[Cite as *State v. Henderson*, 2007-Ohio-2315.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2006-L-110**
- vs -	:	
STEVEN HENDERSON, SR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 000621.

Judgment: Reversed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

WILLIAM M. O'NEILL, J.

{¶1} Appellant, Steven Henderson, Sr., appeals from the judgment of the Lake County Common Pleas Court. In the trial court, Henderson entered a plea of no contest and was found guilty of having a weapon under disability, a fourth-degree felony and a violation of R.C. 2923.13(A)(3). In this court, he is challenging the ruling of the trial court on his motion to suppress and his conviction. On review, we conclude that, while the initial traffic stop of Henderson was lawful, the continued detention and interrogation

of Henderson was unreasonable and unlawful. The trial court erred in failing to grant Henderson's motion to suppress. The judgment entry of the trial court is reversed.

{¶2} On the night of August 24, 2005, Henderson was operating a late model Cadillac eastbound on Interstate 90. Officer Jonathan O'Leary of the Madison Village Police Department was following Henderson's vehicle for some distance. O'Leary made an inquiry regarding Henderson's plates through his Mobile Data Terminal (MDT). In response, O'Leary was informed that the plates had expired, that a temporary protection order had been issued against Henderson, that he had "violent tendencies," and that Henderson had a history of prior drug use.

{¶3} O'Leary approached Henderson's vehicle from the passenger side and asked to see Henderson's driver's license. He also asked about a pill bottle located in the car, Henderson's in-car television, and the contents of a brown paper bag. During this time, the officer also learned that Henderson was unemployed and on disability.

{¶4} Multiple air fresheners on the rear-view mirror, a bottle of cologne, and multiple cell phones as well as a considerable amount of jewelry worn by Henderson were also observed by O'Leary. The officer testified that he could smell a really strong smell of air fresheners or cologne and that he observed that the vehicle had air shocks that were filled to the maximum, raising up the back end of the vehicle. Air shocks are useful if one wants to conceal weight in the trunk of the car. O'Leary also testified that, from his training and experience, substances with strong aromas are used to mask the smell of drugs. Finally, he testified that, in his experience, persons who transport drugs often have weapons close at hand.

{¶5} After this initial encounter, Officer O'Leary returned to his vehicle and wrote a citation for expired plates. Upon returning to the Henderson vehicle, the officer asked Henderson to step out of the vehicle and proceed to the rear of the vehicle. He handed the citation to Henderson and told him he was free to go.

{¶6} Thereupon, Officer O'Leary asked Henderson, "[w]ould it be okay if I asked you a question?" Henderson replied that it would be alright with him. The officer then asked him about the temporary protection order, to which Henderson gave a vague answer. Then the officer asked Henderson about his prior drug use, and Henderson replied that he had used crack cocaine when he was younger and that he had been in recovery for a number of years. The officer then asked whether Henderson had any drugs on his person or in the car, to which Henderson replied in the negative. The officer then asked for permission to search inside the vehicle. Henderson replied, "go ahead." It was during a search of the vehicle that O'Leary discovered a .25-calibre handgun.

{¶7} Henderson was indicted by the grand jury on two counts, the first count for carrying a concealed weapon, a fourth-degree felony, in violation of R.C. 2923.12(A)(3); and the second count for having a weapon while under disability, as stated above.

{¶8} Henderson filed a motion to suppress evidence obtained from the search of his vehicle. Following an evidentiary hearing, the trial court denied Henderson's motion to suppress. Henderson thereupon entered a plea of no contest to the charge of having a weapon while under disability. The prosecutor moved for a nolle prosequi of the carrying concealed weapon charge, which was accepted by the court. Henderson was sentenced to 90 days in jail and two years of community control.

{¶9} Henderson filed a timely appeal to this court, raising the following two assignments of error:

{¶10} "[1.] The trial court erred to the prejudice of the defendant-appellant when it overruled his motion to suppress evidence challenging the lawfulness of the continued detention in violation of his due process rights and rights against unreasonable search and seizure as guaranteed by sections 10 and 14, Article I of the Ohio Constitution and the Fourth and Fourteenth Amendments to the United States Constitution.

{¶11} "[2.] The trial court erred to the prejudice of the defendant-appellant when it overruled his motion to suppress challenging evidence found after an invalid consent to search in violation of the Fourth Amendment of the United States Constitution and section 14, Article I of the Ohio Constitution."

{¶12} The two assignments of error shall be discussed together in this analysis.

{¶13} "Appellate review of a motion to suppress presents a mixed question of law and fact."[1] The appellate court must accept the trial court's factual findings, provided they are supported by competent, credible evidence.[2] Thereafter, the appellate court must independently determine whether those factual findings meet the requisite legal standard.[3]

{¶14} This case contains similar facts to the case of *State v. Hale*,[4] recently decided by this court. In the *Hale* case, the officer stopped a vehicle and noticed the smell of marijuana as he was standing at the passenger side of the vehicle. The passenger was asked to exit the vehicle and, in a patdown search of the passenger, a

1. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8.
2. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594.
3. *State v. Thompson* (July 27, 2001), 11th Dist. No. 2000-T-0096, 2001 Ohio App. LEXIS 3356, at *5.
4. *State v. Hale*, 11th Dist. No. 2004-L-105, 2006-Ohio-133.

handgun was discovered to be on his person. He was convicted of having a weapon while under a disability. The passenger challenged the search by way of a motion to suppress and, on appeal to this court, this court held that the officer "had the authority to search and inquire further based upon his reasonable suspicion that drug activity was in progress."[5]

{¶15} Our legal analysis in the *Hale* case proceeded as follows:

{¶16} "Our analysis begins with the United States Supreme Court in the case of *Whren v. United States*:

{¶17} "'Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of (the Fourth Amendment). *** An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.'[6]

{¶18} "That court went on to explain that:

{¶19} "'In principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause.'[7]

5. Id. at ¶41.
6. (Citations omitted.) *Whren v. United States* (1996), 517 U.S. 806, 809-810.
7. Id. at 817.

{¶20} "Within weeks of that decision by the United States Supreme Court, the Supreme Court of Ohio made a like decision with respect to traffic stops in the case of *Dayton v. Erickson*, in which it adopted the holding of the Sixth Circuit Court of Appeals and approved of the following language:

{¶21} "'"We hold that so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment. *** The stop is reasonable if there was probable cause, and it is irrelevant what else the officer knew or suspected about the traffic violator at the time of the stop."'[8]

{¶22} "The Supreme Court of Ohio went on to hold in the *Dayton v. Erickson* case that:

{¶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.'[9]"10

{¶24} Thus, applying the foregoing legal principles to the case at hand, Henderson's initial encounter with O'Leary was reasonable, because O'Leary had probable cause to issue Henderson a citation for expired plates. The question is whether the next encounter with Henderson, where O'Leary asked Henderson to exit his vehicle, then asked him to proceed to the rear of his vehicle, where he told

8. *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, at 9-10, quoting *United States v. Ferguson* (C.A. 6, 1993), 8 F.3d 385, 388.
9. *Dayton v. Erickson*, syllabus.
10. *State v. Hale*, supra, at ¶25-32.

Henderson he was free to go, but where O'Leary began to question him, was reasonable under the circumstances. We conclude that it was not reasonable.

{¶25} "[I]f circumstances attending an otherwise proper stop should give rise to a reasonable suspicion of some other illegal activity, different from the suspected illegal activity that triggered the stop, then the vehicle and the driver may be detained for as long as that new articulable and reasonable suspicion continues ***."[11]

{¶26} At the time O'Leary asked Henderson to exit his vehicle, he knew from the MTD broadcast that Henderson had a temporary protection order issued against him, that he had violent tendencies, and had prior drug use. He also observed an unemployed individual driving a late model Cadillac, who was wearing a lot of jewelry, had multiple cell phones in his vehicle, used air fresheners and cologne, and had an in-car television. At the time Henderson was asked to exit his vehicle, O'Leary could reasonably have been observing a drug user or a drug dealer. Based upon his training and experience, either of these conclusions based upon his observations would have been reasonable. Further, this court has held that a police office does not need reasonable suspicion to request a driver to exit his vehicle:

11. *State v. Myers* (1990), 63 Ohio App.3d 765, 771. See, also, *State v. Gedeon* (1992), 81 Ohio App.3d 617, 618, citing *Terry v. Ohio* (1968), 392 U.S. 1.

{¶27} "'"*** Once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.'"[12] Further, it is 'proper for an officer to order a driver to exit a lawfully stopped vehicle, even if there was no reasonable suspicion of criminal activity.'[13]"14

{¶28} Officer O'Leary's motive in asking Henderson to exit his vehicle is not controlling.[15] Apart from his motive, O'Leary had probable cause for the initial traffic stop. However, his continued detention and questioning after advising Henderson that he was "free to go" required the existence of reasonable suspicion of ongoing criminal activity.[16] At the time O'Leary told Henderson he was "free to go," there was no ongoing criminal activity that O'Leary could observe. As the Second Appellate District stated in the case of *State v. Retherford*:

{¶29} "'[T]he mere fact that a police officer has an articulable and reasonable suspicion sufficient to stop a motor vehicle does not give that police officer "open season" to investigate matters not reasonably within the scope of his suspicion.'"[17]

12. *State v. Wojtaszek,* 11th Dist. No. 2002-L-016, 2003-Ohio-2105, at ¶17, quoting *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 111.
13. *State v. Jennings* (Mar. 3, 2000), 11th Dist. No. 98-T-0196, 2000 Ohio App. LEXIS 800, at *13.
14. *Kirtland Hills v. Strogin*, 11th Dist. No. 2005-L-073, 2006-Ohio-1450, at ¶19.
15. *Dayton v. Erickson*, supra, at 9-10.
16. *State v. Helton*, 11th Dist. No. 2005-A-0043, 2006-Ohio-2494, at ¶26, quoting *State v. Myers*, supra, at 771.
17. (Citations omitted.) *State v. Retherford* (1994), 93 Ohio App.3d 586, 600.

{¶30} Instead of simply handing Henderson his citation for expired plates and allowing him to go on his way, O'Leary pursued the items that did not make sense to him and continued with his questioning of Henderson until he got Henderson's consent to search his vehicle. Thus, the statement to Henderson that he was "free to go" was ephemeral. A reasonable person would not perceive that he was free to go when the officer moves into the next round of questioning with the lights from his patrol vehicle still flashing.[18]

{¶31} When Henderson told O'Leary to "go ahead" and search the vehicle, the consent to search was already tainted by the lack of specific and articulable facts or a reasonable suspicion of any ongoing criminal activity. O'Leary did not possess such specific and articulable facts as of the time he told Henderson he was "free to go." Therefore, Henderson's consent was not effective to legitimize a detention that was already unlawful and unreasonable. As stated by the Second Appellate District:

{¶32} "[A] 'valid consent cannot be given following an illegal detention to which it is strongly connected, and that evidence uncovered as a result of such a search must be suppressed as fruit of the poisonous tree.'"[19]

{¶33} For the foregoing reasons, we conclude that the trial court erred in failing to grant Henderson's motion to suppress.

18. See id. at 598.
19. Id. at 603, quoting *State v. Pinder* (Dec. 15, 1993), 2d Dist. No. 93 CA 6, 1993 Ohio App. LEXIS 5972, at *13.

{¶34} Henderson's assignments of error have merit.

{¶35} The judgment of the trial court is reversed. The matter is hereby remanded to the trial court for further proceedings consistent with this opinion.

COLLEEN MARY O'TOOLE, J., concurs,

MARY JANE TRAPP, J., concurs with Concurring Opinion.

MARY JANE TRAPP, J., concurs with Concurring Opinion.

{¶36} I concur with the judgment and opinion of the court, but I write separately to articulate a Fourth Amendment analysis of the perilous intersection of consent searches and police drug interdiction during automobile stops. I note at the outset the courageous and valiant efforts of our police officers in combating the war on illegal drugs, and that the techniques used during drug interdiction traffic stops have been upheld by the courts when an articulable and reasonable suspicion of criminal activity is present. However, we have witnessed a retreat from the *Weeks* and *Mapp*[20] line of cases addressing Fourth Amendment protections against unreasonable searches and seizures, especially in automobile search and seizures cases. Thus, it is imperative, now more than ever, when the Bill of Rights is viewed by some as a "technicality" that can be ignored for expediency's sake, that this type of police investigation operate within the bounds outlined by our constitution.

20. *Weeks v. United States* (1914), 232 U.S. 383 and *Mapp v. Ohio* (1961), 367 U.S. 643.

{¶37} As Ohio born Justice William Day wrote, “The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.” *Weeks* at 393.

{¶38} I begin my analysis with the well recognized rule that a police stop of a motor vehicle is a significant intrusion that requires justification as a “seizure” within the meaning of the Fourth and Fourteenth Amendments of the United States and Ohio Constitutions. *State v. Retherford* (1994), 93 Ohio App.3d 586, 598. See *State v. Heinrichs* (1988), 46 Ohio App.3d 63, 65, citing *Delaware v. Prouse* (1979), 440 U.S. 648, 653. It is undisputed that in the case at bar, the initial stop of Henderson’s automobile was justified by the fact that his vehicle had expired license tags. Thus, Henderson was legally “seized” under both the Fourth Amendment and the Ohio Constitution the moment he was pulled over. However, once the officer issued the citation and told Henderson he was “all set,” the probable cause that justified the stop was dispelled.

{¶39} It cannot be seriously argued that Henderson, who was standing on the side of an interstate, next to an officer, would have felt free to go when the officer gave him his citation, yet continued to question him. As the Supreme Court remarked in *Delaware v. Prouse,* pulling over a vehicle onto the side of the road may involve “an unsettling show of authority which interferes with the freedom of movement, is inconvenient, takes up the individual’s time, and may create substantial anxiety.” *Prouse* at 657.

{¶40} In *State v. Vanderhoff* (1995), 106 Ohio App.3d 21, 25, we recognized that once the officer had dispelled his suspicions of outstanding warrants that, at that point, the appellant should have been free to leave. However, the officer did not do so, and instead ordered the appellant out of the car. We remarked: "[a]ppellant was not free to leave at this point in time, and the detention of appellant became custodial in nature, even though the officers did not have any basis upon which the restraint of appellant could be justified or which a search of the vehicle could be undertaken." Id. at 25. Thus, as in *Vanderhoff*, once the officer had given Henderson his traffic citation and told him he was "all set," his continued detention and further questioning became unlawful unless the stop otherwise gave rise to a reasonable suspicion of some other illegal activity, different from the original stop.

{¶41} The question that follows, then, is whether the officer had a different new, articulable, and reasonable suspicion to prolong the detention or whether the officer was simply engaged in a "fishing expedition." After questioning Henderson about a temporary protection order that was issued against him, his past convictions, and his drug history; questions to which Henderson truthfully replied; the officer asked if he had anything "like that" on him. When Henderson responded in the negative, the officer then asked if he could search Henderson's vehicle for "any items like that," to which, of course, Henderson consented. At this point, the officer did not have any new indicia of illegal drug activity. The officer did not base his continued detention upon an odor of drugs, an alert by a drug dog of the presence of drugs, or even "nervousness" or odd behavior of the suspect. Based on Henderson's prior convictions and drug history, combined with the type of car and Henderson's personal style, the officer had a hunch

that criminal activity may be afoot. This was clearly not enough to justify the continued detention.

{¶42} In *State v. Chatton* (1984), 11 Ohio St.3d 59, 61, the Ohio Supreme Court noted that "the detention of an individual by a law enforcement officer must, at the very least, be justified by 'specific and articulable facts' indicating that the detention was reasonable." (Citations omitted). Further, "[a]n inarticulate hunch or suspicion is not enough. The officer must have a reasonable belief and specific facts upon which a reasonable suspicion could be based that appellant was violating or about to violate the law." *State v. Carter*, 11th Dist. No. 2003-P-0007, 2004-Ohio-1181, at ¶35, citing *State v. Dickinson* (Mar. 12, 1993), 11th Dist. No. 92-L-086, 1993 Ohio App. LEXIS 1428, at 4. Thus, the continued detention of Henderson after the issuance of the citation was clearly unlawful since the officer did not have a new reasonable suspicion to justify his further questioning and subsequent search.

{¶43} Having determined the prolonged detention was unlawful, we must next decide whether Henderson's "consent" to search the car cleansed the illegal police conduct. The only logical conclusion is that it did not. "Consent given while unlawfully detained, even if voluntary, renders the resulting evidence inadmissible unless the consent is an 'independent act of free will.'" *Carter* at ¶36, citing *Florida v. Royer* (1983), 460 U.S. 491, 501-502.

{¶44} After *Vanderhoff*, we were presented with a similar case, *State v. Lyons* (2000), 11th Dist. No. 99-L-067, 2000 Ohio App. LEXIS 2532, where we reviewed the "voluntariness" of consent. We stated: "the general rule is that a warrant supported by probable cause is needed in order for a search to occur. However, a warrantless

search may be conducted if an exception to the warrant requirement exists." Id. at 8, citing *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 219. "For example a warrantless search does not violate the Fourth or Fourteenth Amendments if it is performed with the voluntary consent of the person whose privacy rights are at issue." Id. "Additionally voluntariness is a question of fact to be determined by considering the totality of the circumstances." Id. at 9, citing *Schneckloth,* at 248-249. "Furthermore, consent must be shown to have been freely and voluntarily given by 'clear and positive' evidence, and the burden is on the state to demonstrate such consent." Id. citing *State v. Posey* (1988), 40 Ohio St. 3d 420, 427, citing *Bumper v. North Carolina* (1968), 391 U.S. 543, 548. "That burden is not satisfied by showing a mere submission to a claim of lawful authority." Id. citing *Royer* at 497.

{¶45} In this case, as in *Lyons*, the state has failed to carry their burden of proving clearly and convincingly that the appellant freely and voluntarily consented to the search of his vehicle. Id. at 11. "***[T]he causal conversation, the general questions, or the request for consent cannot be used to impermissibly broaden the investigative scope of the initial detention in the absence of a reasonable or articulable suspicion that further criminal activity is afoot." *Retherford* at 600-601.

{¶46} "When consent is obtained after illegal police activity, such as an illegal detention, search, or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search." Id. at 602, citing *Royer* at 501. Thus, our inquiry next focuses on whether the consent became voluntary due to an attenuated break from the illegal detention. Consent "will be held voluntary only if there is proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior

illegal action." Id. Furthermore, "[f]actors to consider in determining whether the consent is sufficiently removed from the taint of the illegal [seizure] include the length of time between the illegal seizure and the subsequent search, the presence of intervening circumstances, and the purpose and flagrancy of the misconduct." Id. at 601, citing *United States v. Richardson* (C.A. 6, 1991), 949 F.2d 851, 858. See, also, *Brown v. Illinois* (1975), 422 U.S. 590, 603-604.

{¶47} In this case, Henderson consented to a search during the course of an illegal detention. There were only a few moments between the illegal seizure and the subsequent search. There were no intervening circumstances that served to attenuate the link, nor were there any suspicions further raised by Henderson's truthful answers to the officer's questions. Consequently, "a valid consent cannot be given following an illegal detention to which it is strongly connected, and that evidence uncovered as a result of such a search must be suppressed as fruit of the poisonous tree." *Retherford* at 603.

{¶48} Thus, I find that after reviewing the totality of the circumstances, the only conclusion that can be drawn is that Henderson did not voluntarily consent to the search of his automobile, but was merely submitting to a claim of lawful authority while being unlawfully detained.