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**This Case Involves Substantial Constitutional Questions, Felonies, and Questions of Great General Interest**

**Substantial Constitutional Questions Making this a Case of Public or Great General Interest**

1. Does a drug dog “alert” to an automobile (which concededly provides probable cause to search the automobile) also provide probable cause to search a recent occupant who was not in or near the automobile when the drug dog “alerted” to it?
2. If an illegal search yields testimony that a police officer felt evidence through a defendant’s clothing, but the evidence itself is never recovered, should that testimony have been suppressed or excluded?
3. Does a short but measureable delay in a traffic stop where, but for the delay, the defendant would have left the scene prior to the arrival of the drug dog, amount to an illegal detention?

This case presents a number of constitutional issues, the first of which appears to be a nationwide issue of first impression. The United States Supreme Court has said that a person does not, “by mere presence in a suspected car, lose[] immunities from search of his person to which he would otherwise be entitled.” United States v. Di Re, 332 U.S. 581, 587 (1948). Yet Di Re is an old decision and its application to dog sniff encounters has not been settled. The Court has also opined that, “An officer’s inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.” Arizona v. Johnson, 555 U.S. 323, 333 (2009). Yet it is not clear whether “measurably” is to be taken literally, or whether the overall effect of the delay is what is important.

These questions and constitutional issues are not merely academic. In 2008, the most recent year for which statistics have been collected, 16.9% of United States residents aged 16 years and older had some sort of contact with the police. U.S. Department of Justice: Bureau of

Justice Statistics, Contacts between Police and the Public, 2008, at 3, Table 3 (2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp08.pdf>. Nearly half of those, or 8% of the entire over-16 population, interacted with law enforcement through a traffic stop. Id. 870,000 of those stops resulted in a search. Id. at 10. Of the estimated 870,000 searches conducted during traffic stops in 2008, an average of 8% turned up evidence of criminality. Id. at 10, Table 15. Yet 75% of the persons searched perceived the search as illegitimate. Id. In that context it is worth noting that black drivers were three times as likely to be searched as their white counterparts. Id. at 10.

The fact that there are unresolved questions of any magnitude with respect to what is the most common way that citizens interact with law enforcement, represents a potential crisis of public trust. The Court should hear this appeal.

### **Felonies**

Appellant, Antoine Jefferson was convicted of a third degree felony for tampering with evidence under Ohio Revised Code section 2921.12(A)(1) and a fifth degree felony for obstruction of official business under Ohio Revised Code section 2921.31. In this case the facts do not justify the stigma and punishment associated with felonies. Jefferson was stopped by the police, for admittedly pretextual reasons, based on a non-existent license violation. He was detained for over half-an hour and subjected to a roadside search that involved exploring his genitals. When he tried to leave and escape the unwanted exploration of his private parts, he was prosecuted for obstruction and for destroying evidence. Specifically, an officer reportedly felt a bulge just above Jefferson's testicles which the officer claimed felt like crack. Because, after Jefferson's attempted flight, the officers never found any crack, they reasoned Jefferson must have destroyed it. To put it bluntly, Jefferson was detained for no good reason, searched for no good reason, and then criminally prosecuted for attempting to leave an illegal detention and for destroying evidence the police only suspected existed in the first place.

## Facts

### **April 9, 2010 – Traffic Stop & Drug Investigation**

On April 9, 2010 at around 10:05am, State Trooper Himes ran the plate of a vehicle he had a hunch was involved in drug trafficking. The vehicle, a Land Rover on large rims being driven by a black man with dreadlocks, had passed him going southbound on I71 toward Columbus an hour earlier. (OSHP Video Stop, Body Mic. at 10:09:14-10:09:19, 10:13:45).<sup>1</sup> Now it was returning northbound and Himes suspected it was being used to run drugs. In fact, Antoine Jefferson was driving his girlfriend to Mansfield from the Columbus airport where he had just picked her up. Id. at 10:15:38-10:15:47. When Himes ran the plate, he discovered that Jefferson had been issued an Ohio driver's license in 1995 and had never renewed. Thus, given that a license expires four years and ninety days after issue, around 1999/2000 Jefferson's license would have expired. (Suppression Tr. at 8:6-9:12).<sup>2</sup> After visually identifying Jefferson as the driver, Himes pulled the Land Rover over. Id. at 7:15-7:22.

Himes got out of his cruiser, approached the passenger side of Jefferson's Land Rover, and the following conversation ensued:

Himes: "Hey. How you doin? Do you have an Ohio driver's license?"

Jefferson: "No sir I don't."

Himes: "OK. Do you reside here in the State of Ohio?"

Jefferson: "No sir I don't." <inaudible>

(OSHP Video Stop, Body Mic. at 10:07:19-10:07:31). During the suppression hearing, Himes

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<sup>1</sup> Traffic Video of the April 9, 2010 stop, recorded by unit 1732 (Himes) of the Ohio State Highway Patrol (OSHP) and admitted as a joint exhibit in the suppression hearing. (Suppression Tr. at 116:16-116:21). The DVD disc from the OSHP contains two videos, one of the stop itself and one which shows the Defendant being transported from the scene to the Delaware County Jail. Once the desired video is selected, there are two audio options, "In-Car Audio" and "VLP1" (which is Himes' body microphone). The joint exhibit shall be cited herein as (OSHP Video ["Stop" OR "Transport"], ["In-Car" OR "Body Mic."] at [hour]:[min]:[sec]-[hour]:[min]:[sec]).

<sup>2</sup> Transcript of the suppression hearing held in case number 10 CR I 04 238 on October 8, 2010 before The Hon. R. Markus in the Common Pleas Court of Delaware County, Ohio. It shall be cited herein as (Suppression Tr. at [page]:[line]-[page]:[line]).

testified that Jefferson handed him a Georgia license and Himes then “returned to [his] vehicle to check [Jefferson’s] driver’s license through Georgia.” (Suppression Tr. at 10:18-10:22).

However, when Himes returned to his car, before calling dispatch to ask for a license check, he spent some time talking over the radio about whether to call a drug dog and ultimately decided to have Trooper Dave Norman (a K-9 unit) come to the scene to conduct a sniff. *Id.* at 11:13-11:16, 42:15-42:19. His body microphone recorded the exchange between Himes and another Trooper, Michael Wilson over the radio:

Wilson: “Ya got Dave behind ya. Just passin us. Any good?”

Himes: “I saw him go south about an hour ago. He said he just picked the passenger up from the airport.”

Wilson: “It’s up to you man. I haven’t run a dog yet.”

Himes: “Eh... I’m gonna check the ID on him first. Eh... You know what, see if Dave can 20.” (Himes testified in the suppression hearing that this was a request for Dave Norman, the trooper with the drug dog, to come to the traffic stop.)

(OSHP Video Stop, Body Mic. at 10:09:08-10:09:42); see also, (Suppression Tr. at 39:18-43:1).

Not until after this conversation did Himes first radio dispatch:

Himes: “1732 Columbus.”

Dispatcher: “1732”

Himes: “Looking for a Georgia DQ.”

Dispatcher: “Go ahead.”

Himes: “0 6 9 9 6 2 0 5 0. Also, check 78 on 6.”

Dispatcher: “Okay.”

(OSHP Video Stop, Body Mic. at 10:10:03-10:10:31); see also, (Suppression Tr. at 41:8-41:9).

At the suppression hearing, Himes testified that at the time when he called the drug dog, he “was still checking on [Jefferson’s] license through the state of Georgia.” (Suppression Tr. at 11:21-11:25). However, the recording shows that Himes called for the dog at 10:09am and did not contact dispatch until after 10:10. (OSHP Video Stop, Body Mic. at 10:09:08-10:10:31). In other

words, before radioing to check on Jefferson's license and criminal background, Himes asked for the drug dog.

After a few minutes of waiting in silence, Himes walked from his cruiser to the driver's side of Jefferson's Land Rover. He told Jefferson to get out of the car and he then performed a consensual pat down for weapons. Id. at 10:13:26-10:14:21. He felt neither weapons nor contraband during the pat-down. (Suppression Tr. at 44:1-44:7). While this was going on, one can hear faintly through Himes' body microphone, Himes' lapel radio saying something that is unintelligible over the traffic noise. (OSHP Video Stop, Body Mic. at 10:14:04-10:14:20). Switching to the in-car microphone, one can hear the radio more clearly. It says:

Dispatch: "1778. Correction -1732. 78 on Antoine Gregory Jefferson."

Dispatch: "Shows he has a valid Georgia license."

(OSHP Video Stop, In-Car at 10:14:04-10:14:21); see also (Suppression Tr. at 30:1-33:7). After the pat-down, Himes put Jefferson in the back of the police cruiser.

Approximately 20 seconds after dispatch announced that Jefferson had a valid Georgia license, Trooper Dave Norman and his dog arrived. (OSHP Video Stop, In-Car at 10:14:42). About two minutes later, the dog alerted to the rear passenger-side wheel-well of the Land Rover by sitting and pointing his nose at the area. Id. at 10:16:58; (Trial Tr. at 156:2-156:7).<sup>3</sup> After some discussion inconsequential to this appeal, the officers began search the Land Rover. (OSHP Video Stop, Body Mic. at 10:18:49). In the course of about 10 minutes, the officers removed everything from the car and searched it thoroughly. While the search was on-going, Himes told Jefferson that Jefferson had a valid Georgia license and returned his license to him. (OSHP Video Stop, In-Car at 10:19:20-10:19:45). He later testified that if the car search revealed no

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<sup>3</sup> Transcript of the jury trial held in case number 10 CR I 04 238 on March 3, 2011 before The Hon. E. Krueger in the Common Pleas Court of Delaware County, Ohio. It shall be cited herein as (Trial Tr. at [page]:[line]-[page]:[line]).

drugs, there would be no further reason to hold Jefferson at that point. (Suppression Tr. at 46:18-46:22). By 10:29am, the officers had loaded everything back into the Land Rover, all officers had walked away and were back in their own respective police vehicles, yet Jefferson remained locked in the back of Himes' cruiser. (OSHP Video Stop, In-Car at 10:28:55).

Around two minutes after the officers stopped searching the Land Rover, another Trooper, Wilson, left his patrol car and walked to Himes' cruiser. Id. at 10:30:52. Once there, he opened the door and told Jefferson:

Wilson: "Hop out here man."

Wilson: "I'm gonna pat you down. You don't have any weapons on you do you?"

Jefferson: "No sir. I don't."

Id. at 10:31:00-10:31:09. Wilson later testified that he asked Jefferson if he could pat him down and Jefferson consented. (Suppression Tr. at 75:11-75:21, 100:9-101:5). However, the audio recordings of the interaction quoted above show that Wilson neither asked-for nor obtained consent for the search of Jefferson's person. See, (OSHP Video Stop, In-Car at 10:31:00-End). Wilson told Jefferson to "hop out" and then told him that he was going to pat him down. The first was a command and the second a declarative statement. The only question Wilson asked was whether Jefferson had any weapons on him. Jefferson testified, in agreement with the audio recordings, that Wilson never asked for or obtained consent to search his person. (Suppression Tr. at 104:10-105:8).

Despite not having obtained consent, Wilson testified accurately that this was not a Terry pat-down, but a search of Jefferson's person for drugs. Id. at 74:3-74:11. Wilson's reason for searching Jefferson was the dog alert on the Land Rover. Id. at 84:16-84:24. However, Wilson admitted that he could not remember whether or not Jefferson had been in the car when the dog alerted on it (the video shows Jefferson was in Himes cruiser during the entire time the dog was

present). Id. at 85:10-85:12; (OSHP Video Stop, In-Car at 10:16:15-10:18:44).

As Wilson searched, he began to explore Jefferson's genital area in an effort to determine if Jefferson was hiding drugs near his penis or testicles. (Suppression Tr. at 76:1-76:5, 76:12-76:18, 112:12-112:19) In the course of this non-consensual touching, Wilson squeezed a bulge just above Jefferson's testicles. Id. at 76:20-77:1. This caused Jefferson to stand up straight and turn to face Wilson. Id. at 112:12-112:19. Wilson, believing he had felt and squeezed a bundle of crack cocaine, thought Jefferson was trying to elbow him and escape. Id. at 81:10-81:15; (Trial Tr. at 117:17-117:19); c.f., (Trial Tr. at 184:11-184:15). He grabbed Jefferson's jacket and spun him around in an attempt to throw him to the ground. (Suppression Tr. at 81:19-82:5). Jefferson fell down a slope and then took-off running. (Trial Tr. at 117:19-118:3). Wilson and Himes pursued, firing their tasers at Jefferson as they went. Id. at 118:20-119:12. Jefferson vaulted a chain-link fence and ultimately tried to escape his tormentors by wading a shallow pond. Id. at 123:1-123:8. While wading in the pond, his pants (heavy wet sweatpants) fell down and he reached into the murky water to pull them up. (OSHP Video Transport, In-Car at 11:45:50-11:45:59); see also, (Trial Tr. at 139:18-139:22). The officers watching from shore interpreted this as an attempt by Jefferson to destroy the crack cocaine Wilson claimed to have felt. Id. at 123:14-123:23. Seeing that the officers had holstered their tasers, Jefferson returned to shore and was arrested. Id. at 135:20-136:19; (OSHP Video Transport, In-Car at 11:52:36-11:53:00). No drugs of any kind were ever found in connection with this incident.

### **Posture and History**

Jefferson was indicted for a third degree felony for tampering with evidence under Ohio Revised Code section 2921.12(A)(1) and a fifth degree felony for obstruction of official business under Ohio Revised Code section 2921.31.

Through counsel, Jefferson moved to suppress all evidence, statements, and observations

collected as a result of several alleged violations of the United States and Ohio constitutions. Essentially, counsel argued that the initial traffic stop, though justified at its inception, was unconstitutionally prolonged and that the pat-down searches in the case did not satisfy Terry v. Ohio, and progeny. 392 U.S. 1 (1968). The trial court denied the motion. Judge Markus held that the investigation of whether Jefferson had a valid license which allowed him to drive in Ohio was not completed before the dog arrived and “alerted” to Jefferson’s car. (J. Markus, Order Denying Motion to Suppress, Oct. 18, 2010 at 2-3). He then held that the search of Jefferson’s person by Trooper Wilson was a lawful extension of the vehicle search (which was justified because of the dog “alert”). Id. at 3.

Having lost his suppression motion, Jefferson proceeded to jury trial. At trial, the prosecution argued that Jefferson obstructed official business because he prolonged the search for drugs and the traffic stop by fleeing while Wilson was attempting to search his person. (Trial Tr. at 194:23-196:18). They also argued that Jefferson created a risk of physical harm to himself by jumping the fence, risking being tasered, attempting to hit Wilson in the face, and jumping into a dirty cold pond. Id. at 201:18-202:13. Finally, the prosecution argued that Jefferson tampered with evidence in that he destroyed the crack that Wilson claimed he felt in Jefferson’s pants. Id. at 197:8-198:8. The jury returned a verdict of guilty on both counts and additionally found that Jefferson had created a risk of physical harm to a person. Id. at 231:20-232:2.

Following his conviction, Jefferson appealed. Appellate counsel raised five assignments of error. Relevant to this appeal, Jefferson argued: First, the search of Jefferson’s person, performed by Wilson, was unconstitutional and thus, evidence obtained through that search should have been suppressed. Second, by virtue of the duration and scope of the traffic stop, the stop was rendered unconstitutional and evidence flowing from that stop after the point where it

became unconstitutional should have been suppressed. The appeals panel overruled these assignments of error. State v. Jefferson, 2012-Ohio-148, at ¶¶ 39-47. This appeal follows.

### **Discussion – Propositions of Law**

#### **First Proposition of Law – Wilson’s Search of Jefferson’s Person Violated the Constitution Because there was no Probable Cause to Justify a Search of Jefferson’s Person**

Wilson testified accurately that the search he conducted was not a Terry pat-down (a limited search for weapons based on reasonable suspicion that the person is armed and dangerous), but a search of Jefferson’s person for drugs. (Suppression Tr. at 74:3-74:11); see e.g., Johnson, 555 U.S. at 326-27 (“to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.”). Yet, there was no justification for the search. There was no consent for the search. (Suppression Tr. at 100:9-101:5, 104:10-105:8); see also, (OSHP Video Stop, In-Car at 10:31:00-End). The dog alerted to the Land Rover while Jefferson was in the police car talking with Himes. (OSHP Video Stop, In-Car at 10:16:15-10:16:59). The dog never alerted to the police car where Jefferson was sitting. Jefferson made no admissions about possessing drugs. Id. at 10:17:37-10:17:53 (specifically denying that drugs are or have ever been in the car). Jefferson was not, according to the officers, under arrest such that this could be a search incident. Id. at 10:17:34-10:17:38, 10:18:11-10:18:16 (after the dog alerted Himes told Jefferson twice that he was not under arrest).

Because there was no independent justification for searching Jefferson, the trial court conceived of a novel notion that the search of Jefferson’s person was a legal extension of the car search. (J. Markus, Order Denying Motion to Suppress, Oct. 18, 2010 at 3). Nationwide there are some decisions which support the idea that a search of a suspect is justified based on a dog sniff conducted while he is in the vehicle. See, e.g., State v. Harding, 9 A.3d 547, 551 (Md. Ct. Spec. App. 2010) (dog alert to car does provide probable cause to search passengers); State v.

Ofori, 906 A.2d 1089, 1099 (Md. Ct. Spec. App. 2006) (dog alert to car does provide probable cause to search passengers). There are also some decisions which hold the opposite. See, e.g., State v. Wallace, 812 A.2d 291, 302 (Md. 2002) (dog alert to a car does not provide probable cause to search passengers); People v. Fondia, 740 N.E.2d 839, 841 (Ill. App. Ct. 2000) (search of a person not seated near the portion of the car that the dog alerted to, was unlawful). However, appellant was unable to find a single case which upheld the principle that a dog sniff conducted upon a vehicle when a person is out of the vehicle can give probable cause to search that person. This appears to be an issue of first impression.

The United States Supreme Court has spoken on subjects related to this inquiry. “We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.” Di Re, 332 U.S. at 587. Though the Court appeared to rethink Di Re in Maryland v. Pringle, a close reading of Pringle shows the Court was actually quite careful to comment on specific facts, beyond mere presence in a car, which showed the three persons in Pringle shared a “common enterprise.” That is, Pringle does not, *a priori*, impute a “common enterprise” to group of persons in a car with contraband. The “common enterprise” presumption only arises when there are facts which make it fair to attribute contraband in the car to all passengers:

In this case, [Defendant] was one of three men riding in a Nissan Maxima at 3:16 a.m. There was \$763 of rolled-up cash in the glove compartment directly in front of [Defendant]. Five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three men. Upon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money.

....

Here we think it was reasonable for the officer to infer a common enterprise among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.

Maryland v. Pringle, 540 U.S. 366, 371-73, (2003) (internal quotation marks omitted) (citations omitted). Though some courts have erroneously expanded Pringle to justify searching persons who are present in a car to which a dog alerts because they share a “common enterprise”, that logical move is incorrect given the Court’s decision to rule narrowly on the specific facts in Pringle so as to preserve the holding in Di Re. See, e.g., State v. Griffin, 949 So.2d 309, 311-14 (Fla. Ct. App.) (deciding, based on Florida precedent, that a sniff does not provide probable cause to search car occupants but asking the Florida Supreme Court to take jurisdiction and decide that, based on Pringle, a dog alert gives probable cause to search the persons of all occupants of the car), *declining to exercise jurisdiction* 958 So.2d 920 (Fla. 2007). Because Pringle was narrow and Di Re maintains vitality, the reasoning in Di Re is still persuasive and the holding binding:

[A]n occupant of a house could be used to conceal [] contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning . . . , we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?

We see no ground for expanding the ruling in the Carroll case to justify this arrest and search as incident to the search of a car. We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.

Di Re, 332 U.S. at 587. In short, probable cause to search a car, according to Di Re, should not be equated with probable cause to search all the persons found therein.

Even if this Court is inclined to discount Di Re because of its age, the Supreme Court’s decisions still do not support the link the trial court attempted here. Much more recently, the Supreme Court has held that objects in a car are subject to search if the car is subject to search.

Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (“We hold that police officers with probable cause to search a car may inspect passengers’ belongings found in the car that are capable of concealing the object of the search.”). Reasoning from this holding, a person within a car at the time when a dog sniffs and alerts, might be subject to search provided one is willing to assume that a person’s clothing and orifices are essentially a mobile organic container which is capable of concealing the object of the search. But no court has ever yet decided that a container or person outside of a car at the time the dog sniffs and alerts to the car, is a valid object of search.

The ruling of the trial court leapt well-beyond any rational interpretation of the current law. The search of Jefferson’s person was illegal and the evidence obtained by exploitation of that illegality, must be suppressed.

**Second Proposition of Law – Assuming, *Arguendo*, that Wilson’s Search of Jefferson’s Person Violated the Constitution, Evidence was Obtained Through the Illegal Search and Should have been Suppressed**

The Court of Appeals did not reach the question of whether the search of Jefferson’s person violated the Constitution. Instead it rested its ruling on the proposition that even if the search were unconstitutional, there would have been nothing to suppress. Jefferson, 2012-Ohio-148, at ¶ 43. That is, said the appeals court, no evidence of Jefferson’s crimes was obtained as a result of the illegal search because the evidence introduced at trial consisted of “observation[s] of [] fresh crime[s] . . . .” Jefferson, 2012-Ohio-148, at ¶¶ 44-45 (citing State v. Ali, 154 Ohio App. 3d 493, 2003-Ohio-5150, 797 N.E.2d 1019, at ¶ 13).

The Supreme Court has made clear that “the exclusionary sanction applies to any ‘fruits’ of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention.” United States v. Crews, 445 U.S. 463, 470 (1980). When deciding whether to

exclude evidence, the question is not what type of evidence but “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” Wong Sun v. United States, 371 U.S. 471, 488 (1963) (citations omitted) (internal quotation marks omitted). In this case, there was evidence which was obtained by exploitation of the tainted search of Jefferson’s person.

Wilson testified at trial about having felt crack cocaine in Jefferson’s pants. (Trial Tr. at 114:4-114:18). That testimonial evidence was obtained as a direct, immediate, and sole result of Wilson illegally searching Jefferson’s crotch. It should have been suppressed. If it had been, it is hard to envision how a reasonable juror could have found Jefferson guilty of “destroy[ing] . . . any . . . thing, with purpose to impair its value or availability as evidence . . .” if there was no “thing” with “value . . . as evidence” to be destroyed. Ohio Rev. Code § 2921.12(A)(1) (1974).

**Third Proposition of Law – The Traffic Stop was Unconstitutionally Prolonged Because it was Delayed in Order to Create and Support a Drug Investigation for which there was no Probable Cause**

The Court of Appeals claimed that the traffic stop was not prolonged in violation of the Constitution because Himes “made a routine check with his dispatcher to check Appellant’s license and warrant status. While he was awaiting a response, he decided to call a K9 unit to conduct an exterior drug sniff.” Jefferson, 2012-Ohio-148, at ¶ 41. This is simply wrong. The video shows that Himes discussed calling for the dog and did, in fact, call for the dog before he ever contacted dispatch to request information about Jefferson. Compare (OSHP Video Stop, Body Mic. at 10:09:08-10:09:35) (radio discussion between Himes and Wilson regarding the drug dog and Himes’ request that Wilson get Trooper Norman to bring his dog); with id. at 10:10:03-10:10:26 (radio request to dispatch for information on Antoine Jefferson).

The U. S. Supreme Court has spoken on this issue:

A seizure that is justified solely by the interest in issuing a [] ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. . . . [That] result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained.

In the state-court proceedings, however, the judges carefully reviewed the details of Officer Gillette's conversations with respondent and the precise timing of his radio transmissions to the dispatcher to determine whether he had improperly extended the duration of the stop to enable the dog sniff to occur.

Illinois v. Caballes, 543 U.S. 405, 407-08 (2005). If the Fifth District Court of Appeals had done the “careful[] review[ of] the details” that the Supreme Court’s decision in Caballes recommends, they would have realized that Himes delayed calling dispatch so he could instead make arrangements with another trooper for a drug investigation. Himes called dispatch at 10:10am and not 10:09am because at 10:09am he was busy talking about bringing in a drug dog. If Himes had called dispatch first, and then had asked for the dog in the intervening time while dispatch researched his question, there would have been no delay. But he did not. He delayed the lawful traffic investigation so that he could pursue an unlawful drug investigation.

Though some delay has already been demonstrated, it is also worth noting that Himes initial delay was not the only one. At around 10:14am dispatch answered Himes’ question – Antoine Jefferson had a valid Georgia license. (OSHP Video Stop, In-Car at 10:14:04-10:14:20). Yet the K-9 unit did not arrive until nearly 10:15, the dog did not begin checking the car until shortly after 10:16, and the dog did not alert until nearly 10:17. Id. at 10:14:39, 10:16:15, 10:16:57. Himes testified that he had no reason, apart from the drug investigation, to hold Jefferson once he found out that Jefferson’s license was valid. (Suppression Tr. at 46:15-46:22). Since dispatch announced that Jefferson was valid before the drug dog even arrived at the scene, the troopers collectively knew that Jefferson was valid and they should have released him prior to the sniff. Himes not only delayed calling dispatch to start the investigation of the license issue, he did not timely conclude it when dispatch answered his question even though he later

admitted, that having a valid license, there was no reason to hold Jefferson. See Id. As the Supreme Court put it, Himes “improperly extended the duration of the stop to enable the dog sniff to occur.” Caballes, 543 U.S. at 408.

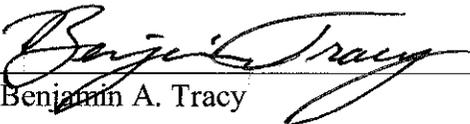
“An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.” Johnson, 555 U.S. at 333; see also, City of Blue Ash v. Kavanagh, 113 Ohio St. 3d 67, 2007-Ohio-1103, 862 N.E.2d 810, at ¶ 22. Himes decision to turn this stop, for a non-existent expired license violation, into a full-fledged drug inquisition, measurably and unconstitutionally delayed the stop.

Even while recognizing that Wong Sun is not a simple “but for” test, evidence collected in this case should have been excluded. 371 U.S. at 488. Testimony regarding the presence of crack is paradigmatic “fruit of the poisonous tree” – evidence obtained by conducting a search during an illegal seizure. See, e.g., United States v. Buchanon, 72 F.3d 1217, 1226 (6th Cir. 1995). Evidence of Jefferson’s flight is also the “indirect product” of the illegal detention. Crews, 445 U.S. at 470. Not only did it take place during and as a provoked result of the illegal seizure, but the flight is only meaningful as “evidence” if one considers that Jefferson was detained – without the illegal detention, “flight” is just a man running by the side of the road. Observations regarding crack and Jefferson’s flight are fruit of the poisonous tree and there is no attenuation, independent source, or suggestion of inevitable discovery that would remove the evidence from the ambit of the exclusionary rule. See, United States v. Murray, 487 U.S. 533, 537 (1988) (discussing the independent source doctrine); Nix v. Williams, 467 U.S. 431, 443 & n.4 (1984) (discussing the inevitable discovery doctrine) Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (discussing attenuation).

March 2, 2012

Respectfully submitted,

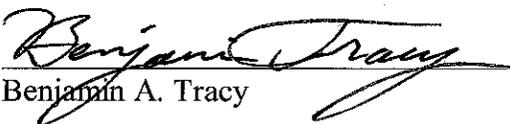
Benjamin A. Tracy, Counsel of Record

  
Benjamin A. Tracy

COUNSEL OF RECORD FOR APPELLANT,  
ANTOINE G. JEFFERSON

**CERTIFICATE OF SERVICE**

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellees, Douglas N. Dumolt, Assistant Delaware County Prosecuting Attorney, 140 N. Sandusky Street, 3rd Floor, Delaware, Ohio 43701 on March 2, 2012.

  
Benjamin A. Tracy

COUNSEL OF RECORD FOR APPELLANT,  
ANTOINE G. JEFFERSON

## **APPENDIX OF ATTACHMENTS**

- J. Markus, Order Denying Motion to Suppress, Oct. 18, 2010.
- State v. Jefferson, 2012-Ohio-148.

IN THE COURT OF COMMON PLEAS  
FOR DELAWARE COUNTY

STATE OF OHIO,

Plaintiff

vs.

ANTOINE JEFFERSON,

Defendant

5/11  
2/28

Case No. 10CR-I-04-0238

JUDGE RICHARD M. MARKUS  
(Serving by Assignment)

OPINION AND ORDER DENYING  
DEFENDANT'S MOTION TO  
SUPPRESS EVIDENCE

On April 16, 2010, the Delaware County Grand Jury indicted the defendant for one count of Tampering with Evidence in violation of R.C. 2921.12(A)(1) and one count of Obstructing Official Business in violation of R.C. 2921.31(A). On August 31, 2010, the defendant filed Motion to Suppress Evidence. On September 28, 2010, the state filed its response to that motion and on October 6, 2010, the defendant filed his reply to the state's response.

On October 8, 2010, during his assignment to the Delaware County Common Pleas Court, this visiting judge conducted an evidentiary hearing on the defendant's Motion to Suppress Evidence. On October 11, 2010, the state filed a list of supplementary authorities, and the defendant's counsel filed a statement that he relied on previously supplied authorities.

In substance, the state claims that the defendant committed the alleged offenses in the course of a motor vehicle highway stop. At the hearing, the state called highway patrol officers Himes and Wilson, the defendant testified, and the parties stipulated to the testimony of a third officer. Both parties relied on a CD recording (with time notations) of officer Himes' patrol car camera and his radio communications, which the court received in evidence as Exhibit A. At the conclusion of the evidence, defendant's counsel explained that the defendant sought to suppress

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DELAWARE COUNTY OHIO  
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evidence about any observations the officers made after 10:30:40 a.m. on April 9, 2010, as shown by the CD recording. More specifically, the defendant sought to suppress evidence about officer Wilson's pat down search and the defendant's reported flight after 10:30.

From the hearing evidence the court finds that Highway Patrol Officer Himes lawfully stopped the defendant's vehicle on the northbound lanes of Interstate Highway 71, when he reasonably believed that the defendant was operating that vehicle without a valid drivers license. The officer observed that the defendant's vehicle displayed Ohio license plates, and the officer's patrol car computer reported that the vehicle's owner purchased the vehicle in Ohio in 2009 and that the owner's Ohio driver's license expired several months earlier. After officer Himes stopped the defendant's vehicle, the other two highway patrol officers arrived and participated in search activities.

The defendant did not contest the legality of the traffic stop. Instead, defendant's counsel argued that the highway patrol officers violated the defendant's Fourth Amendment rights by detaining him and performing a pat down search of his person after the justification for the stop had expired.

From the evidence the court finds that the officers collectively had additional information that justified the defendant's continued detention and further search up to and including the challenged observations. Officer Wilson was the second officer who arrived. He told officer Himes that the Mansfield Municipal Court had convicted this defendant for driving without a valid license only four days before this traffic stop. Though the defendant showed officer Himes an apparently current Georgia driver's license, officer Himes had reason to doubt that the Georgia license satisfied Ohio's license requirements for someone who seemingly resided in

Ohio, purchased a vehicle in Ohio, and operated that vehicle with Ohio license plates. A few hours earlier Officer Himes observed the same vehicle proceeding south on Interstate 71. After the traffic stop, the defendant told him that he had picked up his passenger at the Columbus airport and was transporting her back to Mansfield.

While officer Hines detained the defendant for that offense, he radioed his dispatcher to check for any outstanding warrants or other information about criminal activity. He had not received a complete response to that request before the challenged observations. While officer Hines was waiting for that response, he requested a canine unit to assist him there. The canine unit officer arrived with a drug detecting dog. As this third officer escorted the dog around the defendant's vehicle, the dog "alerted" in a manner which the officer interpreted to mean that illegal drugs were present.

All three officers then commenced a search of the defendant's car. They completed their search of the vehicle's passenger compartment and spare tire area, but they had not yet searched the undercarriage or the engine compartment when the challenged observations occurred. Officer Wilson conducted his pat down search of the defendant's person as a further part of their search for the perceived drug presence. Officer Himes had not completed his citation for the driver's license violation when that pat down search occurred. Moreover, the defendant could not lawfully drive his vehicle away without a valid driver's license.

The traffic stop consumed less than 25 minutes before the challenged observations occurred. When officer Wilson detected what he perceived as contraband during his pat down search and when the defendant then reportedly fled, the officers lawfully arrested the defendant with probable cause to believe he committed the offenses alleged here.

In all the circumstances the court finds that the state proved that the officers lawfully detained the defendant following the lawful traffic stop, lawfully conducted the challenged pat down search, and lawfully observed the defendant's reported flight in the course of that search. Accordingly, the court denies the defendant's motion to suppress evidence.<sup>1</sup>

*Richard M. Markus*

Judge Richard M. Markus, Retired Judge Recalled to Service pursuant to Ohio Constitution, Art. IV, §6(C) and R.C. 141.16 and assigned to the Delaware County Common Pleas Court for time when he heard his matter

THE CLERK SHALL MAIL TIME STAMPED COPIES OF THIS ORDER  
TO ALL COUNSEL AND THE VISITING JUDGE

This document sent to each attorney/party by:	
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<input type="checkbox"/>	fax
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<input type="checkbox"/>	certified mail
Date: 10/19/10: [Signature]	

<sup>1</sup> The state also argued that the defendant voluntarily consented to the challenged pat down search, but the court does not reach that issue.

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

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STATE OF OHIO

Plaintiff-Appellee

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JUDGES:

Hon. W. Scott Gwin, P. J.  
Hon. John W. Wise, J.  
Hon. Patricia A. Delaney, J.

-vs-

Case No. 11 CAA 04 0033

ANTOINE JEFFERSON

Defendant-Appellant

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common  
Pleas, Case No. 10 CR 104 0238

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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DELAWARE COUNTY, OHIO  
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*Wise, J.*

{¶1} Defendant-Appellant Antoine Jefferson appeals his conviction and sentence on tampering with evidence and obstructing official business, entered in the Delaware County Common Pleas Court following a jury trial.

{¶2} Plaintiff-Appellee is the State of Ohio.

### **STATEMENT OF THE FACTS AND CASE**

{¶3} On April 8, 2010, Trooper Matthew Himes of the Ohio State Highway Patrol was working drug interdiction on Interstate 71 in Delaware County Ohio. At approximately 10:00 a.m., he was stationary, in a marked patrol car watching traffic pass by. At approximately 10:05 a.m., Trooper Himes observed a green Land Rover travelling northbound on I-71. As the vehicle passed him, Trooper Himes ran the license plate through the Law Enforcement Automated Data Systems (LEADS) which revealed that the Ohio driver's license of the vehicle's registered owner expired in 1999. Further, it showed the vehicle was purchased in July, 2009, in Ohio.

{¶4} Trooper Himes pulled up beside the vehicle, identified the driver as the registered owner by his physical description, and initiated a traffic stop for driving without a valid license. Once the vehicle was stopped, Trooper Himes approached the vehicle and made contact with Appellant, the driver of the vehicle.

{¶5} When asked, Appellant indicated that he did not have an Ohio driver's license. He indicated that he was a Georgia resident and had a Georgia driver's license. Appellant presented his Georgia driver's license to Trooper Himes, who returned to his cruiser to check its validity.

{16} According to Trooper Himes, while at his vehicle, but before he had determined the validity of Appellant's license or his state or residency, he radioed Trooper Norman to bring his canine partner to the scene. According to Trooper Himes, at that time he had already learned that just four days prior to the traffic stop, Appellant had been convicted of driving without a valid license in Mansfield Municipal Court. He had also learned that the vehicle Appellant was driving had been purchased in Ohio nine months prior.

{17} While Trooper Himes was still awaiting the status of Appellant's license and checking his criminal history, Trooper David Norman and his canine partner arrived on the scene. Trooper Norman had his canine partner conduct a free-air sniff around the vehicle. At that time, the canine alerted on the vehicle for the odor of narcotics. When the canine alerted on Appellant's vehicle, the Troopers conducted a probable cause search of the motor vehicle. Appellant and his passenger were removed from the vehicle, Appellant was read his Miranda rights and then placed, without handcuffs, in the back of Trooper Himes' cruiser while the search was conducted.

{18} Prior to placing Appellant in the back of his cruiser, Trooper Himes asked him if he carried a knife or any kind of weapon. Appellant denied having any weapons and consented to a pat-down search for weapons.

{19} Trooper Himes stated that while the other troopers were continuing the search of Appellant's vehicle, he returned to his cruiser and spoke with Appellant about the odor of narcotics in his vehicle. Appellant stated that there were no narcotics in the vehicle and that he had the vehicle cleaned a few days prior to the traffic stop.

{¶10} Trooper Himes then left his cruiser and returned to Troopers Norman and Wilson, who were at the front of Appellant's vehicle. It was at this time that Trooper Wilson approached Appellant, and Trooper Himes attempted to search the engine compartment of the motor vehicle for concealed contraband. While Trooper Himes was attempting to locate a hood release for Appellant's vehicle, he noticed Trooper Wilson and Appellant in a struggle. Trooper Himes ran back to assist, but before he got back to his cruiser, Appellant had fallen down, gotten up, and was climbing over a barbed wire fence. Trooper Himes deployed his laser, but it was ineffective.

{¶11} According to Trooper Wilson, he had approached the Appellant seated in Trooper Himes' cruiser and asked Appellant to exit the cruiser so that he could perform a search of Appellant's person. Trooper Wilson stated that he had noticed a heightened level of nervousness throughout the traffic stop that did not dissipate as it does in the course of a typical traffic stop. Trooper Wilson explained that he was performing a consensual search for drugs based on the "nervousness" of the defendant, positive canine hit, and absence of contraband in the vehicle.

{¶12} Trooper Wilson stated that he asked Appellant for permission to perform the search and that Appellant gave verbal consent. During the pat down, Trooper Wilson started on Appellant's right side and came down his right front pocket, down the side of his right leg, and back up the inside of his right leg. At no point did he manipulate any object to determine its identity." When he reached the inside of Appellant's right leg, he felt what he believed to be a plastic baggie containing crack cocaine. At that time, Appellant attempted to elbow Trooper Wilson in the head and started to run. Trooper Wilson grabbed his sweatshirt and held on and attempted to throw him to the ground.

Unable to do so, Trooper Wilson spun him in a circle and let go. Appellant then proceeded to get up and take off running. The three troopers pursued him and called for him to stop. Two of the troopers attempted to stun Appellant with their tasers, but were unable to stop him from climbing over a barbed wire fence near the highway and fleeing the scene.

{¶13} Trooper Himes, Trooper Norman, and Trooper Wilson pursued Appellant over the fence, while Sergeant Kemmer stayed with Appellant's companion and the cruisers. The troopers continued to chase Appellant for approximately two hundred yards to a small lake, which Appellant jumped into. Appellant swam out approximately thirty yards into the "muck," roughly chest deep in the water, and the troopers watched him destroying the suspected contraband. Appellant then returned to shore with his pants down around his legs, weighed down from the water and the mud. He also had cuts from the pursuit, so a squad was called to treat Appellant's injuries. Appellant was placed under arrest.

{¶14} On April 16, 2010, the Grand Jury of Delaware County indicted Appellant Antoine Jefferson on one count of Tampering with Evidence, in violation of R.C. §2929.12(A)(1), a third-degree felony, and one count of Obstructing Official Business, in violation of R.C. §2921.31(A), a fifth degree felony.

{¶15} On August 31, 2010, Appellant filed a motion to suppress.

{¶16} On October 8, 2010, a hearing was held on Appellant's motion to suppress.

{¶17} By Judgment Entry filed October 18, 2010, the trial court denied Appellant's motion to suppress.

{¶18} On March 3, 2011, this matter proceeded to jury trial.

{¶19} The jury found Appellant guilty as charged.

{¶20} Appellant now appeals, assigning the following errors for review:

**ASSIGNMENTS OF ERROR**

{¶21} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT'S FOURTH AMENDMENT RIGHTS TO THE U.S. CONSTITUTION AND ARTICLE ONE SECTION FOURTEEN OF THE OHIO CONSTITUTION BY OVERRULING HIS MOTION TO SUPPRESS EVIDENCE, AS

{¶22} "a) THERE WAS NO LEGITIMATE REASON FOR THE UNDERLYING TRAFFIC STOP (PLAIN ERROR ANALYSIS),

{¶23} "b) THE STOP'S SCOPE AND DURATION WERE IMPROPER AND THE DETAINMENT OF APPELLANT IN THE POLICE CRUISER WHILE THE POLICE ENGAGED IN A "FISHING EXPEDITION" WAS UNLAWFUL,

{¶24} "c) THE POLICE HIDING EVIDENCE BY TURNING OFF THEIR MICROPHONES WAS UNLAWFUL, AND VIOLATED APPELLANT'S 5TH, 6TH, AND 14TH AMENDMENT RIGHTS

{¶25} "d) THE FIRST SEARCH WAS IMPROPER, AND

{¶26} "e) THE SECOND SEARCH OF DEFENDANT'S BODY WAS UNLAWFUL.

{¶27} "ALL EVIDENCE AND STATEMENTS OBTAINED AFTER THE SEARCH SHOULD HAVE BEEN SUPPRESSED AND THE CASE DISMISSED.

{¶28} "II. THE TRIAL COURT COMMITTED STRUCTURAL, CONSTITUTIONAL AND/OR PLAIN ERROR TO THE PREJUDICE OF APPELLANT,

AND THE JUDGE EXCEEDED HIS STATUTORY AUTHORITY BY INSERTING HIMSELF IN THE PLEA ARRANGEMENTS AND ORDERING APPELLANT THAT HE MUST ADMIT THAT HE POSSESSED DRUGS, WHEN HE DID NOT, AS A CONDITION OF ANY PLEA ARRANGEMENT.

{¶29} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW, TO THE PREJUDICE OF APPELLANT, WHEN IT STRUCK DEFENDANT'S OPENING STATEMENT AND QUESTIONS, CONVEYING TO THE JURY THE COURT'S VIEW ABOUT THE DEFENDANT'S FAILURE TO TESTIFY, AND ERRED WHEN IT DENIED THE DEFENSE MOTION FOR MISTRIAL.

{¶30} "IV. THE TRIAL COURT ERRED AS A MATTER OF LAW, TO THE PREJUDICE OF APPELLANT, BY CONVICTING APPELLANT, BECAUSE THIS CONVICTION WAS BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION.

{¶31} "V. APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS 6TH AMENDMENT RIGHTS, WHEN DEFENSE COUNSEL FAILED TO SHOW THE CD AT TRIAL AND FAILED TO HAVE APPELLANT TESTIFY."

I.

{¶32} In his first assignment of error, Appellant argues that the trial court erred in overruling his motion to suppress. We disagree.

{¶33} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether the

findings of fact are against the manifest weight of the evidence. See *State v. Fanning* (1982) 1 Ohio St.3d 19, 437 N.E.2d 583; *State v. Klein* (1991), 73 Ohio App.3d 486, 597 N.E.2d 1141; *State v. Guysinger* (1993), 86 Ohio App.3d 592, 621 N.E.2d 726. Second, an appellant may argue that the trial court failed to apply the appropriate test or correct law to the findings of fact. See *State v. Williams* (1993), 86 Ohio App.3d 37, 619 N.E.2d 1141, overruled on other grounds. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue that the trial court incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172; *State v. Claytor* (1993), 85 Ohio App.3d 623, 627, 620 N.E.2d 906; and *Guysinger*, supra.

{¶34} Here, Appellant challenges the trial court's interpretation of the law and conclusion on the ultimate issues. Our review is therefore de novo.

{¶35} Appellant alleges that the traffic stop was unconstitutionally delayed and further that the searches of his person were unconstitutional. Appellant also argues that the traffic stop was not based on a reasonable and articulable suspicion of criminal activity.

{¶36} With regard to Appellant's challenge to probable cause for the traffic stop, we find that Appellant did not raise this issue in his motion to suppress before the trial court. It is well established that a party cannot raise any new issues or legal theories for the first time on appeal." *Dolan v. Dolan*, 11th Dist. Nos. 2000-T-0154 and 2001-T-

0003, 2002-Ohio-2440, at ¶ 7, citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629. "Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process." *Nozik v. Kanaga* (Dec. 1, 2000), 11th Dist. No. 99-L-193, 2000 Ohio App. LEXIS 5615. We find that Appellant therefore has waived review of this issue by failing to raise it at the trial level. See *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277.

{¶37} However, even under a plain error analysis, we find that the trooper had a reasonable articulable suspicion for the traffic stop in this matter based on information he garnered through a random license plate check. Such check revealed that the registered owner of the vehicle had an expired driver's license, and upon pulling alongside the vehicle, the trooper was able to see that Appellant fit the description of the registered owner.

{¶38} We must next consider the propriety of the trooper's detention of Appellant and his vehicle at the traffic stop. We recognize the general rule that the scope and duration of an investigatory stop must last no longer than is necessary to effectuate the purpose for which the initial stop was made. See, e.g., *State v. Bevan* (1992), 80 Ohio App.3d 126, 129.

{¶39} This Court has concluded: "[W]hen a motorist is lawfully detained pursuant to a traffic stop and when the purpose of the traffic stop has yet to be fulfilled, the Fourth Amendment is not violated when the officer employs a trained narcotics canine to sniff the vehicle for drugs." *State v. Latona*, Richland App. No.2010-CA-0072, 2011-Ohio-1253, ¶25, citing *State v. Guckert* (Dec. 20, 2000), Washington App. No. 99CA49, 2000-Ohio-1958.

{¶40} Furthermore, when detaining a motorist for a traffic violation, an officer may delay a motorist for a time period sufficient to issue a ticket or a warning, including the time sufficient to run a computer check on the driver's license, registration, and vehicle plates. *State v. Brown*, Tuscarawas App.No. 2009AP050024, 2010-Ohio-1110, ¶ 22, citing *State v. Batchili*, 113 Ohio St.3d 403, 865 N.E.2d 1282, 2007-Ohio-2204, ¶ 12, and *State v. Bolden*, Preble App.No. CA2003-03-007, 2004-Ohio-184, ¶ 17.

{¶41} In the case sub judice, the trooper made a routine check with his dispatcher to check Appellant's license and warrant status. While he was awaiting a response, he decided to call a K9 unit to conduct an exterior drug sniff.

{¶42} We therefore conclude that the brief detention of Appellant in this instance to allow for the computer check on Appellant's driver's license status and to conduct a non-invasive drug dog sniff of the car's exterior was also constitutionally valid.

{¶43} Appellant also challenges the pat-down searches of his person. Appellant herein essentially argues that the evidence of his actions, which occurred immediately after he was being searched, should have been suppressed. We find the fundamental issue in this case, however, is whether Appellant's independent criminal activity would have been "fruit of the poisonous tree" and thus subject to suppression, even if we were to find the police seizure was illegal.

{¶44} The Fourth Amendment prohibits unreasonable searches and seizures. "However, an observation of a fresh crime committed during or after the arrest is not to be suppressed even if the arrest is unlawful." *State v. Ali*, 154 Ohio App.3d 493, 797 N.E.2d 1019, 2003-Ohio-5150, ¶ 13. "The Fourth Amendment's exclusionary rule, which [the defendant] seeks to invoke, does not sanction violence as an acceptable

response to improper police conduct. The exclusionary rule only pertains to evidence obtained as a result of an unlawful search and seizure." *Id.* at ¶ 16, 797 N.E.2d 1019, quoting *Akron v. Recklaw* (Jan. 30, 1991), Summit App.No. 14671, 1991 WL 11392 (additional citations omitted).

{¶45} Here, we find that the conduct for which Appellant was arrested and charged, obstructing official business and tampering with evidence, was unrelated to and independent of such searches.

{¶46} Based on the foregoing, we find that the trial court therefore correctly decided the ultimate issues raised in Appellant's motion to suppress.

{¶47} Appellant's first assignment of error is overruled.

## II.

{¶48} In his second assignment of error, Appellant claims that the trial court erred in participating in the plea negotiations. We disagree.

{¶49} In this case, Appellant challenged the State's recitation of the facts.

{¶50} Under Ohio law, trial courts may reject plea agreements and are not bound by a jointly recommended sentence. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 28. The decision to accept or reject a plea bargain rests solely within the discretion of the trial court. *State v. Asberry*, 173 Ohio App.3d 443, 2007-Ohio-5436, 878 N.E.2d 1082.

{¶51} We find no abuse of discretion in the trial court's refusal to accept Appellant's plea. We therefore find Appellant's argument not well-taken.

## III.

{¶52} In his third assignment of error, Appellant argues that the trial court erred in not granting a mistrial. We disagree.

{¶53} During opening statements in this case, defense counsel made a number of statements concerning Appellant's reasons for being uncomfortable with the pat-down search, his fear of dogs and taser guns, the fact that he possessed a valid Georgia driver's license and that he never intended to run from the police. A short while into the trial, defense counsel informed the trial court that he had decided to not have Appellant take the witness stand. Based on the lack of evidence in support of any the assertions made in opening statements, the trial court struck defense counsel's opening statements. Following closing arguments, defense counsel moved the trial court for a mistrial based on the trial court's statements to the jury striking the opening statements.

{¶54} The granting of a mistrial rests within the sound discretion of the trial court, as it is in the best position to determine whether the situation at hand warrants such action. *State v. Glover* (1988), 35 Ohio St.3d 18, 517 N.E.2d 900; *State v. Jones* (1996) 115 Ohio App.3d 204, 207, 684 N.E.2d 1304, 1306.

{¶55} "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened \* \* \*." *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33, 550 N.E.2d 490, 497. The granting of a mistrial is necessary only when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, 580 N.E.2d 1, 9; *State v. Treesh* (2001), 90 Ohio St.3d 460, 480, 739 N.E.2d 749, 771. When reviewed by the appellate court, we should examine the climate and conduct of the entire trial, and reverse the trial court's decision as to whether to grant a mistrial only for a gross

abuse of discretion. *State v. Draughn* (1992), 76 Ohio App.3d 664, 671, 602 N.E.2d 790, 793–794, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 473 N.E.2d 768, certiorari denied (1985), 472 U.S. 1012, 105 S.Ct. 2714, 86 L.Ed.2d 728; *State v. Gardner* (1998), 127 Ohio App.3d 538, 540–541, 713 N.E.2d 473, 475.

{¶156} Upon review, we find no abuse of discretion in the trial court's decision to strike the improper statements contained in the opening statements and provide the jury with a limiting instruction.

{¶157} Appellant's third assignment of error is overruled.

#### IV.

{¶158} In his fourth assignment of error, Appellant argues that his conviction is against the manifest weight and sufficiency of the evidence.

{¶159} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury '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. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997–Ohio–52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶160} An appellate court's function when reviewing the sufficiency of the evidence is to determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶61} In the instant case, Appellant was convicted of obstructing official business and tampering with evidence.

{¶62} The elements of the offense of obstruction of official business are set forth in R.C. §2921.31(A), and are as follows:

{¶63} "No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's capacity, shall do any act that hampers or impedes a public official in the performance of the official's lawful duties."

{¶64} The crime of Tampering with Evidence is set forth in R.C. §2921.12(A)(1), and provides in pertinent part:

{¶65} "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

{¶66} "(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;"

{¶67} In this case, the State presented evidence to support the charge of obstructing official business. Appellant had been stopped for a traffic search and was being searched by a State Highway Patrolman when he took off running away from the officer. The officers were required to pursue Appellant and then call an ambulance to have Appellant's minor injuries treated. Appellant's actions delayed the performance of the completion of the traffic stop and search of Appellant's person.

{¶68} The State also presented evidence that Appellant ran away from the patrolmen immediately upon Trooper Himes' discovery of an object in appellant's pant that he believed to be crack cocaine. While the patrolmen were chasing Appellant, he ran into a lake, removed something from his pant and dropped it into the murky water.

{¶69} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, certiorari denied (1990), 498 U.S. 881; 111 S.Ct. 228, 112 L.Ed.2d 183.

{¶70} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Appellant's actions were done to "alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation."

{¶71} Based on the foregoing, we find that the State met its burden of production regarding each element of the crime and, accordingly, there was sufficient evidence to support Appellant's convictions.

{¶72} "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.' *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)".

*United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266–1267, 140 L.Ed.2d 413.

{¶73} Appellant's fourth assignment of error is overruled.

V.

{¶74} In his fifth and final assignment of error, Appellant argues that he was deprived of his right to the effective assistance of counsel. We disagree.

{¶75} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to Appellant. The second prong is whether Appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838, 122 L .Ed.2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶76} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St.3d at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶77} In order to warrant a reversal, Appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial; a trial whose result is reliable. *Strickland* 466 U.S. at 687, 694, 104 S.Ct. at 2064; 2068. The burden is upon the

defendant to demonstrate that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id. Bradley*, supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra; *Bradley*, supra.

{¶78} In the instant case, Appellant asserts trial counsel was ineffective for failing to introduce the video of the traffic stop and further, that counsel should have allowed him to testify in his own defense.

{¶79} Decisions regarding which defense to pursue at trial is a matter of trial strategy "within the exclusive province of defense counsel to make after consultation with his client." *State v. Murphy*, 91 Ohio St.3d 516, 524, 2001-Ohio-0112. This Court can only find counsel's performance regarding matters of trial strategy deficient if counsel's strategy was so "outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff.'" *State v. Woullard*, 158 Ohio App.3d 31, 813 N.E.2d 964, 2004-Ohio-3395, ¶ 39, quoting *State v. Yarber* (1995), 102 Ohio App.3d 185, 188, 656 N.E.2d 1322. Further, the Ohio Supreme Court has recognized if counsel, for strategic reasons, decides not to pursue every possible trial strategy, defendant is not denied effective assistance of counsel. *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523.

{¶80} Further, decisions regarding what witnesses to call at trial fall within trial strategy and, absent prejudice, generally will not constitute ineffective assistance of counsel. *State v. Hessler*, Franklin App. No. 01AP-1011, 2002-Ohio-3321; *State v. Coulter* (1992), 75 Ohio App.3d 219, 598 N.E.2d 1324.

{¶81} In this case, we find the decision to not introduce the video of the traffic stop and not to call Appellant to the stand was a tactical decision, and the Ohio Supreme Court has stated "[w]e will ordinarily refrain from second-guessing strategic decisions counsel make at trial, even where counsel's trial strategy was questionable. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189." *State v. Myers* (2002), 97 Ohio St.3d 335, 362, 780 N.E.2d 186, 217.

{¶82} Further, the trial court in this case confirmed with Appellant that it was his decision not to testify. (T. at 173).

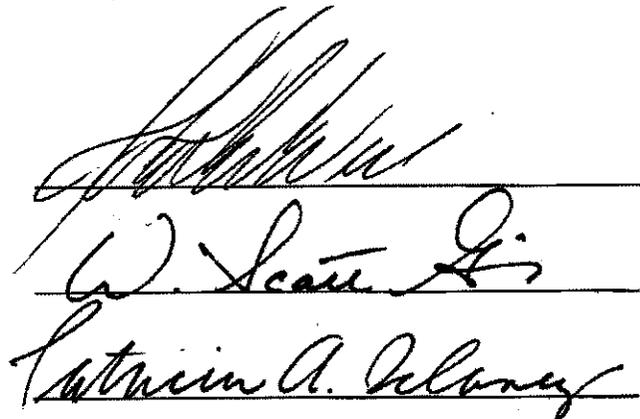
{¶83} Appellant's fifth assignment of error is overruled.

{¶84} For the foregoing reasons, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.



W. Scott Gwin  
Patricia A. Delaney

JUDGES

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