

IN THE SUPREME COURT OF OHIO

07-1125

RONNIE C. LOPEZ,

Appellant,

v.

THE STATE OF OHIO,

Appellees.

On Appeal from the Hamilton
County Court of Appeals,
First Appellate District

Court of Appeals
Case No. C-050088

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT RONNIE C. LOPEZ

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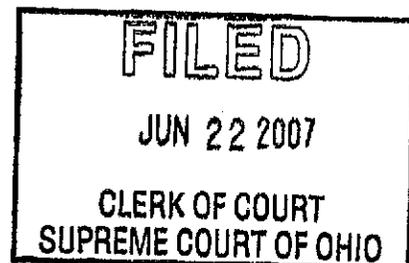


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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

In this case the denial of appellant's right to effective assistance of counsel precluded a collateral attack on direct appeal substantively extinguishing his right to appeal constitutional violations.

As the United States Supreme Court stated in Evitts v. Lucey, (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 2d 821, at 399-400. " A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A state may not extinguish this right because another right of the appellant— the right to effective assistance of counsel—has been violated."

Failure of the court to resist Constitutional abuses by the executive perpetuates the erosive effect of diminished judiciary power and devalues the patrimonial endeavor to establish those freedoms.

The Hamilton County Court of Common Pleas appointed Mr. A. Norman Aubin to represent appellant Lopez on appeal of the denial of his motion to suppress following a no-contest plea.

Appellant's claims of ineffective assistance of counsel first occurred with Mr. Aubin refusing to raise certain constitutional violations on direct appeal in addition to issues which had already been briefed. Mr. Aubin refused to present issues which he believed to be irrelevant and was allowed to withdraw as counsel, it should be noted that withdrawal procedures specifically mandated by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493(1967). U.S.C.A. Const. Amend. 6. Were not strictly followed.

The First District Court of Appeals then appointed Mr. Myron Y. Davis to represent the appellant by supplementing or amending the original merit brief filed by Mr. Aubin. The First District Court of Appeals erroneously erred in assuming the assignments of error in the original brief were largely the same as those in

the supplemental brief. The Court of Appeals only discussed the assignments of error in the supplemental brief. "It is inherent in the Constitutional plan ... that when a state court takes cognizance of a case, the state assents to appellate review by this court of the Federal issues raised in the case 'whoever may be the parties to the original suit, whether private persons, or the state itself.' " Id at 30, 110 S.Ct. 2238(quoting Principalities of Monaco v. Mississippi, 292 U.S. 313, 329, 54 S.Ct. 745, 78 L.Ed. 1282(1934); Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. 420, 585, 9 L.Ed. 773(1837)(Story, J., dissenting)).

On April 28, 2006, the First District Court of Appeals affirmed the decision of the Hamilton County Court of Common Pleas, without reviewing the issues presented in Lopez's original merit brief which was supplemented. On May 8, 2006, Lopez timely filed an Application for Reconsideration pursuant to App.R. 26(A). under the premise that "App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." State v. Owens(1997), 112 Ohio St. 3d 334. 336, 678 N.E. 2d 956. Appellant's timely filed Application for Reconsideration was then denied as being 'not well taken', even though it "called to the attention of the court an obvious error in its decision and raised issues for consideration that were either not considered at all or were not fully considered when they should have been." Columbus v. Hodge(1987), 37 Ohio App. 3d 68, 523 N.E. 2d 515, citing Matthews v. Matthews(1981), 5 Ohio App. 140, 5 OBR 320, 450 N.E. 2d 278.

Appellant Lopez's Memorandum in Support of Jurisdiction to the Ohio Supreme Court included the issues omitted from appellate review that were raised in his May 8, 2006, Application for Reconsideration. The Supreme Court of Ohio refused to hear the case.

Ohio Revised Code accords instruction that "remedial laws and all proceedings under them shall be liberally construed to promote their object and assist the

parties in obtaining justice," R.C. 1.11. The discretion to disallow applications to reopen an appeal based on a meritorious claim of ineffective assistance of counsel and right to appeal, does not provide a remedy.

Ohio and other states "May erect reasonable procedural requirements for triggering the right to an adjudication," Logan v. Zimmerman Brush Co.(1982), 455 U.S. 422, 437, 102 S.Ct. 1148, 71 L.Ed. 2d 265, the decision by the Appellate Court denying Appellant's May 8, 2006, Application for Reconsideration as "not well taken" and the May 11, 2007, denial of Appellant's 26(B) Application to Reopen for being untimely is an unreasonable application of Ohio law.

Lopez's claims of legitimate substantial constitutional violations have not had the benefit of an appellate court review of the issues on their merits, i.e.,. In Dehart v. Aetna Life Ins. Co.(1982), 69 Ohio St. 2d 189, 431 N.E. 2d 644, 23 O.O. 3ed 210, this court stated at 192, 431 N.E. 2d 644: "***It is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits. See e.g., Cobb v. Cobb,(1980), 62 Ohio St. 2d 124, (403 N.E. 2d 991)(16 O.O. 3d 145). Judicial discretion must be carefully--and cautiously--exercised before Supreme Court will uphold an outright dismissal of a case on purely procedural grounds." Dehart v. Aetna Life Ins. Co., 69 Ohio St. 2d 189, 431 N.E. 2d 644, Ohio, 1982 " Court of Appeals abuses it's discretion when, after dismissing case sua sponte for minor, technical, correctable, inadvertant violation of local rule, it refuses to reinstate case when ¹ mistake was made in good faith and not part of continuing course of conduct for purpose of delay, ² neither opposing party nor court is prejudiced by error, ³ dismissal is sanction that is disproportionate to nature of mistake, ⁴ client will be unfairly punished for fault of counsel and ⁵ dismissal frustrates prevailing policy of deciding cases on the merits.

Contrary to the holdings in Evitts v. Lucey(1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 2d 821, the appellate courts interpretation of an invalidly convicted person has no right to appeal constitutional violations overlooked by ineffec-

tive appellate counsel, as long as the appellate counsel refuses to raise certain constitutional violations.

If allowed to stand, the decision of the court of appeals would obliterate Constitutional protections provided under the First Amendment guarantee of meaningful access to the courts, Fifth Amendment Due Process of Laws, Sixth Amendment Right to Effective Assistance of Counsel, and Fourteenth Amendment Equal Protection of Laws and Due Process. The Murnahan decision which spawned App.R. 26(B) is being misused. Murnahan, 63 Ohio St. 3d.

This case raises the question of the Court's integrity in complying with its own rules and reviewing Constitutional violations not brought to the attention of the court due to deficient appellate representation on direct review, which the Appellate Rules claim to provide a remedy for through App.R. 26 (A) and (B). This Court should grant jurisdiction to allow review of the First District Court of Appeals erroneous and unconstitutional misapplication of law.

STATEMENT OF THE CASE AND FACTS

The case arises from the attempt of Ronnie C. Lopez to have constitutional violations reviewed on direct appeal by the First District Court of Appeals, for the last (2) two years.

Defendant-Appellant was convicted on plea of no-contest before the Court of Common Pleas, Hamilton County, No. B-0402530, of possession of marijuana and trafficking in marijuana. Defendant-Appellant by and through counsel, A. Norman Aubin, appealed.

On April 29, 2005, Lopez's brief to the First District Court of Appeals was filed setting forth only three claims.

On May 24, 2005, Mr. Aubin filed a "Motion to Withdraw as Counsel" stating "Defendant-Appellant and Counsel have reached an impasse as to what issues should be presented in this matter." Lopez filed a Pro se "Motion to Remove Counsel", citing a conflict of interest, regarding issues that relate to constitutional viola-

tions that should be raised, in light of the denial of his motion to suppress and subsequent no-contest plea.

On June 8, 2005, an "Entry Granting Motion of A. Norman Aubin to withdraw, appointing Mr. Myron Y. Davis as new counsel, and extending time for an amended or supplemental brief until July 29, 2005", was granted.

On July 12, 2005, Defendant-Appellant contacted Mr. Davis, newly appointed counsel presenting issues to be prepared on his behalf, and briefed. However, on November 23, 2005 a supplemental brief was filed, Mr. Davis's brief omitted the requested claims and was filed against Defendant's wishes, nonetheless.

The First District Court of Appeals further prejudiced Defendant-Appellant in ruling on Defendant-Appellant's appeal, adjudicating only the supplement which Mr. Davis had filed, devoid claims in the initial appeal.

The state filed its brief on December 14, 2005, and on April 28, 2006, the Appeals Court affirmed Lopez's judgment of conviction, Case No. C-050088.

On May 8, 2006, Lopez, Acting Pro se, applied back to the First Appellate District Court of Appeals pursuant to App.R. 26(A), requesting that Court to "reconsider" the appellate issues "that were not considered at all or were not considered when they should have been." Matthews v. Matthews(1981), 5 Ohio App. 3d 140, 5 OBR 320, 450 N.E. 2d 278. However, on June 8, 2006, that Court overruled Lopez's motion (App.R. 26(A)) as "not well taken".

On September 29, 2005, Lopez timely filed a Pro se Post-conviction petition in the Hamilton County Court of Common Pleas. Lopez then filed a "Motion for time to revise and supplement defendant's Pro se Post-conviction petition," with information that was withheld by the Hamilton County Prosecutors Office, On June 6, 2006. On June 12, 2006, "Entry denying petition for review Post-conviction relief" was filed.

On July 12, 2006, Lopez, acting Pro se, filed a notice of appeal of denial of his post-conviction motion by placing same in his prison mailbox system. How-

ever, the Notice of Appeal arrived in the Clerk's office on July 18, 2006.

On August 17, 2006, the First District Court of Appeals dismissed the appeal as "untimely".

On September 21, 2006, Lopez, Pro se, appealed the overruling of his post-conviction petition in Case No. 06-1733, filing a Notice of Appeal and Memorandum of Jurisdiction to the Supreme Court of Ohio, which was denied on December 13, 2006.

On May 26, 2006, in Case No. 06-1046, Lopez exhausted his direct appeal issues by raising them , Pro se, before the Ohio Supreme Court. The propositions of law are : 1)Police officers lacked probable cause to search Lopez' vehicle; 2)Detention of Lopez after the stop was unconstitutional; 3)Trial court abused its discretion by permitting police officer to testify as to what canines searching meant; 4) Lopez's Fourth Amendment rights were violated; 5)violation of Lopez' right to Equal Protection , and 6)trial court erred by admitting evidence of an improperly certified canine.

On June 26, 2006, the State filed its "Memorandum" in response. On August 23, 2006, the Ohio Supreme Court dismissed the appeal.

On March 30, 2007, Lopez filed a "Delayed Application to Reopen Appeal" pursuant to appellate rule 26 (B), "due to the fact that he received ineffective assistance of counsel during his direct appeal."

On May 11, 2007, the First District Court of Appeals overruled his Application for Reopening of Appeal.

On May 18, 2007, Lopez mailed his Application for Reconsideration, which was received by the Clerk of Courts, First Appellate District on May 21, 2007, but not filed until May 22, 2007.

Lopez' reply to the state's response included certified mail receipt and return receipt which reflects the clerk received his App.R. 26(A) Application for Reconsideration timely, then filed said motion in an untimely manner.

The Court of Appeals erred by not allowing Defendant-Appellant's Application to Reopen his direct appeal based on ineffective assistance of counsel, to address constitutional violations on their merits, rather than deny on mere procedural technicalities.

In support of its position on these issues, the Appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No.1: The Appellant-Defendant's right to Appeal shall not be extinguished because another right of the Appellant--the right to effective assistance of counsel --has been violated.

In Evitts v. Lucey(1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 2d 821, the United States Supreme Court stated " A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A state may not extinguish this right because another right of the Appellant--the right to effective assistance of counsel--has been violated."

Lopez's claims of constitutional violations have not had the benefit of an appellate review of the issues on their merits. In Dehart v. Aetna Life Ins. Co. (1982), 69 Ohio St. 2d 189, 431 N.E. 2d 644, 23 O.O. 3d 210, This court stated at 192, 431 N.E. 2d 644:"***It is a fundamental tenet of judicial review in Ohio that Courts should decide cases on their merits. See e.g., Cobb v. Cobb(1980), 62 Ohio St. 2d 124, 403 N.E. 2d 991, 16 O.O. 3d 145. Judicial discretion must be carefully--and cautiously--exercised before Supreme Court will uphold an outright dismissal of a case on purely procedural grounds."

The Appellate Court has simultaneously ignored and misapplied the law, violating due process of law under the Fourteenth amendment.

Proposition of Law No.2: Appellant-Defendant has right to effective assistance of counsel on direct appeal under the

Sixth Amendment.

Right to effective assistance of counsel under the Sixth Amendment, Due Process and Equal Protection of Laws under the Fifth and Fourteenth Amendment requires review of meritorious issues omitted by Appellate Counsel's deficient representation, presented in App.R. 26(B) Application to reopen.

Defendant-Appellant entered a plea of nolo contendere, after being denied right to a fair trial, due process, and equal protection of laws. His plea was made on the premise that issues overruled in his motion to suppress hearing, and issues brought to the attention of trial court during sentencing would be raised on direct appeal. In Rodriguez v. United States, 89 S.Ct. 1715(1969), "Those whose right to appeal has been frustrated should be treated exactly like any other appellant; he should not be given an additional hurdle to clear just because the rights were violated at some earlier stage in the proceedings. Accordingly, we hold that the Courts below erred in rejecting petitioner's application for relief because of his failure to specify the points he would raise were his right to appeal reinstated."

The effective assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render or rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence.

Defendant-Appellant's right to appellate review of constitutional violations has been denied where appellate counsel's have failed to advocate his position and to perfect an appeal or to follow withdrawal procedures specifically mandated by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 2d 493(1967). U.S. C.A. Const. Amend. 6.

"Appellate counsels failure to raise confrontation clause claim on direct-appeal, constitutes ineffective assistance of counsel and provided "cause" for procedural default. Clemons v. Delq, 124 F.3d 944 (8th Cir. 1997) "Appellate Coun-

sels failure to raise a dead-bang winner, constitutes ineffective assistance and establishes "cause" for failure to raise the error." U.S. v. Cook, 45 F.3d 388(10th Cir. 1995). Appellate Counsel's failure to raise clearly meritorious issues on direct appeal constitutes ineffective assistance . Banks v. Reynolds, 54 F.3d 1508, 1515-16 (10th Cir. 1995). Reinstatement of appeal is appropriate remedy of ineffective assistance of appellate counsel where counsel failed to litigate defendant's claims." Allen v. U.S., 938 F.2d 664(6th Cir. 1991).

Proposition of Law No. 3: The entire basis for App.R. 26(A) and (B) is the claim that appellate counsel rendered constitutionally ineffective assistance by failing to raise one or more constitutional violations in the original appeal.

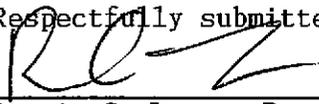
The United States Court of Appeals, Sixth Circuit Court's classification of Rule 26 (B) applications is controlled by the recent Sixth Circuit precedent of White v. Schotten, 201 F.3d 743(6th Cir. 2000), cert. denied,---U.S.----121 S.Ct. 332, 148 L.Ed. 2d 267(2000). In White, this Court analyzed whether a criminal defendant was entitled to effective assistance of counsel through the course of filing a Rule 26(B) Application for ineffective assistance of appellate counsel. See Id at 752-53. The court reasoned that, because Ohio courts did not consider an attack on the adequacy of appellate counsel to be proper in a state habeas proceeding, see State v. murnahan, 63 Ohio St. 3d 60, 584 N.E. 2d 1204, 1208(Ohio 1992), A Rule 26(B) Application claiming ineffective assistance of appellate counsel must still be a part of the activities related to the direct appeal itself. See White, 201 F.3d at 752-53. Thus the Court explained that if a Rule 26(B) Application was part of the direct appeal then the Defendant still has a right to effective assistance of counsel"throughout all phases of that stage". Id at 753.

The First District Court of Appeals must be required to allow meaningful access to the courts for constitutional violations overlooked by deficient appellate representation.

CONCLUSION

For the reasons stated above , this case involves matters of great general interest and a substantial constitutional question, involving a felony. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented in his Application for Reopening pursuant to App.R. 26 (B) will be reviewed on their merits, where the issues presented have not been reviewed by any appellate court due to ineffective appellate representation.

Respectfully submitted,

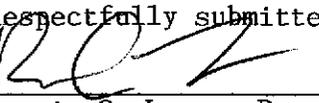


Ronnie C. Lopez, Pro se

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to counsel for Appellees, Joseph T. Deters, Hamilton County Prosecuting Attorney, at 230 East Ninth Street, Cincinnati, Ohio on June 19, 2007.

Respectfully submitted,



Ronnie C. Lopez, Pro se
Prison Id. No. #487-984
Chillicothe Corr. Inst.
P.O. Box 5500
Chillicothe, Ohio 45601

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-050088
	:	TRIAL NO. B-0402530B
Plaintiff-Appellee,	:	
vs.	:	
RONNIE C. LOPEZ,	:	<i>ENTRY DENYING</i>
	:	<i>APPLICATION TO REOPEN</i>
Defendant-Appellant.	:	<i>APPEAL.</i>

This cause is considered upon defendant-appellant Ronnie C. Lopez's App.R. 26(B) application to reopen his appeal and upon the state's response.

An appellant must file an application to reopen his appeal within 90 days of the date on which the court of appeals journalized its judgment, unless he can show good cause for applying at a later time.¹ Lopez filed his application well after the 90-day period. He asks that the filing delay be excused because he is unversed in the law and because he relied to his detriment upon his appellate counsel's advice concerning his right to raise constitutional claims in his direct appeal.

Neither ignorance of the law nor misplaced reliance upon counsel provides good cause for failing to timely apply to reopen an appeal.² Moreover, Lopez had no right to counsel to assist him in filing his application.³ Thus, his claim of good cause also fails to

¹ See App.R. 26(B)(1) and 26(B)(2)(b).

² See *State v. Pierce* (1996), 74 Ohio St.3d 453, 659 N.E.2d 1252; *State v. Reddick* (1995), 72 Ohio St.3d 88, 647 N.E.2d 784; *State v. Sizemore* (1998), 126 Ohio App.3d 143, 145-146, 709 N.E.2d 943.

³ See *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 22, 25; *State v. Dennis*, 86 Ohio St.3d 201, 1999-Ohio-94, 713 N.E.2d 426.

the extent that it is founded upon an alleged deficiency in his appellate counsel's performance following the entry of judgment on appeal.

The Ohio Supreme Court requires intermediate appellate courts to strictly enforce the 90-day deadline for filing an application to reopen an appeal.⁴ Because Lopez failed to meet the deadline and failed to establish good cause for his delay, the court denies the application.

To the Clerk:

Enter upon the Journal of the Court on MAY 11 2007
per order of the Court 
Presiding Judge

(COPIES SENT TO ALL PARTIES.)

⁴ See *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861; *State v. Lamar*, 102 Ohio St.3d 467, 2004-Ohio-3967.

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO

APPEAL NO. C-050088
TRIAL NO. B-0402530B

Appellee,

vs.

ENTRY OVERRULING MOTION
FOR RECONSIDERATION

RONNIE C. LOPEZ

Appellant.

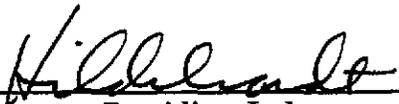
This cause came on to be considered upon the *pro se* motion of the appellant filed herein for reconsideration.

The Court, upon consideration thereof, finds that the motion is not well taken and is hereby overruled.

To The Clerk:

Enter upon the Journal of the Court on JUN - 8 2006 per order of the Court.

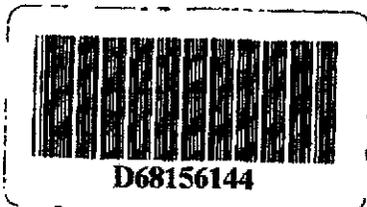
By: _____



Presiding Judge

(Copies sent to all counsel)

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**



STATE OF OHIO,

Plaintiff-Appellee,

vs.

RONNIE LOPEZ,

Defendant-Appellant.

APPEAL NO. C-050088
TRIAL NO. B-0402530B

OPINION.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

APR 28 2006

COURT OF APPEALS

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 28, 2006

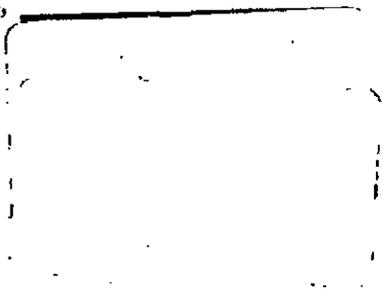
*Joseph T. Deters, Hamilton County Prosecuting Attorney, and Scott M. Heenan,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,*

Myron Y. Davis, Jr., for Defendant-Appellant.

FILED

2006 APR 28 AM 3

GREGORY HARTMANN
CLERK OF COURTS
HAM. CNTY. OH.



Please note: We have sua sponte removed this case from the accelerated calendar.

**FILED
COURT OF APPEALS**

APR 28 2006

GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

DOAN, Presiding Judge.

{¶1} Defendant-appellant, Ronnie Lopez, appeals convictions for possession of marijuana under R.C. 2925.11 and trafficking in marijuana under R.C. 2925.03. The record shows that Lopez entered a no-contest plea after the denial of his motion to suppress evidence. The trial court accepted the plea and found Lopez guilty based on the facts presented by the state. We affirm the convictions.

{¶2} The evidence presented at the suppression hearing showed that on March 11, 2003, Sergeant Gregory Morgan of the Regional Enforcement Narcotics Unit (RENU) was patrolling Interstate 74 just east of the Indiana border. The purpose of his patrol was to help stop drug trafficking on the highway. Agents Thomas Canada, Christopher Arnold, and Rob Shircliff, who were all in uniform and driving marked police cars, were assisting Morgan that day.

{¶3} Morgan observed a gray Chevrolet Impala in the high-speed lane following a Budget rental van so closely that he originally believed the van could have been towing the Impala. He decided to stop the Impala for following the van too closely. As he approached the two vehicles near a truck weigh station, the Impala changed lanes, going into the right lane.

{¶4} As the two vehicles approached the entrance ramp from the weigh station, a truck was entering the highway. The van, which was still in the left lane, seemed to be startled by the truck entering the highway and swerved sharply to the left, partially going over the berm lane lines. The van then swerved back to the right over the marked lane line, but overcompensated and almost collided with the truck to its right.

{¶5} After observing these movements by the van, Morgan decided to stop the van instead of the Impala. He radioed to Agent Arnold to stop the Impala for following the van too closely. Arnold followed the Impala, which then committed several lane violations. Arnold testified that drug traffickers on the highway frequently travel in tandem, and that one car would often commit traffic violations to distract police officers' attention from the vehicle actually carrying the drugs.

{¶6} Morgan activated his lights and siren. Although the van pulled over to the berm and continued for a long time, it eventually stopped. The van had no rear windows. Before his approach on foot, Morgan could not see the driver or determine the number of occupants in the van. As he approached it from the passenger side, he detected an overwhelming odor of carpet freshener, which he described as "almost sickening." He testified that carpet freshener was a method often used by drug dealers to mask the odor of drugs.

{¶7} Lopez was the driver of the van. Morgan took Lopez's driver's license and found that he had no criminal record. When asked about his erratic driving, Lopez stated that he was not used to driving the van. He also stated that he was traveling from Chicago to Cincinnati to sell boxes, although he later claimed to be traveling from Indianapolis. He did not know the name of the person he was going to meet in Cincinnati, but he stated that he expected that person to call him when he got closer. Morgan felt Lopez's inability to answer simple questions about his activities, along with the strong odor of carpet freshener, was suspicious. Lopez did not have the rental papers for the van. He told Morgan he was traveling alone, and he became very nervous when

Morgan questioned him about the contents of the van and mentioned the possibility of a drug dog being brought to the scene to sniff the vehicle.

{¶8} Meanwhile, Agent Arnold had stopped the Impala, driven by Ernest Hollingsworth. As Arnold approached the car, he detected an odor of raw marijuana. Despite Hollingsworth's denial of any criminal record, Arnold discovered that he had an extensive record of drug offenses.

{¶9} Arnold had with him his drug-sniffing dog, Bo. Bo indicated the presence of drugs in the Impala. Agent Canada arrived to help with the stop. Inside the Impala, Canada found the rental documents for both the Impala and the van, which were both in Hollingsworth's name.

{¶10} Morgan asked Arnold to bring Bo to his location to determine if drugs were in the van. Lopez had previously refused to consent to a search of the van's cargo compartment. Bo indicated that drugs were present in the van. A search of the van resulted in the discovery of approximately 700 pounds of marijuana.

{¶11} Lopez now presents four assignments of error for review. Before addressing the merits of those assignments of error, we note that Lopez's original attorney in this appeal was granted permission to withdraw after he had filed a brief on Lopez's behalf. His newly appointed attorney has filed a "supplemental" brief in which he has relied upon the original brief's statements of fact, but has raised his own assignments of error. Although Lopez filed a pro se motion to strike the original brief, this court did not rule on that motion. Nevertheless, the assignments of error in the original brief were largely the same as those in the supplemental brief. Consequently, we discuss only the assignments of error in the supplemental brief in this opinion.

{¶12} In his first assignment of error, Lopez contends that the stop of his vehicle violated his Fourth Amendment rights. He argues that the police officers lacked “probable cause” to stop his vehicle. This assignment of error is not well taken.

{¶13} An investigative stop is a seizure within the meaning of the Fourth Amendment that must be supported by objective justification. *State v. Andrews* (1991), 57 Ohio St.3d 86, 87, 585 N.E.2d 1271; *State v. Neu* (Mar. 3, 2000), 1st Dist. No. 990552. The standard is not probable cause, but reasonable suspicion, which is less demanding. *State v. Lowman* (1992), 82 Ohio App.3d 831, 837, 613 N.E.2d 692; *State v. Moore*, 6th Dist. No. H-02-001, 2002-Ohio-4476, ¶10-11. See, also, *State v. Kiefer*, 1st Dist. No. C-030205, 2004-Ohio-5054, ¶11-12 and 17-19. The police officers must “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Andrews*, supra, at 87, 585 N.E.2d 1271, quoting *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868. The standard is objective: would the facts available to the officers at the moment of the seizure have warranted an individual of reasonable caution in the belief that the action taken was appropriate? *Andrews*, supra, at 87, 585 N.E.2d 1271; *State v. Black* (Dec. 31, 1998), 1st Dist. No. C-970874.

{¶14} Specifically, in relation to automobiles, if there is a reasonable and articulable suspicion that an automobile or its occupants are subject to seizure for a violation of the law, stopping that automobile and detaining its occupants are reasonable under the Fourth Amendment. *Delaware v. Prouse* (1979), 440 U.S. 648, 663, 99 S.Ct. 1391. A court determines the validity of an investigative stop by looking at the totality of the circumstances. *State v. Freeman* (1980), 64 Ohio St.2d 291, 414 N.E.2d 1044,

paragraph two of the syllabus. An officer's observation of a traffic violation or erratic driving justifies an investigative stop. *Moore*, supra, at ¶12; *State v. Pence* (July 29, 1996), 12th Dist. No. CA95-09-020. See, also, *State v. Robinette*, 80 Ohio St.3d 234, 239, 1997-Ohio-343, 685 N.E.2d 762; *State v. Evans*, 67 Ohio St.3d 405, 407, 1993-Ohio-186, 618 N.E.2d 162.

{¶15} In this case, the police officers saw Lopez swerve far to the left, almost driving off the berm and into the grass median, and then overcompensate to the right to the point where he almost hit a truck. As the trial court noted, the testimony showed that Lopez violated R.C. 4511.33, which requires vehicles to travel in marked lanes, and R.C. 4511.202, which prohibits operating a vehicle without reasonable control. Thus, the officers could point to specific, articulable facts showing the Lopez was subject to seizure for violating the law.

{¶16} Lopez's erratic driving went well beyond the slight weaving and "insubstantial drifts" in the cases Lopez has cited. See *State v. Johnson* (1995), 105 Ohio App.3d 37, 663 N.E.2d 675; *State v. Drogi* (1994), 96 Ohio App.3d 466, 64 N.E.2d 153; *State v. Gullett* (1992), 78 Ohio App.3d 138, 604 N.E.2d 176. Further, those cases are no longer valid precedent. See *State v. Hodge*, 147 Ohio App.3d 550, 2002-Ohio-3053, 771 N.E.2d 331, ¶11-26; *State v. Hicks*, 7th Dist. No. 01 CO 42, 2002-Ohio-3207, ¶15-34; *State v. Moeller* (Oct. 23, 2000), 12th Dist. No. CA99-07-128. Under the circumstances, the stop of Lopez's vehicle did not violate his Fourth Amendment rights, and we overrule his first assignment of error.

{¶17} In his second assignment of error, Lopez contends that his continued detention after the initial stop and the use of a drug-sniffing dog violated his Fourth

Amendment rights. He argues that the search and seizure were unreasonable in the absence of an individual suspicion of wrongdoing. This assignment of error is not well taken.

{¶18} The Ohio Supreme Court has held that “[w]hen a police officer’s objective justification to continue detention of a person stopped for a traffic violation for the purpose of searching the vehicle is not related to the purpose of the original stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some illegal activity justifying an extension of the detention, the continued detention to conduct a search constitutes an illegal seizure.” *Robinette*, supra, at paragraph one of the syllabus.

{¶19} In this case, the police could point to specific, articulable facts showing that Lopez may have been violating the law, which justified his continued detention. One of the first things the officer noticed upon approaching the van was the overwhelming odor of carpet freshener, which, in his experience, was often used by drug dealers to mask the odor of drugs. A court reviewing a police officer’s actions must give due weight to the officer’s experience and training, and view the evidence as those in law enforcement would understand it. *Andrews*, supra, at 88, 565 N.E.2d 1271.

{¶20} Further, Lopez was evasive in answering simple questions. The Impala had been closely following the van. As soon as the police showed an interest in the van, the Impala quickly sped away and committed several lane violations. The officers knew that drug dealers would often use another vehicle to distract police from the vehicle carrying the drugs. Based on these facts, the police officers’ continued detention of Lopez did not violate his Fourth Amendment rights.

{¶21} Further, if a vehicle is lawfully detained, an exterior sniff by a drug dog is not a search within the meaning of the United States or Ohio constitution. *United States v. Place* (1983), 462 U.S. 696, 707, 103 S.Ct. 2637; *In the Matter of Dengg* (1999), 132 Ohio App.3d 360, 365, 724 N.E.2d 1255; *State v. Bordieri*, 6th Dist. No. L-04-1321, 2005-Ohio-4727, ¶22; *State v. Morales*, 5th Dist. No. 2004 CA 68, 2005-Ohio-4714, ¶68. Police need not have a reasonable suspicion of drug-related activity before subjecting an otherwise lawfully detained vehicle to a drug sniff. *Dengg*, supra, at 365, 724 N.E.2d 1255; *Bordieri*, supra, at ¶22. Because Lopez's vehicle was lawfully detained, the dog's sniff of his vehicle did not violate his Fourth Amendment rights. See *State v. Foreman* (C.A.4, 2004), 369 F.3d 776, 781-786.

{¶22} Under the automobile exception to the warrant requirement, police may conduct a warrantless search of an entire vehicle if the police officers have probable cause to believe that they will discover evidence of a crime. *United States v. Ross* (1982), 456 U.S. 798, 800-801, 102 S.Ct. 2157; *State v. Moore*, 90 Ohio St.3d 47, 51, 2000-Ohio-10, 734 N.E.2d 804; *Dengg*, supra, at 365, 724 N.E.2d 1255. Once a properly trained dog indicates the odor of drugs in a lawfully detained vehicle, police have probable cause to search the vehicle. *Dengg*, supra, at 366, 724 N.E.2d 1255; *Bordieri*, supra, at ¶22; *Morales*, supra, at ¶68.

{¶23} In this case, the dog's quick and decisive alert to drugs in the vehicle would alone have provided probable cause to search it. Certainly, the dog's alert, together with the tandem driving of the van and Impala, the odor of carpet freshener, and Lopez's evasiveness and nervousness, provided probable cause for the search of the van.

Consequently, we find no violation of Lopez's Fourth Amendment rights, and we overrule his second assignment of error.

{¶24} In his third assignment of error, Lopez contends that the trial court erred by admitting testimony about the drug-detection dog's sniff of the van. He argues that the state failed to prove the dog's qualifications or that his handler was properly certified. This assignment of error is not well taken.

{¶25} As we have previously stated, an alert from a properly trained drug-detection dog provides probable cause to search a vehicle. *Dengg*, supra, at 366, 724 N.E.2d 1255; *Bordieri*, supra, at ¶22; *Morales*, supra, at ¶68. Some disagreement exists among courts about what evidence is necessary to show that a dog is reliable and properly trained. Nevertheless, the majority hold that the state can establish reliability by presenting evidence of the dog's training and certification, which can be testimonial or documentary. Once the state establishes reliability, the defendant can attack the dog's "credibility" by evidence relating to training procedures, certification standards, and real-world reliability. *State v. Nguyen*, 157 Ohio App.3d 482, 2004-Ohio-2879, 811 N.E.2d 1180, ¶22-55; *State v. Calhoun* (May 3, 1995), 9th Dist. No. 94CA005824; *State v. Knight* (C.P.1997), 83 Ohio Misc.2d 79, 86, 679 N.E.2d 758; *United States v. Diaz* (C.A.6, 1994), 25 F.3d 392, 394-396. We agree with the reasoning of these cases.

{¶26} Lopez seems to argue that the state must present evidence on every requirement for training and certification of dogs and handlers in the Ohio Administrative Code. See Ohio Adm.Code 109:2-7-03 and 109:2-7-05. We disagree. In this case, the state submitted Arnold's and Bo's training certificates into evidence, as well as a letter from the training school showing that Arnold and Bo had passed the required courses.

Lopez argues that these documents were inadmissible into evidence for various reasons. Even if they were inadmissible, Arnold testified that he and Bo were certified and that they went through the certification process every two years. He also testified regarding the training courses that he had taken with Bo. That evidence was sufficient to meet the state's burden of showing that the dog was reliable. Lopez could then have presented evidence that the proper procedures for training and certification in the administrative code were not followed. In fact, he cross-examined Arnold fairly extensively about Bo's training and reliability.

{¶27} The trial court found that the dog was properly certified and that he was reliable. Because that finding was based on competent, credible evidence, this court must accept it. *State v. Brewster*, 1st Dist. Nos. C-030024 and C-030025, 2004-Ohio-2993, ¶22. Accordingly, the trial court did not err in failing to exclude testimony about the dog, and we overrule Lopez's third assignment of error.

{¶28} In his fourth assignment of error, Lopez contends that the trial court erred in accepting his no-contest plea. At the plea hearing, Lopez stated that his due-process rights had been ignored and that he felt that he had no redress for those violations. He argues that his statements indicated that he wished to "establish his trial rights." This assignment of error is not well taken.

{¶29} If a defendant does not make a plea voluntarily, enforcement of that plea is unconstitutional. *State v. Engel*, 74 Ohio St.3d 525, 527, 1996-Ohio-179, 660 N.E.2d 450; *State v. Gordon*, 149 Ohio App.3d 237, 2002-Ohio-2761, 776 N.E.2d 1135, ¶16. A plea is voluntary if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Gordon*, supra, at ¶17, quoting *North Carolina*

v. *Alford* (1970), 400 U.S. 25, 31, 91 S.Ct. 160. The “motivational niceties” of a plea are not an element of inquiry required of a trial court before it accepts the plea. The court’s inquiry is whether the accused, no matter what his motivations, knows and understands the legal implication of waiving his statutory and constitutional rights. No violation of rights occurs unless the record shows from the totality of the circumstances that the accused’s plea has not been intelligently and voluntarily made. *State v. Holder* (1994), 97 Ohio App.3d 486, 493, 646 N.E.2d 1173.

{¶30} The record shows that the trial court initially accepted Lopez’s no-contest plea. When the court asked Lopez if he wished to make a statement in mitigation of sentence, Lopez stated, “Since my being stopped, I have had several problems as far as the issues concerning the due process. * * * There are a lot of things that, because of the way the cases have been set up in these courts, that I’m not able to challenge.” He discussed how he believed the police officers had perjured themselves and that the drug task force involved in his stop had exhibited a pattern of inappropriate behavior. He added, “I haven’t had the opportunity to say anything since I have been here and it’s not been in my best interest anyhow, other than this, and I don’t expect it to be so much as acknowledged, but I did want to make at least that statement.”

{¶31} Then, the following exchange occurred:

{¶32} “THE COURT: I’m not sure I can accept this plea. What’s he saying he’s not been granted any due process rights?”

{¶33} “MR. GOLDBERG [Lopez’s counsel]: * * * I believe he’s addressing the suppression issues

{¶34} “THE COURT: Is that what you’re talking about –

{¶35} "MR. GOLDBERG: The stop.

{¶36} "THE COURT: -- or something else?

{¶37} "MR. GOLDBERG: Right.

{¶38} "THE DEFENDANT: Yes, sir."

{¶39} The court asked Lopez about the due-process violation that he believed had occurred. Lopez contended that when he was initially arrested, he was placed in a psychiatric unit in the jail, which he believed was a ploy to keep him from having access to the public and to his attorney. This exchanged followed:

{¶40} "MR. GOLDBERG: Judge, these issues really have nothing to do with the plea?

{¶41} "THE DEFENDANT: Right, correct.

{¶42} "THE COURT: There's a statement on the record that he's been denied due process and I'm not going to let that go, I want him to explain what he's --

{¶43} "THE DEFENDANT: I would be happy to, sir.

{¶44} "MR. GOLDBERG: He's not denying the facts in the indictment?

{¶45} "THE DEFENDANT: No, I'm not.

{¶46} "MR. GOLDBERG: Is that correct?

{¶47} "THE DEFENDANT: That's correct."

{¶48} Thus, the record demonstrates that Lopez understood that by entering a no-contest plea he was admitting the facts in the indictment, and that his "due process" issues were related to matters decided by the court in overruling his motion to suppress or to matters that were irrelevant to the plea. Lopez did not waive the issues related to the denial of his motion to suppress by pleading no contest, and he has actually raised those

issues on appeal. See Crim.R. 12(I); *State v. Feliciano*, 11th Dist. No. 2004-L-205, 2006-Ohio-1678, ¶13.

{¶49} Our review of the record shows that the trial court strictly complied with the provisions of Crim.R. 11(C) and correctly informed Lopez of the constitutional rights enumerated in *Boykin v. Alabama* (1969), 395 U.S. 238, 89 S.Ct. 1709, that he would be waiving by pleading no contest. The court also substantially complied with the rule in all other respects. See *State v. Ballard* (1981), 66 Ohio St.2d 473, 477-481, 423 N.E.2d 115; *State v. McCann* (1997), 120 Ohio App.3d 505, 507-508, 698 N.E.2d 470. The trial court conducted a meaningful dialogue to ensure that Lopez's plea was made knowingly and voluntarily. Consequently, the trial court did not err in accepting his plea. We overrule Lopez's fourth assignment of error and affirm his convictions.

Judgment affirmed.

HILDEBRANDT and PAINTER, JJ., concur.

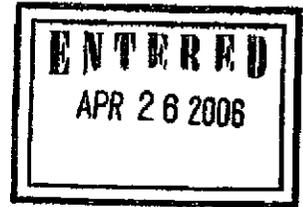
Please Note:

The court has placed of record its own entry in this case on the date of the release of this Opinion.



D68160063

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO



STATE OF OHIO,
Plaintiff-Appellee,

vs.

RONNIE LOPEZ,
Defendant-Appellant.

APPEAL NO. C-050088
TRIAL NO. B-0402530B ✓

JUDGMENT ENTRY.

This cause having been heard upon the appeal, the record and the briefs filed herein and arguments, and

Upon consideration thereof, this Court Orders that the judgment of the trial court is affirmed for the reasons set forth in the Opinion filed herein and made a part hereof.

Further, the Court holds that there were reasonable grounds for this appeal, allows no penalty and Orders that costs are taxed in compliance with App. R. 24.

The Court further Orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution pursuant to App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on April 28, 2006 per Order of the Court.

By: *H. Hillman*
Presiding Judge

Chillicothe - A487984

The Supreme Court of Ohio

FILED

AUG 23 2006

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio

v.

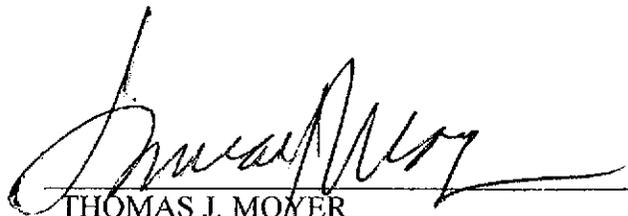
Ronnie Lopez

Case No. 06-1046

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

(Hamilton County Court of Appeals; No. C050088)



THOMAS J. MOYER
Chief Justice