

# Tulsa Law Review

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Volume 1 | Number 2

---

1964

## Evidence: Should the Weight of Authority Go to the Dogs

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### Recommended Citation

Don E. Cummings, *Evidence: Should the Weight of Authority Go to the Dogs*, 1 Tulsa L. J. 192 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol1/iss2/9>

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## EVIDENCE: SHOULD THE WEIGHT OF AUTHORITY GO TO THE DOGS?

The Tulsa County Police Department, like many other police departments throughout the country, is training and developing a number of Alsatian, or German Police dogs, to patrol a beat with an officer and to search out a prowler or burglar. Each dog must go through an individual training program of four parts: obedience and familiarization, tracking, attack, and search.<sup>1</sup> This discussion will be confined to an analysis of the weight given to evidence of trailing by dogs, thus dealing only with tracking.<sup>2</sup>

Before graduation, the German Police dog must be able to follow a trail one mile long and an hour and a half old. This would indicate that the trainers of the police dogs regard a trail of this condition sufficiently difficult to test the capabilities of a fully trained dog. If a trail one mile long and an hour and a half old is considered only difficult, then at what point is a trail impossible to follow? If the evidence is to be admitted, it is argued that since the dogs have been tested only to the extent of one mile and one and a half hours, then police dog evidence gained on a trail longer or older should not be admissible.<sup>3</sup>

The ability of a dog to follow the trail of a criminal and to overtake him and single him out as the person who was at the scene of the crime about the time of its commission is recognized in a majority of the jurisdictions where the question has been raised.<sup>4</sup> Wigmore states:

"It is conceded by most courts that the fact that a well-trained and well-tested bloodhound of good breed, after smell-

<sup>1</sup> 52 J. CRIM.L., C.&P.S. 330 (1961).

<sup>2</sup> *State v. Grba*, 196 Iowa 241, 194 N.W. 250 (1923). As case law and noted law treatises have dealt sparingly with the subject, authorities are limited to those cases dealing with bloodhounds. It is probable that these cases will become the authority for controversies involving police dog evidence. Dogs are able to follow the scent of human being because microscopic particles of effluvia emanate constantly from the body of every living human being. These particles possess an odor characteristic of the particular individual. It is supposed that the highly developed olfactory nerves of the dog enable him to detect the peculiar odor of these particles, and thus follow a trail. How long the particles exist after the person passes has never been scientifically demonstrated. The scent is referred to as being cold or fresh, with time and atmospheric conditions having an affect on it. *Brott v. State*, 70 Neb. 395, 97 N.W. 593 (1903). A trail is easier to follow over soft terrain such as grass and wooded areas since the dog may follow the scent left by crushed grass and insects where the man walked. In a city where hard surface prevails and after the lapse of considerable time, trailing is more difficult and often impossible.

<sup>3</sup> 52 J. CRIM.L., C.&P.S. 330 (1961).

<sup>4</sup> *Hodge v. State*, 98 Ala. 10, 13 So. 385 (1893); *Spears v. State*, 92 Miss. 613, 46 So. 166 (1908); *State v. Hunter*, 143 N.C. 607, 56 S.E. 547 (1907); *State v. Freeman*, 146 N.C. 615, 60 S.E. 986 (1908); *State v. Dickerson*, 77 Ohio 34, 82 N.E. 969 (1907); *Parker v. State*, 46 Tex. Crim. 461, 80 S.W. 1008 (1904).

ing a shoe or other article belonging to the doer of a crime, and after which had tracked definitely to the accused, is admissible to show that the accused was the doer of the criminal act."<sup>5</sup>

If however, there is no shoe or other article left behind by the criminal, the task of trailing becomes jeopardized if the dog is allowed the wide latitude of selecting any attractive smell and following it.

The Oklahoma rule granting admission was dealt with in a case which typifies a firm reliance on the tracking capabilities of a bloodhound.<sup>6</sup> In this case, two bloodhounds were taken to a place where a felony had occurred. They followed a trail which was not made by a man but by a horse and the only way the dogs could have followed the scent of the man was to pick it up off branches and high weeds through which he rode the horse. However, the horse had a broken shoe and it could have been that instead of the dogs leading the officers, the officers were leading the dogs. It was stated: "The officers followed the tracks of the horse some distance to where it entered a gate near defendants home, and at this point the dogs gave evidence of finding the trail of the accused where he dismounted."<sup>7</sup> Thus we have a chain of events as follows: the dogs followed the accused from the scene of the crime losing the trail twice before reaching defendant's home. As defendant was not at home, the officers, after considerable time, regained the trail only after seeing the defendant returning.

In the *Buck* case the court relied heavily on the opinion that a bloodhound, once placed upon an individual's trail, will not leave that trail until called off.<sup>8</sup> A bloodhound's determination to remain on the trail is, however, not an undisputed fact. This proposition is denied by an English authority which said: "The bloodhound regarded as a police dog and known for its tracking abilities, proved to be extremely nervous and hard to get back on the track once the scent had faded or was lost."<sup>9</sup>

Most of the principal objections to the use of bloodhound evidence are raised in *State v. Grba*,<sup>10</sup> which denied admission of the evidence. The first objection was that the many variable factors involved, such as the training and experience of a dog, the officer's manner of handling him, the circumstances surrounding the trailing, as well as the inability of the court to determine why a dog acted as it did, make such evidence too unreliable to warrant admission in the trial of a criminal case.<sup>11</sup>

<sup>5</sup> I WIGMORE, EVIDENCE 633 (3rd ed. 1940).

<sup>6</sup> *Buck v. State*, 77 Okla. Crim. 17, 138 P.2d 115 (1943).

<sup>7</sup> *Id.* at 31, 138 P.2d at 121.

<sup>8</sup> *Id.* at 32, 138 P.2d at 121.

<sup>9</sup> 52 J. CRIM. L., C.&P.S. 330 (1961).

<sup>10</sup> *State v. Grba*, 196 Iowa 241, 194 N.W. 250 (1923).

<sup>11</sup> *Ibid.*

The case of *Brott v. State*<sup>12</sup> denied the admissibility of bloodhound evidence for the same reason. There, the court analyzed the abilities of the bloodhound as follows:

"Difficulties do not deter the bloodhound from pursuing his business. He trails as best he can. He always follows some scent, and he goes somewhere. Undoubtedly nice and delicate questions are time and again presented to him for decision, but the considerations that induce him in a particular case to adopt one conclusion rather than another cannot go to the jury. The jury cannot know whether his faith in the identity of the scent which he followed was strong or weak, in attempting to separate one smell from ten, twenty, fifty, or a hundred similar smells with which it is intermixed and commingled. It is highly probable, if not quite certain, that the bloodhound undertakes a task altogether beyond his capacity."<sup>13</sup>

The *Brott* analysis is supported by one author who made an extensive study of the cases dealing with the bloodhound as a witness. The conclusion reached was that, while in a few instances bloodhounds have performed wonderful feats and have shown exceptional merit in trailing human beings, the bloodhound is thoroughly undependable as a witness.<sup>14</sup>

Another more subtle objection is that the defense cannot cross-examine the dog. The right of the accused to be confronted with the witnesses against him is expressly provided for in the Constitution of the United States.<sup>15</sup>

Another court has objected that the evidence is hearsay and should be excluded.<sup>16</sup> *Rex v. White* concluded that the evidence is hearsay by the use of the following analogy:

"Let us suppose that the most skillful of trackers was employed to track the murderer, and that he had followed courses such as those taken by the dogs, and thereafter had communicated his observations and conclusions to another. But before the trial he died. Under our rules of evidence, that another could not be called as a witness to tell what the tracker told him, the evidence would have to be excluded."<sup>17</sup>

When bloodhound evidence is offered for admission, perhaps the most overwhelming problem a court is faced with is to decide the veracity of the person testifying to the breeding and training of the dog. The character of the man working and training the dog is as important as the dog's training.<sup>18</sup>

<sup>12</sup> *Brott v. State*, 70 Neb. 395, 97 N.W. 393 (1903).

<sup>13</sup> *Id.* at 396, 97 N.W. at 594 (1903).

<sup>14</sup> *Bloodhound as a Witness*, 54 AM.L. REV. 109 (1929).

<sup>15</sup> U.S. CONST. amend. VI.

<sup>16</sup> *Rex v. White*, 37 B.C. 43, 3 D.L.R. 1 (1926).

<sup>17</sup> *Id.* at 45, 3 D.L.R. at 5 (1926).

<sup>18</sup> *Supra.* note 14 at 119.