[Cite as *State v. Aguirre*, 2012-Ohio-644.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0057**
- vs -	:	
JAMIE AGUIRRE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2009 CR 0652.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Eric P. Finnegan*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Dennis Day Lager, Portage County Public Defender, 209 South Chestnut Street, Suite 400, Ravenna, OH 44266 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Jamie Aguirre,[1] appeals the judgment of the Portage County Court of Common Pleas denying his motion to suppress evidence from an alleged unconstitutional stop and detention, his motion for directed verdict based on insufficient evidence, and his motion to dismiss the indictment. For the reasons that follow, the judgment of the trial court is affirmed.

1. We note that "Jaime" is the correct spelling of appellant's first name.

{¶2} On the evening of October 25, 2009, appellant was traveling alone in his white Ford truck, westbound, on Interstate Highway 76 in Portage County, Ohio. He was returning to his home in northern Ohio from a professional football game in Pittsburgh, Pennsylvania. Shortly after 9:00 p.m., appellant exited the interstate onto State Route 43 in Brimfield Township and proceeded to a nearby gas station. While he was driving on the exit ramp, another motorist observed his white truck and immediately contacted the Brimfield Township Police Department to register a complaint of erratic driving.

{¶3} In response to the complaint, the department dispatched three officers to the general vicinity of the I-76 and State Route 43 intersection. The officers were told by the dispatcher that the complaint involved a white truck. Upon arriving in the area of the intersection, Patrolman Stephen Gyoker saw a white truck parked beside a public pay-phone in the parking lot of the gas station. Patrolman Gyoker further observed that the driver of the white truck, appellant, was using the pay-phone at that time. Deciding not to approach immediately, Patrolman Gyoker parked his vehicle behind the gas station in a hotel parking lot. A few moments later, Patrolman John Pettit pulled his own vehicle into the hotel parking lot and had a brief discussion with Patrolman Gyoker concerning the present location of appellant's truck.

{¶4} After completing his telephone call, appellant got into his white truck and proceeded to turn into the southbound lanes of State Route 43. Appellant then stopped at a traffic light which was immediately before the entrance ramp to I-76 westbound. At that juncture of the roadway, State Route 43 has three southbound lanes. While sitting at the traffic light, appellant was in the center lane, which would normally indicate that he intended to go straight through the intersection.

{¶5} Patrolman Pettit followed appellant's truck onto State Route 43; however, instead of driving into the center lane, Patrolman Pettit pulled his vehicle into the right-hand lane, which flowed directly into the highway entrance ramp immediately after the traffic light. As Patrolman Pettit was easing closer to the intersection, the light changed to green, and appellant's truck quickly made a right turn across the right-hand lane and onto the highway entrance ramp. Since Patrolman Pettit's vehicle was moving forward when the traffic light changed, it was necessary for him to apply his brakes to avoid hitting appellant's truck.

{¶6} In light of the improper right turn, Patrolman Pettit followed appellant onto the entrance ramp and initiated a traffic stop before the truck could reach the highway. Patrolman Gyoker pulled his vehicle directly behind Patrolman Pettit's car on the side of the ramp and assisted in the traffic stop. Upon approaching the truck, Patrolman Pettit informed appellant of the reason for the stop and asked him a series of basic questions. During this preliminary discussion, Patrolman Pettit noticed that no odor of alcohol was emanating from the truck cab or appellant himself; as a result, he quickly deduced that appellant was not intoxicated. Nevertheless, Patrolman Pettit also saw that appellant's eyes were bloodshot and that he appeared to be nervous and would not make any direct eye-contact. In addition, the officer noted that there were two cell phones sitting in the truck's middle console and that one of the phones was illuminated.

{¶7} At the close of their initial conversation, Patrolman Pettit formally asked to see appellant's driver's license. Once appellant had complied, the officer conveyed the required information to the department's dispatcher. In response, Patrolman Pettit was informed that appellant's license was valid and there were no outstanding warrants for his arrest. In light of this, the officer decided not to give him a citation for the illegal right

turn and, instead, began to return the driver's license to him.

{¶8} In handing the license to appellant, Patrolman Pettit asked him whether he had any illegal drugs inside the truck. When appellant denied any improper activity, the officer then inquired whether he would be willing to consent to a search of the truck cab. Appellant replied that the officers could "look" if they wanted to because the cab did not have anything illegal inside it. Accordingly, appellant exited his vehicle and stood with a third officer on the side of the roadway while Patrolmen Pettit and Gyoker conducted the search.

{¶9} In looking both under and between the seats in the extended cab, the two officers readily found five marijuana cigarettes, a spent nitrous oxide cartridge, a small metal scale, and a separate smoking device. Upon finding these items, the two officers placed appellant under arrest on misdemeanor drug charges and called for a tow truck so that his vehicle could be impounded until other arrangements were made for its release. While waiting for the tow truck, the officers conducted an inventory search of the cab in accordance with department policy.

{¶10} As part of this second search, the officers found other items that appeared to be suspicious under the circumstances. These items included a wireless surveillance camera, a police scanner, a pair of regulation handcuffs, and a wallet containing $1,000 in cash. In addition, the officers located a third cell phone, a portable TV/DVD player, and five memory cards which could be viewed in the cell phone or on the TV screen.

{¶11} After the inventory search was finished, appellant was transported to the Brimfield Township Police Department and placed in a holding cell. While questioning appellant as to why he would need a surveillance camera, Patrolman Gyoker asked him if he would be willing to execute a written consent form so that the officers could look at

the contents of the five memory cards and the cell phones. Again, appellant consented to the search and signed the written form.

{¶12} In subsequently viewing the five memory cards, Patrolman Gyoker found numerous photographs of nude or semi-nude individuals. The officer further noted that the ages of the individuals varied considerably, including two pictures of a young male child. Moreover, the cards contained short video clips, some of which appeared to have been recorded with the surveillance camera at a medical office. Like the photographs, the individuals in the video clips were nude or semi-nude.

{¶13} One day after appellant's arrest, the police department obtained a search warrant for the remainder of the truck cab. In executing this warrant, the officers found an assortment of papers that had been concealed under the center armrest. Included in those papers was a copy of a photograph of a relatively young female who is partially nude.

{¶14} In light of the various items obtained during the searches, the Portage County Grand Jury returned a 15-count indictment against appellant. Under each of the first 11 counts, he was charged with the illegal use of a minor in nudity-oriented materials or performances. Under the remaining four charges, appellant was indicted on two counts of possessing drug abuse instruments, one count of possession of drugs, and one count of possessing drug paraphernalia.

{¶15} After entering an initial plea of not guilty and engaging in limited discovery, appellant moved the trial court to suppress all evidence seized both during and after the traffic stop. As the primary basis for the motion, he argued that the officers did not have the required suspicion of criminal behavior to extend the duration of the stop. That is, appellant maintained that once Patrolman Pettit decided not to cite him for a traffic

violation, there was no valid reason to further detain him and ask additional questions.

{¶16} Patrolman Pettit was the sole witness to testify during the hearing on the motion to suppress. As part of his direct examination, the officer stated that, during the initial stages of the traffic stop, he had formed the suspicion that appellant may be engaged in some form of illegal drug activity. In support of his belief, the officer referred to his observations that appellant had red and glassy eyes, appeared to be nervous, did not make eye contact, and had exited the highway to use a pay-phone even though he had two cell phones in his center console. On cross-examination, Patrolman Pettit said that he also believed appellant had been free to leave the scene after his driver's license had been returned to him.

{¶17} In its judgment overruling the motion to suppress, the trial court recited the basic points which had formed the basis of Patrolman Pettit's testimony. Based on this, the court concluded that there had been sufficient "probable cause" to warrant the initial traffic stop and that appellant had consented to the search of his vehicle. However, the trial court never addressed the question of whether Patrolman Pettit had a reasonable suspicion that appellant could be engaging in drug-related activity.

{¶18} Within seven days of learning of the trial court's disposition of the motion to suppress, appellant agreed to change his plea to one of no contest to each of the 15 counts in the indictment. Initially, the trial court accepted the new plea and found appellant guilty on all 15 counts. Before the case could go forward for sentencing, though, appellant moved to withdraw the no-contest plea regarding the 11 counts of illegally using a minor in nudity-oriented materials. In making this request, he asserted that his no-contest plea had not been made knowingly, because his trial counsel had failed to inform him that the indictment against him was defective as to the "child

pornography" charges. Appellant further asserted that, since he now fully understood the elements of those 11 charges, he believed that he had a valid defense.

{¶19} Once the state had an opportunity to respond, the trial court issued a new judgment granting the motion to withdraw the plea and setting the case for trial as to the 11 "child pornography" charges. Approximately two weeks later, appellant moved to dismiss all of the 11 remaining counts, again maintaining that the indictment was defective because each of those counts failed to cite a judicially-created element of the offense. Specifically, he contended that none of the 11 counts alleged that the disputed materials were lewd in nature or graphically focused upon the genitals.

{¶20} In its response to the motion to dismiss, the state submitted that, since the governing statute for the offense—R.C. 2907.323—only refers to materials that show a minor in a "state of nudity," it was unnecessary for the indictment to cite the "lewd/genitals" requirement. In its judgment denying the motion to dismiss the charges, the trial court essentially adopted the state's position, holding the cited requirement was merely a judicially-created definition for the element "state of nudity."

{¶21} A one-day bench trial on the "child pornography" counts was held in June 2010. As part of its basic case, the state presented as exhibits the 11 photographs and videos that formed the basis for the remaining charges. The state also presented the testimony of David Blough, the Brimfield Township Chief of Police, who stated that none of the individuals in the photographs and videos were appellant's own children. In addition, the state introduced into evidence an audiotape statement that appellant made with Chief Blough on the day of his arrest.

{¶22} Appellant did not submit any separate evidence in response to the state's evidence or by way of affirmative defense. At the close of the proceeding, the trial court

granted appellant's Crim.R. 29 motion for acquittal as to four of the "child pornography" counts. In its written judgment setting forth its verdict, the court expressly found appellant not guilty on four of the remaining seven counts. As to the last three charges, the trial court found him guilty.

{¶23} After conducting a separate sentencing hearing, the trial court imposed a term of one year on each offense of illegal use of a minor in nudity-oriented materials or performances. The court further ordered that the three, one-year terms would be served concurrently and that appellant would be designated a Tier I sex offender. In regard to the four drug-related offenses, the trial court sentenced him to an aggregate term of 180 days, to be served concurrently with the three, one-year terms.

{¶24} Appellant now appeals and asserts three assignments of error. Appellant's first assignment of error is:

{¶25} "The trial court erred to the prejudice of Defendant-Appellant by denying his motion to suppress evidence at trial on the grounds that the warrantless search and seizure of his automobile and resulting seizure of certain evidence incident thereto was in violation of Defendant-Appellant's rights and protections as guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States and by Article I, Section 14 of the Constitution of the State of Ohio."

{¶26} Appellant argues that his motion to suppress the evidence obtained during the search of his truck should have been granted because the trial court erred in finding that his initial consent to the search was made voluntarily. In support of this argument, he asserts that once Patrolman Pettit decided not to issue him a citation for the improper right turn, the justification for the traffic stop was resolved; thus, his further detainment was illegal. Based upon this, appellant further argues that any

determination regarding the propriety of his consent had to focus upon whether he reasonably believed he was free to leave, and the facts of the case established such a belief was not justified.

{¶27} At the onset, we note that our review of a decision on a motion to suppress involves issues of both law and fact. *State v. Burnside*, 100 Ohio St. 152, 2003-Ohio-5372, ¶ 8. During a suppression hearing, the trial court acts as trier of fact and sits in the best position to weigh the evidence and evaluate the credibility of the witnesses. *Id*., citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Accordingly, an appellate court is required to uphold the trial court's finding of facts provided they are supported by competent, credible evidence. *Id*., citing *State v. Fanning*, 1 Ohio St.3d 19 (1982). Once an appellate court accepts the trial court's factual findings, the court must then engage in a de novo review of the trial court's application of the law to those facts. *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, ¶ 13, citing *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, ¶ 19.

{¶28} Upon review of the record, we determine that the trial court's factual findings are indeed supported by competent, credible evidence. Thus, we accept the court's factual findings as accurate and proceed to determine whether, as a matter of law, the applicable legal standard was properly applied in the case.

{¶29} We begin our legal analysis with the well-founded proposition that police action of stopping an automobile and detaining its occupant is a seizure under the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979), paragraph two of the syllabus. Thus, an automobile stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a

traffic violation has occurred." *Whren v. U.S.*, 517 U.S. 806, 810 (1996); *see also Dayton v. Erickson*, 76 Ohio St.3d 3, 11 (1996). Here, the initial stop of appellant's automobile was reasonable since it was based upon probable cause, i.e., appellant's illegal right-hand turn onto the interstate highway. This point is undisputed by appellant.

{¶30} The question then becomes whether appellant's continued seizure, beyond investigation of the illegal turn, was lawful. This is a pivotal inquiry because appellant offered his consent for the search after the investigation of the illegal turn ended. If consent is given during an *unlawful* detention, the consent may nonetheless be rendered invalid. *Florida v. Royer*, 460 U.S. 491, 502 (1983).

{¶31} As a general matter, "'[a]n officer may not expand the investigative scope of the detention beyond that which is reasonably necessary to effectuate the purposes of the initial stop unless any new or expanded investigation is supported by a reasonable, articulable suspicion that some further criminal activity is afoot.'" *State v. Carter*, 11th Dist. No. 2003-P-0007, 2004-Ohio-1181, ¶ 34, quoting *State v. Retherford*, 93 Ohio App.3d 587, 600 (2d Dist.1996). That is, "[i]f during the scope of the initial stop an officer encounters additional specific and articulable facts which give rise to a reasonable suspicion of criminal activity beyond that which prompted the stop, the officer may detain the vehicle and driver for as long as the new articulable and reasonable suspicion continues." *Id*.; *see also State v. Hale*, 11th Dist No. 2004-L-105, 2006-Ohio-133, ¶ 40, quoting *State v. Myers*, 63 Ohio App.3d 765, 771. ("'[I]f circumstances attending an otherwise proper stop should give rise to a reasonable suspicion of some other illegal activity, different from that which triggered the stop, then the individual may be detained for as long that new articulable and reasonable suspicion continues, even if the officer is satisfied that the suspicion that justified the initial stop

has dissipated.'")

{¶32} Thus, an expanded investigation beyond the purpose of the initial stop must be justified by specific and articulable circumstances which reasonably warrant the continued seizure. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The officer must have reasonable suspicion based on objective facts and circumstances that the suspect is violating or about to violate the law—an officer's inarticulate hunch is not enough. *Carter*, *supra*, at ¶ 35, citing *State v. Dickinson*, 11th Dist. No. 92-L-086, 1993 Ohio App. LEXIS 1428, *4. In analyzing a particular stop, the subjective thoughts of the officer are not relevant; instead, "the circumstances surrounding the stop must 'be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.'" *State v. Bobo*, 37 Ohio St.3d 177, 178 (1984), quoting *United States v. Hall*, 525 F.2d 857, 859 (D.C.Cir.1976). Whether the continued seizure was reasonable is analyzed under the totality of the circumstances. *State v. Bobo*, 37 Ohio St.3d 177, 178 (1984).

{¶33} The officer's attention was first drawn to appellant as a result of a call from a motorist who was concerned enough about appellant's erratic driving to call authorities. Then the officer observed an improper right-hand turn directly in front of the officer, forcing the officer to apply his breaks to avoid an accident. After the stop, and in support of his reasonable suspicion that appellant was involved in some type of criminal activity, Patrolman Pettit was able to articulate the following circumstances: First, the officer noticed that, even though appellant did not appear to be drunk at that time, his eyes were glassy and red. The condition of the suspect's eyes may contribute to an officer's suspicion, particularly of intoxication. *State v. Trimble*, 11th Dist. No. 2010-P-0078, 2011-Ohio-4473, ¶ 13, quoting *State v. Evans*, 127 Ohio App.3d 56 (1998).

Because the officer did not detect an odor of alcohol, the officer's suspicion shifted to drug activity.

{¶34} Second, the officer noticed that appellant appeared to be somewhat nervous, did not engage in direct eye contact, and was looking around the vehicle. A person's nervous appearance is an articulable fact which may contribute to an officer's suspicion. *State v. Matteucci*, 11th Dist. No. 2001-L-205, 2003-Ohio-702, ¶ 31. Similarly, "evasive behavior is a pertinent factor in determining reasonable suspicion." *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶ 47, citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) and *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984).

{¶35} Third, the officer observed that, despite the fact appellant had two cell phones in the center console of his truck, he had just exited the highway to make a telephone call from a pay-phone. Suspicious or strange activities by the suspect are pertinent in determining reasonable suspicion. *State v. Rowe*, 8th Dist. No. 95192, 2010-Ohio-6030. The officer further testified that, based upon his training and experience in drug-related areas, appellant was possibly a drug courier who did not want his call to be tracked via cell phone. "A court reviewing the officer's actions must give due weight to his experience and training and view the evidence as it would be understood by those in law enforcement." *State v. Andrews*, 57 Ohio St.3d 86, 88 (1991), citing *United States v. Cortez*, 449 U.S. 411, 417 (1981).

{¶36} All of these factors, considered together, support the officer's reasonable suspicion. The officer observed appellant, red-eyed and nervous, having made a call from a pay-phone, despite having two cell phones. While each factor may have an innocent explanation when considered in isolation, each circumstance aggregates into

the reasonable belief, based on the totality of the circumstances, that appellant may be engaged in some kind of illegal drug activity and further investigation is warranted.

{¶37} Though appellant builds his argument around *U.S. v. Robinette*, 519 U.S. 33 (1996), his reliance is misplaced. In *Robinette*, the officer did not observe any facts prior to or following the initial stop which could form a new reason to legally detain the defendant further. *Id*. at paragraph one of the syllabus. The request to search the vehicle was simply part of an overall drug interdiction program. *Id*. at 40. Here, however, the officer formed reasonable suspicion pertaining to possible drug-related activity by appellant prior to and during the initial stop. Thus, the officer was not required to release appellant once he had answered the question concerning possible contraband in the vehicle but, instead, had justification for requesting consent to search the automobile.

{¶38} We conclude that, though the initial purpose for the stop came to an end when the officer decided not to give appellant a citation for the illegal turn, other circumstances came to the officer's attention during the stop to justify his continued investigation. These circumstances were based upon the specific and articulable facts cited by the officer at the suppression hearing and outlined above. Since the officer obtained knowledge of all of these circumstances prior to his questions regarding illegal drugs, he could properly rely on each of them in forming his reasonable suspicion. *See State v. Carter*, 11th Dist. No. 2003-P-0007, 2004-Ohio-1181, ¶ 40. The officer's belief that further criminal activity was afoot was therefore reasonable. Thus, the brief and minimally intrusive detention of appellant with his consent was lawful.

{¶39} Because the brief continued detention was lawful, the question becomes

whether appellant's consent was voluntary.[2] *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, ¶ 32. Whether a suspect's consent to search was voluntary or was the product of duress or coercion is a question of fact to be determined from the totality of the circumstances. *Id*. "Relevant factors for the trial court to consider in determining whether a consent was voluntary include the following: (1) the suspect's custodial status and the length of the initial detention; (2) whether the consent was given in public or at a police station; (3) the presence of threats, promises, or coercive police procedures; (4) the words and conduct of the suspect; (5) the extent and level of the suspect's cooperation with the police; (6) the suspect's awareness of his right to refuse to consent and his status as a 'newcomer to the law'; and (7) the suspect's education and intelligence." (Citation omitted). *Id*. at ¶ 33.

{¶40} Here, appellant was not ordered out of his car, not told where to stand, and not physically detained in any fashion. Instead, when asked for permission to search, appellant readily agreed, stated he did not do drugs, and assured the officers that they would find nothing illegal. Appellant then exited his vehicle without hesitation and walked to the front of a patrol vehicle where he stood next to another officer, clearly witnessing the ensuing search. Thus, it is clear from the record that appellant voluntarily offered his consent.

{¶41} As there was no violation of the Fourth Amendment, the trial court did not err in overruling appellant's motion to suppress. Appellant's first assignment of error is without merit.

2. We note that, had appellant been unlawfully detained, the standard to determine consent would be much higher—the state would need to prove that appellant's consent was an independent act of will and not merely a voluntary act. Under this heightened standard, a reasonable person must believe he was free to leave the scene at any time. *State v. Jones*, 187 Ohio App.3d 478, 2010-Ohio-1600, ¶ 32.

{¶42} Appellant's second assignment of error is:

{¶43} "The trial court erred to the prejudice of Defendant-Appellant by denying Defendant-Appellant's Criminal Rule 29 motion for directed verdict of acquittal when there was insufficient evidence to prove the elements of the crime of illegal use of a minor in nudity oriented material or performance (Counts Four, Five and Ten of the indictment), in violation of R.C. 2907.323, by proof beyond a reasonable doubt."

{¶44} Under his second assignment, appellant submits that the trial court erred in not acquitting him of all 11 charges of illegal use of a minor in a nudity-oriented performance or material. As to three charges of which he was convicted, appellant argues that his Crim.R. 29 motion should have been granted because the state's evidence during the bench trial was not legally sufficient to satisfy all elements of the offense. That is, appellant maintains that the state could not establish that the material in his possession displayed a specific state of nudity which was prohibited under the governing statute.

{¶45} Crim.R. 29(A) provides:

{¶46} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶47} Thus, a Crim.R. 29(A) motion tests the sufficiency of evidence. When determining whether there is sufficient evidence presented to sustain a conviction, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574

(1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307 (1979). As this was a bench trial, the trial court acted as the trier of fact and was in the best position to weigh the evidence.

{¶48} In each of the 11 "child pornography" charges, appellant was indicted under R.C. 2907.323(A)(3), which provides:

{¶49} "(A) No person shall do any of the following:

{¶50} "* * *

{¶51} "(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

{¶52} "(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.

{¶53} "(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."

{¶54} The phrase "state of nudity" was judicially analyzed in *State v. Young*, 37 Ohio St.3d 249 (1988). There, the Ohio Supreme Court stated specifically that the statute prohibits "the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of

the person charged." *Id*. at 252. The U.S. Supreme Court, in overruling an overbreadth challenge to the statute, explained that "[b]y limiting the statute's operation in this manner, the Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children." *Osborne v. Ohio*, 495 U.S. 103, 112 (1990). Thus, the phrase "state of nudity" was not intended to cover all materials involving a nude minor; instead, the prohibition only applies to any lewd exhibition or graphic focus upon the genitals. *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, ¶ 16. As to the definition of "lewd," the Ohio Supreme Court has indicated that the term refers to "'sexually unchaste or licentious * * * lascivious * * * inciting to sensual desire or imagination * * *.'" *State ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals*, 63 Ohio St.3d 354, 358 (1992), quoting Webster's Third New International Dictionary 1301 (1986).

{¶55} In the present case, the counts against appellant were based upon certain photographs and video clips which he had stored on the five memory cards. At trial, the state submitted into evidence a compact disc to which the photographs and video clips had been transferred. Once the proper foundation had been laid, the state then showed the 11 items to the trial court on a computer screen.

{¶56} As was stated above, the trial court only found appellant guilty as to three of 11 items. The first was a video clip which lasted approximately 20 seconds. The clip shows a female child who appears to be below the age of ten and is completely nude throughout the video. At the outset, the child is in a laundry room and appears to be looking for an article of clothing in a dryer. The child then finds a pair of underwear and runs across the room to a chair. The clip ends with the child sitting on the chair and beginning to put the undergarment on in an unusual fashion by spreading her legs. The

child is looking at the camera as though she is being directed to put the underwear on in this manner. We conclude that this video clip is sexually licentious and therefore squarely within the definition of lewd exhibition. Further, the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are not applicable to this case because appellant's possession of the video clip was not morally innocent.

{¶57} Appellant's other two convictions under R.C. 2907.323 were predicated on two photographs containing a male child that appears to be below the age of five. The two photographs are identical, except the image of the child has been slightly enlarged in the second photograph. In each, the child is nude except for a football helmet and a pair of white socks. The child is standing in the picture and is holding a football under one arm. The genitals of the male child can be seen in both versions of the picture. We again conclude that both images constitute lewd exhibition in the hands of appellant.

{¶58} When it considered an overbreadth challenge to this statute, the United States Supreme Court noted with favor that the Ohio Supreme Court had even further narrowed the scope of the statute when it recognized the "proper purpose" affirmative defenses available in the statute itself. In *Osborne*, the U.S. Supreme Court stated:

{¶59} "The Ohio Court reached this conclusion because 'when the "proper purposes" exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct narrows significantly. The clear purpose of these exceptions * * * is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is *not* morally innocent, i.e., the possession or viewing of the described material for prurient purposes.'" (Emphasis added.) *Osborne*, *supra*, fn. 10, quoting *State v. Young*, 37 Ohio St.3d, 251-252.

{¶60} In this case, however, no affirmative defense was raised or offered at any time by appellant. Thus, the state's evidence as to these three charges under R.C. 2907.323(A)(3) was legally sufficient, as a matter of law, to warrant a conviction. Appellant's second assignment of error is likewise without merit.

{¶61} Appellant's third assignment of error is:

{¶62} "The trial court erred to the prejudice of Defendant-Appellant by denying his motion to dismiss the indictment charging him with illegal use of a minor in nudity oriented material or performance on the ground that the indictment failed to include the allegation of lewd exhibition or graphic focus on the genitals and therefore failed to set forth and identify a punishable offense."

{¶63} Under his final assignment, appellant challenges the trial court's decision to overrule his pretrial motion to dismiss the 11 charges under R.C. 2907.323(A)(3). Citing *Tooley* and other relevant case law in which the Ohio Supreme Court promulgated the governing definition for "state of nudity" under the statute, appellant submits that once the definition in question was created, it became a necessary element for the offense of illegal use of a minor in nudity-oriented performances or materials. In light of this, he argues that the 11 counts in the indictment were insufficient to state a proper crime because they did not refer to the requirement of a lewd exhibition or a graphic focus on the child's genitals.

{¶64} Pursuant to Crim.R. 7(B), an indictment is not intended to inform the defendant of the nature of the evidence the state will be obligated to produce in order to obtain a conviction. Rather, it is only intended to provide notice of the exact offense for which he will stand trial. The wording of the Ohio Supreme Court's legal analysis in *Young* does not contain any express statement that a modification of the basic elements

of the offense in R.C. 2907.323(A) was intended. Therefore, it must be assumed that *Young* and its progeny was only meant to provide a definition to be used in determining how the phrase "state of nudity" should be applied.

{¶65} In the instant indictment, the 11 counts of "child pornography" against appellant were worded in a manner consistent with R.C. 2907.323(A)(3). To this extent, the indictment was sufficient to provide adequate notice of the charged offense. The trial court did not err in overruling appellant's motion to dismiss.

{¶66} Appellant's third assignment of error is without merit.

{¶67} The judgment of the Portage County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, J., concurs,

THOMAS R. WRIGHT, J., concurs in part and dissents in part, with Concurring/Dissenting Opinion.

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THOMAS R. WRIGHT, J., concurs in part and dissents in part, with Concurring/Dissenting Opinion.

{¶68} Regarding the first assignment of error, the trial court concluded that the officer had probable cause for the initial stop and I agree; however, because the trial court did not determine whether the officer had reasonable articulable suspicion to further detain appellant when the officer asked to search the vehicle, I would remand to the trial court for a determination of this pivotal issue. *State v. Robinette*, 80 Ohio St.3d 234 (1997) and *Florida v. Royer*, 460 U.S. 491 (1983).

{¶69} Regarding the second assignment, as written R.C. 2907.323(A)(3) bans the possession or viewing of any material or performance of a minor who is not the person's child or ward in a state of nudity. This broad prohibition of all nudity led to a challenge on First Amendment overbreadth grounds. *Young v. Osborne,* 37 Ohio St.3d 249 (1988). In the face of that challenge, the *Young* court recognized that nudity, without more is protected expression, even where the subject depicted is a child. *Id*., at 251, citing *New York v. Feber*, 458 U.S. 747, 765, fn. 18, (1982). Accordingly, the *Young* court significantly narrowed the scope of prohibited conduct by judicially defining "state of nudity" to include not all nudity but rather only nudity that "* * * constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." *Id*., paragraph one of the syllabus.

{¶70} In *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3998, ¶ 16, the court reiterated the *Young* holding stating that R.C. 2907.323 reaches "* * * only nudity that either constitutes a lewd exhibition or involves graphic focus on the genitals." Moreover, the *Tooley* court noted that: "The United States Supreme Court agreed that *under the Young interpretation*, the statute did not violate the First Amendment." (Emphasis added). *Id*., citing *Osborne v. Ohio,* 495 U.S. 103, 112-114 (1992).

{¶71} The trial court found appellant guilty of three of the eleven counts. One of the convictions involved a video clip which lasted approximately 20 seconds. The clip shows a completely nude female minor, appearing to be below the age of ten. At the beginning of the video, the minor is in a laundry room looking for an article of clothing in a dryer. She then finds a pair of underwear and runs across the room to a chair. The clip ends with her beginning to put on the undergarment. Although the video shows the

minor's entire physique, the camera does not graphically focus on any part of her body, including her genitals.

{¶72} I accept the majority's definition of "lewd" as referring to sexually unchaste or licentious, lascivious, or inciting to sexual desire or imagination; however, I cannot conclude the video of the minor female simply dressing constitutes a lewd exhibition, nor can it be said that it focuses upon the child's genitals. Accordingly, the video falls within the class of constitutionally protected nudity discussed in *Young*, *Ferber*, and *Osborne.*

{¶73} The other two convictions were predicated upon two photographs that depict a male minor that appears to be below the age of five. The two photographs are identical, except the image of the minor has been slightly enlarged in the second photograph. In each, the minor is nude except for a football helmet and a pair of white socks. The minor is standing in the picture and is holding the football.

{¶74} The genitals of the male minor can be seen in both versions of the picture. However, the genitals are not in graphic focus in either version, instead the child's entire form is shown in each photograph. Again, the photographs of the minor do not constitute a lewd exhibition nor does either photograph focus upon the minor's genitals. To this extent, the pictures constitute nothing more than nude photos of a child which are constitutionally protected pursuant to *Young*, *Ferber*, *and Osborne*.

{¶75} Because the material is not lewd and does not graphically focus on the genitals, the affirmative defenses contained within R.C. 2907.323(A)(3)(a) and (b), are of no consequence.

{¶76} The case law defines two distinct categories of nudity, one of which is constitutionally protected, the other of which is not. Nudity, without more is protected expression even where the subject depicted is a child.

{¶77} The majority, however, has seemingly concluded that the possession or viewing of nude photos of minors alone, without explanation, constitutes conduct that is proscribed pursuant to the statute. For the reasons stated I do not agree and, therefore, respectfully dissent.

{¶78} I agree with the majority on the third assignment.