COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	**CASE NO. 2015 CR 00628**
vs.	:	**Judge McBride**
PATRICK M. LETT	:	**DECISION/ENTRY**
Defendant	:	

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

Richard R. Campbell, attorney for the defendant Patrick M. Lett, 810 Sycamore Street, Suite 706, Cincinnati, Ohio 45202

This cause is before the court for consideration of the defendant Patrick M. Lett's motion to suppress which was filed on January 28, 2016

A hearing on the motion was originally scheduled on February 24, 2016, but was continued by agreement to March 3, 2016. A hearing was held on that date, and 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 November 10, 2015, at 1:50 pm, Trooper Jason E. Taylor noticed an SUV parked on the shoulder of State Route 32 in Clermont County with its hazard lights activated. Trooper Taylor works for the state highway patrol and was driving a marked patrol vehicle.

Trooper Taylor turned his overhead lights on, pulled off the road, and parked behind the SUV to check on the occupant's welfare. Trooper Taylor walked up to the passenger window of the parked SUV to determine if the occupant needed any help.

Trooper Taylor could see that the defendant Patrick M. Lett was asleep in the driver's seat with his seat reclined. The defendant immediately awoke when Trooper Taylor tapped the window.

The defendant testified that could see that the police cruiser's overhead lights were on from his rearview mirror. The defendant testified that he "cracked" his window open for Trooper Taylor.

Using a casual tone of voice, Trooper Taylor greeted the defendant with "Good morning" and asked him to roll his window down.[1] Trooper Taylor testified that he immediately smelled burnt marijuana emanating from the defendant's SUV as soon as the defendant initially opened his window.

Trooper Taylor asked if the defendant was "just napping." The defendant responded that he was tired and sleeping. The defendant testified that he had an early class that morning at Shawnee State University and was making a two and a half hour

[1] Defs. Ex. A is a video recording from Trooper Taylor's police cruiser of the incident. Most of the audio is very difficult to understand due to the quality of the tape and background noises form the highway.

drive to visit his grandfather. The defendant stated that he decided to pull off the road for a nap instead of risking an accident. Trooper Taylor asked for the defendant's identification and insurance, which the defendant produced.

Trooper Taylor asked the defendant about the odor of marijuana. The defendant admitted that there was a small amount of marijuana in the car and that he had smoked the marijuana the night before.

Trooper Taylor asked the defendant to exit the SUV and to leave his keys in the vehicle. Trooper Taylor then patted the defendant down. The defendant did not appear at the time to be impaired and did not smell of marijuana.

During the subsequent pat-down, the defendant asked if he was being detained. Trooper Taylor responded that he was going to have the defendant wait in the back of the police cruiser while he searched the defendant's SUV. Trooper Taylor then had the defendant sit in the back of his patrol car, without handcuffs, while he conducted the search.

When Trooper Taylor began to search the SUV, he saw a marijuana roach in the ash tray and some marijuana debris on the floor. He continued inspecting the vehicle while leaving the roach in the ashtray. Tests later showed that there was .151 grams of marijuana in the SUV.

Trooper Taylor began searching in the area of the passenger seat and console, and then moved to the passenger compartment, which he unlocked with the defendant's key. Inside the passenger compartment, Trooper Taylor found a 40 caliber semi-automatic firearm with one bullet loaded in the chamber. There was also a magazine with three rounds.

Trooper Taylor returned to the police cruiser and informed the defendant that LEADS reported the firearm was stolen, and he asked what the defendant paid for it and where he got it. The defendant stated that he had purchased the firearm from a person at a gun range for $300 when he went there for his 21st birthday.

Twelve minutes later, Trooper Taylor read the defendant his *Miranda* rights. Trooper Taylor asked "So where did the gun come from?," and the defendant did not answer the question.

The state charged the defendant with violating R.C. 2923.16(B) for knowingly transporting or having a loaded firearm in a motor vehicle in such a manner that the firearm was accessible to the operator or any passenger without leaving the vehicle, a fourth degree felony.

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."[2] When the defendant's motion to suppress is successful, the principal remedy for a constitutional violation is to exclude the evidence from the criminal trial.[3]

---

[2] *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.
[3] *State v. Haines*, 12th Dist. Clermont No. CA2003-02-015, 2003-Ohio-6103, ¶ 8.

Pursuant to Crim.R. 12(C), "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 [evidence] was illegally obtained" must be made prior to trial.[4]

A motion to suppress typically "presents mixed questions of law and fact."[5] 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."[6]

LEGAL ANALYSIS

(I) THE DEFENDANT'S INITIAL ENCOUNTER WITH LAW ENFORCEMENT

The Fourth Amendment to the United States Constitution protects people against "unreasonable searches and seizures."[7] 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."[8]

The Fourth Amendment, however, does not prohibit "all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals."[9] Hence,

---

[4] Crim.R. 12(C).
[5] *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.
[6] Id.
[7] Fourth Amendment to the United States Constitution.
[8] Ohio Constitution, Article I, Section 14.
[9] *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).

a consensual encounter between police officers and individuals "does not trigger Fourth Amendment scrutiny."[10] A Fourth Amendment violation does not occur "simply because a police officer approaches an individual and asks a few questions."[11] Moreover, no seizure occurs merely by asking the individual for identification.[12]

This is so even when police officers lack a basis for suspecting an individual of wrongdoing.[13] 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.[14]

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 liberty to ignore the police presence and go about his business.'"[15] The United States Supreme Court has named 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."[16] Moreover, the voluntariness of an individual's conversation with a police officer "does not depend" upon whether the police

---

[10] *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, n. 16, 88 S.Ct. 1868, 1879, n. 16, 20 L.Ed.2d 889.
[11] *Bostick*, 501 U.S. at 433.
[12] Id. at 437.
[13] Id. at 434-35, citing *I.N.S.*, 466 U.S. at 216.
[14] *Bostick*, 501 U.S. at 433.
[15] Id. at 437.
[16] *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

informed the individual that he or she "was free to decline to cooperate with their inquiry."[17]

The above Fourth Amendment principles likewise apply to individuals in motor vehicles.[18] Ohio appellate courts are divided as to whether a police officer seizes the occupant of a parked vehicle by activating the police cruiser overhead lights.[19] The Twelfth District Court of Appeals has held multiple times that a police officer does not necessarily seize an occupant merely by turning on overhead lights.[20] The Twelfth District Court of Appeals has also remarked that a police officer activating headlights before approaching an individual in a parked vehicle may be necessary as a safety precaution.[21]

The case of *State v. Brown*, 12th Dist. Clermont No. CA2001-04-047, 2001 WL 1567340 (Dec. 10, 2001), illustrates similar circumstances to the case at bar. In *Brown*

---

[17] Id. at 555.
[18] *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).
[19] *See State v. Patterson*, 9th Dist. Summit No. 23135, 2006-Ohio-5424, ¶¶ 17-18 (finding that there was no seizure when police officers pulled their cruiser alongside a parked vehicle and turned on their overhead lights); *State v. Lynch*, 196 Ohio App.3d 420, 2011-Ohio-5502, 963 N.E.2d 890, ¶ 29 (8th Dist.) (holding that there was a seizure and not a consensual encounter when the detectives activated their overhead lights, pulled up alongside a parked vehicle, immediately exited their cruiser, and identified themselves as "police"), *State v. Rozier*, 11th Dist. Trumbuss No. 2009-T-0074, 2010-Ohio-1454, ¶ 29 (determining that there was no seizure when an officer stopped behind a parked vehicle in a cul-de-sac, turned on the overhead lights, asked the occupants what they were doing, asked for identification, and maintained a conversational tone), *State v. Little*, 2d Dist. Clark No. 09-CA-122, 2010-Ohio-2923, ¶ 9 (concluding that "the activation of overhead flashing lights by police officers in a marked cruiser is a universally understood signal that * * *a motorist in a stationary vehicle in the immediate vicinity of the cruiser should not leave the area * * *.").
[20] *State v. Brown*, 12th Dist. Clermont No. CA2001-04-047, 2001 WL 1567340, *3 (Dec. 10, 2001). *See State v. Schnell*, 12th Dist. Butler No. CA2015-06-125, 2016-Ohio-752, ¶ (holding that the defendant had not been seized at the point when a police officer pulled the cruiser behind the defendant's idle vehicle in a gas station and turned the overhead lights on); *State v. Hacker*, 12th Dist. Butler No. CA2000-11-235, 2002-Ohio-2312, ¶ 12 (finding that the defendant in his parked vehicle had not been seized when the officer turned his overhead lights on as the defendant exited his vehicle and walked towards a Walgreen's entrance).
[21] *Lunce*, 2001 WL 530541 at *2.

a police officer activated his cruiser lights and parked behind a vehicle that was in an empty parking lot at night.[22] The officer approached the vehicle, requested identification, and asked why the car was parked and stationary.[23] During this encounter the officer asked if there was anything illegal in the vehicle, and the defendant disclosed that there was a firearm and ammunition in the vehicle.[24]

In examining the totality of the circumstances, the court observed that it was immaterial that the police officer did not exchange pleasantries before his "mere" request for identification and inquiry into the occupant's purpose.[25] Additionally, the police officer's question about whether there was contraband in the vehicle "does not make the encounter coercive."[26] With respect to the use of the overhead lights, the court found that their use was "not enough of a show of force or authority to convert the encounter into a seizure."[27] The officer did not block the vehicle occupant's egress from the parking lot, nor did he use language or a tone suggesting compliance with his request.[28] As such, the use of the overhead lights would not have led a reasonable person to believe that he or she could not end the encounter.[29] Accordingly, the court held that the defendant was not seized within the meaning of the Fourth Amendment, and the encounter was consensual.[30]

If an individual is not detained then there has been "no seizure within the meaning of the Fourth Amendment – then no constitutional rights have been

---

[22] *Brown*, 2002 WL 1567340 at *1.
[23] Id. at *3.
[24] Id. at *1.
[25] Id. at *3.
[26] Id..
[27] Id. at *4.
[28] Id. at *3-4.
[29] Id. at *4.
[30] Id.

infringed."[31] However, if the individual has been detained without a warrant, then the detention was constitutional only if the police officer "reasonably suspected" the defendant of "wrongdoing."[32] The issue will then become whether the police officer has "'specific and articulable facts' that the detention was reasonable."[33]

The Fourth Amendment does not explicitly exclude evidence obtained in contravention of its requirements, but there exists a "judicially crafted exclusionary rule [that] mandates suppression of evidence obtained from a constitutional violation."[34] As such, when statements are "given during a period of illegal detention," they are "inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will."[35]

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 argues he was seized while he was still in his vehicle because Trooper Taylor turned his overhead lights on when he parked his cruiser behind the defendant, Trooper Taylor asked the defendant to roll his window down, and he asked the defendant for his identification.

Taking into account all of the circumstances surrounding the defendant's encounter preceding the search, Trooper Taylor's conduct would not have

---

[31] *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).
[32] *Mendenhall*, 446 U.S. at 552.
[33] *State v. Chatton*, 11 Ohio St.3d 59, 60-61, 463 N.E.2d 1237, 11 O.B.R. 250 (1984).
[34] *U.S. v. Garcia*, 496 F.3d 495, 505 (6th Cir. 2007), citing *Arizona v. Evans*, 514 U.S. 1, 10-11, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995). *See State v. O'Connor*, 12th Dist. Butler No. CA2001-08-195, 2002-Ohio-4122, ¶ 11, quoting *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).
[35] *Royer*, 460 U.S. at 501.

communicated to the defendant that he was not free to go about his business.[36] In reviewing the video footage of the encounter,[37] Trooper Taylor does not display a weapon, he did not physically lean in the vehicle, and he exhibited a conversational tone.[38] Moreover, Trooper Taylor did not block the defendant from driving away if he did not wish to answer his questions.

Trooper Taylor did not "stop" the defendant, as the defendant argues, because the defendant was already parked on the side of the road. Trooper Taylor testified that he wanted to check on the welfare of the defendant in the vehicle because it was unusual to see a vehicle on the side of the road with its hazard lights on. Similar to the Twelfth District Court of Appeal's decision in *State v. Brown*, although Trooper Taylor turned his overhead lights on and asked to see the defendant's identification, these facts are insufficient to show that the defendant had been seized within the meaning of the Fourth Amendment.[39]

Furthermore, the fact that Trooper Taylor asked the defendant to roll down his window does not suggest that the defendant had been detained. The defendant, who was sitting in the driver's seat, testified that he initially "cracked" his window for Trooper Taylor. After greeting the defendant with "good morning" from the passenger side window, Trooper Taylor asked the defendant to roll down his window. Asking a vehicle occupant to roll down a window so that they can speak while on opposite sides of a vehicle is not a show of authority or force sufficient to transform this encounter into a seizure.

---

[36] *Bostick*, 501 U.S. at 437.
[37] Defs. Ex. A.
[38] *Mendenhall*, 446 U.S. at 554.
[39] *Brown*, 2002 WL 1567340 at *3-4.

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 Trooper Taylor approached the defendant's vehicle and spoke with him while the defendant remained in his vehicle. Therefore, the defendant's motion to suppress evidence on this basis is denied.

(II) THE SEARCH OF THE DEFENDANT'S VEHICLE

The defendant's second reason to suppress evidence is that the search of his SUV was done in the absence of probable cause and a warrant, and no exception applied to permit a warrantless search.

The Fourth Amendment to the United States Constitution, as well as the Ohio Constitution, not only protects people against unreasonable seizures, but from unreasonable searches as well.[40] Generally, a search is reasonable under the Fourth Amendment when it is based upon probable cause and executed under a warrant.[41] Probable cause is required to be predicated on "objective facts" that justify the issuance of a warrant.[42] In order for a search to be constitutional, probable cause must exist and, if so, "then a search warrant must be obtained unless an exception to the warrant requirement applies."[43] Probable cause for a search exists when "given all the

---

[40] Fourth Amendment to the United States Constitution; Ohio Constitution, Article I, Section 14.
[41] *State v. Moore*, 90 Ohio St.3d 47, 49, 734 N.E.2d 804, 123 A.L.R. 5th 661 (2000), citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1976).
[42] *Moore*, 90 Ohio St.3d at 49.
[43] Id.

circumstances * * * there is a fair probability that contraband or evidence of a crime will be found in a particular place."[44]

The United States Supreme Court has "long acknowledged" that an odor can be "persuasive evidence to justify the issuance of a search warrant."[45] Moreover, "the smell of marijuana alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to search a motor vehicle."[46] "There need be no additional factors to corroborate the suspicion of the presence of marijuana."[47]

A law enforcement officer need not have any specific training or expertise in order to identify marijuana's smell.[48] Rather, an officer's "ordinary training" may qualify the officer to identify marijuana by smell, thereby establishing probable cause to conduct a search when the officer smells and identifies marijuana.[49] However, the officer needs to establish that he or she has had "some experience identifying marijuana in the past."[50] Thus, if "*no* testimony is adduced regarding the officer's training, experience, or qualifications in detecting and identifying the odor of marijuana, reviewing courts have held that suppression is proper" when the sole basis for the search is the marijuana odor.[51]

---

[44] *State v. Morse*, 12th Dist. Warren No. CA2001-11-099, CA 2001-11-100, 2002-Ohio-3873, ¶ 9, citing *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 660 (1989). *See State v. Gonzales*, 6th Dist. Wood No. WD-07-060, 2009-Ohio-168, ¶ 15 (Citation omitted.) ("Probable cause is defined as 'a reasonable ground for belief of guilt.'").
[45] *Moore*, 90 Ohio St.3d at 49, citing *Johnson v. United States*, 333 U.S. 10, 13, 68 S.Ct. 347, 92 L.Ed. 436 (1948).
[46] Id. at 48.
[47] Id. at 50.
[48] *State v. Mansour*, 12th Dist. Warren No. CA2015-06-051, 2016-Ohio-755, ¶ 12, citing *State v. Knox*, 8th Dist. Cuyahoga No. 98713, 2013-Ohio-1662, ¶ 15.
[49] *Mansour*, 2016-Ohio-755 at ¶ 12, citing *Knox*, 2013-Ohio-1662 at ¶ 15.
[50] *Mansour*, 2016-Ohio-755 at ¶ 12, citing *Knox*, 2013-Ohio-1662 at ¶ 15.
[51] (Emphasis original.) *Mansour*, 2016-Ohio-755 at ¶ 15, citing *State v. Birdsong*, 5th Dist. Stark No. 2008 CA 00221, 2009-Ohio-1859, ¶ 16.

A law enforcement officer may search a motor vehicle without a warrant based on the "well established automobile exception to the warrant requirement" once the officer has probable cause to believe that a vehicle contains contraband.[52] The automobile exception is based upon the concept of exigent circumstances because the "inherent mobility of the automobile" creates a danger that the contraband "would be removed before a warrant could be issued."[53]

In *State v. Moore*, 90 Ohio St.3d 47, 48, 734 N.E.2d 804, 123 A.L.R. 5th 661 (2000), the Ohio Supreme Court held that the smell of marijuana, by itself, can establish probable cause to conduct a search of a car for contraband. In *Moore* the Court found that the automobile exception applied, permitting an officer who smelled burnt marijuana during a traffic stop to conduct a vehicle search.[54]

The officer smelled the marijuana when the defendant rolled down his window.[55] In order for the officer to have obtained a warrant, the officer would have had to allow the defendant to leave the scene in his vehicle, unaccompanied by any law enforcement officer.[56] The possible loss of evidence was a compelling reason for the officer to conduct a search of the vehicle absent a warrant, and thus the automobile exception

---

[52] *Moore*, 90 Ohio St.3d at 50, citing *Maryland v. Dyson*, 527 U.S. 465, 466, 119 S.Ct. 2013, 144 L.Ed.2d 422 (1999). *See State v. Waldroup*, 100 Ohio App.3d 508, 514, 654 N.E.2d 390 (12th Dist. 1995), citing *State v. Mills*, 62 Ohio St.3d 357, 367, 583 N.E. 972 (1992) (explaining that under the automobile exception a police officer can undertake a warrantless search of a vehicle that it has probable cause to believe contains contraband when exigent circumstances exist).

[53] *Moore*, 90 Ohio St.3d at 50, citing *South Dakota v. Opperman*, 428 U.S. 364 367, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

[54] *Moore*, 90 Ohio St.3d at 44-49.

[55] Id. at 52-53.

[56] Id. at 52.

applied.[57] Accordingly, there was no Fourth Amendment violation for the search of the defendant's vehicle.[58]

The scope of a vehicle search can be "no greater than a magistrate could have authorized by issuing a warrant based on the probable cause that justified the search."[59] Thus, "probable cause to search an automobile is 'defined by the object of the search and the places in which there is probable cause to believe it may be found."[60] In multiple instances, the odor of marijuana has provided probable cause for a police officer to search the entire vehicle for contraband, which includes the passenger compartment.[61] Although the smell of burnt marijuana, in particular, does not always provide probable cause to search the trunk of a vehicle, it does provide probable cause to search a vehicle's passenger compartment.[62]

In the case at bar, the defendant argues that the warrantless search of his vehicle was unconstitutional because Trooper Taylor lacked probable cause for the search. The defendant posits that the smell of burnt marijuana did not justify the search of the passenger compartment, where the gun was found, because the officer had already identified the roach that may have produced the smell of burnt marijuana.

---

[57] *Moore*, 90 Ohio St.3d at 53.
[58] Id.
[59] *Gonzales*, 2009-Ohio-168 at ¶ 17, quoting *United States v. Ross*, 456 U.S. 798, 804, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).
[60] *Gonzales*, 2009-Ohio-168 at ¶ 24, citing *Ross*, 456 U.S. at 824. The *Gonzales* Court also noted that burnt marijuana provides a different probable cause from raw marijuana. Id. at ¶ 21.
[61] *State v. Fogel*, 5th Dist. Licking No. 110CA097, 2012-Ohio-1960, ¶ 24.
[62] *See State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 52 (finding that the smell of burnt marijuana justified the search of a passenger compartment, although it did not justify the search of a vehicle trunk); *State v. Whatley*, 5th Dist. Licking No. 10-CA-93, 2011-Ohio-2297, ¶ 30 (finding that the automobile exception applied to a search of a vehicle, including the passenger compartment and trunk, where the police officer smelled burnt marijuana). In cases that do not involve the odor of marijuana, the observation of marijuana in a vehicle gives an officer probable cause to search the entire vehicle on the belief that it contained further contraband. *See State v. Greenwood*, 2d Dist. Montgomery No. 19820, 2004-Ohio-2737, ¶ 11.

Trooper Taylor did have probable cause to search the defendant's vehicle for contraband. Trooper Taylor had probable cause because he smelled a moderate odor of burnt marijuana when the defendant opened his window, and the defendant told Trooper Taylor that there was a small amount of marijuana in the car. As the cases discussed above illustrate, the odor of burnt marijuana is sufficient to establish probable cause for a police officer to search a vehicle for contraband, including the passenger compartment.[63]

Moreover, the automobile exception applies because, as in *State v. Moore*, in order for Trooper Taylor to have obtained a warrant, he would have had to allow the defendant to leave the scene in his vehicle, unaccompanied by any law enforcement officer.[64] In such a situation, the possible loss of evidence is a compelling reason for Trooper Taylor to conduct a search of the vehicle absent a warrant.[65]

During oral argument, the defendant highlighted that the state did not illicit testimony from Trooper Taylor establishing that he has training and experience in identifying the smell of marijuana.[66] The defendant is correct that Trooper Taylor's identification of a marijuana odor, in and of itself, is insufficient to establish probable cause without testimony about Trooper Taylor's "training, experience, or qualifications in detecting and identifying the odor of marijuana."[67] However, probable cause is still established because Trooper Taylor testified that the defendant admitted there was

---

[63] *See Farris*, 2006-Ohio-3255 at ¶ 52; *Whatley*, 2011-Ohio-2297 at ¶ 30.
[64] *Moore*, 90 Ohio St.3d at 52.
[65] Id. at 53.
[66] Trooper Taylor testified that he had been a highway patrol trooper for 19 years and receives monthly and annual training. However, the state did not question him regarding his experience identifying the smell of marijuana.
[67] *Mansour*, 2016-Ohio-755 at ¶ 15, citing *Birdsong*, 2009-Ohio-1859 at ¶ 16.

marijuana in the vehicle.[68] Thus, Trooper Taylor was not relying on his sense of smell alone. Trooper Taylor's identification of a burnt marijuana odor, coupled with the defendant's admission, provided Trooper Taylor with probable cause to search the vehicle's passenger compartment under the automobile exception without abridging the Fourth Amendment.

(III) THE DETENTION OF THE DEFENDANT IN THE POLICE CRUISER

The defendant's third proffered reason to suppress evidence is that he was arrested without probable cause when Trooper Taylor placed him into the police cruiser to conduct a search of the defendant's vehicle. At that juncture, Trooper Taylor only knew that the defendant had a small amount of marijuana in the vehicle, which is a minor misdemeanor. As a minor misdemeanor, the defendant could not be arrested on that basis. The defendant posits that the evidence discovered after the alleged arrest, e.g. the stolen firearm, must be suppressed.

Possession of less than 100 grams of marijuana is a minor misdemeanor.[69] Aside from a few exceptions, a police officer cannot arrest a person for a minor misdemeanor.[70] When a person is arrested for a minor misdemeanor, absent one of the limited exceptions, that person's rights are violated under the Fourth Amendment of

---

[68] *See State v. Runyan*, 12th Dist. Clermont No. CA2010-05-032, 2011-Ohio-263, ¶ 16 (finding that the smell of marijuana detected by a police officer, in tandem with the fact that a motor vehicle occupant stated that there was a marijuana pipe in the counsel, gave probable cause for the officer to search the vehicle under the automobile exception).
[69] R.C. 2925.11(C)(3)(a)-(b).
[70] R.C. 2935.26.

United States Constitution and Section 14, Article I of the Ohio Constitution.[71] In that circumstance, the government's interests in making a full custodial arrest are minimal and outweighed by the serious intrusion upon the arrested person's liberty and privacy.[72] When such violation occurs, evidence that the police officer obtained incident to that arrest is subject to suppression under the exclusionary rule.[73]

A formal arrest is one of three types of police encounters. In the Fourth Amendment context there are: "(1) consensual encounters; (2) investigatory stops; and (3) seizures that equate to an arrest."[74] Regarding the last category, a person is arrested when four elements are satisfied: "(1) An intent to arrest, (2) under a real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested."[75]

Generally, to arrest a person a police officer must have a warrant, unless the police officer has probable cause at the time of arrest.[76] An officer has probable cause to make a warrantless arrest when the officer has "sufficient information, derived from a reasonably trustworthy source, to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused."[77] If an officer arrests

---

[71] *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, ¶ 16, quoting *State v. Jones*, 88 Ohio St.3d 430, 727 N.E.2d 886 (2000), at the syllabus.
[72] *Brown*, 2003-Ohio-3931 at ¶ 19, quoting *Jones*, 88 Ohio St.3d at 440.
[73] *Brown*, 2003-Ohio-3931 at ¶ 16, quoting *Jones*, 88 Ohio St.3d at the syllabus.
[74] *State v. McLemore*, 10 N.E.3d 1186, 2014-Ohio-2116, ¶ 9 (9th Dist.), citing *State v. Patterson*, 9th Dist. Summit No. 23136, 2006-Ohio-5424, ¶ 11.
[75] (Citation omitted.) *State v. Barker*, 53 Ohio St.2d 135, 139, 372 N.E.2d 1324, 7 O.O.3d 213 (1978).
[76] *State v. Timson*, 38 Ohio St.2d 122, 127, 311 N.E.2d 16, 67 O.O.2d 140 (1974). *See State v. Scruggs*, 12th Dist. Clinton No. CA2005-11-042, 2007-Ohio-6416, ¶ 6, citing *State v. Kerby*, Clark App. No. 03-CA55, 2007-Ohio-187, ¶ 31.("Arresting officers must possess probable cause to believe that a suspect has committed a felony when making a warrantless arrest.").
[77] *Timson*, 38 Ohio St.2d at 127, citing *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). *See Scruggs*, 2007-Ohio-6416 at ¶ 6, citing *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223 (1964) ("Probable cause to arrest exists when the facts and circumstances

a person absent probable cause, thus violating that individual's Fourth Amendment rights, then the evidence secured incident to the arrest must be suppressed.[78]

Detaining a motorist during an investigatory stop does not violate the Fourth Amendment so long as "it is objectively justified by the circumstances."[79] Such detention is justified when "additional facts are encountered that give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop."[80] The police officer is permitted to detain the motorist for the amount of time "reasonably necessary to confirm or dispel his suspicions of criminal activity."[81] The officer must release the motorist when the officer becomes satisfied that no criminal activity occurred.[82]

To determine whether the officer had a "reasonable and articulable suspicion" to detain a motorist is "determined by evaluating the totality of the circumstances 'through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.'"[83]

---

within an officer's knowledge and of which he or she had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense.")

[78] *Timson*, 38 Ohio St.2d at 131.

[79] *State v. Stephenson*, 12th Dist. Warren No. CA2014-05-073, 2015-Ohio-233, ¶ 19, citing *State v. Williams*, 12th Dist. Clinton No. CA2009-08-014, 2010-Ohio-1523, ¶ 18.

[80] *Stephenson*, 2015-Ohio-233 at ¶ 19, citing *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353, ¶ 25. *See McLemore*, 2014-Ohio-2116 at ¶ 10, citing *State v. Farrey*, 9th Dist. Summit No. 26703, 2013-Ohio-4263, ¶ 8. ("To justify an investigative stop, officer [sic] must be able to point to 'specific and articulable facts, which taken together with rational inferences from those facts,' support a reasonable suspicion of criminal activity.").

[81] *Stephenson*, 2015-Ohio-233 at ¶ 19, citing *Williams*, 2010-Ohio-1523 at ¶ 18.

[82] Id.

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

If an officer has a reasonable, articulable suspicion of further criminal activity, the officer may order the motorist to exit the car.[84] "A motorist may also be detained in a patrol car and subject to a brief pat-down search for weapons when an officer has a lawful reason to detain the driver in the patrol car."[85] One such lawful reason is when the "detention prevents either the officer or the individual from being subjected to a dangerous condition."[86] For instance, in *State v. Stephenson*, 12th Dist. Warren No. CA2014-05-073, 2015-Ohio-233, a state trooper lawfully detained the defendant in a police cruiser when the stop took place during midday along a busy highway with a high speed limit.[87]

Moreover, the Twelfth District Court of Appeals, among others, recognizes that "an arrest does not occur every time an individual is placed in the back of a police cruiser."[88] The Twelfth District Court of Appeals has further clarified that "[t]his is true

---

[84] *Stephenson*, 2015-Ohio-233 at ¶ 27, citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330 (1977). *See State v. Whatley*, 5th Dist. Licking No. 10-CA-93, 2011-Ohio-2297, citing *Mimms*, 434 U.S. 106 ("Officers are permitted to remove occupants of vehicles for officer safety in order to conduct a search, so long as they have been lawfully detained.")

[85] *Stephenson*, 2015-Ohio-233 at ¶ 27, citing *State v. Evans*, 67 Ohio St.3d 405, 410 (1993). Of note, the defendant has not cited the pat-down that he received before being placed in the police cruiser as a constitutional violation.

[86] *Stephenson*, 2015-Ohio-233 at ¶ 28, citing *State v. Lozada*, 92 Ohio St.3d 74 (2001), paragraph one of the syllabus. *See State v. Leiman*, 12th Dist. Clermont No. CA2004-01-005, 2004-Ohio-5336, ¶ 12, citing *Lozada*, 92 Ohio St.3d at paragraph one of the syllabus ("During a routine traffic stop, it is reasonable to search the driver for weapons before placing the driver into a patrol car, if placing the driver into the car during the investigation prevents the officers or the driver from being subjected to a dangerous condition and placing the driver in the patrol car is the least intrusive means to avoid a dangerous condition.").

[87] *Stephenson*, 2015-Ohio-233 at ¶¶ 29-30.

[88] *In re M.D.*, 12th Dist. Madison No. CA2003-12-038, 2004-Ohio-5904, ¶ 18, citing *Haines*, 2003-Ohio-6103 at ¶ 13. *See Haines*, 2003-Ohio-6103 at ¶ 13, citing *State v. Johnson*, 12th Dist. Clermont No. CA99-06-061, *4 (May 1, 2000) ("If a suspect is placed into a police cruiser for a brief period of time, this does not necessarily elevate the traffic stop to the level of a formal arrest."); *See McLemore*, 2014-Ohio-2116 at ¶ 22 ("This Court has recognized that, while conducting an investigatory detention based upon reasonable suspicion, the police may place an individual in the back of a police cruiser and handcuff an individual for safety purposes without offending the Fourth Amendment."); *State v. Scarbury*, 5th Dist. Know No. 03CA000016,

when the individual is being requested to stay while relevant facts are being ascertained * * * even if the suspect in the police cruiser is not free to leave."[89] Moreover, a seizure occurs under the Fourth Amendment when an officer performs a safety pat-down search.[90]

If Trooper Taylor arrested the defendant for the minor misdemeanor of possessing less than 100 grams of marijuana, the evidence that he obtained incident to that arrest is subject to suppression.[91] However, as discussed in Section II, Trooper Taylor's search of the defendant's vehicle was done pursuant to the automobile exception, not incident to his arrest.

Moreover, at the time that the defendant was placed into the police cruiser, he was not yet under arrest. A person is arrested when there is "(1) [a]n intent to arrest, (2) under a real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested."[92]

The first and last elements are lacking. Trooper Taylor detained the defendant when he had the defendant exit the vehicle, patted him down, and placed him in the back of the police cruiser. At this time the defendant asked if he was being detained, and Trooper Taylor explained that he was going to have the defendant sit in his car while he searched the vehicle.[93] This exchange shows that it was not Trooper Taylor's intent to arrest the defendant at that point. Further, based on Trooper Taylor's response

---

2003-Ohio-6483, ¶ 16 (noting that "numerous courts have held an officer may ask a driver to sit in his or her patrol car to facilitate the traffic stop * * *.").
[89] *In re M.D.*, 2004-Ohio-5904 at ¶ 18, citing *Haines*, 2003-Ohio-6103 at ¶ 13.
[90] *Patterson*, 2006-Ohio-5424 at ¶ 19.
[91] *Brown*, 2003-Ohio-3931 at ¶ 16, quoting *Jones*, 88 Ohio St.3d at the syllabus.
[92] *Barker*, 53 Ohio St.2d at 139.
[93] Defs. Ex. A.

to the defendant, the defendant would have also understood that he was merely being placed in the police cruiser while Trooper Taylor conducted an investigatory search of his SUV.

When Trooper Taylor told the defendant to get out of the vehicle, patted him down, and then placed him in the police cruiser, Trooper Taylor was detaining the defendant within the meaning of the Fourth Amendment. As discussed in Section I, before this point, while Trooper Taylor spoke with the defendant when the defendant remained in his vehicle, the two were engaged in a consensual encounter. However, that encounter changed to an investigatory stop when Trooper Taylor patted the defendant down and placed him in the police cruiser.

The investigatory stop and placement of the defendant in the police cruiser did not contravene the defendant's Fourth Amendment rights. A lawful investigatory stop is based on facts "that give rise to a reasonable, articulable suspicion of criminal activity."[94] Such is the case here. As discussed in Section II, Trooper Taylor had probable cause to search the vehicle based on smelling marijuana and the defendant's statement that there was marijuana in the car. Viewing the stop based on a totality of the circumstances, from the perspective of "a reasonable and prudent police officer on the scene," Trooper Taylor had more than a reasonable, articulable suspicion to detain the defendant during the stop to search the vehicle for contraband.[95]

Although the defendant was placed in in the police cruiser during this investigatory stop, "an arrest does not occur every time an individual is placed in the

---

[94] *Stephenson*, 2015-Ohio-233 at ¶ 19, citing *Cochran*, 2007-Ohio-3353 at ¶ 25. *See McLemore*, 2014-Ohio-2116 at ¶ 10, citing *Farrey*, 2013-Ohio-4263 at ¶ 8.
[95] *Stephenson*, 2015-Ohio-233 at ¶ 20, quoting *Popp*, 2011-Ohio-791 at ¶ 13.

back of a police cruiser,"[96] even "if the suspect in the police cruiser is not free to leave."[97] The defendant's placement in the police cruiser was not an arrest. As in *State v. Stephenson*, 12th Dist. Warren No. CA2014-05-073, 2015-Ohio-233, the investigatory stop took place during midday along a busy highway with a high speed limit, thus justifying placing the defendant into the defendant's vehicle for his safety.[98]

Trooper Taylor arrested the defendant when he returned to the police cruiser to inform the defendant that he located a stolen gun in the SUV. At that point Trooper Taylor can be heard asking the defendant to get out of the vehicle so he can handcuff him. He then reads him his *Miranda* rights. When the defendant was placed under arrest, it was after Trooper Taylor had probable cause to believe that a felony had been committed because he had discovered the gun in the passenger compartment. Improperly handling firearms under R.C. 2923.16(B), which is what the defendant was charged with, is a fourth degree felony.

For these reasons, the court finds that Trooper Taylor had probable cause to arrest the defendant of a felony, and therefore the items seized from the defendant's vehicle will not be suppressed.

---

[96] *In re M.D.*, 2004-Ohio-5904 at ¶ 18, citing *Haines*, 2003-Ohio-6103 at ¶ 13. *See Haines*, 2003-Ohio-6103 at ¶ 13, citing *Johnson*; *McLemore*, 2014-Ohio-2116 at ¶ 22; *State v. Scarbury*, 2003-Ohio-6483 at ¶ 16.
[97] *In re M.D.*, 2004-Ohio-5904 at ¶ 18, citing *Haines*, 2003-Ohio-6103 at ¶ 13.
[98] *Stephenson*, 2015-Ohio-233 at ¶¶ 29-30.

(IV) THE DEFENDANT'S STATEMENTS

"A suspect subjected to a custodial police interrogation must be warned of his constitutional rights in the absence of a clear, intelligent waiver of those rights."[99] Absent a *Miranda* warning, if statements stem from a "custodial interrogation," it is "well-established" that the prosecution may not use those statements.[100] A "custodial interrogation" includes "two distinct concepts: custody and interrogation."[101]

An "interrogation" is "express questioning as well as any 'words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[102] An interrogation must involve a "measure of compulsion above and beyond that inherent in custody itself" before the interrogation is considered a "custodial interrogation."[103]

---

[99] *State v. Thompson*, 103 Ohio App.3d 498, 502, 659 N.E.2d 1297 (12th Dist. 1995), citing *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *See State v. Moore*, 12th Dist. Fayette No. CA2010-12-037, 2011-Ohio-4908, ¶ 15, citing *In re J.B.*, 12th Dist. Butler No. CA2004-09-226, 2005-Ohio-7029, ¶ 53. ("*Miranda* rights must be given 'when questioning by law enforcement officers rises to the level of custodial interrogation.'"); *State v. Byrne*, 12th Dist. Butler Nos. CA2007-11-268, CA2007-11-269, 2008-Ohio-4311, ¶ 10 (stating that *Miranda* warnings are required when a person is subjected to a custodial interrogation).

[100] *Durham*, 2013-Ohio-4764 at ¶ 15, quoting *Huysman*, 12th Dist. Warren No. CA2005-09-107, 2006-Ohio-2245, ¶ 13. *See State v. Coleman*, 12th Dist. Butler No. CA2001-10-241, 2002 WL 745322, *4 (Apr. 29, 2002).

[101] *Durham*, 2013-Ohio-4764 at ¶ 15, citing *State v. Staley*, 12th Dist. Madison No. CA99-08-019, 2000 WL 554512, *3 (May 8, 2000).

[102] *Durham*, 2013-Ohio-4764 at ¶ 16, quoting *State v. Strozier*, 172 Ohio App.3d 780, 2007-Ohio-4575, 876 N.E.2d 1304, ¶ 20 (2d Dist.).

[103] *Durham*, 2013-Ohio-4764 at ¶ 16, quoting *State v. Brumley*, 12th Dist. Butler No. CA2004-05-114, 2005-Ohio-5768, ¶ 10.

To determine whether a person is "in custody, the court must examine the totality of the circumstances surrounding the interrogation."[104] This determination is based upon "the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."[105] A person is "in custody" when "placed under arrest prior to a police interrogation, or if not formally arrested, where there is a state of significant restraint on his freedom of movement."[106] Thus, although a person may not be "under arrest," the person may still be "'in custody' for *Miranda* purposes."[107] To make this determination, courts first "inquire into the circumstances surrounding the questioning, and second, given those circumstances, determine whether a reasonable person would have felt that he or she was not at liberty to terminate the interview and leave."[108]

A motorist is not generally considered "in custody" for *Miranda* purposes if the motorist is "temporarily detained" during an ordinary traffic stop.[109] A motorist may not be considered "in custody" even when an officer asks the motorist to exit the vehicle.[110] Furthermore, "[c]onfining an individual to the police cruiser is not a custodial placement if it is part of the investigation, even if the suspect in the police cruiser is not free to

---

[104] *Durham*, 2013-Ohio-4764 at ¶ 17, citing *State v. Coleman*, 12th Dist. Butler No. CA2001-10-241, 2002-Ohio-2068, ¶ 23.
[105] *Durham*, 2013-Ohio-4764 at ¶ 17, quoting *State v. Henry*, 12th Dist. Preble No. CA2008-04-006, 2009-Ohio-434, ¶ 13.
[106] *Durham*, 2013-Ohio-4764 at ¶ 17, citing *State v. Smith*, 12th Dist. Fayette No. CA2008-04-006, 2009-Ohio-434, ¶ 13. *See Moore*, 2011-Ohio-1908 at ¶ 16, quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602 (1966) ("Custodial interrogation is defined as 'questioning initiated by law enforcement to officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.").
[107] *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 13.
[108] *Moore*, 2011-Ohio-1908 at ¶ 16, quoting *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3420, ¶ 27.
[109] *Farris*, 2006-Ohio-3255 at ¶ 13, citing *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).
[110] *Durham*, 2013-Ohio-4764 at ¶ 20.

leave."[111] "[G]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process ordinarily does not fall within the ambit of custodial interrogation."[112] This is so because "such general questioning is only an attempt to elicit basic facts relative to the officer's investigation."[113] However, if a person "is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*."[114]

The case of *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, involved a motorist who was in custody for *Miranda* purposes, although he was not formally under arrest. In *Farris*, a motorist was pulled over for speeding, and during the stop the officer smelled burnt marijuana emanating from inside the car.[115] The officer had the motorist exit the vehicle, patted him down, took his car keys, instructed him to enter the police cruiser, and told him he was going to search the vehicle because he smelled marijuana.[116] The motorist was not free to leave the scene because he did not have his keys and "reasonably believed that he would be detained at least as long as it would take for the officer to search his automobile."[117] The Court explained that the "'only relevant inquiry' in determining whether a person is in custody is 'how a

---

[111] *Durham*, 2013-Ohio-4764 at ¶ 24, citing *State v. Popp*, 12th Dist. Butler No. CA2010-05-128, 2011-Ohio-791, ¶ 20. *See Moore*, 2011-Ohio-4908 at ¶ 18, quoting *State v. Haines*, 12th Dist. Clermont No. CA2003-02-15, 2003-Ohio-6103, ¶ 13 ("Nonetheless, '[c]onfining an individual to the police cruiser is not a custodial placement if it is part of the investigation, even if the suspect in the police cruiser is not free to leave.").

[112] *Durham*, 2013-Ohio-4764 at ¶ 23, quoting *State v. Rivera-Carrillo*, 12th Dist. Butler No. CA2001-03-054, 2002-WL 371950, *3 (Mar. 11, 2002).

[113] *In re M.D.*, 2004-Ohio-5904 at ¶ 23, citing *State v. Rivera-Carillo*, 12th Dist. Butler No. CA2001-03-054, 2002-Ohio-1013.

[114] *Farris*, 2006-Ohio-3255 at ¶ 14, citing *Berkemer*, 468 U.S. at 440. *See Moore*, 2011-Ohio-1908 at ¶ 17, citing *State v. Grant*, 11th Dist. Ashtabula No. 1362, 1989 WL 78586, *4 (July 14, 1989) ("[D]etention for custodial interrogation is procedurally equivalent to an arrest.").

[115] *Farris*, 2006-Ohio-3255 at ¶ 1.

[116] Id. at ¶ 14.

[117] Id.

reasonable man in the suspect's position would have understood his situation.'"[118] The Court concluded that a reasonable person in the motorist's position would have understood himself as "in custody of a police officer as he sat in the cruiser."[119]

As discussed, statements made in the course of a custodial interrogation are suppressed absent a *Miranda* warning. In certain instances, "successive interrogations, first unwarned and then warned, violates a defendant's *Miranda* rights."[120] The Ohio Supreme Court has described the underlying concern: "In a question-first scenario in which the *Miranda* warning is withheld and the suspect makes inculpatory statements, the risk is that the warning will mean less when it is eventually recited[.]"[121]

However, the Ohio Supreme Court has also rejected the "cat out of the bag" argument, which would find that "after an unwarned statement of guilt, there exists a 'subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag and, in doing so, has sealed his own fate."[122] Instead, statements made post-*Miranda* warning may be excluded when they are part of "sequential interrogations" that are "essentially one continuous interrogation."[123] Courts consider the following factors to determine if an interrogation is a continuous interrogation:

---

[118] Id. quoting *Berkemer*, 468 U.S. at 442.
[119] *Farris*, 2006-Ohio-3255 at ¶ 14. *Cf. Moore*, 2011-Ohio-4908 at ¶ 20 (finding that a person locked in the back of a police cruiser without handcuffs for questioning was not in custody, but when the person was transported in the back seat of the cruiser, his physical restraint was heightened and a reasonable person under the same or similar circumstances would not feel free to leave, thus requiring the officer to give a *Miranda* warning); *In re M.D.*, 2004-Ohio-5904 at ¶¶ 23-24 (finding that, although the defendant was placed in the back of a police cruiser and was neither arrested nor free to leave, the questions from the officer were merely on-the-scene inquiries).
[120] *Farris*, 2006-Ohio-3255 at ¶ 15.
[121] Id. at ¶ 19.
[122] Id. at ¶ 26 citing *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).
[123] *Farris*, 2006-Ohio-3255 at ¶ 27.

> "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first."[124]

The defendant in the case at hand claims that all statements made prior to his *Miranda* warnings must be suppressed, and all statements that were obtained after *Miranda* must be suppressed because "the cat was already out of the bag." The defendant does not specify which statements he is referring to.

The defendant was not read his *Miranda* warning until he was placed in the police cruiser and Trooper Taylor had returned to the cruiser to tell the defendant that he found a stolen gun in the SUV. At that point, Trooper Taylor had already had a LEADS report conducted to determine whether the gun was stolen. In response to Trooper Taylor, the defendant stated that he had purchased the gun from a person at a gun range for $300. Twelve minutes later, Trooper Taylor read the defendant his Miranda rights, after which the defendant declined to answer questions about the gun.

As discussed in Section I, the initial conversation that the defendant had with Trooper Taylor while the defendant was in his SUV was consensual. During the initial conversation it is clear that the defendant was not under a "state of significant restraint on his freedom of movement," and thus was not in custody for *Miranda* purposes.[125]

Although the defendant was not arrested when he was placed into the back of Trooper Taylor's police cruiser, as discussed in Section III, he was detained. Whether he was under arrest is not dispositive of whether he was "in custody."[126] The court must

---

[124] *Farris*, 2006-Ohio-3255 at ¶ 28.
[125] *Durham*, 2013-Ohio-4764 at ¶ 17 citing *Smith*, 2009-Ohio-434 at ¶ 13.
[126] *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 13.

examine the "circumstances surrounding the questioning," and decide "whether a reasonable person would have felt that he or she was not at liberty to terminate the interview and leave."[127]

The circumstances surrounding the questioning in the instant case are very similar to those in *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985. Like *Farris*, the defendant in the instant case was asked to exit his vehicle, had his keys taken away, was patted down, and was placed in a police cruiser so that a state trooper could search his vehicle after smelling burnt marijuana.[128] As with the motorist in *Farris*, a reasonable person in the defendant's position would have understood himself as "in custody of a police officer as he sat in the cruiser."[129] This is particularly the case after Trooper Taylor found the gun in the defendant's vehicle, received a LEADS report stating that it was stolen, and came back to the police cruiser to inform the defendant. As such, the defendant's statements while in the police cruiser before he received his *Miranda* warning must be suppressed from the trial, including the defendant's admission that he purchased the gun for $300 from someone at a gun range.

The defendant also argues that his statements after receiving a *Miranda* warning should be excluded because the "cat was out of the bag."[130] First, courts have rejected the "cat out of the bag" argument to prohibit all custodial interrogations after a *Miranda*

---

[127] *Moore*, 2011-Ohio-1908 at ¶ 16 quoting *Hoffner*, 2004-Ohio-3420 at ¶ 27.
[128] *Farris*, 2006-Ohio-3255 at ¶ 14.
[129] Id.
[130] Defs. Mot. at pg. 9.

warning when the suspect already gave an inculpatory statement during a custodial interrogation before receiving the warning.[131]

Second, the defendant has not presented any evidence to the court that the defendant did, in fact, make similar statements after receiving his *Miranda* warning. To the contrary, the video footage from the police cruiser shows that the defendant did not answer any more questions regarding the gun after receiving his *Miranda* warnings. Neither of the witnesses testified on this topic either. Without such evidence, none of the factors that courts consider to determine if an interrogation is a continuous interrogation are applicable in this case.[132] Accordingly, the court does not find that the defendant's statements made post-*Miranda* warning should be suppressed.

CONCLUSION

For the foregoing reasons, the defendant's motion to suppress shall be granted in part and denied in part. Specifically, the court grants the defendant's motion to suppress from trial any statements he made while in the police cruiser, before receiving a *Miranda* warning. All other requests to suppress evidence are denied.

A plea or trial setting conference will be held on Wednesday, June 8, 2016 at 8:00 a.m.

IT IS SO ORDERED.

---

[131] *Farris*, 2006-Ohio-3255 at ¶ 26 citing *Elstad*, 470 U.S. 298.
[132] *Farris*, 2006-Ohio-3255 at ¶ 28.

DATED: 6-1-2016

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the within Decision/Entry were sent on this 1st day of June 2016 by e-mail to Thomas W. Scovanner, assistant prosecuting attorney, for the state of Ohio, at tscovanner@clermontcountyohio.gov, and to Richard R. Campbell, attorney for the defendant, at RRCAttorney@gmail.com.

Adm. Assistant to Judge McBride