

**STATE V. CARTER: THE MINNESOTA CONSTITUTION  
PROTECTS AGAINST RANDOM AND SUSPICIONLESS  
DOG SNIFFS OF STORAGE UNITS**

Rachel Bond<sup>†</sup> and Theodora Gaitas<sup>††</sup>

|      |   |      |
|------|---|------|
| I.   | INTRODUCTION .....  | 1288 |
| II.  | FACTS AND PROCEDURAL HISTORY .....  | 1289 |
|      | A. <i>Facts</i> .....   | 1289 |
|      | B. <i>Procedural History</i> .....  | 1291 |
| III. | THE COURT OF APPEALS DECISION .....   | 1292 |
| IV.  | THE SUPREME COURT DECISION .....  | 1293 |
|      | A. <i>The Majority Opinion</i> .....  | 1293 |
|      | 1. <i>Without the Dog Sniff, the Remaining Statements in<br/>            the Warrant Failed to Establish a Substantial Basis for<br/>            Probable Cause</i> ..... | 1293 |
|      | 2. <i>A Dog Sniff Outside a Storage Unit Is Not a Search<br/>            Under the Fourth Amendment</i> .....   | 1294 |
|      | 3. <i>A Dog Sniff Outside a Storage Unit Is a Search Under<br/>            the Minnesota Constitution</i> .....   | 1296 |
|      | 4. <i>What Level of Suspicion Is Required?</i> .....  | 1297 |
|      | B. <i>The Special Concurrence of Justice Page</i> .....   | 1299 |
|      | C. <i>The Dissent of Justice Russell Anderson</i> .....   | 1300 |
| V.   | ANALYSIS .....  | 1301 |
|      | A. <i>Expanding the Meaning of a “Search” Under Article I,<br/>            Section 10</i> .....   | 1302 |
|      | B. <i>The Nature of Privacy and the Degree of Intrusion Under<br/>            the Fourth Amendment</i> .....  | 1303 |
|      | C. <i>The Nature of Privacy and the Degree of Intrusion Under<br/>            Article I, Section 10</i> .....   | 1307 |
|      | D. <i>Limiting the Reach of Kyllo</i> .....   | 1308 |
|      | E. <i>Potential for False Alerts</i> .....  | 1310 |

---

<sup>†</sup> Rachel Bond is a lawyer in the General Litigation group at Faegre & Benson LLP.

<sup>††</sup> Theodora Gaitas is an Assistant State Public Defender. The authors represented Andre Carter in his appeals to the Minnesota Court of Appeals and the Minnesota Supreme Court.

|   |      |
|---|------|
| <i>F. Limiting the “Plain Smell” Doctrine</i> ..... | 1311 |
| VI. CONCLUSION.....                                 | 1313 |

## I. INTRODUCTION

In *State v. Carter*,<sup>1</sup> the Minnesota Supreme Court considered whether a drug-detection dog sniff of a fenced-in storage unit was a search under either the Fourth Amendment of the U.S. Constitution or article I, section 10 of the Minnesota Constitution.<sup>2</sup> Although the court ruled that a drug-detection dog sniff outside a storage unit was not a search under the Fourth Amendment, it was a search within the meaning of article I, section 10 of the Minnesota Constitution.<sup>3</sup> To justify such a search, the police must “have at least [a] reasonable, articulable suspicion of criminal activity” before conducting the sniff.<sup>4</sup>

This Article argues that *Carter* is an important decision for six primary reasons. First, *Carter* recognized that the protections against governmental intrusions are greater under the Minnesota Constitution than the protections afforded by the U.S. Constitution.<sup>5</sup> Second, the court in *Carter* held that a dog sniff of a storage unit is not a search under the Fourth Amendment—an issue not yet decided by the U.S. Supreme Court.<sup>6</sup> Third, *Carter* concluded that a dog sniff of a storage unit is a search under article I, section 10 of the Minnesota Constitution, declining to follow the U.S. Supreme Court’s analysis that focuses almost exclusively on the nature of the item sought.<sup>7</sup> Fourth, the court refused to extend *Kyllo v. United States*,<sup>8</sup> which concerned the use of a thermal-imaging device on a home, to dog sniffs.<sup>9</sup> Fifth, the court decided that the “plain smell” doctrine does not apply to odors detected by dogs.<sup>10</sup> Sixth, the court signaled that the potential for “false alerts” from drug-detection dogs is a consideration in determining the

---

1. 697 N.W.2d 199 (Minn. 2005).

2. *Id.* at 202.

3. *Id.*

4. *Id.*

5. *Id.* at 210-11.

6. *Id.* at 208-09.

7. *Id.* at 210-11.

8. 533 U.S. 27 (2001).

9. *Carter*, 697 N.W.2d at 207-08.

10. *Id.* at 211.

constitutionality of this type of investigation.<sup>11</sup> The decision in *Carter* sets clear limits on government intrusions—not only on the unrestrained and suspicionless use of drug-detecting dogs, but also on other emerging law enforcement investigative techniques as well.

## II. FACTS AND PROCEDURAL HISTORY

### A. *Facts*

On June 10, 2002, police deployed a canine unit to conduct a dog sniff of a bank of storage units located inside a fenced-in St. Paul storage facility.<sup>12</sup> The dog indicated the presence of a controlled substance in a unit rented by Andre Carter.<sup>13</sup>

Based in large part on the dog sniff, police applied for a warrant to search Carter's storage unit.<sup>14</sup> The search warrant application noted that "approximately" four weeks before the dog sniff was conducted, a Minnesota Bureau of Criminal Apprehension ("BCA") agent, dressed in "raid gear" and staging for an operation near the storage facility, observed a white car drive into the storage facility.<sup>15</sup> Shortly thereafter, the white car left the facility, then re-entered as the driver "stared" at the agent.<sup>16</sup> Then the white car left the facility at the same time as a blue sports-utility vehicle.<sup>17</sup> The blue vehicle was registered to Carter's brother, Benjamin Carter.<sup>18</sup> The BCA agent believed this activity to be suspicious, hypothesizing that the driver of the white car was "scouting or surveying the officers."<sup>19</sup>

The BCA agent informed a St. Paul police officer of his

---

11. *Id.* at 210.

12. *Id.* at 203.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* As the court noted, the search warrants themselves do not indicate that the vehicles entered and departed the facility at the same time. *See id.* at 203 n.1; *see also* Application in Support of Search Warrant (on file with authors). During the suppression hearing before the trial court, the affiant officer testified that he was told by the BCA agent that the vehicles left the facility together. *Carter*, 697 N.W.2d at 203 n.1.

18. *Carter*, 697 N.W.2d at 203.

19. *Id.*

observations at the storage facility.<sup>20</sup> Recognizing Benjamin Carter's name from a drug-related investigation, the officer consulted with the manager of the storage facility who told him that Carter and his brother, Benjamin Carter, "each rented two units in the facility and sometimes visited their units several times a day."<sup>21</sup> The officer then arranged for the canine unit, "apparently after securing permission from the facility's management to enter the fenced area immediately outside of [Carter's] unit."<sup>22</sup>

In addition to the dog sniff, the BCA agent's observations, and the storage facility manager's comments, the warrant application alleged the following information:

- Carter and his brother were members of a gang;
- Carter had two prior drug convictions in 1995 and 1997;
- Carter's brother Benjamin had a prior drug conviction from 1995;
- Carter had been convicted of possession of a pistol without a permit in 1995; and
- Carter had three previous arrests, none of which resulted in convictions, in 1994 and 1998.<sup>23</sup>

The warrant application did not identify the facility manager who assisted the officer, or specify the date on which the police made contact with him or her.<sup>24</sup> The application did not indicate when the BCA agent made his observations at the facility.<sup>25</sup> Nor did the application reveal why there was a four-week time period between the BCA agent's observations and the dog sniff.<sup>26</sup>

When the police executed the search warrant, they found two firearms inside Carter's storage unit.<sup>27</sup> There were no drugs in the

---

20. *Id.*

21. *Id.*

22. *Id.* In fact, the record does not indicate how the police gained access to the facility to conduct the dog sniff. The storage facility was a "fenced area with rows . . . [of] different sized garages that people may rent to store various items." Transcript of Defendant's Motion to Suppress Hearing, *State v. Carter* (Mar. 12, 2003) (on file with authors). The entire storage facility was gated and locked to prevent entry, and required a pass or code to enter. *See id.* When the police executed the search warrant, they had to show the manager, who allowed the police to enter and directed them to Carter's unit, the warrant in order to gain access into the storage area. *See id.*

23. *Carter*, 697 N.W.2d at 203.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 204.

2006]

STATE V. CARTER

1291

storage unit.<sup>28</sup>

*B. Procedural History*

Carter was charged with the offense of felon in possession of a firearm under Minnesota Statutes section 624.713, subdivisions 1(b) and 2, and section 609.11, subdivision 5(b).<sup>29</sup> After pleading not guilty, Carter moved to suppress the evidence found pursuant to the search on the ground that without the results of the dog sniff, the application in support of the warrant failed to establish probable cause.<sup>30</sup> The trial court denied Carter's motion to suppress, concluding that the affidavit presented a "substantial basis" for probable cause to support a search warrant.<sup>31</sup> The jury found Carter guilty of possession of a firearm by an ineligible person, and the trial court sentenced him to a sixty-month term of imprisonment.<sup>32</sup>

The Minnesota Court of Appeals, in a published opinion written by Judge Crippen,<sup>33</sup> affirmed the district court's denial of Carter's motion to suppress and Carter's conviction.<sup>34</sup> Carter appealed to the Minnesota Supreme Court.<sup>35</sup>

The Minnesota Supreme Court reversed the court of appeals.<sup>36</sup> The court first concluded that without the results of the dog sniff, the warrant application failed to establish probable cause.<sup>37</sup> Then, the court determined that under U.S. Supreme Court precedent, a dog sniff outside a storage unit is not a search under the Fourth Amendment.<sup>38</sup> But the court found that that the dog sniff was a search within the meaning of article I, section 10 of the Minnesota

---

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* The sixty-month sentence was the mandatory minimum sentence for the offense of felon in possession of a firearm. MINN. STAT. § 609.11, subd. 5(b) (2004).

33. Justice Barry G. Anderson was also on the court of appeals panel. Justice Anderson was subsequently appointed to the Minnesota Supreme Court. Because of his participation in the court of appeals decision, he recused himself from consideration of the case before the Minnesota Supreme Court.

34. *State v. Carter*, 682 N.W.2d 648 (Minn. Ct. App. 2004).

35. *Carter*, 697 N.W.2d at 202.

36. *Id.* at 212.

37. *Id.* at 206.

38. *Id.* at 209.

Constitution.<sup>39</sup> Adopting a standard articulated by the Pennsylvania Supreme Court,<sup>40</sup> the court held that police must have a reasonable, articulable suspicion of criminal activity before conducting a dog sniff and must be lawfully present in the place where the dog sniff occurs.<sup>41</sup>

### III. THE COURT OF APPEALS DECISION

In affirming Carter's conviction, the court of appeals found no precedent requiring the police to have a reasonable and articulable suspicion of criminal activity to justify a dog sniff under the Fourth Amendment. The court began its analysis by noting the unique place dog sniffs occupy in Fourth Amendment jurisprudence.<sup>42</sup> In *United States v. Place*, the U.S. Supreme Court held that a brief detention and dog sniff of luggage in an airport where police had a reasonable suspicion that the luggage contained narcotics did not constitute a "search" within the meaning of the Fourth Amendment.<sup>43</sup> Citing *Place*, the court of appeals noted that dog sniffs are limited both in manner and in scope.<sup>44</sup> Thus, the court concluded, because a dog sniff "discloses only the presence or absence of narcotics, a contraband item," it does not constitute a "search" within the meaning of the Fourth Amendment—at least in public places.<sup>45</sup>

The court of appeals acknowledged that in *State v. Wiegand*,<sup>46</sup> the Minnesota Supreme Court recognized "that there exists a higher reasonable expectation of privacy in one's home than in public places."<sup>47</sup> But the court declined to extend *Wiegand* to dog sniffs of enclosed storage units, determining that *Wiegand*'s holding "is confined to a case where law enforcement attempts to expand the scope or duration of an investigative stop beyond the investigation of an equipment violation that was the cause for the stop."<sup>48</sup> Without precedent establishing a "universal requirement that dog sniffs be limited to cases where a reasonable, articulable

---

39. *Id.* at 211.

40. *Commonwealth v. Johnston*, 530 A.2d 74, 77-79 (Pa. 1987).

41. *Carter*, 697 N.W.2d at 212.

42. *State v. Carter*, 682 N.W.2d 648, 651 (Minn. Ct. App. 2004).

43. 462 U.S. 696, 698 (1983).

44. *Carter*, 682 N.W.2d at 651.

45. *Id.* (quoting *Place*, 462 U.S. at 707).

46. 645 N.W.2d 125 (Minn. 2002).

47. *Carter*, 682 N.W.2d at 651.

48. *Id.* at 652.

suspicion of criminal activity is shown,” the court examined whether Carter had a reasonable expectation of privacy “in the area outside his storage unit where the dog sniff occurred.”<sup>49</sup> Finding that individuals with access to the storage facility were not restricted from the area where the dog sniff occurred, the court concluded that Carter had no reasonable expectation of privacy in the “semi-public area surrounding the entrance to [his] storage unit.”<sup>50</sup>

Finally, citing *Kyllo v. United States*,<sup>51</sup> the court noted the existence of “broader limits to the use of unique detection devices that reveal certain information about the contents of a structure.”<sup>52</sup> But under the circumstances of the *Carter* case, “where (1) there is no intrusion inside a building; (2) it is not asserted that the structure at issue is part of a home; and (3) no question is raised as to the legitimacy of the police presence near the structure,” the court found no authority recognizing a legitimate expectation of privacy.<sup>53</sup>

#### IV. THE SUPREME COURT DECISION

##### A. *The Majority Opinion*

###### 1. *Without the Dog Sniff, the Remaining Statements in the Warrant Failed to Establish a Substantial Basis for Probable Cause*

The Minnesota Supreme Court first considered whether, excluding the dog sniff, the remaining allegations in the search warrant application established probable cause.<sup>54</sup> If independent probable cause existed, the court did not need to decide the constitutionality of the dog sniff.<sup>55</sup>

The court concluded that, under the totality of the circumstances, the three factors in the warrant application other than the dog sniff—Carter’s criminal record, the BCA agent’s observations, and the manager’s statement—were insufficient to

---

49. *Id.*

50. *Id.*

51. 533 U.S. 27 (2001).

52. *Carter*, 682 N.W.2d at 652.

53. *Id.*

54. *State v. Carter*, 697 N.W.2d 199, 204-06 (Minn. 2005).

55. *Id.* at 204.

support the issuance of the warrant for the storage unit.<sup>56</sup> While a person's criminal record may be properly considered by an issuing judge upon an application for a search warrant as "corroborative evidence," Carter's convictions were several years old and thus "less reliable in providing a 'fair probability' that contraband will be found in a place to be searched."<sup>57</sup>

As to the BCA agent's observations at the storage facility, the court noted that the fact that the two cars entered or left the facility together was not part of the warrant application, and therefore irrelevant to the court's analysis.<sup>58</sup> Moreover, the fact that the driver was staring at the officers "can be innocently explained by the unusual experience of seeing police officers in 'raid gear.'"<sup>59</sup> And Carter's "mere association" with his brother, whose car the BCA agent observed, could not provide probable cause because "there was no nexus linking the suspicious vehicles or their drivers to any criminal activity involving [Carter]."<sup>60</sup>

Finally, the court determined that it was unclear whether the manager's statements were sufficiently fresh, given that the warrant application failed to state when the manager provided the information, not to mention the application's failure to explain the four-week gap between the BCA agent's observations and the request for a warrant.<sup>61</sup> Without the results of the dog sniff, there was no "direct connection" to the storage unit, and thus there was no substantial basis for probable cause to issue the search warrant for Carter's storage unit.<sup>62</sup>

## *2. A Dog Sniff Outside a Storage Unit Is Not a Search Under the Fourth Amendment*

Next, the Minnesota Supreme Court considered whether a dog sniff outside a storage unit is a search under the Fourth Amendment.<sup>63</sup> The court noted that "[w]hat a person knowingly

---

56. *Id.* at 206.

57. *Id.* at 205.

58. *Id.* at 205-06.

59. *Id.* at 206 n.3.

60. *Id.*

61. *Id.* at 206. The court also observed that "there may be many legitimate reasons to visit a storage unit frequently. Without more, the mere fact of frequent visits to a storage unit does not provide evidence of the 'fair probability' that contraband is inside." *Id.*

62. *Id.*

63. *Id.* at 206.

exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>64</sup> Then, the court discussed *Place*’s holding that “because a traveler’s expectation of privacy in a public airport is limited, and a trained drug-detection dog sniff is only minimally intrusive, a dog sniff of a traveler’s luggage in a public place was not a search under the Fourth Amendment.”<sup>65</sup> The distinction in *Place*, the court noted, was between a person’s reasonable expectation of privacy in the contents of luggage, but not in scents detectable outside the luggage.<sup>66</sup>

Regarding the intrusiveness of a dog sniff, the court again relied on *Place*’s discussion of the *sui generis* nature of a dog sniff and the observation that there is “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.”<sup>67</sup>

The court rejected the argument that *Kyllo v. United States*<sup>68</sup> overruled the dog sniff rule established in *City of Indianapolis v. Edmond*<sup>69</sup> and *Place*.<sup>70</sup> As it had previously observed in *State v. Wiegand*—a case involving a dog sniff of a car during a stop for a routine equipment violation—the court noted that “a thermal imager is ‘a piece of technical equipment much different from a dog.’”<sup>71</sup> Moreover, the court distinguished *Kyllo* because it involved the heightened expectations of a home.<sup>72</sup> The court also cited the Supreme Court’s recent decision in *Illinois v. Caballes*, which similarly involved a dog sniff of a car.<sup>73</sup> In *Caballes*, the Supreme Court reiterated that a dog sniff is minimally intrusive and does not implicate legitimate privacy interests under the Fourth Amendment

---

64. *Id.* at 207 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

65. *Id.*

66. *Id.*

67. *Id.* (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

68. 533 U.S. 27 (2001) (holding that warrantless use of a thermal-imaging device on a home was an unconstitutional search under the Fourth Amendment).

69. 531 U.S. 32, 40 (2000) (holding that a dog sniff of a vehicle at a traffic checkpoint is not a search because it “does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics”).

70. 462 U.S. at 707; *see supra* text accompanying note 65.

71. *Carter*, 697 N.W.2d at 207 (quoting *State v. Wiegand*, 645 N.W.2d 125, 130 (Minn. 2002)).

72. *Id.* at 208.

73. 543 U.S. 405 (2005).

because it “does not expose noncontraband items that otherwise would remain hidden from public view.”<sup>74</sup> Under the Fourth Amendment, then, the Minnesota Supreme Court determined that *Kyllo* is consistent with *Place* and *Edmond* because

while a heat-sensory device is “capable of detecting lawful activity” inside a house, a dog sniff “reveals no information other than the location of a substance that no individual has any right to possess.” The [Supreme] Court clarified that the relevant inquiry is whether the investigative device used is capable of detecting lawful as well as unlawful activity inside a place that otherwise carries a legitimate expectation of privacy.<sup>75</sup>

While the expectation of privacy in a storage unit may be greater than the privacy interest in a car, the court concluded that the privacy interest in a storage unit is less than that for a home under the Fourth Amendment.<sup>76</sup> Under *Kyllo* and *Caballes*, “the unit is not a place where a person seeks refuge or conducts frequent personal activities.”<sup>77</sup> Thus, the Minnesota Supreme Court concluded that a drug-detection dog sniff in the area immediately surrounding a storage unit does not constitute a search under the Fourth Amendment.<sup>78</sup>

### *3. A Dog Sniff Outside a Storage Unit Is a Search Under the Minnesota Constitution*

In contrast to its Fourth Amendment analysis, the court concluded that the definition of a search is broader under article I, section 10 of the Minnesota Constitution.<sup>79</sup> The court looked to decisions from Pennsylvania and Alaska; both jurisdictions had determined that a dog sniff of a storage unit, while not a search under the Fourth Amendment, was a search under their respective state constitutions.<sup>80</sup> The court noted that the Pennsylvania and

---

74. *Id.* at 409 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

75. *Carter*, 697 N.W.2d at 208 (quoting *Caballes*, 543 U.S. at 409).

76. *Id.* at 209.

77. *Id.*

78. *Id.*

79. Article I, section 10 is textually identical to the Fourth Amendment. Therefore, U.S. Supreme Court decisions interpreting the Fourth Amendment are of “inherently persuasive, although not necessarily compelling, force.” *Id.* at 210 (quoting *State v. Wiegand*, 645 N.W.2d 125, 132 (Minn. 2002)).

80. *Id.* at 210 (citing *McGahan v. State*, 807 P.2d 506, 510 (Alaska Ct. App. 1991); *Commonwealth v. Johnston*, 530 A.2d 74, 78-79 (Pa. 1987)).

Alaska decisions relied in part on Professor Wayne R. LaFave, “who cautions against ‘totally unrestrained’ use of dogs in law enforcement because of the growing recognition that dogs can provide ‘false alerts.’”<sup>81</sup> Considering both the privacy expectation in storage units and the intrusiveness of drug-detection dog sniffs outside a storage unit, the court concluded that “there are good reasons to guard against a police officer’s random use of a drug-detection dog to sniff in the area immediately outside of a person’s storage unit, absent some level of suspicion of drug-related activity.”<sup>82</sup>

The court determined that a person’s expectation of privacy in a storage unit is greater under the Minnesota Constitution than under the Fourth Amendment, particularly where the storage unit is “equivalent in size to a garage and . . . large enough to contain a significant number of personal items and even to conduct some personal activities.”<sup>83</sup> Unlike a car or luggage, the very purpose of a storage unit “is to store personal effects in a fixed location.”<sup>84</sup> A renter of a storage unit has no expectation of privacy in that which can be smelled plainly or seen from the “area immediately outside the unit.”<sup>85</sup> In fact, while a renter should expect that other people may lawfully be present outside the unit, he “need not expect that police will be able to bring to that area drug-detecting dogs that can detect odors that no person could detect.”<sup>86</sup>

Thus, the court concluded that a drug-detection dog outside Carter’s storage unit was a search under the Minnesota Constitution.<sup>87</sup>

#### 4. *What Level of Suspicion Is Required?*

To determine what level of suspicion is required before police may conduct a dog sniff of a storage unit, the *Carter* court returned to decisions by Pennsylvania and Alaska courts.<sup>88</sup> Adopting the

---

81. *Id.* See generally WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.2(g) (4th ed. 2004) (discussing and compiling various cases on the use of drug-detection dogs and the policy rationales underlying their current treatment by those courts).

82. *Carter*, 697 N.W.2d at 210.

83. *Id.* at 211.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 211; see *McGahan v. State*, 807 P.2d 506, 510-11 (Alaska Ct. App. 1991) (“Alaska’s more stringent protection of its citizens’ privacy interests can still

ruling of the Pennsylvania Supreme Court in pertinent part, the court found the reasonable suspicion standard to be a “workable constitutional ‘middle ground’ that balances a person’s expectation of privacy against the government’s interest in using dogs to detect illegal drugs.”<sup>89</sup> Further embracing the Pennsylvania court’s rationale in *Commonwealth v. Johnston*, the Minnesota Supreme Court noted that

[o]n the one hand, much of the law enforcement utility of such dogs would be lost if full blown warrant procedures were required before a canine sniff could be used; but on the other, it is our view that a free society will not remain free if police may use this, or any other crime detection device, at random and without reason.<sup>90</sup>

Recognizing the government’s significant law-enforcement interest in using dogs to detect drugs, the court adopted the holding of the Pennsylvania Supreme Court’s decision in *Johnston*:

[A] narcotics detection dog may be deployed to test for the presence of narcotics [in the area outside a storage unit] where:

1. the police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test; and
2. the police are lawfully present<sup>91</sup> in the place where the canine sniff is conducted.

Applying this rule, the Minnesota Supreme Court concluded that the police did not have a reasonable suspicion that drugs were present in Carter’s storage unit and therefore the dog sniff was an unreasonable search under the Minnesota Constitution.<sup>92</sup> Accordingly, the evidence discovered as a result of the dog sniff and seized during the subsequent search of the storage unit was unlawfully obtained and should have been suppressed.<sup>93</sup> The court

---

be assured if the reasonable suspicion standard is applied to canine searches of areas of public access exterior to commercial buildings.”); *Commonwealth v. Johnston*, 530 A.2d 74, 79 (Pa. 1987) (“[R]equiring police officers to articulate ‘reasonable grounds’ before undertaking a dog-sniff of a storage unit presents a workable constitutional ‘middle ground’ that balances a person’s expectation of privacy against the government’s interest in using dogs to detect illegal drugs.”).

89. *Carter*, 697 N.W.2d at 211 (quoting *Johnston*, 530 A.2d at 79).

90. *Id.* (quoting *Johnston*, 530 A.2d at 79).

91. *Id.* at 212 (quoting *Johnston*, 530 A.2d at 79).

92. *Id.*

93. *Id.*

reversed Carter's conviction and remanded for a new trial.<sup>94</sup>

*B. The Special Concurrence of Justice Page*<sup>95</sup>

Justice Page concurred in the result, but disagreed with the majority's holding that reasonable, articulable suspicion is the proper standard in dog sniff cases.<sup>96</sup> In Justice Page's view, the privacy interest in a storage unit within a secure facility is greater than the privacy interest in an automobile, and "[g]iven this more prominent privacy interest, a search warrant based on anything less than probable cause impermissibly erodes the protections of article I, section 10 of the Minnesota Constitution."<sup>97</sup>

Justice Page articulated this position previously—and more fully—in his concurrence and special concurrence in *State v. Wiegand*.<sup>98</sup> There, Justice Page first disagreed with the intrusiveness analysis employed by the U.S. Supreme Court and the *Wiegand* majority, concluding that "the level of intrusion resulting from a dog sniff is significant and requires probable cause before the intrusion is permissible."<sup>99</sup> According to Justice Page, when police use dogs, "they are investigating. They are trying to find something. They are seeking evidence in hidden places."<sup>100</sup> "The dog is detecting something about the person that is not otherwise apparent on observation."<sup>101</sup>

In addition, Justice Page was persuaded by *Kyllo*'s command that "[t]he Fourth Amendment protection of the home has never been tied to measurement of the quality or quantity of information obtained."<sup>102</sup> Justice Page noted that what is detected fails to make the search any more or less reasonable, particularly in light of advances in technology that enable an officer to "conduct a search that detects only criminal activity."<sup>103</sup> "[T]he intrusion is complete

---

94. *Id.* at 212.

95. Chief Justice Blatz joined in Justice Page's special concurrence.

96. *Carter*, 697 N.W.2d at 212 (Page, J., concurring).

97. *Id.* (citing *State v. Pietraszewski*, 285 Minn. 212, 216, 172 N.W.2d 758, 762 (1969)).

98. 645 N.W.2d 125, 137-40 (Minn. 2002) (Page, J., concurring).

99. *Id.* at 137.

100. *Id.* (quoting *United States v. Beale*, 736 F.2d 1289, 1293 (9th Cir. 1984) (Pregerson, J., dissenting)).

101. *Id.* at 138.

102. *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 37 (2001)).

103. *Id.*

regardless of what the dog smelled.”<sup>104</sup> Moreover, the lack of a physical intrusion does not make the dog sniff less intrusive.<sup>105</sup> Neither the infrared technology in *Kyllo* nor the eavesdropping in *Katz v. United States*<sup>106</sup> was permissible, even though neither involved a physical invasion.<sup>107</sup> Like the sense-enhancing infrared technology in *Kyllo*, “the sense-enhancing dog-sniff, not in general public use, obtained information regarding the interior of the vehicle that could not have been obtained without physical intrusion—a physical intrusion that would otherwise require probable cause.”<sup>108</sup>

Justice Page concluded his special concurrence in *Carter* by noting that the privacy interest in a storage unit is even greater than the privacy interest in an automobile.<sup>109</sup> Given this privacy interest and the fact that a dog sniff is an intrusive search, Justice Page interpreted the Minnesota Constitution to require probable cause before a dog sniff could be conducted around the exterior of a vehicle.<sup>110</sup>

*C. The Dissent of Justice Russell Anderson*

The lone dissenting voice was that of Justice Russell Anderson. Noting that there was no reason to reject the analysis set forth in *United States v. Place*, Justice Anderson argued that the use of a drug-detecting dog “outside Carter’s storage unit did not constitute a search” because Carter did not have “a legitimate expectation of privacy in the air outside the unit, in a semi-public walkway.”<sup>111</sup> Focusing on “[t]he area where the dog sniff was conducted,” Justice Anderson noted that the area was accessible to other people, that Carter could not restrict access to the area outside the unit, that Carter was only at the unit periodically, and that Carter did not live there.<sup>112</sup> Dog sniffs, even fallible ones, are “a limited intrusion, revealing nothing else inside the structure that might implicate a legitimate expectation of privacy.”<sup>113</sup>

---

104. *Id.*

105. *Id.*

106. 389 U.S. 347 (1967).

107. *Wiegand*, 645 N.W.2d at 138 (Page, J., concurring).

108. *Id.* (citing *United States v. Ross*, 456 U.S. 798, 809 (1982)).

109. *State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005) (Page, J., concurring).

110. *Id.*

111. *Id.* at 213-14 (Anderson, J., dissenting).

112. *Id.* at 214.

113. *Id.*

Justice Anderson's dissent also relied on *Caballes*, noting that because a dog sniff is limited to detecting the "presence of contraband," and "[b]ecause any interest in possessing contraband is not one that society considers legitimate, a sense-enhancing technique that only reveals the presence of contraband 'compromises no legitimate privacy interest.'"<sup>114</sup> Quoting *Caballes*, Justice Anderson noted:

Critical to [the *Kyllo*] decision was the fact that the device was capable of detecting lawful activity—in that case intimate details in a home. . . . The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from [a person's] hopes or expectations concerning the nondetection of contraband. . . .<sup>115</sup>

Justice Anderson determined that even under the majority's rationale, he would have "conclud[ed] that the police had reasonable suspicion to justify a dog sniff," and would have affirmed Carter's conviction.<sup>116</sup>

#### V. ANALYSIS

The Minnesota Supreme Court's decision in *Carter* is significant for several reasons. First, *Carter* clearly held that article I, section 10 of the Minnesota Constitution provides broader protection from government intrusions than does the Fourth Amendment of the Federal Constitution.<sup>117</sup> Second, applying the U.S. Supreme Court's Fourth Amendment jurisprudence, the court found that a dog sniff of a storage unit is not a search under the Federal Constitution—a question that has yet to be addressed by the Supreme Court.<sup>118</sup> Third, *Carter* rejected the analysis that the U.S. Supreme Court has applied to drug-detecting dog sniffs, which focuses on the nature of the item sought, and concluded that a dog sniff of a storage unit is a search under article I, section 10 of the Minnesota Constitution.<sup>119</sup> Fourth, the Minnesota Supreme Court refused to extend the rationale of *Kyllo*—the U.S. Supreme Court's decision concerning the use of thermal imaging to "see" inside a

---

114. *Id.* (quoting *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)).

115. *Id.* at 214-15 (quoting *Caballes*, 543 U.S. at 409-10).

116. *Id.* at 215.

117. *Id.* at 210 (majority opinion).

118. *Id.* at 207-09.

119. *Id.* at 208-11.

home—to dog sniffs.<sup>120</sup> Fifth, the court clarified that the “plain smell” doctrine does not apply to smells that are detected by dogs.<sup>121</sup> And finally, *Carter* recognized that the potential for false alerts from drug-detection dogs must be factored into the constitutional analysis of this type of investigation.<sup>122</sup>

*Carter* is certainly instructive about how the Minnesota Supreme Court will approach the constitutionality of dog sniffs in future cases.<sup>123</sup> But the decision will also have a broader impact. *Carter* provides a unique framework for addressing government intrusions under article I, section 10 of the Minnesota Constitution, bracing Minnesota search and seizure law for emerging law enforcement technologies.

A. *Expanding the Meaning of a “Search” Under Article I, Section 10*

In *Carter*, the court took seriously its “responsibility as Minnesota’s highest court to independently safeguard for the people of Minnesota the protections embodied in [the state] constitution.”<sup>124</sup> As the court noted, it is “free to offer protections under the Minnesota Constitution that are greater than those under the United States Constitution,” but will not “cavalierly” do so.<sup>125</sup> While the court in several earlier decisions recognized that Minnesota citizens’ protections against seizures may be greater under the state constitution than the Federal Constitution,<sup>126</sup> those

---

120. *Id.* at 207-08, 211.

121. *Id.* at 211.

122. *Id.* at 210.

123. *See id.* at 207-11.

124. *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004).

125. *Carter*, 697 N.W.2d. at 210.

126. In 1993, the Minnesota Supreme Court declined to follow the U.S. Supreme Court’s approach that a seizure occurs when police use physical force, because it represented a “sharp departure” from Minnesota’s rule that a seizure occurs when a reasonable person would not feel free to leave. *In re E.D.J.*, 502 N.W.2d 779, 780 (Minn. 1993) (discussing *California v. Hodari*, 449 U.S. 621 (1991)). In the following year, the Minnesota Supreme Court declined to follow the U.S. Supreme Court’s holding in *Terry v. Ohio*, 392 U.S. 1 (1968), that a police roadblock to investigate drunk driving did not violate the Fourth Amendment. *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 185-86 (Minn. 1994) (discussing *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990)). The court decided that *Sitz* “represent[ed] a ‘radical’ departure from the way the [*Terry* balancing] test has been and should be applied” to roadblocks. *Id.* at 186. Instead, *Ascher* held that article I, section 10 required “objective individualized articulable suspicion of criminal wrongdoing before subjecting a driver to an investigative stop.” *Id.* at 187. Furthermore, in *Askerooth*, the court refused to follow the U.S. Supreme Court’s decision that the Fourth Amendment does not

decisions did not address whether those same protections applied to searches.<sup>127</sup> *Carter* makes clear that the Minnesota Constitution affords greater protections against unreasonable searches than does the U.S. Constitution.<sup>128</sup>

This expansion of the meaning of a search will likely have important consequences outside of the dog sniff context. Increasingly, technology is enhancing law enforcement's ability to conduct criminal investigations that involve minimal physical intrusions.<sup>129</sup> Moreover, technology itself is driving the need for new investigative techniques, as in the case of growing Internet surveillance.<sup>130</sup> Novel law enforcement technologies—from sense-enhancing devices to computer surveillance tools—will likely challenge the future boundaries of a search under article I, section 10 of the Minnesota Constitution.

*B. The Nature of Privacy and the Degree of Intrusion Under the Fourth Amendment*

*Carter* decided that a dog sniff of a storage unit is not a search under the Federal Constitution's Fourth Amendment.<sup>131</sup> Although the U.S. Supreme Court has not considered the constitutionality of dog sniffs of storage units, its jurisprudence treats a dog sniff as a constitutionally unique investigative technique.<sup>132</sup> In *Place, Edmond*, and *Caballes*, the Court explained that a dog sniff is minimally intrusive because it entails no physical invasion and it does not implicate a legitimate privacy interest—because a person cannot have a reasonable expectation of privacy in contraband.<sup>133</sup> In

---

prohibit the warrantless arrest of a person who has committed a misdemeanor, concluding that “*Atwater's* apparent removal of any consideration of a balancing of individual interests with governmental interests troubles us because this removal is in tension with a broad range of our precedent.” *Askerooth*, 681 N.W.2d at 362 (discussing *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)).

127. See cases cited *supra* note 126.

128. *Carter*, 697 N.W.2d. at 210.

129. See Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1336-57 (2002) (discussing new law enforcement technologies).

130. See Geoffrey A. North, *Carnivore in Cyberspace: Extending the Electronic Communications Privacy Act's Framework to Carnivore Surveillance*, 28 RUTGERS COMPUTER & TECH. L.J. 155, 156-68 (2002) (discussing a government-created surveillance device for policing internet activity).

131. *Carter*, 697 N.W.2d at 202.

132. See *Illinois v. Caballes*, 543 U.S. 405, 409 (2005); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *United States v. Place*, 462 U.S. 696, 707 (1983).

133. See cases cited *supra* note 132.

*Caballes*, the Court held that the Fourth Amendment does not require a reasonable, articulable suspicion to justify using a drug-detection dog on a car stopped during a legitimate traffic stop because it “reveals no information other than the location of a substance that no individual has any right to possess.”<sup>134</sup> Further, the Court squarely stated that “[o]fficial conduct that does not ‘compromise any legitimate interest in privacy’ is not a search subject to the Fourth Amendment,” and that “any interest in possessing contraband cannot be deemed ‘legitimate.’”<sup>135</sup>

The Minnesota Supreme Court in *Carter* was, of course, constrained by the U.S. Supreme Court’s dog sniff precedent.<sup>136</sup> Thus, even if the privacy interest is greater for a storage unit than it is for a car, the court recognized that under the Fourth Amendment, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,”<sup>137</sup> and while “a person has a reasonable expectation of privacy in luggage *contents* . . . there is no such expectation in scents that may be detected at the luggage’s exterior.”<sup>138</sup>

Turning to the intrusiveness of a dog sniff, the court noted the *sui generis* nature of a dog sniff as articulated in *Place*, commenting that there is “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.”<sup>139</sup> Further, the court noted that *Caballes*

emphasized its view that a drug-detection dog sniff is only minimally intrusive, deciding that the dog sniff of a

---

134. *Caballes*, 543 U.S. at 410.

135. *Id.* at 408 (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

136. *See id.* at 409; *Edmond*, 531 U.S. at 40; *Place*, 462 U.S. at 707.

137. *State v. Carter*, 697 N.W.2d 199, 207 (Minn. 2005) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

138. *Id.* (citing *Place*, 462 U.S. at 707 n.4). In fact, there are good reasons why a dog sniff of a place such as a storage unit or a home, not to mention a person, might raise greater constitutional concerns. *Carter*’s reliance on *Place* and *Caballes* in this context thus seems inadequate; *Place*’s focus on a traveler’s limited expectation of privacy in luggage while in a public airport has limited applicability to a person’s expectation of privacy in a storage unit, particularly when Minnesota decisions already hold that under the Fourth Amendment a person has a reasonable expectation of privacy in places such as a storage unit. *See State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003); *see also State v. Larsen*, 650 N.W.2d 144, 148-49 (Minn. 2002) (finding a reasonable expectation of privacy in an ice-fishing house).

139. *Carter*, 697 N.W.2d at 207 (quoting *Place*, 462 U.S. at 707).

vehicle lawfully seized on a public roadway “generally does not implicate legitimate privacy interests” under the Fourth Amendment because it “does not expose noncontraband items that otherwise would remain hidden from public view.” The Court specifically determined that *Kyllo* is “entirely consistent” with *Place*. The Court observed that while a heat-sensory device is “capable of detecting lawful activity” inside a house, a dog sniff “reveals no information other than the location of a substance that no individual has any right to possess.” The Court clarified that the relevant inquiry is whether the investigative device used is capable of detecting lawful as well as unlawful activity inside a place that otherwise carries a legitimate expectation of privacy.<sup>140</sup>

Thus, under these cases, a drug-detection dog sniff in the area immediately surrounding a storage unit is not a search under the Fourth Amendment because a storage unit “is not a place where a person seeks refuge or conducts frequent personal activities.”<sup>141</sup>

As many commentators have observed, there are compelling reasons to criticize the Supreme Court’s approach to dog sniffs.<sup>142</sup> For example, since *Katz v. United States*, it has been the law that the reach of the Fourth Amendment “cannot turn upon the presence or absence of a physical intrusion into any given enclosure” and that a physical invasion is not necessary to trigger constitutional protections.<sup>143</sup> The Supreme Court’s focus on the nature of the item sought, and its conclusion that there is no legitimate expectation of privacy in contraband, is likewise constitutionally unsound.<sup>144</sup> The nature of the place to be searched is the starting

---

140. *Id.* at 208 (internal citations omitted).

141. *Id.* at 209.

142. See, e.g., Richard E. Myers II, *In the Wake of Caballes, Should We Let Sniffing Dogs Lie?*, 20 CRIM. JUST. 4 (2006) (criticizing the analysis of dog sniffs employed by the Supreme Court and Circuit Courts of Appeals in the context of the Fourth Amendment).

143. 389 U.S. 347, 353 (1967); see also *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (“We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search.”) (internal citation omitted).

144. See *Byars v. United States*, 273 U.S. 28, 29 (1927) (“A search prosecuted in violation of the Constitution is not made lawful by what it brings to light.”); see also *Kyllo*, 533 U.S. at 37 (“The Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained.”); *Illinois v. Caballes*, 543 U.S. 405, 415 (2005) (Souter, J., dissenting) (“As a general proposition, using a dog to sniff for drugs is subject to the rule that the object of

point of the search inquiry<sup>145</sup> and an analysis that only looks to the nature of the item sought is insufficient.<sup>146</sup> It has been repeatedly observed that a canine sniff may be designed to detect limited information,<sup>147</sup> but it is still intrusive.<sup>148</sup> Thus, while *Caballes* “does

---

enforcing criminal laws does not, without more, justify suspicionless Fourth Amendment intrusions.”).

145. See *Carter*, 697 N.W.2d at 206 (“The [Fourth Amendment] right arises only when a person has a legitimate expectation of privacy in the place in question” (citing *United States v. Chadwick*, 433 U.S. 1, 7 (1977))); see also *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality opinion) (“Because the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context, it is essential first to delineate the boundaries of the [area searched].”).

146. A house or a storage unit carries greater privacy expectations than does a car or luggage in an airport. See *California v. Carney*, 471 U.S. 386, 392 (1985) (“Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements.”); see also *United States v. Knotts*, 460 U.S. 276, 281 (1983) (commenting that a diminished expectation of privacy in a vehicle is justified because “its function is transportation and it seldom serves as one’s residence or as the repository of personal effects” (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974))). Similarly, a person has a lower expectation of privacy in an airport because at an airport, people and luggage are subject to extensive scrutiny. See *State v. Martinson*, 581 N.W.2d 846, 850 (Minn. 1998) (discussing the extensive use of antihijacking surveillance and drug courier profiles at airports); see also *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (“[D]ue in part to extensive antihijacking surveillance and equipment, reasonable privacy expectations are of significantly lesser magnitude [in a major international airport.]” (quoting *Florida v. Royer*, 460 U.S. 491, 515 (1983) (Blackmun, J., dissenting))).

147. But see *Doe v. Renfrow*, 475 F. Supp. 1012, 1017 (N.D. Ind. 1979) (dog alerted to student who had been playing with her dog that was in heat).

148. Justice Brennan’s concurring opinion in *Place* explains that a dog does more than merely allow the police to do more efficiently what they could do using only their own senses. A dog adds a new and previously unobtainable dimension to human perception. The use of dogs, therefore, represents a greater intrusion into an individual’s privacy. Such use implicates concerns that are at least as sensitive as those implicated by the use of certain electronic detection devices. 462 U.S. 696, 719-20 (1983) (Brennan, J., concurring). Similarly, New Hampshire’s highest court noted:

Employing a trained canine to sniff a person’s private vehicle in order to determine whether controlled substances are concealed inside is certainly a search [within the terms of the New Hampshire Constitution]. The drug detection dog discerned something not otherwise apparent to the officers through their own senses, aided or unaided, and advised them of what the dog had discovered by means the officers could perceive. The very purpose of bringing the dog to the vehicle was to have it detect any contraband that might be hidden inside. The sniff, in short, was a prying by officers into the contents of [the defendant’s] possession, which, concealed as they were from public view, could not have been evident to the officers before the prying began.

not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment,<sup>149</sup> it is difficult to envision a circumstance under which the Supreme Court would decide that a dog sniff—even of a house or a person—ran afoul of the Fourth Amendment if the dog sniff only detected the presence of contraband.

*C. The Nature of Privacy and the Degree of Intrusion Under Article I, Section 10*

In *Carter*, the Minnesota Supreme Court used a strikingly different approach in considering the privacy interest and degree of intrusion under the Minnesota Constitution. First, the court concluded that “a person’s expectation of privacy in a self-storage unit is greater for the purpose of the Minnesota Constitution than it has been determined to be under the Fourth Amendment,”<sup>150</sup> particularly for storage units like Carter’s “that are equivalent in size to a garage and are large enough to contain a significant number of personal items and even to conduct some personal activities.”<sup>151</sup> Unlike a car or luggage, “the dominant purpose for such a unit is to store personal effects in a fixed location.”<sup>152</sup> While the court cautioned that the expectation of privacy does not extend to objects that can be plainly viewed or smelled, it clarified that a smell in the area outside of a storage unit is “‘plain’ only if a person is capable of detecting it.”<sup>153</sup>

The court’s analysis of the degree of intrusiveness factor is noteworthy—because there is almost no analysis at all. After discussing the so-called “plain smell” doctrine, the court moved

---

State v. Pellicci, 580 A.2d 710, 716 (N.H. 1990); *see also* United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985) (“[T]he officers’ use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument.”); People v. Haley, 41 P.3d 666, 672 (Colo. 2001) (rejecting the argument that a “dog merely enhances the olfactory senses of an officer” and merely sniffs the air where the officer’s “sole purpose was to conduct a drug investigation and to detect whether evidence hidden from view was within the car”); State v. Wiegand, 645 N.W.2d 125, 137 (Minn. 2002) (Page, J., concurring) (concluding that dog-sniffs constitute a significant intrusion “requir[ing] probable cause before the intrusion is permissible”).

149. 543 U.S. 405, 417 (2005) (Souter, J., dissenting).

150. *Carter*, 697 N.W.2d at 210.

151. *Id.* at 211.

152. *Id.*

153. *Id.*

immediately to its conclusion that “the sniff of a drug-detection dog outside appellant’s storage unit was a search for purposes of the Minnesota Constitution.”<sup>154</sup> The court did not, for purposes of its article I, section 10 analysis, rely on or even cite the *Place, Edmond* or *Caballes* decisions and their discussion of the limited intrusiveness of dog sniffs. It did not rest its decision on the rationale of those cases that the dog detects only the presence or absence of contraband, and does not physically invade the area. Thus, unlike the U.S. Supreme Court, the *Carter* majority was unwilling to focus its inquiry on the unlawful nature of the item searched.

The court’s analysis under the Minnesota Constitution is a sharp break from the Supreme Court’s approach to dog sniffs. Under *Carter*, the specific context within which the dog sniff is conducted, and the corresponding nature of the privacy interest in the place being sniffed, appears to take precedence over the limited nature of the intrusion presented by a dog sniff.

*D. Limiting the Reach of Kyllo*

In *Kyllo*, the Supreme Court held that the use of a thermal-imaging device to detect the growth of marijuana in a home is a search and thus presumptively invalid if conducted without a warrant.<sup>155</sup> There are persuasive arguments that under *Kyllo*’s rationale, a dog sniff is a search under the U.S. Constitution. As one court noted:

Like the heat-detecting device in *Kyllo*, a dog’s nose is able to detect the presence of drugs and explosives which would be unknowable without physical intrusion. Neither the device in *Kyollo* [sic] nor a dog’s nose injects anything into the area of privacy; both are dependent upon invisible elements—molecules or heat—emanating from the place being investigated.<sup>156</sup>

Just as thermal imagers “detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye,” a trained canine unit detects odors that cannot be smelled by a human nose.<sup>157</sup> Dog sniffs, like the thermal-imaging scan, still allow

---

154. *Id.*

155. 533 U.S. 27, 40 (2001).

156. *United States v. Richard*, No. 01-20048-01, 2001 U.S. Dist. LEXIS 14104, at \*17 n.4. (W.D. La. Aug. 17, 2001) (italics added).

157. *Kyllo*, 533 U.S. at 29.

police to obtain information about the interior of a protected place “that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area.’”<sup>158</sup> Finally, drug-detecting dogs implicate *Kyllo*’s concern for advancing technology such as the “dog on a chip,”—a device that can smell microscopic amounts of drugs, chemical agents, or even cancerous cells.<sup>159</sup>

The United States and the Minnesota Supreme Courts, however, have rejected the argument that thermal imaging and dog sniffs are equivalents. It is evident that neither court is willing to expand the applicability of *Kyllo* much beyond houses. In *Caballes*, the Supreme Court declared that its holding there—that a dog sniff of a car during a valid traffic stop does not implicate legitimate privacy interests—was “entirely consistent” with *Kyllo*.<sup>160</sup> As in *Caballes*, a critical aspect of the holding in *Kyllo* was “the fact that the [thermal-imaging] device was capable of detecting lawful activity—in that case, intimate details in a home, such as ‘at what hour each night the lady of the house takes her daily sauna and bath.’”<sup>161</sup> The Court considered this information about lawful activity to be “categorically distinguishable” from “expectations concerning the nondetection of contraband in the trunk of [a] car.”<sup>162</sup> While the Court has not considered whether *Kyllo* would change its analysis of a dog sniff of a storage unit or a house, the logical extension of *Place* and *Caballes* is that, notwithstanding *Kyllo*, unless the sniff can detect lawful activity, no legitimate expectation of privacy is infringed.

Similarly, in the context of a storage unit, the Minnesota Supreme Court in *Carter* reaffirmed its position first set forth in *Wiegand*:<sup>163</sup> *Kyllo* did not overrule *Edmond*<sup>164</sup> or *Place*.<sup>165</sup> The court rejected the argument that a drug-detecting dog is similar to the “sense-enhancement technology . . . not in general public use.”<sup>166</sup>

---

158. *Id.* at 34 (internal citation omitted).

159. *See, e.g.*, CNN.com, Box to Replace Drug-Sniffing Canines?, <http://www.cnn.com/2003/TECH/ptech/11/21/dog.chip.ap> (Nov. 22, 2003).

160. 543 U.S. 405, 409-10 (2005).

161. *Id.* at 409-10 (quoting *Kyllo*, 533 U.S. at 38).

162. *Id.* at 410.

163. *State v. Wiegand*, 645 N.W.2d 125,130 (Minn. 2002).

164. 531 U.S. 32, 40 (2000) (holding that a dog sniff of a vehicle at a traffic checkpoint is not a search because it “does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics”).

165. *State v. Carter*, 697 N.W.2d 199, 207-08 (Minn. 2005).

166. *Id.* (quoting *Kyllo*, 533 U.S. at 34).

*Carter* clearly limits *Kyllo*'s analysis to the home—or at least to places where “a person seeks refuge or conducts frequent personal activities,”<sup>167</sup> which would apparently include an ice-fishing house.<sup>168</sup> Under this standard, however, *Carter*'s expectation of privacy in his storage unit, which as the court noted was “equivalent in size to a garage and [was] large enough to contain a significant number of personal items and even to conduct some personal activities,”<sup>169</sup> could have implicated *Kyllo*. At least for now, however, Minnesota courts following *Carter* will limit *Kyllo* to its facts—the use of a thermal-imaging or similar device that can detect lawful activity in a home or other places where “a person seeks refuge or conducts frequent personal activities.”

*E. Potential for False Alerts*

In examining the question of whether there were “significant reasons why the definition of a search should be broader” under the state constitution than under the Federal Constitution, the court looked to decisions of the Alaska and Pennsylvania courts for guidance, both of which had held that a dog sniff of a storage unit was a search under their respective state constitutions.<sup>170</sup> As to these decisions, the court noted that “[t]hese courts relied in part on persuasive arguments by Professor Wayne R. LaFave, who cautions against ‘totally unrestrained’ use of dogs in law enforcement because of the growing recognition that dogs can provide ‘false alerts.’”<sup>171</sup> The court's citation of this factor—the potential error rates of drug-detecting dogs—from these decisions is significant given that the issue of “false alerts” was not explicitly before the court, although it may have been suggested by the fact

---

167. *Id.* at 209.

168. *Id.* (citing *State v. Larsen*, 650 N.W.2d 144, 149 (Minn. 2002), which held that warrantless entry into an ice-fishing house violated the Fourth Amendment because the structure is “erected and equipped to protect its occupants from the elements and often provid[es] eating, sleeping and other facilities”).

169. *Id.* at 210-11; *see also* *United States v. Dart*, 747 F.2d 263, 265-67 (4th Cir. 1984) (finding defendant's expectation of privacy in a rented storage unit “analogous to the expectation of privacy he had in his home” where the unit was located “in a fenced area,” had a “garage-like door that provided the only entrance to the unit” and the unit “was secured with a lock for which only Dart had a key”).

170. *Carter*, 697 N.W.2d at 210 (citing *McGahan v. State*, 807 P.2d 506, 510 (Alaska Ct. App. 1991); *Commonwealth v. Johnston*, 530 A.2d 74, 77-79 (Pa. 1987)).

171. *Id.* (citing 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.1(e), at 315 (2d ed. 1987)); *McGahan*, 807 P.2d at 510-11 (citing 1 LAFAVE, § 2.2(f), at 372)).

that no drugs were found when police searched Carter's storage unit the day after the dog indicated that there were drugs in the unit.<sup>172</sup>

The potential for false alerts is of growing concern to courts and commentators. Justice Souter's dissent in *Caballes* observed that the "infallible dog"—the idea that canine sniffs detect nothing but the presence of contraband that forms the basis for the proposition that dog sniffs are *sui generis* and only present a limited intrusion—"is a creature of legal fiction . . . whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine."<sup>173</sup> Justice Souter argued that once this fallibility is recognized, the *Place* justification that sniffs are *sui generis* falls away, and the sniff "conducted to obtain information about the contents of private spaces beyond anything human senses could perceive . . . is the first step in a process that may disclose 'intimate details' without revealing contraband, just as a thermal-imaging device might do, as described in *Kyllo*."<sup>174</sup>

Thus, *Carter* signaled its concern with the potential error rate of dog sniffs, and an erroneous dog sniff—in particular one that reveals "intimate details" of a private place.<sup>175</sup> This may be a significant factor for the court in future cases.

#### F. Limiting the "Plain Smell" Doctrine

Finally, *Carter* makes clear that the reach of the so-called "plain

---

172. See *Carter*, 697 N.W.2d at 204.

173. *Illinois v. Caballes*, 543 U.S. 405, 411-12. (2005) (Souter, J., dissenting). Justice Souter cites a number of cases in support of his dissent. See, e.g., *United States v. \$242,484.00*, 351 F.3d 488, 511 (11th Cir. 2003) (noting that because as much as 80% of all currency in circulation contains drug residue, a dog alert "is of little value"), *vacated on other grounds by reh'g en banc*, 357 F.3d 1225 (11th Cir. 2004); *United States v. Limares*, 269 F.3d 794, 797 (7th Cir. 2001) (accepting as reliable a dog that gave false positives between 7 and 38% of the time); *United States v. Kennedy*, 131 F.3d 1371, 1378 (10th Cir. 1997) (describing a dog that had a 71% accuracy rate); *United States v. Scarborough*, 128 F.3d 1373, 1378 n.3 (10th Cir. 1997) (describing a dog that erroneously alerted four times out of nineteen while working for the postal service and 8% of the time over its entire career); *United States v. Carr*, 25 F.3d 1194, 1214-17 (3d Cir. 1994) (Becker, J., concurring in part and dissenting in part) ("[A] substantial portion of United States currency . . . is tainted with sufficient traces of controlled substances to cause a trained canine to alert to their presence."); *Laimé v. State*, 60 S.W.3d 464, 476 (Ark. 2001) (speaking of a dog that made between ten and fifty errors).

174. *Caballes*, 543 U.S. at 412-13.

175. *Carter*, 697 N.W.2d at 214 (quoting *Caballes*, 543 U.S. at 409-10).

smell” doctrine does not extend to smells detectable by dogs. Some courts have held that the warrant requirement exception for smells that an officer can plainly detect includes smells detected by a canine.<sup>176</sup> This approach, however, has been criticized because in those cases “none of the officers involved was able to detect the odor of narcotics; the drugs were not in the plain smell of the officers. The officers needed trained dogs to sniff out the contraband.”<sup>177</sup>

The *Carter* majority agreed with these commentators. The court stated:

We are mindful that a person’s expectation of privacy in a self-storage unit does not extend to that which can be plainly seen or smelled from the area immediately outside the unit. But we consider the smell of that area to be “plain” only if a person is capable of detecting it. Stated another way, a renter of such a unit must expect that other people will lawfully be in the area outside the unit and will be able to smell plain odors emanating from the unit. But the renter need not expect that police will be able to bring to that area drug-detecting dogs that can detect odors that no person could detect. Such dogs do not enable a police officer to smell the odor, but instead, as in *Kyllo*, provide information to the police officer that was “previously . . . unknowable without physical intrusion.”<sup>178</sup>

Thus, the court properly determined that there is nothing plain about a smell that cannot be detected by the human nose.

In his dissent, Justice Russell Anderson expressed his concern for the ramifications of the majority’s decision on “plain smell” observations such as “the use of bomb-detection dogs to sniff for

---

176. See, e.g., *United States v. Bronstein*, 521 F.2d 459, 461 (2d Cir. 1975) (“If the police officers here had detected the aroma of the drug through their own olfactory senses, there could be no serious contention that their sniffing in the area of the bags would be tantamount to an unlawful search. . . . We fail to understand how the detection of the odoriferous drug by the use of the sensitive and schooled canine senses here employed alters the situation and renders the police procedure constitutionally suspect.”). See generally 1 LAFAYETTE, SEARCH & SEIZURE § 2.2(g) (4th ed. 2004).

177. Max A. Hansen, Comment, *United States v. Solis: Have the Government’s Supersniffers Come Down with a Case of Constitutional Nasal Congestion?*, 13 SAN DIEGO L. REV. 410, 423 (1976) (citing *United States v. Solis*, 393 F. Supp. 325, 327 (C.D. Cal. 1975)); see also 1 LAFAYETTE, SEARCH & SEIZURE § 2.2(g) (4th ed. 2004).

178. *Carter*, 697 N.W.2d at 211 (quoting *Kyllo v. United States*, 533 U.S. 27, 40 (2001)).

explosives” and “humans detecting the odor of a decaying body or a methamphetamine laboratory.”<sup>179</sup> But this concern is misplaced. The majority was clear, as it was in *Wiegand*, that the decision was specifically limited to sniffs of drug-detecting dogs, and did not apply to bomb-detecting dogs “as to which the special needs of law enforcement might well be significantly greater.”<sup>180</sup> Similarly, it seems clear that smells detectable by humans, whether a methamphetamine laboratory or a decaying body, would fall outside of the *Carter* holding—precisely because they are smells that can be detected by a human nose, and thus people “must expect that other people will lawfully be in the area outside the unit and will be able to smell plain odors emanating from the unit.”<sup>181</sup>

## VI. CONCLUSION

Drug-detecting dog sniffs will continue to present challenges to courts considering their constitutionality. In *Carter*, the Minnesota Supreme Court clearly signaled that the Minnesota Constitution does not allow random and unrestrained use of dogs,<sup>182</sup> particularly in places that carry higher expectations of privacy. The decision thus establishes important boundaries on the future use of dog sniffs, as well as other kinds of law enforcement investigatory techniques.

---

179. *Id.* at 215.

180. *Id.* at 211 n.8; *see also* State v. Wiegand, 645 N.W.2d 125, 131 n.5 (Minn. 2002) (distinguishing the implications of that holding for drug-sniffing dogs from the implications for “the accepted use of dogs to detect, for example, explosives”).

181. *Carter*, 697 N.W.2d at 211.

182. *See* Delaware v. Prouse, 440 U.S. 648, 661 (1979). When an official lacks either probable cause to believe a violation has occurred or other articulable basis upon which a reasonable suspicion may be based before effectuating a search or seizure, “[t]his kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.” *Id.* “Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.” Ascher v. Comm’r of Pub. Safety, 519 N.W.2d 183, 186 n.1 (Minn. 1994) (citing *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)).