

**IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY**

STATE OF OHIO,
CITY OF CHARDON,

Plaintiff-Appellant,

- VS -

DAVID E. HEATH, JR.,

Defendant-Appellee.

CASE NO. 2022-G-0047

Criminal Appeal from the
Chardon Municipal Court

Trial Court No. 2022 CRB 00439

OPINION

Decided: July 31, 2023
Judgment: Reversed and remanded

Steven E. Patton, Chardon Police Prosecutor, Patton & Lee, LLC, 7160 Chagrin Road, Suite 155, Chagrin Falls, OH 44023 (For Plaintiff-Appellant).

R. Robert Umholtz, Geauga County Public Defender, and *Paul J. Mooney*, Chief Assistant Geauga County Public Defender, 211 Main Street, Chardon, OH 44024 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} Appellant, the state of Ohio (the “state”), appeals the judgment of the Chardon Municipal Court that granted appellee’s, David E. Heath (“Mr. Heath”), motion to suppress evidence discovered during a search of Mr. Heath’s vehicle during a traffic stop. The trial court found there was no basis for an exterior dog-sniff sweep of the vehicle since there was no reasonable, articulable suspicion of criminal activity beyond an equipment violation.

{¶2} The state raises one assignment of error on appeal, contending the trial court erred in its determination that there must be a reasonable, articulable suspicion of

criminal activity before a drug dog can be used at a traffic stop even when there is no unreasonable delay.

{¶3} After a careful review of the record and pertinent law, we find the state's assignment of error to be with merit since Mr. Heath was not unreasonably detained; thus, the sergeant was not required to have a reasonable, articulable suspicion. The exterior sniff by a trained narcotics dog was conducted while the vehicle was being lawfully detained for a reasonable period in which to issue a routine traffic citation (approximately three minutes into the stop) and does not constitute a "search." While we recognize the pretextual undertones presented by the particular facts surrounding this traffic stop, the canine unit happened to arrive "at the right place, at the right time."

{¶4} The judgment of the Chardon Municipal Court is reversed and remanded.

Substantive and Procedural History

{¶5} Following a traffic stop for tinted windows, Mr. Heath was charged with possession of a controlled substance, a fifth-degree felony, in violation of R.C. 2925.11(A) and (C)(4)(a), and dark tinted windows, a minor misdemeanor, in violation of R.C. 4513.241. Upon the recommendation of the prosecutor to keep this matter in the jurisdiction of the municipal court, the charge of possession of a controlled substance was amended to attempted possession of a controlled substance, a first-degree misdemeanor, in violation of R.C. 2923.02 and R.C. 2925.11(A) and (C)(4)(a).

{¶6} Mr. Heath filed a motion to suppress, contending there was no reasonable or articulable suspicion of drug activity to warrant a delay in the traffic stop to conduct a dog-sniff search.

The Motion to Suppress Hearing

{¶7} At the hearing on the motion to suppress, the state presented the testimony of the arresting sergeant, Geauga County Sheriff's Sergeant Jonathan Bilicic ("Sgt. Bilicic") and a dashcam video of the traffic stop.

{¶8} Sgt. Bilicic testified he was on patrol in a marked vehicle when he observed a black Mercedes with heavily tinted windows. Sgt. Bilicic approached the vehicle and advised Mr. Heath of the reason for the stop. Mr. Heath gave the sergeant his driver's license, who observed Mr. Heath "appeared to be nervous," his "hands were shaking," and his eyes were "red, bloodshot."

{¶9} Sgt. Bilicic returned to his vehicle and ran Mr. Heath's driver's license through the LEADS ("Law Enforcement Automated Database Search") database. He also sent a message to a canine unit who was patrolling in the same zone. Sgt. Bilicic's LEADS search revealed Mr. Heath did not have any warrants: "he was valid, and his license plates were valid." Sgt. Bilicic retrieved his tint meter and returned to Mr. Heath's vehicle to confirm the window tint was in violation.

{¶10} Sgt. Bilicic asked Mr. Heath if he had anything illegal in the vehicle. Mr. Heath "looked down" and responded "no." After further examination, Sgt. Bilicic testified he inquired whether Mr. Heath had anything illegal in the vehicle because he was familiar with Mr. Heath from his time as a narcotics detective and his eyes were "bloodshot." Sgt. Bilicic stated he asks the driver whether he or she is in possession of anything illegal "almost every time" he conducts a traffic stop.

{¶11} Sgt. Bilicic explained that at the time of the traffic stop, there was an ongoing drug trafficking investigation of a house in the area. Although there was no information

Mr. Heath had been at the suspected house, he was in the vicinity, and he had been observed stopping at a stop sign for longer than usual and sitting in his vehicle in a nearby gas station parking lot.

{¶12} Sgt. Bilicic tested Mr. Heath's driver side window and found the tint saturation at 37%. He informed Mr. Heath window tint cannot be "below 50%" (i.e., it must allow more than 50% of light in). Mr. Heath told the sergeant he had just purchased the vehicle and asked him what he could do. Sgt. Bilicic advised him he could tear it off and remove it from the windows.

{¶13} The canine unit arrived on the scene two to three minutes into the stop while Sgt. Bilicic was testing Mr. Heath's driver's side door window. The officer brought his canine partner to walk around the rear of the vehicle. Sgt. Bilicic had sent a message to the canine unit when he retrieved his tint meter "just for backup, and to walk around the vehicle." Upon the court's inquiry, Sgt. Bilicic testified he did not have to provide additional time for the canine unit to arrive since "he was there pretty quickly."

{¶14} The dash cam video showed a third officer arrive and stand behind Sgt. Bilicic. While Sgt. Bilicic was conversing with Mr. Heath, the canine unit stood in position next to Sgt. Bilicic's cruiser. Sgt. Bilicic motioned for the canine unit to walk around the vehicle, and the canine alerted his handler to the trunk of the vehicle. Sgt. Bilicic again asked Mr. Heath if he had anything illegal in the vehicle, which Mr. Heath denied.

{¶15} Mr. Heath was asked to step out of the vehicle. The officers searched and detained him in Sgt. Bilicic's cruiser while they searched his vehicle, which revealed a methamphetamine pipe in the car. Nothing was ever found in or near the trunk of the car.

{¶16} Sgt. Bilicic confirmed on cross-examination that he did not include in his sworn statement his observations that Mr. Heath had red eyes or that Mr. Heath had been observed sitting in the gas station parking lot. He also did not believe Mr. Heath's nervousness and shaky hands were a sign of alcohol or field sobriety tests should be administered. Upon questioning by the court, Sgt. Bilicic testified he had been advised Mr. Heath was driving the vehicle that was seen sitting at the gas station by the narcotics detectives approximately 15-20 minutes prior to the stop and further, had already checked the vehicle's license plate.

The Trial Court's Ruling

{¶17} The trial court found there was probable cause to stop the vehicle due to the window tint. Further, the duration of the stop and calls for backup were reasonable. The court noted there was no evidence of any smell of either marijuana or alcohol, the sergeant noted no signs of impairment, and nervousness is quite common in an encounter with the police, especially to one who is familiar with the police. The sergeant did not request Mr. Heath to exit the vehicle for field sobriety testing, and there was nothing in plain view to mandate a further search. While Sgt. Bilicic was justified in calling for backup, there was no need to call for a canine unit because there was no reasonable articulable suspicion of criminal activity. The trial court granted Mr. Heath's motion to suppress and dismissed the case.

{¶18} The state raises one assignment of error for our review:

{¶19} "The trial court erred in granting Appellee's Motion to Suppress."

Standard of Review

{¶20} When reviewing a motion to suppress, this court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Russo*, 11th Dist. Lake No. 2019-L-080, 2020-Ohio-3236, ¶ 25. "Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *Kirtland Hills v. Fuhrman*, 11th Dist. Lake No. 2007-L-151, 2008-Ohio-2123, ¶ 8, quoting *State v. Retherford*, 93 Ohio App.3d 586, 592, 639 N.E.2d 498 (2d Dist.1994).

Exterior Dog Sniff Sweep

{¶21} The state contends the trial court erred in granting Mr. Heath's motion to suppress by determining there must be reasonable, articulable suspicion of criminal activity before a drug dog can be used at a traffic stop even when there is no unreasonable delay in the traffic stop.

{¶22} The Fourth Amendment to the United States Constitution, as well as Article One, Section 14 of the Ohio Constitution, guarantee "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." When a police officer stops an automobile and detains its occupants, a "seizure" is committed within the meaning of the Fourth and Fourteenth Amendments." *State v. Henry*, 11th Dist. Lake No. 2007-L-082, 2007-Ohio-6732, ¶ 21; *Delaware v. Prouse* (1979), 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

{¶23} “Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity.” *Henry* at ¶ 22, quoting *State v. Carter*, 11th Dist. Portage No. 2003-P-0007, 2004-Ohio-1181, ¶ 33, citing *Dayton v. Erickson*, 76 Ohio St.3d 3, 11, 665 N.E.2d 1091 (1996).

{¶24} In this case, there is no doubt Sgt. Bilicic had probable cause to conduct a traffic stop since Mr. Heath’s windows were visibly heavily tinted. Thus, our inquiry turns to whether Mr. Heath was delayed “for a time period sufficient to issue a ticket or a warning.” *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, 865 N.E.2d 1282, ¶ 12, quoting *State v. Howard*, 12th Dist. Preble Nos. CA2006-02-002 & CA2006-02-003, 2006 Ohio-5656, ¶ 15. In *Batchili*, the Supreme Court of Ohio explained this “includes the period of time sufficient to run a computer check on the driver’s license, registration, and vehicle plates.” *Id.*, quoting *Howard* at ¶ 15. 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 in order to determine if an officer completed these tasks within a reasonable time. *Id.*

{¶25} A review of Sgt. Bilicic’s testimony and the dash cam video reveals the traffic stop was only several minutes long, and, most fundamentally, the exterior dog sniff sweep occurred before the traffic stop was completed and a citation issued. The canine unit arrived on the scene minutes after the stop was initiated.

{¶26} Cases involving searches after a traffic stop are heavily fact-dependent, and we recognize the pretextual undertones this case presents. We are bound, however, by the precedent of this court that “an exterior sniff by a trained narcotics dog to detect the presence of contraband does not constitute a search under circumstances in which a vehicle has been lawfully detained.” *State v. Melone*, 11th Dist. Lake 2009-L-047, 2009-Ohio-6710, ¶ 58. Where an inspection by law enforcement does not intrude on a legitimate expectation of privacy, there is no search subject to the Warrant Clause of the Fourth Amendment. *Id.*, citing *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983). It follows, therefore, that any interest in possessing contraband cannot be characterized as “legitimate,” and an exterior dog sweep, which only reveals the possession of contraband, does not compromise a legitimate privacy interest. *Id.*, citing *Illinois v. Caballes*, 543 U.S. 405, 408-409, 125 S.Ct. 834, 160 L.E.2d 842 (2005). See also *Henry* at ¶ 26 (Police need not have a reasonable suspicion of drug-related activity prior to subjecting an otherwise lawfully detained vehicle to a canine sniff).

{¶27} This case is reminiscent of *State v. Melone*, in which we aptly remarked, “By violating a traffic law, appellant subjected himself and his vehicle to a period of official detention that might have substantially exceeded four minutes, the time appellant was detained prior to the deployment of the dog. Further, the exterior sweep, even though it occurred subsequent to the officer confirming the validity of appellant’s license and registration, took place before the officer issued a citation. It therefore occurred before the traffic stop ended. Given the totality of the circumstances, we hold the stop of appellant’s vehicle was not unreasonably prolonged and therefore was constitutionally valid. Thus, the canine sweep of the exterior of appellant’s vehicle did not infringe upon

appellant's Fourth Amendment right to be free from unreasonable searches and seizures." *Id.* at ¶ 60.

{¶28} Finding Mr. Heath was not unreasonably detained, we reverse the trial court's ruling granting Mr. Heath's motion to suppress since the sergeant was not required to have a reasonable, articulable suspicion to conduct a dog-sniff sweep under these circumstances. The exterior sniff by a trained narcotics dog was conducted while the vehicle was being lawfully detained for a reasonable period in which to issue a routine traffic citation and does not constitute a "search." See *Henry* at ¶ 26. The canine unit happened to arrive "at the right place, at the right time."

{¶29} "Nevertheless, we would be remiss if we did not take this opportunity to remind law enforcement officers of the dangers of engaging in a pretextual stop in which a traffic citation is issued in a dilatory manner. The circumstances of this case present a perilously close set of facts, and we must always be mindful that '[t]he liberties of the American citizen depend upon the existence of established and known rules of law limiting the authority and discretion of men wielding the power of government.' Perry & Cooper, *Sources of Our Liberties*, (Chicago: American Bar Association, 1959), at 1." *Henry* at ¶ 44.

{¶30} Finding the state's assignment of error to be with merit, the judgment of the Chardon Municipal Court is reversed and remanded in accordance with this opinion.

JOHN J. EKLUND, P.J.,

EUGENE A. LUCCI, J.,

concur.