

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
| | : | Hon. William B. Hoffman, P.J. |
| Plaintiff-Appellant | : | Hon. Sheila G. Farmer, J. |
| | : | Hon. John W. Wise, J. |
| -vs- | : | |
| | : | |
| NATHAN A. FENSLER | : | Case No. 2015 AP 04 0018 |
| | : | |
| Defendant-Appellee | : | <u>O P I N I O N</u> |

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| CHARACTER OF PROCEEDING: | Appeal from the Court of Common Pleas, Case No. 2014 CR 11 0295 |
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| JUDGMENT: | Reversed and Remanded |
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| DATE OF JUDGMENT: | October 30, 2015 |
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APPEARANCES:

For Plaintiff-Appellant

MICHAEL J. ERNEST
125 East High Street
New Philadelphia, OH 44663

For Defendant-Appellee

MARK A. PERLAKY
153 North Broadway Street
New Philadelphia, OH 44663

Farmer, J.

{¶1} On March 16, 2014, New Philadelphia Police Officer Mitchell Gobely stopped a vehicle for improper display of a county sticker on a license plate. The sticker was obscured by the bumper. Driver of the vehicle was appellee, Nathan Fensler. There were two passengers in the vehicle. One of the passenger's gave the officer a false social security number. Officer Gobely called for the K-9 unit. The K-9 alerted on the vehicle and cocaine was discovered therein. On November 3, 2014, the Tuscarawas County Grand Jury indicted appellee on one count of possessing drugs (cocaine) in violation of R.C. 2925.11.

{¶2} On January 27, 2015, appellee filed a motion to suppress, claiming an unreasonable prolonged detention. A hearing was held on March 23, 2015. By judgment entry filed April 20, 2015, the trial court granted the motion, finding the officer did not have probable cause for the prolonged stop.

{¶3} Appellant, the state of Ohio, filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CONCLUDING THAT THE STOP OF THE APPELLANT WAS UNREASONABLY AND ILLEGALLY EXTENDED OR PROTRACTED."

I

{¶5} Appellant claims the trial court erred in granting appellee's motion to suppress. We agree.

{¶6} 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*, 1 Ohio St.3d 19 (1982); *State v. Klein*, 73 Ohio App.3d 486 (4th Dist.1991); *State v. Guysinger*, 86 Ohio App.3d 592 (4th Dist.1993). 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*, 86 Ohio App.3d 37 (4th Dist.1993). 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*, 95 Ohio App.3d 93 (8th Dist.1994); *State v. Claytor*, 85 Ohio App.3d 623 (4th Dist.1993); *Guysinger*. As the United States Supreme Court held in *Ornelas v. U.S.*, 517 U.S. 690, 116 S.Ct. 1657, 1663 (1996), "...as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶7} In *Terry v. Ohio*, 392 U.S. 1, 22 (1968), 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*, 64 Ohio St.2d 291 (1980), paragraph one of the syllabus.

{¶8} Appellant does not dispute the facts, but challenges the legal conclusion reached by the trial court (Judgment Entry filed April 20, 2015):

FINDS that in this case, the agent of the New Philadelphia, Ohio Police Department who stopped the motor vehicle operated by the Defendant, on the date in question, after determining that the motor vehicle had appropriate and current license plate information and motor vehicle registration did **not** have additional probable cause to delay or extend the contact with Defendant and others in this motor vehicle. The undersigned expressly indicates that in his Judicial opinion, "nervousness" of individuals in a motor vehicle does not serve as legal probable cause to embark on a "fishing expedition" for additional probable cause to detain individuals in a motor vehicle at a legitimate traffic stop. "Nervousness" of persons in a motor vehicle stopped by law enforcement officials is a normal, human response to the demonstration of police authority. Suggesting that it is sufficient legal "probable cause" to extend a traffic stop to further investigate the identity of passengers in order to possibly

access the existence of a warrant or warrants involving the passengers is law enforcement "overreach" and in violation of constitutional safe guards against such police conduct. Additionally, the undersigned concludes that seeking identification information from individuals in a motor vehicle at an initially legal traffic stop simply for the reason that it was a "Saturday night/early Sunday morning" and the agent effecting the traffic stop was curious as to whether or not the passengers had any "outstanding warrants" for their arrest is unauthorized by statute or case law authority.

{¶9} The facts are undisputed. Officer Gobely initiated a traffic stop at 1:00 a.m. because the vehicle's county sticker on the license plate was obscured. T. at 6-7, 24. The license plate was tilted and the sticker was obscured by the bumper. T. at 7. Officer Gobely approached the vehicle and asked the driver, appellee herein, and the two passengers for identification. *Id.* Officer Gobely explained it was standard police procedure to ask for the identification of all the occupants of a vehicle during an early morning stop. T. at 26. A female passenger in the vehicle first gave Officer Gobely a fake social security number and then upon questioning, gave her correct social security number and name. T. at 8-9, 13. Officer Gobely discovered there was an outstanding warrant for this passenger. T. at 9.

{¶10} While Officer Gobely was checking identifications, he called for the K-9 unit because from the initial contact, he believed the driver was acting suspiciously and "was acting very nervous, kind of looking around the vehicle frantically." T. at 10. The entire stop until the alert by the K-9 lasted thirteen minutes. State's Exhibit A. A ticket

was started, but never issued for the improper display of the county sticker. T. at 15-16. Officer Gobely freely admitted he could have verified the vehicle's registration without the county sticker. T. at 24. It is unclear if the validity of the registration was known prior to the stop. T. at 24-25.

{¶11} In analyzing the facts presented, we accept the template set forth by the Supreme Court of Ohio in *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, paragraph two of the syllabus: "The 'reasonable and articulable' standard applied to a prolonged traffic stop encompasses the totality of the circumstances, and a court may not evaluate in isolation each articulated reason for the stop."

{¶12} The first issue, as in *Batchili*, was whether there was a legal basis for the stop. Officer Gobely testified he pulled the vehicle over because of an obscured county sticker on the license plate. T. at 7, 24. The stop for an improperly displayed license plate, "including any county identification sticker," is legal (R.C. 4503.21), and the tilted nature of the plate created reasonable articulable suspicion.

{¶13} "The focus of the inquiry, therefore, is whether there was an illegally prolonged detention" given the officer's observations. *Batchili* at ¶ 8. In reviewing State's Exhibit A, when Officer Gobely approached the vehicle (at 1.22 minute video time), the county sticker remained obscured. Once he obtained the identification of the occupants (at 3.24 minute video time) and learned of the fake social security number of the passenger, only 8.42 minutes had lapsed. Officer Gobely's suspicions were peaked and he called for the K-9 unit. Prior to its arrival, Officer Gobely was aware of the outstanding warrant for the passenger. T. at 16-17.

{¶14} It appears the trial court concluded that Officer Gobely should have terminated the stop once he passed the rear of the vehicle and should not have pursued the occupants' identifications.

{¶15} We conclude the traffic stop was valid and the failure to display violation was a continuing offense even after Officer Gobely was able to verify the legality of the registration. We further conclude upon stopping a vehicle at 1:00 a.m. and under police procedures, the asking for identification of the vehicle's occupants was not an unnecessary intrusion of the occupants' Fourth Amendment rights. As stated in *Bachili* at ¶ 11-15:

The Fourth Amendment imposes a reasonableness standard upon the exercise of discretion by government officials. *Delaware v. Prouse* (1979), 440 U.S. 648, 653-654, 99 S.Ct. 1391, 59 L.Ed.2d 660. "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 654, 99 S.Ct. 1391, 59 L.Ed.2d 660. To justify a particular intrusion, the officer must demonstrate "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889.

The facts of this case are almost directly aligned with those of the Twelfth District Court of Appeals case *State v. Howard*, Preble App. Nos. CA2006-02-002 and CA2006-02-003, 2006-Ohio-5656, 2006 WL

3059799, ¶ 15, which held, "[W]hen 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 [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. *State v. Bolden*, Preble App. No. CA2003-03-007, 2004-Ohio-184 [2004 WL 77617], ¶ 17, citing *Delaware v. Prouse* (1979), 440 U.S. 648, 659, 99 S.Ct. 1391 [59 L.Ed.2d 660]. '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 [657 N.E.2d 591], citing *State v. Cook* (1992), 65 Ohio St.3d 516, 521-522 [605 N.E.2d 70], and *U.S. v. Sharpe* (1985), 470 U.S. 675, 105 S.Ct. 1568 [84 L.Ed.2d 605]."

The record establishes that at the time the dog alerted, eight minutes and 56 seconds into the stop, Trooper Arnold was still waiting for the results of the criminal-background check. She further testified that it would take her approximately five to ten minutes to issue a warning, and anywhere from ten to 20 minutes to issue an actual citation.

There simply is no evidence to suggest that Batchili's detention for the traffic violation was of sufficient length to make it constitutionally dubious. A traffic stop is not unconstitutionally prolonged when

permissible background checks have been diligently undertaken and not yet completed at the time a drug dog alerts on the vehicle. There is no showing that the detention was delayed so that the dog could conduct its search, and therefore, there was no constitutional violation.

Moreover, assuming the detention was actually prolonged by the request for a dog search, "the detention of a stopped driver may continue beyond [the normal] 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 [580 N.E.2d 61]; *State v. Venham* [1994], 96 Ohio App.3d [649,] 655 [645 N.E.2d 831]." *Howard*, 2006-Ohio-5656, 2006 WL 3059799, at ¶ 16.

{¶16} Less than nine minutes into the stop, Officer Goble had more than a reasonable suspicion relative to a passenger in the vehicle, and prior to the K-9's arrival, knew there was an outstanding warrant for the passenger's arrest. Taken as a whole, the circumstances sub judice lead us to the conclusion that the stop was not unreasonably prolonged or illegally extended.

{¶17} Upon review, we find the trial court erred in granting the motion to suppress.

{¶18} The sole assignment of error is granted.

{¶19} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby reversed, and the matter is remanded to said court for further proceedings consistent with this opinion.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

SGF/sg