STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 27, 2018
v	No. 339239 Berrien Circuit Court
JAMES HENNERY HANNIGAN, Defendant-Appellant.	LC No. 2014-002421-FH

Before: MURPHY, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

In this interlocutory appeal, defendant, James Hennery Hannigan, appeals by leave granted the trial court's order denying his motion to suppress evidence. We reverse and remand.

This case arises out of a traffic stop that occurred along I-196 in Berrien County, Michigan. Defendant was driving a rented recreational vehicle (RV) with two passengers northbound on I-196 to attend the Lakes of Fire Art Festival and the Electric Forest Music Festival in Rothbury, Michigan. The police officer initiated the stop after observing defendant drive over the "gore."[1] After a positive indication by a drug-sniffing dog, police officers searched the RV and discovered capsules of methylenedioxymethamphetamine (MDMA) and several small bags of marijuana. Defendant was charged with possession with the intent to deliver MDMA, which is commonly known as ecstasy, MCL 333.7401(2)(b)(*i*), and possession with the intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*).

In defendant's motion to suppress, he argued that the narcotics should be suppressed because the traffic stop in this case was unduly prolonged contrary to *Rodriquez v United States*, 575 US __; 135 S Ct 1609; 191 L Ed 2d 492 (2015). According to defendant, the purpose of the stop was completed when the police officer returned defendant's documentation, and no evolving circumstances or new information revealed during the course of the stop justified the delay until the dog arrived. However, the trial court disagreed and denied the motion. The trial

[1] The officer explained that the "gore" is where the solid white lines are present that separate I-94 and the exit to I-196. It appeared that the driver was going to continue eastbound on I-94 and then at the last second made a right turn, went through the gore, and exited on northbound I-196.

court concluded that the mission of the traffic stop was still incomplete by the time that the dog arrived. In the alternative, the trial court determined that defendant voluntarily consented to wait for the dog, and that the officer had reasonable suspicion to detain defendant until the dog arrived.

On appeal, defendant contends that the trial court erred in denying his motion to suppress the evidence of the narcotics discovered in the RV. We agree.

This Court reviews "[a] trial court's findings of fact on a motion to suppress . . . for clear error." *People v Hrlic*, 277 Mich App 260, 262-263; 744 NW2d 221 (2007). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). However, "the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference," so this Court reviews "de novo the trial court's ultimate ruling on the motion to suppress." *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

The Fourth Amendment of the United States Constitution provides:

> 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.

"[A] 'seizure' within the meaning of the Fourth Amendment occurs when in view of all the circumstances, a reasonable person would conclude that he was not free to leave." *People v Kavanaugh*, 320 Mich App 293, 300; __ NW2d __ (2017) (quotation marks omitted). Typically, evidence that is unconstitutionally seized must be excluded from trial. *People v Dillon*, 296 Mich App 506, 508; 822 NW2d 611 (2012). "[A] police officer may stop and detain a motor vehicle on the basis of an articulable and reasonable suspicion that the vehicle or one of its occupants is violating the law." *Id*. "This Court's determination of whether there was reasonable suspicion to justify a stop must be made on a case-by-case basis, evaluated under the totality of the circumstances, and based on common sense." *Id.*

"In analyzing the propriety of the detention" associated with a traffic stop, this Court applies "the standard set forth in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968)." *Williams*, 472 Mich at 314. "Under *Terry*, the reasonableness of a search or seizure depends on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' " *Id*., quoting *Terry*, 392 US at 20. Furthermore, "[a] traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period." *Williams*, 472 Mich at 315.

In *Illinois v Caballes*, 543 US 405, 409; 125 S Ct 834; 160 L Ed 2d 842 (2005), the Supreme Court held that a dog sniff completed during a valid traffic stop did not violate the Fourth Amendment. However, it later held in *Rodriquez*, 135 S Ct at 1614-1615, that a police

officer may not prolong a traffic stop to allow a dog sniff without reasonable suspicion to justify that delay.

In this case, defendant does not argue on appeal that the initial traffic stop was unlawful. As a result, we will assume that the initial traffic stop was proper.

However, "[i]t is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." *Caballes*, 543 US at 407. "A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id*.

Here, the police officer testified that he was suspicious that defendant was under the influence of drugs or alcohol, that he was driving while distracted, and that the passengers of the RV were concealing contraband because it took 1½ miles for defendant to pull over after he activated his emergency lights. After defendant pulled over, the officer approached the RV, made contact with defendant, and then returned to his patrol car with defendant's paperwork. After running defendant's information through the Law Enforcement Information Network (LEIN), the officer returned to the driver's side of the RV, asked defendant to exit the RV, and asked defendant additional clarifying questions near the rear of the RV.

We find that these actions were permissible. First, there was defendant's act of driving over the gore, followed by his delay in pulling the RV over to the side of the highway. We viewed the video and even if defendant could not see the officer's lights initially, he moved his patrol car completely into the left lane where the RV's side mirror was clearly visible. Therefore, it is somewhat difficult to believe that defendant could not see the emergency lights, but he did pull over promptly after the officer activated his siren. Also, "[i]t is no violation for the Fourth Amendment for an officer to ask reasonable questions in order to obtain additional information about the underlying offense and the circumstances leading to its commission." *Williams*, 472 Mich at 316. "For example, in addition to asking for the necessary identification and paperwork, an officer may also ask questions relating to the reason for the stop, including questions about the driver's destination and travel plans." *Id*. Finally, it was not impermissible for the officer to ask defendant to step out of the RV and answer additional questions. See *Penn v Mimms*, 434 US 106, 111; 98 S Ct 330; 54 L Ed 2d 331 (1977) (stating that an "officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both").

While speaking to defendant at the rear of the RV, the officer asked defendant for consent to search the RV, but defendant declined. According to the officer's testimony, another police officer arrived at the scene at this point and indicated that he called the drug-sniffing dog, which was located at the Berrien County Jail, and that the dog and its handler were in route.

After the dog was summoned, the officer spoke with the passengers separately. Their stories were consistent with the information defendant provided. According to the video, the officer finished his questioning of the passengers approximately 15 minutes into the video. However, the dog did not arrive for another additional 15 minutes.

The testimony regarding whether the officer intended to give defendant a verbal warning concerning improper lane use was unclear. However, the officer testified at the suppression hearing that he never made the decision to give defendant a verbal warning at the scene because he arrested him instead. Additionally, the officer told the trial court that when he handed defendant his paperwork, defendant was not free to go and he had not completed the stop by the time that the dog arrived.

In addition, the officer testified that his concerns that defendant was under the influence of drugs or alcohol were dispelled after he made contact with defendant. He questioned the passengers about the activities in the RV right before the stop. They indicated that defendant was not driving while distracted (such as using a cellular phone) and that they did not conceal any contraband. The officer did not observe or smell any narcotics.

The officer had reasonable concerns regarding defendant's driving after observing him drive over the gore and taking 1½ miles to pull over after the officer activated his emergency lights. However, we hold that requiring defendant to wait for the dog impermissibly prolonged the traffic stop. The officer testified that he had not entered the passengers' information into the system or decided to give defendant a verbal warning. However, the dog arrived 15 minutes after the officer returned defendant's documents and questioned defendant and his passengers. "Even if the officer has not yet completed the traffic violation matters, if conducting a canine sniff caused that completion to be delayed, it remains a constitutional violation." *Kavanaugh*, 320 Mich App at 301 n 6. See also *Rodriquez*, 135 S Ct at 1616 ("The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs'—i.e., adds time to—'the stop[.]' ").

Moreover, based on the video and the testimony at the suppression hearing, defendant did not consent to wait for the dog. As discussed above, defendant was not unlawfully detained when the officer asked him to wait for the dog. However, "[c]onsent must be freely and voluntarily given in order to be valid." *Williams*, 472 Mich at 318. "Consent is not voluntary if it is the result of coercion or duress." *People v Bolduc*, 263 Mich App 430, 440; 688 NW2d 316 (2004).

In this case, at approximately eight minutes into the video, the officer asks for defendant's consent to search the RV. Defendant explained that he was in a hurry to get to his destination and that he did not have anything illegal in the RV. The officer said "what [he was] going to do then" was bring in a drug-sniffing dog to do a sniff around the RV and then he would send defendant on his way. At this point, defendant nods and it appears that he said "okay." Then there is some additional conversation that was difficult to understand and the officer said, "I am asking you to wait for that, okay?" Additionally, the officer testified at the suppression hearing that defendant "shook his head" and was "hem humming around" saying that he was late during the discussion about the dog.

Therefore, considering the officer's statements to defendant, it appeared that defendant would not be free to leave unless he either: (1) allowed the officer to search the RV; or (2) waited for the dog to arrive to complete a contraband sniff. As a result, any assumed consent given by defendant was not "freely and voluntarily given," *Williams*, 472 Mich at 318, because the officer indicated that he did not have a choice to decline. In fact, the officer expressly asked

defendant to wait for the dog to arrive. Accordingly, defendant's assumed consent to wait for the dog was involuntary. *Id*.

Thus, we conclude that the continued detention of defendant and his passengers after the officer completed the computer checks on defendant's information and questioned defendant and his passengers was unconstitutional unless the stop revealed a set of new circumstances that led to a reasonably articulable suspicion that criminal activity was afoot. *Kavanaugh*, 320 Mich App at 301.

> Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances. A determination regarding whether a reasonable suspicion exists must be based on commonsense judgments and inferences about human behavior. That suspicion must be reasonable and articulable. [I]n determining whether [a police] officer acted reasonably in [extending the detention], due weight must be given, not to his inchoate and unparticularized suspicion or hunch, but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. [*Id*. at 301-302 (quotation marks, ellipses, and citations omitted; initial two alterations in original).]

The officer cited several factors in support of his conclusion that he had reasonable suspicion to suspect that there were narcotics in the RV: (1) defendant did not pull over right away; (2) defendant's destination; (3) defendant's reaction after the officer asked for his consent to search the RV; (4) defendant met his male passenger online; and (5) the male passenger's nervousness.

As discussed above, defendant driving over the gore and 1 ½ miles after the officer activated his emergency lights could reasonably raise suspicion regarding a traffic violation, driving under the influence or while distracted, and whether defendant was perhaps trying to evade the officer for whatever reason, assuming that he saw the activated lights. However, defendant was not under the influence of drugs or alcohol, and the passengers confirmed that defendant was not driving while distracted. The officer questioned defendant and his passengers separately. These discussions did not reveal any inconsistent stories, there were no outstanding warrants for defendant or his passengers, and the officer did not observe any signs indicating drug or alcohol use or the presence of any weapons. As a result, even if the length of time it took defendant to pull over was initially indicative of possibly something illegal happening in the RV, it was not enough to support a finding of reasonable suspicion after the officer completed a brief investigation of defendant and his passengers.[2]

[2] We are not prepared to conclude that, standing alone, defendant driving over the gore and then waiting to pull over provided probable cause or reasonable suspicion that drugs were in the RV.

Next, the officer testified that his suspicions were also raised because defendant and his passengers were going to the Electric Forest Music Festival. According to his knowledge and experience, the festival was known for widespread use of narcotics. However, by itself, this fact did not support reasonable suspicion. Especially because the officer testified that he did not observe any evidence that defendant or his passengers were using drugs or alcohol.

The officer was suspicious due to defendant's and the male passenger's nervousness. He testified that defendant broke eye contact and became nervous after he asked for defendant's consent to search the RV. In addition, when the officer made his initial contact with defendant at the RV, the male passenger looked straight ahead and did not speak to him. At the outset, we did not observe any change in defendant's demeanor after the officer asked for consent to search the RV; however, it was difficult to see defendant's face clearly because of the quality of the video. Further, any visual contact with the male passenger cannot be seen on the video.

> Moreover, many courts have given little weight to considerations of nervousness in a traffic stop. See, e.g., *United States v Richardson*, 385 F3d 625, 630-631 (CA 6, 2004) (stating that "nervousness . . . is an unreliable indicator, especially in the context of a traffic stop" and noting that "[m]any citizens become nervous during a traffic stop, even when they have nothing to hide or fear"); *United States v Simpson*, 609 F3d 1140, 1147-1148 (CA 10, 2010) (recognizing that "[n]ervousness is of limited value" in determining whether reasonable suspicion exists because most citizens exhibit signs of nervousness when confronted by law enforcement whether innocent or guilty and absent "significant knowledge of a person, it is difficult, even for a skilled police officer, to evaluate whether a person is acting normally for them or nervously"). [*Kavanaugh*, 320 Mich App at 304 (alteration and ellipsis in original).]

In this case, even if defendant broke eye contact after being asked to consent to a search and the male passenger looked straight ahead and did not speak to the officer when he first approached the RV, this does not rise to the level of nervousness to support reasonable suspicion. In fact, the officer subsequently interviewed the male passenger separately, and apparently he did not observe any other indications that the passenger was nervous.

Finally, the officer testified that he was suspicious because defendant met his male passenger online and had only known him for about four hours. However, the popularity of smart phone applications such as Uber and Lyft show that this is not an uncommon occurrence. That aside, the officer did not explain how defendant giving someone he met online a ride to a music festival indicated any evidence of criminal activity.

"It is not enough that an officer have an 'inchoate and unparticularized suspicion or 'hunch[,]' [and] [t]he officer must be able to articulate 'the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.' " *Id*. at 306, citing *Terry*, 392 US at 27.

In this case, we cannot conclude that the circumstances cited by the officer supported a finding of reasonable suspicion. As a result, defendant's detention to wait for the dog after the officer ran computer checks and interviewed defendant and his passengers was impermissible

under *Rodriquez*. Thus, evidence of the narcotics discovered in the RV was inadmissible. See *Kavanaugh*, 320 Mich App at 302-308 (concluding that the police officer did not have reasonable suspicion sufficient to detain the defendant when: the defendant did not pull over until reaching the end of the exit ramp; he appeared nervous throughout the encounter – shaky hands and avoiding eye contact; the defendant could not produce the registration or title for the vehicle; he did not close the passenger-side door of the patrol car when he was sitting with the officer; and the defendant and his passenger gave inconsistent answers to some general questions).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly