[Cite as *State v. Nelson*, 2009-Ohio-2546.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22718
v.	:	T.C. NO. 2007 CR 4130
BLAINE T. NELSON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 29th day of May, 2009.

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FROELICH, J.

{¶ 1} Blaine Nelson pled no contest in the Montgomery County Court of Common Pleas to improperly handling a firearm in a motor vehicle, in violation of R.C. 2923.16(B), a fourth-degree felony, after the trial court overruled, in part, his motion to suppress evidence. The trial court sentenced him accordingly.

{¶ 2} Nelson appeals from his conviction, arguing that the trial court erred in denying a portion of his motion to suppress. For the following reasons, trial court's judgment will be affirmed.

I

{¶ 3} The State's evidence at the suppression hearing established the following facts.

{¶ 4} Shortly before 1:00 a.m. on October 5, 2007, Officer Matthew Steffano, a four-year veteran of the Jackson Township Police Department, was in uniform and driving in a marked cruiser when he observed a gold, four-door Pontiac proceeding along South Clayton Road from the vicinity of an apartment complex located in the Village of New Lebanon, Ohio. The apartment complex has a reputation as a high crime area, with drugs and weapons being a problem in that area.

{¶ 5} South Clayton Road is a hilly, two-lane road in an unlit rural area. On October 5, the pavement was dry, and the temperature was normal for an early October evening. Steffano was wearing a long-sleeved uniform.

{¶ 6} Steffano drove behind the vehicle for approximately one-half to a full mile. During that time, Steffano observed the vehicle drive over the right shoulder lane line, coming close to a mailbox. Based on the observation, at 12:57 a.m., Steffano activated his emergency lights and initiated a traffic stop. Steffano testified that he was concerned about the vehicle possibly being operated by someone driving while impaired by drugs or alcohol.

{¶ 7} Steffano ran the vehicle's plates and learned that it was owned by Laura Knipfer. Steffano then approached the vehicle's driver, who identified himself as Blaine

Nelson. A woman was seated in the passenger seat; she identified herself as Laura Knipfer, the vehicle's owner and Nelson's girlfriend.

{¶ 8} As Steffano spoke with Nelson, he noticed that Nelson appeared "very nervous" and was "sweating." When Steffano asked where they were going, Nelson stated he was driving to 9 Maeder Street in the Drexel neighborhood near Dayton, which was Knipfer's residential address. However, the vehicle was not traveling a route that would lead to that address. Instead, the vehicle was traveling toward Farmersville, Ohio. When Steffano asked Nelson what road he was on, Nelson replied, incorrectly, that he was on South Diamond Mill Road. (South Clayton Road is west of and runs parallel to South Diamond Mill Road.) Steffano did not note any indication of drug or alcohol usage by the vehicle's occupants.

{¶ 9} Steffano returned to his cruiser with Nelson's and Knipfer's driver's licenses "to check the occupants of the vehicle out." Concerned about Nelson's behavior and the answers that he had provided, Steffano also requested assistance from the New Lebanon police department for his safety. (Steffano explained that he was the only on-duty patrol officer for Jackson Township at the time.) Steffano waited for back-up in his cruiser, and the vehicle's occupants remained in their car; Steffano took no steps to process the traffic ticket while they waited.

{¶ 10} At 1:03 a.m., Officer James Chambers of the New Lebanon police department, an officer with eight years of experience, received the call for back-up, and he responded to the request a couple of minutes later. Upon arriving, Steffano informed Chambers that he had seen the car leave the South Clayton Apartments, that he had pulled the vehicle over due to its crossing the right shoulder lane line, and that

he requested assistance because the driver was acting extremely nervous. Chambers then approached the driver's side of the vehicle to talk with Nelson, and Steffano approached on the passenger side to speak with Knipfer. Steffano hoped to get Knipfer's consent to search the vehicle.

{¶ 11} In speaking with Nelson, Chambers also observed Nelson acting extraordinarily nervous. Nelson was sweating profusely, his eyes appeared glassy, and he was shaking. Nelson's shaking caused him to drop the cigarette he was smoking onto the floor board of the car. Chambers asked Nelson if he would mind speaking to him (Chambers) outside of the vehicle, and Nelson agreed. Nelson retrieved his cigarette and the two spoke by the trunk of the car. When Chambers asked about Nelson's travel plans, Chambers also believed that Nelson's stated travel route made no sense, as he was not heading in the intended direction.

{¶ 12} Nelson's nervous behavior, in turn, caused Chambers to be concerned about the officers' safety. Chambers asked Nelson for permission to conduct a pat down for officer safety. Nelson agreed. Chambers noticed a bulge appearing under Nelson's hooded sweatshirt in the vicinity of his left armpit. Chambers had Nelson place his hands on the trunk of the car. When he patted Nelson down, Chambers felt what he believed to be a semi-soft gun holster under Nelson's left arm, with no gun present. Chambers announced, "gun holster, no gun," to Steffano. Chambers asked Nelson where the gun was located. Nelson responded that it was in the car between the seats.

{¶ 13} Chambers handcuffed Nelson and gave him to Steffano to place in his cruiser. Before placing Nelson in the cruiser, Steffano also patted down Nelson and felt

a shoulder holster beneath Nelson's left armpit. During this time, Knipfer stood with her hands on the front of the cruiser.

{¶ 14} As Steffano placed Nelson in his cruiser, Chambers kneeled onto the driver's seat of the vehicle and saw, in plain sight, the handle of a gun between the driver and passenger seats. Chambers retrieved a .357 Smith and Wesson revolver, fully loaded. Chambers unloaded the gun, and placed it on the roof of the vehicle for photographs.

{¶ 15} Chambers returned to Steffano's cruiser to ask Nelson whether he held a permit to carry a concealed weapon ("CCW"). Nelson stated that he did not have a CCW permit, he acknowledged that the gun was his, and he explained that he carried the gun "because Drexel isn't safe and there's some people that don't like him." The officers retrieved the gun holster from Nelson. At no time was Nelson advised of his *Miranda* rights. Steffano and Chambers indicated that Nelson was cooperative throughout the encounter.

{¶ 16} After Chambers retrieved the weapon, Steffano obtained Knipfer's consent to search the vehicle. A small amount of marijuana was found.

{¶ 17} Although Officer Steffano did not recall writing Nelson a citation for crossing the right shoulder lane line, Chambers testified that he had advised Steffano to do so, and that a citation, with a citation reference number, appears in the police report for the incident. Chambers photographed the gun and gave the gun and a disk of the photos to Steffano. Nelson was arrested and transported to the Montgomery County Jail. Knipfer was permitted to leave the scene in her vehicle.

{¶ 18} There was no testimony regarding the overall duration of the traffic stop,

nor was there any evidence regarding the amount of time that had passed between Chambers' arrival and his request to conduct a patdown of Nelson for weapons.[1]

II

{¶ 19} On October 30, 2007, Nelson was indicted with carrying a concealed weapon, in violation of R.C. 2923.12(A)(2), and improperly handling a firearm in a motor vehicle, in violation of R.C. 2923.16(B). Nelson subsequently moved to suppress the items seized during the traffic stop and any statements that he made. He claimed that the evidence obtained was the product of an unlawful search and seizure, that the police officers failed to advise him of his *Miranda* rights, and that his statements resulted from "unlawful coercive efforts of custodial interrogation." At the conclusion of the hearing on the motion, the State conceded that Nelson's admission that he owned the gun should be suppressed. However, it asserted that Nelson was properly detained and that the gun and the holster were properly seized.

{¶ 20} On February 6, 2008, the trial court granted in part and overruled in part the motion to suppress. The court suppressed the statements made by Nelson in the

[1]Steffano's police report indicates that Nelson was arrested at 1:12 a.m. Based on this representation, the length of time between the stop of Nelson's vehicle and his arrest would have been approximately 15 minutes, which is within the reasonable period of time for processing a traffic ticket. E.g., *State v. Hisel*, Montgomery App. No. 21706, 2007-Ohio-3808 (search of defendant's vehicle 20 minutes after the initial stop and while officer was still writing ticket was during the period of time reasonably required to process the traffic violations). Steffano's and Chambers' police reports are in the record as Court's Exhibit 1. (During closing argument, the State stated that it would "like to make it an exhibit and the Court can look at it," apparently for the purpose of reviewing Steffano's statement in his report that he had issued traffic ticket 027062 to Nelson.) However, the trial court did not state that it was admitting the reports into evidence, and we find no suggestion that the trial court considered the officers' reports in rendering its decision. Accordingly, we will not rely on Steffano's police report in determining whether Nelson's detention was prolonged beyond the time necessary to complete a ticket for the marked lanes violation.

back of the cruiser, namely his admissions that he owned the gun, that he did not have a valid CCW permit, and his reasons for carrying the gun. The trial court overruled the motion to the extent that it sought to suppress the gun and the holster.

{¶ 21} In overruling, in part, Nelson's motion, the trial court initially determined that Steffano had "adequate probable cause to stop the vehicle and conduct an investigation" based on his observation that Nelson drove over the right lane line and appeared to come close to hitting a mailbox. The court thus concluded that the initial traffic stop was justified.

{¶ 22} The trial court next determined that Steffano had a reasonable and articulable basis to suspect criminal activity, justifying further detention and a more in-depth investigation based on (1) the vehicle coming from a high crime area; (2) the driver appearing unusually nervous as manifested by shaking and sweating, with no weather-related reason for such behavior; (3) Nelson's incorrect identification of the street that he was on; and (4) Nelson's travel route being inconsistent with the observed path of travel. Steffano then called for back-up due to his reasonable belief that further investigation was appropriate.

{¶ 23} The trial court next found that Nelson's unusual nervousness made Chambers concerned for his safety and that ordering Nelson to exit the vehicle to protect his safety was appropriate. Considering Nelson's behavior along with the fact that Chambers observed a bulge under Nelson's arm that was consistent with a gun holster, the court determined that Chambers had a reasonable and articulable basis to fear for his safety, thus justifying a patdown for weapons. The court further recognized that Nelson had consented to the patdown for weapons, which resulted in the discovery

of the empty gun holster.

{¶ 24} The court noted that Steffano had testified that Knipfer had consented to the search of her vehicle. Even if consent had not been given, the court found a reasonable basis to search the automobile for the gun based on the discovery of the empty holster and Nelson's other suspicious behavior. Upon entering the vehicle, the gun was in plain view. The court thus denied Nelson's motion to suppress the evidence seized during the traffic stop.

{¶ 25} As stated above, Nelson subsequently pled no contest to improper handling of a firearm. The State dismissed the carrying a concealed weapon charge.

III

{¶ 26} In his sole assignment of error, Nelson claims that the trial court erred in failing to grant his motion to suppress in its entirety. Nelson argues that Steffano unlawfully prolonged his detention and went beyond the scope of a routine traffic stop.

{¶ 27} The State responds that the police officer had a reasonable and articulable suspicion that Nelson committed a violation of R.C. 4511.33(A)(1), a traffic offense, to justify the stop of the vehicle. The State argues that, upon stopping the vehicle, the officers had a reasonable and articulable suspicion that Nelson was engaged in criminal activity based on his behavior and the answers that he provided, such that Nelson's continued detention was warranted. The State further claims that "the frisk of Nelson was supported by articulable facts and circumstances giving rise to a reasonable fear for the officers' safety" and that the automobile exception permitted Chambers to enter the car and retrieve the gun.

{¶ 28} In reviewing the trial court's ruling on a motion to suppress evidence, this

court must accept the findings of fact made by the trial court if they are supported by competent, credible evidence. See *State v. Morgan*, Montgomery App. No. 18985, 2002-Ohio-268. However, "the reviewing court must independently determine, as a matter of law, whether the facts meet the appropriate legal standard." Id.

{¶ 29} The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution protect individuals from unreasonable searches and seizures. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. A traffic stop by a law-enforcement officer must comply with the Fourth Amendment's reasonableness requirement. *Whren v. United States* (1996), 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89.

{¶ 30} We agree with the State that Steffano lawfully stopped the car based on his observation of a marked lane violation. A police officer may stop and detain a motorist when he has a reasonable and articulable suspicion that a motorist has committed, is committing, or is about to commit any criminal offense, including a traffic offense, and no independent reasonable and articulable suspicion of other criminal activity is required under *Terry*. *State v. Stewart*, Montgomery App. No. 19961, 2004-Ohio-1319, at ¶13; *Dayton v. Erickson* (1996), 76 Ohio St.3d 3. We determine the existence of reasonable suspicion by evaluating the totality of the circumstances, considering those circumstances "through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Heard*, Montgomery App. No. 19323, 2003-Ohio-1047.

{¶ 31} R.C. 4511.33 provides: "(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: (1) A vehicle or trackless trolley 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."

{¶ 32} A police officer who witnesses a motorist cross the lane markings in violation of R.C. 4511.33 may make a constitutional stop of the motorist, even without evidence of erratic or unsafe driving. *State v. Mays* (2008), 119 Ohio St.3d 406, 2008-Ohio-4539, at syllabus. See, also, *State v. Clark*, Darke App. No. 1733, 2009-Ohio-529 (discussing *Mays* at length). The supreme court stated: "R.C. 4511.33 requires a driver to drive a vehicle entirely within a single lane of traffic. When 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." *Mays* at ¶16.

{¶ 33} The supreme court further explained that the phrase "as nearly as is practicable" requires the driver to remain within the lane markings unless the driver cannot reasonably avoid straying. Id. at ¶18. In determining whether the officer had a reasonable and articublable suspicion that a marked lane violation occurred, the question of whether the motorist might have a possible defense to a charge of violating R.C. 4511.33 is irrelevant. Id. at ¶17. The supreme court's conclusion comports with the existing authority in this district, which holds that evidence of a defendant's marked lane violation establishes reasonable suspicion or probable cause for a traffic stop. See, e.g., *State v. McEldowney*, Clark App. No. 06-CA-138, 2007-Ohio-6690; *State v. Schwieterman*, Darke App. No. 1588, 2003-Ohio-615; *State v. Yslas*, 173 Ohio App.3d

396, 2007-Ohio-5646.

{¶ 34} Steffano testified that Nelson "drove off the right side of the road and crossed over the white line, and almost struck a mailbox." On cross-examination, Steffano clarified that the vehicle did not leave the pavement, but the vehicle went over the white edge lines, which are approximately twelve inches from the edge of the pavement. Based on the officer's testimony, Steffano had a reasonable and articulable suspicion that Nelson, the driver of the vehicle, had violated R.C. 4511.33. Accordingly, Steffano lawfully initiated the traffic stop for the marked lane violation.

{¶ 35} Nelson next argues that the stop of the vehicle was unreasonably prolonged, resulting in an unlawful search of his person and of the vehicle. He states: "The Officer testified that based on the time of day, he felt the driver may be impaired. Upon seeing no indications that the Appellant was under the influence, the Officer should have wrote [sic] the citation and let the Appellant go. The waiting for the second officer to arrive, patting down of the Appellant, and search of the vehicle was a prolonged detention and not within the scope of a traffic stop." We disagree.

{¶ 36} A traffic stop may last no longer than is necessary to resolve the issue that led to the original stop, absent some specific and articulable facts that further detention was reasonable. *State v. Chatton* (1984), 11 Ohio St.3d 59; *State v. Wilkins*, Montgomery App. No. 20152, 2004-Ohio-3917, at ¶10. "When a law enforcement officer stops a vehicle for a traffic violation, the officer may detain the motorist for a period of time sufficient to issue the motorist a citation and to perform routine procedures such as a computer check on the motorist's driver's license, registration and vehicle plates. '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.'" *Wilkins* at ¶10, quoting *State v. Aguirre*, Gallia App. 03CA5; *State v. Ramos*, 155 Ohio App.3d 396, 2003-Ohio-6535.

{¶ 37} Once the reasonable period of time for issuing the traffic citation has passed, a police officer must have a reasonable articulable suspicion of criminal activity in order to continue the detention. *Wilkins* at ¶11. As explained by the Supreme Court of Ohio: "When a police officer's objective justification to continue detention of a person stopped for a traffic violation for the purpose of searching the person's vehicle is not related to the purpose of the original stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some illegal activity justifying an extension of the detention, the continued detention to conduct a search constitutes an illegal seizure." *State v. Robinette*, 80 Ohio St.3d 234, 1997-Ohio-343 (paragraph one of the syllabus). See, also, *Mays* at ¶13-14; *Wilkins* at ¶11.

{¶ 38} At the suppression hearing, Steffano stated that, when he initiated the traffic stop, he had concerns that the driver might be impaired by alcohol or drugs. When he spoke with Nelson upon approaching the vehicle, he found no indications that Nelson was impaired. However, he noticed that Nelson was acting excessively nervous and was sweating, even though it was an October night. When asked about where he was heading, Nelson's response did not comport with his travel route, and Nelson did not provide the correct name of the road on which he was driving. Based on Nelson's behavior, his responses to Steffano's questions, and their presence on an unlit rural road late at night, Steffano acted reasonably when he requested assistance from the

New Lebanon police department.

{¶ 39} The delay occasioned by Steffano's request for back-up was minimal and did not unreasonably prolong the traffic stop. Steffano testified that he initiated the traffic stop at 12:57 a.m., and Chambers testified that he received the call for assistance at approximately 1:03 a.m. According to Steffano, Chambers arrived "only a couple of minutes" later.

{¶ 40} Although the hearing testimony did not establish whether the reasonable period of time for issuing a traffic ticket had elapsed, we agree with the State that Steffano had a reasonable and articulable suspicion of criminal activity other than the traffic violation, which made Nelson's continued detention reasonable. Nelson's vehicle had been observed coming from a high crime area known for drugs and weapons. Upon being stopped, Nelson acted excessively nervous and he was sweating, which was not warranted by the weather conditions. After Chambers' arrival, Nelson continued to act nervous, his eyes appeared glassy, and he was visibly shaking, so much so that he dropped his cigarette onto the floorboard of the car. Nelson could not correctly identify the road upon which he was traveling, and he stated that he was heading toward his girlfriend's address in Drexel, although his route would not take him in that direction. On this record, Nelson's continued detention was justified by a reasonable suspicion of criminal activity, and Nelson's Fourth Amendment rights were not violated by his detention. See *Yslas*, supra (concluding that defendant's continued detention during traffic stop was justified by, among other factors, occupant's nervousness, shaking, failure to make eye contact, and inconsistent statements regarding travel plans).

{¶ 41} After a brief conversation during which Chambers observed Nelson's nervous behavior, Chambers asked Nelson if he "would mind speaking to me outside the car for a second." Chambers testified that Nelson consented to step out of the vehicle and speak with him and that Nelson "was completely cooperative the whole time." Due to Nelson's consent, Chambers' conversation with Nelson outside of the vehicle was lawful. Even if Nelson had not consented, it is well-established that, during the course of a lawful traffic stop, law enforcement officers are authorized to remove the occupants from the vehicle. *Maryland v. Wilson* (1997), 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41; *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331.

{¶ 42} Nelson next claims that Chambers' patdown for weapons was unlawful. Once a lawful stop has been made, the police may conduct a limited protective search for concealed weapons if the officers reasonably believe that the suspect may be armed or a danger to the officers or to others. *State v. Molette*, Montgomery App. No. 19694, 2003-Ohio-5965, ¶13. To justify a pat-down under *Terry*, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. However, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27; *State v. Smith* (1978), 56 Ohio St.2d 405, 407.

{¶ 43} Chambers testified that, although Nelson was completely cooperative, Nelson's extreme nervousness and the answers to the officer's questions made him

(Chambers) fear for his safety. Regardless, Chambers further testified: "I asked Mr. Nelson if he would mind if I'd pat him down real quick for officer safety. *** Mr. Nelson agreed to it, no problem." The trial court credited Chambers' unrefuted testimony that Nelson had consented to the protective patdown. Based on Nelson's consent, the officer's patdown for weapons was lawful.

{¶ 44} Having located an empty gun holster under Nelson's clothing, Chambers was entitled to inquire, for his own safety, where the gun was located. We note that Chambers testified that Nelson was still standing with his hands on the back of the Pontiac when he was asked about the location of the gun, and it appears that he was not yet in custody.

{¶ 45} Even if Nelson had been in custody, Chambers would have been entitled under the "public safety" exception to the *Miranda* rule to ask Nelson about the whereabouts of the gun. "The public safety exception allows the police, under certain circumstances, to temporarily forgo advising a suspect of his *Miranda* rights in order to ask questions necessary to securing their own immediate safety or the public's safety." *State v. Strozier*, 172 Ohio App.3d 780, 2007-Ohio-4575, at ¶23, quoting *State v. Santiago* (Mar. 13, 2002), Lorain App. No. 01 CA 7798. "In order to establish that the exception is warranted in any given case, the State must show that: (1) there was an *objectively* reasonable need to protect the police or the public, (2) from an *immediate* danger, (3) associated with a weapon, and that (4) the questions asked were related to that danger and reasonably necessary to secure public safety." *State v. Jergens* (Sept. 3, 1993), Montgomery App. No. 13294 (Emphasis in original); *Strozier* at ¶25. By locating an empty holster on Nelson, particularly in light of Nelson's extremely nervous

behavior, Chambers had an objectively reasonable belief that a gun posed an immediate danger to him and to Steffano, and his question to Nelson about the location of the gun was narrowly focused to allow him to find the gun and to lessen that danger.

{¶ 46} Finally, once Nelson indicated that the gun was located in the vehicle between the seats, the officers were entitled to search the car and retrieve the weapon under the Fourth Amendment's automobile exception. *United States v. Ross* (1982), 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572. "The basic tenets of the 'automobile exception' are the area searched must be a vehicle, that there is probable cause to believe it contains evidence of crime, the vehicle is mobile, and any area or container for which probable cause exists may be searched immediately." *State v. Dixon*, Montgomery App. No. 22147, 2008-Ohio-1978, ¶11. Nelson's statement gave Chambers probable cause to believe that the vehicle contained a firearm that was unlawfully "accessible to the operator or any passenger without leaving the vehicle," contrary to R.C. 2923.16(B). In addition, because Nelson had not informed the officers that he had a CCW permit, as he would have been required to do if he had such a permit, see R.C. 2923.12(B)(1), the officers had probable cause to believe that the gun was evidence of a carrying a concealed weapon violation. Accordingly, Chambers was justified in conducting a warrantless search of the vehicle based on probable cause that the vehicle contained evidence of a crime.

{¶ 47} Moreover, under the totality of these circumstances, the officers were entitled to conduct a protective search of the vehicle for Nelson's gun in order to ensure their safety. See *Michigan v. Long* (1983), 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201. At the time of looking in the vehicle, the officers lacked probable cause to arrest

Nelson, and it was possible that Nelson, who was acting nervously and admitted to having a gun in the car, would return to the vehicle. The officers' testimony further suggested that they had no reason to suspect Knipfer of any offense at the time of the search and that she would be permitted to return to the vehicle. In fact, Knipfer did leave the scene in her car. Considering that, at the time of the search, it was likely that one, if not both, of the occupants would be permitted to return to the vehicle, Chambers acted reasonably when, out of a concern for the officers' safety, he looked into the car for Nelson's weapon prior to allowing any of the occupants to re-enter the car.

{¶ 48} Upon review of the record, the trial court properly denied Nelson's motion to suppress the evidence seized during the traffic stop.

{¶ 49} Nelson's assignment of error is overruled.

IV

{¶ 50} The judgment of the trial court will be affirmed.

. . . . . .

WOLFF, J., concurs.

GRADY J., concurring:

{¶ 51} Officer Steffano stopped Defendant's vehicle on probable cause of a traffic code violation. Therefore, the stop was constitutionally valid, *Dayton v. Erickson* 91996), 76 Ohio St.3d 3, and whether the officer had reasonable articulable suspicion of criminal activity to allow him to perform the stop is therefore a moot issue. Nevertheless, the scope and duration of the resulting detention ordinarily can be no longer than reasonably necessary to effectuate the purpose of the stop. *Florida v. Royer* (1983), 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229.

{¶ 52} Officer Steffano testified that Defendant's erratic driving had caused him to at first suspect that Defendant was under the influence of alcohol or drugs, but that his suspicion was resolved when he conversed with Defendant. Defendant argues that, after that, the officer should have issued a citation for the traffic stop and sent him on his way, and that "waiting for the second officer to arrive, patting down of the (Defendant), and the search of the vehicle was a prolonged detention and not within the scope of the traffic stop." (Brief, p.4).

{¶ 53} A traffic stop may reasonably be prolonged in relation to its purpose when facts and circumstances before the officer present a reasonable and articulable suspicion of other criminal activity. *State v. Yslas*, 173 Ohio App.3d 396, 2007-Ohio-5646. However, on this record, that was neither why Defendant's traffic stop was prolonged by the officer nor the reason on which the trial court relied to find that the stop was not unreasonably prolonged.

{¶ 54} The trial court found that Officer Steffano called for back-up assistance because he was alone and the driver of the vehicle, Defendant, was extremely nervous. The record indicates that Officer Chambers received the call or dispatch for assistance about six minutes after the stop was made, and that Officer Chambers arrived on the scene shortly after he got the call. The record also indicates that, consistent with his concerns, Officer Steffano did not question or otherwise have further contact with Defendant or his passenger until Officer Chambers arrived.

{¶ 55} The Supreme Court has acknowledged that "detentions involving suspects in vehicles are especially fraught with danger to police officers." *Michigan v. Long* (1983), 463 U.S. 1032, 1047, 103 S.Ct. 3469, 3480, 77 L.Ed.2d 1201. The stop in this

case took place shortly before 1:00 a.m., on a two-lane road in an unlit rural area. Two persons were in the vehicle that was stopped, a fact that "increases the possible sources of harm to the officer." *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 110, 99 S.Ct. 330, 54 L.Ed.2d 331. Defendant was cooperative, but he was extremely nervous.

{¶ 56} Another officer might have proceeded to issue a citation for the traffic violation. Nevertheless, and giving Officer Steffano the deference due to an officer on the scene, the record supports a finding that Officer Steffano did not act unreasonably in calling for back-up assistance from another officer. Protecting the safety of the officer and the persons he detains is among the law enforcement purposes to be served which determine whether, per *Florida v. Royer*, the duration of a detention was unreasonable. *United States v. Sharpe* (1985), 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605. The delay that resulted from Officer Steffano's call for assistance, like the order to step out of the vehicle approved in *Pennsylvania v. Mimms*, served a legitimate safety purpose, and its brief duration created but a minimal intrusion on Defendant's liberty interest under the totality of the facts and circumstances involved.

{¶ 57} When Officer Chambers arrived, he and Officer Steffano approached Defendant's vehicle and asked Defendant and his passenger to step outside. When they did, Officer Chambers asked Defendant for permission to perform a pat-down search. Defendant consented. The record offers no basis to find that the consent was not knowing or voluntary, or that it was the product of duress because the stop was unduly prolonged. The consent, being a waiver of Defendant's Fourth Amendment right, also relieved the State of any burden to show a reasonable and articulable suspicion that Defendant was armed and dangerous, which is required when a non-

consensual pat-down search is performed. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889.

{¶ 58} The pat-down revealed an empty gun holster beneath Defendant's sweatshirt. That discovery created a reasonable and articulable suspicion that Defendant had concealed a gun inside the passenger compartment of the vehicle from which he just emerged, and to which he would return after being served with a traffic citation. That discovery authorized the officers to search the passenger compartment for a gun. *Michigan v. Long*; accord, *Arizona v. Gant* (2009), ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 489, 498. The trial court did not err when the court denied Defendant's motion to suppress evidence of the gun police then found.

{¶ 59} Notwithstanding the reasons on which the trial court relied, the State, responding to Defendant's argument, argues that the stop was not unreasonably prolonged because Officer Steffano acted on a reasonable and articulable suspicion of other criminal activity. The majority adopts that argument. I do not agree.

{¶ 60} In *State v. Yslas*, officers stopped a vehicle on I-75 for a traffic violation. The driver and passenger gave conflicting answers concerning their destination. The rear compartment of their vehicle was filled with luggage. When questioned about possible violations of law, the driver gave replies that were vague and evasive. He was also nervous. We found that these events, as they unfolded, presented reasonable and articulable suspicion of criminal activity sufficient to permit the investigating officers to prolong the detention in order to call for a drug dog. When the dog then alerted, drugs were found inside the vehicle and the driver and passenger were arrested.

{¶ 61} Except for Defendant's nervousness, the present case is dissimilar to

Yslas. Being lost on a dark, rural road does not suggest criminal activity of any kind. Defendant had just driven out of an apartment complex with a reputation for drug and gun use, but the reputation of a locale for criminal conduct, standing alone, is insufficient to show reasonable and articulable suspicion of criminal conduct. *State v. Carter* (1994), 69 Ohio St.3d 57. Furthermore, Defendant, while confused about the direction in which he was going, was not impaired by drugs or alcohol, and he was wholly cooperative.

{¶ 62} On the totality of those circumstances, there was an insufficient basis to reasonably suspect that Defendant was involved in criminal activity, sufficient in law to prolong his traffic stop in order to investigate that possibility, which is no more than a form of inarticulate hunch which the Supreme Court rejected in *Terry v. Ohio*. I would affirm for the alternative reasons discussed above.

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(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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