**COURT OF COMMON PLEAS**
**CLERMONT COUNTY, OHIO**

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| **STATE OF OHIO** | : | |
| Plaintiff | : | **CASE NO. 2018 CR 00531** |
| vs. | : | **Judge McBride** |
| **ERICA G. GOERS** | : | **DECISION/ENTRY** |
| Defendant | : | |

Robert D. Barbato, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

W. Stephen Haynes, public defender and counsel for the defendant Erica G. Goers, 302 E. Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of the motion to suppress filed by the defendant Erica G. Goers on November 27, 2018. The court held an evidentiary hearing on the motion on January 11, 2019. The parties submitted written arguments following the hearing, and on February 5th the court took the motion under advisement.

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

## FINDINGS OF FACT

The charges in the instant case arise from an incident that occurred on March 1, 2018. At 3:00 p.m. on that date, Deputy John Schaefer, a deputy sheriff with the Clermont County Sheriff's Office, received a dispatch call relaying an anonymous tip. The tip indicated that there was a suspicious vehicle with two to three occupants.

According to the tip, the vehicle had been sitting at a gas pump at a United Dairy Farmers store for approximately 20 to 25 minutes, and that "somebody" had possibly seen the occupants shooting up drugs. The tip also reported that the vehicle was a small, black Chevy two-door with the license plate number HGB-1882.[1]

When Deputy Schaefer pulled into the UDF, he spotted the suspicious vehicle, turned on his emergency lights, and pulled in front of the vehicle, where he parked his police cruiser. He recalled that he was "almost" blocking the vehicle in and that it was a "busy" day at UDF. He remained in his vehicle long enough to respond to the dispatcher that he had found the vehicle and describing the occupants. Inside the vehicle were two male occupants, including the driver, as well as the defendant, who was a passenger.

Either just before or contemporaneous with Deputy Schaefer exiting his cruiser, the defendant exited the passenger door of the suspicious vehicle and began to walk towards the UDF. She had with her a large handbag. Deputy Schaefer was not sure if

[1] Defs. Ex. A. The court notes that Deputy Schaefer and Deputy Gregory recalled that the caller may have mentioned a needle or a needle cap. However, that information does not appear in either of the narrative reports in evidence, and the officers testified that they recalled the information about a needle because they had read it in a report. *See* Defs. Exs. A and B. For this non-exhaustive list of reasons, the court does not believe that the tip mentioned a needle or needle cap.

the defendant was ignoring him but believed she would have seen him. He then "shouted" and "hollered" out for the defendant to "stop" and "return over here." The defendant immediately complied. Deputy Schaefer told her to set her handbag down on the back of the cruiser, which she did.

When Deputy Schaefer went to the passenger side of the vehicle, he noticed a long rifle between the door and the seat. He drew his weapon and told the two male occupants to put their hands in the air. The rifle was later determined to be a pellet gun. Deputy Schaefer then collected the three individuals' identification information. The driver's information was not accurate.

Deputy Eric Gregory and Corporal Cooper, both with the Clermont County Sheriff's Office, then arrived on the scene. When questioned, the defendant told officers she did not know the driver, said his name was Taylor, and stated he was a friend of her sister's. However, the defendant was allegedly dating the driver and knew his name to be Michael Jeffries.

Deputy Gregory searched the defendant's handbag. Inside the handbag, he found a pack of cigarettes, and inside the cigarette pack he found a baggy of methamphetamine. The defendant said she did not know how the drugs came to be in her purse, and she stated that the baggy did not belong to her.

## PROCEDURAL BACKGROUND

On June 26, 2018, the defendant Erica G. Goers was indicted on the following charges: (1) aggravated possession of drugs in violation of R.C. 2925.11(A), a felony of

the fifth degree, and (2) obstructing justice in violation of R.C. 2921.32(A)(5), a felony of the fifth degree.

The defendant filed her motion to suppress on November 22, 2018. The court held an evidentiary hearing on the motion on January 11, 2019. The defendant filed her memorandum in support of her motion on January 23rd. The state filed its memorandum in opposition on January 29th. On February 5th, the defendant filed her reply in support of the motion, and the court then 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."[2] 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.[3]

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.[4]

In filing a motion to suppress, the defendant "shall state with particularity the

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[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 (1995).
[3] *State v. Haines*, 12th Dist. Clermont No. CA2003-02-015, 2003-Ohio-6103, ¶ 8.
[4] Crim.R. 12(C).

grounds upon which it is made and shall set forth the relief or order sought."[5] The defendant must "state the motion's legal and factual bases with sufficient particularity to place the prosecutor and the court on notice of the issues to be decided."[6] When a defendant moves to suppress evidence recovered during a warrantless search, the state has the burden of showing that the search fits within one of the defined exceptions to the Fourth Amendment's warrant requirement. *State v. Banks-Harvey*, 152 Ohio St.3d 368, 2008-Ohio-201, 96 N.E.3d 262, ¶ 18, citing *Athens v. Wolf*, 38 Ohio St.2d 237, 241, 313 N.E.2d 405 (1974).

A motion to suppress typically "presents mixed questions of law and fact."[7] In reviewing such a motion, "the trial court, as the trier of fact, is in the best position to weigh the evidence in order to resolve factual questions and evaluate witness credibility."[8]

## LEGAL ANALYSIS

In the case at bar, the defendant has filed a motion to suppress on several grounds. This decision will deal only with the defendant's first argument, as it is dispositive of this

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[5] *State v. Way*, 12th Dist. Butler No. CA2008-04-098, 2009-Ohio-96, ¶ 7, quoting Crim.R. 47.
[6] *Way*, 2009-Ohio-96 at ¶ 7, quoting *State v. Wood*, 12th Dist. Clermont No. CA2007-12-115, 2008-Ohio-5422, ¶ 10.
[7] *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. *See State v. Minton*, 12th Dist. Warren No. CA2017-08-132, 2018-Ohio-2142, ¶ 12, citing *State v. Bell*, 12th Dist. Clermont No. CA2008–05–044, 2009–Ohio–2335, ¶ 8 (holding same).
[8] *State v. Deluca*, 12th Dist. Butler No. CA2016-03-055, 2017-Ohio-1235, ¶ 9, citing *State v. Vaughn*, 12th Dist. Fayette No. CA2014-05-012, 2015-Ohio-828, ¶ 9. *See Codeluppi*, 2014-Ohio-1574 at ¶ 7, citing *Burnside*, 2003-Ohio-5373 at ¶ 8 (explaining that when the trial court reviews a motion to suppress "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.").

motion: whether there was a stop and seizure of the defendant, and if so, whether it was valid.

## I. WHETHER THE DEFENDANT WAS DETAINED

The Fourth Amendment to the United States Constitution protects people against "unreasonable searches and seizures."[9] 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."[10] 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 possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'"[11]

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."[12] In the Fourth Amendment context there are three types of police encounters: "(1) consensual encounters; (2) investigatory stops; and (3) seizures that equate to an arrest."[13]

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[9] Fourth Amendment to the United States Constitution.
[10] Ohio Constitution, Article I, Section 14.
[11] *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).
[12] *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).
[13] *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.

A consensual encounter between police officers and individuals "does not trigger Fourth Amendment scrutiny."[14] A Fourth Amendment violation does not occur "simply because a police officer approaches an individual and asks a few questions."[15] 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.[16]

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.'"[17] 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."[18] 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."[19] The above Fourth Amendment principles likewise apply to individuals in motor vehicles.[20]

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[14] *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d, 59 USLW 4708 (1991), paragraph one of the syllabus, citing *Terry*, 392 U.S. at 1, 19, fn. 16.
[15] *Bostick*, 501 U.S. at 433.
[16] Id.
[17] Id. at 437.
[18] *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).
[19] Id. at 555.
[20] *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).

The state has conceded that Deputy Schaefer made an investigatory stop, i.e. *Terry* stop, of the defendant, and the court agrees. Deputy Schaefer, upon seeing the vehicle the defendant was in, pulled into the UDF gas station, turned on his emergency lights, and parked his cruiser in front of the suspicious vehicle. He testified that he was "almost trying to block it in." 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.[21] 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.[22]

Before he exited his cruiser, the defendant exited the suspicious car and began to walk towards the UDF. At that point, Deputy Schaefer "shouted" and "hollered out at her" for her to "stop" and "return over here." The court finds that, at this point, the defendant was detained for an investigatory stop because Deputy Schaefer's actions, verbal commands, and tone of voice would have communicated to a reasonable person that she was not at liberty to ignore his presence and go about her business.[23]

## II. WHETHER DETAINING THE DEFENDANT WAS UNCONSTITUTIONAL

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[21] *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, ¶ 22 (holding that the defendant had not been seized at the point when a police officer parked his 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).

[22] *Lunce*, 2001 WL 530541 at *2.

[23] *See Hacker*, 2002-Ohio-2312 at ¶ 13 (finding that a deputy seized a defendant in a Walgreen's parking lot, not at the moment he activated his overhead lights as the defendant walked towards the Walgreen's from his vehicle, but at the moment the deputy raised his hands, signaling the defendant to stop).

As explained, when Deputy Schaefer shouted to the defendant to stop and return to him, he detained her. The next issue is whether it was constitutional for him to do so. Detention is constitutional as an investigatory stop when a police officer "reasonably suspected" the defendant of "wrongdoing."[24] The officer must have had "'specific and articulable facts' that the detention was reasonable."[25] To determine whether the officer had a "reasonable and articulable suspicion" to detain an individual, courts evaluate "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.'"[26]

"When an investigative stop is made in sole reliance upon a police dispatch, the state must demonstrate at a suppression hearing that the facts precipitating the dispatch justified a reasonable suspicion of criminal activity."[27] Additionally, "[t]he Ohio Supreme Court has found several factors to be relevant in making that determination, including (1) whether the stop occurred in a high crime area; (2) whether the officer knew of recent criminal activity in the area; (3) the time of the stop; (4) whether the defendant's conduct was suspicious; and (5) the officer's training and experience."[28]

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[24] *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 * * *.").
[25] *State v. Chatton*, 11 Ohio St.3d 59, 60-61, 463 N.E.2d 1237 (1984).
[26] *State v. Stephenson*, 12th Dist. Warren No. CA2014-05-073, 2015-Ohio-233, ¶ 20, quoting *State v. Popp*, 12th Dist. Butler No. CA2010-05-128, 2011-Ohio-791, ¶ 13.
[27] *In re D.W.*, 184 Ohio App.3d 627, 2009-Ohio-5406, 921 N.E.2d 1114, ¶ 17 (2d Dist.) *See State v. Warner*, 7th Dist. Columbiana No. 15 CO 0026, 2016-Ohio-4660, ¶ 33 (holding same).
[28] *State v. Williams*, 6th Dist. Lucas No. L-17-1148, 2018-Ohio-5202, ¶ 25, citing *City of N. Olmsted v. Tackett*, 8th Dist. Cuyahoga No. 81068, 2002-Ohio-6330, ¶ 16.

The strength of the anonymous tip, as well as the above factors, will be examined in turn to determine whether Deputy Schaefer had reasonable, articulable suspicion to detain the defendant during an investigatory stop.

## A. ANONYMOUS TIP

"Courts have generally recognized three categories of informants: (1) the identified citizen informant, (2) the known informant, i.e., someone from the criminal world who has a history of providing reliable tips, and (3) the anonymous informant."[29] "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, * * * 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity[.]'"[30] Even so, "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.'"[31]

The United States Supreme Court examined the reliability of anonymous tips in *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). There, the police received an anonymous tip asserting that a woman was carrying cocaine in a brown attaché case and predicting that she would leave an apartment building at a certain time, get into a car matching a particular description, and drive to a named hotel to make a drug deal. The Court held that this tip, standing alone, would not have justified a *Terry*

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[29] *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 36 (2004), citing *Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 720 N.E.2d 507 (1999).
[30] *Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), citing *Adams v. Williams*, 407 U.S. 143, 146–147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) and quoting *Alabama v. White*, 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).
[31] *J.L.*, 529 U.S. at 270, quoting *White*, 496 U.S. at 327.

stop.[32] Only after police observation demonstrated that the informant had accurately predicted the defendant's movements did it become reasonable to believe that the tipster had accurate information.[33] The Court stressed that anonymous tips cannot just state "easily obtained facts and conditions existing at the time of the tip."[34] Instead the court held that the critical factor is the ability to predict the suspect's future behavior.[35] Considering that the route driven by the defendant involved several turns, the court concluded that the destination was sufficiently corroborated to allow the police to pull her over before reaching the hotel.[36] Even so, the Court deemed *White* a "close case."[37]

The United States Supreme Court further refined the law of anonymous tips in *Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), in which the police received information that a black male wearing a plaid shirt, standing at a particular bus stop, was carrying a gun.[38] When the police arrived at the bus stop, there were three African American males, one wearing a plaid shirt.[39] Apart from the tip, there was no reason to suspect any of the three of criminal conduct. But one of the officers approached and frisked the defendant, who did have a gun in his pocket.[40]

The Court held that an anonymous tip that provided no predictive information and left the police with no means to test the informant's credibility was unreliable and did not justify the stop and frisk.[41] That the tip turned out to be correct did not mean that there

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[32] *White*, 496 U.S. at 329.
[33] Id. at 332.
[34] Id.
[35] Id.
[36] Id. at 331.
[37] Id. at 332.
[38] *J.L.*, 529 U.S. at 268.
[39] Id.
[40] Id.
[41] Id. at 271.

was any reasonable suspicion to believe that these three men had engaged in unlawful conduct in the first place.[42] The Court reflected:

> "An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."[43]

There are also numerous Ohio state court cases that illustrate the broad spectrum of anonymous tip scenarios. Ohio case law is clear that anonymous reports of a suspicious vehicle are not enough to create reasonable suspicion of criminal activity.[44] So too, tips about vehicles that have been sitting at gas stations for prolonged periods of time do not give rise to a reasonable suspicion.[45]

Even anonymous tips reporting suspected drug or alcohol activity in vehicles is often not enough to create a reasonable suspicion. In *State v. Whitacker*, 6th Dist. Wood No. WD-13-061, 2014-Ohio-2220, a police officer on patrol received a call from dispatch that an individual had telephoned the police department and stated that there were intoxicated females with children in a red vehicle behind Checker's Bar in Bowling Green,

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[42] Id.

[43] Id. at 272.

[44] *See State v. Anderson*, 11th Dist. Geauga No. 2003-G-2540, 2004-Ohio-3192, ¶¶ 2, 13-14 (finding that anonymous tip reporting a suspicious little blue car with a male driver traveling in the area was insufficient for an officer to effectuate an investigative stop of the vehicle); *City of Bowling Green v. Tomor*, 6th Dist. Wood No. WD-02-012, 2002-Ohio-6366, ¶¶ 2, 10-11 (finding reasonable suspicion to stop a the defendant was lacking where the stop was based on an anonymous tip that there was a suspicious white car traveling up and down Winfield Drive in Bowling Green, Ohio).

[45] *See State v. Williams*, 6th Dist. Lucas No. L-17-1148, 2018-Ohio-5202, ¶ 48 (finding a tip insufficient to create reasonable suspicion of criminal activity where an employee of Barney's Convenient Mart, located at the BP gas station, called 9-1-1 to report that a black car with tinted windows had been sitting in the parking lot with the engine running for over an hour).

Ohio.[46] The officer identified the vehicle in the bar's parking lot and noted that there were two women and some children in the vehicle.[47] The officer, along with two others, initiated a stop of the vehicle, and ultimately police seized evidence from the defendant during a warrantless search.[48]

On appeal, the Sixth District Court of Appeals examined whether the officer had reasonable suspicion that the defendant had engaged in prohibited activity.[49] The court observed: "The anonymous telephone call which prompted police response, while specific in its description of the vehicle, passengers, and location failed to provide a reasonable basis to suspect criminal activity."[50] The court went on to explain that, additionally, "because the specificity of the information, such as location and make/model of the vehicle, does not provide evidence of knowledge of the concealed criminal activity, its reliability is limited to aiding officers in locating the vehicle."[51] Accordingly, the appellate court found that the trial court should have granted the defendant's motion to suppress.[52]

Likewise, the case of *State v. McCord*, 8th Dist. Cuyahoga No. 93127, 2010-Ohio-1979, dealt with an anonymous tip reporting drug activity. In *McCord*, the Cleveland police received a phone call from an anonymous caller, stating that occupants of a black Hummer parked in front of 11903 Ablewhite Avenue were engaged in drug activity.[53] The call came through the non-emergency line at the police department, and the dispatcher

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[46] *State v. Whitacker*, 6th Dist. Wood No. WD-13-061, 2014-Ohio-2220, ¶ 4
[47] Id.
[48] Id. at ¶ 18.
[49] Id. at ¶ 20.
[50] Id.
[51] Id.
[52] Id. at ¶ 21.
[53] *State v. McCord*, 8th Dist. Cuyahoga No. 93127, 2010-Ohio-1979, ¶ 2.

relayed the information to Officer Taylor, who was patrolling in that area.[54] On a prior occasion, when Officer Taylor encountered a similar vehicle at this address, a passenger was carrying a weapon, so he called for backup.[55] Two zone cars blocked the Hummer, and Officer Taylor exited his vehicle and instructed the Hummer's occupants to let him see their hands.[56] One passenger kept dropping his hands to his waist, which Officer Taylor believed to be a furtive movement, and the officers drew their weapons.[57] Eventually police located drugs in the vehicle, and the defendant was charged on several counts.[58]

On appeal, the Eighth District Court of Appeals found that the circumstances fell short of reasonable suspicion.[59] The court reflected that there were insufficient surrounding circumstances to provide officers with a reasonable suspicion because, although the officer found the vehicle identified in the tip, he did not observe any drug activity.[60] Moreover, the defendant was merely sitting in a parked car, no one approached the car, and no furtive movements were observed *before* the stop.[61]

Similarly, an anonymous tip failed to generate reasonable suspicion of drug activity in *State v. Whitsette*, 8th Dist. Cuyahoga No. 92566, 2009-Ohio-4373. In *Whitsette*, Cleveland police officers received an anonymous tip that Robert and Terrence Whitsette were engaged in drug activity in the area of 11106 Revere in Cleveland, Ohio.[62] The tip

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[54] Id.
[55] Id.
[56] Id. at ¶ 3.
[57] Id.
[58] Id. at ¶¶ 4-6.
[59] Id. at ¶ 16.
[60] Id.
[61] Id.
[62] *State v. Whitsette*, 8th Dist. Cuyahoga No. 92566, 2009-Ohio-4373, ¶ 4.

also indicated that the men drove a blue Thunderbird and often had weapons on their persons.[63] The officers found the Thunderbird at the disclosed address with two men inside.[64] As the officers stopped their undercover car, a male passenger jumped from the vehicle and ran to the rear of the home, and meanwhile the defendant stayed seated.[65] When officers searched the defendant, they found drugs.[66]

The appellate court reflected that the anonymous tip did not provide the officers with information upon which they could test the informant's veracity.[67] Although the tipster described the vehicle, the tipster did not provide a description of the men inside.[68] As such, the location of the vehicle and general details about the Thunderbird would have been information anyone knowing the Whitsettes could have provided.[69] Beyond providing more details that the officers could corroborate, the tipster also failed to indicate how he or she possessed inside knowledge about the alleged criminal behavior.[70] Thus, although the officers were able to partially confirm the tip about the location of the Thunderbird, "more was needed for the officers to legally conduct an investigative stop."[71]

Furthermore, the court found the surrounding circumstances also did not provide reasonable suspicion, despite the fact that the stop occurred in a high crime area.[72] The defendant was not acting in a suspicious manner, no one approached the car, and the

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[63] Id.
[64] Id. at ¶ 5.
[65] Id.
[66] Id.
[67] Id. at ¶ 11.
[68] Id.
[69] Id.
[70] Id.
[71] Id. at ¶ 12.
[72] Id. at ¶ 13.

officers did not observe any furtive movements.[73] Accordingly, the court concluded that the trial court properly granted the defendant's motion to suppress.[74]

In the present case, the anonymous tip that Deputy Schaefer received through dispatch falls short of providing reasonable suspicion of criminal activity sufficient to detain the defendant for an investigatory stop. The tip was specific in terms of describing the vehicle and its location, but this reliability is limited to aiding Deputy Schaefer in locating the vehicle. Notably, the tip stated that there were two or three occupants in the vehicle, and there was no description of what they looked like, or whether they were men or women. Thus, there was no way for Deputy Schaefer to corroborate the identities of the occupants.

Moreover, as an anonymous tip, it is critical that the tip is reliable in its assertion of illegality, not just in its tendency to identify a determinate vehicle. However, the tip only intimated that "someone had <u>possibly</u> seen them [the vehicle occupants] shooting up drugs in the car."[75] This tip is unclear as to whether it was the anonymous tipster who saw the possible drug use, or another person who then told the anonymous tipster. Further, it is unclear how the tipster possessed this inside knowledge of the drug use. And as discussed, tips that report suspicious vehicles alone are insufficient to create reasonable suspicion. On the whole, the anonymous tip provided a very thin amount of information to suggest that the defendant was engaged in illegal activity, and it lacked sufficient information for officers to corroborate it. As such, the court finds that the

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[73] Id.
[74] Id. at ¶ 15.
[75] (Emphasis added.)

anonymous tip did not provide Deputy Schaefer with reasonable suspicion of criminal activity sufficient to detain the defendant as he did.

In cases where an anonymous tip is insufficient to create a reasonable, articulable suspicion of criminal activity, other factors can be examined to establish a basis for a *Terry* stop. In *State v. Jordan*, 104 Ohio St.3d 21, 2004–Ohio–6085, 817 N.E.2d 864, the Ohio Supreme Court examined a case in which police responded to an anonymous tip that a male was "doing drugs" on the porch of 2019 West 105th Street in Cleveland, and that the same male had earlier been driving a light blue car, which was now parked in front of that address.[76] The location was allegedly a high drug activity area.[77] Upon arriving in a marked police vehicle, the police saw the defendant and another man sitting on the front porch and a blue vehicle fitting the tipster's description parked nearby.[78] As the uniformed officers approached, the defendant "hollered something" to his companion, who "immediately fled" through the house and out the back door.[79] The defendant stayed on the porch and confirmed that the vehicle belonged to him.[80] Based on these circumstances, the police conducted a protective pat-down search of the defendant, during which they found a crack pipe.[81] The defendant was arrested and subsequently indicted for possession of cocaine.[82]

The Court opined that the anonymous tip "failed to show that the informant had 'knowledge of concealed criminal activity' and was thus reliable in its assertion of illegality.

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[76] *Jordan*, 2004–Ohio–6085 at ¶ 31.
[77] Id. at ¶ 32.
[78] Id. at ¶ 31.
[79] Id.
[80] Id.
[81] Id. at ¶ 32.
[82] Id.

At most, the tip helped the officers identify a 'determinate person.'"[83] This was problematic, as the tip did not provide the officers with any basis on which to test the assertion of criminal conduct.[84] However, the court noted that the decision to stop the defendant was not based on the tip alone, but upon the totality of the circumstances, including the facts that it was a high drug activity area and the defendant's companion immediately fled.

The Court reflected that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[85] And, in *Jordan*, the defendant was heard to yell something to his companion, who immediately fled. The officer had testified that, based on his experience, drug dealers often have lookouts when they are engaged in dealing drugs.[86] The Court ultimately concluded that the stop was constitutional based on the totality of the circumstances:

> "To summarize, the officers * * * considered the totality of the circumstances: their receipt of an anonymous tip regarding drug activity that they were able to partially confirm, the residence location in an area known to them as a high drug activity area, [the defendant's] shout upon seeing their approach in uniform, and his companion's immediate flight. * * * [These circumstances] taken as a whole, created a reasonable suspicion that [the defendant] was engaged in illegal activity, and, therefore, the officers' investigatory stop did not violate the Fourth Amendment."[87]

In turning back to the present case, the anonymous tip Deputy Schaefer received, as discussed, was insufficient standing alone to establish a reasonable suspicion. Thus,

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[83] Id. at ¶ 42.
[84] Id.
[85] Id. at ¶ 47.
[86] Id. at ¶ 52.
[87] Id. at ¶ 52.

the court will continue to examine additional factors that the Ohio Supreme Court considers to determine if the totality of the circumstances indicate that Deputy Schaefer had a reasonable, articulable suspicion to detain the defendant.

## B. WHETHER THE STOP OCCURRED IN A HIGH CRIME AREA

"Ohio courts recognize that '[t]he reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely in determining whether an investigative stop is warranted.'"[88] However, in the case at bar, there was no testimony that the stop occurred in a high crime area. As such, this factor does not increase Deputy Schaefer's reasonable suspicion of criminal activity.

## C. WHETHER THE OFFICER KNEW OF RECENT CRIMINAL ACTIVITY

Whether an officer knew of recent criminal activity happening in the area of the stop can also be considered as a factor providing a basis for reasonable suspicion.[89] In the instant case, Deputy Schaefer did not testify that he was aware of recent criminal activity in the area. Thus, this factor does not buttress the state's argument that reasonable suspicion existed.

## D. THE TIME OF THE STOP

[88] *Williams*, 2018-Ohio-5202 at ¶ 45, citing *State v. Bobo*, 37 Ohio St.3d 177, 179, 524 N.E.2d 489 (1988).
[89] *Williams*, 2018-Ohio-5202 at ¶ 44, citing *State v. Freeman*, 64 Ohio St.2d 291, 295, 414 N.E.2d 1044 (1980).

"Where an investigatory stop occurs very late at night or early in the morning, courts have found that this fact, combined with additional factors, may support a finding of reasonable, articulable suspicion."[90] In the present case, the stop occurred at approximately 3:00 p.m. There is absolutely nothing suspicious about being in a vehicle at a UDF gas pump in the late afternoon. Indeed, Deputy Schaefer testified that the gas station was somewhat busy that day. Thus, this factor does not lend itself to establishing reasonable suspicion of criminal activity.

## E. WHETHER THE DEFENDANT'S CONDUCT WAS SUSPICIOUS

As mentioned, suspicious behavior by the defendant may create reasonable suspicion, which includes "[n]ervous, evasive behavior[.]"[91] So too, furtive movements, such as "hiding or ducking, may constitute suspicious conduct."[92] And as explained in the *Jordan* Case, headlong flight is a consummate act of evasion.[93] However, merely walking away from police officers is not a fact that creates reasonable, articulable suspicion.[94]

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[90] *Williams*, 2018-Ohio-5202 at ¶ 33, citing *Freeman*, 64 Ohio St.2d at 295.
[91] *State v. Williams*, 5th Dist. Stark No. 2004CA00354, 2005-Ohio-3345, ¶ 23, quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 885, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).
[92] *Williams*, 2018-Ohio-5202 at ¶ 34, citing *State v. Taylor*, 10th Dist. Franklin No. 05AP-1016, 2006-Ohio-5866, ¶ 12.
[93] *Jordan*, 2004–Ohio–6085 at ¶ 47.
[94] *State v. Young*, 8th Dist. Cuyahoga No. 92744, 2010-Ohio-3402, ¶ 34, citing *State v. Williams*, Cuyahoga App. No. 92822, 2010-Ohio-901, ¶ 12-13 ("Generally, simply * * * walking away from police officers does not subject one to search or seizure.").

In *State v. Harris*, 9th Dist. Summit No. 25443, 2011-Ohio-3190, the defendant was a passenger in a van parked outside of a bar one evening.[95] An officer patrolling the parking lot noticed the van parked in a dark area of the lot.[96] He had previously made numerous arrests in the park lot before.[97] As he approached the van, he saw the defendant, a passenger, look in his direction.[98] The defendant then "got out and walked toward the bar,"[99] "almost immediately."[100] The van then began to reverse.[101] The officer told the defendant to have a seat in the van, and he complied.[102]

The defendant contended that this constituted an illegal investigatory stop, but the trial court denied his motion to suppress.[103] The appellate court reversed, explaining:

> "Based on the facts before the trial court, we conclude that the police lacked the reasonable suspicion of criminal activity necessary to conduct an investigatory stop * * * and, thus, conclude that the stop was unlawful. While the stop took place in a dark portion of a high-crime area, we fail to see how Mr. Harris' conduct prior to the stop can be viewed as indicative of criminal activity. There was no testimony elicited that prior to the investigatory stop Mr. Harris was making any furtive gestures which would constitute a fact to be taken into account in a totality of the circumstances analysis."[104]

Further, the court noted that the defendant's actions, coupled with the fact that it was in a high crime area in which the officer had made numerous arrests, did not amount to reasonable suspicion of criminal activity.[105]

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[95] *State v. Harris*, 9th Dist. Summit No. 25443, 2011-Ohio-3190, ¶ 2.
[96] Id.
[97] Id.
[98] Id.
[99] Id.
[100] Id. at ¶ 7.
[101] Id. at ¶ 2.
[102] Id.
[103] Id. at ¶ 3.
[104] Id. at ¶ 8.
[105] Id.

The Eighth District Court of Appeals reached a similar conclusion in *State v. Williams*, 8th Dist. Cuyahoga No. 92822, 2010-Ohio-901. In *Williams*, officers were "checking out" complaints of drug activity in the area of East 124th Street and Corlett Avenue in Cleveland.[106] One officer saw three people huddled in the doorway of an apartment building, and when the three people saw the police, they dispersed and began going in different directions.[107] The defendant began to walk away as well, but seemed uncertain of which way to walk.[108] At that point, police stopped and searched the defendant, finding a loaded gun in his pocket.[109]

On appeal, the court found that the officers did not have reasonable suspicion of criminal activity to detain the defendant based on the fact that the defendant was in a high crime area, he was huddled with two other people, and he walked away from police.[110] The court observed: "Williams's attempt to walk away when the police arrived likewise did not indicate criminal activity. This court has held that absent observation of other suspicious behavior, the mere fact that a person walks briskly away when the police approach does not justify an investigative stop or subsequent pat-down."[111] Moreover, the court did not interpret the defendant's decision to walk away from police as an act of flight: "Woyma testified that neither Williams nor the two individuals he was with ran away from the police; they merely walked away. They did not yell and did not throw anything

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[106] *State v. Williams*, 8th Dist. Cuyahoga No. 92822, 2010-Ohio-901, ¶ 3.
[107] Id. at ¶ 4.
[108] Id.
[109] Id. at ¶ 5.
[110] Id. at ¶ 9.
[111] Id. at ¶ 13, citing *State v. Fanning*, 70 Ohio App.3d 648, 650, 591 N.E.2d 869 (8th Dist. 1990).

away. Despite the State's assertion otherwise, none of the three individuals tried to 'flee' in 'panic.'"[112]

In examining the case at bar, Deputy Schaefer did not testify to any suspicious behavior by the defendant or other occupants of the vehicle before the defendant exited the vehicle. When she exited the vehicle before Deputy Schaefer stopped her, she began walking towards the UDF. Walking towards UDF when parked at a UDF gas pump is not a suspicious or furtive behavior.

Furthermore, Deputy Schaefer did not testify that the defendant was running, scurrying, or fleeing, but only that she was walking. Even if she had seen Deputy Schaefer before heading towards the UDF, that is not a behavior that gives rise to a reasonable, articulable suspicion of criminal conduct. When Deputy Schaefer told her to stop and return, she immediately complied. Moreover, Deputy Schaefer did not observe the defendant attempting to dispose of anything along her walk towards UDF, nor did he see her try to hide anything in her purse. On the whole, Deputy Schaefer did not observe any suspicious conduct by the defendant that would lead to a reasonable suspicion of criminal activity.[113]

## F. THE OFFICER'S TRAINING AND EXPERIENCE

[112] *Williams*, 2010-Ohio-901 at ¶ 13.

[113] Deputy Schaefer testified that all three vehicle occupants appeared to be on some type of drug after talking to them "further. He testified that he made this observation based on their demeanor, movements, and hazy look of their eyes. However, the other officers who testified stated that the occupants seemed normal and the defendant was coherent. Moreover, Deputy Schaefer's narrative does not reflect this observation, and he testified that he normally documents 100% of an individual's demeanor in this type of case. Due to this non-exhaustive list of reasons, the court did not credit this portion of testimony from Deputy Schaefer in its findings of fact. In any case, these observations would have been made after Deputy Schaefer stopped the defendant, since Deputy Schaefer made this observation after talking to the defendant "further."

Lastly, courts consider an officer's training and experience.[114] Deputy Schaefer has 25 years of service with the Clermont County Sheriff's Office. However, beyond his ample years of service, no other testimony was offered as to Deputy Schaefer's training or experience that would enable him to conclude that the conduct reported and observed here provided a basis for suspecting that criminal activity was afoot.

When examining the totality of the circumstances, Deputy Schaefer did not have a reasonable suspicion of criminal activity sufficient to stop the defendant. He had a partially confirmed anonymous tip but no other supporting indicia of criminal activity to corroborate it. After considering the totality of the circumstances, the court finds that the investigatory stop of the defendant was unconstitutional.

## III. SUPPRESSION OF EVIDENCE

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."[115] As such, evidence obtained by police during an illegal search or seizure is suppressed.[116] So too, when statements are "given during a period of illegal detention," they are

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[114] *Williams*, 2010-Ohio-901 at ¶ 43.
[115] *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).
[116] *State v. Green*, 12th Dist. Warren No. CA2004-11-134, 2005-Ohio-6871, ¶ 34.

"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."[117]

Since the court has found that detaining the defendant for an investigatory stop was illegal, all items seized from her during the detention must be suppressed, along with all statements she made to law enforcement officers during that detention.

## CONCLUSION

For the foregoing reasons, the defendant's motion to suppress is well-taken and is hereby granted.

**IT IS SO ORDERED.**

DATED: 5-3-19

Judge Jerry R. McBride

[117] *Florida v. Royer*, 460 U.S. 491, 501, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

**CERTIFICATE OF SERVICE**

I certify that copies of the within Entry have been sent on this 3rd day of May 2019 by e-mail to Robert D. Barbato, Assistant Prosecuting Attorney, at rbarbato@clermontcountyohio.gov, and to W. Stephen Haynes, Attorney for the Defendant, at shaynes@clermontcountyohio.gov. Printed copies were provided to the Public Defender's Office and the Prosecuting Attorney's Office.

Judicial Assistant to Judge McBride