

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22833
v.	:	T.C. NO. 2007 CR 4513
	:	
DAVID M. THOMAS	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 17th day of July, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on Notice of Appeal of David M. Thomas, filed July 11, 2008. On December 20, 2007, Thomas was indicted on one count of possession of less than one gram of heroin in violation of R.C. 2925.11(A), a felony of the fifth degree. On January 31, 2008, Thomas appeared in court and entered a plea

of not guilty. Thomas filed a motion to suppress evidence on February 13, 2008 and a suppression hearing was held on March 13, 2008. On April 22, 2008, the trial court overruled Thomas' motion to suppress. Thereafter, Thomas entered a plea of no contest. On July 11, 2008, Thomas was sentenced to five years of community control sanctions.

{¶ 2} The events giving rise to this matter began at approximately 3:30 p.m. on October 4, 2007. Huber Heights Police Officer Aaron Harlow was on patrol near the intersection of Route 202 and Bufort Boulevard, an area of high-drug activity. Officer Harlow is a nine-year police veteran and a canine handler. Harlow's dog, Sammy, was with him while he was on patrol that day. While stationed in a parking lot, Officer Harlow observed a white Ford Escort pull into the Glenburn Green apartment complex, very briefly park at one of the buildings, then exit the complex heading east on Bufort Boulevard. Officer Harlow initiated a traffic stop when he observed the vehicle turning left onto Route 202 without using a turn signal.

{¶ 3} Officer Harlow approached the passenger side of the vehicle and observed Thomas to be very nervous, "almost to the point he was shaking, and he was sweating profusely." A passenger was also present. The passenger in the vehicle did not appear nervous, nor was he visibly sweating. Officer Harlow introduced himself, explained the purpose of the stop and requested identification from Thomas and the passenger, along with the vehicle registration and the proof of insurance. Thomas did not have proof of insurance in the vehicle.

{¶ 4} While collecting Thomas' documents, Officer Harlow inquired as to why Thomas had stopped at the apartment complex. Thomas responded that he stopped

to pick up a friend for work. Thomas identified his friend as "Glenn," but did not know the last name of the friend, nor did he know the friend's address. Officer Harlow instructed Thomas to stay in his vehicle before returning to the patrol car to run computer checks.

{¶ 5} Officer Harlow began a computer check in his car and called dispatch to run independent computer checks in order to check databases that were not available in his patrol car. He also called for backup. Thereafter, Officer Harlow began to write a written warning on the traffic violation. Within ten minutes, and prior to him finishing the written warning, a backup officer, Officer Wunderlich arrived. Officer Harlow handed the written warning to Officer Wunderlich to complete.

{¶ 6} Officer Harlow returned to Thomas' vehicle and asked him to step out of the vehicle to answer some questions. Thomas complied. Officer Harlow asked for consent to pat-down the defendant in order to check for weapons. Thomas consented. While questioning Thomas, Officer Harlow observed that Thomas was more nervous than earlier in the traffic stop. He was shaking, sweating, running his hands through his hair, and could not stand still. While Officer Harlow was speaking with Thomas, dispatch called Officer Harlow with the results of Thomas' criminal history. Dispatch indicated that Thomas had previously been charged with drug abuse and drug abuse instruments.

{¶ 7} Subsequently, Officer Harlow asked for consent to search Thomas' vehicle. Thomas denied consent. Officer Harlow then decided to use Sammy to perform an open air sniff of the vehicle. Because Sammy is an aggressive-indicating canine, Officer Harlow asked Thomas and the passenger in the vehicle to sit in Officer

Wunderlich's patrol car for their safety while the canine performed the open air sniff.

{¶ 8} When Officer Harlow retrieved Sammy from his vehicle, about 13 minutes had elapsed since the initial traffic stop. Sammy walked around Thomas' car sniffing for the presence of narcotics. Sammy alerted at the driver's side door handle. After alerting, Officer Harlow searched the vehicle and found three capsules of heroin.

{¶ 9} Thomas' sole assignment of error is as follows:

{¶ 10} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS."

{¶ 11} Thomas argues on appeal that the trial court erred in finding that Officer Harlow had reasonable suspicion of criminal activity to detain Thomas longer than the time necessary to issue a written warning for the traffic violation. Furthermore, Thomas argues that the trial court erred in finding that the State met its burden of proof that the warrantless search was reasonable. Finally, Thomas argues that the trial court erred by finding that Officer Harlow's search of Thomas' car did not violate his Fourth Amendment rights because Officer Harlow observed no signs of impairment or furtive movements to justify the detainment.

{¶ 12} A trial court undertakes the position of the trier of fact in a motion to suppress evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592; *State v. Mills* (1992), 62 Ohio St.3d 357, 366. The trial court is in the best position to decide questions of fact and to determine the credibility of witnesses. *Retherford*, 93 Ohio App.3d at 592; *State v. Clay* (1972), 34 Ohio St.2d 250, 251. "Accordingly, in our review, we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting those facts as true, we must independently

determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard.” *Retherford*, 93 Ohio App.3d at 592.

{¶ 13} The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. A traffic stop by a law enforcement officer must comply with the Fourth Amendment's reasonableness requirement. *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89. “The duration of a traffic stop may last no longer than is necessary to resolve the issue that led to the original stop, absent some specific and articulable facts that further detention was reasonable.” *State v. Ramos* (2003), 155 Ohio App.3d 396, 401, 2003-Ohio-6535 citing *State v. Chatton* (1984), 11 Ohio St.3d 59.

{¶ 14} When a law enforcement officer stops a vehicle for a traffic violation, the officer may detain the motorist for a period of time sufficient to issue the motorist a citation and perform routine procedures such as a computer check on the motorist's driver's license, registration and vehicle plates. *State v. Pryor*, Montgomery App. No. 20800, 2005-Ohio-2770 at ¶ 15; *Ramos*, 155 Ohio App.3d at 401. In determining if an officer completed the tasks of a traffic stop within a reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation. *State v. Batchili*, 113 Ohio St.3d 403, 406, 2007-Ohio-2204.

{¶ 15} We have stated, “a police officer need not have a reasonable suspicion that a vehicle contains contraband prior to summoning a canine drug unit.” *Ramos*, 155 Ohio App.3d at 400. It is well established that the use of a trained narcotics dog

does not constitute a “search” under the Fourth Amendment. *Prior*, Montgomery App. No. 20800 at ¶ 13; *Illinois v. Caballes* (2005), 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842. Reasonable suspicion that a vehicle contains drugs is not required prior to conducting a canine sniff of the vehicle during a traffic stop so long as the duration of the traffic stop is not extended beyond what is reasonably necessary to resolve the issue that led to the stop and issue a traffic citation. *State v. Johnson*, Montgomery App. No. 20624, 2005-Ohio-1367 at ¶ 19. “If, however, the duration of the traffic stop is extended in order to bring a drug sniffing dog to the scene, police must have a reasonable suspicion that the vehicle contains drugs in order to justify the continued detention.” *Id.* If a trained canine alerts to the odor of drugs from a lawfully stopped and detained vehicle, an officer has probable cause to search the vehicle for contraband. *State v. Heard*, Montgomery App. No. 19323, 2003-Ohio-1047 at ¶ 17.

{¶ 16} In overruling Thomas’ motion to suppress, the trial court found that Thomas was not unreasonably detained because the canine sniff began about thirteen minutes after the vehicle was stopped. The court concluded that the free-air sniff occurred within a reasonable length of time after the initial traffic stop. We agree.

{¶ 17} Our decision in *State v. Pryor* is illustrative. In *Pryor*, we held that a canine sniff that was initiated approximately twenty minutes after the initial traffic stop was not an unreasonably long detention. *Pryor*, Montgomery App. No. 20800 at ¶ 16. In *Pryor*, we stated that “[u]nlike the typical case where a motorist is detained while police await arrival of a K-9 unit, [Officer] Bemis’ dog, Kain, already was present.” *Id.* Like the officer in *Pryor*, the officer that made the stop, Officer Harlow, was a canine handler, and his dog was with him at the time of the stop.

{¶ 18} Officer Harlow observed a traffic violation, and made the traffic stop at around 3:30 p.m. He collected Thomas' and the vehicle passenger's identification and vehicle registration. After asking a few questions, Officer Harlow returned to his vehicle where he began a computer check, called dispatch to run additional computer checks, and requested back-up. Thereafter, Officer Harlow began to write a written warning. Within ten minutes, the back-up arrived and Officer Harlow returned to Thomas' vehicle, asked a few additional questions, and requested consent to search Thomas' vehicle. After Thomas refused to consent, Officer Harlow informed Thomas that a canine sniff would be performed. Officer Harlow patted down Thomas, then the passenger, and placed them in the back seat of the back-up officer's patrol vehicle for their safety because the dog aggressively indicated the presence of narcotics. Thirteen minutes after the initial traffic stop, the canine sniff occurred. Based on the circumstances of the stop, thirteen minutes was not an unreasonable detention. Although Thomas argues that Harlow testified it only takes one minute to complete a warning ticket, this misstates his testimony. He testified that a "verbal warning" only takes one minute, not a written warning citation.

{¶ 19} Additionally, the trial court found that even if the detention was extended beyond what was reasonably necessary to issue the written warning, Officer Harlow had sufficient reasonable suspicion to detain Thomas until the canine sniff. However, since we have already determined that there was not an unreasonable detention, the determination of whether there was reasonable suspicion is rendered moot. We have previously held that it is not necessary to determine whether the police had a reasonable, articulable suspicion of criminal activity other than a traffic violation that

would justify prolonging a Defendant's detention because the Defendant was not in fact detained longer than was necessary to complete the traffic stop. *State v. Kuralt*, Montgomery App. No. 20532, 2005-Ohio-4529 at ¶ 12.

{¶ 20} Accordingly, Thomas' sole assignment of error is overruled, and the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.