

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

FILED
2016 OCT 25 PM 2:57
DARRELL A. WENTWORTH
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

STATE OF OHIO :
Plaintiff : **CASE NO. 2016 CR 00248**
vs. : **Judge McBride**
RODERICK RYAN EVANS : **DECISION/ENTRY**
Defendant :

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

Rittgers & Rittgers, Edward C. Perry and Charlie M. Rittgers, counsel for the defendant Roderick Ryan Evans, 810 Sycamore Street, Fourth Floor, Cincinnati, Ohio 45202

This cause is before the court for consideration of a motion to suppress filed by the defendant Roderick Ryan Evans on July 1, 2016. The court held a hearing on the motion on August 17, 2016.

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

FINDINGS OF FACT

On April 28, 2016 the defendant was indicted for aggravated possession of drugs in violation of R.C. 2925.11(A), a felony of the third degree.

The charge stems from an incident that occurred on June 6, 2014. At 10:10 p.m. on that night, Deputy Robert Bailey of the Clermont County Sheriff's Office stopped the defendant Roderick Ryan Evans, who was driving a vehicle in Batavia Township, located in Clermont County, Ohio. Deputy Bailey stopped the defendant because the defendant did not have a functioning rear license plate light.

Deputy Bailey informed the defendant of the reason for the stop and took the defendant's identification and registration information. At three minutes into the stop, Deputy Bailey decided to deploy his narcotics canine, Mox, to sniff the exterior of the vehicle. Mox alerted for narcotics at the rear passenger seat.

Deputy Bailey asked the defendant to step out of his vehicle, patted him down as a safety precaution, and asked the defendant to stand off to the side. The defendant stood between his own vehicle and the police cruiser.

Deputy Bailey told the defendant that Mox had alerted and asked if the defendant had any illegal substances in the vehicle. The defendant replied that he had marijuana in the backseat area of the vehicle. Deputy Bailey then searched the vehicle for drugs. He did not handcuff or otherwise restrain the defendant during the search.

In the vehicle, Deputy Bailey found marijuana, a dollar bill with a white powdery substance on it, and a bag of white crystals. Sometime during Deputy Bailey's search, other officers arrived on scene and placed the defendant in the police cruiser.

After locating the drugs, Deputy Bailey placed the defendant under arrest and read him his *Miranda* rights. Later testing revealed that the white crystals were methamphetamine, which serves as the basis for the present case.

Regarding the training of Deputy Bailey and Mox as a canine unit, Deputy Bailey has been certified to use a canine to locate drugs since 2004. Mox was first trained and certified by the Ohio Peace Officer Training Academy in 2011, and then was recertified in 2013 and 2015. In 144 controlled tests that Mox undertook for his 2013 certification, called training deployments, Mox had a 97% accuracy rate at detecting narcotics. He is trained to detect marijuana, methamphetamine, cocaine, ecstasy, and heroine.

On cross examination, Deputy Bailey was asked what Mox's accuracy rate is in the field. Deputy Bailey responded that he did not know because he did not have the reports on his person that would contain that information.

On July 1, 2016, the defendant filed a motion to suppress the defendant's statements and any items seized from the defendant. The state did not file a response. The court held a hearing on the matter on August 17, 2016.

At the close of the hearing, the defendant's counsel clarified the evidence that he sought to suppress. He argued that (1) the evidence of drugs taken from the vehicle should be suppressed because Mox's alert was unreliable, and therefore Deputy Bailey did not have probable cause to search the vehicle, and (2) the defendant's statement to Deputy Bailey that marijuana was in the vehicle should be suppressed because the defendant was in custody at the time Deputy Bailey asked if there were illegal substances in the vehicle, but the defendant had not received a *Miranda* warning.

After the hearing, the defendant requested an additional week to submit an additional memorandum in support of his motion. The court allowed both parties to do so, but neither the state nor the defendant filed any additional memoranda.

STANDARD OF REVIEW

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

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

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

¹ *State v. Scruggs*, 12th Dist. Clinton No. CA2005-11-042, 2007-Ohio-6416, ¶ 4, citing *State v. French*, 72 Ohio St.3d 446, 449-50 (1995).

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

³ Crim.R. 12(C).

⁴ *State v. Codeluppi*, 139 Ohio St.3d 165, 2014-Ohio-1574, 10 N.E.3d 691, ¶ 7, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5373, 797 N.E.2d 71, ¶ 8.

LEGAL ANALYSIS

I. THE SEARCH AND SEIZURE OF THE DEFENDANT'S VEHICLE

The Fourth Amendment to the United States Constitution protects people against "unreasonable searches and seizures."⁶ Similarly, the Ohio Constitution provides: "The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated."⁷ The United States Supreme Court has long observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."⁸

The above Fourth Amendment principles apply to drivers in motor vehicles.⁹ "When the police stop a vehicle based on probable cause that a traffic violation has occurred, the stop is reasonable under the Fourth Amendment."¹⁰ "The law is settled

⁵ *Id.*

⁶ Fourth Amendment to the United States Constitution.

⁷ Ohio Constitution, Article I, Section 14.

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

⁹ *State v. Lunce*, 12th Dist. Butler No. CA2000-10-209, 2001 WL 530541, *2 (May 21, 2001), citing *State v. Johnson*, 85 Ohio App.3d 475, 478 (12th Dist. 1993).

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

that in Fourth Amendment terms a traffic stop entails a seizure of the driver 'even though the purpose of the stop is limited and the resulting detention is quite brief.'"¹¹ The "tolerable duration" of a seizure in the context of a traffic stop is "determined by the seizure's 'mission' – to address the traffic violation that warranted the stop * * * and to attend to related safety concerns * * *."¹² The stop may not last any longer than necessary to effectuate its purpose.¹³

If a traffic stop exceeds "the time needed to handle the matter for which the stop was made," then the stop "violates the Constitution's shield against unreasonable seizures."¹⁴ Hence, a seizure based upon a traffic violation "'become[s] unlawful if it is prolonged beyond the time reasonably required to complete [the] mission of issuing a ticket for the violation."¹⁵ Accordingly, a law enforcement officer's authority for the seizure ends "when tasks tied to the traffic infraction are – or reasonably should have been – completed."¹⁶

The officer's "mission" during a traffic stop includes determining whether to issue a traffic ticket, checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of

¹¹ *Brendlin v. California*, 55 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007), citing *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

¹² *Rodriguez v. U.S.*, 135 S.Ct. 1609, 1614, 191 L.Ed.2d 492, 83 USLW 4241 (2015), citing *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005).

¹³ *Rodriguez*, 135 S.Ct. at 1614.

¹⁴ *Id.* at 1612.

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

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

insurance.¹⁷ Such checks “serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.”¹⁸ To determine whether an officer completed these checks in a “reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation.”¹⁹

When an officer investigates other crimes during a traffic stop, the officer “detours” from his or her mission.²⁰ During an “otherwise lawful traffic stop,” an officer may “conduct certain unrelated checks” or detours, but the checks may not otherwise prolong the stop.²¹

“Both Ohio courts and the United States Supreme Court have determined that ‘the exterior sniff by a trained narcotics dog to detect the odor of drugs is not a search within the meaning of the Fourth Amendment to the Constitution.’²² Accordingly, “a lawfully detained vehicle may be subjected to a canine sniff of the vehicle’s exterior even without the presence of a reasonable suspicion of drug-related activity.”²³

¹⁷ *Rodriguez*, 135 S.Ct. at 1615, citing *Prouse*, 440 U.S. at 658-660. See *Batchili*, 2007-Ohio-2204 at ¶ 12 (explaining that detaining a motorist for a traffic violations allows for “time sufficient to run a computer check on the driver’s license, registration, and vehicle plates.”).

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

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

²⁰ *Rodriguez*, 135 S.Ct. at 1616.

²¹ *Id.* at 1615.

²² *Casey*, 2014-Ohio-2586 at ¶ 22, citing *Grenoble*, 2011-Ohio-2343 at ¶ 30.

²³ *Grenoble*, 2011-Ohio-2343 at ¶ 30, citing *State v. Rusnak*, 120 Ohio App.3d 24, 28 (6th Dist. 1997); See *State v. Kremer*, 12th Dist. Warren No. CA2015-11-101, 2016-Ohio-3399, ¶ 18, citing *State v. Cruz*, 12th Dist. Preble No. CA2013-10-008, 2014-Ohio-4280, ¶ 15 (holding same).

Even so, a “dog sniff” is not part of the officer’s mission during a traffic stop, but instead “is a measure aimed at ‘detect[ing] evidence of ordinary criminal wrongdoing.’”²⁴ “Thus, a canine sniff of a vehicle may be conducted during the time period necessary to effectuate the original purpose of the stop.”²⁵ If the canine alerts on the vehicle before a diligently undertaken stop is complete, then the canine sniff is permissible.²⁶ Therefore, the critical question in determining whether a canine sniff is lawful, is “whether conducting the sniff ‘prolongs’ – i.e., adds time too – ‘the stop.’”²⁷ If the canine sniff is completed before the “reasonable completion of the traffic stop,” then “the officer does not need additional suspicion of criminal activity to conduct the sniff.”²⁸ When a canine narcotics canine “alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband.”²⁹

The United States Supreme Court set forth guidelines for determining the reliability of a narcotics detection canine in *Florida v. Harris*, 133 S.Ct. 1050, 185 L.Ed.2d 61, 81 USLW 4081 (2013).³⁰ The Court explained that if the state “produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested the showing, then the court should find probable cause.”³¹ If, however, the defendant disputed the state’s showing, then “the court should weigh

²⁴ *Rodriguez*, 135 S.Ct. at 1615, citing *Indianapolis v. Edmond*, 531 U.S. 32, 40-41, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000).

²⁵ *Grenoble*, 2011-Ohio-2343 at ¶ 20, citing *State v. Cahill*, 3d Dist. Shelby App. No. 17-01-19, 2002-Ohio-4459, ¶ 22; See *Kremer*, 2016-Ohio-3399 at ¶ 22, citing *Cruz*, 2014-Ohio-4280 at ¶ 15.

²⁶ *Batchili*, 2007-Ohio-2204 at paragraph one of the syllabus.

²⁷ *Rodriguez*, 135 S.Ct. at 1616.

²⁸ *Casey*, 2014-Ohio-2586 at ¶ 22, citing *State v. Elliott*, 7th Dist. Mahoning No. 11 MA 182, 2012-Ohio-3350, ¶ 18.

²⁹ *Kremer*, 2016-Ohio-3399 at ¶ 22, citing *Cruz*, 2014-Ohio-4280 at ¶ 15.

³⁰ *Florida v. Harris*, 133 S.Ct. 1050, 185 L.Ed.2d 61, 81 USLW 4081 (2013).

³¹ *Harris*, 133 S.Ct. at 1058.

the competing evidence.³² The ultimate inquiry the court makes is “whether all the facts surrounding the dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.”³³

The *Harris* Court determined that the “best measure of a dog’s reliability” is found in “controlled testing environments.”³⁴ This is because “errors may abound” in a canine’s field performance records.³⁵ The Court explained the numerous pitfalls in relying on field performance:

“If a dog on patrol fails to alert to a car containing drugs, the mistake usually will go undetected because the officer will not initiate a search. Field data thus may not capture a dog's false negatives. Conversely * * * if the dog alerts to a car in which the officer finds no narcotics, the dog may not have made a mistake at all. The dog may have detected substances that were too well hidden or present in quantities too small for the officer to locate. Or the dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person. Field data thus may markedly overstate a dog's real false positives.”³⁶

As such, the state is not required to introduce field performance records to demonstrate that the canine is reliable.³⁷ Instead, “evidence of a dog’s satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert.”³⁸

The Twelfth District Court of Appeals dealt with the reliability of a canine's drug alert in *State v. Cruz*, 12th Dist. Preble No. CA2013-10-008, 2014-Ohio-4280. In *Cruz*

³² *Harris*, 133 S.Ct. at 1058.

³³ *Id.*

³⁴ *Id.* at 1057.

³⁵ *Id.* at 1056.

³⁶ *Id.* at 1056-57.

³⁷ *Id.* at 1056.

³⁸ *Id.* at 1057.

the defendant was charged with possession of marijuana and possession of criminal tools after a state trooper found marijuana in her vehicle, subsequent to an alert from a canine sniff for drugs.³⁹ The defendant moved to suppress all evidence seized from the vehicle on the basis that, *inter alia*, the canine lacked the requisite training and certification to provide probable cause and was not a reliable canine unit.⁴⁰

After reviewing *Florida v. Harris*, the appellate court found that the canine unit was reliable. There was testimony regarding the extensive training, certification, and recertification that the canine and his handler (a state trooper) had undergone.⁴¹ Moreover, the canine had an accuracy rate of 96% in detection of narcotics, when the standard threshold required by the Ohio Peace Officer Training Commission was only 80%. In sum, the court found this evidence adequate to establish that the canine was reliable, and therefore the officers had probable cause to search the vehicle, where marijuana was found.⁴²

In the instant motion to suppress, the defendant argues that the seizure of drugs during the search of his vehicle was illegal and should be suppressed. Specifically, in oral argument, the defendant argued that the evidence of the marijuana, dollar bill with white powder, and methamphetamine should be suppressed because the alert from Mox, the narcotics canine, was not sufficiently reliable to provide Deputy Bailey with probable cause to search the defendant's vehicle.

³⁹ *Cruz*, 2014-Ohio-4280 at ¶ 8.

⁴⁰ *Id.* at ¶ 20.

⁴¹ *Id.* at ¶ 24.

⁴² *Id.* at ¶¶ 27-28.

As a threshold issue, Deputy Bailey had probable cause to stop the defendant's vehicle because he noticed that the defendant's rear license plate light was not functioning, which is a traffic violation. Thus, the initial stop was reasonable.⁴³

In turning to Mox's sniff of the defendant's vehicle, because an exterior sniff of a vehicle by a trained narcotics canine is not a search, Deputy Bailey did not require probable cause of criminal activity before using Mox to sniff the defendant's vehicle for narcotics.⁴⁴ Deputy Bailey did, however, need to conduct the canine sniff within the time period needed to cite the defendant for the traffic violation.⁴⁵ Deputy Bailey testified that the canine sniff took place within three minutes of stopping the defendant. He also testified that it typically takes him 15-18 minutes to issue a traffic citation. As such, Mox's narcotics sniff at three minutes into a stop for a traffic violation is permissible.⁴⁶

In addressing whether Mox's alert was reliable, thus providing Deputy Bailey with probable cause to search the defendant's vehicle, the court finds that the alert was reliable. Mox's alert, when considered in the totality of the circumstances, would cause

⁴³ *Casey*, 2014-Ohio-2586 at ¶ 18, citing *Bowling Green*, 2006-Ohio-2563 at ¶ 11.

⁴⁴ *Grenoble*, 2011-Ohio-2343 at ¶ 30, citing *Rusnak*, 120 Ohio App.3d at 28.

⁴⁵ *Grenoble*, 2011-Ohio-2343 at ¶ 20, citing *Cahill*, 2002-Ohio-4459 at ¶ 22.

⁴⁶ See *State v. Batchill*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶¶ 13-14 (a canine sniff was lawful where it occurred eight minutes and 56 seconds into a stop for a traffic violation, when the officer testified it normally takes 10-20 minutes to issue a citation); *State v. Kremer*, 12th Dist. Warren No. CA2015-11-101, 2016-Ohio-3399, ¶¶ 17, 19 (finding that deploying a canine unit less than 10 minutes after a traffic stop was lawful); *State v. Forbes*, 12th Dist. Preble No. CA2007-01-001, 2007-Ohio-6412 (canine sniff conducted 11 minutes into the stop did not unreasonably prolong the stop); *State v. Beltran*, 12th Dist. Preble No. CA2004-11-015, 2005-Ohio-4194 (canine sniff 42 minutes after traffic stop was not unconstitutional); *State v. Cochran*, 12th Dist. Preble No. CA2006-10-023, 2007-Ohio-3353 (canine sniff 28 minutes after traffic stop was not unconstitutional); *State v. Bell*, 12th Dist. Preble No. CA2001-06-009, 2002-Ohio-561 (cocaine found in the vehicle when a drug canine alerted on the trunk 14 minutes after the stop, which did not prolong the detention any longer than necessary to effectuate the purpose of the stop); *State v. Kilgore*, 12th Dist. Butler No. CA98-09-201, 1999 WL 452235 (June 28, 1999) (waiting on a narcotics canine for 5 minutes was reasonable).

a reasonably prudent person to believe that a search of the vehicle would reveal illegal narcotics.⁴⁷ The undisputed evidence demonstrates that Deputy Bailey and Mox are certified as a canine unit and have undergone extensive training, certification, and recertification training. It is also undisputed that Mox's accuracy rate for the detection of narcotics during training deployments is 97%.⁴⁸

The fact that Deputy Bailey could not recall Mox's accuracy rate in the field without consulting field reports does not undercut the strength of the evidence showing that Mox performed highly reliable in controlled test settings. Aside from procuring testimony from Deputy Bailey that he could not recall Mox's field accuracy, the defendant has presented no evidence to this court that contests Mox's reliability. In fact, field performance represents the very type of evidence that the United States Supreme Court cautioned against relying heavily upon in *Florida v. Harris* because it is not a reliable measure of a narcotics canine's accuracy. As the Court cautioned, "errors may abound" in a canine's field performance records.⁴⁹

Accordingly, and in consideration of all the evidence presented, the court finds that Mox's alert to narcotics was reasonable. Therefore Deputy Bailey had probable cause to search the defendant's vehicle. As such, the defendant's request to suppress evidence of the drugs seized in his vehicle is denied.

⁴⁷ *Harris*, 133 S.Ct. at 1057.

⁴⁸ See *Cruz*, 2014-Ohio-4280 at ¶ 24 (in finding the canine unit reliable, the court cited the fact that the canine's accuracy rate for detection of narcotics was 96%, which is well above the 80% threshold required by the Ohio Peace Officer Training Commission).

⁴⁹ *Harris*, 133 S.Ct. at 1056.

II. THE DEFENDANT'S STATEMENTS TO LAW ENFORCEMENT

"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."⁵⁰ Absent a *Miranda* warning, if statements stem from a "custodial interrogation," it is "well-established" that the prosecution may not use those statements.⁵¹ A "custodial interrogation" includes "two distinct concepts: custody and interrogation."⁵²

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."⁵³ An interrogation must involve a "measure of compulsion above and beyond that inherent in custody itself" before the interrogation is considered a "custodial interrogation."⁵⁴

⁵⁰ *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).

⁵¹ *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).

⁵² *Durham*, 2013-Ohio-4764 at ¶ 15, citing *State v. Staley*, 12th Dist. Madison No. CA99-08-019, 2000 WL 554512, *3 (May 8, 2000).

⁵³ *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.).

⁵⁴ *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.”⁵⁵ 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.”⁵⁶ 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.”⁵⁷ Thus, although a person may not be “under arrest,” the person may still be “in custody” for *Miranda* purposes.⁵⁸ 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.”⁵⁹

A motorist is not generally considered “in custody” for *Miranda* purposes if the motorist is “temporarily detained” during an ordinary traffic stop.⁶⁰ A motorist may not be considered “in custody” even when an officer asks the motorist to exit the vehicle.⁶¹ “[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

⁵⁵ *Durham*, 2013-Ohio-4764 at ¶ 17, citing *State v. Coleman*, 12th Dist. Butler No. CA2001-10-241, 2002-Ohio-2068, ¶ 23.

⁵⁶ *Durham*, 2013-Ohio-4764 at ¶ 17, quoting *State v. Henry*, 12th Dist. Preble No. CA2008-04-006, 2009-Ohio-434, ¶ 13.

⁵⁷ *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*, 384 U.S. at 444 (“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.’”).

⁵⁸ *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 13.

⁵⁹ *Moore*, 2011-Ohio-1908 at ¶ 16, quoting *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3420, ¶ 27.

⁶⁰ *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).

⁶¹ *Durham*, 2013-Ohio-4764 at ¶ 20.

of custodial interrogation.”⁶² This is so because “such general questioning is only an attempt to elicit basic facts relative to the officer’s investigation.”⁶³ 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*.”⁶⁴

The defendant in the case at hand claims that the statement made prior to his *Miranda* warnings must be suppressed, in which he told Deputy Bailey that he had marijuana in his vehicle. A similar situation arose in *State v. Sell*, 2d Dist. Montgomery No. 26458, 2015-Ohio-1940, in which the defendant was asked questions about the results of a canine narcotics sniff before receiving *Miranda* warnings. In *Sell*, the defendant was indicted for aggravated possession of drugs.⁶⁵ The defendant was a passenger in a vehicle that was pulled over for a traffic stop.⁶⁶

The officer had his canine sniff the exterior of the vehicle, and the canine gave a positive alert for drugs.⁶⁷ During the sniff, the officer asked the defendant to step outside of the vehicle, and she stood off of the road while the sniff was conducted.⁶⁸ The officer asked the defendant to sit on the curb, and she was told she was not free to leave.⁶⁹ The defendant was not handcuffed or otherwise restrained.⁷⁰ When the canine alerted, the officer searched the vehicle, found drugs in a purse, and asked the

⁶² *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).

⁶³ *In re M.D.*, 2004-Ohio-5904 at ¶ 23, citing *Rivera-Carrillo*, 2002 WL 371950.

⁶⁴ *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.”).

⁶⁵ *State v. Sell*, 2d Dist. Montgomery No. 26458, 2015-Ohio-1940, ¶ 2.

⁶⁶ *Id.* at ¶ 5.

⁶⁷ *Id.* at ¶ 6.

⁶⁸ *Id.* at ¶¶ 5, 23.

⁶⁹ *Id.* at ¶¶ 6, 23.

⁷⁰ *Id.* at ¶ 23.

defendant if the purse was hers.⁷¹ The defendant admitted that the purse was hers, as well as its contents.⁷² The defendant had not received her *Miranda* rights at the time of the statement.⁷³

On appeal, the court rejected the lower court's finding that the instruction to the defendant that she was not "free to leave" was sufficient to find she was in custody for purposes of a *Miranda* warning.⁷⁴ The appellate court concluded that, under these circumstances, "nothing in the record would have led a reasonable person to believe they were under arrest."⁷⁵

A similar situation arose in *State v. Wilkins*, 2d Dist. Montgomery No. 20152, 2004-Ohio-3917. In *Wilkins* the defendant claimed an officer questioned him about the results of a positive narcotics canine alert without first being informed of his *Miranda* rights.⁷⁶ More particularly, after the canine alerted for the presence of drugs, the officer asked the defendant "Hey, the dog hit on the car. Is there anything you want to tell me?"⁷⁷ The defendant responded by telling the officer he had drugs in his shoe.⁷⁸

The defendant argued that he was in custody for *Miranda* purposes because the officer removed him from his vehicle during a routine traffic stop, he was placed in the back of a police cruiser while a drug-sniffing canine swept the vehicle, he was not free to leave the area, and the officer questioned him about his canine's positive alert

⁷¹ *Sell*, 2015-Ohio-1940 at ¶ 9.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at ¶ 19.

⁷⁵ *Id.* at ¶ 23.

⁷⁶ *State v. Wilkins*, 2d Dist. Montgomery No. 20152, 2004-Ohio-3917, ¶ 15.

⁷⁷ *Id.* at ¶ 5.

⁷⁸ *Id.*

without giving him his *Miranda* rights.⁷⁹ The court disagreed, concluding: "Such circumstances do not rise to [the] level of custody. Stated simply, nothing about these circumstances would have led a reasonable person to believe that he was under arrest or that his movements were restrained to a degree associated with an arrest."⁸⁰ As such, the defendant was not entitled to receive his *Miranda* warnings before the officer informed him that the canine had positively alerted for drugs.⁸¹

The circumstances in the case at bar are similar to those of *Sell* and *Wilkins*, except the facts of this case provide even less support for finding that the defendant was in custody. Here, the defendant was stopped for a traffic violation, and Deputy Bailey conducted a canine sniff for narcotics while the defendant remained in his vehicle. When Mox made a positive alert for narcotics, the defendant was asked to step out of his vehicle and stood between his vehicle and the police cruiser. The defendant was not placed in the police cruiser, handcuffed, or otherwise physically restrained. These circumstances would not have led a reasonable person to believe that he was under arrest.

Because the defendant was not in custody while he was standing outside of his vehicle, Deputy Bailey was not required to provide *Miranda* warnings prior to informing the defendant that Mox alerted for drugs and asking him if there were any drugs in the vehicle. Accordingly, the court does not find that the defendant's statement to Deputy Bailey that he had marijuana in the vehicle should be suppressed.

⁷⁹ *Wilkins*, 2004-Ohio-3917 at ¶ 18.

⁸⁰ *Id.* at ¶ 21. See *State v. Williams*, 12th Dist. Clinton No. CA2009-08-014, 2010-Ohio-1523, ¶ 16 (the defendant's detention at the time of the canine sniff was not the functional equivalent of a formal arrest).

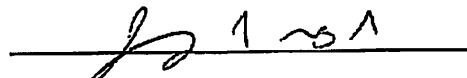
⁸¹ *Wilkins*, 2004-Ohio-3917 at ¶ 21.

CONCLUSION

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

IT IS SO ORDERED.

DATED: 10-25-16



Judge Jerry R. McBride