[Cite as *State v. Butterworth*, 2010-Ohio-1137.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
MICHAEL J. BUTTERWORTH	:	Case No. 2009AP050023
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2008CR050153
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 22, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MICHAEL J. ERNEST 125 East High Avenue New Philadelphia, OH 44663	MARK A. PERLAKY 153 North Broadway New Philadelphia, OH 44663

Farmer, J.

{¶1} On March 21, 2008, appellant, Michael Butterworth, was stopped by police in the drive-thru of a Rite Aid pharmacy for attempting to pick up a fraudulent prescription. During the investigation, a canine unit arrived on the scene. The canine alerted to drugs in the vehicle. Upon inspection, marijuana was found.

{¶2} On May 27, 2008, the Tuscarawas County Grand Jury indicted appellant on one count of trafficking in marijuana in violation of R.C. 2925.03. On October 20, 2008, appellant filed a motion to suppress, claiming an illegal prolonged detention during the investigative stop and a violation of his right to remain silent. A hearing was held on December 29, 2008. By judgment entry filed January 2, 2009, the trial court denied the motion.

{¶3} A jury trial commenced on March 12, 2009. The jury found appellant guilty. By judgment entry filed May 1, 2009, the trial court sentenced appellant to six months in prison, reserved for imposition, and two years of supervised community control sanctions.

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

I

{¶5} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE ACQUIRED FROM MR. BUTTERWORTH'S VEHICLE AT THE SCENE OR AN INVESTIGATIVE STOP AND ACQUIRED FROM STATEMENTS MADE BY APPELLANT AT THE UHRICHSVILLE POLICE STATION."

II

{¶6} "THE TRIAL COURT ERRED IN LIMITING APPELLANT'S CROSS-EXAMINATION OF OFFICER BRANDON MCCRAY DURING TRIAL BY REFUSING TO ALLOW HIM TO ASK OFFICER MCCRAY ABOUT THE WEIGHT OF THE SUSPECTED MARIJUANA RECOVERED BY POLICE."

III

{¶7} "THE TRIAL COURT COMMITTED JUDICIAL MISCONDUCT THROUGH CERTAIN STATEMENTS MADE TO DEFENSE COUNSEL THROUGHOUT TRIAL THAT PREJUDICED THE JURY AND DENIED APPELLANT THE RIGHT TO A FAIR TRIAL."

I

{¶8} Appellant claims the trial court erred in denying his motion to suppress as his detention during a lawful stop was unreasonably prolonged, and the investigating officer lacked reasonable articulable suspicion for further detention. In addition, appellant claims his statements made to the police at the station were involuntary. We disagree.

{¶9} 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."

{¶10} Uhrichsville Police Officer Brandon McCray testified he and Sergeant Douglas Hines initiated the stop of appellant's vehicle after receiving a call from a Rite Aid pharmacy that two individuals were in the drive-thru attempting to pick up a fraudulent prescription. December 29, 2008 T. at 7-10. During his investigation, Officer McCray observed the following regarding appellant's vehicle:

{¶11} "There were several air fresheners hanging from the rear view mirror and hanging from the like dash area of the car. And given the nature of the fraudulent drug prescription and past training and that drug traffickers sometimes have an over abundance of air fresheners in their vehicle that kind of started to lead suspicion to that possible activity.

{¶12} "***

{¶13} "There was also a - - what I thought was an over abundance of - - in the back seat like plastic - - I can't say that they were exactly Wal Mart bags but like the plastic grocery type bags and there was also a lot - - a large amount of candy, Jolly Rancher, candy that was scattered throughout the car." Id. at 12 and 13, respectively.

{¶14} After making these observations, Officer McCray called for a canine unit from the Sheriff's Department. Id. at 14. Once the canine unit arrived, Officer McCray asked appellant to pull forward through the drive-thru so the dog could circle the vehicle. Id. at 15. Appellant complied and the dog alerted to a drug substance in the vehicle. Id. at 15-16. Officer McCray conducted a search of the vehicle whereupon he discovered "a sizeable amount of marijuana." Id. at 17-18.

{¶15} Regardless of the drug search, Officer McCray testified on the fraudulent prescription issue. In answering a defense counsel question on how long it took him to finish the fraudulent prescription investigation, Officer McCray explained he was not "satisfied that that whole situation was resolved" and the normal routine would have been to finish up the investigation at the police station had it not been for the intervening canine detection. Id. at 24-25. Officer McCray testified the canine unit arrived during the time it took to confirm appellant's identity. Id. at 29.

{¶16} In *State v. Whitman,* Holmes App. No. 09-CA-03, 2009-Ohio-5647, ¶9-12, this court succinctly stated the following:

{¶17} "The use of a drug-detection dog does not constitute a 'search,' and an officer is not required, prior to a dog sniff, to establish either probable cause or a reasonable suspicion that drugs are concealed in a vehicle. See *Illinois v. Caballes* (2005), 543 U.S. 405, 409, 125 S.Ct. 834, 160 L.Ed.2d 842; *United States v. Place*

(1983), 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110; *State v. Carlson* (1995), 102 Ohio App.3d 585, 594, 657 N.E.2d 591; *United States v. Seals* (C.A.5, 1993), 987 F.2d 1102, 1106. The officer needs no suspicion or cause to 'run the dog around' the stopped vehicle if he does it contemporaneously with the legitimate activities associated with the traffic violation. See *Caballes,* 543 U.S. at 409 (upholding constitutionality of dog sniff conducted by an officer – '[w]hile [a second officer] was in the process of writing a warning ticket, [the second officer] walked his dog around [Caballes's] car' - and stating that the use of the dog during Caballes's traffic stop '[did] not implicate legitimate privacy interests' because 'the dog sniff was performed on the exterior of [Caballes's] car *while* he was lawfully seized for a traffic violation'). (Emphasis added.)

{¶18} "Further, 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. *United States v. Reed* (C.A.6, 1998), 141 F.3d 644, quoting *United States v. Berry* (C.A.6, 1966), 90 F.3d 148, 153; accord *United States v. Hill* (C.A.6, 1999), 195 F.3d 258, 273; *United States v. Diaz* (C.A.6, 1994), 25 F.3d 392, 394; *State v. French* (1995), 104 Ohio App.3d 740, 663 N.E.2d 367.

{¶19} " ' "[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, 865 N.E.2d 1282, 2007-Ohio-2204, at ¶12, quoting *State v. Keathley* (1988), 55 Ohio App.3d 130, 131, 562 N.E.2d 932. '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 *United States 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, 657 N.E.2d 591, citing *State v. Cook* (1992), 65 Ohio St.3d 516, 521-522, 605 N.E.2d 70, and *United States v. Sharpe* (1985), 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605. See also *Woodson,* 2008-Ohio-670, at ¶21.

{¶20} "However, '[a]n officer may not expand the investigative scope of the detention beyond that which is reasonably necessary to effectuate the purposes of the initial stop unless any new or expanded investigation is supported by a reasonable, articulable suspicion that some further criminal activity is afoot.' *Woodson* at ¶22, citing *State v. Retherford* (1994), 93 Ohio App.3d 586, 600, 639 N.E.2d 498, citing *United States v. Brignoni-Ponce* (1975), 422 U.S. 873, 881-882, 95 S.Ct. 2574, 45 L.Ed.2d 607. 'In determining whether a detention is reasonable, the court must look at the totality of the circumstances.' *State v. Matteucci,* 11th Dist. No.2001-L-205, 2003-Ohio-702, ¶30, citing *State v. Bobo* (1988), 37 Ohio St.3d 177, 178, 524 N.E.2d 489. See also *Woodson,* 2008-Ohio-670, at ¶22."

{¶21} Under the totality of the circumstances, we find calling for the canine unit did not cause a delay. The fraudulent prescription investigation was not yet complete, and the normal course would have been to take appellant to the police station to discuss the issue and determine why appellant was at the drive-thru trying to pick up the prescription. In addition, reasonable suspicion is more than just a hunch. In this case,

Officer McCray articulated why he believed drugs were being transported or were present in the vehicle i.e., presence of numerous air fresheners and plastic bags.

{¶22} As for appellant's arguments that his statements made to the police at the station were involuntary, Officer McCray testified he "mirandized" appellant at the station prior to asking him any questions. December 29, 2008 T. at 35. Appellant understood his rights and signed the form waiving those rights. Id. No questions were asked until after appellant signed the form. Id. at 35-36. Sergeant Hines confirmed that appellant was not questioned until after he signed the form. Id. at 67.

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

{¶24} Assignment of Error I is denied.

II

{¶25} Appellant claims the trial court erred in limiting the cross-examination of Officer McCray. We disagree.

{¶26} The standard of review to be applied by this court with regard to a trial court limiting cross-examination is abuse of discretion. *State v. Acre* (1983), 6 Ohio St.3d 140. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶27} Appellant was convicted of trafficking in marijuana in violation of R.C. 2925.03(A)(2) which states the following:

{¶28} "(A) No person shall knowingly do any of the following:

{¶29} "(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person."

{¶30} The bag of marijuana seized was shown and passed to the jury. T. at 235-236. Officer McCray testified he did not know the weight of the marijuana without looking at the testing officer's affidavit. T. at 236. Officer McCray did not make a guess as to the weight, and did not want to render a guess as to how many marijuana cigarettes the amount could produce. Id. Thereafter, defense counsel produced the examination document from the testing officer and attempted to have Officer McCray testify about the analysis. T. at 237. The trial court interrupted and inquired as to the relevance of the weight. Id. Defense counsel argued it was relevant to the issue of personal use. T. at 238. The trial court determined weight was irrelevant:

{¶31} "THE COURT: Weight is irrelevant and I'm not going to allow any evidence of weight so continue on with your other questions.***This marijuana is visible to these men and women and they can see and then you can argue whether that is personal use or not and Mr. Ernest can argue the opposite." T. at 240.

{¶32} The issue of weight was not a specific element of the crime charged sub judice. We find weight may be relevant in considering the purpose for possession however, it was not relevant in this case as appellant had told the police he was selling the marijuana. T. at 206-208.

{¶33} Any error in excluding the testimony relative to weight was harmless. Harmless error is described as "[a]ny error, defect, irregularity, or variance which does

not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right.

{¶34} Upon review, we find any error in the trial court limiting the cross-examination of Officer McCray to be harmless.

{¶35} Assignment of Error II is denied.

III

{¶36} Appellant claims the trial court's statements to his trial counsel unduly prejudiced his right to a fair trial. We disagree.

{¶37} No objections were made to the complained of statements. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91; Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *Long*. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

{¶38} The complained of statements include the discussion with defense counsel cited in Assignment of Error II, and the following additional statements:

{¶39} "[MR. GREIG] Q. So he was arrested at the scene.

{¶40} "[OFFICER MCCRAY] A. Correct.

{¶41} "Q. Okay. Did you read his Miranda rights then?

{¶42} "A. No, I did not.

{¶43} "Q. So he was under arrest at that time but you didn't read him his rights.

{¶44} "A. Correct

{¶45} "Q. Are you trained to read someone their rights when you arrest them?

{¶46} "A. Not unless we intend on asking them questions at that exact time.

{¶47} "Q. Well, how long were you out there with him?

{¶48} "THE COURT: Mr. Greig, there's no reason to ask questions about this. What bearing does this have on the case?

{¶49} "***

{¶50} "MR. GREIG: All right, Judge. I'd just like some leeway so I - -

{¶51} "THE COURT: No, you're not going to get any leeway to take time that's unnecessary. This has no bearing on the charges. This is a pretrial matter. If you believed there was a violation of Mr. Butterworth's rights you would've raised it. It's over. Now let's move through this to something relevant for the jury to hear. That's all." T. at 245-246

{¶52} Later, the trial court overruled a defense counsel objection during the cross-examination of appellant as follows:

{¶53} "[MR. ERNEST] Q. You've smoked over 300 joints since the last time - - since this incident took place and today's date, isn't that correct?

{¶54} "A. It's possible, yes.

{¶55} "Q. It's possible you've even smoked up to 600 joints since the event took place.

{¶56} "A. I don't count how many joints. I mean I've been smoking marijuana for twenty years. Driving in a car smoking marijuana I've never gotten in trouble for it. If I

was a drunk driver I'd be in all kinds of trouble. They can't get away with that, you know.

{¶57} "Q. But what I'm saying, Mr. Butterworth, isn't it possible that when someone smokes 600 joints it could possibly affect their recollection of what took place?

{¶58} "MR. GREIG: Your Honor, first of all, he's not a medical expert. He's testified that he's a heavy, heavy user.

{¶59} "THE COURT: Overruled. This is fair cross examination for a man who's apparently an expert on marijuana. Go ahead, Mr. Ernest." T. at 344-345.

{¶60} The trial court then specifically questioned appellant on the source of his drugs:

{¶61} "THE COURT: Listen, you are under oath. That means if you do not tell the truth or if Mr. Ernest thinks you're not telling the truth you can be indicted and charged with perjury. That's a felony crime lying under oath. Now, look at the jury and tell them who sold you this marijuana.

{¶62} "THE WITNESS: Look at the jury? His name is Tony - - can I have a minute, Your Honor, cause it's a complicated name. I always called him by his initials, okay. Tony - - like Overholster or something - - it starts with an 'O'. His initials were T.O.

{¶63} "THE COURT: Where did he live? Where did you buy it from him physically?

{¶64} "THE WITNESS: Um - - I think he was - - at that particular time I think he was living in Canton.

{¶65} "THE COURT: Where in Canton?

{¶66} "THE WITNESS: I'm trying to think of the street name. Probably - - I can't think of the exact street name, Your Honor, but I think it's off Cleveland Avenue somewhere." T. at 364.

{¶67} The most troubling issue is the trial court's inquiry into the source of the drugs. This was outside the scope of the elements of the offense, and was not relevant to the issue of appellant's guilt or non-guilt.

{¶68} We find this inquiry on an irrelevant issue to be in conflict with the trial court's mandate for relevance as reviewed in Assignment of Error II. However, under the plain error standard, we fail to find the trial court's statements impacted the outcome of the trial. Appellant's statements to police about "breaking down" the larger marijuana bag for redistribution constituted overwhelming evidence of the crime. T. at 206.

{¶69} As for the trial court's "expert in marijuana" comment, while inappropriate, we fail to find the comment prejudiced appellant. In trying to convince the jury that the marijuana seized was for his own personal use, appellant testified "one of those bigger bags I could smoke that in a whole day." T. at 314. Appellant admitted to smoking marijuana for over twenty years, sometimes "30 to 35 joints in one day." T. at 313-315. In fact, appellant admitted to smoking marijuana on the morning of his trial prior to going to court. T. at 342-343.

{¶70} Assignment of Error III is denied.

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

By Farmer, J.

Edwards, P.J. and

Gwin, J. concur.

__s/ Sheila G. Farmer_____

__s/ Julie A. Edwards_____

__s/ W. Scott Gwin_____

JUDGES

SGF/sg 0223

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MICHAEL J. BUTTERWORTH	:	
Defendant-Appellant	:	CASE NO. 2009AP050023

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

__s/ Sheila G. Farmer_____

__s/ Julie A. Edwards_____

__s/ W. Scott Gwin_____

JUDGES