COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff	**:**	**CASE NO. 2016 CR 00091**
vs.	**:**	**Judge McBride**
DANIEL N. HARP	**:**	**DECISION/ENTRY**
Defendant	**:**	

Thomas W. Scovanner, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103

Mark J. Tekulve, assistant public defender and counsel for the defendant Daniel N. Harp, 302 E. Main Street, Batavia, Ohio 45103

This cause is before the court for consideration of the motions to dismiss and to suppress filed by the defendant Daniel N. Harp on May 25, 2016.

An evidentiary hearing was held as to these motions on June 23rd and 28th, 2016. At the conclusion of the hearing, the court took the motions under advisement.

Upon consideration of the motion, the record of the proceedings, 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

The defendant Daniel N. Harp was indicted on March 22, 2016 on one count of improperly handling a firearm in a motor vehicle in violation of R.C. 2923.16(B), a felony of the fourth degree.

This charge stems from an incident on January 28, 2016, when the defendant was stopped by Clermont County Deputy Sheriff Timothy Goins. At approximately 7:54 p.m. on that date, Officer Goins stopped the defendant because one of his headlights was out.

Upon the defendant's vehicle coming to a stop, Officer Goins approached the vehicle, informed the defendant why he had been stopped, and asked for his driver's license, proof of insurance, and vehicle registration. In response, the defendant only produced a driver's license.

Officer Goins, during his initial contact with the defendant, noticed that the defendant was acting nervous, exhibited shaking hands, and refused to make eye contact. Officer Goins called the defendant's license number in to determine whether the license was valid. Officer Goins asked the defendant if he could look in his glove box for the proof of insurance and vehicle registration, but the defendant stated there was only an officer's manual in the glove compartment and did not look further. Goins also asked if the defendant had any weapons in the vehicle, and the defendant advised that there was a pellet gun in the vehicle.

Goins testified that he then requested a canine to be brought to the scene at 7:55 p.m. based on the defendant's observed behaviors. While waiting for the canine unit to

arrive, at 7:56 p.m. Officer Goins made an inquiry through the dispatcher as to whether the defendant had any outstanding warrants for his arrest. Within approximately a minute or so, and after being informed that there were no outstanding warrants, Officer Goins was informed that there were no outstanding warrants.

At 7:59 p.m. the canine unit arrived, which consisted of Deputy Sheriff Dan Spears and his canine partner Paco. Paco is trained to alert to the odors of any of the following drugs: cocaine, heroin, ecstasy, methamphetamine, or marijuana. Paco was walked around the vehicle.

Upon arriving at the scene, Officer Spears and his canine walked around the vehicle, and during this first walk around the vehicle Paco alerted to the odor of one of the drugs that he was trained to detect. He demonstrated his detection of the drug and the area where the drug was located by walking back and forth in front of the driver's door while sniffing loudly. The entire process of walking around the vehicle and alerting for a prohibited substance took less than two minutes to complete.

Approximately three to five minutes after Paco alerted, the officers proceeded to search the defendant's vehicle. Before doing so, and before placing the defendant in his police vehicle, Deputy Goins performed a pat down search of the defendant's person. He found oval pills and a glass pipe on the defendant's person, and the glass pipe had drug residue in it. Goins asked him about the pipe, and the defendant advised that he had found it in the driveway and then placed it in his pocket.

During the pat down search, Officer Goins asked if there were any other weapons in the vehicle. The defendant advised that his mother's handgun was in the glove box.

During the search of the vehicle, Deputy Spears found a loaded handgun in the unlocked glovebox, which serves as the basis for the present case. Goins and Sparks also found a light bulb in the center console that had been converted into a pipe along with a bag of glass pipes.

After these items were located, and after having been read his Miranda rights, the defendant stated in response to interrogation that his mother had just moved to Kentucky and that Kentucky had just changed its laws to allow a loaded firearm to be concealed in the glove box.

The defendant was arrested and charged with a headlight violation, improper handling of a firearm, and possession of drug paraphernalia. It is the policy of the Sheriff's office to search vehicles that are seized as the result of an arrest of the driver.

On May 25, 2016 the defendant filed a motion to dismiss and suppress. The state did not file a response. The court held hearings on this matter on June 23rd and 28th, during which Officer Goins and Officer Spears testified, respectively.

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 the defendant's motion to

[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).

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]

LEGAL ANALYSIS

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 United States Supreme Court has long observed that "'[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the

[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] Id.
[6] Fourth Amendment to the United States Constitution.
[7] Ohio Constitution, Article I, Section 14.

possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'"[8]

The above Fourth Amendment principles apply to drivers in motor vehicles.[9] "The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver 'even though the purpose of the stop is limited and the resulting detention is quite brief.'"[10] The "tolerable duration" of a seizure in the context of a traffic stop is "determined by the seizure's 'mission' – to address the traffic violation that warranted the stop * * * and to attend to related safety concerns * * *."[11] The stop may not last any longer than necessary to effectuate its purpose.[12]

"When the police stop a vehicle based on probable cause that a traffic violation has occurred, the stop is reasonable under the Fourth Amendment."[13] If a traffic stop exceeds "the time needed to handle the matter for which the stop was made," then the stop "violates the Constitution's shield against unreasonable seizures."[14] Hence, a seizure based upon a traffic violation "'become[s] unlawful if it is prolonged beyond the

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[8] *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), citing *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891).

[9] *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).

[10] *Brendlin v. California*, 55 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007), citing *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

[11] *Rodriguez v. U.S.*, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492, 83 USLW 4241 (2015), citing *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005).

[12] *Rodriguez*, 135 S.Ct. at 614.

[13] *State v. Casey*, 12th Dist. Warren No. CA2013-10-090, 2014-Ohio-2586, ¶ 18, citing *Bowling Green v. Godwin*, 110 Ohio St.3d 58, 2006-Ohio-2563, ¶ 11. *See State v. Grenoble*, 12th Dist. Preble No. CA2010-09-011, 2011-Ohio-2343, ¶ 11, quoting *Dayton v. Erickson*, 76 Ohio St.3d 3 (1996), at the syllabus ("Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity.").

[14] *Rodriguez*, 135 S.Ct. at 1610.

time reasonably required to complete [the] mission of issuing a ticket for the violation."[15] Accordingly, a law enforcement officer's authority for the seizure ends "when tasks tied to the traffic infraction are – or reasonably should have been – completed."[16]

The officer's "mission" during a traffic stop includes determining whether to issue a traffic ticket, checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.[17] Such checks "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly."[18] To determine whether an officer completed these checks in 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."[19]

When an officer investigates other crimes during a traffic stop, the officer "detours" from his or her mission.[20] During an "otherwise lawful traffic stop," an officer

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[15] Id. quoting *Illinois*, 543 U.S. at 407.

[16] *Rodriguez*, 135 S.Ct. at 1614. *See State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶ 12, quoting *State v. Keathley*, 55 Ohio App.3d 130, 131, 562 N.E.2d 932 (2d Dist. 1988) ("[W]hen detaining a motorist for a traffic violation, an officer may delay the motorist for a time period sufficient to issue a ticket or a warning."); *Grenoble*, 2011-Ohio-2343 at ¶ 28 (stating that an officer may detain a motorist for a traffic stop for a time sufficient to issue a ticket or warning, and to run a computer check on the driver's license, registration, and vehicle plates).

[17] *Rodriguez*, 135 S.Ct. at 1615, citing *Prouse*, 440 U.S. at 658-660. *See Batchili*, 2007-Ohio-2204 at ¶ 12 (explaining that detaining a motorist for a traffic violations allows for "time sufficient to run a computer check on the driver's license, registration, and vehicle plates."); *Casey*, 2014-Ohio-2586 at ¶ 18, citing *Grenoble*, 2011-Ohio-2343 at ¶ 28 ("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 to perform routine procedures such as a computer check on the motorist's driver's license, registration, and vehicle plates.").

[18] *Rodriguez*, 135 S.Ct. at 1615, citing *Prouse*, 440 U.S. at 658-659.

[19] *Batchili*, 2007-Ohio-2204 at ¶ 12, quoting *State v. Carlson*, 102 Ohio App.3d 585, 598-599, 657 N.E.2d 591 (9th Dist. 1995). *See Grenoble*, 2011-Ohio-2343 at ¶ 28, citing *Carlson*, 102 Ohio App.3d at 598-599 (holding same).

[20] *Rodriguez*, 135 S.Ct. at 1616.

may "conduct certain unrelated checks" or detours, but the checks may not otherwise prolong the stop.[21]

"Both Ohio courts and the United States Supreme Court have determined that 'the exterior sniff by a trained narcotics dog to detect the odor of drugs is not a search within the meaning of the Fourth Amendment to the Constitution."[22] Accordingly, "a lawfully detained vehicle may be subjected to a canine sniff of the vehicle's exterior even without the presence of a reasonable suspicion of drug-related activity."[23] Even so, a "dog sniff" is not part of the officer's mission during a traffic stop, but instead "is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'"[24] "Thus, a canine sniff of a vehicle may be conducted during the time period necessary to effectuate the original purpose of the stop."[25] If the dog alerts on the vehicle before a diligently undertaken stop is complete, then the canine sniff is permissible.[26] Therefore, the critical question in determining whether a dog sniff is lawful, is "whether conducting the sniff 'prolongs' – i.e., adds time too – 'the stop.'"[27] If the canine sniff is completed before the "reasonable completion of the traffic stop," then "the officer does not need additional suspicion of criminal activity to conduct the sniff."[28]

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[21] Id. at 1615.
[22] *Casey*, 2014-Ohio-2586 at ¶ 22, citing *Grenoble*, 2011-Ohio-2343 at ¶ 30.
[23] *Grenoble*, 2011-Ohio-2343 at ¶ 30, citing *State v. Rusnak*, 120 Ohio App.3d 24, 28 (6th Dist. 1997).
[24] *Rodriguez*, 135 S.Ct. at 1615, citing *Indianapolis v. Edmond*, 531 U.S. 32, 40-41, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000).
[25] *Grenoble*, 2011-Ohio-2343 at ¶ 20, citing *State v. Cahill*, 3d Dist. Shelby App. No. 17-01-19, 2002-Ohio-4459, ¶ 22.
[26] *Batchili*, 2007-Ohio-2204 at paragraph one of the syllabus.
[27] *Rodriguez*, 135 S.Ct. at 1616.
[28] *Casey*, 2014-Ohio-2586 at ¶ 22, citing *State v. Elliott*, 7th Dist. Mahoning No. 11 MA 182, 2012-Ohio-3350, ¶ 18.

If a detention is prolonged in order to conduct a canine sniff, the officer must have encountered additional facts that "give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop."[29] Otherwise, "* * * 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."[30]

"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 unfold."[31] Although a driver's nervousness and furtive gestures are factors to be weighed in determining whether reasonable suspicion exists, nervousness alone is not sufficiently reliable to give rise to reasonable suspicion during a traffic stop, absent other factors.[32]

The case of *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, demonstrates an instance where a dog sniff did not impermissibly prolong an otherwise valid traffic stop. In *Batchili*, an officer stopped the defendant for a marked lanes violation.[33] While the officer returned to her cruiser to check the validity of the defendant's driver's license and to determine whether any warrants against the

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[29] *Batchili*, 2007-Ohio-2204 at ¶ 15, citing *State v. Myers*, 63 Ohio App.3d 765, 771, 580 N.E.2d 61 (2d Dist. 1990). *See Casey*, 2014-Ohio-2586 at ¶ 20, citing *Elliott*, 2012-Ohio-3350 at ¶ 18 ("However, 'if the circumstances give rise to a reasonable suspicion of some other illegal activity, different than that which triggered the stop, then the officer may detain the driver for as long as the new articulable reasonable suspicion exists.").

[30] *State v. Robinette*, 80 Ohio St.3d 234, 685 N.E.2d 762 (1997), at paragraph one of the syllabus.

[31] *Casey*, 2014-Ohio-2586 at ¶ 20, quoting *State v. Popp*, 12th Dist. Butler No. CA2010-05-128, 2011-Ohio-791, ¶ 13.

[32] *Casey*, 2014-Ohio-2586 at ¶ 26, citing *United States v. Richardson*, 385 F.3d 625, 630 (6th Cir.2004).

[33] *Batchili*, 2007-Ohio-2204 at ¶ 3.

defendant were outstanding, she called an officer to conduct a drug sniff with a canine.[34] When the canine arrived, it alerted to the presence of drugs at eight minutes and 56 seconds into the stop, while the officer was still waiting for results of the criminal background check.[35] Further, the officer testified that it normally took her approximately five to ten minutes to issue a warning and anywhere from 10 to 20 minutes to issue a citation.[36] In concluding that the dog sniff was lawful, the court explained: "There is no showing that the detention was delayed so that the dog could conduct its search, and therefore, there was no constitutional violation."[37]

In his motion to dismiss and suppress, the defendant argues that the seizure of all evidence during the search of the defendant's person and his vehicle was illegal and should be suppressed. He maintains in his brief that the traffic stop was unreasonably prolonged to permit the canine sniff. At oral argument the defendant additionally argued that, even if the stop was not unreasonably prolonged, the evidence should still be suppressed because the officers did not have any reasonable belief that the defendant had committed any crime aside from the one involving his headlight.

The defendant posits that it was insufficient that Officer Goins was suspicious of the defendant because he exhibited nervousness during the stop. The defendant indicated to the court at the hearing that he would submit case law in support of his argument that reasonable suspicion was necessary for the canine sniff; however, he never did so.

[34] Id. at ¶ 5.
[35] Id. at ¶ 13.
[36] Id.
[37] Id. at ¶ 14.

The state counters that the evidence seized is admissible because the canine sniff was permissible. The state argues that, as long as the stop was not prolonged, Officer Goins was permitted to have a canine sniff conducted. The state's position is that, because the canine alert occurred only seven minutes into the stop, and it generally takes Officer Goins 10 to 15 minutes to issue a citation, the stop was not unreasonably prolonged.

As discussed, a canine sniff is not considered a search within the meaning of the Fourth Amendment.[38] The law is clear that reasonable suspicion is not necessary for an officer to conduct a canine sniff so long as the traffic stop is not unreasonably prolonged.[39] The evidence submitted to the court demonstrates that the traffic stop was not unreasonably prolonged by the canine sniff.

Officer Goins stopped the defendant at 7:54 p.m. At 7:55 p.m. Officer Goins requested a canine unit, and Officer Spears arrived with Paco at 7:59 p.m. Within two minutes Paco had alerted, thereby placing his alert at or about 8:01 p.m. Therefore, Paco alerted at seven minutes into the stop.[40] At this point, Officer Goins had already diligently called in the defendant's license and checked whether he had outstanding warrants. He had not, however, had time to finish writing a citation, which normally takes him 10 to 15 minutes to complete.

Because the canine sniff did not in any way delay the defendant's stop, the court finds that the defendant's stop was not unreasonably prolonged. Furthermore, because the canine sniff was completed before the reasonable completion of the traffic stop,

[38] *Casey*, 2014-Ohio-2586 at ¶ 22, citing *Grenoble*, 2011-Ohio-2343 at ¶ 30.
[39] *Grenoble*, 2011-Ohio-2343 at ¶ 20, citing *Cahill*, 2002-Ohio-4459 at ¶ 22.
[40] *See Batchili*, 2007-Ohio-2204 at ¶ 13 (finding that an alert that took place at 8 minutes and 56 seconds into a stop was permissible, and it did not unreasonably prolong the traffic stop, which normally would require the officer 10 to 20 minutes to issue a citation).

Officer Goins did not need to have reasonable suspicion of drug activity to conduct the sniff.[41] In sum, the canine sniff of the defendant's vehicle was permissible and did not violate the defendant's Fourth Amendment rights. As such, the defendant's motion to suppress should be denied.

As for his motion to dismiss, "the proper remedy for a Fourth Amendment violation is suppression of the evidence wrongfully obtained, not dismissal of the charges."[42] Additionally, the defendant has not offered any argument as to why this matter should be dismissed. Accordingly, the court declines to dismiss the charge against the defendant.

CONCLUSION

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

IT IS SO ORDERED.

DATED: _____ _____

Judge Jerry R. McBride

[41] *Casey*, 2014-Ohio-2586 at ¶ 22, citing *Elliott*, 2012-Ohio-3350 at ¶ 18.
[42] *Blanchester v. Hester*, 81 Ohio App. 3d 815, 820, 612 N.E.2d 412 (12th Dist. 1992)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent by e-mail on this 17th day of August 2016 to Thomas W. Scovanner, assistant prosecuting attorney for the state of Ohio, at tscovanner@clermontcountyohio.gov, and to Mark Tekulve, attorney for the defendant Daniel N. Harp, at tekulvelaw@fuse.net.

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Judicial Assistant to Judge McBride