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

This case concerns violations of the Fourth and Fourteenth Amendments of the United States Constitution and violations of the Ohio Constitution, Article 1, §14.

This concerns the traffic stop initiated by a rolling stop at a stop sign, the subsequent failure of the Appellant in a sobriety test and the arrest and then search of the vehicle.

The Appellant was followed by the deputy for a rolling stop at a stop sign. This was shown on a video from the police cruiser at trial. The video also showed two other cars driving completely through the stop sign yet these vehicles, according to the deputy, were not noticed. The appellants plates were ran prior to the stop sign incident when he was at a gas station with other vehicles who's plates were not ran.

The deputy followed the appellant and observed the drivers side wheels cross the center line. The deputy pulled the appellant over and testified that when the appellant lowered the window, he could smell raw marijuana. The State claims that this gave the deputy probable cause to detain and search the vehicle. The deputy supposedly then called the K9 unit yet he called them on his cell phone instead of going through dispatch. It was found in *State v. Vanscoder*, 637 N.E.2d 374 that it required not only odor but the sight of to give probable cause. This was also the finding in *U.S. v. Wald*, 208 F.3d 902, where the mere odor of burnt methamphetamine did not provide probable cause.

The deputy conducted a field sobriety test on the appellant who failed the test. The appellant is placed in the back of the

cruiser and his heard, on the video tape, to be placed under arrest. At trial the deputy then testified that the appellant was not under arrest, even though the video tells otherwise.

The traffic stop itself was unconstitutionally prolonged in order for the K9 unit to arrive. The Fourth Amendment imposes a reasonableness standard upon the exercise of discretion by government officials. **Delaware v. Prouse (1979), 440 U.S. 648, 653-654, 99 S.Ct. 1391, 59 L.Ed 2d 660.** "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the [\*406] individuals Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 654, 99 S.Ct. 1391, 59 L.Ed.2d 660. To justify a particular intrusion, the officer must demonstrate "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." **Terry v. Ohio (1968), 392 U.S. 1,21, 88 S.Ct. 1868, 20 L.Ed.2d 889.**

"[W]hen 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. **State v. Keatghly (1988), 55 Ohio App.3d 130, 131 [562 N.E.2d 932].** This measure includes the period of time sufficient to run a computer check on the drivers license, registration, and vehicle plates. **State v. Bolden, Preble App. No. CA2003-03-007, 2004 Ohio 184, P17, citing Delaware v. Prouse(1979), 440 U.S. 648, 659, 99 S.Ct. 1391 [59 L.Ed.2d 660].**

The appellant estimates between thirty and forty minutes elapsed before the K9 unit arrived. This is against the Fourth Amendment of the United States Constitution. **State v. Elliot, 2012-Ohio-3350, 2012 Ohio App. Lexis 2944.**

Once the K9 unit arrived the deputy took the dog and led it to the rear door of the vehicle. The alert by the K9 was not probable cause because the state claim that probable cause was established by the odor of raw marijuana. The question is was this a search that falls under the automobile exception or search incident to arrest and subsequently an inventory search. Either scenario is faulted with the uncorroborated probable cause as submitted by the state. or in the search being conducted whilst the appellant is arrested and detained in the rear of the police cruiser Most case law states that odor is not probable cause. There were no drugs inside the car and no drugs or drug material in sight to initiate probable cause. *Ker v. California*, (1963), 374 U.S. 23, 83 S.Ct. 1623; *State v. Williams*, (1978), 55 Ohio St.2d 82, 85, 377 N.E.2d 1013.

The other factor is that records show that after the cell phone call by the deputy to the K9 officer that officer called into dispatch. The time stamp shows that the K9 officer was called at the same instant the appellant is being pulled over.

This case questions police procedure on traffic stops and the search and seizure of items in that vehicle, against the Fourth Amendment of the United States Constitution.

The other issues in this case are the effective assistance of counsel for failing to show that the evidence should have been suppressed and that the evidence of the bag was tainted by the deputy when the original container was discarded and the deputies own bag substituted. This only came to light in the prosecutors closing arguments.

STATEMENT OF THE CASE AND FACTS.

On December 19th, 2011, the Appellant was driving his vehicle when he was pulled over by a Medina County Sheriff's Deputy. The Deputy stated that he had pulled him over for a traffic violation and proceeded to give a sobriety test. The Appellant failed this test and was placed under arrest by the Deputy, (evidenced in the video). The Deputy said he could smell raw marijuana when the Appellant wound down the window. Later the K9 unit showed up after apparently receiving a call from the Deputies cell phone instead of through dispatch which would be the normal course. The dog was took to the car and was directed to the rear door by the Deputy and the Deputy touched the rear door of the vehicle. There were no drugs found in the vehicle so the Deputy proceeded to search the entire vehicle. Under some rags and such in the hood of the car the Deputy said he had found some drugs.

The car was legally immobilized due to the Appellants arrest yet the Deputy testified that he was not under arrest yet the video showed otherwise.

The Appellant took the case to trial and was found guilty and sentenced to 11 years imprisonment. The Appellant appealed and the appointed appellate counsel submitted just one error which was failing to bring the Appellant to trial within 90 days as provided by the Ohio Revised Code §2945.71. The Appellant filed for reopening his appeal under App.R.26(B) with a number of errors that appointed counsel had not brought up. The issues brought up were evidence violations by the Deputy, the procedure of the search and seizure, the fact that the Deputy called the K9 unit prior to the stop and directed the dog to the car, and that the vehicle

was immobilized as defined in the Ohio Revised Code yet conducted a warrantless search of the vehicle. These issues included ineffective assistance of trial counsel for not bringing these errors to the attention of the jury. The Appellate Court denied these issues but left questions of law and of the Constitution unanswered. This timely appeal to the Supreme Court of Ohio follows.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.

**Proposition of Law No.1:** The trial court abused its discretion when it denied the appellants suppression hearing.

(A) The appellant was followed by a Medina County Sheriffs Deputy after the deputy observed the appellants vehicle make a rolling stop at a stop sign. The appellants plates had already been ran by the deputy whilst the appellant was at a nearby gas station. Evidence suggests that the K9 unit was called, on the deputies cell phone, prior to the stop. The K9 officer called dispatch himself when he was leaving to respond and the time cast serious doubt on the stop not being premeditated. The deputy followed the appellants car and pulled him over when his outside wheels crossed the center divide. When the

appellant rolled down the window the deputy claimed he could smell raw marijuana and would call the K9 unit? The deputy used this as probable cause to call the unit and search the appellants car. The mere odor of marijuana does not provide probable cause, **U.S. v. Wald, 208 F.3d 902**, suspicion of contraband was not corroborated by other evidence.

(B) Section 14, Article 1 of the Ohio Constitution states:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The probable cause in this case was the supposed odor of raw marijuana when the appellant wound the window down yet there was no drugs found in the passenger compartment of the vehicle. There

were no drugs or drug material in sight to initiate probable cause. *Ker v. California*, (1963), 374 U.S. 23, 83 S.Ct. 1623; *State v. Williams*, (1978), 55 Ohio St.2d 82, 85, 377 N.E.2d 1013.

(C) The video that was introduced at the suppression hearing was not viewed at the hearing by either the appellant or his counsel. They had to make uncorroborated statements about what the Judge would see and then the Judge took the video with him to view at his home over the weekend. His decision or conclusions could not be contested by counsel because the video was not viewed at the same time.

(D) The deputy gave the appellant a field sobriety test which the appellant failed. The deputy placed the appellant in the back of the police cruiser and was told he was under arrest. This can be heard on the tape. The appellant was then detained a further 30 to 40 minutes until the K9 unit arrived. This stop was unconstitutionally prolonged beyond a reasonable time. *State v. Elliot*, 2012-Ohio-3350, 2012 Ohio App. Lexis 2944.

(E) The deputy led the dog to the rear passenger door of the car and said this was an alert to the presence of drugs. Again it should be noted that no drugs were found in the passenger compartment of the car.

(F) The deputy proceeded to search the interior of the car and upon finding no drugs proceeded to search the trunk and under the hood. There was no alert on these areas and the search is being conducted without a warrant because the appellant is under arrest. The deputy later testified that he was not under arrest but he was detained in the back of the cruiser which is restrained because he could not leave of his own accord.

(G) The deputy went under the hood and moved rags around and found a bag containing drugs. This bag of drugs was used as evidence against the appellant. There was no evidence that this bag belonged to the appellant and, in fact, the prosecutors closing argument stated that this was not the bag found at the search but it belonged to the deputy who had , supposedly, taken the drugs out of the bag and placed them in his own bag. The prosecutor explained that there were no fingerprints found because this was not the bag that was found at the search.

**State v. Dubose, 164 Ohio App.3d 698; 2005-Ohio-6602; 843 N.E.2d 1222; 2005 Ohio App. Lexis 5928.** Therefore the evidence should have been suppressed because:

(a) The stop was initiated by a misdemeanor.

(b) The deputy stated that he could smell raw marijuana when the window was lowered. This was impossible and was a pretext to an unconstitutional search of the vehicle.

(c) Probable cause was not a valid reason on the mere odor of marijuana.

(d) Proper procedure was not followed when the deputy called the K9 unit on his cell phone. Evidence suggests that the K9 was called prior to the stop.

(e) The video at the suppression hearing should have been viewed at the same time as the court so questions could have been discussed and argued.

(f) If the appellant was under arrest then the stop search was illegal.

(g) The length of time for the stop was unconstitutional.

(h) The search and seizure was against the Constitution of Ohio, §14, Article 1.

(i) The search of the other areas of the vehicle was unconstitutional.

(j) The evidence had been tampered with by the deputy and the original bag, perhaps containing someone else's fingerprints, had been discarded.

**Proposition of Law No. 2:** The prosecutors introduced new evidence in his closing arguments disclosing evidence that was favorable to the defense. Defense counsel had no opportunity to use this evidence in trial. The appellant was prejudiced by this disclosure at the end of the trial.

During the closing arguments the prosecution made the statement that the evidence in this case did not have the appellants fingerprints on it because the bags that the drugs are in was not the original bag. The appellate court made this out to be a standard evidence bag that items are placed into. The question they did not consider was, if that is the case then what happened to the original bag that might have had fingerprints on it.

Because this was in the final closing arguments the defense counsel had no opportunity to use this in the appellants favor. Counsel did object to this but the court overuled him.

"The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." **Brady v. Maryland, 373 U.S. 83 (1963) at 86.** In **U.S. v. Agurs, 427 U.S. 97 (1976),** the court distinguished three situations where a Brady claim might arise. The third one was "where the Government failed to volunteer exculpatory evidence never requested, or requested only in a

general way. Without this disclosure the appellant did not have the chance to build his defense. This is against the Fifth and Fourteenth Amendments of the United States Constitution.

In the third prominent case on the way to Brady law, **U.S. v. Bagley, 473 U.S. 667 (1985)**, the court disavowed any difference between the second and third **Agurs** circumstances, i.e., the specific request and the general or no request situation. **Bagley** held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the Government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. **Kyles v. Whitley, 514 U.S. 419 (1995) at 433.**

**Proposition of Law No. 3:** Trial counsel was ineffective for failing the appellant at the suppression hearing and for not being able to argue the objection to the prosecutions closing argument adequately.

Trial counsel did object to the prosecutions disclosure about the bag being different and the fact that there were no prints that matched the appellants. He should have argued for a mistrial so the jury would realize the significance of this fact, especially because this was the only physical evidence presented. "Such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charge against the defendant and can thus jeopardize the defendants rights to be tried solely on the basis of the evidence presented at trial." **U.S. v. Carroll, 26 F.3d 1380, (6th Cir.) 1994.**

Trial counsel should have investigated the states case and viewed the video at the suppression hearing with the Judge, not

allowing the Judge to a private viewing.

**Proposition of Law No. 4:** The conviction is against the standards of "sufficiency of evidence" and the "manifest weight of the evidence."

The only evidence in this case was the bag of drugs supposedly found under the hood of the car. The chain of custody made by the State is broken under the words of the prosecutor at closing.

The admissibility of the traffic stop is in question because the prosecution presented two versions to cover the various differences between the "automobile exception" and warrantless searches. There is the fact that no drugs were found in the car and the fact that the deputy testified, unlikely, that he smelled raw marijuana when the window was lowered. Was the appellant arrested before the search or not? This is contradicted by the deputies own testimony and the video presented to the court. There is no record of the call to the K9 unit because the deputy used his cell phone yet there was a cruiser with a perfectly working radio straight to dispatch. There are two different standards of review for claims of insufficient evidence.

**State v. Marcum, 2011 WL 3210051 (Ohio) at 5, "Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by Jackson v. Virginia, 1979, 443 U.S. 307 at 319."**

Whereas the manifest weight of evidence has a different standard;

**State v. Mattison, 90 N.E.2d 926 (Ohio) 1985 at 929, "Weighing the evidence under the guidelines set forth in State v. Gaston, Cuyahoga App. No. 37846, with specific reference to Cole v. McClure, 102 N.E. 264 (1913)."**

Proposition of Law No. 5: The court erred in denying the defendants motion to dismiss for failing to bring him to trial within 90 days as provided in Ohio Revised Code §2945.71

The appellant was held in the county jail the whole time the case was pending and each day the accused is in jail in lieu of bail on a pending case shall be counted as three days, R.C.2945.71(E). Under §2945.71(C), a person against who a charge of felony is pending\*\*\*shall be brought to trial within two hundred and seventy days after the persons arrest.

The Appellant was arrested on December 19th, 2011, and was held without bail. On January 13th, 2012, he requested discovery discovery which was received on January 27th. On February 21st the appellant filed a motion to suppress evidence. The trial court held a hearing on the motion on the 30th March but did not issue its decision until 11th June. At the conclusion of the hearing on the 30th March the court stated that it would issue a decision on the motion "by the end of next week". His trial was scheduled for the 23rd April. After the date of the 11th June any further delays were either by the defense or mutually agreed upon.

The claims is that it took 25 days between his arrest and when defense counsel submitted a motion for discovery, 26 days between when discovery was received and the filing of the motion to suppress, and 49 days between the previously scheduled trial on the 23rd April to the 11th June when the court finally ruled on his motion to suppress. Therefore it took over the 90 days to bring him to trial, in violation of §2945.71.

The appellate courts arguments were only based on their own opinions stating "a motion to suppress tolls the speedy trial

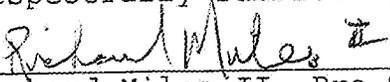
clock from the time the defendant files the motion until the court disposes of the motion, as long as the trial courts disposition occurs within a reasonable time." **State v. Kolvek, 9th Dist. Summit No. 21808, 2004-Ohio-2515.** When the trial court states it will issue a decision "by the end of next week" and the court states on the subject of the video evidence, "going to try and watch this over the weekend or next week", are not a showing of any diligence to make a ruling and also the fact that the trial was originally set four weeks from the date of the hearing. The appellants claims do not include the "reasonable time" from the date of the hearing to the date of the scheduled trial.

The appellants speedy trial rights were violated as governed by the Ohio Revised Code Z2945.71 therefore the case should have been dismissed.

CONCLUSION.

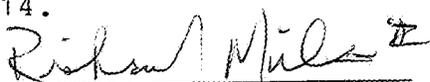
For the reasons discussed above and the explanation in the Explanation of why this case is of great general interest and involves a substantial constitutional question this case does involve matters of great general interest and a substantial constitutional question. The appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully Submitted,

  
Richard Miles II, Pro Se  
Defendant-Appellant  
#633-763  
Belmont Correctional Inst.  
Post Office Box 540  
St. Clairsville, OH, 43950

CERTIFICATE OF SERVICE.

I, the undersigned, do hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. mail to the office of the Medina County Prosecutor on this the 7 day of April, 2014.

  
Richard Miles II. #633-763

STATE OF OHIO  
COUNTY OF MEDINA

COURT OF APPEALS  
IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT  
)ss:  
) 13 SEP 30 AM 9: 59

STATE OF OHIO

FILED  
DAVID B. WADSWORTH  
MEDINA COUNTY  
CLERK OF COURTS  
A. No. 12CA0102-M

Appellee

v.

RICHARD MILES, II

Appellant

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF MEDINA, OHIO  
CASE No. 12 CR 0001

DECISION AND JOURNAL ENTRY

Dated: September 30, 2013

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HENSAL, Judge.

{¶1} Richard Miles II appeals his conviction for possession of cocaine in the Medina County common pleas court. For the following reasons, this Court affirms.

I.

{¶2} According to Medina County Sheriff's Deputy Paul Schismenos, he was on duty on the evening of December 19, 2011, when he saw Mr. Miles fail to come to a complete stop at a stop sign. Deputy Schismenos began following Mr. Miles and saw him fail to use a turn signal when merging into highway traffic and fail to stay in his lane of travel. He, therefore, initiated a traffic stop. When he approached the car and Mr. Miles lowered the window, Deputy Schismenos immediately noticed the odor of raw marijuana. After Bosco, a canine officer's dog, also alerted on the car, officers conducted a search of it and found marijuana and cocaine.

{¶3} The Grand Jury indicted Mr. Miles for possession of cocaine. He moved to suppress the evidence obtained during the traffic stop, arguing that Deputy Schismenos

improperly extended the length of the stop until the canine officer could arrive. The trial court denied his motion, and a jury found him guilty of the offense. The court sentenced him to 11 years imprisonment. Mr. Miles has appealed, assigning as error that the trial court violated his right to a speedy trial.

## II.

### ASSIGNMENT OF ERROR

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS FOR FAILING TO BRING HIM TO TRIAL WITHIN 90 DAYS AS PROVIDED IN OHIO REVISED CODE SECTION 2945.71.

{¶4} Mr. Miles argues that the trial court should have dismissed his case because he was not tried within the time allowed under Revised Code Section 2945.71. Under Section 2945.71(C), “[a] person against whom a charge of felony is pending \* \* \* [s]hall be brought to trial within two hundred seventy days after the person’s arrest.” “[E]ach day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days.” R.C. 2945.71(E).

{¶5} “When reviewing an assignment of error raising a violation of a criminal defendant’s right to a speedy trial, this court reviews questions of law de novo.” *State v. Bennett*, 9th Dist. Summit No. 21121, 2003-Ohio-238, ¶ 5. We must accept the factual findings of the trial court, however, “if they are supported by some competent, credible evidence.” *Id.*

{¶6} Mr. Miles’s speedy trial time began on December 19, 2011, when he was arrested and held without bail. On January 13, 2012, he requested discovery, which the State provided on January 27. On February 21, he filed his motion to suppress evidence. The trial court held a hearing on the motion on March 30 and issued its decision on June 11. Mr. Miles subsequently requested a continuance of the trial date because of newly discovered evidence. The trial was

rescheduled for July 9, but on that day, Mr. Miles moved for a continuance to obtain new counsel. The trial court granted his motion. On July 24, the parties mutually agreed to schedule the trial for September 24.

{¶7} Under Revised Code Section 2945.72(E), “[t]he time within which an accused must be brought to trial \* \* \* may be extended \* \* \* by \* \* \* [a]ny period of delay necessitated by reason of a \* \* \* motion \* \* \* or action made or instituted by the accused[.]” Mr. Miles concedes that all of the delays in going to trial were attributable to him except for the trial court’s delay in ruling on his motion to suppress. He notes that, at the conclusion of the hearing on his motion, the trial court said that it would try to issue a decision “by the end of next week.” At the time, his trial was scheduled for April 23. Mr. Miles contends that, because the trial court did not provide any explanation for why it did not rule on his motion until June 11, the 49 days that passed from April 23 to June 11 should be attributed to the State. Combined with the 25 days between when he was arrested and moved for discovery and the 26 days between when he received discovery and filed his motion to suppress, he argues that it took over 90 days to bring him to trial, in violation of Section 2945.71.

{¶8} “A strict adherence to the spirit of the speedy trial statutes requires a trial judge, in the sound exercise of his judicial discretion, to rule on [defense] motions in as expeditious a manner as possible.” *State v. Martin*, 56 Ohio St.2d 289, 297 (1978). This Court has held that “a motion to suppress tolls the speedy trial clock from the time the defendant files the motion until the trial court disposes of the motion, as long as the trial court’s disposition occurs within a reasonable time.” *State v. Kolvek*, 9th Dist. Summit No. 21808, 2004-Ohio-2515, ¶ 7. “The determination of whether a trial court disposed of a motion within a reasonable time necessarily involves a thorough examination of the circumstances.” *Id.* at ¶ 8. “Moreover, a reviewing court

must consider the complexity of the facts, the difficulty of the legal issues presented in the case at issue, and the demands placed on the time and schedules of trial court judges.” *Id.*

{¶9} A review of the record does not provide this Court with sufficient information to undergo an analysis of the facts and circumstances that affected the timing of the trial court’s ruling. At the hearing on the motion, the court noted that it still had to view a video of the traffic stop, but indicated that it was “going to try to watch this over the weekend or next week.” It also noted that it had “one [other case] ahead of you that I haven’t gotten to yet.” Mr. Miles asserts that those factors do not justify the length of the court’s delay. He argues that his motion to suppress did not present any novel or complicated issues, but merely concerned whether the deputies had probable cause to search his vehicle. He, therefore, argues that it was unreasonable for the court to take 73 days, from March 30 to June 11, to rule on his motion.

{¶10} The Ohio Rules of Superintendence provide that “[a]ll motions shall be ruled upon within one hundred twenty days from the date the motion was filed \* \* \*.” Sup.R. 40(A)(3). The Fifth District Court of Appeals has concluded that the 120-day rule provides the standard for what is a reasonable amount of time within which to rule on a motion to suppress. *State v. Fields*, 5th Dist. Guernsey No. 05-CA-17, 2006-Ohio-223, ¶ 28. In *State v. Beam*, 77 Ohio App.3d 200 (11th Dist.1991), the Eleventh District Court of Appeals opined that “[i]t seems probable that the Supreme Court, in setting the rule, perceived one hundred twenty days to be the outside time limit of reasonableness in ruling on a motion.” *Id.* at 209. Upon review of the facts of that case, it concluded that “the trial court did not exceed its permitted time by ruling on the motion [to suppress] one hundred nine days after it was heard.” *Id.* In *State v. King*, 3d Dist. Wyandot No. 16-11-07, 2012-Ohio-1281, the Third District Court of Appeals determined that, even though the trial court did not provide an explanation for its delay in ruling on the

defendant's motion to suppress, 72 days was "not an unreasonable amount of time for the trial court to consider the facts and legal issues presented \* \* \*." *Id.* at ¶ 37; *see also City of Logan v. Quillen*, 4th Dist. Hocking No. 94CA26, 1995 WL 637059, \*3 (Oct. 27, 1995) (concluding that 72-day delay in ruling on motion to dismiss was not unreasonable and collecting similar cases).

{¶11} Upon review of the record, we conclude that the court disposed of Mr. Miles's motion to suppress within a reasonable time after holding a hearing on the motion. Accordingly, the entire time period from the date Mr. Miles filed his motion, February 21, to the date the court issued its decision, June 11, does not count toward the 90-day time limit under Section 2945.71(C), (E). Mr. Miles's assignment of error is overruled.

### III.

{¶12} The trial court correctly denied Mr. Miles's motion to dismiss because the State did not violate his right to a speedy trial. The judgment of the Medina County common pleas court is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

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

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



JENNIFER HENSAL  
FOR THE COURT

MOORE, P. J.  
WHITMORE, J.  
CONCUR

APPEARANCES:

MICHAEL WESTERHAUS, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and LAUREN M. HASE, Assistant Prosecuting Attorney, for Appellee.

STATE OF OHIO )

COUNTY OF MEDINA )

STATE OF OHIO

Appellee

v.

RICHARD MILES, II

Appellant

COURT OF APPEALS

ss: FEB 27 11:11:29

FILED  
DAVID B. WADSWORTH  
MEDINA COUNTY  
CLERK OF COURTS

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

C.A. No. 12CA0102-M

JOURNAL ENTRY

Appellant Richard Miles has applied to reopen his appeal under Rule 26 of the Ohio Rules of Appellate Procedure. Under Appellate Rule 26(B)(1), “[a] defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel.” To establish ineffective assistance of counsel, Mr. Miles “must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel’s errors, the proceeding’s result would have been different.” *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, ¶ 204 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1994); *State v. Bradley*, 42 Ohio St. 3d 136, paragraph two of the syllabus (1989)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

Mr. Miles argues that his appellate lawyer should have argued that the trial court incorrectly denied his motion to suppress. He argues that the deputy who initiated the traffic stop of his vehicle ignored other cars that rolled through the same stop sign that he did, that it would have been impossible for the deputy to detect the odor of raw marijuana when he lowered the window of his vehicle, and that the deputy did not have probable cause to justify a warrantless search of his vehicle. He also argues that it was not clear when a drug dog was requested, whether the dog was properly trained, and whether the deputy who walked the dog around his vehicle followed proper procedure. He also argues that there was ambiguity regarding when he was placed under arrest, whether the sobriety tests were conducted properly, and whether the drugs that were found under the hood of his car were handled by the deputies properly. He further argues that the video of the traffic stop should have been viewed during the suppression hearing, that the length of the stop was unconstitutional, and that the search of his vehicle violated his constitutional rights.

“[A]ppellate counsel need not raise every possible issue in order to render constitutionally effective assistance.” *State v. Burke*, 97 Ohio St.3d 55, 2002-Ohio-5310, ¶ 7. In this case, none of the arguments Mr. Miles raises had merit. The deputy explained that, because he was doing paperwork, he did not see the other cars that can be seen on the video committing the same traffic violation that Mr. Miles committed. The deputy’s credibility was for the court to determine. The deputy also explained that, although they only found raw marijuana under the hood of the car, the reason he was able to detect the faint smell of the drug when Mr. Miles lowered the window of

the vehicle was because Mr. Miles had the heater running, which brought the smell into the passenger compartment. Regarding whether the deputy had probable cause to search the vehicle, the Ohio Supreme Court has held that the smell of marijuana by someone qualified to recognize the odor is sufficient to establish probable cause. In addition, the drug dog alerted on the vehicle in two places, which also established probable cause.

Regarding the drug dog, we note that Mr. Miles's trial counsel did not ask the dog's handler any questions on cross-examination. Consequently, there are no arguments that appellate counsel could have made regarding the walk-around that would not have been dependent on information that is outside the record. Such arguments are not appropriate on direct appeal. Regarding the video of the stop, it is clear from the suppression hearing that Mr. Miles's lawyer was able to view the video before the hearing. The fact that the parties mutually agreed to let the court watch it at a later time did not produce any non-frivolous arguments for appeal.

Regarding the time at which Mr. Miles was formally placed under arrest and whether the sobriety tests were administered correctly, given the circumstances of this case, those issues are immaterial. The deputy initially placed Mr. Miles in the back of his police vehicle for safety reasons because he had detected the odor of marijuana and because Mr. Miles stopped close to the white fog line on the edge of the lanes of traffic. Although the deputy had Mr. Miles perform sobriety tests, he did not cite Mr. Miles for any under-the-influence offenses. Accordingly, whether the tests were conducted correctly was not material. Similarly, once the officer had probable cause

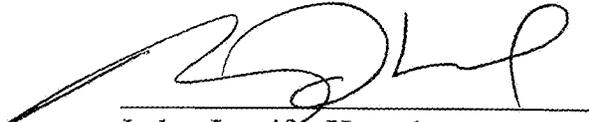
to search the vehicle based on his detection of the smell of marijuana, the length of the stop was irrelevant.

Regarding whether the deputies had probable cause to search under the hood, even if the odor of marijuana only gave them probable cause to search the passenger compartment, by the time the deputy finished administering the field sobriety tests and conducting that part of the search, the drug dog had alerted on the car's front driver's side fender, which gave the deputies probable cause to search under the hood. Finally, the fact that the deputies transferred the drugs that they found from the brown paper bag where they found them to a police evidence bag did not present a meritorious issue for appeal.

Mr. Miles next argues that the prosecutor improperly introduced new evidence during closing argument regarding a fingerprint that was on the bag where the deputies put the drugs they had found in Mr. Miles's vehicle. The prosecutor asserted that the fingerprint probably belonged to one of the deputies, and argued that the fact that they did not know whose fingerprint it was was irrelevant because the bag was not found in Mr. Miles's vehicle. It was merely an evidence bag that the deputies used to store the evidence they recovered from Mr. Miles's vehicle. We conclude that, given the evidence presented in the record as a whole, the prosecutor's opinion about the source of the fingerprint did not create a non-frivolous issue for appeal.

Mr. Miles also contends that his appellate counsel should have argued that his conviction was not supported by sufficient evidence and against the manifest weight of the evidence. Upon review of the record, there is not a reasonable probability that

the outcome of Mr. Miles's appeal would have been different if his counsel had made those arguments. Accordingly, we conclude that Mr. Miles has not demonstrated that there is a genuine issue regarding whether his appellate counsel was ineffective. The application for reopening is denied.



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Judge Jennifer Hensal

Concur:  
Whitmore, J.  
Moore, J.