

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. **08-1742**
 :
 Plaintiff-Appellee, :
 :
 vs. : On appeal from the Lorain County
 : Court of Appeals, Ninth Appellate
 : District Case No. 07CA009183
 DARRICK BARBEE, :
 :
 Defendant-Appellant. :

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DARRICK BARBEE**

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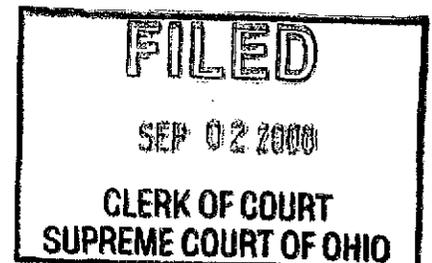


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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Darrick Barbee's case is of great public and general interest because it concerns the Fifth Amendment privilege against self-incrimination. Mr. Barbee's case offers this Court an opportunity to demand that Ohio courts remain vigilant in protecting that privilege. Furthermore, Mr. Barbee was deprived of the right to the effective assistance of counsel during his trial and direct appeal. This Court should grant jurisdiction in this case to ensure that every citizen is to be afforded effective assistance of trial and appellate counsel.

STATEMENT OF THE CASE AND OF THE FACTS

After stopping Darrick Barbee for minor traffic violations, state troopers conducted a canine sniff, and later a search, of the borrowed Cadillac that Mr. Barbee was driving. The troopers found cocaine concealed inside a speaker in the trunk of the Cadillac. Mr. Barbee was convicted of two counts of possession of cocaine. The court of appeals affirmed Mr. Barbee's convictions, holding that those convictions were supported by sufficient evidence, were not against the manifest weight of the evidence, and the trial court did not err by admitting evidence obtained as a result of a warrantless search of the Cadillac. *State v. Barbee*, 9th Dist. No. 07CA009183, 2008-Ohio-3587, ¶1.

Trooper Richard Menges testified that he stopped the Cadillac which Mr. Barbee was driving because it was following another car too closely and it had only one working brake light. After stopping Mr. Barbee, Trooper Menges learned that Mr. Barbee had borrowed the vehicle from a friend and was driving from Detroit, Michigan, to New Castle, Pennsylvania. Trooper Menges separately questioned the passenger of the vehicle. The trooper became suspicious because he felt that the responses of the two men were inconsistent and that Mr. Barbee appeared nervous while being questioned. *Barbee*, at ¶2.

While the trooper was writing out warning slips for the traffic violations, he summoned a canine officer to the scene. When Trooper Farabaugh arrived with his drug-sniffing dog, Trooper Menges told Mr. Barbee that a canine officer would be walking his dog around the car. *Barbee*, at ¶3. Trooper Farabaugh testified that, before he could begin his normal search pattern, the dog pulled him toward the open passenger side window. The trooper testified that this behavior indicated that the dog has detected an odor of illegal drugs. The trooper then began walking around the car, and the dog alerted at the open driver's window by scratching and pawing into the window. *Barbee*, at ¶4.

Trooper Menges testified that after the dog alerted on the vehicle, he told Mr. Barbee that the officers were preparing to search it. He asked again whether the vehicle contained illegal drugs. According to Trooper Menges' testimony, Mr. Barbee looked down at the floor and, "huh-uh. . . . [H]e didn't answer [] no; he didn't answer [] yes." The troopers eventually found two bags of cocaine concealed in a speaker in the trunk of the car. *Barbee*, at ¶5.

The jury found Mr. Barbee guilty on both counts of possession of cocaine. He was sentenced to prison terms of four and three years, to be served consecutively. Mr. Barbee appealed, arguing that the trial court erred by denying his motion to suppress the fruits of the traffic stop and search of his vehicle. Mr. Barbee also argued that his convictions were based on insufficient evidence and were against the manifest weight of the evidence. The court of appeals affirmed the convictions, holding that the traffic stop, canine sniff, and subsequent search of the vehicle were each justified under the circumstances. The court of appeals also held that the convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. *Barbee*, at ¶6.

ARGUMENT

PROPOSITION OF LAW I

A trial court errs when it allows pre-arrest silence to be used to infer a criminal defendant's guilt, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

This Court has held that the use of a defendant's pre-arrest silence, as substantive evidence of guilt, violates the Fifth Amendment privilege against self-incrimination. *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, at paragraph one of the syllabus. In *Leach*, this Court agreed with the Sixth Circuit Court of Appeals' analysis that admitting evidence of pre-arrest silence as evidence of guilt substantially impairs the policies behind the privilege against self-incrimination and that the government's use of pre-arrest silence in its case-in-chief is not a legitimate governmental practice. *Leach*, at ¶28, citing *Combs v. Coyle* (C.A. 6. 2000), 205 F.3d 269. Pre-arrest silence may still be used to impeach a criminal defendant. *Leach*, ¶33.

Allowing the use of pre-arrest silence as evidence of guilt in the State's case-in-chief undermines the very protections the Fifth Amendment was designed to provide. *Leach*, at ¶31. Use of pre-arrest silence in the State's case-in-chief would force criminal defendants either to permit the jury to infer guilt from their silence or surrender their right not to testify and take the stand in order to explain their prior silence. *Leach*, at ¶31. And the State may argue inferences from the silence that are not reliable. A defendant's pre-arrest silence is inherently ambiguous and, therefore, not probative of guilt. *Leach*, at ¶34. In the face of police questioning, a suspect may remain silent for innocent reasons including fear of police, threats from another person not to speak to police, embarrassment about a relationship or conduct that is not necessarily criminal, or the belief that explaining his or her conduct is futile. *Leach*, at ¶34. Impermissible testimony regarding a defendant's pre-arrest silence may involve the fact that a person remained silent or

that he or she asserted the right to counsel in the face of questioning by law enforcement, when that testimony is used to infer the defendant's guilt. *Leach*, at ¶25.

In *Leach*, Mr. Leach made pre-arrest, pre-Miranda statements indicating that he wished to speak with an attorney before being questioned by the police regarding the offenses that he was eventually charged with committing. This Court held that the testimony regarding Mr. Leach's pre-arrest statements, regarding his wish to speak to an attorney before being voluntarily interviewed by the police, were used to infer Mr. Leach's guilt. *Leach*, ¶33-34. This Court held that that use of pre-arrest silence was impermissible, and affirmed the court of appeals' reversal of Mr. Leach's convictions. *Leach*, ¶38.

In the present case, Mr. Barbee remained silent, before his arrest, when questioned by law enforcement regarding the presence of contraband in the Cadillac. Mr. Barbee's position at trial was that he was not aware of the presence of cocaine hidden inside the Cadillac that he had borrowed. Mr. Barbee argued on appeal that his convictions for possession of cocaine were not supported by sufficient evidence and were against the manifest weight of the evidence. Mr. Barbee argued that the State had failed to demonstrate that he *knowingly* possessed the cocaine that was found inside a speaker in the truck of the car that he had borrowed from a third party. According to R.C. 2901.22(B), a person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he or she is aware that such circumstances probably exist. See R.C. 2901.22(B). The term "possess" is defined in R.C. 2925.01(K) as "having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." As part of its analysis regarding whether the State had demonstrated that

Mr. Barbee had knowingly possessed the cocaine hidden inside the Cadillac that he had borrowed from a third party, the court of appeals noted that circumstantial evidence has the same probative value as direct evidence. *Barbee*, at ¶26.

At trial, the State offered testimony that when Trooper Menges told Mr. Barbee that a canine officer had arrived and would be walking his dog around the car, Mr. Barbee “looked down and he started licking his lips [and] ... [h]is mouth went dry. And you could just ... see sweat start beading off his forehead.” Later, when the trooper told Mr. Barbee that the dog had indicated that illegal drugs were present and that the officers were prepared to search the Cadillac, Trooper Menges asked Mr. Barbee whether there were any drugs in the Cadillac. The trooper testified that Mr. Barbee did not give a clear answer, but rather “just looked down at the floor and ... didn’t answer me no; he didn’t answer me yes.” *Barbee*, ¶27.

Mr. Barbee’s position in the trial court, and on appeal, was that he did not know that the cocaine was inside the car that he had borrowed, and that as a result, he could not have knowingly possessed it. *Barbee*, ¶31. The court of appeals pointed to the trooper’s testimony regarding Mr. Barbee’s pre-arrest silence in the face of police questioning, regarding the existence of contraband in the car, as circumstantial evidence that Mr. Barbee had knowledge of the presence of that contraband. *Barbee*, at ¶27, 29, 33. The court of appeals reasoned that Mr. Barbee’s pre-arrest silence was circumstantial evidence capable of being used to infer his guilt. That reasoning is in contravention of this Court’s decision in *Leach*.

Mr. Barbee requests that this Court reverse and remand to the trial court for a new trial, during which Mr. Barbee’s pre-arrest silence may not be used to infer his guilt in violation of the Fifth Amendment privilege against self-incrimination.

PROPOSITION OF LAW II

Trial counsel provides ineffective assistance, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, by failing to object to testimony regarding a defendant's pre-arrest silence, when that testimony is used to infer the defendant's guilt.

Mr. Barbee's trial counsel was ineffective for failing to object to the use of Mr. Barbee's pre-arrest silence to infer his guilt regarding the charges of possession of cocaine. See Proposition of Law I. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance caused prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland* at 694.

Had Mr. Barbee's trial counsel objected, Mr. Barbee's pre-arrest silence would not have been available to infer his guilt. Alternatively, had Mr. Barbee's trial counsel objected to the use of pre-arrest silence to infer his guilt, the issue would have been properly preserved for appeal. As such, Mr. Barbee was denied the effective assistance of trial counsel. *Strickland* at 694-695.

PROPOSITION OF LAW III

A defendant is deprived of the effective assistance of appellate counsel when appellate counsel fails to raise a constitutional error on direct appeal.

A convicted criminal defendant is entitled to the effective assistance of appellate counsel on a first appeal as of right. *Douglas v. California* (1963), 372 U.S. 353; *Evitts v. Lucey* (1985), 469 U.S. 387, 396. Appellate counsel is ineffective if appellate counsel's performance is

objectively unreasonable, and if that deficiency substantially prejudices the defendant's appeal. *Strickland*, at 694-695.

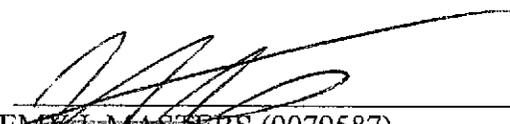
Mr. Barbee's appellate counsel was ineffective for failing to raise the use of Mr. Barbee's pre-arrest silence to infer his guilt, as described in Proposition of Law I. Mr. Barbee's Fifth Amendment right against self-incrimination was violated by the use of his pre-arrest silence to infer his knowledge of the existence of cocaine in the Cadillac that he had borrowed from a third party. And Mr. Barbee's trial counsel was ineffective for failing to object to the use of that testimony. See Proposition of Law II. Appellate counsel's failure to raise the pre-arrest silence and ineffective-assistance-of-counsel issues constituted deficient performance that prejudiced the outcome of Mr. Barbee's appeal. Thus, Mr. Barbee was denied the effective assistance of appellate counsel.

CONCLUSION

This case concerns a substantial constitutional question regarding the Fifth Amendment privilege against self-incrimination. This Court should grant jurisdiction in order to continue to prohibit the use of pre-arrest silence as substantive evidence of a criminal defendant's guilt and to insure that criminal defendants are afforded the effective assistance of trial and appellate counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this **Memorandum in Support of Jurisdiction of Appellant Darrick Barbee** has been sent via regular U.S. Mail to Billie Jo Belcher, Lorain County Assistant Prosecutor, 225 Court Street, 3rd Floor, Elyria, Ohio 44035, on this 2nd day of September, 2008.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.
Plaintiff-Appellee,	:	
vs.	:	On appeal from the Lorain County Court of Appeals, Ninth Appellate District Case No. 07CA009183
DARRICK BARBEE,	:	
Defendant-Appellant.	:	

APPENDIX TO

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT DARRICK BARBEE**

STATE OF OHIO
COUNTY OF LORAIN

FILED IN THE COURT OF APPEALS
)ss: LORAIN COUNTY NINTH JUDICIAL DISTRICT
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C.A. No. 07CA009183

STATE OF OHIO

Appellee

v.

DARRICK D. BARBEE, JR.

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 04CR065296

DECISION AND JOURNAL ENTRY

Dated: July 21, 2008

DICKINSON, Judge.

INTRODUCTION

{¶1} After stopping it for minor traffic violations, state troopers conducted a K9 sniff and subsequent search of the borrowed Cadillac Darrick Barbee Jr. was driving. The officers found approximately \$120,000 worth of cocaine in a speaker in the trunk. Mr. Barbee was convicted of two counts of possession of cocaine. This Court affirms his convictions because they are supported by sufficient evidence and are not against the manifest weight of the evidence and because the trial court did not err by admitting into evidence the fruits of the warrantless search of the vehicle.

FACTS

{¶2} Trooper Richard Menges testified that he stopped the Cadillac Mr. Barbee was driving because it was following another car too closely and it had only one working brake light. According to the trooper, he followed Mr. Barbee on Interstate 80 and paced him driving at

about 63 miles per hour while following approximately 20 feet behind another vehicle. After stopping him, Trooper Menges learned that Mr. Barbee had borrowed the vehicle from a friend and was driving from Detroit, Michigan, to New Castle, Pennsylvania. Trooper Menges separately questioned the passenger of the vehicle. The trooper became suspicious because he felt the responses of the two men were inconsistent and Mr. Barbee "appeared nervous" while being questioned.

{¶3} While the trooper was writing out warning slips for the traffic violations, he summoned a K9 officer to the scene. When Trooper Farabaugh arrived with his drug-sniffing dog, Trooper Menges told Mr. Barbee that a K9 officer would be walking his dog around the car. According to Trooper Menges, Mr. Barbee reacted physically to that news, indicating that he was becoming increasingly nervous.

{¶4} Trooper Farabaugh walked his dog, Caesar, around the vehicle. Trooper Farabaugh testified that, before he could begin his normal search pattern, Caesar pulled him toward the open passenger side window. The trooper testified that this behavior change indicates the dog has detected an odor of illegal drugs and he is "working through it." The trooper then began walking the search pattern around the car, and Caesar alerted at the open driver's window by scratching and pawing into the window. The entire dog sniff lasted less than one minute.

{¶5} According to Trooper Menges, after the dog alerted on the vehicle, the trooper told Mr. Barbee that the officers were preparing to search it. He asked again whether the vehicle contained illegal drugs. Mr. Barbee looked down at the floor and said, "huh-uh. . . . [H]e didn't answer [] no; he didn't answer [] yes." The troopers found two Ziplock bags of cocaine concealed in a speaker in the trunk. One bag contained 249 grams of cocaine powder and the

other contained 249 grams of crack cocaine. Officer Menges testified that the street value of the controlled substances found in the Cadillac totaled approximately \$120,000.

{¶6} The jury found Mr. Barbee guilty on both counts of possession of cocaine. He was sentenced to prison terms of four and three years to be served consecutively. Mr. Barbee has appealed, arguing that the trial court erred by denying his motion to suppress the fruits of the traffic stop and K9 "search" of his vehicle. He has also argued that his convictions were based on insufficient evidence and were against the manifest weight of the evidence. This Court affirms the convictions because the traffic stop, K9 sniff, and subsequent search of the vehicle were each justified under the circumstances. Furthermore, the convictions were supported by sufficient evidence and were not against the manifest weight of the evidence.

THE TRAFFIC STOP

{¶7} Mr. Barbee's first assignment of error is that both the traffic stop and the "K-9 search" of his vehicle were illegal and, therefore, the trial court erred in failing to suppress the fruits of that search. Mr. Barbee has specifically argued that the stop was pretextual and the alleged traffic violations, if committed, were too minor to justify the stop.

{¶8} A motion to suppress evidence presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St. 3d 152, 2003-Ohio-5372, at ¶8. Therefore, a reviewing court "must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.*; but see, *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶14 (Dickinson, J., concurring). The reviewing court "must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Burnside*, 2003-Ohio-5372, at ¶8.

{¶9} In order to initiate a valid traffic stop, an officer must have a “reasonable suspicion that a motorist was violating a traffic law.” *State v. Poole*, 9th Dist. No. 2336-M, 1995 WL 338477, at *3 (June 7, 1995) (citing *State v. Carlson*, 102 Ohio App. 3d 585, 593 (1995)). Reasonable suspicion is “something less than probable cause.” *Carlson*, 102 Ohio App. 3d at 590. “[A] traffic stop will not be pretextual if the officer had specific and articulable reasons to believe the driver was violating the law.” *State v. Hunt*, 9th Dist. No. 94CA005795, 1994 WL 686834, at *2 (Dec. 7, 1994). “[A]ny violation of a traffic law gives rise to a reasonable suspicion to make an investigatory stop.” *State v. Johnson*, 9th Dist. No. 03CA0127-M, 2004-Ohio-3409, at ¶11 (citing *Whren v. United States*, 517 U.S. 806 (1996); *State v. Wilhelm*, 81 Ohio St. 3d 444 (1998)). The extent of the violation is not the issue. The question is whether the officer could articulate specific facts supporting a reasonable suspicion that any violation had occurred. *Id.* at ¶12. Once a traffic stop has been initiated, the detention may not last any longer than is “necessary to effectuate the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500 (1983).

{¶10} In this case, Trooper Richard Menges, the officer who initiated the traffic stop, testified at the suppression hearing that he saw the Cadillac and noticed that “its brake light was out.” As the trooper followed the Cadillac, he saw that it was following too closely behind the vehicle in front of it. The trooper initiated the traffic stop after he had observed what he believed to be two separate traffic violations.

{¶11} Mr. Barbee has argued that he did not violate the tail light requirement because Section 4513.05 of the Ohio Revised Code requires only one tail light that “shall be so wired as to be lighted whenever the headlights or auxiliary driving lights are lighted.” Trooper Menges, however, testified about an inoperable brake light rather than a tail light. Section 4513.071(A) of

the Ohio Revised Code requires all motor vehicles operated on a highway to have two or more functioning brake lights that are "actuated upon application of the service brake." There is an exception for passenger cars "manufactured or assembled prior to January 1, 1967." R.C. 4513.071(A). There was no evidence, however, that the Cadillac Mr. Barbee was driving on April 26, 2004, was nearly 40 years old, as would be required for it to fall under the exception. See *id.* At trial, the evidence revealed the Cadillac was a 1994 model. It is the apparent vintage of the vehicle, however, observable to the officer prior to the stop, that created a "reasonable suspicion that [Mr. Barbee] was violating a traffic law" by displaying only one operable brake light. See *State v. Poole*, 9th Dist. No. 2336-M, 1995 WL 338477, at *3 (June 7, 1995) (citing *State v. Carlson*, 102 Ohio App. 3d 585, 593 (1995)). Mr. Barbee did not offer any evidence at the suppression hearing tending to show that the Trooper's suspicion was not reasonable.

{¶12} Trooper Menges also testified that he observed the Cadillac following a vehicle too closely. He estimated the space between the vehicles to be approximately 20 feet. Section 4511.34(A) of the Ohio Revised Code forbids following "another vehicle . . . more closely than is reasonable and prudent, having due regard for the speed of [the] vehicle . . . and the condition of the highway." Trooper Menges's testimony supported a reasonable suspicion that Mr. Barbee was violating the law by following "more closely than [was] reasonable and prudent" under the circumstances. Mr. Barbee did not question the trooper about road conditions or vehicle speed or offer any evidence at the suppression hearing tending to show that the trooper's suspicion was not reasonable. The trooper's reasonable, articulable suspicion that Mr. Barbee was violating two separate traffic laws justified the stop.

THE DOG SNIFF

{¶13} Mr. Barbee has argued that the "K-9 [s]earch" of the vehicle was unreasonable because "[t]he [t]rooper had no articulable suspicion causing him to fear that Mr. Barbee was armed or that contraband would be found in the vehicle." An exterior dog sniff, however, is not a search within the meaning of the Fourth Amendment. *State v. Shook*, 9th Dist. No. 93CA005716, 1994 WL 263194, at *4 (June 15, 1994) (citing *United States v. Place*, 462 U.S. 696, 707 (1983)). Therefore, if a traffic stop is justified, and does not last any longer than necessary to effectuate the original purpose of the stop, an officer may simultaneously conduct a canine sniff of the exterior of the vehicle without any additional reasonable, articulable suspicion of criminal activity. *State v. White*, 175 Ohio App. 3d 302, 2008-Ohio-657, at ¶15 (citing *State v. Carlson*, 102 Ohio App. 3d 585, 594 (1995)).

{¶14} This Court has determined that the traffic stop in this case was justified by the trooper's reasonable suspicion that Mr. Barbee had committed two traffic violations. Trooper Menges testified at the suppression hearing that he was writing the warning citations for those violations when Trooper Farabaugh arrived with the drug-sniffing dog. Furthermore, the videotape revealed that the dog sniff lasted approximately one minute. As Trooper Menges had not yet completed the citations for the traffic violations, he did not need any additional suspicion or probable cause to justify the canine sniff of the vehicle. See *White*, 2008-Ohio-657, at ¶15 (citing *Carlson*, 102 Ohio App. 3d at 594; *State v. Shook*, 9th Dist. No. 93CA005716, 1994 WL 263194, at *4 (June 15, 1994)).

DRUG DOG RELIABILITY

{¶15} Mr. Barbee has argued that the search of the vehicle violated his constitutional rights to be free from unreasonable search and seizure because the troopers lacked probable

cause to justify it. Mr. Barbee bases this argument primarily on his assertion that the drug-sniffing dog used in his case "should not be deemed credible enough to establish probable cause to search the vehicle" because records are not kept regarding his reliability in the field. Specifically, Mr. Barbee was interested in learning how frequently Caesar has given a false alert when illegal drugs were not present.

{¶16} The evidence indicated that the dog handler in this case, Trooper Farabaugh, had been working as a dog handler with the Ohio State Highway Patrol for 13 years prior to Mr. Barbee's traffic stop. Trooper Farabaugh testified that he had been working with the dog, Caesar, for two years. He testified that Caesar is "extremely reliable." He also testified that, at the time of Mr. Barbee's traffic stop, Caesar was certified by both the North American Police Work Dog Association and the Ohio Police Officers Training Academy.

{¶17} Although Trooper Farabaugh was unable to provide field records as requested by the defense, he did provide training records. Trooper Farabaugh testified that, in addition to successfully completing initial specialized training, Caesar has been required to complete extensive ongoing training in order to maintain his certification with the Ohio State Highway Patrol. The trooper testified that Caesar is trained to detect five different drugs. At least once or twice per month, Trooper Farabaugh meets with other dog handlers to hide small amounts of these drugs in various areas to practice searching with their dogs. The dogs' various behavioral changes and indications are recorded in the training record. Trooper Farabaugh testified that Caesar is tested with "blank cars, as well as ones with drugs in them." According to Trooper Farabaugh, this frequent, ongoing training helps the dog improve its skills and helps the handler to recognize the dog's specific behavioral changes when drugs are detected and to eliminate any

tendency to unconsciously cue the animal. The trooper testified that Caesar has passed all of his ongoing training evaluations.

{¶18} This Court has previously held that, “once a trained drug dog alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband.” *State v. Carlson*, 102 Ohio App. 3d 585, 600 (1995) (citing *Shook*, 1994 WL 263194 at *10)). In *Carlson*, however, the reliability of the individual dog was not directly challenged.

{¶19} A defendant did challenge a dog’s reliability in a later case in which this Court held that “[t]he dog’s alert on [the] pickup truck provided probable cause to believe that illegal drugs would be found in it.” *State v. Anderson*, 9th Dist. No. 95CA006052, 1995 WL 734036, at *4 (Dec. 13, 1995). In that case, the evidence included real world statistics on the field accuracy of the drug-sniffing dog. The defendant argued, however, that because drugs were found in just 61% of the dog’s positive alert incidents, “the chances of finding contraband based upon the ‘alert’ of this dog would be approximately the same as flipping a coin.” *Id.* This Court has defined probable cause for a search based on a dog’s alert as “a fair probability” of finding contraband in a particular place. *Id.* This Court determined that the evidence in *Anderson* was sufficient to find that an alert from that dog provided “a ‘fair probability’ that drugs would be found in a vehicle on which the dog . . . alerted.” *Id.* (quoting *State v. Carlson*, 102 Ohio App. 3d 585, 600 (1995)).

{¶20} In the 2004 case of *State v. Nguyen*, the Sixth District Court of Appeals directly faced the question of whether “real world reports of [the particular dog’s] performance in the field are material to [the defendant’s argument] of lack of probable cause to conduct a warrantless search of [defendant’s] motor vehicle.” *State v. Nguyen*, 157 Ohio App. 3d 482,

2004-Ohio-2879, at ¶52. After an extensive survey of state and federal case law, the Sixth District adopted the majority view that “proof of 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. Therefore, “the fact that the trooper cannot provide a percentage of alleged false alerts is immaterial to a determination of [the dog’s] reliability.” *Id.* at ¶63. Although testimony regarding a particular dog’s performance history, health, or quality of training could call into question the reliability of a particular dog, a trial court may properly find “from the uncontested training and certification evidence that [the dog] was [] sufficiently trained and reliable.” *State v. Calhoun*, 9th Dist. No. 94CA005824, 1995 WL 255929, at *4 (May 3, 1995); see *Nguyen*, 2004-Ohio-2879, at ¶65 (Singer, J., concurring).

{¶21} In this case, Mr. Barbee did not question the quality of Caesar’s training or the validity of his certifications. Likewise, there was no question regarding Caesar’s health at the time of the stop. Trooper Farabaugh testified that he is an experienced dog handler who had been working with Caesar for two years before this stop. Although the training records were not offered into evidence at the suppression hearing, the transcript reveals that the State supplied Mr. Barbee with voluminous records showing that Caesar had performed well in training. The evidence in this case was sufficient for the trial court to determine that Caesar was sufficiently trained and reliable for his alert to give the troopers probable cause to search the vehicle.

{¶22} The trial court properly overruled Mr. Barbee’s motion to suppress the evidence obtained in the warrantless search of his vehicle. The traffic stop, the dog sniff, and the subsequent search were reasonable under the circumstances. Mr. Barbee’s first assignment of error is overruled.

SUFFICIENCY

{¶23} Mr. Barbee has argued that the trial court incorrectly denied his motions for acquittal because his convictions were not supported by sufficient evidence. Under Rule 29(A) of the Ohio Rules of Criminal Procedure, a defendant is entitled to acquittal on a charge against him “if the evidence is insufficient to sustain a conviction” Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it would have convinced an average juror of Mr. Barbee’s guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶24} Mr. Barbee was convicted of two counts of violating Section 2925.11(A) of the Ohio Revised Code by knowingly possessing crack cocaine in an amount exceeding 25 grams, a first-degree felony, and by knowingly possessing non-crack cocaine in an amount between 100 and 500 grams, a second-degree felony. Mr. Barbee has argued that the State failed to present any evidence that he knew there was cocaine in the trunk of the car he had borrowed from a friend.

{¶25} According to the Ohio Revised Code, “[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B). The term “possess” used in R.C. 2925.11(A) is defined in R.C. 2925.01(K) as: “having control over a thing or substance, but may

not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.”

{¶26} “Possession may be actual or constructive.” *State v. Collins*, 9th Dist. No. 23005, 2006-Ohio-4722, at ¶11 (quoting *State v. Kobi*, 122 Ohio App. 3d 160, 174 (1997)). “Constructive possession exists when an individual is able to knowingly exercise dominion or control over an object, even though it is not within his immediate physical possession.” *State v. Ruby*, 149 Ohio App. 3d 541, 2002-Ohio-5381, at ¶36. “[O]wnership need not be proven to establish constructive possession.” *Collins*, 2006-Ohio-4722, at ¶11. “Readily usable drugs in close proximity to an accused may constitute sufficient circumstantial evidence to support a finding of constructive possession.” *Ruby*, 2002-Ohio-5381, at ¶36 (citing *State v. Brown*, 2d Dist. No. 17891, 2000 WL 966161 (July 14, 2000); *State v. Scalf*, 126 Ohio App. 3d 614 (1998)). “[T]he crucial issue is not whether the accused had actual physical contact with the article concerned, but whether the accused was capable of exercising dominion or control over it. *Id.* at ¶30 (citing *State v. Brooks*, 113 Ohio App. 3d 88 (1996)). Furthermore, circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, 61 Ohio St. 3d 259, 272 (1991).

{¶27} Mr. Barbee was caught driving a borrowed Cadillac with \$120,000 worth of cocaine in the trunk. There was no evidence that Mr. Barbee did not have access to the trunk of the car he was driving. The State presented additional circumstantial evidence that Mr. Barbee knew the cocaine was there. Trooper Menges testified that, when he told Mr. Barbee that a K9 officer had arrived and would be walking his dog around the car, Mr. Barbee “looked down and he started licking his lips [and] . . . [h]is mouth went dry. And you could just . . . see sweat start beading off his forehead.” Later, when the trooper told Mr. Barbee that the dog had indicated that illegal drugs were present and the officers were preparing to search the vehicle, Trooper

Menges asked Mr. Barbee if there were any drugs in the car. According to the trooper, Mr. Barbee did not give a clear answer, but "just looked down on the floor and . . . didn't answer me no; he didn't answer me yes."

{¶28} Furthermore, it was not a small quantity of cocaine that the troopers found concealed in the trunk. It is unlikely that Mr. Barbee's friend lent him the vehicle for a lengthy drive across three states without mentioning that the trunk held \$120,000 worth of cocaine. The Third District Court of Appeals has recognized that, the greater the amount of illegal drugs involved, the greater the likelihood that the defendant had the culpable mental state of knowing the drugs were present. See *State v. Chapman*, 73 Ohio App. 3d 132, 138 (1992) (citing *State v. Dick*, 3d Dist. No. 13-89-48, 1991 WL 44168 at *3 (Mar. 22, 1991)). That seems to ring true under the circumstances of this case.

{¶29} Viewing the evidence in a light most favorable to the prosecution, it was sufficient to convince an average juror beyond a reasonable doubt that Mr. Barbee knowingly possessed the cocaine the troopers found in the trunk of the Cadillac. Therefore, the trial court correctly denied Mr. Barbee's Criminal Rule 29 motions for acquittal. Mr. Barbee's assignment of error regarding the Rule 29 motions is overruled.

MANIFEST WEIGHT

{¶30} Mr. Barbee's final assignment of error is that his convictions are against the manifest weight of the evidence. When a defendant argues that his convictions are against the manifest weight of the evidence, this Court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a

manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶31} Mr. Barbee has argued that his evidence was more persuasive than that offered by the State. Mr. Barbee, however, did not present any witnesses or other evidence at his trial. Mr. Barbee did not deny having access to the trunk. In fact, at least one of the troopers testified that suitcases were found in the trunk. Mr. Barbee’s lawyer argued that those suitcases were evidence that Mr. Barbee and his passenger were telling the truth about driving to Pennsylvania. Mr. Barbee also did not attempt to prove that the cocaine in the trunk belonged to his passenger. He merely theorized, through the arguments of his lawyer and his cross-examination of the State’s witnesses, that that owner of the vehicle loaned him the car without mentioning the large quantity of cocaine in the trunk.

{¶32} There was no direct evidence regarding who owned the drugs or who had placed them inside the vehicle. In closing argument, Mr. Barbee’s lawyer pointed out that no additional contraband, cash, or drugs were found in the car or on Mr. Barbee’s person. He suggested to the jury that someone who knew he was carrying \$120,000 worth of drugs would certainly also carry a gun. While the circumstantial evidence in this case may allow for alternative interpretations, that “is insufficient for reversal on a manifest weight review where [this Court is] guided by the presumption that the jury’s interpretation was correct.” See *State v. Figueroa*, 9th Dist. No. 22208, 2005-Ohio-1132, at ¶10.

{¶33} In light of the evidence discussed in Mr. Barbee’s previous assignment of error, this Court cannot conclude that the jury lost its way and created such a manifest miscarriage of justice that Mr. Barbee’s conviction must be reversed and a new trial ordered. Accordingly, the

verdict was not against the manifest weight of the evidence. Mr. Barbee's final assignment of error is overruled.

CONCLUSION

{¶34} The traffic stop was justified by the trooper's reasonable suspicion that Mr. Barbee had violated two traffic laws. The dog sniff was not a search and was conducted while the first trooper was completing warning slips for the traffic violations. The dog's alert supplied the troopers with probable cause to search the vehicle. Therefore, the trial court correctly denied Mr. Barbee's motion to suppress the fruits of that search.

{¶35} Mr. Barbee's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. Therefore, the decision of the trial court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

Clair E. Dickinson
CLAIR E. DICKINSON
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR

APPEARANCES:

DENISE G. WILMS, Attorney at Law, for appellant.

DENNIS WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for appellee.