[Cite as *State v. Williams*, 2010-Ohio-1523.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-08-014
	:	O P I N I O N
- vs -		4/5/2010
	:	
REGINALD A. WILLIAMS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CRI2009-5026

Richard W. Moyer, Clinton County Prosecuting Attorney, Brian A. Shidaker, 103 East Main Street, Wilmington, Ohio 45177, for plaintiff-appellee

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BRESSLER, P.J.

{¶1} Defendant-appellant, Reginald A. Williams, appeals his conviction in the Clinton County Court of Common Pleas for carrying a concealed weapon in violation of R.C. 2923.12(A). For the reasons outlined below, we affirm.

{¶2} Officer Scott Baker of the Wilmington Police Department testified that while patrolling the streets on January 17, 2009, he observed the backseat passenger in appellant's vehicle flick a cigarette butt onto the hood of Baker's cruiser. At 12:57 a.m., Baker initiated a traffic stop to cite appellant for what he believed to be littering from a

motor vehicle in violation of R.C. 4511.82. Baker and a second officer, William Russell, who had arrived to assist him, approached the vehicle to find appellant and two passengers: Derrick Harris, whom Baker recognized from prior drug-related incidents, and a woman named Amber Ross.

{¶3} After obtaining each person's identification, Baker returned to his cruiser to await further information from dispatch. Three minutes later, dispatch advised Baker that Ross had provided a social security number without a matching file, which, in the officers' experience, indicated a "false social security number." In response, the officers requested that dispatch perform a further investigation regarding any females named "Amber Ross" in the surrounding area. Several minutes later, dispatch informed the officers that a woman named Amber Ross, matching the passenger's physical description, had a felony warrant out of Montgomery County for a probation violation for possession of cocaine. Around this time, Baker asked dispatch to send a third officer with a canine unit for back-up assistance.

{¶4} At this point, Officer Russell again approached appellant's vehicle and asked Ross to step out of the vehicle to speak in private. When Ross admitted that she was aware of the felony warrant and that the associated social security number belonged to her, Russell placed Ross under arrest. At the same time, Baker testified that he walked to the driver's side of the vehicle, where appellant remained seated, and informed him that Ross "possibly had a warrant out of Montgomery County." Baker testified that appellant was not yet free to leave because his investigation into whether he could cite appellant for his passenger's littering violation had been interrupted by the officers' unexpected discovery of Ross' felon status.

{¶5} Pursuant to Baker's request, Officer Kelly Hopkins arrived with a certified drug dog at 1:09 a.m. Hopkins testified that as she led the dog around the vehicle, the

dog alerted to the front passenger door. After the dog alerted on the vehicle, Baker testified that he returned to the driver's side and ordered appellant and Derrick Harris out of the vehicle to submit to a pat-down search for weapons. When Baker asked the group about weapons, appellant indicated that he had a gun inside the vehicle. Baker testified that at this point, appellant and Harris were seated inside the patrol car, stating that "[t]hey weren't arrested, [and] weren't handcuffed. It was pretty cold out for * * * that evening. So they were asked if they wanted to have a seat in the patrol car where it was warmer. They agreed." Based on the drug dog's alert and appellant's admission that there was a gun inside the vehicle, Officer Hopkins searched appellant's vehicle, in which she discovered marijuana seeds and a loaded gun lying in the open center console.

{¶6} After the weapon was secured, Baker approached appellant inside the patrol car and informed him that he was under arrest. Baker testified that because he believed appellant was in violation of "at least improper handling of a firearm in a motor vehicle," he *Mirandized* appellant, asking whether he understood his rights and whether he wanted to make any statements. Baker testified that at that point, appellant stated that he purchased the gun from his cousin, who had originally purchased it from Vandalia Range and Tactical. Baker then placed appellant in handcuffs and released Harris from the scene.

{¶7} Appellant was indicted for carrying a concealed weapon, in violation of R.C. 2923.12(A), and for having a weapon under disability, in violation of R.C. 2923.12(A)(2). Appellant moved to suppress all physical evidence obtained as a result of the search and the statements he made prior to receiving *Miranda* warnings.[1] After

1. On appeal, appellant's assignment of error failed to address any statements appellant made before or after he received *Miranda* warnings, thus we will not address this issue in our analysis.

hearing appellant's testimony, along with the testimony of Officers Baker, Russell and Hopkins, the trial court overruled appellant's motion. Appellant then entered a plea of no contest to one count of carrying a concealed weapon in violation of R.C. 2923.12(A), while the state dismissed the weapons under disability charge. On August 10, 2009, the trial court imposed sentence. Appellant timely appealed, raising one assignment of error:

{¶8} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 14, ARTICLE 1 OF THE OHIO CONSTITUTION."

{¶9} When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to evaluate witness credibility and resolve questions of fact. See *State v. Bell*, Preble App. No. CA2001-06-009, 2002-Ohio-561, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. In reviewing the decision of a trial court on a motion to suppress, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Bell* at 2. Accepting such facts as true, an appellate court must then independently determine, as a matter of law, and "without deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard." *State v. Anderson* (1995), 100 Ohio App.3d 688, 691.

{¶10} In his sole assignment of error, appellant advances three separate issues for our review. Appellant first claims that the trial court erred in finding that probable cause existed "to justify the traffic stop." He argues that the state failed to demonstrate the existence of probable cause or reasonable suspicion of criminal activity "beyond a

mere hunch" that would justify the initial traffic stop.

{¶11} As a general matter, "[a] traffic stop initiated by a law enforcement officer implicates the Fourth Amendment." *State v. Marcinko*, Washington App. No. 06CA51, 2007-Ohio-1166, ¶25; *Whren v. United States* (1996), 517 U.S. 806, 809, 116 S.Ct. 1769. "Such a traffic stop must comply with the Fourth Amendment's general reasonableness requirement. In *Whren,* the Supreme Court recognized that the Fourth Amendment's reasonable requirement is fulfilled and a law enforcement officer may constitutionally stop the driver of a vehicle when the officer possesses probable cause to believe that the driver of the vehicle has committed a traffic violation." *Marcinko* at ¶25. Further, the Ohio Supreme Court has clearly stated: "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[.]" *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, paragraph one of the syllabus.

{¶12} In pertinent part, R.C. 4511.82(B) states: "No operator of a motor vehicle in operation upon any street, road, or highway shall allow litter to be thrown, dropped, discarded, or deposited from the motor vehicle, except into a litter receptacle in a manner that prevents its being carried away or deposited by the elements." Officer Baker testified that while driving two-to-three car lengths behind appellant's vehicle, he observed one of its occupants throw a cigarette butt out the window, which bounced off the hood of Baker's cruiser. Based upon this observation, Baker had probable cause to believe that a traffic violation under R.C. 4511.82 had occurred. Consequently, the stop was not unreasonable under the Fourth Amendment.

{¶13} Appellant also appears to argue that because littering from a motor vehicle is a minor misdemeanor and is not "an arrestable offense," the initial traffic stop was not

justified. However, this court and the Ohio Supreme Court have held that even a de minimus traffic violation provides probable cause for a traffic stop. *Bell*, 2002-Ohio-561 at 2; *State v. Wilhelm*, 81 Ohio St.3d 444, 1998-Ohio-613; *Erickson*, 76 Ohio St.3d 3. Therefore, littering from a motor vehicle in violation of R.C. 4511.82 is a reasonable basis for a traffic stop. See *State v. Barden*, Columbiana App. No. 2000-CO-35, 2001-Ohio-3226.

{¶14} Appellant next argues that the evidence against him should have been suppressed because the warrantless search of his vehicle was not valid under the United States Supreme Court's recent ruling in *Arizona v. Gant* (2009), __ U.S. __, 129 S.Ct. 1710, which permits police to search a vehicle incident to a recent occupant's arrest only when (1) "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," or (2) when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Id. at 1719. In essence, appellant contends that the search was not justified under either branch of *Gant* because at the time the police searched his vehicle, (1) all occupants of the vehicle were "seized" to the degree of a formal arrest, and (2) no testimony was given "that indicated the search was initiated to discover evidence relevant to the littering citation or Amber [Ross'] outstanding warrant." However, appellant's reliance on *Gant* is misplaced. The vehicle search was conducted pursuant to appellant's admission that there was a gun in the vehicle and the drug dog's alert. Further, appellant was not placed under arrest (or its functional equivalent) until *after* the vehicle was searched.

{¶15} While it is true that the temporary detention of individuals during a traffic stop constitutes a "seizure of 'persons' within the meaning of [the Fourth Amendment]," not all seizures rise to the level of a formal arrest. *Marcinko*, 2007-Ohio-1166 at ¶25.

"In a typical investigatory detention, such as a routine traffic stop, individuals are not 'in custody' for purposes of *Miranda*." *State v. Keggan*, Greene App. No. 2006 CA 9, 2006-Ohio-6663, ¶31; *Berkemer v. McCarty* (1984), 468 U.S. 420, 440, 104 S.Ct. 3138. However, if the individual is, during the course of the detention, "subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." *Berkemer,* 468 U.S. at 440. The test for determining whether a seizure is an arrest rather than an investigatory detention is "if a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *Keggan* at ¶30. In *Keggan*, the Second Appellate District held that the defendant was under an investigatory detention, rather than a formal arrest, when the officer required the defendant and his passenger to exit defendant's vehicle, patted the defendant down, and asked the defendant to sit in the officers' police cruiser without handcuffs. The court stated that "[a]though [defendant] clearly was not free to leave the scene during this time, the totality of the circumstances indicate that [defendant's] freedom of action was not restrained to a degree associated with a formal arrest and that a reasonable person would have understood that the restraint imposed was for safety, not arrest, purposes. The record thus supports the trial court's conclusion that [defendant] was merely subject to a non-custodial investigatory detention[.]" Id. at ¶37.

{¶16} Similarly, in the case at bar, although Officer Baker admitted that appellant was not free to leave the scene, appellant's seizure at the time of the vehicle search was not the functional equivalent of a formal arrest. Rather, appellant's continued detention was part of Baker's ongoing investigation into whether appellant could be cited for his passenger's littering violation. Before Baker could consult his code book, his investigation was interrupted by the officers' discovery of Ms. Ross' potential felon status

and Mr. Harris' known drug history.

{¶17} As a general matter, when detaining a motorist for a traffic violation, an officer may delay the motorist for a time period sufficient to issue a ticket or a warning. See *State v. Howard*, Preble App. Nos. CA2006-02-002, CA2006-02-003, 2006-Ohio-5656, ¶15. This time period also includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates. Id.; *State v. Bolden,* Preble App. No. CA2003-03-007, 2004-Ohio-184, ¶17; *Delaware v. Prouse* (1979), 440 U.S. 648, 659, 99 S.Ct. 1391. "In 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." *Howard*, 2006-Ohio-5656 at ¶15, quoting *State v. Carlson* (1995), 102 Ohio App.3d 585, 598-599.

{¶18} However, Ohio courts have also consistently held that if an officer, during the initial detention of a motorist, ascertains additional specific and articulable facts that give rise to a reasonable suspicion of criminal activity beyond that which prompted the stop, the officer may further detain the motorist and conduct a more in-depth investigation. *State v. Robinette*, 80 Ohio St.3d 234, 241, 1997-Ohio-343; *State v. Griffith* (Aug. 10, 1998), Madison App. No. CA97-09-044. The continued investigatory detention does not violate the Fourth Amendment as long as it is objectively justified by the circumstances. *Griffith* at 3; *Robinette* at 241; *State v. Myers* (1990), 63 Ohio App.3d 765. "The officer may detain the vehicle for a period of time reasonably necessary to confirm or dispel his suspicions of criminal activity." *State v. Wynter* (Mar. 13, 1998), Miami App. No. 97 CA 36, 1998 WL 127092, *3; *United States v. Sharpe* (1985), 470 U.S. 675, 685-686, 105 S.Ct. 1568; *Myers* at 771. "Once the officer is satisfied that no criminal activity has occurred, then the vehicle's occupants must be

released." *Wynter* at *3.

{¶19} "In determining whether a detention is reasonable, the court must look at the totality of the circumstances." *State v. Matteucci*, Lake App. No. 2001-L-205, 2003-Ohio-702, ¶30. The totality of the circumstances approach "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *State v. Ulmer*, Scioto App. No. 09CA3283, 2010-Ohio-695, ¶23; *United States v. Arvizu* (2002), 534 U.S. 266, 273, 122 S.Ct. 744. Thus, when an appellate court reviews a police officer's reasonable suspicion determination, "the court must give 'due weight' to factual inferences drawn by resident judges and local law enforcement officers." *Ulmer* at ¶23; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657, 1663.

{¶20} In the case at bar, the trial court found that appellant's continued detention was based on specific articulable facts giving rise to a suspicion of some separate illegal activity that warranted an extension of the detention in order to implement a more in-depth investigation. See, e.g., *State v. Napier* (May 27, 1998), Medina App. No. 2671-M, 1998 WL 281368, *3. Specifically, prior to writing or issuing the littering citation, the officers developed a reasonable suspicion of further criminal conduct based on the following facts: (1) Amber Ross provided the officers with a false social security number; (2) the officers discovered that Ross had a felony warrant out for a drug-related probation violation; and (3) the other passenger, Derrick Harris, was known for his "past drug experience." Officer Baker testified that based on his training and experience, "anyone that has past drug experience, it's just a good possibility that there's * * * more into it with the narcotics." Further, Officer Russell testified that outstanding warrants for the possession of drugs are a "strong indicator" that drugs will be present at the scene.

{¶21} Based upon the officers' training and experience, plus the presence of two passengers with known drug histories and Ross' suspicious and evasive behavior, the officers in the case at bar were justified in detaining appellant and his companions for additional investigation, including the time it took to conduct the dog sniff. Further, the fact that the officers ultimately failed to issue a citation for littering is not important. The Ohio Supreme Court has stated that "the constitutionality of a prolonged traffic stop does not depend on the issuance of a citation." *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, ¶20-21. "The failure to issue a traffic citation when there is an indication of a potentially far more significant crime is easily excused when more pressing issues are being addressed." Id.

{¶22} Based upon our disposition of the first and second parts of appellant's assignment of error, we have already determined that the continued detention of appellant's vehicle and its occupants was lawful. Appellant's third argument concerns the drug dog sniff, which we find was legally conducted in the case at bar. This court has held that during a continued, lawful detention of a vehicle, officers are not required to have a reasonable, articulable suspicion of criminal activity in order to call in a canine unit to conduct a canine sniff on the vehicle. See, e.g., *State v. Feerer*, Warren App. No. CA2008-05-064, 2008-Ohio-6766, ¶10. "Because the 'exterior sniff by a trained narcotics dog is not a search within the meaning of the Fourth Amendment to the Constitution,' a canine sniff of a vehicle may be conducted even without the presence of such reasonable, articulable suspicion of criminal activity so long as it is conducted during the time period necessary to effectuate the original purpose of the stop." Id. See, also, *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637. "A drug sniffing dog used to detect the presence of illegal drugs in a lawfully detained vehicle does not violate a reasonable expectation of privacy and is not a search under the Ohio

Constitution." *State v. Waldroup* (1995), 100 Ohio App.3d 508, 514.

{¶23} In the case at bar, the dog sniff was conducted approximately 12 minutes into the stop. In addition, Officer Baker testified that the initial purpose of the stop was "still ongoing," albeit interrupted, because Baker had yet to determine whether an officer could cite a driver for a passenger's littering violation under R.C. 4511.82. Under these circumstances, the dog sniff did not unreasonably extend the stop. See *Batchili*, 2007-Ohio-2204 at ¶13 (drug dog alerted eight minutes and 56 seconds into the stop, which did not make the stop "constitutionally dubious"); *State v. Forbes*, Preble App. No. CA2007-01-001, 2007-Ohio-6412 (dog sniff conducted 11 minutes into the stop did not unreasonably prolong the stop); *Bell*, 2002-Ohio-561 (cocaine found in vehicle when a drug dog alerted on the trunk 14 minutes after the stop, which did not prolong the detention any longer than necessary to effectuate the purpose of the stop); *Matteucci*, 2003-Ohio-702 at ¶35 (waiting seven minutes for a canine unit to arrive on the scene did not infringe upon defendant's rights); *State v. Kilgore* (June 28, 1999), Butler App. No. CA98-09-201 (waiting on a drug dog for five minutes was reasonable).

{¶24} Based upon the aforementioned facts and the totality of the circumstances known to the officers, there existed sufficient reasonable articulable suspicion to permit the officers to continue the investigation for the time it took Officer Hopkins to bring the drug dog on the scene and walk it around the vehicle. See *Napier*, 1998 WL 281368 at *3. Once the dog alerted on the vehicle, the officers had sufficient probable cause to justify a full-scale search of the vehicle. *Bell* at 2; *Howard*, 2006-Ohio-5656 at ¶17; *Batchili,* 2007-Ohio-2204; *Matteucci*, 2003-Ohio-702 at ¶36.

{¶25} Based on the foregoing analysis, appellant's single assignment of error is without merit. Accordingly, the judgment of the trial court is affirmed.

POWELL and HENDRICKSON, JJ., concur.