

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Appellee,

S.Ct. Case No. 2015-1568

On Appeal from the Warren
County Court of Appeals,
Twelfth Appellate District

vs.

Court of Appeals
Case Nos. CA2014-11-138
CA2014-11-139

GREGORY CLAYTON
Appellant.

APPELLANT GREGORY CLAYTON MOTION FOR RELIEF
PURSUANT TO OHIO S.C.T. R. 4.01

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Cincinnati, Ohio 45214

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PROSECUTING ATTORNEY DAVID P. FORNSHELL#0071582
ASSISTANT PROSECUTOR MICHAEL GREER#0084352 (Counsel of Record)
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COUNSEL FOR APPELLEE

FILED
OCT 11 2016
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
OCT 11 2016
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Now comes the Appellant, _____ pro se pursuant to Ohio S.Ct. R. 4.01 requesting relief from judgment in this Court, Case No. 2015-1568 for the reason that Appellant Counsel did not, nor the Clerk of Court this Court, provide Appellant with notice or a copy of this Courts judgment filed January 20, 2016 accepting the jurisdictional appeal, thus denying Appellant the opportunity to file a timely Pro se Merit Brief with the Court.

II. ARGUMENT AND LAW

Ohio S.Ct. Prac. R. 4.01 provides:

(A) Motion for order or relief.

(1)Unless otherwise addressed by these rules, an application for an order or other relief shall be made by filing a motion for the order or relief. The motion shall state with particularity the grounds on which it is based.

Appellant asserts that appellate counsel Edward Kathman(0055446), nor the clerk of courts for the Ohio Supreme Court, sent Appellant notice or the judgment filed January 20, 2016, S.Ct. Case No. 2015-1568, thus as a result of this negligence, Appellant was denied the opportunity to file a timely pro se merit brief with the Ohio Supreme Court.

After many telephone calls to counsel requesting information as to the status of Appellant's appeal in this Court, none of those calls were ever returned. As of the date of filing the instant motion, counsel is still avoiding Appellant.

It was not until September 27, 2016 that Appellant took off work and went to the Warren County Common Pleas Clerks Office and discovered that Appellant's appeal in this Court was dismissed March 30, 2016 for counsel's failure to prosecute. See State ex rel. Sautter v. Grey, 117 Ohio St.3d 465, 2008 Ohio 1444, ¶16, 884 N.E.2d 1062. As of date, Appellant still has not heard from counsel.

III. CONCLUSION

Accordingly, Appellants request the Court to issue an order reversing the Courts March 30, 2016 Judgment Entry dismissing the appeal and afford Appellant the opportunity to file a pro se merit brief or in the alternate, appoint counsel, in time proscribed by S.Ct. R. 16.02(A)(2), to file a pro se merit brief.

RESPECTFULLY SUBMITTED,



GREGORY CLAYTON
1720 Freeman Avenue
Cincinnati, Ohio 45214

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. Mail to the Warren County Prosecutor at 500 Justice Drive, Lebanon, Ohio 45036 on this 3 day of October, 2016.



GREGORY CLAYTON





TALESIA TRIBBLE
Notary Public, State of Ohio
My Commission Expires
September 20, 2020

AFFIDAVIT OF GREGORY CLAYTON

I, Gregory Clayton, first being cautioned as to the penalty of perjury swear and state that:

1. I am the Appellant in the instant motion for relief from judgment, Ohio Supreme Court Case No. 2015-1568;
2. That I was and am without the means to afford a attorney for this instant action;
3. That the Court rendered its judgment on January 20, 2016 accepting the jurisdictional appeal;
4. That I was never appraised of said judgment;
5. That court appointed counsel Edward Kathman(0055446) never informed me of said judgment and to this very day, counsel will not return my calls;
6. That the clerk of courts never sent notice of said judgment to me;
7. On September 27, 2016, Appellant took off work and went to the Warren County Common Pleas Clerks Office and discovered that Appellant's appeal in this Court was dismissed March 30, 2016 for counsel's failure to prosecute the appeal;
8. That the delay in notice of the Court's judgment denied me the opportunity to file a timely pro se merit brief and seek review from this Court;
9. Had I been aware that this Court rendered judgment and accepted the jurisdictional appeal on January 20, 2016, I would have filed a timely pro se merit brief or made sure that appellate counsel filed a timely brief with the Ohio Supreme Court;
10. I have presented operative facts warranting my Motion for Relief from Judgment pursuant to S.Ct. Prac. R. 4.01. I respectfully request the granting of my Motion for

Relief from Judgment pursuant to S.Ct. Prac. R. 4.01.

FURTHER AFFIANT SAYETH NAUGHT.


AFFIANT- GREGORY CLAYTON

Sworn to and subscribed in my presence this 3rd day of October, 2016.

SEAL:



TALESIA TRIBBLE
Notary Public, State of Ohio
My Commission Expires
September 20, 2020


NOTARY PUBLIC




TALESIA TRIBBLE
Notary Public, State of Ohio
My Commission Expires
September 20, 2020

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No. 2015-1568
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	
	:	
Jason Raphael,	:	On APPEAL from the Warren
	:	County Court of Appeals
and	:	Twelfth Appellate District
	:	
Gregory Clayton,	:	C.A. Case Nos. CA2014-11-138
	:	CA2014-11-139
Defendants-Appellants.	:	

MOTION FOR RECONSIDERATION OF DEFENDANTS-APPELLANTS

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Counsel for Defendants-Appellants
Jason Raphael & Gregory Clayton

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No. 2015-1568
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Plaintiff-Appellee,	:	
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v.	:	
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Jason Raphael,	:	On appeal from the Warren
	:	County Court of Appeals
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	:	
Gregory Clayton,	:	C.A. Case Nos. CA2014-11-138
	:	CA2014-11-139
Defendants-Appellants.	:	

MOTION FOR RECONSIDERATION OF DEFENDANTS-APPELLANTS

Pursuant to S.Ct.Prac.R. 18.02(B)(2), Defendants-Appellants respectfully request that this Court reconsider its decision journalized March 30, 2016 in this case. Specifically, Defendants-Appellants ask this Court to permit the Defendants-Appellants an additional twenty days for the filing of the merit brief in the within cause from the date the Court acts on this Motion for Reconsideration. The Defendants-Appellants and their counsel request the Court to find that the failure to timely file the Defendants-Appellants' brief was due to inadvertence of counsel and not through any actions of the Defendants-Appellants. Defendants-Appellants present the following Memorandum in Support of their request that this Court reconsider its determination dismissing the appeal.

Respectfully submitted,

/s/ Robert G. Kelly
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/s/ Edward T. Kathman
Edward T. Kathman #005544
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Memorandum in Support of Reconsideration

Counsel for the Defendants-Appellants have conferred on this case on numerous occasions concerning the filing of the merit brief in the within cause. Initial correspondence sent to Robert G. Kelly, Counsel for Raphael, was received indicating the Court's acceptance of this case. On February 17, 2016 Kelly received the notice the record was filed in the within cause and in reviewing the notice from the Court was awaiting an additional document for the briefing schedule in the within matter.

Counsel for Defendant-Appellant Raphael employs a daily mail log of all documents that are received at his office and the administrative assistant marks all deadlines in the attorney's calendar and Kelly also reviews all correspondence to check for deadlines. In the instant case the deadline was not apparent from the communication and therefor no entry was made to ensure the timely filing of the Defendants-Appellants' brief. Counsel for Raphael has approximately 98% of his appeals in the First District Court of Appeals and a deadline for the filing of a brief has never passed without a brief being filed or dismissed. Further, counsel for the Defendants-Appellants have appeared at all court hearings in this matter.

Counsel for Defendant-Appellant Clayton has not received any communication from the Ohio Supreme Court concerning this case. Counsel for Clayton has inspected the online filings and he anticipated a scheduling order from the Ohio Supreme Court. Counsel for Defendant-Appellant Clayton is not a regular practitioner before the Ohio Supreme Court.

In addition, the Court has accepted this case after the filing of the Memorandum in Support of Jurisdiction. This case merits the Court's attention due to the recent U.S. Supreme Court decision in *Rodriguez v. United States*, ___ U.S. ___, 135 S.Ct. 1609 (2015). In *Rodriguez*, the U.S. Supreme Court made it clear that "absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable searches and seizures. The dismissal of the appeal will result in the Court of Appeals ruling which the Defendants-Appellants claim conflicts with *Rodriguez* to remain the law of the case. The Defendants-Appellants are charged with serious felonies and issues related to their denial of their constitutional rights should not hinge on the failure to correctly docket the deadline for a brief when their freedom is at issue. The Defendants-Appellants should not be penalized and have the Court deny the Defendants-Appellants the opportunity to present their appeal.

Counsel for Defendant-Appellant Raphael has conferred with counsel for Plaintiff-Appellee (Kathryn Horvath) on March 30, 2016 concerning this Motion for Reconsideration and was advised by opposing counsel she is not taking a position in favor or against this motion for reconsideration.

Conclusion

Counsel for Defendants-Appellants respectfully request the Court to vacate the March 30, 2016 decision denying the appeal for want of prosecution and request the Court to grant the Defendants-Appellants twenty days from the date of the ruling on the Motion to Reconsider to file their brief in the within cause for the reasons set forth herein.

Respectfully submitted,

/s/: Robert G. Kelly

Robert G. Kelly #0002167

/s/: Edward T. Kathman

Edward T. Kathman #005544

Counsel for Defendants-Appellants

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Certificate of Service

I hereby certify that a copy of the foregoing MOTION FOR RECONSIDERATION OF DEFENDANTS-APPELLANTS was forwarded by regular U.S. Mail to David P. Fornshell, Prosecuting Attorney, and Kathryn Horvath, Assistant Prosecuting Attorney, Warren County Prosecutor's Office, 500 Justice Drive, Lebanon, Ohio 45036, this 31st day of March, 2016.

/s/: Robert G. Kelly

Robert G. Kelly #0002167

/s/: Edward T. Kathman

Edward T. Kathman #005544

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee

vs.

JASON RAPHAEL

and

GREGORY CLAYTON

Defendants-Appellants

:: CASE NO.

15-1568

:: APPEAL NOS. CA2014-11-138

:: CA2014-11-139

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JASON RAPHAEL AND GREGORY CLAYTON
MEMORANDUM IN SUPPORT OF JURISDICTION

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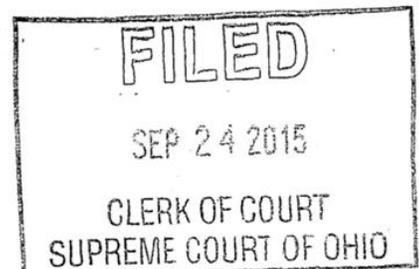


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

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.

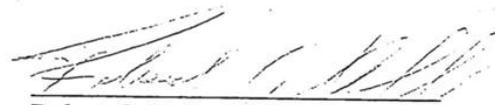
PROPOSITION OF LAW No. II: The extended and continued detention of a citizen is unconstitutional once the canine did not detect illegal drugs, and any actions taken by law enforcement after the fact were beyond the scope of the detention. The good faith exception to the exclusionary rule based upon the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



Robert G. Kelly (0002167)



Edward T. Kathman (005544)

Attorneys At Law

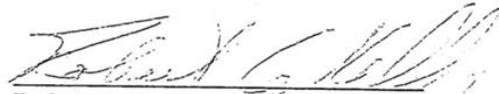
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Norwood, Ohio 45212

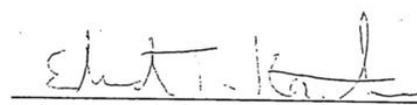
Attorneys for Defendants-Appellees

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.



Robert G. Kelly (0002167)



Edward T. Kathman (0055446)

Attorneys At Law

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

STATE OF OHIO,
Plaintiff-Appellant,

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

- vs -

JUDGMENT ENTRY

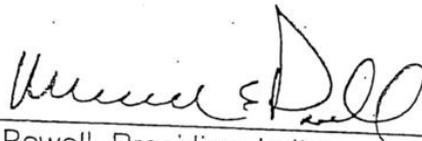
JASON RAPHAEL, et al.,
Defendants-Appellees.

14CR 29858

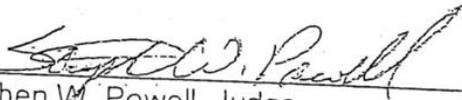
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same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

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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.

FILE COPY

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

v.

JASON RAPHAEL,

And

GREGORY CLAYTON

Defendants-Appellees.

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Case No. 2015-1568

On Appeal from the Warren
County Court of Appeals,
Twelfth Appellate District

Court of Appeals Case Nos.
CA2014-11-138 & CA2014-11-139

**STATE OF OHIO'S RESPONSE TO THE DEFENDANT-APPELLEES' MOTION AND
MEMORANDUM IN SUPPORT OF JURISDICTION**

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Jason Raphael & Gregory Clayton

EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Plaintiff-Appellant, State of Ohio, herein responds to Defendants-Appellees, Jason Raphael and Gregory Clayton, on the issue of jurisdiction, pursuant to S.Ct.Prac.R.¹ 3.2(A). This is not a case of public or great general interest. Defendants-Appellees are not public figures. This case is not in the public eye. In addition, this case does not pose any substantial constitutional questions that would affect the public. Moreover, Defendants-Appellees' propositions of law are without merit.

STATEMENT OF THE CASE AND FACTS

In Case No. 14CR29858, on March 17, 2014, in Warren County, Ohio, Defendant-Appellee, Jason Raphael, was indicted and charged, in Count 1, with Trafficking in Marihuana, R.C.² 2925.03(A)(2), a second-degree felony since the alleged amount of marijuana involved equaled or exceeded 40,000 grams. Indictment, T.d. 02-14CR29858, p. 1. In Count 2, Raphael was charged with Possession of Marihuana, R.C. 2925.11(A), a second-degree felony since the alleged amount of marijuana involved equaled or exceeded 40,000 grams. *Id.*

In Case No. 14CR29857, on March 17, 2014, in Warren County, Ohio, Defendant-Appellee, Gregory Clayton, was indicted and charged, in Count 1, with Trafficking in Marihuana, R.C. 2925.03(A)(2), a second-degree felony since the alleged amount of marijuana involved equaled or exceeded 40,000 grams. Indictment, T.d. 02-

¹ Rules of Practice of the Supreme Court of Ohio.

² Ohio Revised Code.

14CR29857, p. 1. In Count 2, Clayton was charged with Possession of Marihuana, R.C. 2925.11(A), a second-degree felony since the alleged amount of marijuana involved equaled or exceeded 40,000 grams. *Id.* In Count 3, Clayton was charged with Permitting Drug Abuse, R.C. 2925.13(A), a fifth-degree felony. *Id.* at 2.

On June 25, 2014, Raphael and Clayton jointly moved the Warren County Court of Common Pleas to suppress evidence seized in their cases. Motion to Suppress with Supporting Memorandum, T.d. 13-14CR29858, & T.d. 14-14CR29857.

On August 27, 2014, the trial court began a two-day suppression hearing regarding Appellees' motions. Suppression Hearing, 08/27/2014, T.p. The State's first witness was Deputy Andrew Grossenbaugh of the Warren County Sheriff's Office. *Id.* at 4-76. Deputy Grossenbaugh explained that Warren County has two major drug corridors running through it: Interstate 71 (I-71) and Interstate 75 (I-75). *Id.* at 6.

Deputy Grossenbaugh testified that, at approximately 1:00 a.m. on February 11, 2014, he observed a Chrysler Pacifica with darkly-tinted windows traveling southbound at about 64 miles per hour, which was under the 70-miles-per-hour speed limit. *Id.* at 7. Deputy Grossenbaugh observed the vehicle commit a marked-lane violation. *Id.* at 12. Deputy Grossenbaugh initiated a traffic stop at about 1:35 a.m. *Id.*

Deputy Grossenbaugh testified that, when he approached the vehicle, he saw that the Pacifica's seats were folded down and there were eight large packages in the vehicle. *Id.* at 14. The packages were wrapped in moving blankets "and taped extremely tightly." *Id.* Deputy Grossenbaugh explained that this was significant to him because drug couriers often use moving blankets to wrap around drugs. *Id.* Deputy

Grossenbaugh testified that packages "were shaped in blocks, it appeared to me that through my training, they were very similar in size and shape to bundles of bulk amount marijuana." *Id.* at 18.

Deputy Grossenbaugh testified that Clayton was the driver and Raphael was the passenger. *Id.* at 14. Deputy Grossenbaugh observed Raphael speaking on a cell phone. *Id.* Deputy Grossenbaugh asked Raphael for identification, but he said he did not have any. *Id.* at 14-15. Raphael could not provide his social security number. *Id.* at 15. Deputy Grossenbaugh found Raphael's lack of identification suspicious. *Id.* Deputy Grossenbaugh testified that, in his experience, when a person claims not to know or remember his social security number, that person often has an active warrant or does not want to be identified. *Id.* at 16.

Deputy Grossenbaugh testified that the Pacifica was registered to an 84-year-old lady from Cincinnati, Ohio. *Id.* at 16-17. Deputy Grossenbaugh found this suspicious. *Id.* at 17. Clayton told Deputy Grossenbaugh that the vehicle belonged to Clayton's aunt; however, this did not allay the deputy's suspicion. *Id.* Deputy Grossenbaugh testified that he observed five cell phones in the vehicle. *Id.*

Deputy Grossenbaugh testified that, when he first made contact with Clayton and Raphael, both were shaking excessively and were avoiding eye contact with the deputy. *Id.* at 22. Deputy Grossenbaugh characterized Raphael's and Clayton's behavior as extremely nervous. *Id.* Deputy Grossenbaugh testified, "Clayton's pulse was extremely visible in his neck." *Id.* Deputy Grossenbaugh found all of this behavior unusual. *Id.* Deputy Grossenbaugh testified that the fact that owner of the vehicle was

not there; the block-shaped packages; the multiple cell phones; the failure of Raphael to produce identification; and Raphael's and Clayton's extreme nervousness indicated criminal activity. *Id.* at 22-23. Specifically, all this information indicated that they were drug couriers. *Id.* at 23.

Deputy Grossenbaugh explained that, using the name and date of birth provided by Raphael, he was unable to confirm Raphael's identity. *Id.* at 25.

Deputy Grossenbaugh testified that, initially, Clayton indicated that he and Raphael were moving to Cincinnati. *Id.* Seconds later, Clayton told the deputy that he, Clayton, was moving to Columbus. *Id.* Deputy Grossenbaugh found this significant since the Pacifica was loaded. *Id.* "If they're moving to Columbus, generally their car would be empty on a return trip back to Cincinnati." *Id.*

Deputy Grossenbaugh testified that, after gathering this information, he asked for an additional officer and asked for a canine unit. *Id.* at 24.

Deputy Grossenbaugh testified that he was able to confirm Clayton's identity. *Id.* at 26. The deputy learned that Clayton had been charged with "a drug abuse charge and a weapons type charge;" however, the deputy was not sure whether Clayton had been convicted of those offenses. *Id.*

Deputy Grossenbaugh testified that, eventually, Deputy Ascencio arrived as backup. *Id.* The deputies separated Defendants-Appellants and interviewed them individually. *Id.* at 26-27. Deputy Grossenbaugh interviewed Clayton. *Id.* Clayton told Deputy Grossenbaugh that Clayton and Raphael were moving Clayton's aunt's stuff. *Id.* Deputy Grossenbaugh asked what stuff, and Clayton respond "like furniture stuff or

antique stuff." *Id.* Deputy Grossenbaugh testified that the packages did not look like furniture or antiques because the packages were wrapped tightly, leading Deputy Grossenbaugh to believe that if the packages were antiques they were broken. *Id.* at 27-28. Further, the packages were all very similar in size and shape. *Id.* at 28. Clayton indicated that his aunt had died "and that's why they were moving her from Columbus to Cincinnati" despite the fact the vehicle was registered in Cincinnati. *Id.* This information heightened Deputy Grossenbaugh's suspicion. *Id.*

Deputy Grossenbaugh asked Clayton how long Clayton had known Raphael. *Id.* Clayton told Deputy Grossenbaugh that he, Clayton, and Raphael had known each other "since they were kids." *Id.* Clayton stated that he and Raphael had grown up together. *Id.* Deputy Grossenbaugh testified that these statements became significant later when he conferred with Deputy Ascencio. *Id.* at 28-29. Deputy Ascencio relayed to Deputy Grossenbaugh that Raphael stated that he, Raphael, and Clayton had only known each other for a couple of, or a few, months. *Id.* at 29. Raphael also told Deputy Ascencio that Raphael and Clayton were not taking anything to Columbus. *Id.*

Deputy Grossenbaugh asked for consent to search the vehicle, but Clayton declined. *Id.* Clayton continued to avoid eye contact and to shake excessively. *Id.*

Deputy Grossenbaugh testified that the canine unit arrived at about 2:00 a.m. *Id.* at 31. Deputy Grossenbaugh testified that it was common to use canine units during traffic stops and that drug dealers know that. *Id.* at 32. Deputy Grossenbaugh explained that large scale drug operations often use various substances and multiple layers to mask the odor of illegal drugs to fool drug dogs. *Id.*

Deputy Grossenbaugh testified that he had witnessed canine searches where the drug dog did not alert but drugs were still found. *Id.* Deputy Grossenbaugh testified that using a drug dog was only one tool that he relied during a possible drug interdiction investigation. *Id.* at 33. Deputy Grossenbaugh knew all of this on February 11, 2014. *Id.* Deputy Grossenbaugh testified that the drug dog did not alert on the Pacifica. *Id.* Despite this, Deputy Grossenbaugh continued to investigate due to the observations and information that he had uncovered. *Id.* Deputy Grossenbaugh testified that it was his and Deputy Ascencio's opinion that the packages in the Pacifica were marijuana bales. *Id.* Deputy Grossenbaugh testified that the drug dog's failure to alert did not lessen his suspicions at all. *Id.*

Deputy Grossenbaugh testified that he contacted Detective Schweitzer of the Warren County Drug Taskforce to help to obtain a search warrant. *Id.* While waiting for Detective Schweitzer, Clayton stayed, without handcuffs, in the back of Deputy Grossenbaugh's cruiser. *Id.* at 34. Raphael stayed, without handcuffs, in the back of Deputy Ascencio's cruiser. *Id.* Deputy Grossenbaugh testified that Detective Schweitzer arrived around 2:50 a.m. and observed the packages in the back of Pacifica and agreed with Deputy Grossenbaugh and Deputy Ascencio that the packages were bales of marijuana. *Id.*

Deputy Grossenbaugh testified that the Pacifica was driven to the taskforce's headquarters. *Id.* at 35. Appellees were transported to the sheriff's office and placed in interview rooms. *Id.* Deputy Grossenbaugh helped Detective Schweitzer draft the affidavit for the search warrant. *Id.*

Deputy Grossenbaugh testified about State's Exhibit No. 6, the affidavit to the search warrant, and about State's Exhibit No. 7, the search warrant. *Id.* at 36. Deputy Grossenbaugh testified that the affidavit contained the fact that the drug dog did not alert on the Pacifica. *Id.* Deputy Grossenbaugh testified that Detective Schweitzer took the affidavit and search warrant to Judge Peeler of the Warren County Court of Common Pleas and that the judge signed it. *Id.* at 37.

Deputy Grossenbaugh testified that the search warrant was executed and bales of marijuana were discovered. *Id.* When the packages were opened, it was discovered that the packages had been wrapped multiple times in plastic and paper, with the strong odor of ammonia. *Id.*

During cross-examination, Deputy Grossenbaugh testified that he believed that he had probable cause to seek a search warrant. *Id.* at 61. Deputy Grossenbaugh further testified, "To get a search warrant was made--the probable cause--everything we had was before the canine got there, however, we pursued the search warrant after the canine and consent was denied." *Id.* Deputy Grossenbaugh further testified that, after the drug dog failed to alert, he still had strong probable cause that the packages were bales of marijuana and that he was aware of drug dogs not alerting on vehicles in which drugs were discovered. *Id.* at 64. Regarding Detective Schweitzer, Deputy Grossenbaugh testified that the detective had several years of experience with drug interdiction and had greater experience at drafting search warrants than the deputy. *Id.* at 66. Deputy Grossenbaugh admitted that he has only written one, perhaps two, search warrants during his career. *Id.*

After Deputy Grossenbaugh's testimony, Deputy Randy Ascencio took the stand. Suppression Hearing, 08/27/2014, T.p., pp. 77-100, & Suppression Hearing, 10/27/2014, T.p., pp. 4-28. Deputy Ascencio testified that he spoke with Raphael. Suppression Hearing, 08/27/2014, T.p., p. 87. Raphael told Deputy Ascencio that Raphael and Clayton were traveling from Columbus to Cincinnati. *Id.* Raphael indicated that he and Clayton were moving furniture for Clayton's dead aunt. *Id.* Raphael expressed confusion about whether he and Clayton were transporting the packages from Columbus to Cincinnati or from Cincinnati to Columbus. *Id.* at 89. But Raphael indicated that the packages were already in the vehicle when Clayton picked up Raphael in Cincinnati. *Id.* This contradicted Clayton's story that they had picked up the packages in Columbus and was moving them to Cincinnati. *Id.* Deputy Ascencio asked Raphael about how long Raphael and Clayton had known each other. *Id.* at 88. Raphael told Deputy Ascencio that he, Raphael, had known Clayton for a couple of, or a few, months. *Id.*

After Deputy Ascencio, Detective Dan Schweitzer of the Warren County Sheriff's Office assigned to the Warren County Drug Taskforce testified. *Id.* at 33-77. Detective Schweitzer testified that he drafted an affidavit for a search warrant for the vehicle. *Id.* While the detective was drafting the affidavit, he was aware that the drug dog had not alerted on the Pacifica. *Id.* at 45. Detective Schweitzer testified that he included this fact in the affidavit. *Id.* Judge Peeler signed the search warrant even though the affidavit had stated that the drug dog had failed to alert. *Id.*

After hearing the evidence, the trial court granted Defendants-Appellees'

suppression motion. Decision and Order, 11/17/2104, T.d. 16-14CR29857 & T.d. 15-14CR29858, p. 6.

The State appealed to the Warren County Court of Appeals, Twelfth Appellate District. *State v. Raphael*, 12th Dist. Nos. CA2014-11-138 & CA2014-11-139, 2015-Ohio-3179, ¶1. The Twelfth District reversed the trial court's decision granting the Defendants-Appellees' suppression motion, holding that deputies had probable cause to search Defendants-Appellees' vehicle, despite the fact that the canine unit failed to alert, and could have searched the vehicle pursuant to the automobile exception. *Id.* at ¶¶24-25. The Twelfth District held that the detention of the vehicle to obtain a search warrant did not run afoul of the Fourth Amendment. *Id.* at ¶25. Finally, the Twelfth District held that the dog's failure to alert did not destroy the probable cause that the deputies had prior to the canine search. *Id.* at ¶26.

ARGUMENT

Response To Propositions of Law I and II: The Warren County Court of Appeals, Twelfth Appellate District, did not err when it reversed the trial court's decision to suppress because the deputies had probable cause to search Defendants-Appellees' vehicle prior to the arrival of the canine unit.

In Defendants-Appellees' first proposition of law, they argue that the Twelfth District erred when it reversed the trial court's decision granting their suppression motion because there were no reasonable, articulable suspicion to justify the continued detention of the vehicle once the canine unit failed to alert. To support this argument, Defendants-Appellees cite *State v. Casey*, 12th Dist. No. CA2013-10-090, 2014-Ohio-2586, and *Rodriquez v. United States*, ____ U.S. ____, 135 S.Ct. 1609, 191 L. Ed. 2d

492 (2015). In Defendants-Appellees' second proposition, they argue that the good faith exception does not apply and insist that *Rodriquez* controls the result of this case.

In this case, the deputies had no need for additional reasonable, articulable suspicion to continue the detention of Defendants-Appellees' vehicle. Prior to the canine's failure to alert, the deputies knew that Defendants-Appellees possessed multiple cell phones. See *State v. Carter*, 11th Dist. No. 2003-P-0007, 2004-Ohio-1181, ¶40 (The presence of one cell phone in the vehicle's center console was a factor, among others, that supported the officer's reasonable suspicion of criminal activity.). The deputies knew about the inconsistencies between Clayton's three statements regarding the purpose of the trip and knew about the inconsistencies between Clayton's stories and Raphael's story. See *State v. Stephenson*, 12th Dist. No. CA2014-05-073, 2015-Ohio-233, ¶23 (Inconsistent statements about purpose of trip was a factor, among others, that supported officer's reasonable, articulable suspicion to extend the duration of the stop beyond the initial purpose of the stop.). The deputies knew about the inconsistencies between Clayton's story and Raphael's story about how long they had known one another. See *Stephenson*, 2015-Ohio-233, at ¶23 (Inconsistent statements about how long driver and passenger had known one another was a factor, among others, that supported officer's reasonable, articulable suspicion to extend the duration of the stop beyond the initial purpose of the stop.). The deputies knew that Clayton had been previously charged with drug and weapons offenses. See *Carter*, 2004-Ohio-1181, at ¶40 (A suspect's prior drug convictions, along with other factors, may support an officer's reasonable suspicion of criminal activity.). The deputies knew that

Defendants-Appellees were traveling along a major drug corridor. See *Stephenson*, 2015-Ohio-233, at ¶23 (Travel along a major drug corridor, I-71, was one factor, among others, that supported officer's reasonable, articulable suspicion to extend the duration of the stop beyond the initial purpose of the stop.), see also *United States v. Pack*, 612 F.3d 341, 361 (5th Cir. 2010) (Travel along a major drug corridor in Texas, was one factor, among others, that supported officer's reasonable, articulable suspicion of unspecified criminal activity.). The deputies knew that Raphael did not have valid identification, and they could not confirm Raphael's identity. See *State v. Jones*, 3rd Dist. No. 5-11-01, 2011-Ohio-4181, ¶15 (Failure of the passenger to produce identification was one factor, among others, that supported officer's reasonable, articulable suspicion to extend the duration of the stop beyond the initial purpose of the stop.). Further, the deputies knew that all eight packages in the back of Defendants-Appellees' vehicle had uniform shape and size and resembled bales of marijuana. See *United States v. Hindhaugh*, 10th Cir. No. 98-3096, 1999 U.S. App. LEXIS 80, p. *7 (Jan. 5, 1999) (Block shapes visible in a duffle bag in a vehicle were a factor, among others, that supported officer's reasonable, articulable suspicion of criminal activity.). This evidence was uncontroverted. And it not only supported reasonable, articulable suspicion to extend the duration of the stop beyond its initial purpose but this evidence also constituted probable cause to search the vehicle.

Further, the failure of the canine unit to alert did not negate any of the probable cause in this case. In *State v. Alexander*, 151 Ohio App. 3d 590, 2003-Ohio-760, 784 N.E.2d 1225, ¶56, the Eighth Appellate District held that a drug dog's failure to alert did

not nullify a law enforcement agent's suspicion that the suspect carried drugs. In *State v. Clark*, 2nd Dist. No. 18314, 2000 Ohio App. LEXIS 5110, pp. *17-*18 (Nov. 3, 2000), the Second Appellate District held that a drug dog's failure to alert did not negate all of the other "drug courier" characteristics that were present. A dog's failure to alert is simply a neutral factor for the State when analyzing whether or not an officer has reasonable, articulable suspicion. *Id.* at *18. In 1981, the United States Court of Appeals, First Circuit, held that a drug dog's failure to alert does not destroy the probable cause that would otherwise exist. *United States v. Jodoin*, 672 F.2d 232, 236 (1st Cir. 1982). "It is just another element to be considered by the magistrate." *Id.*

Additionally, in *United States v. Glover*, 104 F.3d 1570, 1577 (10th Cir. 1997), the defendant argued that, because a drug dog's positive alert supplies probable cause, then the absence of an alert must negate or nullify probable cause. The Tenth Circuit rejected this argument, noting that "drug-detecting dogs have not supplanted the neutral and detached magistrate as the arbiter of probable cause." *Id.* Further, in *United States v. Ramirez*, 342 F.3d 1210, 1212 (10th Cir. 2003), the defendant argued that a drug dog's failure to alert eliminated reasonable suspicion. The Tenth Circuit rejected this argument, holding that neither a positive alert nor a negative alert change the factors that constituted reasonable, articulable suspicion in the first place. *Id.* at 1212-1213.

So how do we know that this uncontroverted evidence constituted probable cause? We know because a neutral and detached magistrate—in the form of Judge Peeler of the Warren County Court of Common Pleas—considered all of the factors

adduced at the suppression hearing. And Judge Peeler concluded, despite the drug dog's failure to alert, that the deputies had probable cause to search the vehicle.

The affidavit of the search warrant included all the factors previously mentioned, including the dog's failure to alert. Further, the deputies were aware of all the factors included in the affidavit, except for the failure to alert, before the canine unit arrived. So, if all these factors were sufficient to support probable cause in light of the drug dog's failure to alert, then it stands to reason that the deputies had probable cause to search the vehicle prior to the arrival of the canine unit. In other words, the deputies did not need the canine unit. The deputies could have legally searched the vehicle pursuant to the automobile exception to the warrant requirement. Therefore, the Twelfth District did not err when it so held and reversed the trial court's decision.

Regarding the Twelfth District's opinion in *Casey*, the Twelfth District held that nervousness, in and of itself, is insufficient to constitute reasonable, articulable suspicion to continue a detention beyond the initial purpose of the traffic stop. 2014-Ohio-2586, ¶¶26-27. However, in this present case, a cursory review of the record shows that the deputies had far more than nervousness to justify the detention of Defendants-Appellees' vehicle. Thus, *Casey* offers Defendants-Appellees no relief.

As for *Rodriguez*, the United States Supreme Court granted certiorari regarding "the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff." 135 S.Ct. at 1614. The *Rodriguez* court reversed, holding, "Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against

unreasonable seizures." *Id.* at paragraph one of the syllabus.

In this case, the trial court concluded that Defendants-Appellees' behavior after the initial stop constituted reasonable suspicion to further detain Defendants-Appellees until the arrival of the canine unit. Decision and Order, 11/17/2104, T.d. 16-14CR29857 & T.d. 15-14CR29858, p. 4. This was a correct application of the law to the facts and comported with the United States Supreme Court's decision in *Rodriquez*. So this case falls outside the scope of *Rodriquez*.

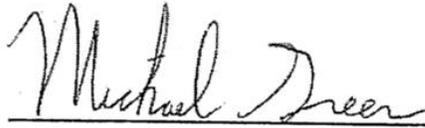
As for the good faith exception to the exclusionary rule, the Twelfth District did not apply the good faith exception in its decision. So the application of the good faith exception is not an issue before this Court.

When it comes down to brass tacks, the deputies in this case had probable cause to search Defendants-Appellees' vehicle before the arrival of the canine unit. And the canine unit's failure to alert did not negate any of the deputies' probable cause to search. Further, neither *Casey* nor *Rodriquez* apply to this case. Thus, Defendants-Appellees have failed to demonstrate that the Twelfth District erred. So this Court should not grant jurisdiction regarding Defendants-Appellees' first or second propositions of law.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Warren County Court of Appeals, Twelfth Appellate District, and neither accept jurisdiction nor grant leave for the appeal of Jason Raphael and Gregory Clayton since their propositions of law lack merit. Moreover, this Court should not accept jurisdiction over this appeal because Defendants-Appellees have neither raised a substantial constitutional question nor presented an issue of public or great general interest.

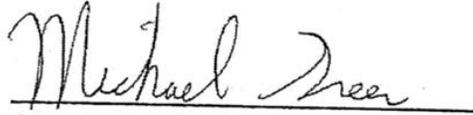
Respectfully submitted,



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CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing was mailed by ordinary U.S. mail to Defendants-Appellees' counsel: Mr. Robert G. Kelly, and Mr. Edward T. Kathman, 4353 Montgomery Road, Norwood, Ohio 45212 on this 15th day of October, 2015.

A handwritten signature in cursive script that reads "Michael Greer". The signature is written in black ink and is positioned above a horizontal line.

MICHAEL GREER, #0084352
Assistant Prosecuting Attorney

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COURT OF APPEALS
WARREN COUNTY
FILED

SEP 28 2015

James L. Spaeth, Clerk
LEBANON, OHIO

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO
Plaintiff-Appellee

vs.

JASON RAPHAEL
and
GREGORY CLAYTON

Defendants-Appellees

:: CASE NO. **15-1508**
:: APPEAL NOS. CA2014-11-138
:: CA2014-11-139

:: NOTICE OF APPEAL OF DEFENDANTS-
APPELLANTS, JASON RAPHAEL AND
GREGORY CLAYTON

NOTICE OF APPEAL OF DEFENDANTS-APPELLEES,
JASON RAPHAEL AND GREGORY CLAYTON

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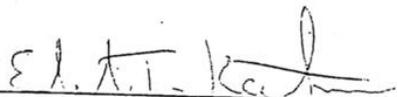
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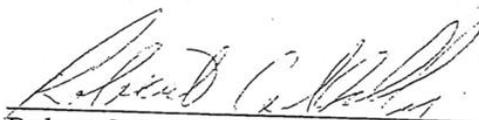
FILED
SEP 24 2015
CLERK OF COURT
SUPREME COURT OF OHIO

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Notice of Appeal of Appellants, Jason Raphael and Gregory Clayton, by United States mail, addressed to David P. Fornshell, Esq., and Michael Greer, Esq., Warren County Prosecutors Office, 500 Justice Drive, Lebanon, Ohio 45030, this 24th day of September, 2015.



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The Supreme Court of Ohio

FILED

JAN 20 2016

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 2015-1568

v.

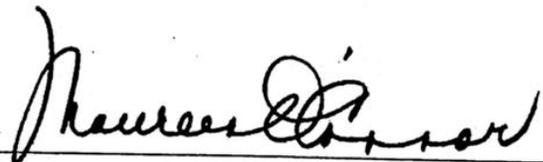
ENTRY

Jason Raphael et al.

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Upon consideration of the jurisdictional memoranda filed in this case, the court accepts the appeal. The clerk shall issue an order for the transmittal of the record from the Court of Appeals for Warren County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Warren County Court of Appeals; Nos. CA2014-11-138 and CA2014-11-139)



Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

FILED

MAY 18 2016

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 2015-1568

v.

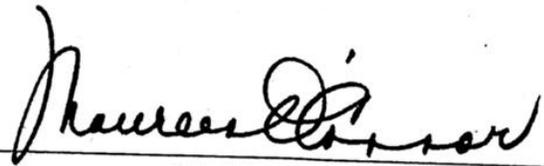
Jason Raphael, et al.

RECONSIDERATION ENTRY

Warren County

It is ordered by the court that the motion for reconsideration in this case is denied.

(Warren County Court of Appeals; Nos. CA2014-11-138 and CA2014-11-139)



Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

FILED

MAR 30 2016

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

Jason Raphael, et al.

FILE COPY

Case No. 2015-1568

JUDGMENT ENTRY

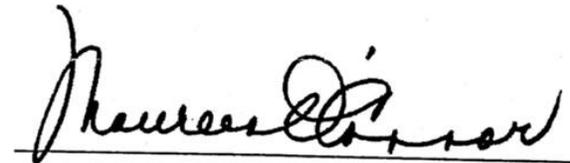
APPEAL FROM THE
COURT OF APPEALS

This cause is pending before the court as an appeal from the Court of Appeals for Warren County. The records of this court indicate that appellants have not filed a merit brief, due March 23, 2016, in compliance with the Rules of Practice of the Supreme Court of Ohio and therefore have failed to prosecute this cause with the requisite diligence.

Upon consideration thereof, it is ordered by the court that this cause is dismissed.

It is further ordered that mandates be sent to and filed with the clerks of the Court of Appeals for Warren County and the Court of Common Pleas for Warren County.

(Warren County Court of Appeals; Nos. CA2014-11-138 and CA2014-11-139)



Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

COURT OF APPEALS
WARREN COUNTY
FILED

MAY 23 2016

James L. Spaeth, Clerk
LEBANON OHIO

Case No. 2015-1568

FILED

MAY 18 2016

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

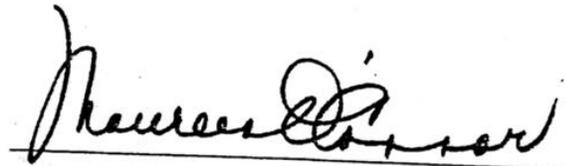
Jason Raphael, et al.

RECONSIDERATION ENTRY

Warren County

It is ordered by the court that the motion for reconsideration in this case is denied.

(Warren County Court of Appeals; Nos. CA2014-11-138 and CA2014-11-139)



Maureen O'Connor
Chief Justice

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

FILE COPY

STATE OF OHIO,

Plaintiff-Appellant,

- vs -

JASON RAPHAEL, et al.,

Defendants-Appellees.

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

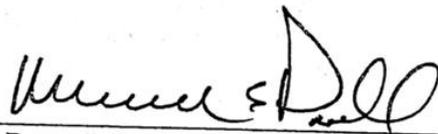
JUDGMENT ENTRY

14CR 29858

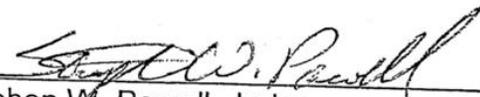
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same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