[Cite as *State v. Grenoble*, 2011-Ohio-2343.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-09-011
	:	O P I N I O N
- vs -		5/16/2011
	:	
DEAN O. GRENOBLE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 09-CR-10345

Martin P. Votel, Preble County Prosecuting Attorney, Eric E. Marit, Courthouse, 101 East Main Street, Eaton, Ohio 45320, for plaintiff-appellee

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PIPER, J.

{¶1} Defendant-appellant, Dean O. Grenoble, appeals the decision of the Preble County Court of Common Pleas, denying his motion to suppress and sentencing him to a mandatory term of imprisonment following his convictions for possession of marijuana and possession of criminal tools.

{¶2} On August 13, 2009, appellant was traveling on Interstate 70 in Preble County in a pickup truck, and passed Ohio State Highway Patrol Trooper Larry Richard Barrett

driving well under the posted speed limit. Trooper Barrett noticed that appellant exhibited an unusual demeanor and driving mannerisms, and began to follow the truck. After Trooper Barrett observed appellant commit a series of marked lane violations, he initiated a traffic stop.

{¶3} Trooper Barrett approached appellant's truck and noted appellant acting extremely nervous as he provided his license and vehicle registration. When Trooper Barrett asked appellant about the marked lane violations, appellant responded that he may have been preoccupied. Within three to four minutes after the stop, Trooper Barrett requested assistance from Trooper Shawn Simms and initiated a check of appellant's driver's license and criminal history, and provided *Miranda* warnings. There is some dispute as to the time Trooper Simms arrived, but Trooper Simms arrived within three to 17 minutes after Trooper Barrett's request. Upon his arrival, Trooper Simms walked a canine around the truck and the canine alerted, indicating the presence of narcotics inside the truck. Trooper Barrett then asked appellant if there were drugs in the truck, and appellant admitted that there was a small amount of personal use marijuana in the front seat. Also, after the canine alerted, Trooper Barrett's license and criminal history check revealed that appellant had previously committed criminal drug offenses. The troopers searched the truck and found a small amount of green plant material that they suspected to be marijuana in the front seat, and two large bales of the material in the bed of the truck wrapped in contact paper. The troopers conducted a field test, which confirmed that the material was marijuana. In addition, the troopers found a roll of contact paper in appellant's suitcase. The troopers then arrested appellant.

{¶4} Appellant was charged with one count of possession of marijuana in violation of R.C. 2925.11(A)(C)(3)(f), a felony of the second degree, because the amount of drug involved exceeds 20,000 grams (Count 1), and one count of possession of criminal tools in

violation of R.C. 2923.24(A), a felony of the fifth degree, because the instrument involved in the offense was intended for use in the commission of a felony (Count 2).

{¶5} Appellant moved to suppress the observations of Trooper Barrett after initiating the traffic stop and statements appellant made after the stop. The trial court held a hearing on appellant's motion and overruled it. After a bench trial, appellant was convicted of both counts and sentenced to a mandatory term of incarceration of eight years on Count 1 and a term of incarceration of 12 months on Count 2, with the sentences to be served consecutively.

{¶6} Appellant appeals his convictions and sentence, and raises three assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "ONE MARKED LANE VIOLATION, WHEREBY THE TIRE CROSSES OVER THE MARKED LANE BY LESS THAN A TIRE'S WIDTH, IS INSUFFICIENT REASONABLE SUSPICION TO INITIATE A TRAFFIC STOP."

{¶9} In his first assignment of error, appellant argues that Trooper Barrett improperly stopped him. Appellant maintains that a single marked lane violation is not sufficient reasonable suspicion to initiate a traffic stop.

{¶10} An appellate court's review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. When considering a motion to suppress, the trial court assumes the role of the trier of fact and is therefore in the best position to resolve factual questions and evaluate witness credibility. *State v. Curry* (1994), 95 Ohio App.3d 93, 96. As such, we accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. However, an appellate court independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the

trial court's decision, "whether as a matter of law, the facts meet the appropriate legal standard." *Curry* at 96.

{¶11} "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." *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, syllabus.

{¶12} If an officer's decision to stop a motorist for a criminal violation, including a traffic violation, is prompted by a reasonable and articulable suspicion considering all of the circumstances, the stop is constitutionally valid. *State v. Evans*, Warren App. No. CA2009-08-116, 2010-Ohio-4402, ¶9, citing *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, ¶8.

{¶13} R.C. 4511.33 provides, in relevant part, that:

{¶14} "(A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:

{¶15} "(1) A vehicle * * * shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety."

{¶16} Appellant is misguided in his assertion that one marked lane violation is an insufficient basis for an officer to stop a motorist. In *Mays* at ¶16, the Ohio Supreme Court unequivocally stated, "[w]hen an officer observes a vehicle drifting back-and-forth across an edge line, the officer has a reasonable and articulable suspicion that the driver has violated R.C. 4511.33."

{¶17} The *Mays* court further stated at ¶17-18:

{¶18} "R.C. 4511.33 does provide for certain circumstances in which a driver can

cross a lane line without violating the statute. However, the question of whether appellant might have a possible defense to a charge of violating R.C. 4511.33 is irrelevant in our analysis of whether an officer has a reasonable and articulable suspicion to initiate a traffic stop. An officer is not required to determine whether someone who has been observed committing a crime might have a legal defense to the charge.

{¶19} "R.C. 4511.33(A)(1) provides that a driver must remain within the lane markings 'as nearly as is practicable' and that a driver shall not move from a lane 'until the driver has first ascertained that such movement can be made with safety.' The phrase 'as nearly as is practicable' does not give the driver the option to remain within the lane markings; rather, the phrase requires the driver to remain within the lane markings unless the driver cannot reasonably avoid straying."

{¶20} In addition, we note that appellant incorrectly argues that this court has issued decisions that do not comport with *Mays*. In support of this contention, appellant claims this court made statements in *State v. Graham*, Warren App. No. CA2008-07-095, 2009-Ohio-2814, that indicate this court relied upon the appellant's erratic, unsafe driving as the basis for the stop rather than the marked lane violation.

{¶21} However, appellant misconstrues this court's decision in *Graham*. In *Graham* at ¶18-19, we stated, "[the law enforcement officer] began following Graham and observed the van drifting over the marked center-line and then back into the original travel lane. Based on [the officer's] testimony, the court had competent and credible evidence that after nearly causing an accident with the semi-truck, Graham's van drifted over the marked lane lines, and then drifted back into the original travel lane. Because Graham's unsafe driving constituted a violation of R.C. 4511.33, Lewis had the requisite suspicion or probable cause to initiate the traffic stop." Our usage of the phrase "unsafe driving" in this context is a reference to this particular defendant's act of committing a marked lane violation. Id.

Therefore, this court found, in accordance with *Mays*, that the basis for the officer's stop was the marked lane violation. Id.

{¶22} At the suppression hearing, Trooper Barrett testified that as appellant passed him, he observed that appellant was driving under the posted speed limit and that his demeanor and driving mannerisms were unusual. Trooper Barrett further testified that as he followed appellant on Interstate 70, a four-lane highway, he observed appellant drive "across the center hash line from the right lane slightly into the left passing lane by about a tire's width, [and then he] re-entered the right lane. [He] then drove across the white fog line on two occasions, each time by about half a tire's width [, n]ot all the way onto the rumble strips, but nearly onto the rumble strips. [He] then re-entered the right lane abruptly. At that particular point in time there was no traffic around the vehicle to force it outside of its lane and no turn signals were utilized during that maneuver. So I conducted a traffic stop[.]"

{¶23} Based on Trooper Barrett's testimony, we find that he had reasonable, articulable suspicion that appellant violated R.C. 4511.33 and that he initiated a lawful traffic stop after observing appellant commit multiple marked lane violations. Accordingly, appellant's first assignment of error is overruled.

{¶24} Assignment of Error No. 2:

{¶25} "DELAYING A TRAFFIC STOP FOR NEARLY AN HOUR, WHEN THE STOP SHOULD HAVE TAKEN NO MORE THAN TWENTY-FIVE MINUTES, WAS UNREASONABLE WHEN BASED SOLELY ON APPELLANT'S NERVOUSNESS."

{¶26} In his second assignment of error, appellant argues he was improperly delayed after Trooper Barrett stopped his vehicle. Appellant contends this delay was unconstitutional because the duration of the stop was much longer than the purpose for the stop, and lacked reasonable suspicion to justify this delay.

{¶27} In conducting a stop of a motor vehicle for a traffic violation, an "officer may

detain an automobile for a time sufficient to investigate the reasonable, articulable suspicion for which the vehicle was initially stopped." *State v. Cahill*, Shelby App. No. 17-01-19, 2002-Ohio-4459, at ¶21, citing *State v. Smith* (1996), 117 Ohio App.3d 278, 285. However, an investigative stop may last no longer than is necessary to effectuate the purpose of the stop. *State v. Venham* (1994), 96 Ohio App.3d 649, 655; *Florida v. Royer* (1983), 460 U.S. 491, 103 S.Ct. 1319.

{¶28} Thus, 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. *State v. Keathley* (1988), 55 Ohio App.3d 130, 131. This time period also includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates. *State v. Bolden*, Preble App. No. CA2003-03-007, 2004-Ohio-184, ¶17, citing *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." *State v. Carlson* (1995), 102 Ohio App.3d 585, 598-599, citing *State v. Cook* (1992), 65 Ohio St.3d 516, 521-522; and *United States v. Sharpe* (1985), 470 U.S. 675, 105 S.Ct. 1568.

{¶29} However, the detention of a stopped driver may continue beyond this time frame when additional facts are encountered that give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop. *State v. Myers* (1990), 63 Ohio App.3d 765, 771; *Venham*, 96 Ohio App.3d at 655.

{¶30} In addition, a lawfully detained vehicle may be subjected to a canine sniff of the vehicle's exterior even without the presence of a reasonable suspicion of drug-related activity. *State v. Rusnak* (1997), 120 Ohio App.3d 24, 28. Both Ohio courts and the United States Supreme Court have determined that "the exterior sniff by a trained narcotics dog to

detect the odor of drugs is not a search within the meaning of the Fourth Amendment to the Constitution." Id.; *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637. Thus, a canine sniff of a vehicle may be conducted during the time period necessary to effectuate the original purpose of the stop. Moreover, if a trained narcotics dog "alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband." *Cahill*, 2002-Ohio-4459 at ¶22.

{¶31} Initially, we note that appellant failed to raise this issue before the trial court, either in his motion to suppress or in his post-hearing memorandum. It is well-settled that generally, a party is not permitted to raise issues or arguments on appeal that the party failed to raise in the trial court at a time when the trial court could have corrected the alleged error or avoided it altogether. See, e.g., *State v. Abney*, Warren App. No. CA2004-02-018, 2005-Ohio-146, ¶17, *citing State v. Awan* (1986), 22 Ohio St.3d 120, 122, and *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus.

{¶32} Nevertheless, we find Trooper Barrett did not detain appellant for an unreasonable amount of time. Contrary to appellant's claim, it was not just appellant's nervousness that gave Trooper Barrett reasonable, articulable suspicion of additional criminal activity. In addition to appellant's nervousness, once the canine alerted, Trooper Barrett had additional facts that gave rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop. See *Myers*, 63 Ohio App.3d at 771; *Venham*, 96 Ohio App.3d at 655. After independently reviewing the audio/video recording from Trooper Barrett's cruiser camera, we note the canine sniff took place less than nine minutes into the stop, and this occurred before Trooper Barrett received the results of the license and criminal background check that the trooper had already initiated. Given that these events took place within nine minutes after the traffic stop, and appellant even states in his brief that a traffic ticket can generally be written within 25 minutes, we find that appellant was not detained for

longer than necessary to investigate the reasonable, articulable suspicion of the marked lane violation, and that appellant was not detained longer than constitutionally permitted. See, e.g., *Bolden*, 2004-Ohio-184 (canine sniff 23 minutes after traffic stop was not unconstitutional); *State v. Beltran*, Preble App. No. CA2004-11-015, 2005-Ohio-4194 (canine sniff 42 minutes after traffic stop was not unconstitutional); *State v. Cochran*, Preble App. No. CA2006-10-023, 2007-Ohio-3358 (canine sniff 28 minutes after traffic stop was not unconstitutional). Accordingly, appellant's second assignment of error is overruled.

{¶33} Assignment of Error No. 3:

{¶34} "IMPOSITION OF A MANDATORY TERM OF IMPRISONMENT VIOLATED THE SEPARATION OF POWERS DOCTRINE."

{¶35} In his third assignment of error, appellant argues that his mandatory term of imprisonment following his convictions violates the Separation of Powers Doctrine requirements of the United States and Ohio Constitutions.

{¶36} "Ohio courts have continually held that mandatory sentencing legislation does not violate the separation of powers doctrine and we will not stray from that controlling precedent." *Graham*, 2009-Ohio-2814, ¶80, citing *State v. Thompkins*, 75 Ohio St.3d 558, 1996-Ohio-264; *State v. Waldo*, Clermont App. No. CA2008-02-015, 2008-Ohio-4167; and *State v. Rosado*, Cuyahoga App. No. 88504, 2007-Ohio-2782. Accordingly, appellant's third assignment of error is overruled.

{¶37} Judgment affirmed.

HENDRICKSON, P.J., and HUTZEL, J., concur.

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