[Cite as *State v. Nash*, 2009-Ohio-2477.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. William B. Hoffman, J.
-vs-	:	
	:	
MYRON NASH	:	Case No. 2008CA00268
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2007CR2152
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 26, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney Stark County, Ohio By: KATHLEEN O. TATARSKY Assistant Prosecuting Attorney 110 Central Plaza South Suite 510 Canton, OH 44702-1413	DEREK LOWRY 116 Cleveland Avenue, NW Suite 800 Canton, OH 44702-1732

Farmer, P.J.

{¶1} On January 14, 2008, the Stark County Grand Jury indicted appellant, Myron Nash, on one count of trafficking in marijuana in violation of R.C. 2925.03 and one count of possessing marijuana in violation of R.C. 2925.11. Said charges arose from the stop of appellant's vehicle for speeding.

{¶2} On February 28, 2008, appellant filed a motion to suppress, claiming an unreasonable stop and search of his vehicle. A hearing was held on August 29, 2008. At the conclusion of the hearing, the trial court denied the motion. Said decision was journalized on September 2, 2008.

{¶3} On August 29, 2008, appellant pled no contest to the charges. By judgment entry filed September 3, 2008, the trial court found appellant guilty. By judgment entry filed November 13, 2008, the trial court sentenced appellant to an aggregate term of one year in prison.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} "THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS."

I

{¶6} Appellant claims the trial court erred in denying his motion to suppress. Specifically, appellant claims the arresting officer lacked reasonable articulable suspicion to justify his detention and conduct a sweep of his vehicle by a K9; therefore, all evidence seized was inadmissible as "fruit of the poisonous tree." We disagree.

{¶7} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, "…as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶8} Appellant's challenge is two-tiered. First, did the arresting officer have reasonable articulable suspicion of criminal activity? Secondly, did the ten minute detention for questioning followed by the K9 search violate appellant's Fourth Amendment guarantees against unreasonable searches and seizures?

{¶9} The facts leading up to the stop are not in dispute. On August 3, 2007, Canton Police Sergeant John Dittmore and FBI agent Mark McMurtry were conducting surveillance of the rear of appellant's grandmother's residence. T. at 6, 30. They were in an unmarked vehicle and were not wearing uniforms. T. at 8, 29. The law enforcement officers observed appellant exit the residence and place something in the back seat of his SUV. T. at 7, 30-31. Appellant then walked through an alley towards the front of the house, "looked up and down the street," and returned to his vehicle. T. at 7, 31. Appellant drove off, followed by the unmarked vehicle. T. at 8, 31-32. The law enforcement officers observed appellant exceeding the posted speed limit and then speeding through a construction zone. T. at 8-9, 32. Sergeant Dittmore called for a marked K9 unit "who had been assisting us in the area" to stop appellant's vehicle. T. at 9, 32. The K9 unit, Canton Police Officer John Clark and his dog, Vegas, arrived some one to two miles after being called. T. at 21. The stop occurred between 5:00 p.m. and 6:00 p.m. T. at 33. Officer Clark conversed with appellant and then upon Sergeant Dittmore's instruction, walked Vegas around appellant's vehicle. T. at 34. Sergeant Dittmore observed Vegas alert positive for the presence of drugs. T. at 35. Upon opening the driver's side rear passenger door, Sergeant Dittmore discovered a quarter pound bag of marijuana. T. at 36. Thereafter, appellant was taken back to his grandmother's residence where he consented to a search and an additional three pounds of marijuana was discovered. T. at 10-13, 37-39. Appellant challenges the stop and search of his vehicle.

{¶10} In *Terry v. Ohio* (1968), 392 U.S. 1, 22, the United States Supreme Court determined that "a police officer may in appropriate circumstances and in an appropriate

manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." However, for the propriety of a brief investigatory stop pursuant to *Terry*, the police officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. Such an investigatory stop "must be viewed in the light of the totality of the surrounding circumstances" presented to the police officer. *State v. Freeman* (1980), 64 Ohio St.2d 291, paragraph one of the syllabus.

{¶11} Sergeant Dittmore observed appellant's traffic violation and radioed for assistance. Once informed of the violation, Officer Clark had the right to effectuate a stop. Therefore, the stop was legitimate.

{¶12} In *Adams v. Williams* (1972), 407 U.S. 143, the United States Supreme Court reviewed a case wherein a police officer detained an individual upon acting on an informant's tip. The *Adams* court stated the following at 147:

{¶13} "In reaching this conclusion, we reject respondent's argument that reasonable cause for a stop and frisk can only be based on the officer's personal observation, rather than on information supplied by another person. Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation. Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. But in some situations-for example, when the victim of a street crime seeks immediate police aid and gives a description of his assailant, or when a credible informant warns of

a specific impending crime-the subtleties of the hearsay rule should not thwart an appropriate police response."

{¶14} The "informant" in this case was Sergeant Dittmore, and a challenge to his reliability was not made. The information given to Officer Clark rose to the level of reasonable suspicion. The focus of the stop is "reasonable suspicion" and not the higher standard required for probable cause to arrest which is when "the arresting officer must have sufficient information, derived from a reasonably trustworthy source, to warrant a prudent man in believing that a felony has been committed and that it has been committed by the accused." *State v. Timson* (1974), 38 Ohio St.2d 122, 127.

{¶15} Having found the stop to be correct, we will address the length of the detention. In *United States v. Place* (1983), 462 U.S. 696, 707, the United States Supreme Court held a dog sniffing for contraband was not a search because it was "less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited."

{¶16} As noted by the United States Supreme Court in *Illinois v. Caballes* (2005), 543 U.S. 405, 409, the use of a K9 to sniff at a vehicle stopped for a traffic offense is not an intrusion upon one's privacy interests:

{¶17} "Accordingly, the use of a well-trained narcotics-detection dog-one that 'does not expose noncontraband items that otherwise would remain hidden from public view,' *Place,* 462 U.S., at 707, 103 S.Ct. 2637-during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on

the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement."

{¶18} In this case, the stop lasted about ten minutes and was conducted by the K9 unit. Officer Clark engaged in a brief conversation with appellant followed by the walk-around with Vegas. We find the detention was not prolonged or beyond the time limit of an average traffic stop.

{¶19} Upon review, we find the trial court did not err in denying appellant's motion to suppress.

{¶20} The sole assignment of error is denied.

{¶21} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Hoffman, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William B. Hoffman

JUDGES

SGF/sg 507

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MYRON NASH	:	
Defendant-Appellant	:	CASE NO. 2008CA00268

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellant.

/ Sheila G. Farmer

s/ W. Scott Gwin

s/ William B. Hoffman

JUDGES