Ky. 218 (1918).

As King Richard's supposed 12th-century admonishment indicates, the issue of the reliability of dog tracking evidence has ancient roots. In modern times, there is also the issue of the Fourth Amendment, and whether a "sniff" is a search.

Understanding that dog tracking evidence has a commonality with hearsay might help with conceptualizing the question of reliability. When a dog tracks a scent, then signals that he/she has found the person or contraband sought, the situation is by definition one of out-of-court assertive conduct of an animal. Out-of-court assertive conduct is a hearsay concept. 7 Cal.L.Rev.Comm. Reports 1 (1965).

While Richard may have had full confidence in the reliability of dog tracking evidence, some courts have had their doubts. In an early 20th century case, the Iowa Supreme Court said, "All of the courts that admit such evidence concede that it is merely a circumstance and is 'of the weakest character.'" *State v. Grba*, 194 N.W. 250 (1923). "While most jurisdictions have overcome the reservations expressed in *Grba* with respect to admissibility of the evidence, these jurisdictions generally retain reservations about the possibility of inaccuracy of the evidence." *People v. Gonzales*, 218 Cal.App.3d 403 (Cal. App. 5th Dist. 1990). At least one commentator believes that modern courts have gone too far in accepting dog tracking evidence. See Andrew Eric Taslitz, "Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup" 42 Hastings L.J. 17 (1990).

California's approach to dog tracking evidence is designed to use a canine's unique sensory ability while requiring independent assurance of the dog's accuracy. Before I discuss what that approach is, I will discuss what that approach is not. It is not to investigate "the demonstrable reliability of a newly-developed scientific technique" and thus does not require the type of foundational judicial scrutiny prescribed by *People v. Kelly*, 17 Cal.3d 24 (1976). *People v. Craig*, 86 Cal.App.3d 905 (1978).

The *Craig* court explained that, while *Kelly* dealt with scientific machines, which by their nature generally duplicate results time and time again, dogs are animate objects which by their nature do not necessarily duplicate results in a rote manner. Also, according to the *Craig* court, *Kelly* dealt with "problems of *general acceptance* in the scientific community of inanimate scientific techniques, rather than specific recognition of one animal's ability to utilize a subjective, innate capability." [Emphasis in original.] The *Craig* court chose not to apply *Kelly* but instead to "require each particular dog's ability and reliability be shown on a case-by-case basis." "We are not merely assuming a well-trained dog can trail a human," the court wrote. "We say that this ability is a *fact* which, like other facts, may be proven by expert testimony.

"This testimony should come from a person sufficiently acquainted with the dog, his training, ability and past record of reliability. If the testimony comes from an expert in the area of training, trailing, and operational performance of such dogs, that expert is qualified to state an opinion as to the ability of that particular dog in question to trail a human."

So, in each case, the particular dog's abilities must be established by expert testimony. In directing that the expert be "sufficiently acquainted with *the dog, his training, ability and past record of reliability*" [emphasis added], the *Craig* court inherently explained that those are areas of expert inquiry. In *People v. Malgren*, 139 Cal.App.3d 234 (Cal. App. 1st Dist. 1983) (disapproved on another ground at *People v. Jones*, 53 Cal.3d 1115 (1991)), the court said that, "in determining what weight to give such evidence, the jury should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the trailing in question."

California requires not only evidence related to the dog and the dog's human counterparts but also corroborating evidence. "[W]hen dog tracking evidence is used to prove the identity of a defendant, there must be some other evidence, either direct or circumstantial, which supports the accuracy of that identification evidence." *Malgren* (disapproved on another ground at *Jones*). What type of corroborating evidence is required to "support the accuracy of that identification evidence" was further defined in *Gonzales*.

In *Gonzales*, the defendant urged that the corroborating evidence required in dog tracking cases should be of the same ilk as that which is required in cases where a conviction rests in part on the testimony of an accomplice. The corroborating evidence required in accomplice cases is "evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." *Penal Code* Section 1111.

But the *Gonzales* court explained that, while the concern in accomplice cases is trustworthiness, the concern in dog tracking cases is substantiality. "The difficulty is that we want to assure ourselves the dog did not err either in picking up the scent of the person who handled the pillowcase or in following that scent to the person found. It is not a question of trustworthiness, it is a question of substantiality - while the evidence might be trustworthy, we are not willing to rest our verdict on that evidence alone. We want other evidence that will validate its veracity." The court "emphasiz[ed] that the corroborating evidence necessary to support dog-tracking evidence need not be evidence which independently links the defendant to the crime; it suffices if the evidence merely supports the accuracy of the dog tracking."

The U.S. Supreme Court has ruled that a "canine sniff" by a trained dog of luggage that is located in a public place is not a search under the Fourth Amendment to the Constitution. *United States v. Place*, 462 U.S. 696 (1983). In *Place*, the Drug Enforcement Administration had dogs conduct a "canine sniff" of luggage where there was apparently no probable cause for a "search."

The Supreme Court said that, when a well-trained dog conducts the sniff, noncontraband items are not exposed, no one rummages through the contents of the luggage, "the sniff discloses only the presence or absence of narcotics," and "the owner of the property is not subject to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. "In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in

the manner in which the information is obtained and in the content of the information revealed by the procedure."

In *People v. Mayberry*, 31 Cal.3d 335 (1983), the state Supreme Court concluded that a person has no reasonable expectation of privacy in the odors escaping from luggage in an airport. "In our view, the escaping smell of contraband from luggage may be likened to the emanation of a fluid leading from a container. The odor is detectable by the nose, as the leak is visible to the eye. We discern no constitutionally significant difference in the manner of escape, and conclude that any privacy right is lost when either escapes into the surrounding area."

Justice James A. Ardaiz, the author of the opinion in *Gonzales*, said, "[W]e would simply add a more modern response [to Phillip's statement about taking "the word of a knight" over the "barking of a cur"]: 'It depends on what prince and which dog.'"

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