**When does drug dog odor become “residual”?**

**All too often, casual use of terms or casual testimony during a motion to suppress has led police K-9 officers into this troubling area**

By Ted Daus

In a review of recent case law, in which I focused on a trend toward statistical analysis of K-9 team deployments versus real finds of actual drugs, I was forced to examine what factors have led America’s K-9 handlers to the precarious position in which they find themselves. Unfortunately, I have discovered that in many cases, the biggest factor has been the K-9 handler himself. All too often, casual use of terms or casual testimony during a motion to suppress has led police K-9 officers into this troubling area.

Canine officers often testify in front of judges who have little working knowledge of how a K-9 officer performs his duties, let alone how a dog is trained to alert to drug odor. Most judges’ frame of reference about how dogs work or perform is their current or childhood pets. The lack of foundational information about subject matter that is critical to the case over which the judge is presiding is clearly one of the causes of our problem. A “Dog Training 101” course is not offered as part of the law school curriculum. Handlers are questioned by lawyers who sometimes know even less than judges.

These factors can contribute to an extremely frustrating experience on the witness stand for the handler. That is why it is imperative that the handler dot every “i” and cross every “t” when testifying in court. Educating not only the defense attorney and the prosecutor, but also the judge, is an essential element in a courtroom victory. Being thorough and patient with your courtroom testimony and not becoming sarcastic or combative with the defense attorney is the desired approach. There is a reason why they say “You’ll catch more flies with a teaspoon of honey than with a barrel of vinegar” — because it is true.

**Beware Warped Words**
One of my favorite areas of testimony involves the defense attorney’s fictitious terms: “dead scents” and “stale” or “lingering” odor. Let’s define these oxymoronic terms: “dead,” meaning no longer alive or no longer in existence or use, and “scent,” meaning a distinctive odor. Now let’s examine the false logic of the defense attorney’s question, “Has your dog ever alerted to a dead scent?” How can a dog alert to a distinctive odor that is no longer in existence? If it is no longer in existence, then by definition, the odor is not present and a dog cannot alert to it. Defense lawyers use these types of deceptive terms to try to mislead or confuse the judge. They will also use such terms in an attempt to dupe you into answering this misleading style of question.

Next, let’s define “stale odor.” “Stale” means having lost freshness. Does your dog have the ability to discern freshness? No, a dog only has the ability to determine that odor is or is not present. A dog does not alert by lifting its right hind leg for odor that’s more than 10 hours old or its left hind leg for odor that’s less than 10 hours old. Here again is another disingenuous term, used by defense attorneys to merely confuse the court. If the defense attorney is using terminology in his questions that you don’t use in your everyday K-9 logs, records, or training, then you likely have encountered a “trap” term.

“Lingering odor” is one of my personal favorites. Linger means to remain in a place longer than is usual or expected; to remain alive; to continue or persist, although gradually dying, ceasing, or disappearing. It sounds like the fundamental understanding of odor.

Since the odor of any removed object will dissipate over time, the odor of a removed object is, by definition, lingering. Somehow, defense attorneys have succeeded in buffaloing handlers and judges into believing this term of art has meaning in the realm of narcotics detection. In actuality, it falls into the category of “when you can’t dazzle them with brilliance, baffle them with B.S.” It is another classic example of a “trap” term.

**Odor Is Odor**
Now let’s discuss the arch-enemy of the K-9 handler — the term “residual odor.” Let’s examine the terms residual and odor and how they function together. The term residual means: the quantity remaining after most of something has been removed. Odor is a distinctive smell. Thus, “residual odor” is what remains of a distinctive smell after the original object has been removed. Allow me to simplify that concept: the odor given off by an object — whether or not the object is present — is still just odor. Defense lawyers want to label odor as “residual” because they want to be able to argue that if a dog can alert on a car without drugs actually being in the vehicle, then the dog should not be a tool that law enforcement can use to determine whether there is probable cause for a search of that car.

For your dog and in your testimony, odor is odor. It is either there or it is not. Do not fall into the trap of legitimizing questions that use misleading terms by trying to answer them. Instead, explain that such questions do not make sense as applied to narcotics dog handling. Do not be afraid to ask the defense attorney what he means in using those terms. Force him to define the terms so you can better understand the issue or goal. This is kind of fun, because many attorneys do not understand the terms themselves, nor can they explain them to you.

If I were to ask you to describe what a Martian looks like and you were to answer “a three-to-four- foot-high, green life form with an oblong head and big, black, bug-like eyes,” the mere fact that you answered the question allows the questioner to assume that Martians exist. Instead, the appropriate answer would be something like, “How can I answer that question when Martians don’t exist?”

It is common knowledge that a well-trained police canine will alert to the odor of four or five basic narcotics. However, in courtroom testimony or a deposition, handlers can get lazy. All too often, they mistakenly say things like, “My dog alerted to the cocaine,” or “My dog alerts to the presence of a narcotic substance.” Are those statements true and accurate?

The better way to articulate the concept would be: “My dog alerted to the odor of one of the four narcotics that he is trained to detect,” or “My dog alerted to the presence of the odor of narcotics.” The point is to emphasize that odor is truly what the dog is trained to detect, and odor is what the dog alerts on. Labeling the odor as a “dead scent,” “stale,” “lingering,” or “residual” only serves to undermine the central philosophy that odor is odor and nothing more. It is either present for the dog to detect or it is not.

**A Relevant Case**
Recently, the Supreme Court of Nebraska examined the testimony, records and deployment statistics of a K-9 team when they wrote (in their comments on State v. Howard, 282 Neb. 352, 803 N.W.2d 450 (September 2011):

*“Here, Eberle [the officer/handler] testified about Rocky's training and certification at the hearing on the motions to suppress. Eberle testified that Rocky is certified by the Nebraska State Patrol, the entity responsible for certifying drug detection dogs in Nebraska. Rocky obtained his certification in June 2007 after Eberle and Rocky attended a 5-week training session where they were trained as a team. Eberle testified that during training, examiners knew whether a drug substance was present or not when Rocky alerted. He testified that he and Rocky passed an examination at the conclusion of the training and have renewed their certification annually.*

*“Eberle also testified about Rocky's field record. He stated that a form is completed every time Rocky is deployed for a field search. The form indicates whether Rocky alerted and whether drugs were found. Eberle explained that sometimes Rocky will alert but no drugs are found. He explained that this can occur because often there is evidence that the items searched contained the scent of drugs, and it is that scent that Rocky is trained to detect.*

*“The record shows that during 79 field deployments, Rocky alerted 41 times. Seven times, no contraband was found following the alert and there was no explanation for the alert. Another seven times, no contraband was found following the alert, but there was a reasonable explanation for the presence of the scent of drugs. On three occasions, Rocky alerted but it was not documented whether any contraband was found. Based on the evidence of Rocky's training and certification and his field records, we conclude that the district court did not err in finding that the canine sniff was reliable...”*

Dogs alert to odor and direct the handler to the source of the odor, and then the officer searches for drugs in the area where source odor was indicated. Every handler has had the experience of his dog alerting to a vehicle in which odor was present but no drugs were found. That should not shock anyone when it happens, nor should it shock the judge or the lawyers involved in the case once they learn that a dog does not find drugs but merely alerts to drug odor.

*Ted Daus is an assistant state attorney assigned to the Drug Trafficking Unit, with over 20 years as a prosecutor for the Broward County State Attorney’s Office in Fort Lauderdale, Florida. He is also Police K-9 Magazine’s Associate Editor for legal issues.*