[Cite as *State v. Lukjare*, 2016-Ohio-4613.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 15-COA-038
	:	
RYAN LUKJARE	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Ashland Municipal Court, Case No. 15-COA-038
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	June 17, 2016

APPEARANCES:

For Plaintiff-Appellant:	For Defendant-Appellee:
ANDREW N. BUSH 1213 E. Main St. Ashland, OH 44805	ROGER SOROKA JOSHUA BEDTELYON 503 South Front St., Ste. 205 Columbus, OH 43215

Delaney, J.

{¶1} Plaintiff-appellant State of Ohio appeals from the October 29, 2015 decision of the Ashland Municipal Court granting the motion to suppress of defendant-appellee Ryan Lukjare.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from the suppression hearing on September 29, 2015. Appellant called two witnesses: Trooper Marshall and Deputy Pidgeon. Also relevant is a videotape of the stop admitted as appellant's Exhibit 2.

Testimony of Trooper Marshall and Deputy Pidgeon

{¶3} On July 10, 2015, around 7:58 p.m., Trooper Marshall was monitoring traffic on Interstate Route 71 from a stationary position when he noticed the vehicle driven by appellee, which appeared to be speeding because it passed other cars. Marshall used a laser device to measure appellee's speed and found it to be 82 m.p.h. Marshall then initiated a traffic stop.

{¶4} Marshall approached the vehicle and told appellee why he was stopped. Marshall noticed a strong odor of cologne or deodorizer emanating from the vehicle. Appellee stated he was on his way to a bachelor party and had two male passengers with him. Marshall noticed appellee was nervous; when asked to retrieve documents, appellee's hands were shaking and he wouldn't make eye contact. Marshall asked appellee to exit the vehicle and placed him in the rear of the patrol car for the purpose of separating appellee from the strong odor in the vehicle. Marshall patted down but did not handcuff appellee before placing him in the cruiser.

{¶5} Based upon appellee's nervous demeanor and the odor in the vehicle, Marshall requested assistance of a K-9 narcotics officer approximately five minutes into the stop. Marshall intended to have the K-9 "walk around" the exterior of appellee's vehicle to sniff for the presence of narcotics.

{¶6} While awaiting the arrival of the K-9 unit, Marshall wrote a speeding citation for appellee.

{¶7} Deputy Pidgeon arrived on the scene approximately 13 minutes into the traffic stop with K-9 officer Nicky. The dog is trained in narcotics detection and had recently been state-certified. Pidgeon testified he and Nicky perform "walk-around" vehicle sniffs several times per week.

{¶8} Pidgeon opened the back door of the patrol car to speak to appellee and told him he was a narcotics officer there to walk his dog around the vehicle. Pidgeon testified he thus gives suspects an opportunity to admit to the presence of contraband in the vehicle before the walk-around occurs. In this case, appellee stated there were drugs in the vehicle. Marijuana and drug paraphernalia were located in bags in the rear hatch of the car. Appellee said the drugs were his.

{¶9} Appellee was not Mirandized at any time throughout the stop and remained seated in the rear of Marshall's patrol car.

{¶10} No walk-around dog sniff was performed because appellee told the officers about the drugs in the vehicle.

Videotape of Appellee's Conversation with Officers

{¶11} Appellant's Exhibit 2 is the dash-cam video from Marshall's cruiser. The video shows the entirety of the stop; conversation at appellee's vehicle cannot be heard

but the audio picks up once appellee is seated in the rear of the patrol car. Marshall asks appellee questions relevant to completing the traffic citation.

{¶12} Around the 20:12 time mark, there is the sound of the vehicle door opening and Deputy Pidgeon introduces himself to appellee. He advises appellee he is on the scene with his K-9 to walk around the exterior of the vehicle to sniff for narcotics. He then says it is customary to give drivers the opportunity to tell officers whether there is "anything" in the vehicle before he runs his dog. Pidgeon asks "Is anything in there?" and appellee responds "Yes." Pidgeon responds, "Tell him what's in there." The conversation continues between Pidgeon, appellee, and Marshall, with appellee stating in response to the officers' questions that he has a small amount of marijuana in the vehicle; the marijuana is for personal use and is located in his bags; the marijuana belongs to him, not to the passengers; and he is "99 percent sure" the passengers don't have any contraband.

{¶13} The video demonstrates no walk-around is performed. Marshall and another trooper escort the passengers out of the vehicle, open the trunk, and then search bags taken from the rear hatch area.

Citation and Suppression

{¶14} Appellee was cited for speeding,[1] possession of marijuana pursuant to R.C. 2925.11(C)(3), a minor misdemeanor, and possession of drug paraphernalia pursuant to R.C. 2925.141, also a minor misdemeanor. Appellee entered pleas of not guilty and filed a motion to suppress evidence stemming from the traffic stop.

[1] The traffic citation is not in the record before us.

{¶15} The matter proceeded to suppression hearing on September 29, 2015. After hearing the evidence, the trial court found on the record that Marshall did have reasonable articulable suspicion to stop appellee and the traffic stop was not unreasonably extended beyond its stated purpose when Marshall requested Pidgeon and Nicky to the scene. The trial court asked the parties to brief the remaining issue: whether appellee was subject to custodial interrogation for *Miranda* purposes when Pidgeon stated he was giving him an opportunity to tell officers if "anything" was in the vehicle before he walked the K-9 around the exterior.

{¶16} Both parties submitted briefs and on October 29, 2015, the trial court entered its Judgment Entry granting appellee's motion to suppress on the *Miranda* issue, finding in pertinent part:

> * * * *.
>
> Based on a review of all the circumstances surrounding [appellee's] detention in the back of the patrol car during his interrogation by Deputy Pidgeon, it is evident to the Court that he was restrained of his liberty to a degree normally associated with formal arrest. The fact that Deputy Pidgeon opened the locked door and stood in the door opening, while [appellee] remained blocked inside, is of particular importance to the Court. There was clearly an interrogation of [appellee], and, in the Court's view, that interrogation occurred while [appellee] was in custody. Therefore, in the absence of Miranda warnings, the statements are inadmissible and all

> evidence obtained as a result of the statements is subject to suppression.
>
> * * * *.

{¶17} The trial court further found the marijuana and drug paraphernalia were not admissible pursuant to the inevitable-discovery doctrine because there was insufficient evidence in the record to establish the K-9 would have inevitably detected the drugs.

{¶18} Appellant filed a Crim.R. 12(K) certification and now appeals from the trial court's Judgment Entry Regarding Defendant's Motion to Suppress of October 29, 2015.

{¶19} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶20} "I. THE TRIAL COURT ERRED IN FINDING THAT THE APPELLEE WAS IN CUSTODY FOR MIRANDA PURPOSES."

{¶21} "II. THE TRIAL COURT ERRED IN FINDING THAT THE INEVITABLE DISCOVERY DOCTRINE DID NOT APPLY IN THIS MATTER."

ANALYSIS

I., II.

{¶22} Appellant's two assignments of error are related and will be considered together. Appellant argues the trial court erred in finding appellee was subject to custodial interrogation and alternatively the evidence should be admissible pursuant to the inevitable-discovery doctrine. We agree that appellee was not subject to custodial interrogation and thus reverse the decision of the trial court. Appellant's second assignment of error is moot.

Standard of Review: De Novo

{¶23} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams*, 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶24} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). 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. See*, Williams*, supra.

{¶25} Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a 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, 96, 620 N.E.2d 906 (8th Dist.1994).

{¶26} In the instant case, the facts are undisputed and appellant argues the trial court incorrectly decided the ultimate issue raised in the motion to suppress, to wit, whether appellee was subject to custodial interrogation such that the contraband he pointed the officers to must be suppressed. We find appellee was not subject to custodial interrogation when he was in the rear of the patrol car because he was not subject to the functional equivalent of arrest.

Appellee Not Subject to Custodial Interrogation

{¶27} The state may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Not all questioning, however, rises to the level of "custodial interrogation."

{¶28} Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *State v. McKinley*, 5th Dist. Delaware No. 15 CAA 06 0048, 2016-Ohio-191, ¶ 17, citing *Miranda*, supra, 384 U.S. at 444. In *Thompson v. Keohane,* the Court offered the following description of the *Miranda* custody test:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person

> have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.
>
> *Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995); *accord, Yarborough v. Alvarado,* 541 U.S. 652, 653, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

{¶29} The police and courts must "examine all of the circumstances surrounding the interrogation," *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994), including those that "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave," Id. at 325. However, the test involves no consideration of the particular suspect's "actual mindset." *Yarborough,* supra, 541 U.S. 652 at 667; a*ccord, State v. Mason,* 82 Ohio St .3d 144, 153, 1998–Ohio–370, 694 N.E.2d 932; *State v. Gumm,* 73 Ohio St.3d 413, 429, 1995–Ohio–24, 653 N.E.2d 253.

{¶30} Traffic stops such as the one at issue here do not rise to the level of "formal arrest." Thus, generally in the course of an ordinary traffic stop, *Miranda* rights are not implicated because custodial interrogation does not occur. In *Berkemer v. McCarty,* 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), the Supreme Court held that roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" under the rule announced in *Miranda,* supra. See *Berkemer,* supra, 335–340. Although an ordinary traffic stop limits the "'freedom of action'" of the

detained motorist and imposes certain pressures on the motorist to answer questions, such pressures do not sufficiently impair the motorist's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. Id. A traffic stop is usually brief, and the motorist expects that, while he may be given a citation, in the end he most likely will be allowed to continue on his way. Id. at 438. Moreover, the typical traffic stop is conducted in public, where "[p]assersby, on foot or in other cars, witness the interaction of the officer and motorist." Id. Therefore, the atmosphere surrounding it is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda.* However, "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he is entitled to the full panoply of protections prescribed by *Miranda.*" Id. at 440. A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable [person] in the suspect's position would have understood his situation." Id. at 442.

{¶31} It is true that once a traffic stop evolves beyond the "ordinary," questioning may rise to the level of custodial interrogation under certain circumstances. In *Pennsylvania v. Bruder,* 488 U.S. 9, 109 S.Ct. 205, 102 L.Ed.2d 172 (1988), the Supreme Court held that an ordinary traffic stop during which the police officer asked the driver a modest number of questions at a location visible to passing motorists did not involve custody for purposes of *Miranda.* The Court noted its holding in *Berkemer* applied only to ordinary traffic stops, but observed a motorist "might properly" be found to have been placed "in custody" for purposes of *Miranda* safeguards where he was detained for over one-half hour and subjected to questioning while in a patrol car. *Bruder,* supra, at 11, f.n.

2. The Court noted that *Berkemer* applies only to "ordinary traffic stops" and not to the "unusual traffic stop" where a motorist is subjected to "prolonged detention" while in a patrol car.

{¶32} The Ohio Supreme Court has noted a suspect need not be under arrest to be "in custody" for *Miranda* purposes. *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 13, citing *Berkemer*, supra, 468 U.S. at 420. The analysis turns upon the officer's treatment of the suspect after the traffic stop to determine whether the suspect is "in custody for practical purposes." Id. The "only relevant inquiry" in determining whether a person is in custody is "how a reasonable man in the suspect's position would have understood his situation." Id., citing *Berkemer,* 468 U.S. at 442.

{¶33} The traffic stop at issue here is an "ordinary traffic stop." The circumstances in the instant case reveal appellee was not handcuffed before he was placed in the rear of the patrol car. He was never placed under arrest. Marshall's decision to call the K-9 to the scene was supported by his observations of the odor in the vehicle and appellee's evident nervousness. 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. *State v. Camp*, 5th Dist. Richland No. 14CA42, 2015-Ohio-329, 24 N.E.3d 601, ¶ 30, citing *Illinois v. Caballes,* 543 U.S. 405, 409, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), additional citations omitted. 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. Id., citing *United States v. Reed,* 141 F.3d 644 (6th Cir.1998), internal citations omitted.

{¶34} Appellee was not subjected to prolonged detention because Pidgeon and Nicky arrived on the scene quickly, 13 minutes into the stop. Even if the detention was prolonged by Marshall's request to Pidgeon to come to the scene, "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. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶ 15, internal citations omitted.

{¶35} Appellee was ultimately issued three minor misdemeanor citations and permitted to be on his way.

{¶36} We have previously held that traffic stops in which a suspect is placed in the front seat of a cruiser and questioned about drinking do not implicate *Miranda*.[2] See, e.g., *State v. Crowe,* 5th Dist. Delaware No. 07CAC030015, 2008-Ohio-330 [suspect's placement in front seat of police cruiser is not functional equivalent of arrest] and *State v. Mullins*, 5th Dist. Licking No. 2006-CA-00019, 2006-Ohio-4674 [no evidence suspect in custody or otherwise deprived of his freedom of action in any significant way and

[2] But see, *City of Cleveland v. Oles*, 8th Dist. Cuyahoga No. 102835, 2016-Ohio-23, 45 N.E.3d 1061, at ¶ 19 ["a reasonable person, removed from his or her own vehicle and questioned about their alcohol consumption in the passenger seat of a police cruiser would not feel free to leave."]. *Oles* is the subject of a certified-conflict case pending before the Ohio Supreme Court; the cited cases in conflict with *Oles* are: *State v. Leonard,* 1st Dist. Hamilton No. C–060595, 2007-Ohio-3312, 2007 WL 1874232; *State v. Rice,* 1st Dist. Hamilton Nos. C–090071, C–090072 and C–090073, 2009-Ohio-6332, 2009 WL 4456214; *State v. Kraus,* 1st Dist. Hamilton Nos. C–070428 and C–070429, 2008-Ohio-3965, 2008 WL 3165934; *State v. Mullins,* 5th Dist. Licking No. 2006–CA–00019, 2006-Ohio-4674, 2006 WL 2588770; *State v. Crowe,* 5th Dist. Delaware No. 07CAC030015, 2008-Ohio-330, 2008 WL 271816; *State v. Coleman,* 7th Dist. Mahoning No. 06 MA 41, 2007-Ohio-1573, 2007 WL 969428; *State v. Serafin,* 11th Dist. Portage No. 2011–P–0036, 2012-Ohio-1456, 2012 WL 1106744, *State v. Brocker,* 11th Dist. Portage No. 2014–P–0070, 2015-Ohio-3412, 2015 WL 5005120.

statements was made in response to "general on-the-scene questioning"]; see also, *State v. Swiger*, 5th Dist. Ashland No. 15-COA-004, 2015-Ohio-2999, [nonverbal results of field sobriety tests are not self-incriminating statements protected by the constitutional privilege against self-incrimination.]

{¶37} *Thompson v. Keohane* instructs us that the "ultimate inquiry" remains whether there was formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. 516 U.S. at 112. Appellee was not handcuffed; his keys were not taken away; nor was he subjected to a lengthy detention. *State v. Crowe*, 5th Dist. Delaware No. 07CAC030015, 2008-Ohio-330, ¶ 36; see also, *State v. Mullins*, 5th Dist. Licking No. 2006-CA-00019, 2006-Ohio-4674 [no evidence suspect in custody or otherwise deprived of his freedom of action in any significant way and statements was made in response to "general on-the-scene questioning"]; *State v. Leonard*, 1st Dist. Hamilton No. C-060595, 2007-Ohio-3312 [intrusion minimal where driver not handcuffed, not subject to lengthy detention, and keys not taken.] We thus distinguish *Farris* from the instant case because appellee was not "subjected to treatment" which a reasonable person would have understood to be in police custody. Id.; see also, *Berkemer*, supra, 468 U.S. at 441-42.

{¶38} We conclude appellee's statements to law enforcement are admissible because appellee was not subject to custodial interrogation in the rear of the patrol car. The physical evidence of the contraband is thus not subject to suppression and we need not reach appellant's second assignment of error.

{¶39} Upon our de novo review of the issues presented, we disagree with the trial court's decision to suppress the evidence. Appellant's first assignment of error is sustained and the second assignment of error is overruled as moot.

CONCLUSION

{¶40} The judgment of the Ashland Municipal Court is reversed and this matter is remanded to the trial court for further proceedings in accord with this opinion.

By: Delaney, J. and

Baldwin, J. concur;

Hoffman, P.J., dissents.

Hoffman, P.J., dissenting

{¶41} I respectfully dissent from the majority opinion. I find a reasonable person under the circumstances in which Appellant found himself would believe he or she was not free to leave; therefore, in custody.

{¶42} I find the factual differences between the case sub judice and this Court's two prior opinions on the subject significant. In *State v. Crowe*, 5th Dist. Delaware No. 07CAC030015, 2008-Ohio-330, and *State v. Mullins*, 5th Dist. Licking No. 2006-CA-00019, 2006-Ohio-4674, only one police officer was present during the encounter. In the present case, there were two police officers and a police dog present. I find the presence of additional law enforcement personnel a factor supporting an inference of custody.

{¶43} Although not specifically mentioned in either *Crowe* or *Mullins*, I also find the fact Appellant herein was patted down an indicator a reasonable person might believe he or she is in custody.

{¶44} But, the single most significant factual distinction between this case and *Crowe* and *Mullins* is the fact Appellant was placed in the **back seat** of the cruiser, as opposed to the front seat like the appellants in *Crowe* and *Mullins*. It is commonly believed (if not known), once in the backseat of cruiser, the door can only be opened from the outside. Although not apparent in this record, most, if not all police cars are equipped with a protective cage separating the rear passenger compartment from the front driver compartment. I find placement in the backseat of the cruiser substantially more suggestive of being in custody than placement in the front seat.

{¶45} When all the above circumstances are considered, I agree with the trial court Appellant was in custody.

_____
HON. WILLIAM B. HOFFMAN