COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2016 CR 00532**
vs.	:	**Judge McBride**
JOHN THEODORE BARHAM	:	**DECISION/ENTRY**
Defendant	:	

Matthew Wiseman, assistant prosecuting attorney, for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Mark Tekulve, assistant public defender, for the defendant John Theodore Barham, 302 E. Main Street, Batavia, Ohio 45103

This cause is before the court for consideration of the motion to suppress filed by the defendant John Theodore Barham on September 29, 2016. The court held a hearing on the motion on January 10, 2017. At the conclusion of the hearing, the court took the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

On September 13, 2016, the defendant John Theodore Barham was indicted on one count of possession of heroin in violation of R.C. 2925.11(A), a felony of the fifth degree.

This charge stems from an incident that occurred on April 26, 2016 at a United Dairy Farmers store in Clermont County, Ohio. On that date, Officer Christopher Wilson of the Union Township Police Department pulled into the United Dairy Farmers location at 711 Ohio Pike near the end of his shift to purchase gas. He arrived at the station at approximately 5:10 p.m. As he exited his vehicle and stood up, he noticed that the defendant, who was in a nearby vehicle at the pump, was slumped over in the driver's seat, lying across a female passenger's lap.

Officer Wilson testified that, upon seeing the defendant slumped over, he was immediately concerned that the defendant was suffering from a drug overdose. Officer Wilson walked over to the vehicle and, noticing that the driver's side window was open, introduced himself and began to ask questions concerning the defendant's wellbeing.

The defendant immediately responded to the officer's questions, and as Officer Wilson spoke to the defendant, he determined that the defendant appeared to be alert and oriented. The defendant informed Officer Wilson that he was slumped over because he was using tweezers to help his girlfriend with a below-the-waist grooming problem.

As Officer Wilson spoke with the defendant, he noticed a cap to a hypodermic needle on the floorboard near the defendant's foot. The needle cap made Officer

Wilson believe that there may be drugs in the vehicle. He also did not know if the defendant was in possession of the hypodermic needle since only the cap was on the floor. Finally, Officer Wilson was aware that the defendant, who was seated in the driver's location in the vehicle, did not have a valid driver's license.

Officer Wilson called the police dispatcher at 5:16 p.m. and requested a canine unit to come to the scene. Officer Wilson had the defendant exit the vehicle so he could not tamper with any potential drug evidence. He then patted the defendant down as a precautionary measure to ensure he did not have weapons. He next had the defendant sit in the back of his police cruiser while they waited for the canine unit to arrive. The defendant was not handcuffed.

At 5:28 p.m., a canine unit arrived, which consisted of Officer Robert Heintzelen, of the Amelia Police Department and his trained canine Gator. Gator conducted a free air sniff of the vehicle, and by 5:30 p.m., he alerted on the driver's side door.

Officer Wilson had the passenger exit the vehicle and, upon searching the vehicle, found a hypodermic needle under the center console. The defendant was informed that he would not be arrested at that time because the needle needed to be sent away for drug testing. When the needle was tested, it was positive for heroin.

On September 13, 2016, the defendant was indicted on one count of possession of heroin in violation of R.C. 2925.11(A), a felony of the fifth degree. On September 29th, the defendant filed the instant motion to suppress. The state did not file a written response. The court held oral argument on the matter on January 10, 2017, and after the arguments were concluded, the court took the motion under advisement.

STANDARD OF REVIEW

A motion to suppress is defined as "a device used to eliminate from a criminal trial evidence that has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation, etc.) of the United States Constitution."[1] When a defendant's motion to suppress is successful, the principal remedy for a constitutional violation is to exclude the evidence from the criminal trial.[2]

Pursuant to Crim.R. 12(C), before trial "any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." A motion to suppress evidence "on the ground that it was illegally obtained" must be made prior to trial.[3]

A motion to suppress typically "presents mixed questions of law and fact."[4] In reviewing such a motion, "the court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses."[5]

---

[1] *State v. Scruggs*, 12th Dist. Clinton No. CA2005-11-042, 2007-Ohio-6416, ¶ 4, citing *State v. French*, 72 Ohio St.3d 446, 449-50 (1995).
[2] *State v. Haines*, 12th Dist. Clermont No. CA2003-02-015, 2003-Ohio-6103, ¶ 8.
[3] Crim.R. 12(C).
[4] *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5373, 797 N.E.2d 71, ¶ 8.
[5] *Codeluppi*, 2014-Ohio-1574 at ¶ 7, citing *Burnside*, 2003-Ohio-5373 at ¶ 8.

LEGAL ANALYSIS

(I) OFFICER WILSON'S INITIAL ENCOUNTER WITH THE DEFENDANT

The Fourth Amendment to the United States Constitution protects people against "unreasonable searches and seizures."[6] Similarly, the Ohio Constitution provides: "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated."[7]

The Fourth Amendment, however, does not prohibit "all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference with enforcement officials with the privacy and personal security of individuals."[8] Hence, a consensual encounter between police officers and individuals "does not trigger Fourth Amendment scrutiny."[9] A Fourth Amendment violation does not occur "simply because a police officer approaches an individual and asks a few questions."[10] The encounter is consensual so long as the police officers do not "by means of physical force or show of authority" restrain the liberty of an individual.[11]

To determine whether an individual has been detained, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at

---

[6] Fourth Amendment to the United States Constitution.
[7] Ohio Constitution, Article I, Section 14.
[8] *I.N.S. v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984), quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 3074, 49 L.Ed.2d 1116 (1976).
[9] *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d, 59 USLW 4708 (1991), at paragraph one of the syllabus, citing *Terry v. Ohio*, 392 U.S. 1, 19, fn. 16, 88 S.Ct. 1868, 1879, fn. 16, 20 L.Ed.2d 889.
[10] *Bostick*, 501 U.S. at 433.
[11] Id.

liberty to ignore the police presence and go about his business.'"[12] The United States Supreme Court has provided examples of police conduct that may indicate to an individual that he or she is not free to leave, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might by compelled."[13] Moreover, the voluntariness of an individual's conversation with a police officer "does not depend" upon whether the police informed the individual that he or she "was free to decline to cooperate with their inquiry."[14] The above Fourth Amendment principles likewise apply to individuals in motor vehicles.[15]

In the case at bar, the defendant's first argument in favor of suppression is that the warrantless stop and detention contravenes the Fourth Amendment. The defendant more specifically argues it was permissible for Officer Wilson to check on his welfare, but as soon as Officer Wilson knew that the defendant was not in peril, the conversation should immediately have stopped and Officer Wilson should not have continued to look in the defendant's vehicle.

Taking into account all of the circumstances surrounding the defendant's encounter preceding the canine sniff, Officer Wilson's conduct would not have communicated to the defendant that he was not free to go about his business.[16] There was not testimony or other evidence that Officer Wilson displayed a weapon, physically

---

[12] *Bostick*, 501 U.S. at 437.
[13] *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).
[14] Id. at 555.
[15] *State v. Lunce*, 12th Dist. Butler No. CA2000-10-209, 2001 WL 530541, *2 (May 21, 2001), citing *State v. Johnson*, 85 Ohio App.3d 475, 478 (12th Dist. 1993).
[16] *Bostick*, 501 U.S. at 437.

leaned in the vehicle, or exhibited something other than a conversational tone.[17] Moreover, Officer Wilson did not block the defendant from driving away if the defendant did not wish to answer his questions.

In view of these circumstances, the defendant was not detained before the canine sniff. Officer Wilson did not stop the defendant because the defendant was already parked at the pump of the U.D.F. gas station. Rather, Officer Wilson had a consensual encounter with the defendant through the defendant's open window. Officer Wilson wanted to check on the defendant's welfare because he believed the defendant may have overdosed on drugs due to the fact that he was slumped over the passenger's lap.

Although the defendant's initial encounter with Officer Wilson was consensual, the defendant posits that Officer Wilson should have left the defendant immediately upon determining the defendant was safe. Therefore, the defendant argues that Officer Wilson should not have lingered to see the needle cap inside the vehicle. However, a careful review of Officer Wilson's testimony reveals that he did not linger after determining that the defendant was safe. Officer Wilson testified that through speaking with the defendant for a few minutes, he was able to determine that the defendant was lucid. It was during this same conversation that Officer Wilson spotted the needle cap. Accordingly, Officer Wilson did not linger at the vehicle after his consensual encounter with the defendant to look for contraband.[18]

---

[17] *Mendenhall*, 446 U.S. at 554.

[18] Of note, even if Officer Wilson had stopped and detained the defendant before the canine sniff, which he did not, he would have been doing so lawfully under the community-caretaking/emergency-aid exception to the Fourth Amendment. This exception "allows police officers to stop a person to render aid if they reasonably believe that there is an immediate need for their assistance to protect life or prevent serious injury." *State v. Dunn*, 131 Ohio St.3d 325,

Of note, once Officer Wilson saw the hypodermic needle cap, he had a reasonable and articulable suspicion to detain the defendant for purposes of conducting a canine sniff. Officer Wilson testified that once he called for a canine unit, he did detain the defendant by having the defendant exit the vehicle and wait in the police cruiser. If an individual has been detained without a warrant, the detainment is constitutional as an investigatory stop when the police officer "reasonably suspected" the defendant of "wrongdoing."[19] The officer must have had "'specific and articulable facts' that the detention was reasonable."[20]

Once he noticed the hypodermic needle cap, Officer Wilson had encountered "additional facts * * * that give rise to a reasonable, articulable suspicion of criminal activity," justifying detaining the defendant.[21] "The existence of a reasonable articulable suspicion is determined by evaluating the totality of the circumstances 'through the eyes of the reasonable and prudent officer on the scene who must react to events as they

---

2012-Ohio-1008, 964 N.E.2d 1037, ¶ 22. This exception recognizes that it "is necessary to allow police to respond to emergency situations where life or limbs is in jeopardy." Id. at ¶ 21. Officer Wilson's belief that the defendant may have been suffering from a drug overdose is an emergency where the defendant's life may have been in jeopardy. *See State v. Levengood*, 61 N.E.3d 766, 2016-Ohio-1340, ¶ 12 (5th Dist.) (finding that the exception applied where the police received a report of an unresponsive male who had overdosed on heroin), *State v. Bugaj*, 7th Dist. Belmont No. 06-BE-27, 2007-Ohio-967, ¶ 22 (finding that exigent circumstances existed when an officer discovered a man unresponsive on the floor and "* * * did not know whether the man was dead or alive, whether he had suffered from a drug overdose, [or] whether he had another medical problem * * *."); *State v. Stanberry*, 11th Dist. Lake No. 2002-L-028, 2003-Ohio-5700, ¶ 21 (finding that the exigent circumstances exception applied where officers responded to an emergency call regarding an alleged overdose).

[19] *Mendenhall*, 446 U.S. at 552. *See Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed. 332 (1993), at paragraph one of the syllabus ("*Terry* permits a brief stop of a person whose suspicious conduct leads an officer to conclude in light of his experience that criminal activity may be afoot * * *.").

[20] *State v. Chatton*, 11 Ohio St.3d 59, 60-61, 463 N.E.2d 1237, 11 O.B.R. 250 (1984).

[21] *State v. Beltran*, 12th Dist. Preble No. CA2004-11-015, 2005-Ohio-4194, ¶ 16, citing *State v. Myers*, 63 Ohio App.3d 765, 580 N.E.2d 61 (2d Dist. 1990).

unfold."[22] From the eyes of a reasonable and prudent officer, a reasonable and articulable suspicion existed for an investigatory stop because the hypodermic needle cap must have come from a hypodermic needle, and needles are a common tool employed for drug use. Moreover, it would be unusual, absent drug activity, to leave hypodermic needle caps or hypodermic needles on the floor of a vehicle.

A lawfully detained vehicle can be subjected to a canine sniff.[23] A canine sniff of a lawfully detained vehicle is "not a search within the meaning of the Fourth Amendment to the Constitution," and therefore probable cause is not required to conduct a canine sniff.[24] However, when a narcotics canine "'alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband."[25] Gator's sniff and alert on the vehicle, which occurred while the defendant was lawfully detained, provided Officer Wilson with probable cause to search the vehicle.[26] In conducting this legal search, Officer Wilson discovered the hypodermic needle, which contained a substance now known to be heroin.

In sum, Officer Wilson spotted the hypodermic needle cap as a result of a legal, consensual encounter with the defendant. The needle cap provided Officer Wilson with a reasonable and articulable suspicion to detain the defendant so that a canine unit could be dispatched. Upon the canine alerting on the vehicle, Officer Wilson had

---

[22] *State v. Casey*, 12th Dist. Warren No. CA2013-10-090, 2014-Ohio-2586, ¶ 20 quoting *State v. Popp*, 12th Dist. Butler No. CA2010-05-128, 2011-Ohio-791, ¶ 13.
[23] *Grenoble*, 2011-Ohio-2343 at ¶ 30, citing *State v. Rusnak*, 120 Ohio App.3d 24, 28 (6th Dist. 1997); *See State v. Kremer*, 12th Dist. Warren No. CA2015-11-101, 2016-Ohio-3399, ¶ 18, citing *State v. Cruz*, 12th Dist. Preble No. CA2013-10-008, 2014-Ohio-4280, ¶ 15 (holding same).
[24] *Casey*, 2014-Ohio-2586 at ¶ 22, citing *State v. Grenoble*, 12th Dist. Preble No. CA2010-09-011, 2011-Ohio-2343, ¶ 30.
[25] *Kremer*, 2016-Ohio-3399 at ¶ 22, citing *Cruz*, 2014-Ohio-4280 at ¶ 15.
[26] The propriety of the length of the canine sniff, which the defendant also claims to be illegal, is discussed in Section II below.

probable cause to search the vehicle, which led to the discovery of the hypodermic needle.

In view of the totality of the circumstances, the court finds that the defendant was not seized within the meaning of the Fourth Amendment when Officer Taylor approached the defendant's vehicle and spoke with him. Therefore, the defendant's motion to suppress evidence on this basis is denied.

(II) THE CANINE SNIFF OF THE DEFENDANT'S VEHICLE

Defense counsel briefly mentioned at the outset of oral argument that the defendant's second basis for his motion to suppress was that the canine sniff of the defendant's vehicle was impermissibly long. Defense counsel did not further explain how the time required for the canine sniff was impermissibly long, nor did counsel revisit this argument after all the evidence had been presented. However, the court will briefly address the permissibility of the time period required for the canine sniff.

Officer Wilson detained the defendant when their conversation about the defendant's welfare concluded and he spotted the needle cap. Officer Wilson immediately called for a canine unit at 5:16 p.m., at which time the defendant was no longer free to leave. As discussed, Officer Wilson's decision to detain the defendant at that point was legal.

Officer Heintzelen, the officer from the Amelia Police Department Canine Unit, was dispatched to the United Dairy Farmers location at 5:16 p.m. and arrived at 5:28 p.m. Within two minutes, his canine, Gator, had conducted an exterior sniff and alerted

on the vehicle. Therefore, from the time the defendant was detained until the time of the alert, 14 minutes had passed. A time period of this duration has been held by other courts, including the Twelfth District Court of Appeals, to be permissible.[27] As such, the court finds that the length of time required for the canine sniff was not so long as to be illegal.

CONCLUSION

For the foregoing reasons, the defendant's motion to suppress is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 2-8-17

Judge Jerry R. McBride

[27] *See State v. Bell*, 12th Dist. Preble No. CA2001–06–009, 2002 WL 205502, *3 (Feb. 11, 2002) (a canine alert on a trunk 14 minutes after the stop was constitutional); *Beltran*, 2005–Ohio–4194 (canine sniff 42 minutes after traffic stop was not unconstitutional); *State v. Cochran*, 12th Dist. Preble No. CA2006–10–023, 2007–Ohio–3353 (canine sniff 28 minutes after traffic stop was not unconstitutional).