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BARBARA A. WIEDENBEIN  
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CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	<b>CASE NO. 2019 CR 000724</b>
vs.	:	<b>Judge McBride</b>
DAMON HINKSTON	:	<b><u>DECISION/ENTRY</u></b>
Defendant	:	

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

Ronald A. Mason, assistant public defender and counsel for the defendant Damon Hinkston, 302 E. Main Street, Batavia, Ohio 45103.

On July 30, 2019, the defendant Damon Hinkston was indicted on both a felony drug possession charge and a felony weapons charge. The defendant was charged in Ct. #1 of the indictment with possession of a fentanyl-related compound in violation of R.C. 2925.11(A), a felony of the fifth degree, and in Ct. #2 with having weapons while under disability in violation of R.C. 2923.13(A)(2), a felony of the third degree.

This cause is now before the court for consideration of a motion to suppress filed by the defendant Damon Hinkston on October 8, 2019. The court held an evidentiary hearing on the motion on October 21, 2019. Oral arguments were then heard with respect to the motion on November 7, 2019. At the conclusion of the oral arguments of counsel, the court took the motion under advisement.

Upon consideration of the motion to suppress, 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.

### **STANDARD OF REVIEW**

This matter is before the court on a motion to suppress filed by the defendant challenging the validity of the warrantless arrest of the defendant and of the seizure of evidence during the course of the arresting officer's investigation.

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."<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup>

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<sup>1</sup> *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).

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

<sup>3</sup> Crim.R. 12(C).

In filing a motion to suppress, the defendant “shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought.”<sup>4</sup> 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.”<sup>5</sup> 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.<sup>6</sup>

A motion to suppress typically “presents mixed questions of law and fact.”<sup>7</sup> 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.”<sup>8</sup> As such, the court is free to accept or reject any or all of the testimony presented.<sup>9</sup>

The issues raised by the defendant in this case involve the constitutionality of (1) the stop of the defendant’s vehicle (reasonable suspicion), (2) the continued detention of

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<sup>4</sup> *State v. Way*, 12th Dist. Butler No. CA2008-04-098, 2009-Ohio-96, ¶ 7, quoting Crim.R. 47.

<sup>5</sup> *Way*, 2009-Ohio-96 at ¶ 7, quoting *State v. Wood*, 12th Dist. Clermont No. CA2007-12-115, 2008-Ohio-5422, ¶ 10.

<sup>6</sup> *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).

<sup>7</sup> *State v. Wash*, 12th Dist. Preble No. CA2019-02-002, 2020-Ohio-152, ¶ 11. See *State v. Gray*, 12th Dist. Butler No. CA2011-09-176, 2012-Ohio-4769, ¶ 15 (holding same); *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 (holding same); *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).

<sup>8</sup> *State v. Egnor*, 12th Dist. Warren No. CA2019-05-042, 2020-Ohio-327, ¶ 16, citing *State v. Vaughn*, 12th Dist. Fayette No. CA2014-05-012, 2015-Ohio-828, ¶ 8. See *State v. Deluca*, 12th Dist. Butler No. CA2016-03-055, 2017-Ohio-1235, ¶ 9, citing *Vaughn*, 2015-Ohio-828 at ¶ 9 (holding same); *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.”).

<sup>9</sup> *State v. Leder*, 12th Dist. Clermont No. CA2018-10-072, 2019-Ohio-2866, ¶ 20, citing *State v. Cummins*, 12th Dist. Clermont No. CA2018-07-051, 2019-Ohio-1496, ¶ 45.

the defendant after the stop (reasonableness), (3) the arrest of the defendant (probable cause and canine reliability), (4) the obtaining of statements from the defendant (compliance with *Miranda* and *Berkemer v. McCarty*), and (5) the seizure of evidence from the vehicle (probable cause and automobile exception).

### **FINDINGS OF FACT**

The court makes the following findings of fact based upon the testimony of the witnesses and the exhibits it found to be admissible, credible, and reliable as presented at trial:

Officer Corey Herren has been a certified police officer for 19 years and has worked five of those years with the Village of Williamsburg Police Department, where he is presently employed. He has been trained in the enforcement of Ohio traffic laws as well as in the detection and investigation of drug offenses.

For three years, part of his duties have included being a canine handler, and specifically being a handler of his dog named Braggy. In order to become certified as a special canine unit, Trooper Herren and his canine Braggy completed a 200 hour training course through the Ohio Peace Officer Training Academy (OPOTA). Trooper Herren and Braggy were subsequently certified respectively as having met the minimum eligibility standards to be certified as a canine handler and as a canine. Both subsequently passed certification examinations in order to function as a special canine unit. Braggy has been certified for the following special purposes: tracking, article search, and narcotics

detection. The narcotics that Braggy has been trained on include crack cocaine, powder cocaine, marijuana, methamphetamine, ecstasy, heroin, and derivatives of these drugs.

Trooper Herren also is involved with the training of other dogs, and in this regard works for an OPOTA approved canine training facility. Officer Herren and Braggy are required to train together for 16 hours per month, and in fact they train together 12 hours per week.

Braggy is a passive find dog. Whenever he detects the odor of a narcotic, he sits and stares at the location from where the odor is emanating. According to Officer Herren, Braggy has never given a false positive indication in a controlled environment.

Each canine unit is required to be certified annually. After an examination is performed, the evaluator is required to send to the executive director of the Ohio Peace Office Commission the results of the examination within 30 days. The executive director must then issue or refuse to issue a request for certification. Braggy has been certified on an annual basis pursuant to these requirements. Consequently, Braggy was properly certified as a special purpose canine for the purposes set forth above on June 10, 2019. Braggy has been deployed as a special purpose canine some 15-20 times.

On June 10, 2019, at approximately 11:30 p.m., Officer Herren and his dog Braggy were performing surveillance on what Herren refers to as a "known drug house." According to Herren, there have been approximately 70 previous traffic stops of vehicles being driven to or from that house in which drugs were found to be in the subject vehicles. Furthermore, he says the owner of the house has been indicted and convicted for drug related charges in federal court.

On this date and time, Herren observed a vehicle pull into the driveway, and he observed a male and a female exit the subject vehicle and go inside the house. Within a short time thereafter, he observed the two individuals exit the house and re-enter the vehicle. The vehicle then exited the driveway and proceeded to travel down the roadway.

While the vehicle was in the driveway, Herren ran the license plate number for the vehicle through whatever law enforcement system he was using and was informed that the vehicle was registered in the name of an individual who was then deceased. He pulled behind the vehicle, and while the vehicle was moving, says that he observed the front seat passenger moving from side to side.

Officer Herren testified that in his opinion the passenger appeared to be trying to hide something. However, he never testified to any facts, other than his observation that the passenger moved "from side to side," as the basis for this lay opinion.

In any event, Officer Herren proceeded to activate his emergency lights in order to initiate a traffic stop of the subject vehicle. The subject vehicle pulled over and came to a stop within a short time after the stop was initiated.

Officer Herren, upon exiting his police vehicle, approached the subject vehicle and observed a female driver and a male front seat passenger, who was the defendant. He characterized the female driver as more nervous than would normally be the case for a driver stopped on the roadway, based on his observations that she was "jittery" and quick to answer questions. The male individual, who was the defendant in this case, did not make eye contact with the officer.

Officer Herren requested that both individuals provide him with identification, and both individuals complied with this request. Officer Herren returned to his police vehicle

and ran the identification through whatever system he was using. He suspected that the driver's identification was false, because the description of the identification of the driver "did not quite match" his observations of the driver. He returned to the car and asked the driver for her Social Security number, and she provided him with a Social Security number.

At this point, the other officer who was present at the scene took over the responsibilities to follow-up on the matters related to the traffic stop, while Officer Herren focused primarily on the drug investigation.

Officer Herren inquired of the female driver as to whether there was anything in the vehicle that he needed to be aware of in terms of illegal narcotics, and her answer was "no." He then asked the driver if it would be okay for him to have his canine walk around the vehicle, and she stated that she had no objection to him doing so.

Officer Herren then deployed Braggy for the purpose of having Braggy conduct a "free air" canine sniff around the vehicle. Officer Herren states this canine sniff took place in the first 7-10 minutes after the stop of the subject vehicle. Before proceeding with the canine sniff, Officer Herren asked the two occupants of the vehicle to keep their hands in plain view and to not move around too frantically. He told them it was up to them whether or not they rolled windows up.

Braggy was taken to the front of the vehicle and was given a command to search for narcotics. Officer Herren states that the canine sniff that ensued was conducted in accordance with the training that he had been given. During the sniff, which took less than a minute, Braggy gave a positive indication for narcotics on both the driver's door and the passenger door.

After the canine sniff was concluded, Braggy was returned to Officer Herren's police vehicle, and Officer Herren removed the occupants of the subject vehicle in order to perform a *Terry* pat down. The search was conducted by Officer Herren and his partner Officer Timmers. Officer Herren searched the passenger side of the vehicle, while Officer Timmers searched the driver's side. They both started in the front seated areas of the vehicle.

During the search, Officer Herren observed within an arm's reach of the front seat, but in the back seat area of the vehicle, the butt of a handgun sticking out from under the back seat. A small zip up pouch containing a needle cap, five .38 caliber rounds, and a key (which was later discovered to belong to the defendant's mother) were found in the center console. There were also baggies found in the zip up pouch, and three of them had what appeared to be the residue of drugs inside them.

At some point during the stop, it was discovered that the identification provided by the female driver was not her own but was her twin sister's identification. It was discovered also that the female occupant's driver's license was in fact suspended. She was subsequently identified by another officer as Sapphire Miracle.

Meanwhile, it was further discovered that the Sheriff's Office had earlier that day put out a BOLO requesting that the defendant be detained for investigation of a burglary offense. Moreover, it was learned that he had a suspended license. Officer Herren also believed that the defendant had previously been adjudicated to be delinquent for a prior offense of violence.

Officer Herren questioned both individuals as to whether they were aware that there was a firearm in the vehicle, and both denied having any knowledge of it. Neither individual appeared to be under the influence.

The defendant was placed in custody and was transported to the Jail by another officer. The vehicle was impounded because the owner was deceased, both occupants were being arrested, and there was nobody there to drive the vehicle. An inventory was conducted of the vehicle and vehicle contents in accordance with the standard procedures of the Village of Williamsburg Police Department.

The defendant's wallet was searched during the booking process at the County Jail, and an item of contraband that appeared to be a narcotic drug was retrieved from the defendant's wallet. The substance was sent to a laboratory to be tested and was subsequently confirmed to be a narcotic drug.

According to Officer Herren, it takes approximately 15-20 minutes for a vehicle stop from beginning to end, and it takes longer if the driver has a suspended license or does not have valid identification or if incorrect or inaccurate information is provided.

## **LEGAL ANALYSIS**

### **I. THE STATE'S BURDEN OF PROOF**

As an initial matter, the state posited at oral argument that it bears only a slight burden in this case because the defendant's motion to suppress was of a general nature and contained boilerplate language. In support, the state cites to *State v. Henry*, 12th

Dist. Preble No. CA2008-05-008, 2009-Ohio-10. The court notes, as described in the Standard Section set forth above, the defendant “shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought.”<sup>10</sup> 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.”<sup>11</sup>

As to *Henry*, that case also incorporated these general principles. However, it went a step further to hold that the extent of the state’s burden to demonstrate substantial compliance with field-testing protocol at a suppression hearing depends upon the degree of specificity of the violations alleged.<sup>12</sup> Indeed, appellate cases that have cited to *Henry* regarding principles of “particularity” have all likewise involved challenges to testing procedures.<sup>13</sup>

*Henry* is not directly applicable here because the instant case does not involve a challenge to field testing procedures, wherein the court would need to determine the extent of the state’s burden of proof for establishing substantial compliance with accepted testing procedures. Nevertheless, based on the other above case law, the defendant does need to state his grounds for his motion with particularity. And the court finds that the defendant did that here. The motion, while brief, succinctly names the legal grounds for suppression of evidence. Although the motion is sparse in terms of facts, those were developed through the defense’s cross examination at the evidentiary hearing and during oral argument. Notably, even *Henry* states that “if the defendant’s motion to suppress

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<sup>10</sup> *Way*, at ¶ 7, quoting Crim.R. 47.

<sup>11</sup> *Way*, 2009-Ohio-96 at ¶ 7, quoting *Wood*, 2008-Ohio-5422 at ¶ 10.

<sup>12</sup> *State v. Henry*, 12th Dist. Preble No. CA2008-05-008, 2009-Ohio-10, ¶ 12.

<sup>13</sup> See *State v. Clark*, 12th Dist. Brown No. CA2009-10-039, 2010-Ohio-4567, ¶ 11; *State v. Fink*, 12th Dist. Warren No. CA2008-10-118, 2009-Ohio-3538, ¶ 28; *State v. Baker*, 12th Dist. Warren No. CA2009-06-079, 2010-Ohio-1289, ¶ 35.

lacks the required particularity, the defendant may still provide some factual basis, either during cross-examination or by conducting formal discovery \* \* \*."<sup>14</sup> The court thus finds that the defense did this here, by providing additional factual bases on cross examination. As such, the defendant's motion to suppress does not fail for failure to provide specificity, nor has the state lightened its burden.

## II. THE LEGALITY OF THE STOP

The Fourth Amendment to the United States Constitution protects people against "unreasonable searches and seizures."<sup>15</sup> 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."<sup>16</sup> 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."<sup>17</sup>

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<sup>14</sup> *Henry*, 2009-Ohio-10 at ¶12, citing *State v. Plunkett*, 12th Dist. Warren No. CA2007-01-012, 2008-Ohio-1014, ¶ 11.

<sup>15</sup> Fourth Amendment to the United States Constitution.

<sup>16</sup> Ohio Constitution, Article I, Section 14.

<sup>17</sup> *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).

These Fourth Amendment principles apply to drivers in motor vehicles.<sup>18</sup> A traffic stop is considered a seizure of the driver.<sup>19</sup> Ohio recognizes two types of lawful traffic stops, non-investigatory traffic stops and investigatory traffic stops.<sup>20</sup>

For a non-investigatory traffic stop, “[w]hen the police stop a vehicle based on probable cause that a traffic violation has occurred, the stop is reasonable under the Fourth Amendment.”<sup>21</sup> An officer has probable cause to stop a vehicle for a traffic stop when the officer has observed a traffic violation.<sup>22</sup> This is true even for minor traffic violations.<sup>23</sup> And a traffic stop made with probable cause that a traffic violation occurred is not unreasonable 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.”<sup>24</sup>

In the case at bar, the state submits that Officer Herren had probable cause or reasonable suspicion to stop the defendant on the basis that the driver of the vehicle had committed a traffic violation under R.C. 4549.11. R.C. 4549.11 provides:

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<sup>18</sup> *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).

<sup>19</sup> *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).

<sup>20</sup> *State v. Stover*, 12th Dist. Clinton No. CA2017-04-005, 2017-Ohio-9097, ¶ 8, citing *State v. Campbell*, 12th Dist. Butler Nos. CA2014-02-048 and CA2014-02-051, 2014-Ohio-5315, ¶ 25.

<sup>21</sup> *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.”).

<sup>22</sup> *State v. Turner*, 12th Dist. Clermont No. CA2018-11-082, 2019-Ohio-3950, ¶ 11, citing *Stover*, 2017-Ohio-9097 at ¶ 8.

<sup>23</sup> *State v. Egnor*, 12th Dist. No. CA2019-05-042, 2020-Ohio-327, ¶ 25, citing *City of Dayton v. Erickson*, 76 Ohio St. 3d 3, 11-12 (1996).

<sup>24</sup> *State v. Kelly*, 188 Ohio App.3d 842, 2010-Ohio-3560, 937 N.E.2d 149, ¶ 15 (12th Dist.), quoting *Dayton v. Erickson*, 76 Ohio St.3d 3, 665 N.E.2d 1091 (1996), syllabus.

**"(A) No person shall operate or drive upon the highways of this state a motor vehicle acquired from a former owner who has registered the motor vehicle, while the motor vehicle displays the distinctive number or identification mark assigned to it upon its original registration.**

**(B) Whoever violates division (A) of this section is guilty of operation of a motor vehicle bearing license plates or an identification mark issued to another, a minor misdemeanor on a first offense and a misdemeanor of the fourth degree on each subsequent offense."<sup>25</sup>**

The parties disagree as to whether R.C. 4529.11 applies to a situation wherein a person drives a vehicle registered to a deceased individual, particularly since the statute states that the vehicle must have been "acquired from another." The state maintains that "acquire" could entail merely possessing or controlling a vehicle registered to another person, while the defense suggests that "acquire" means a transfer in ownership.

There is no case law construing probable cause or reasonable suspicion to stop a driver under R.C. 4529.11. Indeed, there is scant case law citing it at all. In one case that discusses it, the statute was applied to a driver of a motorcycle who had purchased the motorcycle but failed to transfer the license plates for the vehicle to his name.<sup>26</sup> The court described R.C. 4529.11 as a prohibition against "operating a vehicle with the license plates of a previous owner of the vehicle."<sup>27</sup> Another case describing R.C. 4549.11 describes it as a charge for "driving on a previous owner's license plates in violation of R.C. 4549.11."<sup>28</sup> Both of these cases, limited as they are, suggest the defense is correct

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<sup>25</sup> R.C. 4549.11.

<sup>26</sup> *State v. Jarzembki*, 6th Dist. Fulton No. F-95-018, 1996 WL 402012, \*2 (July 19, 1996).

<sup>27</sup> (Emphasis added.) *Id.*

<sup>28</sup> (Emphasis added.) *State v. Willis*, 4th Dist. Lawrence No. 94 CA 12, 1994 WL 693912, \*1 (Dec. 7, 1994).

since courts have construed R.C. 4549.11 and described it as applying in cases where there is new ownership of a motor vehicle.

Moreover, the court finds it significant that there is a total absence of case law discussing whether R.C. 4549.11 can provide probable cause or reasonable suspicion to stop a driver who is clearly not the registered owner. Indeed, the court cannot find case law supporting the proposition that an officer has probable cause or reasonable suspicion to stop a vehicle, which has not been reported stolen, when it appears that the driver is not the registered owner. Certainly it is not an uncommon situation that people drive vehicles registered to another (e.g. a wife driving her husband's vehicle, a son driving his mother's vehicle, etc.). And if this was a proper basis to initiate a traffic stop, the court would expect to see ample case law discussing these circumstances with respect to R.C. 4549.11.

Instead, the language the legislature narrowly crafted in R.C. 4549.11 is likely the reason it has not been applied more broadly. As described, R.C. 4539.11 applies where a "motor vehicle was acquired from a former owner \* \* \*."<sup>29</sup> The term acquired is not defined in R.C. Chapter 4549. "Courts give words in a statute their plain and ordinary meaning unless legislative intent indicates a different meaning."<sup>30</sup> Merriam-Webster Dictionary defines "acquire" to mean "to get as one's own."<sup>31</sup> "Owner" is also not defined in R.C. Chapter 4549, but its plain and ordinary meaning is "[t]he person in whom is vested

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<sup>29</sup> R.C. 4549.11(A).

<sup>30</sup> *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 13, citing *Coventry Towers, Inc. v. Strongsville*, 18 Ohio St.3d 120, 122, 480 N.E.2d 412 (1985).

<sup>31</sup> Merriam-Webster Dictionary, Acquire, <https://www.merriam-webster.com/dictionary/acquire> (accessed February 21, 2020).

the ownership, dominion, or title of property; proprietor.”<sup>32</sup> Construing these together, to have violated R.C. 4539.11(A), the driver must now own the motor vehicle from a person who formerly had vested ownership, dominion, or title to the property over it.

There are no facts before the court showing that Officer Herren believed or had reasonable suspicion to believe that Sapphire Miracle, the vehicle’s driver, now owned the vehicle but had failed to register the license plates in her name or that the deceased owner’s estate had sold the vehicle to another person. As such, Officer Herren was mistaken that he had probable cause or reasonable suspicion to stop the defendant on the basis of a traffic violation of R.C. 4549.11.

The court must next determine whether Officer Herren’s mistake of the law should invalidate his stop of the vehicle under *Heien v. North Carolina*, 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014). In *Heien*, a vehicle was stopped because one of its two brake lights was inoperable, and the officer believed that both were required to be working.<sup>33</sup> This belief was a mistake of law by the officer because a single working brake light was all the law required.<sup>34</sup> The Court examined whether reasonable suspicion can rest on a mistaken understanding of what was legally prohibited.<sup>35</sup> The Court held that a mistake of law can provide reasonable suspicion to justify a stop of a vehicle.<sup>36</sup> However, “[t]he Fourth Amendment tolerates only reasonable mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable.”<sup>37</sup> As such, “an officer can

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<sup>32</sup> Black’s Law Dictionary, Owner, <https://thelawdictionary.org/owner/> (accessed February 21, 2020).

<sup>33</sup> *Heien v. North Carolina*, 574 U.S. 54, 135 S.Ct. 530, 534, 190 L.Ed.2d 475 (2014).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 536.

<sup>36</sup> *Id.*

<sup>37</sup> (Emphasis original.) *Id.* at 539.

gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce.”<sup>38</sup>

In *Heien* the Court found that the officer’s mistake regarding the brake light was reasonable because, although the statute refers to “a stop lamp,” suggesting the need for only a single working brake light, it also provides that “[t]he stop lamp may be incorporated into a unit with one or more other rear lamps.”<sup>39</sup> The use of “other” suggests that a “stop lamp” is a type of “rear lamp.” And another subsection of the same provision required that vehicles “have all originally equipped rear lamps or the equivalent in good working order,” arguably indicating that if a vehicle has multiple “stop lamps” all must be functional.<sup>40</sup> As such, the Court resolved that the officer’s mistake of law was reasonable, thus providing reasonable suspicion justifying the stop of the defendant.<sup>41</sup>

The state has not explained how Officer Herren’s mistaken interpretation of 4549.11 was reasonable, except to posit that “acquire” should also mean to gain possession or control of. Firstly, upon reading the statute, the court does not find that it is ambiguous as written, nor is there any case law to support that interpretation. “*Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an unambiguous statute.”<sup>42</sup> Indeed, Ohio courts examining *Heien* do not permit mistakes of law when they are unreasonable.<sup>43</sup> Secondly, based on

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<sup>38</sup> *Id.* at 539-540.

<sup>39</sup> *Id.* at 540.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *State v. Trout*, 5th Dist. Licking No. 18-CA-00043, 2019-Ohio-124, ¶ 22, citing *United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016).

<sup>43</sup> See *Trout*, 5th Dist. 2019-Ohio-124 at ¶ 22 (finding troopers’ mistake of law not objectively reasonable when the traffic statute was clear); *State /City of Vermillion v. Lane*, 6th Dist. Erie No. E-18-008, 2018-Ohio-5284, ¶ 20 (finding officer’s mistake of law not objectively reasonable when the traffic statute at issue was unambiguous and clear); *State v. Dowty*, 2d Dist. Montgomery No.

Ohio case law, the court finds it notable that other officers have not made the same mistake as Officer Herren. On the whole, the court concludes there was no probable cause or reasonable suspicion to stop the defendant based on R.C. 4549.11, notwithstanding Officer Herren's mistake of law.

The state alternatively posits that Officer Herren had reasonable suspicion to stop the vehicle to investigate whether a crime was occurring. The second type of lawful traffic stop is an investigative stop, also known as a *Terry* stop, in which the officer has reasonable suspicion based upon specific or articulable facts that criminal behavior is imminent or has occurred.<sup>44</sup> With respect to a *Terry* stop, the concept of "reasonable and articulable suspicion" has not been precisely defined, but "it has been described as something more than an undeveloped suspicion or hunch but less than probable cause."<sup>45</sup> "The determination of whether an officer had reasonable and articulable suspicion to initiate an investigative stop must be based on the totality of circumstances viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold."<sup>46</sup>

In the case at hand, the state cites the following facts to argue that Officer Herren had a reasonable, articulable suspicion to conduct an investigative stop: (1) Officer Herren saw the defendant leave from a known drug house, (2) it was 11:30 pm, (3) the vehicle was not from the area or registered to the driver, and (4) the defendant made

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26982, 2016-Ohio-4719, ¶ 18 (finding that, because no reasonable officer could have read an unambiguous statute to believe that a traffic violation occurred, *Heien* was inapplicable).

<sup>44</sup> *State v. Bullock*, 2017-Ohio-497, 85 N.E.3d 133, ¶ 7 (12th Dist.), citing *State v. Pfeiffer*, 12th Dist. Butler No. CA2003-12-329, 2004-Ohio-4981, ¶ 23.

<sup>45</sup> *State v. Hawkins*, 2018-Ohio-1983, 101 N.E.3d 520, ¶ 17 (12th Dist.), citing *State v. Baughman*, 192 Ohio App.3d 45, 2011-Ohio-162, 947 N.E.2d 1273, ¶ 15 (12th Dist.).

<sup>46</sup> (Internal quotations omitted.) *Egnor*, 2020-Ohio-327 at ¶ 18, quoting *State v. Hairston*, 156 Ohio St.3d 363, 2019-Ohio-1622, ¶ 10.

furtive movements in the passenger seat. The cases cited by the state are not instructive as to whether Officer Herren had reasonable suspicion to initiate a stop since those cases involved stops properly made for traffic citations.<sup>47</sup>

Some of the cited facts certainly can be factors that courts consider along with other factors to give a reasonable suspicion.<sup>48</sup> But standing alone these factors are not enough to create reasonable suspicion of criminal activity (e.g. furtive movements, time of day, high crime area).<sup>49</sup> Moreover, the Sixth Circuit Court of Appeals has cautioned that context-based factors, including the time of day and whether the stop is in a high crime area, should not receive "undue weight" in considering the totality of the circumstances.<sup>50</sup>

In the instant case, the court resolves that the factors cited by Officer Herren are cumulatively not enough to create reasonable suspicion that the defendant and the driver

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<sup>47</sup> *State v. Cruz*, 12th Dist. Preble No. CA2013-10-008, 2014-Ohio-4280, ¶ 16 (undisputed that the trooper had conducted a valid traffic stop after observing the defendant following too closely behind a semi-truck in violation of R.C. 4311.34); *State v. Young*, 12th Dist. Warren No. CA2011-06-066, 2012-Ohio-3131, ¶ 6 (initiated traffic stop because the driver had signaled a right turn, but then she suddenly flipped on her left turn signal and made an erratic turn to the left).

<sup>48</sup> See *State v. Hairston*, 156 Ohio St.3d 363, 2019-Ohio-1622, 126 N.E.3d 1132 ¶ 20 (the time of night and high-crime reputation of an area can be relevant in determining whether criminal activity might be afoot); *State v. Shorts*, 9th Dist. Lorain No. 11CA009965, 2011-Ohio-6202, ¶ 32 (seeing defendant leave from a known drug house was one of multiple factors the appellate court cited for reasonable suspicion of drug activity); *State v. Barton*, 2d Dist. Montgomery No. 21815, 2007-Ohio-2348, ¶¶ 11-12 (seeing defendant leave from a known drug house was one of multiple factors the appellate court cited for reasonable suspicion of drug activity); *State v. Hurtt*, 4th Dist. Ross No. 17CA3588, 2018-Ohio-1263, ¶ 37 ("It is well-settled that furtive movements can support a reasonable-suspicion determination.").

<sup>49</sup> See *State v. Kessler*, 53 Ohio St.2d 204, 208, 373 N.E.2d 1252 (1978) (finding that furtive movements alone do not create reasonable suspicion); *State v. Davison*, 9th Dist. Summit No. 21825, 2004-Ohio-3251, ¶ 14 (reasonable suspicion is not created merely because of the defendant's presence in a high drug area); *State v. Dixon*, 11th Dist. Lake No. 2013-L-103, 2015-Ohio-208, ¶ 22 (noting that an individual's presence in a high crime area and the time of day are relevant, but do not, standing alone, create reasonable suspicion).

<sup>50</sup> *United States v. See*, 574 F.3d 309, 314 (6th Cir.2009).

of the motor vehicle were engaged in criminal activity.<sup>51</sup> Officer Herren certainly had a suspicion that the vehicle's occupants were involved in criminal activity, but that suspicion never surpassed a mere hunch. As such, Officer Herren could have continued to surveil the subject vehicle to see if he observed any more indicators which would then warrant a stop. However, this is not the course of action that he took, and the court finds that he did not have a reasonable and articulable suspicion to initiate an investigative stop based on the totality of the circumstances that are present in this case.

Because Officer Herren lacked both probable cause to stop the defendant for a traffic violation as well as a reasonable suspicion that the defendant had been engaged in criminal activity, the court finds that the defendant's motion to suppress should be granted. "If the seizure is unlawful, any evidence obtained after the unlawful seizure must be suppressed as the 'fruit of the poisonous tree.'"<sup>52</sup> As such, all evidence discovered and statements made subsequent to Officer Herren stopping the defendant must be suppressed.

### **CONCLUSION**

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

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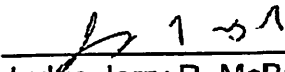
<sup>51</sup> See *State v. Sims*, 8th Dist. Cuyahoga No. 83618, 2004-Ohio-4089 (finding no reasonable suspicion where defendant left a known drug house early in the morning and made furtive movements).

<sup>52</sup> *State v. Jones*, 10th Dist. No. 09AP-1053, 188 Ohio App.3d 628, 2010-Ohio-2854, 936 N.E.2d 529, ¶ 27, quoting *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Counsel are directed to contact the Assignment Commissioner (513-732-7108) within five days and to schedule a trial setting conference, which shall be held within fifteen days.


**IT IS SO ORDERED.**

DATED: 2-25-20

  
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Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

I certify that copies of the within Decision/Entry have been provided on this 25<sup>th</sup> day of February 2020 by e-mail to Katherine Terpstra, Assistant Prosecuting Attorney, at [kterpstra@clermontcountyohio.gov](mailto:kterpstra@clermontcountyohio.gov), and to Ronald A. Mason, Attorney for the Defendant, at [masonlaw@fuse.net](mailto:masonlaw@fuse.net). Printed copies have been provided to the Prosecuting Attorney's Office, the Public Defender's Office, and the Probation Department.

  
\_\_\_\_\_  
Judicial Assistant to Judge McBride