

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO

:: CASE NO. 15-1568

Plaintiff-Appellee

:: APPEAL NOS. CA2014-11-138

vs.

:: CA2014-11-139

JASON RAPHAEL

::

and

::

GREGORY CLAYTON

::

Defendants-Appellants

::

::

JASON RAPHAEL AND GREGORY CLAYTON

MEMORANDUM IN SUPPORT OF JURISDICTION

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

This case presents two issues for the Court to decide that involve the Fourth and Fourteenth Amendments to the U.S. Constitution as it relates to a citizen's right to be free from prolonged detention when the arresting officers are essentially on a fishing expedition.

In this case the Court of Appeals usurped the authority of the trial judge who had the opportunity to view the demeanor of the witnesses, the physical appearances of the Defendants, and to weigh the testimony of the officers. The Court of Appeals never viewed the Defendants or the officers involved who testified before the trial court in this matter. The Court of Appeals substitution of its weighing of the credibility of the witnesses and arriving at a diametrically different conclusion than the trial court, is contrary to law and the deference the trial court has to weigh the evidence.

The Court of Appeals used the automobile exception to reverse the trial court's decision to suppress the evidence in the within case. The stop of the Defendants and the detention of the Defendants for more than two hours while police officers detained the Defendants at the scene of a traffic stop is unreasonable and in violation of law. The Fourth and Fourteenth Amendments, Supreme Court pronouncements on the subject of detention of drivers, and additionally the actions of the police officers who could not determine what was in the Defendants' vehicle until a search warrant more than four hours after the original stop of the Defendants is unwarranted and in contravention of law.

The Defendants denied consent to search the vehicle, the officers were unsure what was contained in the Defendants' vehicle as nothing was in plain sight that violated the law, and the officers believed they required a search warrant to examine the Defendant's vehicle. Four police officers and a drug sniffing dog could not come to a conclusion what was in the Defendants' vehicle until after the search warrant was obtained and the officers searched the Defendants' vehicle. The

officer's never testified there were "exigent circumstances" requiring them to detain the Defendants for more than four hours prior to obtaining a search warrant.

The trial judge had the opportunity to observe the Defendants and the rote responses of the officers about "drug corridors," the "nervousness of the Defendants," and that one of the Defendant's (Clayton's) jugular vein was visible can only be described as contrived. The Defendant's jugular vein that was clearly visible has no neck, as he is extremely overweight and his head literally sits on his shoulders. In addition, the stop was in the early morning hours, there was minimal lighting, and the Defendant with the bulging neck is an extremely dark skinned black man. The trial judge had the opportunity to observe the Defendants while the Court of Appeals had a sterile transcript.

The Twelfth District Court of Appeals ignored its own precedence and Supreme Court decisions that make the stop and detention of the Defendants unreasonable. While police have the right to briefly stop a suspect, ask questions, or check identification in the absence of probable cause, the stop in this case went well beyond a brief stop. If there were articulable facts supporting a reasonable suspicion that the Defendants committed a criminal offense, it certainly should not take 4 ½ hours for the police to arrive at that conclusion. The police have the right to detain the Defendants briefly while attempting to obtain additional information however the prolonged detention of the Defendants was unreasonable.

The reasonableness of a seizure is dependent on what the police in fact do when a vehicle is stopped. A police officer always has to be reasonably diligent. In this case the Court of Appeals ignored what the officers actually did and how they did it. The initial officers on the scene were unable to determine if the items in the Defendants' vehicle were drugs or not drugs. If the items were drugs the officers had the right to search but their ambivalence about the items in the Defendants' vehicle is demonstrated by their request for a drug sniffing dog who did not

hit on the Defendant's vehicle approximately 30 minutes after the stop of the Defendants. The police did not release the Defendants at that point but rather held them for an additional 90 minutes until another officer arrived on the scene and then took the Defendants into custody while the officers awaited a search warrant. The diligence of an officer is to be gauged by noting what the officer actually did, when he did it, and how he did it. If an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete the stop's mission. A traffic stop prolonged beyond what is necessary to complete the stop's mission is unlawful.

The argument is not about the drug sniffing dog. The issue is the detention of the Defendants for a period of four plus hours on a traffic stop when the officers did not know there was contraband in the Defendants' vehicle. If the officers were acting on exigent circumstances, the Defendants' vehicle should have been towed at once. The ex post facto reasoning of the officers in this case was done at trial to justify the detention of the Defendants and attempt to bolster the evidence in the trial court that the trial judge had the good sense to see through.

The detention of these Defendants or any driver of a motor vehicle for four plus hours for a traffic stop is illegal without the knowledge of criminal wrongdoing on the part of the driver or the occupants. In this case, the officers never made a determination there was contraband until the actual search more than four hours after the stop of the Defendants.

STATEMENT OF THE CASE AND FACTS

Jason Raphael and Gregory Clayton were jointly indicted on March 17, 2014 with one count each of Trafficking in Marijuana under R.C. 2925.03(A)(2) and Possession of Marijuana under R.C. 2925.11(A). Additionally, Clayton was charged with Permitting Drug Abuse under R.C. 2925.13(A) and Raphael was charged with Possession of Drug Paraphernalia under R.C.

2925.14. T.d, 2, Case No. 14CR29858; T.d, 2, Case No. 14CR29857.

Defendants filed a Motion to Suppress both seized evidence and statements on June 25, 2014. A hearing on the motion was held on August 27, 2014 and October 27, 2014. The trial court suppressed the evidence seized as a result of the search of vehicle and any tangible evidence obtained from Clayton. The court denied the motion to suppress Raphael's statement to the police and any tangible evidence obtained from him. The Court of Appeals reversed the trial court.

The state presented four witnesses at the hearing on the Motion to Suppress: Warren County Deputies Andrew Grossenbaugh and Randy Asencio, Det. Dan Schweitzer of the Warren County Drug Task Force, and Doug Eveslage, of the Ohio Attorney General's Office, also assigned to the Drug Task Force. Video footage from the cruiser cameras of both Deputies Grossenbaugh and Asencio were stipulated to at the hearing and admitted into evidence at its conclusion.

Deputy Grossenbaugh testified that he was on routine patrol at about 1:30 a.m. the night of February 11, 2014. He had parked his cruiser in a crossover area on Interstate 71, and was observing southbound traffic. Traffic was "relatively light." The officer said he saw a Chrysler Pacifica approaching and "checked its speed" at 66 miles per hour. The speed limit was 70 miles per hour. He said he checked the speed again at the moment the car passed his cruiser, and that it had slowed down to 53 miles per hour. He did not testify as to how he measured these speeds, e.g., through a radar machine or visual observation. Although he acknowledged that most people will step on their brake and slow down when passing a police cruiser, he said he felt that the reduction from 66 to 53 was suspicious.

Deputy Grossenbaugh testified that two trucks driving behind the Pacifica had to brake and change lanes to pass the car, apparently because they were driving much faster than the Pacifica.

(He apparently did not attempt to gauge the speed of the trucks). Due to this, he drove onto the interstate and began following the Pacifica. He drove directly behind the car, which then changed from the right lane into the left lane. Although he testified that he had "caught up" with the Pacifica and positioned himself directly behind it, (commonly known as tailgating), he felt the lane change was "for no apparent reason." Due to this, he felt that the driver's actions "were indicative of criminal activity."

The deputy continued to follow the Pacifica for a total of nine minutes. He said that when the car entered a marked construction zone, it traveled on top of the left fog lane three times. Before the car reached the Morrow Bridge, which was in a construction zone, it changed back to the right lane without using a turn signal 100 feet before doing so. This added to his suspicion of the vehicle, and he pulled it over for a traffic stop. He said he had to turn on his blue lights twice before the car pulled to the right berm. He got out of his cruiser and walked up behind the Pacifica and shone his flashlight into its rear passenger seat. He saw large packages wrapped in moving blankets and taped tightly. He testified that moving blankets are often used by drug couriers, and that I-71 is one of the "major drug corridors" in Ohio. He observed that the packages were "similar" to bundles of bulk amount marijuana.

The deputy walked to the passenger side of the car and asked the driver, Gregory Clayton, for identification. Clayton was cooperative and did so. When the officer determined that the car was registered to an 84-year old woman from Cincinnati, Clayton told him that this was his aunt. He said he was moving her furniture and antiques. The officer also saw four cell phones in the center of the front seat, and an air freshener hanging from the rear view mirror. The passenger, Jason Raphael, was talking on a cell phone when the officer began asking him questions, but told the officer he did not have any identification on him. He did show the officer a "Horseshoe Casino

player's card," and told the officer his name and gave his date of birth. The deputy maintained at the hearing that he could not testify as to whether that information was correct or not. The casino card had Raphael's name on it, but did not contain a photograph. Deputy Grossenbaugh acknowledged that he knew that in order to obtain a player's card, one must show some identification and verify "who they are." He also admitted that at that time, Raphael had committed no crime. Deputy Grossenbaugh contacted the police communication Center and reported Raphael's name and birth date. When asked whether a match came back, the officer stated he did not recall. He acknowledged that Raphael had told him he was from Brooklyn, New York, but also did not recall whether this fact was confirmed. In fact, Deputy Grossenbaugh stated during the hearing that, "As I said, I am not 100% positive on his identity as we sit here today." Yet when the prosecution conducted redirect examination, the deputy stated that he could identify Raphael as the passenger in the car.

Deputy Grossenbaugh testified that when he first started talking to the men, they were "shaking excessively, avoiding eye contact with me." He said he also saw "Mr. Clayton's pulse" in his neck and said his eyes were "trembling." He therefore turned off his cruiser headlights and his emergency lights "and had him focus on a stimulus" to confirm what he was seeing. He admitted that this was not a scientific test, did not constitute a horizontal gaze nystagmus test, and was "not a test at all." "It was just strictly to confirm the fact that I was in fact seeing his pulse visible on his neck." He said that he did not know how much Clayton weighed, but that he appeared the same at the hearing as he did on the night of his arrest. A review of the video taken by the cruiser camera shows that Clayton is a very, very large, dark-skinned African American man, and that his neck is barely visible and blends in with his shoulders. It also shows that Deputy Grossenbaugh's observation was made in dark lighting. Deputy Grossenbaum admitted that his observation about

trembling eyes and a pulse in the neck had nothing to do with Clayton's operation of the Pacifica. Further, he did not detect the odor of alcohol on Clayton's person.

Deputy Grossenbaugh said that initially, Clayton said they were moving to Columbus but later said he was moving his aunt to Cincinnati. A record check on Clayton disclosed that he had been charged with drug trafficking at some point in time, but no proof that he was convicted of the crime existed.

Based on all of the above, Deputy Grossenbaugh was "extremely suspicious that there was drug activity going on." He therefore called for an additional sheriff's unit and a canine unit. Deputy Randy Asencio arrived at the scene at approximately 1:53 a.m., and listened to Grossenbaugh's explanation of his suspicions. Asencio looked in the car, and stated that the packages there also raised his suspicions that they may contain narcotics.

The officers asked Clayton and Raphael to step out of the car. Deputy Grossenbaugh questioned Clayton, beginning by asking him whether he had any guns or hand grenades. Asencio questioned Raphael. The officers felt that each suspect gave inconsistent details about how long the men had known each other and whether they were coming to or from Cincinnati, which further added to their suspicion of drug activity. Both suspects then consented to a search of their person. No drugs or weapons were found on either. Raphael had rolling papers in a pocket.

At approximately 2:00 a.m., Officer Brad Walker from the Mason police department arrived with a trained canine. When this occurred, Clayton was placed in the back of Deputy Grossenbaugh's cruiser, and Raphael was placed in that of Deputy of Asencio. Neither man was handcuffed. Deputy Asencio refused to say that Raphael was under arrest, but only that "I was detaining him and he was not free to leave."

At 2:04 a.m., Officer Walker walked his dog around the Pacifica and conducted "an open air

sniff." The dog did not hit on the car and thus, did not indicate that any drugs were present. The two deputies did not end their investigation there, however, but requested that Det. Schweitzer of the Warren County Drug Task Force come to the scene. He did not arrive until approximately 3 a.m. Police asked Clayton for consent to search the car, but Clayton declined. After this, Clayton and Raphael's detention in the cruisers continued unabated.

From the time Clayton and Raphael were pulled over at 1:42 a.m. and the time Det. Schweitzer arrived at approximately 3:05 a.m., neither suspect required medical care. Likewise, neither was unable to provide for his own safety. No traffic citations were issued to Clayton regarding any lane changes or other violations. According to Deputy Grossenbaugh, Raphael had committed no criminal offense. No warrants were found against Clayton. Neither man received Miranda warnings during this period of time. Deputy Grossenbaum also confirmed that there was no odor of marijuana coming from the Pacifica.

Det. Schweitzer stated that he was asleep when he was called to assist in the investigation of Clayton and Raphael. He testified that he agreed with the other officers that the location of the traffic stop, the presence of the mattress pads taped to bundles, along with the air freshener and cell phones, were all indicative of criminal drug activity. He testified to various materials that marijuana can be wrapped in to avoid detection, but testified that he did not see any of those materials when he looked at the bundles in the Pacifica. Neither did he smell the odor of marijuana.

Det. Schweitzer talked to both Clayton and Raphael. He said Clayton admitted to having a prior drug trafficking conviction. He also talked to Raphael, "who his story was not right, as far as where they were coming from, where they were going and then I called my boss." He did not examine Clayton or Raphael's eyes, or look for furtive glances or nervousness, but called his boss to report his suspicions about marijuana. He estimated this may have occurred at about 3:15 a.m.

At about 4:30 or 5:00 a.m., Det. Schweitzer decided to drive the Pacifica back to a Drug Task Force location to secure it. It had been sitting on the berm of I-71 for three hours. He consulted with Deputies Grossenbaugh and Asencio in order to write the affidavit and search warrant. He then took it to Judge Robert Peeler, who signed it. Upon execution of the search warrant, police found marijuana in the bundles taken from the Pacifica.

In a seven-page decision, Judge Oda concluded that the initial stop of the Pacifica was lawful, and that facts justified the continued detention of Clayton and Raphael until a canine unit arrived. When the dog did not alert during an open air sniff of the car, however, "it is likewise constitutionally impermissible for the deputies in this case to continue to detain Clayton and the vehicle while they summon Det. Schweitzer for further investigation." Decision pg. 6. Deputy Asencio had testified that "nothing about the appearance of the contents of the Pacifica, standing alone, was suspicious." *Id.* Det. Schweitzer's arrival at approximately 2:50 a.m., "with his additional training and expertise," could not be used "after the fact, to justify the continued seizure of Clayton and his vehicle." *Id.*

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW No. 1: Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures. The Constitution is further offended when police engage in manipulative practices beyond the scope of the traffic stop in order to prolong an unjustified detention, particularly when it occurs after the failure of a canine to hit or alert on the stopped vehicle.

The State of Ohio contends that the trial court erred when it found that the continued detention of Clayton and Raphael after the canine failed to hit on the Pacifica was constitutionally impermissible. But the court was correct when it held that a detention from 1:42 a.m. until nearly 3:00 a.m. — during which time a trained police dog failed to indicate the presence of drugs — constituted an unreasonable detention under the totality of the circumstances. Protracted detentions based on unsubstantiated suspicions are constitutionally unjustified. And, as will be

discussed, the United States Supreme Court ruled on this issue on April 21, 2015 and held that a dog sniff may not be used to extend a traffic stop absent reasonable suspicion. (*See Rodriguez v. United States, infra.*) This is in accord with *State v. Casey*, a decision from this Court upon which the trial court relied. 12th Dist. No. CA2013-10-090, 2015-Ohio-2586.

The United States Supreme Court has long held that, "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d 605.

In an April 2015 Slip Opinion, the United States Supreme Court held that, "Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures." *Rodriguez v. United States*, No. 13-9972, Slip Opinion (April 21, 2015).

In *Rodriguez*, a K-9 officer stopped a driver on a traffic violation and issued a warning for driving on the shoulder of a highway. After doing so, the officer asked for consent to walk his dog around Rodriguez's car. Rodriguez refused. The officer detained Rodriguez while he called for a second officer to arrive at the scene. When the back-up officer arrived, the K-9 officer permitted his dog to sniff around the car. The dog alerted, and methamphetamine was found inside the car. Rodriguez appealed, and argued that his detention was unconstitutional.

When determining the reasonableness of Rodriguez's detention, the Supreme Court held that the duration of a routine traffic stop "is determined by the seizure's 'mission,' which is to address the traffic violation that warranted the stop, *Illinois v. Caballes*, 543 U.S. 405, 407 and attend to related safety concerns. Authority for the seizure ends when tasks tied to the traffic infraction are -

or reasonably should have been - completed."

The U.S. Supreme Court further held that, "The Government's argument that an officer who completes all traffic-related tasks expeditiously should earn extra time to pursue an unrelated criminal investigation is unpersuasive, for a traffic stop 'prolonged beyond' the time in fact needed for the officer to complete his traffic-based inquiries is 'unlawful,' Caballes, 543 U.S., at 407. The critical question is not whether the dog sniff occurs before or after the officer issues a ticket, but whether conducting the sniff adds time to the stop. Pp. 5-8.2,"

This Court has often reviewed the unconstitutionality of an extended detention during a traffic stop based solely on unconfirmed suspicions. *See*, for example, *State v. Popp*, 12th Dist. Butler No. CA2010-05-128, 2011---Ohio-791, ¶ 13. And it has steadfastly followed the rationale from the Ohio Supreme Court in *State v. Robinette* which held that, "When a police officer's objective justification to continue detention of a person stopped for a traffic violation for the purpose of searching the person's vehicle is not related to the purpose of the original stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some illegal activity justifying an extension of the detention, the continued detention to conduct a search constitutes an illegal seizure." 80 Ohio St.3d 234, 1997-Ohio-343, 685 N.E.2d 762.

When a court examines whether the length of a detention is reasonable, it must look at the totality of the circumstances. And when a reviewing court "reviews a police officer's reasonable suspicion determination, 'the court must give 'due weight' to factual inferences drawn by resident judges and local law enforcement officers. *Ulmer* at ¶ 23; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911." *State v. Williams*, Twelfth District No. No. CA2009-08-014, 2010-Ohio-1523, 1119.

The use of manipulative tactics to unreasonably delay a traffic stop were forbidden by the Sixth

District Court of Appeals in *State v. Brown* when it held that, "This court has identified "[v]arious activities, including following a script, prolonging a traffic stop in order to 'fish' for evidence, separating an individual from his car and engaging in 'casual conversation' in order to observe 'body language' and 'nervousness' [that it has] deemed (depending on the overall facts of the case) to be manipulative practices which are beyond the scope of, '* * * the fulfillment of the purpose for which the stop was made.'" Id., quoting *State v. Correa* (1995), 108 Ohio App.3d 362, 368, 670 N.E.2d 1035; see also *State v. Smotherman* (July 29, 1994), 6th Dist. No. 93WD082, 1994 WL 395128. *State v. Brown*, 2009-Ohio-3804, ¶ 19, 183 Ohio App. 3d 337, 342, 916 N.E.2d 1138, 1142.

In the present case, Deputy Grossenbaugh conducted a traffic stop after interpreting Clayton's minor lane changes and driving at less-than-the-maximum speed as violations of the traffic laws of Ohio. The trial court ruled that the initial stop was lawful due to the deputy's observations, Decision, pg. 4. Deputy Grossenbaugh testified that although Clayton was cooperative and produced a driver's license as requested, Clayton avoided eye contact, his eyes trembled and a pulse in his neck was visible, facts that he felt indicated nervousness and were suspicious. He acknowledged that he did not smell the odor of alcohol or marijuana, and that his observations had no connection to Clayton's operation of his car. He said that Raphael could produce only a player's card from a casino with his name on it, and did not remember his social security number. He told the officer his date of birth and that he was from Brooklyn, New York. The officer could not verify these facts through the use of LEADS, and felt that the inability to confirm Raphael's identity was suspicious.

The deputy said that inside the car, he saw bundles wrapped in mattress pads and plastic, multiple cell phones in the center console, and an air freshener hanging from the rear view

mirror. He acknowledged that it was not uncommon to see items transported in the same fashion as the bundles observed in the Pacifica, that it was not illegal to use an air freshener in a car, and that people are entitled to use as many cell phones as they wish. Because of a two-day training course on drug and criminal interdiction, however, he felt these factors *could* indicate criminal activity. The trial court found that "the behavior of the occupants and the additional observations of the officer" justified Deputy Grossenbaugh's actions in calling for a canine unit and detaining Clayton and Raphael until a canine unit arrived.

The canine did not hit or alert in any manner to indicate the presence of drugs. The suspicions of Deputy Grossenbaugh and Asencio were therefore not confirmed, and the purpose of the traffic stop had ceased. Any further detention at this point had no relation to the purpose of the original stop. The deputies had placed Clayton and Raphael in the back of their cruisers and continued to detain them there without any justification. Yet they attempted to call in a more senior officer in the hope that he could somehow find a way to develop more evidence than they had been able to produce. The trial court clearly saw the fallacy of these actions and stated, "The deputies do not have probable cause to arrest at this point nor do they have anything beyond nervous behavior, inconsistent stories and suspicious observations of packages that may or may not be illegal contraband to justify continued detention." The judge noted that the traffic stop "cannot simply be a fishing expedition to obtain further evidence of criminal activity," and that "nervousness and furtive gestures" have been found to be unreliable indicators of reasonable suspicion, "especially in the context of a traffic stop."

The judge found that after the canine failed to hit on Clayton's Pacifica, the case became "virtually indistinguishable" from *State v. Casey, supra*. In *Casey*, a defendant was pulled over for a minor traffic violation. The officer detained the driver because he smelled an odor of alcohol.

After successfully completing field sobriety tests, the officer concluded that the driver was not intoxicated and "probably ok to drive." *Casey* at ¶ 3. Yet he detained the driver and asked him whether there was anything illegal, such as drugs or weapons, in his vehicle. The officer testified that the driver's demeanor suddenly changed, and that he "became very nervous, began shifting his gaze between the police cruiser and his vehicle, and also avoided making eye contact." *Id.* at ¶ 4. Based upon this, the officer concluded that Casey might be in possession of an undetermined illegal contraband, and he asked for consent to search the car. When Casey declined to give consent, the officer detained him until a canine unit arrived to conduct a drug sniff. The dog alerted, and police found marijuana, a marijuana pipe and a set of scales during a search of the car.

On an appeal of the denial of a motion to suppress, the Twelfth District found that the sudden change in Casey's demeanor, his nervousness, furtive glances between the police cruiser and his car and the failure to make eye contact after being asked about guns and drugs did not justify the continued detention for a canine unit and drug sniff. Although the officer stated that he believed Casey had something illegal inside the car, but "wasn't sure if he had a gun or he had drugs," this was insufficient to warrant further detention. *Id.* at ¶ 23.

The trial court found canine sniff was justified. But when that failed to confirm any of the deputies' suspicions, the further detention of nearly another hour to contact Det. Schweitzer was not. Deputies Grossenbaugh and Asencio based the extended detention on the same facts used to call for the canine unit, and nothing more occurred to raise or confirm their suspicions. As stated, they had based their suspicions on perceived nervous behavior, inconsistent stories, and the possibility that packages in the Pacifica "may or may not" have been anything more than common items. While the trial court found the detention from 1:42 a.m. to 2:00 a.m. to be justified, no reason existed to keep Clayton and Raphael detained in the back of separate cruisers for nearly another hour.

What is uncontroverted is the fact that the deputies in this case simply could not articulate reasonable suspicions to justify the extended detention of Clayton and Raphael after the canine did not hit on the Pacifica. The fact that they were frustrated with the results of the canine did not justify the additional detention, dependent on the arrival of a senior officer who was asleep at his home and had to be contacted, dress in a uniform, and drive to their location. Probable cause did not exist to arrest Clayton and Raphael, and it was a constitutional violation to hold them at bay on the side of the road in the back of two cruisers without legal reason to do so. For all of these reasons, the Assignment of Error is meritless and the judge's decision below must be affirmed.

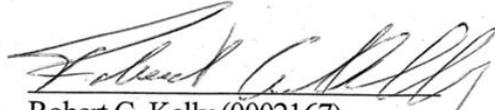
PROPOSITION OF LAW No. II: The extended and continued detention of a citizen is unconstitutional once the canine did not detect illegal drugs, and any actions taken by law enforcement after the fact were beyond the scope of the detention. The good faith exception to the exclusionary rule based upon the search warrant ultimately signed by Judge Peeler is irrelevant to this case.

The State sought a good faith exception to the exclusionary rule be applied to hold that the search warrant signed by a judge was based on probable cause and was facially valid. But the validity of the search warrant never came into question here because the extended and continued detention of a citizen is unconstitutional on the facts. Det. Schweiter's involvement in the case began well after this fact and was beyond the scope of the detention. The affidavit and search warrant written by Det. Schweitzer at approximately 6 a.m. has no effect on the trial judge's analysis of the issues in this case, and the good faith exception to the exclusionary rule has no application here. The relevant issues in this case have been decided by the United States Supreme Court in *Rodriguez v. United States*.

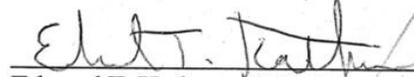
CONCLUSION

The Court of Appeal's analysis and conclusions are in conflict with Ohio and United States Supreme Court case law, Defendants-Appellees submit that the judgment below must be reversed.

Respectfully,



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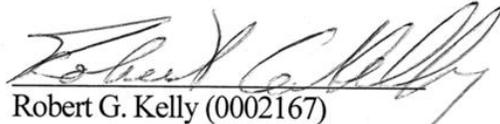
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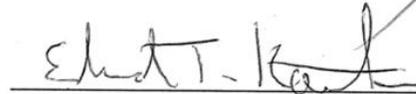
Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Brief of Defendant-Appellee, by United States mail, addressed to David P. Fornshell and Michael Greer, Assistant Prosecuting Attorneys, Warren County Prosecutor's Office, 500 Justice Drive, Lebanon, Ohio 45036, counsel of record, this 24th day of September, 2015.



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COURT OF APPEALS
WARREN COUNTY
FILED

AUG 10 2015

James L. Spaeth, Clerk
LEBANON OHIO

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

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CASE NOS. CA2014-11-138
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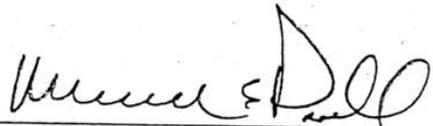
JUDGMENT ENTRY

14CR 29858

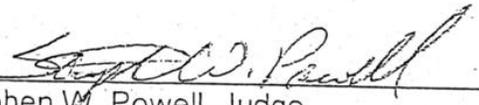
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

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

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



Mike Powell, Presiding Judge



Stephen W. Powell, Judge



Robert P. Ringland, Judge

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

COURT OF APPEALS
WARREN COUNTY
FILED

AUG 10 2015

James L. Spaeth, Clerk
LEBANON OHIO

STATE OF OHIO,

Plaintiff-Appellant,

- vs -

JASON RAPHAEL, et al.,

Defendants-Appellees.

CASE NOS. CA2014-11-138
CA2014-11-139

OPINION
8/10/2015

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case Nos. 14CR29858 and 14CR29857

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellant

Robert G. Kelly, Edward T. Kathman, 4353 Montgomery Road, Norwood, Ohio 45212, for defendants-appellees, Jason Raphael and Gregory Clayton

RINGLAND, J.

{¶ 1} Plaintiff-appellant, the state of Ohio, appeals a decision of the Warren County Court of Common Pleas granting the motion to suppress of defendants-appellees, Jason Raphael and Gregory Clayton. For the reasons stated below, we reverse the decision of the trial court.

{¶ 2} Around 1:30 a.m. on February 11, 2014, Warren County Sheriff's Deputy Andrew Grossenbaugh was parked in his police cruiser along Interstate 71 and observed a

Chrysler Pacifica traveling southbound at 64 m.p.h. The speed limit on the Interstate was 70 m.p.h. and after passing the deputy's police cruiser, the Pacifica slowed to 53 m.p.h. Deputy Grossenbaugh began following the Pacifica and observed it make several marked lane and lane change violations.

{¶ 3} At approximately 1:41 a.m., Deputy Grossenbaugh initiated a traffic stop. The Pacifica did not immediately respond and the deputy had to activate his emergency lights twice before the vehicle pulled over. Once the vehicle came to a stop, the deputy approached the vehicle and found Clayton in the driver's seat and Raphael in the front passenger seat, speaking on a cell phone. According to Deputy Grossenbaugh, the cell phone conversation alerted him to the possibility of drug activity because it is common for drug couriers to call and alert their contact when they are stopped by police. The deputy also saw eight large packages, shaped in blocks, wrapped with moving blankets and taped extremely tightly. The back seats of the Pacifica were folded down and the packages filled the entire rear of the vehicle. The deputy thought the packages were suspicious because drug couriers often wrap drugs with moving blankets and the packages were similar in size and shape to bales of marijuana. The Pacifica was also traveling along Interstate 71, which is a known drug corridor.

{¶ 4} During Deputy Grossenbaugh's initial contact with Raphael and Clayton, both men were extremely nervous, shaking excessively, avoiding eye contact, and Clayton's "pulse was extremely visible in his neck." The deputy obtained identification from Clayton but Raphael was unable to produce identification or his social security number. Instead, Raphael provided the deputy with his Horseshoe Casino player's card, a name, and a date of birth. The deputy also observed five cell phones and an air freshener in the vehicle. The deputy conducted a background check and was unable to confirm Raphael's identity. However, the deputy learned Clayton had been indicted on drug abuse and weapons charges.

{¶ 5} At 1:53 a.m., Deputy Randy Ascencio arrived at the scene and the deputies separately interviewed Clayton and Raphael. The Pacifica was registered to an 84-year-old female from Cincinnati, Ohio, who Clayton claimed was his aunt. At first, Clayton explained he was moving to Columbus, Ohio in his aunt's vehicle. Deputy Grossenbaugh thought it was odd that a vehicle would be fully loaded heading southbound, if Clayton was moving to Columbus. Clayton then stated he was moving "the furniture stuff or antique stuff" of his aunt who had recently passed away. He stated he was moving the furniture from Columbus to Cincinnati. Deputy Grossenbaugh did not believe the bundles were furniture or antiques because they were all similar shape and size and he believed the tight wrapping of the packages would damage the antiques. Deputy Grossenbaugh also thought it was suspicious that Clayton's aunt had lived in Columbus because the registration indicated she resided in Cincinnati. Deputy Ascencio indicated there was confusion during his interview with Raphael regarding whether the men were transporting the packages from Columbus or Cincinnati. In addition, the two men provided inconsistent stories as to how long they had known each other.

{¶ 6} At approximately 2:00 a.m., a canine unit arrived at the scene. Raphael and Clayton were each placed separately in the back of the deputies' police cruisers and were not handcuffed. Before being placed in the cruisers, the men consented to a search of their persons and rolling papers were found on Raphael. Around 2:04 a.m., the canine unit did an open air sniff of the Pacifica and did not alert to the presence of drugs. However, Deputy Grossenbaugh still believed the Pacifica was transporting drugs because drug couriers often try to mask odors by wrapping drugs in blankets and plastic wrap and by applying cleaning agents. Specifically, both Deputy Grossenbaugh and Deputy Ascencio believed the wrapped packages in the back of the Pacifica were bales of marijuana and the canine unit's failure to alert did not lessen their suspicions.

{¶ 7} Deputy Grossenbaugh contacted Detective Dan Schweitzer of the Warren County Drug Task Force for assistance to obtain a search warrant. Detective Schweitzer arrived at approximately 2:50 a.m. and after viewing the packages, he also believed they were bales of marijuana. Clayton declined a request for consent to search the Pacifica and the deputies decided to obtain a search warrant for the vehicle.

{¶ 8} Thereafter, Clayton and Raphael were transported separately in the back of Deputy Grossenbaugh's and Deputy Ascencio's police cruisers to the Warren County Sheriff's Office. The Pacifica was taken to the Drug Task Force headquarters where Detective Schwietzer drafted the affidavit for a search warrant. At approximately 6:00 a.m., the warrant was signed by a judge and the search warrant was executed. The bundles in the back of the vehicle were found to be bales of marijuana. Upon opening the bundles, it was discovered the marijuana bales were wrapped multiple times in plastic and paper, with a strong odor of ammonia.

{¶ 9} On March 17, 2014, Raphael and Clayton were each indicted for trafficking in marijuana, in violation of R.C. 2925.03(A)(2), a second-degree felony since the marijuana equaled or exceeded 40,000 grams and possession of marijuana, in violation of R.C. 2925.11(A), a second-degree felony since the marijuana equaled or exceeded 40,000 grams. Clayton was also indicted for permitting drug abuse, in violation of R.C. 2925.13(A), a fifth-degree felony.

{¶ 10} Raphael and Clayton moved to suppress the evidence found from the search of the vehicle and their persons along with their statements they made to the police. After an evidentiary hearing, the trial court suppressed the evidence seized as a result of the search of the Pacifica and evidence obtained from Clayton following his illegal detention. The court reasoned that while the initial traffic stop and detention was lawful, once the canine failed to alert to the presence of drugs, further detention of Clayton and the Pacifica was illegal.

However, the trial court denied the motion to suppress the evidence obtained from Raphael or statements he made to the police because Raphael was lawfully under arrest.

{¶ 11} The state now appeals, asserting two assignments of error.

{¶ 12} Assignment of Error No. 1:

{¶ 13} THE WARREN COUNTY COURT OF COMMON PLEAS COMMITTED REVERSIBLE ERROR WHEN IT GRANTED RAPHAEL'S AND CLAYTON'S SUPPRESSION MOTIONS AS TO THE MARIJUANA FOUND IN THE PACIFICA.

{¶ 14} Assignment of Error No. 2:

{¶ 15} THE WARREN COUNTY COURT OF COMMON PLEAS COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO APPLY THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

{¶ 16} The state challenges the suppression of the marijuana found in the Pacifica and argues the continued detention of the Pacifica was lawful even though the canine unit failed to alert to the presence of drugs. The state maintains a drug dog's failure to alert does not automatically negate a police officer's probable cause or reasonable articulable suspicion that a vehicle contains drugs, but is instead one factor among many factors to consider. Therefore, the totality of the circumstances demonstrated the deputies had probable cause to search the Pacifica and, consequently, to detain the vehicle while a search warrant was obtained.

Standard of Review

{¶ 17} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Brannon*, 12th Dist. Clinton No. CA2014-09-012, 2015-Ohio-1488, ¶ 24. When considering a motion to suppress, the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility. *State v. Cruz*, 12th Dist. Preble No. CA2013-10-008, 2014-Ohio-4280, ¶ 12. In

turn, the appellate court must accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *Id.* at ¶ 13. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *State v. Swift*, 12th Dist. Butler No. CA2013-08-161, 2014-Ohio-2004, ¶ 9.

Discussion

{¶ 18} "The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution prohibit unreasonable searches and seizures, including unreasonable automobile stops." *Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563, ¶ 11. When the police stop a vehicle based on probable cause that a traffic violation has occurred, the stop is reasonable under the Fourth Amendment. *Id.* During a traffic stop, a law enforcement officer may detain a motorist for a period of time sufficient to issue a citation and to perform routine procedures such as a computer check on the motorist's driver's license, registration, and vehicle plates. *State v. Grenoble*, 12th Dist. Preble No. CA2010-09-011, 2011-Ohio-2343, ¶ 28.

{¶ 19} The detention of a stopped motorist, however, "may continue beyond [the normal] time frame when additional facts are encountered that give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop." *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, ¶ 12; *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353, ¶ 25. "The officer may detain the vehicle for a period of time reasonably necessary to confirm or dispel his suspicions of criminal activity." *State v. Williams*, 12th Dist. Clinton No. CA2009-08-014, 2010-Ohio-1523, ¶ 18. An officer may extend a traffic stop in order to conduct a canine sniff of the vehicle's exterior, if the officer has reasonable suspicion that the vehicle contains drugs. *State v. Stephenson*, 12th Dist.

Warren No. CA2014-05-073, 2015-Ohio-233, ¶ 21.

{¶ 20} In the trial court's decision, it found that the initial traffic stop was valid and reasonable suspicion justified the continued detention of the Pacifica, Raphael, and Clayton until the canine unit arrived. However, the trial court found that after the canine failed to alert to the presence of drugs, the detention was not warranted because the only facts that remained to the deputies were nervousness, inconsistent stories, and suspicious packages. The court reasoned the failure of the drug dog to alert rendered this case indistinguishable from *State v. Casey*, 12th Dist. Warren No. CA2013-10-090, 2014-Ohio-2586.

{¶ 21} In *Casey*, this court held that a motorist was illegally detained when the officer's only suspicion of criminal activity was based on the motorist's nervousness and change in behavior. *Casey* at ¶ 24. We found that the initial traffic stop was valid and the odor of an alcoholic beverage justified the continued detention of the motorist to complete field sobriety tests. *Id.* at ¶ 21. However, once the motorist completed the field sobriety tests and dispelled the officer's suspicions of intoxication, nervousness and furtive glances alone did not amount to enough suspicion to justify further detention. *Id.* at ¶ 27.

{¶ 22} Unlike the facts in *Casey*, Deputies Grossenbaugh and Ascencio observed several behaviors beyond mere nervousness and a change in behavior which they found to be suspicious. Indeed, even the "nervousness, inconsistent stories, and suspicious observations of packages" noted by the trial court, are beyond the facts held by the officers in *Casey*. We find that based on all the facts known to Deputies Grossenbaugh and Ascencio at 2:00 a.m., when the canine unit failed to alert to the presence of drugs in the Pacifica, the deputies had probable cause that the vehicle contained drugs and therefore, could search the vehicle.

{¶ 23} At any time during a valid traffic stop, once police officers obtain probable cause to believe the vehicle contains contraband, the officers may search the vehicle

pursuant to the automobile exception to the Fourth Amendment's warrant requirement. *State v. Durham*, 12th Dist. Warren No. 2013-03-023, 2013-Ohio-4764, ¶ 31. As it relates specifically to an automobile search, probable cause is "a belief reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction." *State v. Kessler*, 53 Ohio St.2d 204, 208 (1978); *State v. Popp*, 12th Dist. Butler No. CA2010-05-128, 2011-Ohio-791, ¶ 27. The determination of probable cause is fact-dependent and turns on what the officers knew at the time they conducted the search. *Godwin*, 110 Ohio St.3d 58, 2006-Ohio-3563 at ¶ 14.

{¶ 24} The facts available to Deputies Grossenbaugh and Ascencio when the canine unit failed to alert were (1) eight suspicious packages, uniform in shape and size, resembling bales of marijuana were in the back of the Pacifica, (2) the packages were wrapped with moving blankets and taped tightly in a manner common with drug couriers, (3) the shape of the bundles were not consistent with the shapes of the furniture and antiques the men claimed to be moving, (4) Clayton's and Raphael's stories regarding how long they had known each other and the purpose of the trip contradicted and Clayton made inconsistent statements regarding the trip, (5) both Raphael and Clayton were extremely nervous, (6) Raphael was on his cell phone at the beginning of the stop and it is common for traffickers to alert their contact when they are stopped by police, (7) the Pacifica was traveling along a major drug corridor, (8) rolling papers were found on Raphael, (9) an air freshener was in the vehicle, (10) there were five cell phones in the vehicle, (11) Clayton had been previously charged with drug and weapon offenses, and (12) Raphael's identity could not be confirmed. Based on all the facts known to Deputies Grossenbaugh and Ascencio at 2:00 a.m., when the canine failed to alert to the presence of drugs in the Pacifica, the deputies had probable cause that the vehicle contained drugs and to search the vehicle.

{¶ 25} Consequently, the deputies could have searched the Pacifica at this point

without a warrant, pursuant to the automobile exception. However, in an abundance of caution, the deputies decided to obtain a warrant to search the Pacifica. The detention of the Pacifica while obtaining a search warrant did not offend the Fourth Amendment. As noted by the United States Supreme Court, "[f]or constitutional purposes, [there is] no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." *Chambers v. Maroney*, 399 U.S. 42, 52, 90 S.Ct. 1975 (1970). See *United States v. Place*, 462 U.S. 696, 701, 103 S.Ct. 2637 (seizure of property permissible pending issuance of a warrant where probable cause and exception to warrant requirement); *United States v. Giacalone*, 588 F.2d 1158, 1161 (6th Cir.1978).

{¶ 26} Additionally, the canine's failure to alert did not destroy the probable cause held by Deputies Grossenbaugh and Ascencio that the Pacifica contained drugs. As noted by the Second District, "[w]hen a drug dog fails to alert, it simply means that he cannot smell the drugs, not that they are not present." *State v. Clark*, 2d Dist. Montgomery No. 18314, 2000 WL 1643789, *7 (Nov. 3, 2000). The failure to alert did not negate the other facts that contributed to the deputies' suspicion that the Pacifica contained drugs. Instead, the failure to alert is simply another factor to consider in analyzing the existence of the requisite suspicion. See *State v. Alexander*, 151 Ohio App.3d 590, 2003-Ohio-760, ¶ 56 (8th Dist.); *United States v. Jodoin*, 672 F.2d 232, 236 (1st Cir.1982). Moreover, we note the search warrant included the information that the canine failed to alert to the presence of drugs in the Pacifica, yet probable cause was still found to support the issuance of the warrant.¹

Conclusion

{¶ 31} Consequently, we find the trial court erred in granting the motions to suppress

1. We do not address the legality of the detention of Raphael and Clayton since it has no bearing on the legality of the search of the Pacifica.

the marijuana found in the Pacifica. Even considering the canine's failure to alert to the presence of drugs in the Pacifica, the deputies had probable cause to believe the vehicle contained contraband. Thus, the deputies could detain the Pacifica while a search warrant was obtained. The state's first assignment of error is sustained. In light of our resolution of the state's first assignment of error, the state's second assignment of error is moot.

{¶ 32} The trial court's decision suppressing the marijuana found in the Pacifica is reversed. This cause is remanded for further proceedings consistent with this opinion.

{¶ 33} Judgment reversed and remanded.

M. POWELL, P.J., and S. POWELL, J., concur.