

IN THE SUPREME COURT OF OHIO

08-1477

STATE OF OHIO,

Plaintiff-Appellee,

:
On Appeal from the Lucas
County Court of Appeals,
: Sixth Appellate District

-vs-

ROBIN LINCOLN JOHNSON,

:
Court of Appeals Case No. L-06-1035
:
:
:

Defendant-Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBIN LINCOLN JOHNSON

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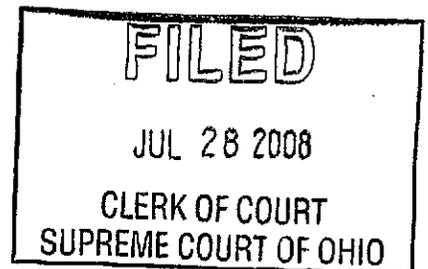


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST, INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION, AND WHY LEAVE TO APPEAL SHOULD BE GRANTED**

As to Proposition of Law No. 1:

Mr. Johnson should be granted leave to appeal the decision of the Court of Appeals which denied his Application for Reopening pursuant to App.R. 26(B). His application was filed after the 90-day deadline set forth in that rule, but half of its 10-page limit was spent explaining his “good cause,” — also from the rule — for being late. Affidavits, as specifically permitted by the rule, were attached to demonstrate the facts constituting good cause.

The same attorney represented Mr. Johnson for over five years, from the inception of his criminal case in 2002 until he was relieved by the trial court on April 1, 2008, immediately after the entry of new counsel. It was only from new counsel that Mr. Johnson, between April 1 and April 18, 2008, became aware that his previous attorney’s appellate representation had been deficient. The App.R. 26(B) application was filed May 7, 2008.

The Court of Appeals denied reopening on the grounds that Mr. Johnson’s factual allegations concerning the ineffective assistance of appellate counsel, because they refer to matters outside the record, must be the subject of a petition for post-conviction relief under O.R.C. 2953.21.

Leave to appeal should be granted because, in this felony case, the Court of Appeals’ circular reasoning completely emasculates App.R. 26(B). That rule exists specifically for the litigation of claims of ineffective assistance of appellate counsel. It permits, even encourages, affidavits in support of claims. App.R. 26(B)(2)(e). If the Court of Appeals’ decision stands, and particularly if it is adopted across other appellate districts, the entire rule may as well not exist. As to this appellant, he has been treated as if the rule did in fact not exist, and as if good cause for late filing

does not matter.

As of now, and as will be discussed in Proposition of Law No. 1, the decision being appealed conflicts with those of other districts.

The importance of App.R. 26(B) is that it attempts to guarantee constitutionally effective representation at the two stages (in the trial court and upon first direct appeal) at which a defendant possesses not only the right to counsel but the right to constitutionally effective counsel under both the Ohio and United States Constitutions. Mr. Johnson has been denied these rights, and so will probably other Sixth District litigants.

As to Propositions of Law Nos. 2 and 3:

There is unsettled law in the area of “drug dog” sniffs during traffic stops. A relatively new phenomenon, most trial and appellate courts have decided to demure to the law enforcement “experts” on the subject, and to range no further in their opinions than necessary to dispose of the case before them. The best example is the most important case on the subject to date, *Illinois v. Caballes*, 543 U.S. 405 (2005). In that case, the Supreme Court left open the question of whether a single canine alert anywhere on a vehicle automatically permits unlimited search of the trunk, and, in *dicta*, hinted that the opposite may be true.

The appellate courts of this state have not bridged the gap between “trained and certified” and “reliable,” often substituting the former for the latter even though it is clear there is more to reliability than training and certification. Rhetorically speaking, training and certification are irrelevant if a dog is not reliable, and reliability is more important than training and certification.

A criminal defendant must be able to challenge the reliability of a drug dog with relevant,

probative evidence. If cross-examination topics are to be limited to whether a dog is “trained” and “certified,” then even a dead dog can be reliable. Logic compels a conclusion that the trial court’s real and only function is to determine whether a drug dog is “reliable.” Any reliability inquiry matters only because it is important to ensure relative accuracy and fairness. This inquiry should include, and its more important component is, whether or not the dog *acted reliably on the occasion in question*.

Nearly as important in judging a dog’s reliability is the dog’s real world performance. A trained and certified dog may nevertheless possess a performance record that calls its reliability into question. To restrict the ability to verify real world performance, and inhibit cross-examine on that question, is both unnecessary and unwise: unnecessary because the records are readily available to the state, and unwise because the relationship between animal and handler is so personal that cross-examination is difficult because the handler can say that *any* action constitutes an “indication” that provides the probable cause to supercede the protections of the Fourth Amendment.

In the instant case, the trial court’s opinion relies far too much on the fact that the dog was “trained” and “certified,” and far too little on the actions of the dog on the video tape depicting the dog’s work. In doing so, it not only comes to the wrong factual conclusion regarding the dog’s reliability, but does not discuss the impact of the dog’s bizarre behavior during its circling of the car in which Appellant was a passenger. This is, or should be, more particularly so because the spot on the vehicle at which the state trooper claimed the dog “indicated” was far from the spot where drugs were found, and because the drugs found were not drugs that the dog had been trained to detect.

Res ipsa loquitur. The video tape in this case speaks for itself. Its contents will be dissected

in more detail below, and demonstrate that, training and certification did not make this dog reliable on this day. This Court should indicate that this can be the most important part of the inquiry into reliability.

Because the law is fairly clear in allowing a drug dog to examine any vehicle whatsoever if it is stopped for a suspected traffic violation — so long as the examination does not unnecessarily prolong the stop — this means that there is not a single citizen in this country, whether as driver or passenger, might not be the subject of a *de facto* or perceived “drug search.”

Thus, not only litigants and lawyers, but those in the general public should understand just how far the activities of a drug dog are permitted to penetrate their lives. This Court should accept these issues to clarify this area of the law, and to make litigation of these cases more transparent and understandable.

STATEMENT OF THE CASE AND FACTS

Mr. Johnson was arrested and charged with drug possession in January, 2002. He immediately retained counsel, who continued to represent him through a suppression hearing, a no contest plea and sentence of imprisonment (January 11, 2006), an unsuccessful direct appeal to the Sixth District (decided August 3, 2007), an unsuccessful attempt to gain jurisdiction in this Court (declined December 12, 2007), and a notice to appear in the trial court for execution of sentence on April 1, 2008. (He had been free on bond from shortly after his arrest until such time.)

The suppression issue involved a drug dog's alleged alert on a car in which Appellant was a passenger, whether that dog was reliable, and what the state trooper's motivations were in bringing out the dog and eventually searching the car. The trial court improperly overruled the motion to suppress, and Mr. Johnson's attorney appealed, assigning as error that the trooper had engaged in a "fishing expedition" without sufficient facts to provide probable cause.

The Court of Appeals affirmed, finding that law enforcement motivations are irrelevant as long as using the drug dog does not unnecessarily and unreasonably prolong the traffic stop.

In the period leading up to April 1¹, the date he was required to appear for execution of sentence, Appellant, unable to access his counsel, contacted and retained new counsel on March 27, 2008. It was from new counsel that Appellant discovered that his original appeal should have contained additional assignments of error. An application under App.R. 26(B) was filed in the Sixth District on May 7, 2008, nine months after the original decision, but only 36 days after the lawyer who had represented Appellant from beginning to end withdrew from his exclusive representation.

The App.R. 26(B) application raised two additional assignments of error as follows:

¹ Prior counsel was relieved of Appellant's representation by the trial court on April 1.

I. THE TRIAL COURT'S JUDGMENT THAT THE DRUG DOG WAS COMPETENT AND CREDIBLE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AN ABUSE OF DISCRETION.

Within this proposed assignment of error, Appellant argued that, despite training and certification, that a dog's real-world performance, especially with regard to the incident in question, is the best indicator of a dog's reliability, and that the video tape clearly showed an out-of-control dog that was not reliable that day.

II. THE TRIAL COURT ERRED WHEN IT REFUSED TO REQUIRE THE STATE TO DISCLOSE THE PRE-INCIDENT REAL-WORLD PERFORMANCE RECORDS OF THE DRUG DOG HANS NOTWITHSTANDING THIS COURT'S DECISION IN STATE V. NGUYEN, 157 Ohio App.3d 482, 2004-Ohio-2879.

Within this proposed assignment of error, Appellant argued that the failure to allow a defendant access to real-world performance records of the dog who sniffed that defendant's car is unfair and improper.

As is always the case, the colorable merit of the additional assignments of error speak for themselves regarding the ineffectiveness of appellate counsel.

But Mr. Johnson used half his 10-page limit in his Application for Reopening explaining that the lawyer he'd had all along had not alerted Appellant to his own ineffectiveness in the original appeal. This he offered not as to the merits of his new arguments and the resulting ineffectiveness of prior counsel, but as "good cause," under App.R. 26(B)(1) for late filing.

The Court of Appeals denied Appellant's Application for Reopening on June 13, 2008, writing that

any misinformation given to the applicant by his trial counsel after the Ohio Supreme Court declined jurisdiction over his case necessarily occurred outside the record of this cause and is, therefore, more properly a subject for a petition for post-conviction

relief pursuant to R.C. 2953.21.

It is this ruling that Mr. Johnson now challenges, as the Court of Appeals confused the question of the ineffectiveness of the appellate representation with the question of whether there was “good cause” to permit reopening after the deadline.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: A Court of Appeals must consider factual allegations referring to matters outside the case record in determining the presence or absence of “good cause” for late filing of an App.R. 26(B) application, and may not deny such application on grounds that outside-the-record allegations of good cause leave post-conviction relief, O.R.C. 2953.21, as an appellant’s exclusive remedy.

Because Mr. Johnson’s Application for Reopening pursuant to App.R. 26(B) contained outside-the-record factual allegation to demonstrate “good cause” for filing after that rule’s 90-day time limitation, the Court of Appeals held that his appropriate remedy is not rule 26(B), but statutory post-conviction relief. To do so clearly thwarts the intent of the “good cause” exception to the 90-day rule.

Appellant submitted three affidavits in support of his application, as permitted by App.R. 26(B)(2)(e). The very fact that the rule contemplates affidavits means that facts from outside the record are completely acceptable, not that an applicant should be relegated to a statutory post-conviction remedy.

The Eighth District put this very issue in proper context in *State v. Hill*, 160 Ohio App.3d 324, 331, 2005-Ohio-1501, which appears to be in conflict with the instant case. *Hill* held that a post-conviction petition is premature unless the putative petitioner has exhausted his direct appeal remedies, including delayed appeal, citing *State v. Gover* (1995), 71 Ohio St.3d 577, 579.

The Court of Appeals has deprived this litigant, and surely others, of the opportunity to comply with App.R. 26(B) and have his case heard. His “good cause” argument was not heard. It was confused with another — inapplicable — remedy merely because the factual statements supporting the good cause demonstrated matters outside the record.

The Court of Appeals mistakes showing good cause for lateness as the substantive argument,

which it is not, because the substantive argument is that he omitted necessary assignments of error..

Appellant has a right to have either this Court or the Sixth District make a determination of whether he has shown good cause for an untimely filing under App.R. 26(B). As of yet, none has been passed.

PROPOSITION OF LAW NO. 2: The behavior of an otherwise trained and certified “drug dog” at the precise time and place at which he allegedly “alerts” is of critical importance in determining the reliability of the dog.

Real world performance is highly relevant in determining the reliability of drug dogs. *State v. Lopez*, 166 Ohio App.3d 336, 337, 2006-Ohio-2091. What could be more real world than the way the dog behaves — in the instant case on video tape — at the scene of the specific incident in question?

Mr. Johnson submits that, given the timidity of most appellate courts in discussing the details of actual case facts when determining drug dog reliability, it would behoove this Court to hold that the behavior of a dog at the scene of the incident under review can be critical to determining the reliability of the dog and the existence or absence of probable cause.

In the instant case, the drug dog was clearly and literally out of the control of his handler. There was a dog inside Appellant’s vehicle, and the drug dog is clearly reacting to it, at one point leaping onto the trunk to confront it through the vehicle’s rear window. The drug dog also leapt to the occupants’ compartment window on several (four or five) occasions. That the dog’s behavior is aberrational is confirmed by his handler’s indication that the dog does not normally react to other dogs.

The dog’s undisciplined, physically spastic, and, if the trooper’s explanation of what constitutes an “indication” is accurate, the dog indicated several times to the other dog.

That there were no drugs found anywhere near the spot on the car to which the dog allegedly alerted, and that the dog was not trained to recognize or alert to the odor of psilocybin mushrooms, support the proposition that the dog was completely “off his game” on this occasion. This is something that does not take an expert to explain, as it is completely apparent on the video.

The trial court's opinion did not give any weight to the dog's behavior *on the occasion in question*. This was error upon which this Court should act, and instruct trial and intermediate appellate courts that this is perhaps the most important gage of a dog's reliability.

PROPOSITION OF LAW NO. 3: The real world performance records of a drug dog, both pre- and post-incident, are relevant to a determination of the dog's reliability, and are subject to disclosure by the State prior to hearing on a motion to suppress.

It has been held that all "circumstances of the particular search [may] raise issues regarding a [drug] dog's reliability." *United States v. Wood* (D. Kansas 1996), 915 F. Supp. 1126, 1136.

This is not, in fact, apparently true in the appellate district in which the instant case was decided. The Sixth District has gone so far as to hold that no inquiry is necessary beyond the establishment of proper training and certification. *State v. Nguyen*, 157 Ohio App.3d 482, 492, 2004-Ohio-2879. This cannot possibly be true.

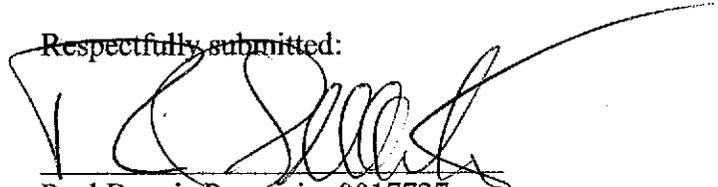
One cannot logically argue that real-world performance of a drug detecting dog is not relevant to the question of whether the dog is reliable. Therefore, there is nothing that should preclude a defendant, upon proper request (which was made and partially denied in the instant case), from having access to a dog's real world performance records, whether from before or after the incident in question. To hold otherwise is to establish a presumption in favor of probable cause, which cannot logically, or morally, exist, inasmuch as the probable cause burden is always on the government. See, e.g., *State v. Groves*, 156 Ohio App.3d 205, 2004-Ohio-662.

There is no reason why real world performance records should not be available to every defendant in every case, and the trial court should not have denied them to this Appellant.

CONCLUSION

For the foregoing reasons, this case involves matters of public and great general interest and substantial constitutional questions, and leave to appeal should be granted. Appellant requests that this Court accept jurisdiction in this case so that the important issues presented may be reviewed on their merits.

Respectfully submitted:



Paul Dennis Pusateri 0017727
Counsel of Record for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served upon Keith A. Pituch, Esq., Asst. Prosecuting Attorney, 711 Adams Street, 2nd Floor, Toledo, Ohio 43604, by ordinary U.S. Mail this 28th day of July, 2008.



Paul Dennis Pusateri

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JOHN J. ...

On January 14, 2002, the defendants, Andrew Florey and Robin Johnson, were each indicted on one count of aggravated possession of drugs, i.e., marijuana, in an amount exceeding 100 times the base amount, in violation of R.C. 2925.11(A) and (C)(1)(c), a felony of the first degree. The indictment included a specification alleging that each defendant is a major drug offender. This defendant is to apply to both of them.

Having different grounds to support their motions, the Court will consider the arguments of each defendant from the search of an automobile. Although each defendant filed a separate memorandum there are presently pending motions filed by both defendants herein, to suppress evidence

STATE OF OHIO
PLAINTIFFS
ANDREW FLOREY, ET AL.,
DEFENDANTS
Honorable Charles W. Whiteberg
Case No.: CR02-1082(A) and (B)
JUDGMENT ENTRY

IN THE COURT OF COMMON PLEAS OF Lucas County, Ohio

FILED
MAY 18 2002
CLERK OF COURT
LUCAS COUNTY

motion is now before the Court on motions filed by each defendant to suppress the seizure of the controlled substance. For the reasons stated herein, the Court finds both motions to be not well taken.

I. FACTS

On January 3, 2002, while on routine traffic control on the Ohio Turnpike, Trooper Alejo Romero [hereinafter Romero] of the Ohio Highway Patrol observed a white Chevrolet Lumina which he clocked at a speed in excess of 75 MPH in an area in which the speed limit was 65 MPH. After pursuing the automobile for three miles, Romero activated his flashing lights and executed a traffic stop of the vehicle. Romero exited his vehicle, approached the Lumina and observed that defendant Alexander Florey [hereinafter Florey] was the driver of the automobile. Romero approached on the passenger side of the car. Defendant Robin Johnson [hereinafter Johnson] was sitting in the front passenger seat. There was a dog in the back seat of the car.

The driver, Florey, had a Montana driver's license, and Johnson had a driver's license from Vermont. When asked where they were going, the defendants stated that they were driving to Vermont from Montana to visit family. Romero asked for the registration, and Johnson reached into the glove box and retrieved a rental car agreement, which indicated that the car had been rented in San Francisco on January 1, 2002. Romero noted that Johnson appeared nervous and his hands were trembling.

A Highway Patrol sergeant arrived at the scene, and Romero gave the sergeant the driver's license and rental agreement to do a validity check. In the meantime, Romero decided to have a dog handler take a dog walk toward defendants' vehicle. Romero is a canine handler and Hans, a dog trained to alert to the presence of certain drugs, was in Romero's vehicle. Romero led Hans on a

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back around the Lumber, and on the second pass Hans scratched at the driver's door. At that time, Romero removed defendants from the vehicle and he and the sergeant conducted a search of the car.

First, Romero and the sergeant did a cursory search of the front inside of the car. They then opened the trunk and found a cloth duffle bag. Upon feeling the bag, the sergeant became suspicious and opened the bag. Inside, the sergeant found a garbage bag which contained several other garbage bags. In one of the garbage bags the sergeant discovered psilocybin. The troopers also found and confiscated a baggie of marijuana seeds inside a boot in the trunk, as well as cigarette rolling paper and \$500 cash inside a back pack located in the back seat.

II. CONCLUSIONS OF LAW

Whether a warrantless stop is reasonable under the Fourth Amendment to the United States Constitution must be determined on a case by case method. It must be determined whether there was probable cause to make the stop or whether there was some articulable, reasonable suspicion of criminal activity to justify an investigatory stop. *Whren v. United States* (1996), 517 U.S. 806; *State v. Erickson* (1995), 76 Ohio St.3d 3. Unless the search or seizure measures were extreme or unusual, if the facts show a probable cause to make the stop, it will be considered reasonable. *Whren, supra*. The subjective intentions of the officer making the stop are irrelevant for purposes of Fourth Amendment analysis; the only issue is whether the objective circumstances justify the stop. *Ohio v. Robinette* (1996), 519 U.S. 33; *State v. Bolding* (May 28, 1999), Eric App. No. E-97-115.

Trooper Romero testified that while on routine traffic control, he observed defendants in their vehicle speeding at 75 MPH in a 65 MPH zone. He then followed them for three miles and paced their car at 72 MPH. The Trooper observed Flory, the driver, violate a traffic law, and he thus had the right to stop the driver to give him a citation. *State v. Lowman* (1992), 82 Ohio App.3d 831. The

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officer's observation of the traffic violation gave him probable cause to stop the driver to issue a warning or citation. *State v. Holding*, *supra*. Thus, the fact that Florey was speeding was sufficient to give Trooper Romero probable cause to stop defendants for a traffic violation.

Defendants argue that Trooper Romero wrongfully detained them in order to search for additional evidence of criminal activity. Defendants contend that the trooper extended the initial traffic stop to find probable cause of drug trafficking to justify a search of the vehicle. The law is well settled that the scope and duration of the investigative stop must not exceed what is necessary to complete the purpose for which the stop was made. *Florida v. Royer* (1983), 460 U.S. 491; *State v. Williams* (1997), 80 Ohio St.3d 234. The trooper cannot conduct a fishing expedition for evidence of another crime. *State v. Montoya* (Mar. 6, 1998), Lucas App. No. L-97-1226.

"If, however, the officer observes additional circumstances that give rise to a reasonable suspicion of some other illegal activity, the officer may detain the driver for as long as that new articulable and reasonable suspicion continues. * * * An officer may also briefly detain an individual without any reasonable, articulable suspicion of criminal activity if it is necessary to promote a legitimate public concern, e.g., reducing drug trafficking. * * * Furthermore, an officer may perform routine procedures so long as they are not used as a [stop] excuse to extend the retention of the driver in order to search for evidence of a crime." [Citations omitted.] *State v. Holding* (May 28, 1999), Erie App. No. E-97-115.

Upon the stop of the vehicle, Romero observed that the driver had a Montana drivers license, the passenger had a Vermont drivers license, and the automobile had been rented in the state of California. Trooper Romero noted that the passenger was nervous even though he was not the person driving the vehicle. Romero further found it unusual that the car was rented in San Francisco when the defendants were traveling from Montana to Vermont to visit family. Moreover, Romero was concerned that based upon the date and time of the rental agreement, the stop was only 36 hours after the car was rented in a vehicle leading him to believe there may be a safety issue. Based upon

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such information, the Trooper had the right to check the validity of the license and rental agreement. While the sergeant was checking the license and rental agreement, Romero and the drug dog made a walk-around of the car. This occurred only six minutes after the initial stop. Romero testified that the usual duration of a traffic stop is fifteen minutes. In determining whether defendants were detained longer than necessary the court must evaluate the duration of the stop in light of the totality of the circumstances. *State v. Cook* (1992), 65 Ohio St.3d 516. As long as the traffic stop is valid, further questioning, even if unrelated to the initial detention, is valid as long as the questioning does not improperly extend the duration of the detention. *State v. Chappis* (1995), 107 Ohio App.3d 551, 556, 71 O.O.2d, on the totality of the circumstances herein and the relative short duration of the stop, the Court finds that Trooper Romero did not exceed the purpose of the initial stop of defendants.

Finally, defendants challenge whether the dog made a positive, objective alert to the presence of narcotics needed to establish probable cause to search the vehicle. While defendants do not dispute that a dog sniff is not a search, they contend that the particular dog in this case and the particular circumstances of the sniff were insufficient to provide probable cause to the troopers for a search of the vehicle.

It is well established that a properly accredited drug dog alert is sufficient to give a police officer probable cause to believe that a vehicle contains narcotics. *State v. Pollock* (1994), 97 Ohio App.3d 175. Defendants argue that the training and reliability of the drug detection dog, Hans, is insufficient to establish a finding that probable cause existed to support a search for drugs. Defendants presented the testimony of Dr. David Craig as an expert in animal behavior and "K-9 detectors." Dr. Craig has a doctorate of veterinary medicine, a bachelor's degree in animal behavior and a master's degree in experimental psychology. Based upon Dr. Craig's review of various documents

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FOR DEBATE

Typical review of the evidence presented herein, the Court finds that Hans was a reliable drug detector dog. Hans was trained and certified by the Lindwood Kennels in Fremont, Ohio as a drug detector dog in April, 2001, after 200 hours of training with Trooper Romero. Such training and certification occurred within nine months of the search herein. In addition, the State produced numerous certificates attesting to the reliability of Hans, including the North American Police Work Dog Association and the Ohio Peace Officers' Training Commission. Specifically, Hans is certified to detect the use of narcotics, cocaine, methamphetamine and heroin. After certification, Hans and Trooper Romero participated in ongoing training on a weekly basis, averaging approximately four to

When the evidence presented, whether testimony from the dog's trainer or records of the dog's training, establishes that the dog is generally certified as a drug detector dog, any other evidence, including the testimony of other experts, that may detract from the reliability of the dog's performance properly goes to the 'credibility' of the dog. Lack of additional evidence, such as documentation of the exact course of training, similarly would affect the dog's reliability. As with the admissibility of evidence generally, the admissibility of evidence regarding a dog's training and reliability is committed to the trial court's sound discretion." *U.S. v. Mawardi-El-Machidi* (C.A. 6, 1999), 186 F.3d 701, 706.

probable cause for the presence of drugs. (The Federal Court has noted:

As previously stated, a positive indication by a properly trained dog is sufficient to establish that being an "active" responder as opposed to being a "passive" responder. He has trained only one dog handler, but it was not for drug detection. Mr. Craig criticized techniques or how they train dogs. Mr. Craig is not certified as a trainer and has never been a dog in action except for the video tape. He testified that he is not familiar with Lindwood Kennels' Mr. Craig, never visited Hans' school, never spoke with Hans' trainer and never saw Hans that the dog was not properly trained and that the dog sniff was not reliable and records, as well as the video tape of the stop and search of defendant's vehicle, it was his opinion

eight hours per week. Thus, contrary to defendants' assertions, there was substantial evidence to support the finding that Hans was a reliable drug-detection dog on the day of the search of the vehicle.

Moreover, defendants argue that the presence of a dog in their vehicle during Hans' walk around the car caused an unreliable reaction which was not necessarily an indication of the presence of drugs. From viewing the video, Dr. Craig surmised that Hans could have lunged toward defendants' dog instead of scratching at the door as a response to the odor of a controlled substance. However, Romero testified that Hans had trained in the presence of other dogs and had not changed his behavior. Hans had been used in searches of other vehicles in which dogs were present, and he had not been distracted on those occasions. In the subject search, Hans circled the defendants' automobile twice without indicating any distraction from the dog located inside the vehicle. From the foregoing, the Court finds that Hans' reliability was not lessened by the presence of another dog inside defendants' automobile.

III. JUDGMENT ENTRY

It is therefore ORDERED that the motion to suppress filed by defendant Andrew Florey, and the motion to suppress filed by defendant Robin Johnson are DENIED.

Charles S. Wittenberg
JUDGE CHARLES S. WITTENBERG

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-06-1035

Appellee

Trial Court No. CR-0200201086

v.

Robin Lincoln Johnson

DECISION AND JUDGMENT ENTRY

Appellant

Decided: August 3, 2007

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Kevin A. Pituch
and Kenneth C. Walz, Assistant Prosecuting Attorneys for appellee.

Sheldon S. Wittenberg, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Robin L. Johnson, appeals a judgment of the Lucas County Court of Common Pleas, which denied appellant's motion to suppress. For the following reasons, we affirm the court's decision.

{¶ 2} At approximately 11:00 a.m., January 3, 2002, Ohio State Highway Patrol Trooper, Alejo Romero III, who was accompanied by his drug-sniffing dog, Hans,

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stopped a white Chevrolet Lumina for traveling ten m.p.h. over the posted speed limit. The vehicle was occupied by the driver, Andrew Flory, appellant, and appellant's dog. Flory produced a valid Montana driver's license, as well as paperwork indicating that the vehicle was rented in San Francisco on January 1, 2002, approximately 36 hours before the stop. Appellant produced a valid Vermont driver's license at the request of Trooper Romero. The trooper told the driver and appellant that he was not going to issue a citation, but asked them to slow down.

{¶ 3} Trooper Romero then engaged appellant and driver in conversation regarding their destination, origin, purpose for the trip, and their occupations. Appellant and Flory told Trooper Romero that they were traveling from Montana to Vermont to visit family, that Flory was a factory worker, and that appellant was a bartender. Trooper Romero testified that the reason he engaged the driver and appellant in conversation was because appellant seemed nervous, and it was unusual for a passenger who was not in danger of getting a traffic citation to be nervous. Romero also stated that he became even more suspicious after the conversation with the driver and appellant because "you don't see two men engaged in long cross-country travel visiting family for a few days; usually that is done by family, or somebody that is more established financially."

{¶ 4} The trooper called for backup, and Sergeant Thomas Laubacher arrived almost immediately. While Sergeant Laubacher was performing a records check on the vehicle and the occupants, Trooper Romero conducted a walk around Flory's vehicle with Hans. The drug dog alerted at the seam between the front and rear doors on the driver's

side. Trooper Romero placed the occupants, including appellant's dog, in Sergeant Laubacher's patrol car and immediately searched the trunk of the Chevrolet. In the trunk the police discovered 24 pounds of psilocybin mushrooms, .515 grams of marijuana seeds, rolling papers and \$800 cash. Driver Flory and appellant were placed under arrest, and Flory was issued a speeding citation.

{¶ 5} Appellant moved to suppress the evidence based on two grounds. The first issue involved Hans' reliability as a drug detection dog. An expert witness, Dr. Daniel Craig, testified extensively on this point on behalf of appellant. Appellant also argued that Trooper Romero impermissibly expanded the scope of the investigation by inquiring about the origin, destination and purpose of the trip, as well as the occupation of both occupants. The trial court denied the motion. Appellant withdrew his not guilty plea, entered a plea of no contest, and was found guilty of aggravated drug possession, a second degree felony. He was sentenced to the minimum jail term of two years, which was stayed pending this appeal. Appellant asserts one assignment of error.

{¶ 6} "Trooper Romero impermissibly expanded the scope of the traffic stop when he conducted a fishing expedition for evidence of further criminal activity."

{¶ 7} The applicable standard of review on a motion to suppress evidence presents a mixed question of law and fact to the reviewing court. *State v. Long* (1998), 127 Ohio App.3d 328, 332. We must review the trial court's "findings of fact only for clear error, giving due weight to inferences drawn from those facts by the trial court. The

trial court's legal conclusions, however, are afforded no deference, but are reviewed de novo." *State v. Russell* (1998), 127 Ohio App.3d 414, 416 (Citation omitted).

{¶ 8} The validity of a law enforcement officer's investigatory stop of a motor vehicle is determined under the Fourth Amendment to the Constitution of the United States and Section 14, Article I, Ohio Constitution. Both of these constitutional provisions prohibit unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Warrantless searches are generally per se unreasonable, subject to specifically established exceptions. *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St.3d 141, 143-144. Absent an exception, courts are required to exclude all evidence seized in violation of the Fourth Amendment. *Mapp v. Ohio* (1961), 367 U.S. 643, 655, 81 S.Ct 1684, 6 L.Ed.2d 1081. An investigatory stop of a motor vehicle is, however, an exception to the Fourth Amendment warrant requirement. *U.S. v. Ross* (1982), 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572.

{¶ 9} Furthermore, the use of a drug dog to sniff the exterior of a vehicle that is lawfully detained is not a search within the meaning of the Fourth Amendment. *State v. Bordieri*, 6th Dist. No. L-04-1321, 2005-Ohio-4727, ¶ 22. Thus, law enforcement officials do not need reasonable suspicion of drug related activity in order to subject a lawfully detained vehicle to a drug dog sniff. *Id.* "[W]hen a [drug] dog alerts to the presence of drugs, it gives law enforcement probable cause to search the entire vehicle." *State v. Nguyen*, 157 Ohio App.3d 482, 2004-Ohio-2879, ¶ 22. Additionally, "the fact that a drug dog is properly trained and certified is the only evidence material to a

determination that a particular dog is reliable." *Id.* at ¶ 55. Finally, in a recent Ohio Supreme Court case, the court held that "[a] traffic stop is not unconstitutionally prolonged when permissible background checks have been diligently undertaken and not yet completed at the time a drug dog alerts on the vehicle." *State v. Batchili*, 113 Ohio St.3d. 403, 2007-Ohio-2204, syllabus.

{¶ 10} In the case under consideration, the entire traffic stop took about seven minutes, or half the time usually expended by Trooper Romero prior to issuing a citation. Based on the facts offered at the suppression hearing, the trooper had probable cause to stop the vehicle for speeding and detain Flory and appellant for the length of time necessary to run background checks and issue a citation or warning. Furthermore, as stated above, he was not required to have any reasonable suspicion of drug activity in order to have Hans perform an exterior sniff of the car. Therefore, the fact that his conversation with the occupants of the vehicle also supplied Trooper Romero with some suspicion of drug activity is of little consequence. In addition, the duration of the conversation was not of such a length to impermissibly expand the length of detention. Hans, who was certified as a drug detection dog at the time of the stop, alerted before the permissible background checks were completed, and the alert gave Trooper Romero probable cause to search the entire vehicle.

{¶ 11} Consequently, in viewing the stop under a totality of the circumstances test, we conclude that Trooper Romero did not engage in an impermissible "fishing

expedition." Therefore, the trial court did not err in denying the motion to suppress, and appellant's sole assignment of error is found not well-taken.

{¶ 12} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R.24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, P.J.

William J. Skow, J.

JUDGE

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-06-1035

Appellee

Trial Court No. CR-0200201086-000

v.

Robin Lincoln Johnson

DECISION AND JUDGMENT ENTRY

Appellant

Decided: JUN 13 2008

* * * * *

This matter is before the court on Robin L. Johnson's application to reopen his appeal pursuant to App.R. 26(B). In conjunction with his application, Johnson filed a motion to preserve a videotape that was an exhibit admitted at his trial.

App.R. 26(B)(1) provides, in part: "An application for reopening shall be filed * * * within ninety days from journalization of the appellate judgment * * *." App.R. 26(B)(2)(b) requires that an application for reopening include "a showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment."

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Our judgment in *State v. Johnson*, 6th Dist. No. L-06-1035, 2007-Ohio-3061, was journalized on August 3, 2007. Johnson's application to reopen his appeal based upon ineffective assistance of appellate counsel was filed on May 7, 2008, a date admittedly beyond the 90 day period set forth in App.R. 26(B)(1). Thus, Johnson is required to demonstrate good cause for the late filing of his application. He apparently relies on the fact that his appellate counsel, who was also his trial counsel, failed to inform him of or misinformed him concerning the availability of the remedy set forth in App.R. 26(B). Specifically, Johnson avers in his affidavit in support of his application:

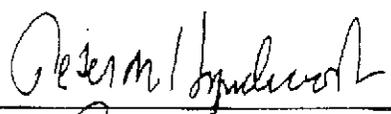
"6. After the Ohio Supreme Court denied jurisdiction [over my case], Attorney Wittenberg advised me that there were no more steps to take to attempt to overturn my conviction, and advised me that we should 'keep quiet' so as to not draw the interest of my judge. He told me that the only other avenue possibly available would be federal habeas corpus (I did not know until informed by my present counsel that Fourth Amendment claims are not cognizable in federal habeas corpus because of a case named *Stone v. Powell*.)"

Taking Johnson's averments as true, we conclude that any misinformation given to the applicant by his trial counsel after the Ohio Supreme Court declined jurisdiction over his case necessarily occurred outside the record of this cause and is, therefore, more properly a subject for a petition for postconviction relief pursuant to R.C. 2953.21. If, in the alternative, Johnson is professing that an ignorance of the law caused the delay in the filing of his App.R. 26(B) application, ignorance of the law is not an excuse, that is, good

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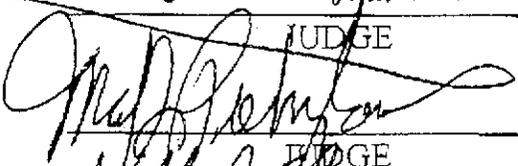
cause. See *State v. Melton*, 8th Dist. No. 82765, 2005-Ohio-6235, ¶ 5. For these reasons, Johnson's application to reopen his appeal is found not well-taken and is, hereby, denied. Johnson's motion to preserve the videotape of "drug dog" used by law enforcement officers during the stop of the vehicle in which Johnson was a passenger is rendered moot.

Peter M. Handwork, J.



JUDGE

Mark L. Pietrykowski, P.J.



JUDGE

William J. Skow, J.



JUDGE

CONCUR.

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