[Cite as *State v. Simmons*, 2011-Ohio-6339.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-029**
- vs -	:	
QUENTIN D. SIMMONS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000275.

Recommendation: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P. O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Paul H. Hentemann, Northmark Office Building, 35000 Kaiser Court, Suite 305, Willoughby, OH 44094-4280 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, Quentin D. Simmons, appeals from the judgment of the Lake County Court of Common Pleas denying his motion to suppress a warrantless search of his vehicle and subsequent seizure of cocaine. Mr. Simmons asserts that the initial traffic stop, which gave rise to this case, was impermissibly expanded to include a dog sniff and subsequent search of his car. He further challenges the dog's ability to accurately detect narcotics and the overall probable cause for the vehicle search. For

the reasons below, we affirm the judgment of the trial court, finding that the initial stop was valid, and the search and seizure subsequent to the stop permissible.

{¶2} **Substantive Facts and Procedural History**

{¶3} At approximately 1:57 a.m., on April 7, 2010, Mr. Simmons was headed southbound on S.R. 306. Officer Burrington of the Willoughby Police Department was headed northbound on the same road, and, when the cars passed each other at an intersection, the officer heard a loud exhaust noise coming from Mr. Simmons' vehicle. Officer Burrington, with his K-9 partner, Rebel, immediately made a u-turn and executed a traffic stop with his lights flashing. Mr. Simmons, however, did not pull over to the right berm immediately. Instead, he turned left into the parking lot of Dino's Restaurant and Days Inn, continued through the parking lot a short distance, and stopped in front of the motel in a non-parking spot.

{¶4} Mr. Simmons then immediately exited the vehicle and approached Officer Burrington's car, which had pulled up behind him. Officer Burrington instructed Mr. Simmons to return to his vehicle, which he did, and then the officer approached the passenger side of Mr. Simmons' car and informed him of why he had pulled him over. Officer Burrington requested Mr. Simmons' license and proof of insurance; Mr. Simmons informed him that the car belonged to his aunt. Mr. Simmons explained that he was planning to meet some women at the motel, and that he intended to have the exhaust system repaired the next day.

{¶5} Officer Burrington began writing a ticket for the loud exhaust system and called for backup, as he had decided to conduct a K-9 sniff of the car. The backup officer, Lieutenant Beckwith, arrived within six minutes. Officer Burrington informed Mr. Simmons he would be conducting a K-9 sniff of his vehicle, and ordered him to exit the

car and stand with Lieutenant Beckwith. Officer Burrington then removed Rebel from his cruiser and conducted the K-9 sniff. Rebel stopped at the passenger side of the car, between the front and rear doors, cleared his nose, squared off and alerted Officer Burrington by scratching at the molding around the rear passenger door window.

{¶6} At this point, a second backup officer arrived, and, together with Lieutenant Beckwith, executed a warrantless search of the vehicle. In the map pocket on the back of the front seat, the officers found two soda cans. The first was filled with liquid and appeared normal; the second was opened, and something rattled around inside of it. The officers unscrewed the top of what was a modified can and found a plastic bag with white powder inside, which appeared to be cocaine. Mr. Simmons' was then arrested, Mirandized, and taken into the custody of the Willoughby Police.

{¶7} Mr. Simmons was bound over to the Lake County grand jury and a three-count indictment was returned. Mr. Simmons was indicted on one count of Possession of Cocaine, a felony of the fourth degree, in violation of R.C. 2925.11, with a forfeiture specification pursuant to R.C. 2941.1417 and 2981.04; and two counts of Possessing Criminal Tools, a felony of the fifth degree, in violation of 2923.24, one of which had a forfeiture specification pursuant to 2941.1417 and 2981.04.

{¶8} Mr. Simmons filed a Motion to Dismiss, or in the Alternative, Motion to Suppress, to which the state responded, and a hearing was held. The trial court denied his suppression motion and set a trial date. Prior to trial, Mr. Simmons changed his plea from not-guilty to no-contest and was sentenced to serve 75 days in jail and two years of community control with extensive conditions. Mr. Simmons timely filed a notice of appeal, and now brings the following assignments of error:

{¶9} "[1.] An unlawful [sic] detention for a traffic infraction became an unlawful detention because the arresting officer decided to use a narcotics-detection dog to sniff around the exterior of the Defendant-Appellant's motor vehicle before completing the traffic citation.

{¶10} "[2.] When will a drug-detection dog alert to the exterior of a vehicle provide an officer with probable cause to conduct a warrantless search of the interior of the vehicle?"

{¶11} **Standard of Review**

{¶12} "At a hearing on a motion to suppress, the trial court functions as the trier of fact, and, therefore, is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of any witnesses." *State v. McGary*, 11th Dist. No. 2006-T-0127, 2007-Ohio-4766, ¶20, quoting *State v. Molek*, 11th Dist. No. 2001-P-0147, 2002-Ohio-7159, ¶24, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366. Thus, "[a]n appellate court must accept the findings of fact of the trial court as long as those findings are supported by competent, credible evidence." Id., quoting *Molek* at ¶24, citing *State v. Retherford* (1994), 93 Ohio App.3d 586. See, also, *City of Ravenna v. Nethken*, 11th Dist. No. 2001-P-0040, 2002-Ohio-3129, ¶13. "After accepting such factual findings as true, the reviewing court must then independently determine, as a matter of law, whether or not the applicable legal standard has been met." *McGary* at ¶20, citing *Molek* at ¶24.

{¶13} **Detention Beyond the Traffic Stop and Expansion of the Search**

{¶14} Mr. Simmons contends that his motion to suppress should have been granted because the police should not have been able to extend his detention beyond the initial traffic stop and issuance of the loud exhaust system citation. Because Mr.

Simmons concedes the initial traffic stop was valid, and as we find the officer had an articulated reasonable suspicion to extend the traffic stop for purposes of the K-9 sniff, we find no violation of Mr. Simmons Fourth Amendment rights occurred.

{¶15} Although Mr. Simmons does not contest the initial stop, it bears repeating that, "'[i]t is well established that an officer may stop a motorist upon his or her observation that the vehicle in question violated a traffic law.' *State v. Boczar,* 11th Dist. No. 2004-A-0063, [2005-Ohio-6910, ¶11], citing *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11-12. *** Moreover, this court has repeatedly held that when a police officer witnesses a minor traffic violation, he or she is warranted in making a stop to issue a citation. *Village of Waite Hill v. Popovich,* 11th Dist. No. 2001-L-227, [2003-Ohio-1587, ¶14]." *State v. Brooks,* 11th Dist. No. 2005-L-200, 2007-Ohio-344, ¶32.

{¶16} "'[W]hen detaining a motorist for a traffic violation, an officer may delay a motorist for a time period sufficient to issue a ticket or a warning.'" *State v. Batchili,* 113 Ohio St.3d 403, 2007-Ohio-2204, ¶12, quoting *State v. Keathley* (1988), 55 Ohio App.3d 130, 131. "This measure includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates." Id., citing *State v. Bolden,* 12th Dist. No. CA2003-03-007, 2004-Ohio-184, ¶17, citing *Delaware v. Prouse* (1979), 440 U.S. 648, 659, 99 S.Ct. 1391, 59 L.Ed.2d 660. Further, "[i]n determining if an officer completed these tasks within 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." Id. , quoting *State v. Carlson* (1995), 102 Ohio App.3d 585, 598-599, citing *State v. Cook* (1992), 65 Ohio St.3d 516, 521-522, and *U.S. v. Sharpe* (1985), 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605.

{¶17} "In evaluating the propriety of an investigative stop, the reviewing court must examine the totality of the circumstances surrounding the stop as 'viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold.'" *State v. Colby,* 11th Dist. No. 2002-P-0061, 2004-Ohio-343, ¶21, citing *State v. Andrews* (1991), 57 Ohio St.3d 86, 87-88. "The pivotal inquiry *** is whether [the officer] was justified in his continued detention of appellant. Once the suspicion which gave rise to the initial stop evaporated, any additional intrusion or detention had to have been supported by specific and articulable facts demonstrating the reasonableness of the continued detention." Id. at ¶22, citing *State v. Chatton* (1984), 11 Ohio St.3d 59, 63.

{¶18} Officer Burrington observed that Mr. Simmons' car had a loud exhaust as they passed one another at an intersection. He executed the initial traffic stop based on Mr. Simmons' violation of Willoughby Ordinance 438.20 – Excessive Noise. This violation was sufficient to justify the initial traffic stop, but insufficient to detain and conduct a K-9 sniff.

{¶19} The officer activated his lights and attempted to pull Mr. Simmons over. Mr. Simmons, however, continued on for some distance, rather than immediately pulling off to the right berm, and then turned left into the parking lot of the Days Inn. Mr. Simmons then exited his vehicle and approached Officer Burrington. Officer Burrington had to tell Mr. Simmons two or three times to return to his car, and this led the officer to surmise that Mr. Simmons either did not want him to get near his vehicle, or that Mr. Simmons was coming toward him "for some other reason." When the officer approached the car, he noted that Mr. Simmons appeared particularly nervous and his "hands were shaking a little bit, which put him more on alert." Mr. Simmons' expression

of nervousness, coupled with his unusual behavior of not pulling over immediately when the lights were activated, and then turning left to parking in an area not designated for parking and exiting his car to approach the police officer, provided Officer Burrington with an articulable reasonable suspicion to extend the detention and perform a K-9 sniff. See *State v. Sherrod*, 11th Dist. No. 2009-L-086, 2010-Ohio-1273 (holding that a totality of circumstances similar to the case sub judice justified continued detention of the appellant for the purposes of conducting a K-9 sniff). The facts changed, and so did the officer's ability to continue detaining Mr. Simmons.

{¶20} It should also be noted that Mr. Simmons' detention was not considerably extended beyond the time it would take to issue a citation, as K-9 Rebel was already in Officer Burrington's cruiser, and Lieutenant Beckwith arrived with six minutes of the initial traffic stop. Officer Burrington explained that he never asks anyone to leave their vehicle for OVI testing, or to run his K-9 around a car, without waiting for backup. This practice is not unreasonable for his own safety, and we find he was able to execute the K-9 sniff within the timeframe the issuance of the traffic citation would have occurred. See *State v. Cahill*, 12th Dist. No. 17-01-19, 2002-Ohio-4459. Therefore, Mr. Simmons' detention was not unduly prolonged by the K-9 sniff.

{¶21} The trial court did not err in finding that Mr. Simmons was not submitted to an unreasonably prolonged detention, and therefore his first assignment of error is without merit.

{¶22} **The K-9 Sniff and Probable Cause to Search**

{¶23} In his second assignment of error, Mr. Simmons challenges the reliability of the K-9's alert, and suggests that probable cause did not exist for the search of his vehicle. Mr. Simmons argues that "the prosecution cannot establish probable cause for

the search by introducing evidence that the dog was trained and certified." Mr. Simmons also argues that the failure to offer evidence of Rebel's track record in the field undercuts the probable cause finding.

{¶24} "Ohio courts have held that the use of a drug sniffing dog to detect the presence of illicit drugs inside an automobile is not considered a 'search' under the Fourth Amendment or the Ohio Constitution. *State v. Waldroup* (1995), 100 Ohio App.3d 508, 514; *State v. Palicki* (1994), 97 Ohio App.3d 175, 181-182; *State v. French* (1995), 104 Ohio App.3d 740, 749 ***. Moreover, a police officer 'does not need a reasonable suspicion of drug-related activity in order to request that a drug dog be brought to the scene or to conduct a dog sniff of [a] vehicle.' *State v. Carlson* (1995), 102 Ohio App.3d 585, 594." *In re Dengg*, 132 Ohio App.3d 360, 365. See, also, *State v. Corpening*, 11th Dist. No. 2007-A-0083, 2008-Ohio-6407, ¶27; *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (holding a K-9 sniff by a "well-trained narcotics-detection dog" as "*sui generis*" because it "discloses only the presence or absence of narcotics, a contraband item").

{¶25} "[O]nce a trained drug dog alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband." *Corpening* at ¶29, quoting *French* at 749. See, also, *Cahill*, supra.

{¶26} Ample evidence related to Rebel's training and certification was presented during the suppression hearing to establish that he is a "well-trained narcotics dog" under *Place*, supra. Officer Burrington testified that he and Rebel had completed training through the state of Ohio, and that their state certifications were up to date. Contrary to Mr. Simmons' assertion, there is evidence in this record that Rebel is certified in the detection of marijuana, cocaine, heroin, and methamphetamine. The

officer further testified that the team had completed an additional, un-required, training and certification program through the North American Police Work Dog Association, for which the certifications were also current.

{¶27} Officer Burrington explained that he and Rebel engage in some form of training on a daily basis. Based on that information, we presume that Rebel is a reliable narcotics dog, and Mr. Simmons failed to put on any evidence to the contrary. Mr. Simmons argues that the state did not put on affirmative evidence related to Rebel's reliability in the field. Such evidence, however, is not required in order to establish reliability of a narcotic-detecting dog.

{¶28} The Sixth District, in *State v. Nguyen*, 157 Ohio App.3d 482, 2004-Ohio-2879, engaged in a substantial survey of federal and state law related to the matter of establishing K-9 reliability and the evidence required to do so. The *Nguyen* court recognized that the national trend stated "that a drug dog's training and certification records can be used to uphold a finding of probable cause to search and can be used to show reliability, if required, but canine reliability does not always need to be shown by real world records." Id. at ¶46. In conclusion, the Sixth District held that "proof of the fact that a drug dog is properly trained and certified is the only evidence material to a determination that a particular dog is reliable." Id. at ¶55. The First and Ninth Districts have expressly followed *Nguyen*, and we elect to do so here today. See *State v. Barbee*, 9th Dist. No. 07CA009183, 2008-Ohio-3587; *State v. Lopez*, 1st Dist. No. C-050088, 2006-Ohio-2091. Therefore, the state was not obligated to submit reports of Rebel's real world performance to establish his reliability. Evidence of his training and certification was sufficient.

{¶29} Mr. Simmons also argues that Rebel was only responding to a "subconscious cuing from the handler (Pavlovian)[1], *** in this case, Patrolman Burrington consciously cu[ing] his dog by saying, 'find the dopeys' to ratify the search," but he never requested a *Daubert* hearing in order to attack the scientific accuracy of Rebel, or formally question the scientific reliability of narcotic-detecting dogs. Instead, he pled no contest on the heels of the trial court's denial of the suppression motion.

{¶30} Because an alert by a trained narcotics dog provides probable cause for the search of a vehicle, the officer's search of Mr. Simmons' car and subsequent seizure of cocaine found in the passenger compartment, in the wake of Rebel's alert, did not violate Mr. Simmons' Fourth Amendment rights. Therefore, the trial court did not err in declining to suppress the evidence, and Mr. Simmons' second assignment of error is without merit.

{¶31} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.

[1] An apparent reference to body of work on conditioned reflexes by the Russian scientist, Ivan Pavlov.