

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff - Appellee

vs.

SUDINIA JOHNSON,
Defendant – Appellant,

: On Appeal from the
: Court of Appeals,
: Twelfth Appellate District,
: Butler County, Ohio

: **11-0033**

: Court of Appeals
: Case No. CA2009-12-307

: Trial Court No. CR2008-11-1919

MEMORANDUM IN SUPPORT OF JURISDICTION

OF APPELLANT SUDINIA JOHNSON

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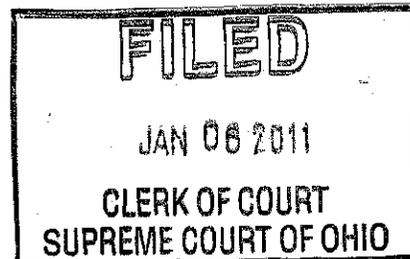


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IN THE
SUPREME COURT OF OHIO

STATE OF OHIO : NO.
Plaintiff-Appellee :
vs. :
SUDINIA JOHNSON : MEMORANDUM IN SUPPORT
Defendant-Appellant : OF JURISDICTION

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

For the vast majority of Ohioans a car is the only reliable method of travel to conduct both private and public affairs. The use of GPS tracking technology permits law enforcement to track more than just a person's location and movement from one place to another on public streets and it is more than just another means of visual surveillance but by enhanced methods. It permits law enforcement to compile a digital history of a person's associations, affiliations, and preferences from the intimate to public and from the personal to political. It permits the government to maintain a complete profile on anyone it chooses through the uninterrupted recording of a person's movements in both public and private spaces for an unlimited period of time.

The decision below holds a surreptitious placement of a GPS device and continuous remote tracking may be done without judicial oversight and does not conflict with the United States of Ohio constitutions. The tracking may be for as long as the government chooses

regardless of whether probable cause exists. This Court is asked to decide whether such unprecedented discretion is something our state and/or federal constitutions have surrendered to the government as a consequence of technological advancements and the never ending desire of government to obtain information.

The request before this court to provide guidance in the face of advancing technology was recognized almost 50 years ago in *Lopez v. United States*:¹

“The fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional question under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system. “

As cheaper and greater technology is available to law enforcement, we become increasingly unable to protect and preserve our right to privacy. GPS devices are effective tools which should be available to law enforcement. Because GPS devices are qualitatively different than just augmenting visual surveillance, judicial authorization is necessary before police may use them in Ohio.

As technology advances we cannot function in society without protections for our privacy. The Supreme Court found Mr. Katz had a protected privacy right in his conversation in a public phone booth despite the existence of technology used by law enforcement.² Before *Katz* it might have been easy to say” if you do not want to have your conversation overheard, do not go out and use a public phone.” After *Katz*, a certain aspect of privacy was protected despite entering into the public view. It is hardly reasonable in this day and age to require a person who does not want to risk GPS monitoring to never use a car.

¹ 373 U.S. 427 (1963)(Warren, C.J., concurring)

² *Katz v. United States*, 389 U.S. 347 (1967)

Today, Americans are engaged in discussions on what aspects of our lives should remain private and what activities the Government has a right to view monitor and maintains records. Airports searches of laptops, body scans by TSA officials, gathering cell phone records, obtaining internet search records have all been the subject of reports on the radio, newspapers and on television. Legislative hearings at the local and national level have begun to investigate the extent and scope of the government's attempt to gather more information about the movements, location and associations of its citizens.

New technologies bring new opportunities for the government to gather more information on its citizens. New technologies permit the government to watch more people, monitor more communications and gather personal information on levels never imagined even ten years ago. As the government moves into areas never considered before, the question of legality arises. What aspects of a person's life may they demand privacy or constitutional protection? Government agencies, citizens and the keepers of information question the use of new technologies and whether each meets the definitions of "legal." All look to the courts for answers.

One may look to decisions such as *Katz*, *Knotts* or *Kyllo* for guidance in determining whether court authorization is necessary before using a new technology to gather information or monitor a person.³ However, the United States Supreme Court declared it was not offering a comment on such guidance when it decided *Knotts*; if "24 hours surveillance of any citizen of this country will be possible, without judicial knowledge or supervision ...dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable."

³ *United States v. Knotts*, 460 U.S. 27 (1983); *Kyllo v. United States*, 533 U.S. 27 (2001).

Some guidance is provided by this court's decision in *State v. Smith* declaring police need to obtain a judicially approved warrant before searching a cell phone legally seized during a legal arrest.⁴ This Court in *Smith* was faced with the definition of "container" as it had been applied to common storage containers with physical items inside. In its analysis, this court noted the changes in technology, and expanded definition of "storage device". It also took note of the split of authority on the issue outside of Ohio. In an effort to make it clear in Ohio for any person or law enforcement agent questioning whether a warrant was necessary before searching information stored in a cell phone, this court issued its decision in *Smith*.

In Ohio one may look to whether federal agencies seeking to use GPS devices first apply to a judge for permission. In Ohio, federal prosecutors in Columbus advise all federal agencies to obtain a warrant.⁵

The courts outside of Ohio are releasing opinions requiring and not requiring the approval of a judge before a GPS device may be placed on a car on a public street in an effort to track a person whom they believe to be driving that car. In New York state court and DC federal Circuit court, appellate decisions require a warrant be obtained before police may monitor a person's movements.⁶ However, decisions from the 9th and 8th Circuit find a warrant is not necessary.⁷ In Ohio, no federal court has issued an opinion on the necessity of judicial oversight before 24 hours surveillance on a person is authorized. Three state courts have held the use GPS surveillance without judicial approval violates state constitutional protections afforded its

⁴ *State v. Smith*, 2009-Ohio-6426

⁵ <http://www.policeone.com/police-products/technology/gps/articles/2001013-GPS-helping-Ohio-police-to-nab-suspects/>

⁶ *People v Weaver*, 12 N.Y.3d 433, 909 N.E.2s 1195; *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010)

⁷ *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010); *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010)

residents.⁸ The last week of 2010 produced a trial court decision from Delaware declaring judicial approval is necessary before GPS devices may be used on a suspect's car to track its movements.⁹

Law enforcement, lower courts in Ohio and persons traveling in cars in Ohio need guidance from this Court as to whether the oversight of a detached and neutral magistrate, in advance, through a warrant supported by probable cause is needed before the use of a secret tracking device by law enforcement.

STATEMENT OF THE CASE AND FACTS

Butler County Sheriff Mike Hackney received information Mr. Sudinia Johnson was possibly involved in the trafficking of cocaine. The person providing the information told police Mr. Johnson was due to acquire more cocaine in the future. Nothing was provided as to the date of the future trafficking offense or any details on who was involved or the manner in which it would happen. Only that it might involve Chicago. "Additional information received...was Sudinia Johnson was using a van during this process, I guess to move these kilos." (Tp. 11) No other information was obtained or sought. The source of this information was described as "reliable" but because no warrant was ever sought by law enforcement there is no record offering a basis for this conclusion used by law enforcement.

There is no record of any efforts made by law enforcement to verify any information provided by the source. There is no testimony of any corroboration by police of any fact, rumor or insinuation made.

⁸ *Washington v. Jackson*, 150 Wash.2d 251, 76 P.2d 217 (2003); *Oregon v. Campbell*, 306 Or 157, 759 P.2d 1040 (1988); <http://www.delawareonline.com/article/20101228/NEWS01/12280338/Judge-says-cops-can-t-track-with-GPS>

⁹ *Id*

On October 23, 2008, police went to Mr. Johnson's home armed with a description of his van. Without benefit of a warrant, police surreptitiously placed a GPS tracking device on the van during the night. After placing the GPS device on the van, other officers took the trash from in front of Mr. Johnson's home. The trash was later examined and a receipt for gas being purchased in the Chicago area was observed by police.

Police monitored the location, movement and activity of Mr. Johnson's van for 6 days by use of a computer. Police are able to obtain a longitude and latitude reading which is accurate to within 6 feet through satellite surveillance. Police have the ability to "ping" the location of the GPS tracked vehicle every minute is so desired. The only limitation is the battery life of the equipment being used.

On October 28, 2008 police monitored the van's movement from Ohio to Illinois. Noting the van was at a shopping center and at a residence in suburban Chicago, police in Butler County sought the assistance of other law enforcement to visually monitor the car, follow it and report on the occupants. These activities occurred in Illinois, Indiana and Ohio. Police in Ohio mobilized from the state border to Hamilton to follow, monitor and stop the van.

Ohio officers followed Mr. Johnson as he crossed into Ohio from Indiana. He was followed by officers into Hamilton, Ohio. No criminal or traffic offenses were observed the entire time the van was followed until it reached Hamilton, Ohio.

The investigating officers ordered a patrol car to conduct a "probable cause" stop of the van driven by Sudinia Johnson. Following that order a patrol car pulled in behind Mr. Johnson and in short time conducted a stop of the van. The basis for the stop was reportedly for an "improper change of course." Officers from many cars surrounded the van at gun point to effectuate the "traffic stop" and ordered Mr. Johnson from his van. The van was physically

searched by officers. The van was then driven to a new location. Mr. Johnson was handcuffed and placed in the back seat of a police car and eventually moved from the “traffic stop” location to a new location for additional investigation. No contraband was ever located in the van driven by Mr. Johnson.

Mr. Otis Kelly was driving a car that was traveling from Illinois to Ohio with Mr. Johnson’s van. He was the subject of a “traffic stop” at another location. Mr. Sudinia Johnson was taken from the place where he “committed the traffic violation” to where Mr. Kelly and police were. At this location, police searched Mr. Kelly’s car and found cocaine hidden in a secret location in Mr. Kelly’s car.

The Twelfth District Decision

On appeal, Sudinia Johnson raised two issues for review; the trial court erred when it ruled police did not need judicial approval to use a GPS tracking device, and the stop and continued detention of Johnson was an improper seizure which invalidated the subsequent searches.

The Twelfth District Court of Appeals issued a decision affirming the order of the trial court overruling the Motion to Suppress. The court found placing the GPS on the van and monitoring its movement did not constitute a search or seizure. Further, it found no search occurred when law enforcement continuously tracked and recorded all movements by Johnson 24 hours a day for almost a week covering at least three states. The court analogized the GPS device did what law enforcement could have done in physical surveillance and therefore was no more intrusive than simply following Johnson 24 hours a day, day in and day out. Finally, it rejected persuasive authority offered by Johnson from three state courts finding warrantless use of GPS tracking devices violated state constitutional protections which were greater in scope

than the 4th Amendment. The court stated Ohioans have no greater protection under the Ohio Constitution than are provided by the United States Constitution.

Proposition of Law: Surreptitious placing of a GPS monitoring device in an individual's vehicle by law enforcement and uninterrupted electronic tracking and recording of movements without spatial or temporal limitation is constitutionally impermissible absent a warrant based upon probable cause

ARGUMENT IN SUPPORT OF APPELLANT'S PROPOSITION OF LAW

The Installation of a GPS tracking device and subsequent tracking and recording of its complete and uninterrupted pattern of movements is a search

Application of the Fourth Amendment depends on whether the person invoking its protection can claim a justifiable and reasonable or a legitimate expectation of privacy has been invaded by Government action.¹⁰ The surreptitious installation, unlimited 24/7 monitoring and recording of a driver's movement conducted from a remote location infringes on an expectation of privacy which society is prepared to recognize as reasonable. Its installation and use by law enforcement is a search. In addressing the question, this court should not ignore the fundamental precept what an individual "seeks to preserve as private, even in an area accessible to the public, may constitutionally protected[.]"¹¹

While there may be a reduced expectation of privacy in a car, no court has held there is none.¹² While a driver on a public road may expect to be seen or pulled over, that does not equate to a reasonable expectation she will be subject to the trespass of a secret warrantless installation of a tracking device to permit the monitoring of the long term pattern of her every movement, associations and activity.

¹⁰ *United States v Knotts*, 460 U.S. 27 (1983).

¹¹ *Katz*, at 351-353. See *Bond v. United States*, 529 U.S. 334 (2000)(knowing exposure of luggage to public did not eliminate privacy right or constitute knowing exposure to all law enforcement tactics.)

¹² See *Cardwell v Lewis*, 417 U.S. 583, 590 (1974).

The secret installation of a monitoring device into a person's private vehicle that affords law enforcement spatially and temporarily unlimited surveillance capabilities should be deemed a trespass and accordingly constitutes an unreasonable search absent the issuance of a warrant by a neutral magistrate.

Requiring a warrant based upon probable cause is a fair balance of law enforcement interest and individual privacy rights

A presumption has been created that a warrant is required unless not feasible for a search to be reasonable.¹³ To require police "whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure" serve to ensure a determination of the reasonableness of the search result from a neutral balancing of the need for the intrusion and the severity of the invasion on an individual's legitimate expectation of privacy.¹⁴ The balancing test in GPS cases should be done in advance of its installation and any monitoring.

In *Karo*, the government argued it would be an undue burden to do so in beeper cases. The Supreme Court rejected this argument. It is precisely because law enforcement cannot know if the monitoring will occur only on public roads, or traverse into a driveway, a private garage, across state lines or onto private land, that pre-authorization through the warrant application is necessary.

Seeking judicial approval before installing a tracking device cannot be described as a hardship resulting in significant delay of the investigation. This is especially true given the utility of the device's information is generally found over the course of the sustained period of monitoring. Given the minimal time required for the actual surreptitious installation, which is a prerequisite for the effectiveness as a crime fighting tool, a brief lapse of time to secure a warrant

¹³ See eg *United States v Leon*, 468 U.S. 897 (1984); *Mincey v. Arizona*, 437 U.S. 385 (1978) and *Henry v United States*, 361 U.S. 98 (1958).

¹⁴ See *Terry v Ohio* 392 U.S. 1 (1968).

would not impede the usefulness of the device. Practically speaking a warrant may be secured in a manner of hours.

A warrant based upon probable cause should be required before implantation of a GPS monitoring device in an individual's car by law enforcement

The unsupervised use of this technology is not compatible with any notion of personal privacy or ordered liberty. This is especially true when placed in the hands of agents of the state “engaged in the often competitive enterprise of ferreting out crime.”¹⁵ Consider what information may be learned on and on. A highly detailed profile can be assembled from a laptop computer not based on where we go but by inferences of our associations and of a pattern of pursuits. The unsupervised use of multiple GPS devices will provide information not only on where people are traveling, but who they are meeting and when they are meeting.

The science discussed in *Knotts* is quite simple. It did not provide much more than could be observed by the human eye. The Court correctly noted the technology “in this case” raised no Fourth Amendment issue.¹⁶ It very boldly reserved for a future time the question of whether a 4th Amendment issue would be posed if “twenty four hour surveillance of any citizen in this country [were] possible, without judicial knowledge or supervision.”¹⁷

It is well established that travel in a car provides a diminished expectation of privacy. It is not so diminished that it should be deemed consent to unsupervised disclosure to police of all that GPS devices will reveal. The courts have held a ride in a car does not deprive the occupants of any reasonable expectation of privacy.¹⁸ Most recently in *Arizona v. Gant*, the Court reaffirmed this view when it stated; “the state seriously undervalues the privacy interests at stake.

¹⁵ *Johnson v. United States*, 333 U.S.10, 13 (1948)

¹⁶ *Knotts* at 282

¹⁷ *Id* at 283.

¹⁸ See *Adams v. Williams*, 407 U.S. 143, 146, (1972).

Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home...the former interest is nevertheless important and deserving of constitutional protection.”¹⁹

The reduced expectation of privacy retained in a person's car is adequate to support his position his right to be free of unreasonable searches and seizures was violated. The invasion of privacy resulting from the prolonged use of the GPS device is inconsistent with the reasonable expectation of privacy.

This issue is still subject to debate in federal courts. States presented with the issue have not disagreed on the issue. Courts in Washington, Oregon, New York and now Delaware all require police to seek judicial permission before using GPS tracking devices on residents.²⁰ Each decision has found a basis in its state constitution for support. In Ohio, our courts have on many occasions interpreted the Ohio Constitution to provide greater protections in the area of search and seizure.²¹ This court should find persuasive the holdings of other state courts when addressing this issue holding the warrantless use of tracking devices is inconsistent with the protections guaranteed by their state constitutions. The *Jackson* court noted the use of a GPS device was not merely an augmentation of an officer's senses but the means of surveillance permitted the state to accumulate vast amounts of information on associations and activities.

The New York Court of Appeals ruled the placement of a GPS device was a search. The court found judicial oversight is required absent exigent circumstances. The determination made after applying both federal and state constitutional analysis to the facts.²²

¹⁹ *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710 (2009) at *8.

²⁰ *Washington v Jackson*; *Oregon v. Campbell*;

<http://www.delawareonline.com/article/20101228/NEWS01/12280338/Judge-says-cops-can-t-track-with-GPS>

²¹ See *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175.

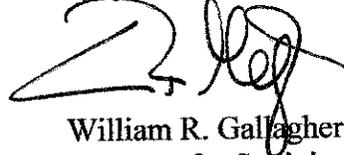
²² *People v Weaver*, 12 N.Y.3d 433; 909 N.E.2d 1195 (May 12 2009).

Technological advances have provided useful tools for law enforcement to aid in the detection of criminal activity and many more will be available in the future. Without judicial oversight, the use of these extremely powerful devices presents an unacceptable risk for abuse. Absent exigent circumstances, the installation of a GPS device to monitor an individual's whereabouts requires a warrant supported by probable cause.

CONCLUSION

For all the reasons presented above, jurisdiction should be granted, briefing and oral arguments should be ordered on the issue presented by Mr. Johnson in this Memorandum.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify I have served a copy of this Memorandum in Support of Jurisdiction by US mail to the Michael Oester, Assistant County Prosecuting Attorney, Butler County Prosecutor's Office this 6th day of January 2011.

A handwritten signature in black ink, appearing to read 'William Gallagher', with a stylized flourish at the end.

William Gallagher
Attorney for Sudinia Johnson

FILED

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CINDY CARPENTER
CLERK OF COURTS

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

SUDINIA JOHNSON,

Defendant-Appellant.

CASE NO. CA2009-12-307

JUDGMENT ENTRY

FILED BUTLER CO.
COURT OF APPEALS

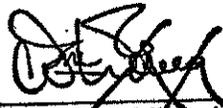
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CINDY CARPENTER
CLERK OF COURTS

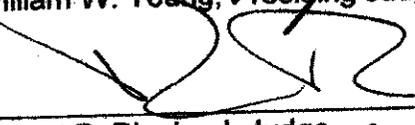
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

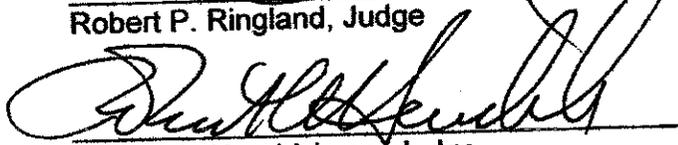
Costs to be taxed in compliance with App.R. 24.



William W. Young, Presiding Judge



Robert P. Ringland, Judge



Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

SUDINIA JOHNSON,

Defendant-Appellant.

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CASE NO. CA2009-12-307

OPINION
11/29/2010

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-11-1919

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William R. Gallagher, The Citadel, 114 East Eighth Street, Cincinnati, Ohio 45202, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Sudinia Johnson, appeals his conviction in the Butler County Court of Common Pleas for one count of trafficking in cocaine and the accompanying specifications and forfeitures. We affirm the decision of the trial court.

{¶2} Detective Mike Hackney, a supervisor in the drug and vice investigations unit for the Butler County Sheriff's Office, received information from three separate confidential

informants that Johnson was trafficking in cocaine. Specifically, Hackney was informed that Johnson recently dispersed multiple kilos of cocaine, Johnson was preparing to acquire seven more kilos, and that Johnson moved the cocaine in a van. According to Hackney's testimony at the motion to suppress hearing, he had been familiar with Johnson possessing and driving a white Chevy van at the time the informants gave him the information.

{¶3} Hackney and two other agents performed a trash pull at Johnson's residence, and while there, attached a GPS device to Johnson's van that was parked on the east side of the road opposite the residences. Hackney testified that he attached the GPS device to the metal portion of the undercarriage of the van. Hackney stated that the device was "no bigger than a pager," and was encased in a magnetic case so that the device did not require any hard wiring into the van's electrical systems.

{¶4} Hackney also testified regarding the information the agents received from the trash pull. Within Johnson's trash, the agents found credit card transaction receipts from gas purchased on the same day from stations in Cincinnati and Chicago.

{¶5} After attaching the device, the agents intermittently tracked the GPS through a secured website. The Tuesday after installation, the GPS indicated that the van was located in a shopping center in the area of Cook County, Illinois. Hackney began making arrangements with law enforcement in Chicago to verify the location of Johnson's van. Bob Medellin, a retired Immigration and Customs officer and employee of the Butler County Sheriff's Office, informed Hackney that he was from the Chicago area and was familiar with the shopping center. Medellin then contacted his brother, Rudy Medellin, also a retired Immigration and Customs officer, who agreed to go to the shopping center and verify the location of Johnson's van.

{¶6} Medellin arrived at the Chicago shopping center and confirmed the van's location, and that the van matched the description and license plate number of the van

Johnson was known to possess and drive. Hackney and Medellin continued to communicate, and Medellin reported that two men were in the van. Medellin then followed the van from the shopping center to a residence in the Chicago area, where he saw the two men exit the van and enter the residence.

{¶7} Medellin saw one man, later identified as Johnson, exit the residence carrying a package or box, and enter the van. Medellin saw the other man, later identified as Otis Kelly, drive away in a Ford that had Ohio plates. Medellin followed Johnson's van and the Ford until they reached the Butler County area, and communicated with Hackney via cell phone during the surveillance.

{¶8} Hackney continued to contact law enforcement officials throughout Ohio, readying them to assist once Johnson and Kelly entered Ohio from Indiana. Hackney drove toward Cincinnati, and after coming upon Johnson's van, began to follow him. Hackney advised law enforcement officers to stop the van and Ford "if they were able to find probable cause to make a stop." Deputy Daren Rhoads, a canine handler with the Butler County Sheriff's Office, initiated a stop after Johnson made a marked lane violation.

{¶9} According to Rhoads' testimony, he spotted Kelly's Ford and Johnson's van and pulled out behind Johnson after another officer began following Kelly's Ford. Rhoads then observed Johnson's van cross over "the fault line before approaching the traffic light" at an intersection. At that point, Johnson's van was in the lane to travel straight through the intersection when instead of going straight, he made an "abrupt right turn," crossing over two lanes of traffic in the process.

{¶10} By the time Rhoads initiated the traffic stop, other officers were also in the position to offer back-up. Officers directed Johnson to exit his vehicle, and then escorted him onto the sidewalk so that Rhoads could deploy his canine partner. The canine made a passive response on the driver's side door and on the passenger's side sliding door. After

the canine walk-around, Johnson gave his consent to have the van searched.

{¶11} Rhoads and other officers performed a preliminary sweep of Johnson's van for narcotics, but did not find any drugs or related paraphernalia in the vehicle. During this time, police vehicles and Johnson's van were situated on the road. After the initial search, officers moved Johnson's van approximately one-tenth of a mile to the location where police had pulled over the Ford driven by Otis Kelly. Officers there had also deployed two canine units around Kelly's Ford, and the canines detected the presence of narcotics. The officers ultimately located seven kilos of cocaine within a hidden compartment in the Ford's trunk, and arrested Kelly for possession of cocaine.¹

{¶12} Once the van was situated at the second location, Rhoads continued his search with the help of an interdiction officer for the Ohio State Highway Patrol. The two concentrated on the undercarriage of the van, and looked for any hidden compartments that Rhoads may have missed during his preliminary search. No drugs were recovered from the van.

{¶13} During the search, Johnson was placed in the back of a police cruiser, and Agent Gregory Barber spoke to Johnson after he received his *Miranda* warning. According to Barber's testimony at the motion to suppress hearing, Johnson told Barber, "you guys got me." Officers later seized Johnson's keys and discovered that one of the keys on Johnson's key ring opened the hidden compartment in the Ford that contained the seven kilos of cocaine seized from Kelly's vehicle.

{¶14} Johnson was later transported to jail where he was Mirandized a second time before he continued his conversation with Barber. Johnson told Barber that he picked up the cocaine in Chicago and was going to sell it in Middletown in order to pay back money he

1. This court affirmed Kelly's conviction and sentence in *State v. Kelly*, Butler App. No. CA2009-10-252, 2010-Ohio-3560.

owed the original sellers in Chicago. Johnson also told Barber that he spent the rest of the money on televisions, shoes, clothing, and "a lot of shopping," and that all of the merchandise was located at his home. Barber applied for and was granted warrants to search Johnson's home and a storage unit. Officers executed the warrants and seized over 50 pairs of Nike Air Jordan shoes, all-terrain vehicles, four flat-screen televisions, clothing, a gun, and multiple vehicles.

{¶15} Johnson was indicted on single counts of trafficking in cocaine, possession of cocaine, and having weapons while under disability. Johnson filed multiple motions to suppress, arguing that law enforcement was required to seek a warrant before attaching the GPS device to his van, that the traffic stop was unlawfully initiated, that Johnson was detained beyond the time frame necessary to issue a ticket or warning, that the search warrants were not supported by probable cause, and that Johnson was denied his right against self-incrimination. After a hearing on the motions, the trial court denied each in turn.

{¶16} Johnson pled not guilty to the having weapons while under disability charge and was acquitted by the trial court. Johnson pled no contest to the remaining charges and specifications, and was found guilty by the trial court. After the counts were merged for sentencing, the trial court sentenced Johnson to a 15-year prison term and also found that the seized vehicles, televisions, shoes, clothing, and firearm were subject to forfeiture. Johnson now appeals the decision of the trial court, raising the following assignments of error.

{¶17} Assignment of Error No. 1:

{¶18} "THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRES [SIC] WHEN IT RULED POLICE DID NOT NEED A SEARCH WARRANT TO PLACE A GPS TRACKING DEVICE ON MR. JOHNSON'S CAR."

{¶19} In Johnson's first assignment of error, he asserts that the trial court erred by not

granting his motion to suppress regarding the placement of the GPS device without first obtaining a warrant. This argument lacks merit.

{¶20} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing the denial of a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, Butler App. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶12.

{¶21} The Fourth Amendment to the United States Constitution guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ***." In order to employ the Fourth Amendment protections, a defendant must have a "constitutionally protected reasonable expectation of privacy." *Katz v. United States* (1967), 389 U.S. 347, 360, 88 S.Ct. 507. The Supreme Court directs reviewing courts to consider a two-part test in order to determine whether the Fourth Amendment is implicated. "First, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo* (1986), 476 U.S. 207, 211, 106 S.Ct. 1809, citing *Katz* at 360.

{¶22} Johnson asserts that he had a reasonable expectation of privacy in his van so that law enforcement should have obtained a search warrant before placing the GPS device on the undercarriage of his van. However, we find that placing the GPS on the van and

monitoring its movement did not constitute a search or seizure under either the Federal or Ohio constitution.

{¶23} The Supreme Court has long held that there is no reasonable expectation of privacy in the exterior of a car because "the exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.'" *New York v. Class* (1986), 475 U.S. 106, 114, 106 S.Ct. 960. See, also, *United States v. Rascon-Ortiz* (C.A. 10, 1993), 994 F.2d 749, 754 (holding that "the undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy").

{¶24} Rather than merely looking under Johnson's undercarriage, Detective Hackney placed a magnetized GPS device on the van. Therefore, in order to determine whether Hackney placing the device constituted a search or seizure, we must first consider whether Johnson has demonstrated that he intended to preserve the undercarriage of his van as private.

{¶25} Johnson did not produce any evidence that demonstrated his intention to guard the undercarriage of his van from inspection or manipulation by others. During the motion to suppress hearing, Detective Hackney testified that while the other agents pulled Johnson's trash from the curb, he approached Johnson's van, laid down on the sidewalk, and placed the device under the passenger's side portion of the undercarriage. At the time Hackney approached the van and attached the device, Johnson's van was parked on the public street, opposite the residences.

{¶26} During cross-examination, Johnson did not challenge Hackney's statement regarding the public way in which Johnson's van was situated, or offer any evidence that Johnson attempted to keep the van private from public scrutiny. See *United States v. Pineda-Moreno* (C.A. 9, 2010), 591 F.3d 1212, 1215 (upholding the warrantless placement of a GPS device after finding appellant had no reasonable expectation of privacy in a vehicle

parked in his driveway where the appellant "did not take steps to exclude passerby [sic]" from the area); and *United States v. Marquez* (C.A. 8, 2010), 605 F.3d 604, 610, (holding that a "warrant is not required when, while the vehicle is parked in a public place, [law enforcement] install a non-invasive GPS tracking device on it for a reasonable period of time").

{¶27} According to Johnson's argument, a search and seizure also occurred because law enforcement was able to track the van's movement and collect information regarding where Johnson traveled and where his van was located on any given occasion. However, like other courts, we find this argument meritless.

{¶28} Supreme Court precedent has established not only that a vehicle's exterior lacks a reasonable expectation of privacy, but also that one's travel on public roads does not implicate Fourth Amendment protection against searches and seizures. In *United States v. Knotts* (1983), 460 U.S. 276, 103 S.Ct. 1081, the Court reversed the decision of the Eighth Circuit to suppress evidence that was gathered as a result of a warrantless installation of a beeper within a drum of chloroform. The suspect loaded the drum into his car, and law enforcement tracked the beeper to determine the driver's final destination.

{¶29} After citing *Katz's* test for determining the applicability of the Fourth Amendment, the Court determined that "one has a lesser expectation of privacy in a motor vehicle because its function is transportation ***. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view." *Id.* at 1085. The Court went on to hold that "a person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.*

{¶30} In an attempt to combat this long-held precedence, Johnson now argues that the GPS device Hackney installed is different than the beeper discussed in *Knotts* because of technological advances and the ability of law enforcement to track suspects with

unparalleled accuracy. Johnson asks this court to depart from *Knotts*, and instead, apply principles set forth by the Supreme Court regarding private telephone calls or the use of hyper-technical instrumentalities to gather information on a suspect.

{¶31} In *Katz*, the Court addressed what rights are implicated by talking on the phone in a public phone booth, and held that, "the Government's activities in electronically listening to and recording the [suspect's] words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. 354.

{¶32} In *Kyllo v. United States* (2001), 533 U.S. 27, 121 S.Ct. 2038, the court was asked to decide whether law enforcement is required to obtain a warrant before using thermal imaging devices to detect drug-related paraphernalia and equipment within a suspect's home. The Court held that where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40.

{¶33} However, the use of a GPS device is dissimilar to the government tapping a phone booth to record private phone calls or using thermal imaging to discover details hidden in one's home. Unlike the defendants in *Katz* and *Kyllo*, Johnson made no attempt to make his activities private, nor did he assert any expectation of privacy. Instead, Johnson parked his van on a public street, did not take any precaution to exert a privacy interest over it, and then openly traveled on the road where any onlooker could see his movement and arrival. We also note that unlike the thermal imaging equipment used in *Kyllo*, GPS devices are readily available for purchase and use by the general public. See *United States v. Garcia* (C.A. 7, 2007), 474 F.3d 994, 995, certiorari denied, 552 U.S. 883, 128 S.Ct. 291, (noting that GPS devices are "commercially available for a couple of hundred dollars" and listing a

website on which the general public can purchase GPS devices).

{¶34} More importantly, the information gathered from the GPS device shows no more information than what detectives could have obtained by visual surveillance. Detective Hackney testified that he would sporadically log onto a secure website and view the position of Johnson's van, but could tell nothing more from the GPS report than the approximate location of the van or how long it had been at a location. This same information could have been ascertained had a member of law enforcement tracked Johnson or employed surveillance techniques that require no technology. There is no question that following a suspect on a public road is not a search that implicates the Fourth Amendment and, "scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise." *Knotts* at 285. See *Garcia*, 474 F.3d 997, certiorari denied, 552 U.S. 883, 128 S.Ct. 291, (finding GPS installation did not require a warrant where tracking substituted "an activity, namely following a car on a public street, [which] is unequivocally *not* a search within the meaning of the amendment"). (Emphasis in original.)

{¶35} Johnson essentially argues that the GPS device is more than a substitute for surveillance. According to his argument before this court, "GPS is not a mere enhancement of human senses, it facilitates a new perception of the world in which any object may be followed and exhaustively recorded over an unlimited period of time." However, neither the Fourth Amendment nor the Supreme Court's interpretation of it, requires police to forego technology simply because it makes police work more efficient or acts as a substitute for countless man hours.²

2. See Judge Smith's dissent in *N.Y. v. Weaver* (2009), 909 N.E.2d 1195, 1204 (noting that "it bears remembering that criminals can, and will, use the most modern and efficient tools available to them, and will not get warrants before doing so. To limit police use of the same tools is to guarantee that the efficiency of law enforcement will increase more slowly than the efficiency of law breakers").

{¶36} The Court released *Knotts* in 1983, at which time, the beeper used to track the suspect was an emerging technological advance in detective work. Even then, the Court dismissed the argument that police cannot employ technological advances without a warrant simply because such advances permit law enforcement to work more efficiently. "The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of [the suspect's] automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." 460 U.S. 282. "We have never equated police efficiency with unconstitutionality ***." *Id.* at 284.

{¶37} Hackney's testimony reveals that he employed the GPS device to estimate the location of Johnson's van at the shopping center near Chicago, something that could have easily been done had a Butler County officer followed Johnson on his day-trip to Chicago. "The fact that the GPS device allowed [law enforcement] to overcome the impracticality of 24-hour visual surveillance is irrelevant. It has long been established that sense enhancement devices, to the extent that they do not reveal more than could have been observed by the naked eye, are permissible." *United States v. Jesus-Nunez* (July 27, 2010), M.D.Pa. No. 1:10-CR-00017-01, 2010 WL 2991229, *3.

{¶38} Hackney's use of the GPS did not reveal any more information that could have been observed by his, or another officer's, naked eye. Just as in *Knotts*, Hackney relied in part on the GPS, but also sought the help of Rudy Medellin in order to verify the van's location and to offer important information regarding the suspects in the van. In fact, the information obtained from Medellin far outweighed in particularity and effect, the data collected by the GPS device. Medellin was able to directly place Johnson's van in the shopping center, verify the license plate, and report information regarding the two men who

sat in the van. Medellin then followed these men to a residence and reported that Johnson carried a box to his van, while the other man departed from the garage in a Ford. Medellin then followed the van and the Ford, which did not have any GPS device attached, until the vehicles reached Butler County. The information provided by Medellin's "old-fashion" or "low-tech" tracking and surveillance eventually led to the discovery of seven kilos of cocaine, and was far more damaging than the mere indication that Johnson's van was near Chicago.

{¶39} Johnson further submits that the GPS device in some way violated his reasonable expectation of privacy in his right to free association. Essentially, Johnson argues that should law enforcement be permitted to install and monitor GPS devices without first obtaining a warrant, the government has unfettered and instantaneous access to a person's whereabouts. In his brief to this court, Johnson warns that through GPS, the government can track "trips to a minister, a psychiatrist, abortion clinic, union meeting, home of a police critic, divorce attorney office, gay bar, AIDS treatment clinic and on and on."

{¶40} We do not disagree with Johnson that GPS surveillance could report a person's location at these or any location. However, Johnson fails to recognize that when a person chooses to drive their vehicle to the minister, psychiatrist, abortion clinic, etc, they are voluntarily letting that fact be known to anyone on the roads, or anyone choosing to follow them, of their intended destination. Law enforcement need not obtain a warrant to observe where a driver chooses to drive on public roads, nor do they need to obtain a warrant to observe via a GPS device where a driver chooses to drive.

{¶41} Johnson relies heavily on three cases in which state courts have found GPS installation to be a search that requires a warrant. However, we find these cases unpersuasive because the courts applied their own respective state constitutions in reaching their decision. New York's highest court premised its holding on its "State Constitution alone" and found that the installation of a GPS constitutes a search. *N.Y. v. Weaver* (N.Y.2009),

909 N.E.2d 1195, 1202. There, the court noted that it had "on many occasions interpreted [its] own Constitution to provide greater protections when circumstances warrant," and further stated that it had "adopted separate standards when doing so best promotes predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens." *Id.*

{¶42} Similarly, Washington's Supreme Court held that installation of a GPS requires a warrant under its state constitution. *State v. Jackson* (Wash.2003), 76 P.3d 217. The court specifically stated that Jackson did not challenge his conviction on Fourth Amendment grounds, but instead, relied on the article and section of the "Washington State Constitution" specific to search and seizure. The court began its analysis by quoting from its constitution that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." *Id.* at 222. The court noted that its constitution is broader than the Fourth Amendment because it focuses on privacy interests that its citizens are "entitled to hold" and that consequently, "it is now settled that article I, section 7 is more protective than the Fourth Amendment." *Id.*

{¶43} The Oregon Supreme Court also held that installation of a GPS and tracking associated data requires a warrant. *State v. Campbell* (Ore.1988), 759 P.2d 1040. However, the court spent a considerable amount of its analysis on comparing its state constitutional provisions regarding search and seizure with that of the federal constitution. The court expressed its "doubts about the wisdom of defining [its constitution] in terms of 'reasonable expectations of privacy,'" and instead, "expressly reject[ed]" the reasonable expectation of privacy standard for defining searches under its constitution. *Id.* at 1044. According to *Campbell*, the Oregon constitution protects its citizens' privacy because they have a "right" to it, not because that privacy expectation is reasonable. *Id.* (Emphasis in original.)

{¶44} Although these three courts have ruled contrary to the analysis we now assert,

each relied on a state constitution that differed from or offered greater protections than those guaranteed by the Fourth Amendment. Ohio's constitution, however, does neither.

{¶45} The Ohio Supreme Court found that Ohio's constitution does not impose greater restrictions or broader guarantees than the Fourth Amendment regarding the legality of searches and seizures. *State v. Robinette*, 80 Ohio St.3d 234, 1997-Ohio-343. Before deciding as such, the court analyzed whether the "provisions are similar and no persuasive reason for a differing interpretation is presented." *Id.* at 238. The court noted that the language within Section 14, Article I of Ohio's constitution is virtually identical to that of the Fourth Amendment.³ Beyond the language, the court noted that there was no persuasive reason for broadening the Fourth Amendment where there was an "absence of explicit state constitutional guarantees protecting against invasions of privacy that clearly transcend the Fourth Amendment." *Id.* at 239.

{¶46} Unlike the states mentioned above that interpret their constitutions to provide different protections than those guaranteed by the Fourth Amendment, we are guided by the Ohio's Supreme Court holding that Ohio's constitutional provisions regarding search and seizure afford "the same protection as the Fourth Amendment," and that "the reach of Section 14, Article I, of the Ohio Constitution is coextensive with that of the Fourth Amendment." *Id.* at 238-239.

{¶47} Because Johnson did not have a reasonable expectation of privacy in the undercarriage of his vehicle, and because placing a GPS device on a vehicle to track the vehicle's whereabouts does not constitute a search or seizure according to the Fourth Amendment and Ohio's constitution, Johnson's argument fails and his first assignment of

3. Section 14, Article I of the Ohio Constitution provides, "the right of the people to be secure in their persons, houses, papers, and *possessions*, against unreasonable searches and seizures shall not be violated ***," whereas the Fourth Amendment states "the right of the people to be secure in their persons, houses, papers, and *effects*, against unreasonable searches and seizures, shall not be violated ***." (Emphasis added.)

error is overruled.

{¶48} Assignment of Error No. 2:

{¶49} "THE STOP AND DETENTION OF JOHNSON VIOLATED HIS RIGHT TO BE FREE OF UNREASONABLE SEARCH AND SEIZURES AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶50} In his second assignment of error, Johnson asserts that the trial court erred in denying his motion to suppress because law enforcement was not authorized to perform a traffic stop on the night he was arrested. This argument lacks merit.

{¶51} Regarding the legality of an initial traffic stop, "where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity." *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, syllabus. An officer's observation that a driver has committed a marked lane violation establishes probable cause that a traffic violation has occurred. *State v. Calori*, Portage App No. 2006-P-007, 2007-Ohio-214, ¶22.

{¶52} According to R.C. 4511.33, "(A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or whenever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply: (1) A vehicle or trackless trolley shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety."

{¶53} According to Deputy Daren Rhoads' testimony at the motion to suppress hearing, he observed Johnson's van cross over "the fault line before approaching the traffic

light" at an intersection. At that point, Johnson's van was in the lane to travel straight through the intersection when instead of going straight, Johnson made an "abrupt right turn," and in the process, crossed over two lanes of traffic.

{¶54} Johnson now asserts that the traffic stop was unlawful because he made the turn in a safe manner and in accordance with the statute. On cross-examination, Johnson asked Rhoads whether the deputy thought the turn across two lanes of traffic was done in a safe manner. Rhoads recalled that Johnson did not cut off any other driver, and otherwise performed the maneuver in a safe manner.

{¶55} However, the Ohio Supreme Court has held that "a traffic stop is constitutionally valid when a law-enforcement officer witnesses a motorist drift over the lane markings in violation of R.C. 4511.33, even without further evidence of erratic or unsafe driving." *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶25. Deputy Rhoads observed Johnson's van drift over the fault line and then saw Johnson make an abrupt right turn over two lanes of traffic from a lane designated for going straight through the light. Regardless of a lack of erratic or unsafe driving, Johnson's marked lane violations provided probable cause so that Rhoads was justified in initiating the traffic stop.

{¶56} The trial court viewed a recording of the moments prior to Johnson's traffic stop captured by video equipment in Rhoads' police cruiser. After viewing the tape, the court stated, "I am just telling you that I observed the video and I saw [Johnson] cross a solid white line, across another lane, from a straight driving lane across a turn lane and then make that right turn. And in my view, there is reasonable articulable suspicion if I had viewed that to believe that there was a traffic violation that occurred." We find no error in the trial court's conclusion regarding the initial legality of the traffic stop.

{¶57} Johnson next challenges the length of his detention after the traffic stop, and asserts that even if the stop was legal at its inception, the subsequent detention and search

violated his constitutional rights. However, a review of the record indicates otherwise.

{¶58} "In conducting a stop of a motor vehicle for a traffic violation, an officer may detain an automobile for a time sufficient to investigate the reasonable, articulable suspicion for which the vehicle was initially stopped.' However, an investigative stop may last no longer than is necessary to effectuate the purpose of the stop. Thus, when detaining a motorist for a traffic violation, an officer may delay the motorist for a time period sufficient to issue a ticket or a warning. This time period also includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates." *State v. Howard*, Preble App. Nos. CA2006-02-002, CA2006-02-003, 2006-Ohio-5656, ¶14-¶15. (Internal citations omitted). Furthermore, a canine sniff of a vehicle may be conducted during the time period necessary to effectuate the original purpose of the stop, and an alert by a trained narcotics dog provides law enforcement with probable cause to search the vehicle for contraband. *Id.* at ¶17.

{¶59} Deputy Rhoads testified that immediately after the traffic stop, he deployed his canine partner around the van, and that the dog indicated the presence of drugs at two different locations on Johnson's van within minutes of the stop. Rhoads also testified that Johnson gave his consent for the officers to perform a more detailed search of the van once the dog indicated the presence of drugs. Officers then moved the van from blocking the public street to a more secure location one tenth of mile away.

{¶60} These events occurred well within the time necessary for Deputy Rhoads to effectuate the purpose of the traffic stop. It is irrelevant that Rhoads did not issue a traffic citation for Johnson's violation of R.C. 4511.33 because he had probable cause to initiate the lawful traffic stop. See *State v. Kelly*, Butler App. No. CA2009-10-252, 2010-Ohio-3560 (upholding legality of traffic stop and subsequent search even though officers did not issue a citation after Kelly followed the vehicle in front of him too closely).

{¶61} Having found that the traffic stop was lawful at its inception and that the dog sniff and subsequent search were conducted in the time sufficient to investigate the reason for the stop, Johnson's second assignment of error is overruled.

{¶62} Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.

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