[Cite as *Columbus v. Ridley*, 2015-Ohio-4968.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 15AP-84
v.	:	(M.C. No. 14 TRD 182551)
Tyrone Ridley, Jr.	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 19, 2015

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for appellant.

Richard C. Pfeiffer, Jr., City Attorney, and *Orly Ahroni*, for appellee.

APPEAL from the Franklin County Municipal Court

SADLER, J.

{¶ 1} Defendant-appellant, Tyrone Ridley, Jr., appeals from a decision of the Franklin County Municipal Court denying his motion to suppress testimony of the officers involved in his arrest. For the reasons that follow, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On September 24, 2014, Columbus Police Officer James Watkins was waiting in the drive-through line of a McDonald's fast food restaurant for his food order. He and another officer were dressed in plain clothes and driving an unmarked vehicle as part of a special assignment known as a directed patrol aimed at targeting specific problems in specific neighborhoods. In this instance, their assignment was to observe drug dealing activities, follow known drug offenders, and observe traffic violations in

order to enable uniformed police in marked police vehicles to make traffic stops at which drugs might be recovered. While in the McDonald's line, Watkins noticed a car that he knew from prior experience had links to drug dealing and drug dealers. Watkins radioed officer Patrick Vehr, another plain-clothes officer on the directed patrol, and requested that he follow the suspect vehicle.

{¶ 3} Vehr located the suspect vehicle and followed it in his unmarked vehicle. According to Vehr, the suspect vehicle began driving erratically and speeding. The suspect vehicle then pulled into an apartment building parking lot and extinguished its lights. Vehr observed the car for some time and was able to discern that there were two occupants; each slumped down in his seat as if hiding. After a time, the driver of the car reactivated the lights and drove out of the apartment lot. The suspect vehicle turned into a Speedway gas station but did not buy gas.

{¶ 4} At that point, another plain-clothes officer in an unmarked vehicle, officer Nicholaus Nessley, prepared to follow the vehicle. Nessley observed the vehicle fail to come to a complete stop before exiting the gas station. Nessley did not stop the vehicle but continued to follow. Nessley then observed the vehicle "roll past the stop sign without making a complete stop and pull into Verne's on 161." (Tr. 40.) Although Nessley testified that he believed the driver was aware he was being followed, the vehicle traveled straight from the Speedway to Verne's parking lot without speeding or making any turns.

{¶ 5} Nessley also stopped his unmarked police vehicle in Verne's parking lot but in such a way as to allow sufficient space for the suspect vehicle to exit. Nessley climbed out of the unmarked car with his badge hanging visibly from a chain around his neck. Appellant and his passenger got out of the suspect vehicle, approached Nessley on foot, and appellant engaged Nessley in conversation.

{¶ 6} According to Nessley, appellant said something to the effect that he was relieved that Nessley was a police officer because he had noticed someone following him and thought he was going to be robbed. Nessley "asked him why he was driving at a high rate of speed, driving around like -- driving crazy." (Tr. 51.) Nessley also asked for permission to conduct a pat-down search for weapons and appellant agreed. During the pat down, Nessley felt something he could not identify. He asked appellant what it was and appellant said it was a knife. Nessley asked if he could remove the knife from

appellant's pocket and appellant agreed. When Nessley removed the knife, he found a small baggie of what appeared to be heroin trapped between the blade of the folding knife and the handle. Nessley asked appellant if the substance was heroin and appellant admitted it was. Thereupon, Nessley arrested appellant.

{¶ 7} Appellant was charged in this case with driving without a license and failing to stop at a stop sign. Though the transcript suggests that appellant was also charged with heroin possession and that he may be subject to future prosecution on that charge in another court, appellant is not charged with drug or weapons possession in this case. On October 17, 2014, appellant filed a "Motion to Suppress," requesting that the trial court "suppress the testimony of [the officers involved in his arrest] pursuant to Rule 601(C), Ohio Rules of Evidence, and Sections 4549.13 through 4549.16 of the Ohio Revised Code." (Motion to Suppress, 1.) The motion was based on the fact that the officers were wearing plain clothes and driving unmarked vehicles at the time they cited him for the traffic offenses.

{¶ 8} The trial court held a hearing on appellant's motion on December 3, 2014. At the close of the hearing, the trial court announced its decision to deny the motion. The trial court found that the officers testified credibly regarding their duties on the date of appellant's arrest and that the officers were not on duty for the exclusive or main purpose of enforcing traffic laws. Based on these findings, the trial court concluded that neither Evid.R. 601(C) nor R.C. 4549.13 through 4549.16 prevented the officers from testifying against appellant. The trial court memorialized its decision in an entry dated December 4, 2014. On January 7, 2015, appellant pleaded no contest to the traffic offenses and the trial court convicted him of a stop sign violation and operating a motor vehicle without a valid driver's license.

{¶ 9} Appellant timely appealed to this court from the judgment of the trial court.

II. ASSIGNMENTS OF ERROR

{¶ 10} Appellant assigns the following errors:

> [I.] The trial court erred when it overruled the Defendant-Appellant's motion made pursuant to Evid. R. 601(C) and R.C. 4549.13 through R.C. 4549.16 to exclude the testimony of the non-uniformed officers operating unmarked police vehicles who participated and provided assistance which resulted in

> the arrest of Defendant-Appellant for misdemeanor traffic violations when they were on duty for the exclusive or main purpose of enforcing traffic laws at that time.
>
> [II.] Defendant-Appellant's stop and seizure by law enforcement officials violated the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 14 of the Ohio Constitution.

III. STANDARD OF REVIEW

{¶ 11} Appellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact. *State v. Moorer*, 10th Dist. No. 14AP-224, 2014-Ohio-4776, ¶ 6, citing *State v. Helmbright*, 10th Dist. No. 11AP-1080, 2013-Ohio-1143. Accordingly, an appellate court's standard of review of a motion to suppress is two-fold. *State v. Holland*, 10 Dist. No. 13AP-790, 2014-Ohio-1964, ¶ 8, citing *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶ 5. First, we must determine whether competent, credible evidence supports the trial court's findings. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. Second, we must independently determine whether the facts satisfy the applicable legal standard, without giving any deference to the conclusion of the trial court. *Id.*

IV. LEGAL ANALYSIS

A. First Assignment of Error

{¶ 12} In appellant's first assignment of error, appellant contends that the trial court erred when it overruled appellant's motion to suppress the officers' testimony pursuant to Evid.R. 601(C) and R.C. 4549.13 through 4549.16. We disagree.

{¶ 13} Evid.R. 601 provides in relevant part:

> Every person is competent to be a witness *except*:
>
> * * *
>
> (C) *An officer, while on duty for the exclusive or main purpose of enforcing traffic laws*, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

(Emphasis added.)

{¶ 14} A number of statutory provisions provide similar requirements, such as R.C. 4549.13:

> Any motor vehicle used by a * * * peace officer, *while said officer is on duty for the exclusive or main purpose of enforcing the motor vehicle or traffic laws* of this state, provided the offense is punishable as a misdemeanor, shall be marked in some distinctive manner or color and shall be equipped with * * * at least one flashing, oscillating, or rotating colored light mounted outside on top of the vehicle.

(Emphasis added.)

{¶ 15} The consequences of violating R.C. 4549.13 are explained in R.C. 4549.14:

> Any officer arresting, or participating or assisting in the arrest of, a person charged with violating the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, *such officer being on duty exclusively or for the main purpose of enforcing such laws*, is incompetent to testify as a witness in any prosecution against such arrested person if such officer at the time of the arrest was using a motor vehicle not marked in accordance with section 4549.13 of the Revised Code.[1]

(Emphasis added.)

{¶ 16} Under both the evidence rule and relevant statutes, the competence of the officers to testify in this prosecution of appellant depends on whether Nessley was on duty for the exclusive or main purpose of enforcing traffic laws. Evid.R. 601(C); R.C. 4549.13 through 4549.16. The Supreme Court of Ohio has interpreted the phrase, " 'on duty exclusively or for the main purpose of enforcing [motor vehicle or traffic] laws' in R.C. 4549.14 and similar language in Evid.R. 601(C) to refer to the officer's main purpose for his whole period of duty and not to his duty during the apprehension and arrest of the suspect." *State v. Huth*, 24 Ohio St.3d 114, 116 (1986), quoting *Columbus v. Stump*, 41 Ohio App.2d 81, 85 (10th Dist.1974). The testimony at the suppression hearing shows that Nessley and his fellow officers were part of a "directed patrol," the primary purpose of

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[1] R.C. 4549.15 and 4549.16 require that officers involved mainly in traffic enforcement must wear a uniform. Evid.R. 601 was adopted to replicate and preserve the provisions set forth in R.C. 4549.13 through 4549.16. *State v. Heins*, 72 Ohio St.3d 504, 506 (1995).

which was to detect, observe, and arrest individuals involved in illegal drug activity. (Tr. 16, 26, 32, 35, 45.) Though it is a routine part of these officers' activity to observe traffic violations so that uniformed officers can make traffic stops in marked police vehicles, the testimony establishes that enforcing traffic laws was not the main purpose of this directed patrol unit. Watkins stated that the directed patrol officers also make arrests or obtain warrants, without the need for a traffic stop, where they personally observe drug deals or other illegal activities.

{¶ 17} This case is distinguishable on its facts from the cases cited by appellant. For example, in *State v. Auxter*, 6th Dist. No. OT-96-004 (Aug. 23, 1996), the court concluded that an officer in an unmarked car who stopped a motorist after transporting a prisoner from a DUI checkpoint was not competent to testify in the prosecution of the motorist because he was on duty for the main purpose of enforcing traffic laws. Unlike the facts in *Auxter*, the evidence in this case shows that the main purpose of the officers in this directed patrol is to investigate drug activity and other offenses committed in a designated "high crime" area of the city. (Tr. 17.) Enforcement of traffic laws was merely one of the methods used to investigate known offenders and uncover illegal drug activity. Similarly, in *State v. Turpin*, 2d Dist. No. 74-20 (Dec. 23, 1974), the arresting officer admitted in his testimony that his duties as a patrol officer were primarily "traffic control operations." *Id*. The officers who testified in this case made no such admission nor does their testimony suggest that enforcement of traffic laws was their main purpose.

{¶ 18} Our review of the record reveals that there is competent and credible evidence to support a finding that Nessley's duties objectively encompassed significantly more activity than traffic enforcement. Thus, the trial court did not abuse its discretion when it found that Nessley was not "on duty for the exclusive or main purpose of enforcing traffic laws." Evid.R. 601(C). Applying the appropriate legal standard, we hold that the trial court did not err when it concluded that the officers involved in appellant's arrest were competent to testify in this case. *See, e.g., State v. McClellan*, 3d Dist. No. 1-09-21, 2010-Ohio-314, ¶ 48-54 (holding that an officer was competent to testify under Evid.R. 601(C) where he observed a violation in the course of conducting drug enforcement related surveillance).

{¶ 19} For the foregoing reasons, appellant's first assignment of error is overruled.

B. Second Assignment of Error

{¶ 20} In his second assignment of error, appellant contends that the trial court erred when it failed to suppress evidence seized in the unlawful search of appellant's person as such evidence was obtained in violation of appellant's Fourth Amendment rights. Appellant concedes that his written motion to suppress does not assert an argument based on the fourth amendment. The city of Columbus argues that appellant waived this argument for purposes of this appeal by failing to raise it in his motion to suppress. We agree.

{¶ 21} Crim.R. 12 provides, in relevant part, as follows:

> (C) Pretrial motions. Prior to 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. The following must be raised before trial:
>
> * * *
>
> (3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only.
>
> * * *
>
> (H) Effect of failure to raise defenses or objections. Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (D) of this rule, or prior to any extension of time made by the court, *shall constitute waiver of the defenses or objections*, but the court for good cause shown may grant relief from the waiver.

(Emphasis added.)

{¶ 22} In *Xenia v. Wallace*, 37 Ohio St.3d 216 (1988), the Supreme Court held that when a defendant seeks to suppress evidence, he must apprise the prosecutor of the grounds on which he challenges the validity of the evidence. *Id.* at 218. The failure of a defendant to adequately specify the grounds for his motion to suppress evidence results in a waiver of that issue on appeal. *Id.* The defendant must "raise the grounds upon which

the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge." *Id*. at paragraph one of the syllabus.

{¶ 23} In a subsequent decision, *State v. Shindler*, 70 Ohio St.3d 54, 58 (1994), the Supreme Court held that a motion to suppress must "state with particularity the legal and factual issues to be resolved," thereby placing the prosecutor and court "on notice of those issues to be heard and decided by the court and, by omission, those issues which are otherwise being waived." In this case, appellant's "Motion to Suppress" requests only that the trial court "suppress the testimony of [the officers] pursuant to Rule 601(C), Ohio Rules of Evidence, and Sections 4549.13 through 4549.16 of the Ohio Revised Code." (Motion to Suppress, 1.) The motion to suppress does not mention the Fourth Amendment protection against unreasonable search and seizure nor does appellant's memorandum in support contain any such argument. Appellant never requested leave, either orally or in writing, to amend his motion to include the constitutional argument, and the record contains nothing to support a finding of good cause for relief from the waiver. Crim.R. 12(H).

{¶ 24} Following the presentation of evidence at the suppression hearing, the prosecutor stated that "the only issue that we are trying to determine here today, is whether Officer Nessley * * * was competent to testify as a witness because he was wearing plain clothes and operating an unmarked cruiser." (Tr. 66.) Appellant's counsel did not object to this statement nor did counsel orally move the court for leave to amend the timely filed suppression motion to include the fourth amendment claims. However, during appellant's closing argument, appellant's trial counsel argued, for the first time, that the search of appellant's person could not be justified under the stop and frisk exception recognized in *Terry v. Ohio*, 392 U.S. 1 (1968). Appellant's trial counsel argued that under the circumstances of this case, Nessley had no reason to ask appellant whether he had any weapons on his person or to ask for appellant's consent to conduct a pat-down search for weapons.

{¶ 25} Immediately following appellant's closing argument, the prosecutor reiterated: "I once again just want to call attention to the fact that the motion itself is solely based on whether the officer and what he was wearing was an unmarked -- or not a police uniform." (Tr. 73-74.) Again, appellant's trial counsel neither objected to the

prosecutor's statement, nor did counsel move the municipal court for leave to amend the previously filed motion to suppress.

{¶ 26} The trial court subsequently announced its ruling on appellant's motion as follows:

> The Court has had the opportunity to listen to the testimony as well as argument of both the City and the defendant.
>
> Defense counsel is correct, these are patrol officers, and they testified as such. They are patrol officers on special assignment, and their special assignment requires them to be in plain clothes and in plain, unmarked motor vehicles.
>
> The testimony from the officers was that they are in that type of mode to search out burglaries, thefts, robberies, drugs, hot areas of crime in a particular area, which I think is Zone 1, the north part of town.
>
> Although I will agree I am not real enthusiastic about the way they conduct their business, I understand why they do what they do. But for purposes of today, I think -- I am at least convinced that their primary goal or primary purpose on this special assignment is not traffic violations. Now, granted they use these traffic violations for another purpose; but, as I believe the law stands today, their primary goal is not to enforce traffic violations. They have an advantage; they have a marked cruiser that can do that.
>
> But I think as long as their primary goal is not for specific traffic violations, and that is not what they are set up for and that is not what their duties are, I believe they are competent to testify. And I believe that defense counsel's motion to suppress is denied.

(Tr. 75-76.)

{¶ 27} The trial court's ruling makes no reference to the Fourth Amendment protection against unreasonable search and seizure. As noted above, the only argument made in the written motion was that the officers were incompetent to testify in appellant's prosecution because they were using vehicles that were not marked and were not wearing a distinctive uniform. Although appellant asserted his fourth amendment claim, for the first time, in his oral argument, appellant never moved the trial court to amend his written motion nor did he attempt to establish "good cause" for relief from the waiver.

Crim.R. 12(H). Thus, the trial court's ruling is properly confined to the issues raised by the written motion to suppress. Crim.R. 12(H).[2]

{¶ 28} Moreover, in addition to waiving the Fourth Amendment claim by failing to include it in his written motion to suppress or in an amendment thereto, appellant has asserted an additional fourth amendment claim for the first time in his appeal to this court. "It is well-settled law that issues not raised in the trial court may not be raised for the first time on appeal because such issues are deemed waived." *State v. Barrett*, 10th Dist. No. 11AP-375, 2011-Ohio-4986, ¶ 13. This well-settled waiver rule applies to arguments not asserted either in a written motion to suppress or at the suppression hearing. *State v. Johnson*, 10th Dist. No. 13AP-637, 2014-Ohio-671, ¶ 14; *State v. Vaughn*, 12th Dist. No. CA2014-05-012, 2015-Ohio-828, ¶ 9; *State v. Perkins*, 9th Dist. No. 21322, 2003-Ohio-3156, ¶ 13; *State v. Molk*, 11th Dist. No. 2001-L-146, 2002-Ohio-6926.

{¶ 29} In his appellate merit brief, appellant claims for the first time that the traffic infractions observed by police were induced by their own conduct in following appellant in unmarked vehicles and causing him to fear that he would be robbed. Appellant argues that because he was provoked into committing the moving violations which precipitated the traffic stop, the later search of his person was constitutionally infirm and the evidence inadmissible. Appellant never made that argument either in his written motion to suppress or at the suppression hearing. And, as noted above, the trial court did not expressly consider that argument in ruling on appellant's motion to suppress.

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[2] *See also Shindler* at 58 (a motion to suppress must "state with particularity the legal and factual issues to be resolved," thereby placing the prosecutor and court "on notice of those issues to be heard and decided by the court and, by omission, those issues which are otherwise being waived"); *State v. Borgerding*, 119 Ohio App.3d 632, 637 (2d Dist.1997) (defendant's claims that the breathalyzer machine had not been operated within the regulations specified by the Ohio Department of Health and that the operator had not followed all the regulations and procedures were too general to put the state and the court on notice of the issues to be decided); *State v. Neuhoff*, 119 Ohio App.3d 501, 505 (5th Dist.1997) (defendant's assertion that the state did not substantially comply with alcohol testing requirements did not provide the requisite legal and factual basis necessary to put the prosecutor and the court on notice as to what the specific issues were to be decided); *State v. Durham*, 12th Dist. No. CA2013-03-023, 2013-Ohio-4764, ¶ 26 (defendant's failure to argue in his suppression motion that the officers' request to roll up his sleeves constitutes an unlawful search under the Fourth Amendment waives the issue for purposes of appeal).

Accordingly, appellant waived this specific argument for purposes of this appeal. *See Johnson*; *Vaughn*; *Perkins*; *Molk*.

{¶ 30} For the foregoing reasons, we find that appellant waived the Fourth Amendment argument for purposes of the suppression hearing by failing either to raise it in his timely filed motion to suppress or to seek an amendment thereto. Furthermore, we find that appellant waived, for purposes of appeal, his argument that the actions of the officers induced him to violate traffic laws. The trial court did not expressly consider that argument and we will not consider it for the time in this appeal. *Johnson*; *Vaughn*; *Perkins*; *Molk*.

{¶ 31} Accordingly, appellant's second assignment of error is overruled.

V. CONCLUSION

{¶ 32} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

DORRIAN, J., concurs.
BRUNNER, J., concurs in part, dissents in part.

BRUNNER, J., concurring in part, dissenting in part.

{¶ 33} I concur with the majority decision overruling appellant's first assignment of error. However, I respectfully dissent from the decision of the majority overruling appellant's second assignment of error. The record contains adequate support for a finding that Ridley did not waive his argument on appeal concerning wrongful search and seizure and that he was wrongfully detained, searched, and seized. The record contains significant evidence that the activity for which he was detained and thereafter searched and seized was provoked by the police officers who followed him and performed it.

{¶ 34} The majority finds that appellant waived this argument. I would find otherwise. With respect to waiver, though Ridley's motion to suppress focused on the competency of the officers to testify, the additional Fourth Amendment issue was argued orally at the hearing after the testimony and during the hearing. Ridley's attorney argued, for instance:

> [Officer Nessley] is asking about weapons, accusing [Ridley] of having a weapon, patting him down for weapons. And

> basically, he said, [m]y sole purpose of getting out of that car was to identify myself as a CPD officer and not let him leave. And my client didn't try to leave. Everything about his actions indicates he was not free to leave; because, if he felt he was free to leave, why would he be consenting to all this?
>
> And we are now trying to classify this as a consensual encounter. Being polite and cooperative does not meet the definition of a legal consensual encounter. Just because he was compliant and polite, that doesn't make it a consensual encounter. This was a Terry traffic stop.
>
> This officer intended to stop him for the traffic violation. He was talking to him about the traffic violations, was clearly inquiring about them and asking him about weapons. He was doing investigative activities. This is not small talk. This is not, Oh, it's a nice day out. These are legal conversations with his hands behind his back in a patdown. This is a Terry stop situation out of a traffic violation by a patrol officer not in uniform and not in a marked cruiser; and, therefore, was not a proper stop. And anything that came after that, including the identification of who my client is, should be suppressed.

(Tr. 72-73.) Based on this statement, I cannot agree with the city or the majority that Ridley waived the evidence suppression argument concerning unlawful search and seizure.

{¶ 35} I further respectfully disagree with the majority's finding that the trial court did not consider appellant's "specific" Fourth Amendment argument made in his brief, that he was provoked into committing the moving violations precipitating the traffic stop. In my view, waiver cannot be applied, as the majority does, by limiting its scope to a specific argument. The majority states:

> Appellant argues that because he was provoked into committing the moving violations which precipitated the traffic stop, the later search of his person was constitutionally infirm and the evidence inadmissible. Appellant never made that argument either in his written motion to suppress or at the suppression hearing. And, as noted above, the trial court did not expressly consider that argument in ruling on appellant's motion to suppress. Accordingly, appellant waived *this specific argument* for purposes of this appeal.

(Emphasis added.) Lead opinion at ¶ 29. First, the record does not adequately support this conclusion. Arguing at the suppression hearing, Ridley's counsel stated:

> Your Honor, I submit to you, this is worse than [speed traps]. This is continuing to follow somebody all over the neighborhood, everywhere they go, when they parked and stop and they go somewhere else, just waiting for them to commit a traffic violation. That is even worse than a speeding trap.

(Tr. 71.) Ridley's counsel argued for Fourth Amendment-based suppression of the evidence retrieved during an illegal stop and addressed the fairness of officers in unmarked cars following Ridley and people like him "all over the neighborhood, everywhere they go, when they parked and stop and they go somewhere else, just waiting for them to commit a traffic violation." (Tr. 71.) That is similar enough to the expanded argument Ridley now offers on appeal for this court to address the merits of his Fourth Amendment argument.

{¶ 36} Second, I hold grave concerns about parsing a Fourth Amendment argument in applying the waiver doctrine. Narrowing an argument in order to find it has been waived is counterintuitive to guaranteeing the protection of individual Constitutional rights as found in the United States Constitution's Bill of Rights. Narrowing an argument in order to find it has been waived is also likely to set a precedent that will extend beyond the Constitutional milieu to other types of legal environments and scenarios, which I am not certain is what the majority intends to do.

{¶ 37} Additionally, in applying waiver, the majority concludes that the trial court did not consider appellant's Fourth Amendment arguments. Nothing in the record indicates that the trial court did not consider the specific Fourth Amendment arguments appellant made at the hearing. The prosecutor's statements during the hearing attempting to frame the character of the argument on suppression have no effect in law to limit what was actually argued at the trial court's hearing and what the trial court actually heard and considered. It was not incumbent on Ridley's counsel to object to gratuitous statements made by the prosecutor characterizing what the hearing was or was not. The court is responsible for its own proceeding; it heard Ridley's argument on unlawful search and seizure, and that is all that is required to prevent waiver.

{¶ 38} The city argues that the failure to raise the Fourth Amendment arguments on search and seizure (whether generally or specifically) within the time limits for filing motions to suppress imposed by Crim.R. 12(D) operates as waiver of appellant's arguments. The initial written motion to suppress was filed within 35 days of Ridley's arraignment. *Compare* Motion to Suppress (filed Oct. 17, 2014) *with* Demand for Jury Trial (filed Sept. 26, 2014). The motion was timely, even if it did not raise all the arguments ultimately advanced at the hearing. In addition, case law shows that a trial court abuses its discretion when it refuses to consider an untimely motion to suppress filed shortly after receiving discovery. *State v. Sargent*, 2d Dist. No. 3042 (Aug. 17, 1994). Ridley's suppression argument relied on the testimony from Officer Nessley adduced during the hearing to the effect that Ridley was not free to leave. This is analogous to receiving discovery in that it was through such testimony that Ridley's counsel would have obtained facts to serve as the basis for suppression under the Fourth Amendment. Crim.R. 12(D) permits a trial court "in the interest of justice" to "extend the time for making pretrial motions" and discovery of the grounds for a suppression motion after the 35-day deadline justifies the conclusion that extending time would be in the interest of justice. *Id.*; *see also State v. Jones*, 8th Dist. No. 93114, 2010-Ohio-2777, ¶ 13-16; *State v. Wisniewski*, 8th Dist. No. 74980 (Oct. 28, 1999). Ridley's argument to suppress evidence obtained from an unlawful search and seizure was not waived or untimely, even if made orally at the hearing. As such, I would proceed to examine the evidence before the court and determine whether Ridley's motion to suppress should have been granted.

{¶ 39} Taking the majority's stated standard of review of a trial court's ruling on a motion to suppress, I would avoid giving deference to the conclusion of the trial court and find that the facts do not satisfy the applicable legal standard. *See* lead opinion at ¶ 11. That is, I would find that the trial court incorrectly concluded that the facts of this case do not offend the Fourth Amendment.

{¶ 40} Ridley posits that his traffic infractions were induced by the actions of the police following him in unmarked cars which made him fear that unknown private individuals were following him for the purpose of robbing him. He argues that the fact that he was provoked into committing moving violations renders the later search of his person invalid. I would agree.

{¶ 41} The city counters that because Ridley stopped of his own volition, no Fourth Amendment seizure occurred. However, when he spoke with Officer Nessley, Ridley expressed his relief that he was being followed by the police and not someone intent on robbing him. It was at that point that Officer Nessley accused Ridley of driving erratically and "asked him why he was driving at a high rate of speed, driving around like -- driving crazy." (Tr. 51.)

> When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544 (1980), who wrote that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," *id.*, at 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (principal opinion). Later on, the Court adopted Justice Stewart's touchstone, *see, e.g.*, [*Cal. v. Hodari D.*, 499 U.S. 621, 627 (1991)]; *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *INS v. Delgado*, 466 U.S. 210, 215 (1984).

Brendlin v. California, 551 U.S. 249, 255 (2007) (parallel citations omitted). This court has noted that questioning of an " 'accusatory nature' * * * 'creates an air of authority that could further cause a reasonable person to believe that he was not free to leave.' " *State v. Tabler*, 10th Dist. No. 14AP-386, 2015-Ohio-2651, ¶ 40, quoting *State v. Goodloe*, 10th Dist. No. 13AP-141, 2013-Ohio-4934, ¶ 14. Officer Nessley testified that, as far as he was concerned, Ridley was not free to leave. Accordingly, I would hold that Ridley was seized. The next question is whether the seizure was legal.

{¶ 42} The city observes that officers are free to view whatever the public may view and that Ridley was in a public place when the police followed him and saw him commit a number of traffic violations. However, in this case there is evidence of more than the mere fact of the observation. There is evidence from both Ridley and the officers about Ridley's erratic driving (the very traffic violations for which Officer Nessley stated he detained him) and, more importantly, what appeared to be the cause of it.

{¶ 43} Officer Vehr testified that, during the time he was following Ridley, he observed Ridley and his passenger pull into an apartment complex, turn off their lights,

and slump down in their seats as if hiding. He also testified that they were driving erratically like they "were almost trying to get away from something." (Tr. 21.) Officer Nessley testified that the first thing Ridley said upon approaching was something to the effect that he was relieved that Officer Nessley was a police officer because he had noticed someone following him and thought he was going to be robbed. Officer Nessley testified, moreover, that the relief was evident on Ridley's face.

{¶ 44} The United States Supreme Court has recognized that an officer cannot base probable cause on ambiguous actions which he has induced or provoked. *See Wong Sun v. United States*, 371 U.S. 471, 482-84 (1963); *see also United States v. Franklin*, 323 F.3d 1298, 1302 (11th Cir.2003) ("officers cannot improperly provoke—for example, by fraud—a person into fleeing and use the flight to justify a stop"); *United States v. Yousif*, 308 F.3d 820, 829 (8th Cir. 2002) ("Reasonable suspicion cannot be manufactured by the police themselves."). In short, there is evidence that shows that the actions of these officers provoked Ridley into driving evasively and that the ensuing stop was not justified.

{¶ 45} The pat-down, discovery of the baggie containing heroin, and discovery that Ridley lacked a license were all made possible by the fact that Ridley was seized by Officer Nessley's accusatory questioning about his erratic driving (which significant evidence in the record suggests was provoked by the police). The record is sufficient to establish that evidence against Ridley involving the possession of heroin and lack of a license were acquired by "exploitation" of the seizure or, as the Supreme Court put it, the "primary illegality." *Wong Sun* at 487-88. The fruits of the seizure and searches during the seizure are "fruit of the poisonous tree" and ought to have been suppressed. *Id.*; *see also State v. Westover*, 10th Dist. No. 13AP-555, 2014-Ohio-1959 (suppressing the results of a warrant check as fruit of an illegal stop notwithstanding the fact that the defendant voluntarily surrendered his identification upon request); *Davis v. Mississippi*, 394 U.S. 721, 724 (1969) (suppressing fingerprint evidence recovered from the defendant during an unconstitutional arrest).

{¶ 46} Therefore, I would sustain Ridley's second assignment of error and reverse the judgment of the trial court.
