[Cite as *State v. Melone*, 2009-Ohio-6710.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-047**
- vs -	:	
JASON B. MELONE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000196.

Judgment: Affirmed.

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

Justin M. Weatherly, Brandon J. Henderson Co., L.P.A., 3238 Lorain Avenue, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jason B. Melone, appeals from the judgment entry of the Lake County Court of Common Pleas denying his motion to suppress evidence obtained from a search of his vehicle following a traffic stop. Appellant challenges both the validity of the initial traffic stop as well as the legality of the eventual search. For the reasons discussed in this opinion, we affirm the decision of the trial court.

{¶2} On February 1, 2008, at approximately 7:30 p.m., Officer Brenda McNeely of the Painesville Police Department was driving her marked cruiser southbound on the curb lane of N. State Street accompanied by her canine partner, Freedy. As she approached the intersection at E. Erie Street, she stopped at the stop bar for a red traffic signal with the intention of turning right onto Erie. On the officer's right, i.e., on the northwest corner of Erie and State Streets, sat a Sunoco gas station. The stop bar at which the officer waited was situated immediately before a curb cut entrance/exit for the gas station.[1]

{¶3} Erie and State streets do not intersect at a typical 90 degree angle, but at a 45 degree angle (or a 135 degree angle, depending on one's vantage point); in other words, a "bird's eye view" of this intersection would reveal its plotting is akin to an "x" pattern rather than the "+" pattern most square intersections resemble. The curb cut entrance to the Sunoco station, therefore, would be most easily accessible to traffic traveling southbound on N. State Street, particularly the lane Officer McNeely occupied.

{¶4} As the officer came to a stop, appellant was driving westbound on E. Erie Street in the curb lane. Appellant approached the intersection with a green light and intended on entering the gas station using the curb cut located on N. State Street between the stop bar where the officer was located and the intersection. Appellant displayed his right turn signal and began to execute a right-hand turn. Instead of making a complete turn, however, appellant veered across traffic so as to enter the curb cut entrance described above.

1. The record indicates a second curb cut entrance to the gas station was located on Erie Street directly after the intersection.

{¶5} Prior to appellant veering toward the curb cut, the officer, relying on appellant's right turn signal and his initial movement onto N. State Street, had started to move her cruiser beyond the stop bar in order to turn right onto Erie Street on the red signal. Once she noticed appellant veering toward her, however, she quickly braked to avoid a collision with appellant's passing vehicle.

{¶6} Due to appellant's driving maneuver, Officer McNeely entered the gas station and initiated a traffic stop. She approached the vehicle and requested appellant's driver's license and proof of insurance. Appellant requested permission to open his door to retrieve his insurance card, which the officer granted. After opening the door, Officer McNeely observed a wadded $20 bill tucked in the driver's door arm rest. She suggested that appellant put the bill elsewhere so it did not fall from the vehicle. Appellant then placed the bill in his glove compartment and produced his insurance card.

{¶7} Officer McNeely subsequently confirmed the validity of appellant's insurance and license and a back-up officer arrived on the scene. The officers re-approached the vehicle and asked appellant and his passenger to exit. The officers then obtained appellant's and his passenger's consent to search their persons for weapons and contraband. The frisk revealed nothing.

{¶8} Next, Officer McNeely advised appellant that she would be utilizing her police canine to check the exterior of his vehicle for contraband. The dog, already on the scene in Officer McNeely's cruiser, was deployed approximately four minutes from the commencement of the stop. The dog circled the vehicle twice and alerted on the passenger's front-door hinge during each pass.

{¶9} According to Officer McNeely, the signal indicated that narcotics were inside the vehicle near that location. She accordingly opened the passenger door, at which point the dog alerted to the glove compartment. Inside the glove compartment, Officer McNeely picked up the $20 bill she had observed in the vehicle's arm rest. Inside the bill was another $20 bill, one rock of suspected crack cocaine, and another small piece of suspected cocaine. Appellant was subsequently placed under arrest; he was later issued a citation for an improper left turn. From its inception to its conclusion, the stop lasted 15 minutes in its entirety.

{¶10} Officer McNeely testified that, during the stop, she never suspected appellant or his passenger of any criminal activity. As a result, her decision to deploy her canine partner was not based upon anything appellant (or his passenger) did or did not do. Instead, on February 1, 2008, the use of the dog was merely perfunctory, i.e., the Painesville Police Department had mandated that officers conduct exterior sweeps with canines on all traffic stops that day. She testified:

{¶11} "That particular day, at briefing, we decided that we were going to randomly run the dog. I was moving around to as many traffic stops as I could to run the dog on as many vehicles as possible for the officers' traffic stops. When I initiated my own traffic stop, I knew then I was going to run the dog before I even approached the car, just because that is the goal that we had set that day to do for the number of officers we had working and the officer that was in charge."

{¶12} Thus, Officer McNeely conceded she was going to deploy her canine partner for an exterior sniff regardless of the behavior (or condition) of a stopped motorist or the quality of his or her violation.

{¶13} Appellant was eventually charged with one count of possession of cocaine, in violation of R.C. 2925.11, a felony of the fifth degree. On October 14, 2008, appellant filed a motion to suppress evidence primarily arguing the officer had no legal basis for stopping his car and, moreover, she lacked reasonable suspicion to conduct the exterior sweep with the canine officer. A hearing was held and, on February 19, 2009, by way of a lengthy judgment entry, the trial court overruled appellant's motion. After engaging in a thorough survey of the legal principles at play in the case, the court specifically ruled:

{¶14} "The officer had probable cause to stop the defendant for several traffic violations. At the very least, Officer McNeely had reasonable, articulable suspicion that a traffic violation occurred, or that the motorist was engaging in hazardous or imprudent traffic maneuvers, if she was mistaken about having probable cause, giving her legal authorization to stop the defendant. The stop was lawful.

{¶15} "The officer was authorized to have the defendant and his passenger exit the motor vehicle for further investigation or in pursuance of the probable cause to arrest or cite.

{¶16} "The defendant consented to a search of his person, which was lawful.

{¶17} "The officer was entitled to deploy her K-9 to sniff the exterior of the defendant's motor vehicle. The dog was deployed at most three or four minutes into the stop. This was not a 'search' or an unlawful police practice. There was no unreasonable delay in deploying the dog and it was not unreasonable for the officer to put writing the citation 'on hold' pending the canine sniff.

{¶18} "Once the dog alerted at the passenger door's front hinge (twice), the officer had probable cause, or at least reasonable, articulable suspicion of drug activity,

to continue the detention and to continue the dog's sniff or the officer's search of the glove compartment.

{¶19} "Once the apparent crack cocaine was located, the officer lawfully arrested the defendant.

{¶20} "The entire stop lasting only about 15 minutes, the time elapsed was shorter than the usual uncomplicated traffic stop where a citation would be issued. The detention time was not unreasonable."

{¶21} Appellant subsequently entered a plea of no contest and the trial court found him guilty of possession of cocaine. Appellant was later sentenced to serve 50 days in the Lake County Jail and three years of community control. He now appeals the trial court's ruling on his motion to suppress.

{¶22} In evaluating an appeal of a motion to suppress evidence, our standard of review is bifurcated. We review the trial court's factual findings only for clear error and give due weight to inferences the trial judge drew from the evidence. *State v. Bokesch*, 11th Dist. No. 2001-P-0026, 2002-Ohio-2118, ¶12-13. If the trial court's factual findings are supported by competent, credible evidence, we then engage in a de novo review of the trial court's application of the law to those facts. *State v. Hummel*, 154 Ohio App.3d 123, 126, 2003-Ohio-4602.

{¶23} With this standard in mind, we shall consider appellant's two assigned errors. His first assignment of error provides:

{¶24} "The trial court erred to the prejudice of the defendant-appellant in denying his motion to suppress evidence on the grounds that the arresting officer failed to establish a de minimus traffic infraction upon which her traffic stop of defendant-appellant could have been justified."

{¶25} Under his first assignment of error, appellant argues Officer McNeely had no reasonable grounds upon which she might base her decision to initiate a traffic stop. Appellant contends his traffic maneuver violated no ordinances, statutes, or other traffic laws and therefore all evidence gathered from this seizure should have been suppressed.

{¶26} It is well-established that an officer's observance of a traffic violation furnishes probable cause to stop a vehicle. See, e.g., *State v. Korman*, 11th Dist. No. 2004-L-064, 2006-Ohio-1795, ¶17. Moreover, even if no actual violation is observed, an officer may initiate a constitutionally valid traffic stop if she has reasonable suspicion, based on specific and articulable facts that a traffic law is being or has been violated. *Berkemer v. McCarty* (1984) 468 U.S. 420, 439. Thus, if the officer can point to a particularized and an objective basis for suspecting a motorist of a violation, the stop will be upheld even in the absence of a true infraction. *State v. Andrews* (1991), 57 Ohio St.3d 86, 87.

{¶27} Appellant was stopped (and eventually cited) for violating City of Painesville Codified Ordinance 332.21(c)(2). The Ordinance provides:

{¶28} "(c) The driver of a vehicle intending to turn into a private road or driveway, alley or building from a public street or highway shall be governed by the following rules:

{¶29} "***

{¶30} "(2) Upon a roadway where traffic is proceeding in opposite directions, approach for a left turn shall be made from that portion of the right half of the roadway nearest the centerline thereof."

{¶31} Appellant contends the officer had neither probable cause to believe nor reasonable, articulable grounds to suspect that he violated the foregoing ordinance. Rather, appellant asserts he simply veered his vehicle right while on Erie street in order to access the curb cut entrance to the Sunoco station which was located immediately in front of the stop strip at which Officer McNeely was waiting. Because he never actually turned left, appellant concludes section 332.21(c)(2) is completely inapplicable. We disagree.

{¶32} At the suppression hearing, testimony established that appellant approached the intersection driving in the curb lane of Erie Street; appellant had his right turn signal activated and Officer McNeely witnessed his vehicle "begin to turn right." Sketches of the scene admitted as exhibits confirm this observation. Once appellant's vehicle veered right, he unquestionably exited the intersection and entered onto State Street.

{¶33} By entering onto State Street, regardless of his actual movements or positioning, he, by necessary implication, was traveling on State Street. Because the traffic on State Street flows north and south, appellant could not legally drive west, which he did. Rather, upon entering State Street, he was required to remain right of the center line on the northbound traffic lane, activate his left turn signal, and *then* attempt to enter the Sunoco station. Instead, appellant entered State Street driving perpendicular to the flow of traffic and continued to drive straight. In doing so, he ignored the substantive provisions of section 332.21(c)(2), the ordinance governing left turns from public roads. While appellant is correct that he did not *actually* turn left once he entered onto State Street, it was this fact, in conjunction with appellant's attempt to

create a new lane of traffic, that gave Officer McNeely an objective basis to initiate a traffic stop.[2]

{¶34} In short, once appellant turned right onto State Street from Erie, the only way appellant could enter the station was by properly following established traffic rules for turning left. The evidence adduced at the hearing, and even appellant's concessions regarding his path of travel, clearly demonstrate he did not do so.[3] We therefore hold the officer had probable cause to stop appellant for violating section 332.21(c)(2).

{¶35} Concededly, the foregoing conclusion is dispositive of appellant's first assignment of error; however, we point out that appellant's actions were sufficient to give Officer McNeely reasonable suspicion that he was in violation of additional traffic laws.

{¶36} For instance, R.C. 4511.20 (A) provides that "[n]o person shall operate a vehicle *** on any street or highway in willful or wanton disregard of the safety of persons or property." Appellant's act of crossing lanes perpendicular to the flow of traffic, regardless of the red traffic signal, reasonably indicates he engaged in willful disregard for other motorists and their vehicles.

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2. Appellant contends that the near collision between his vehicle and Officer McNeely's cruiser was a result of the officer's failure to remain standing at the clearly marked stop line and yield the right-of-way, a violation of R.C. 4511.13(C), Ohio's "Steady Red Indication" statute. Even assuming the officer failed to remain at a standing stop, appellant, as already discussed, had no right-of-way. Moreover, any improper maneuvering on the officer's part would not negate the illegality of appellant's actions. Appellant's point is an example of the classic "tu quoque" ("you're another") fallacy. As a matter of logic, the fact that another may be guilty of an accusation does not prove that the accuser is innocent. These points aside, Officer McNeely explained that her decision to move past the stop line was a result of her observation that, prior to driving directly at the curb cut, appellant actually began to turn right. The record established the officer did make a complete stop. She advanced beyond the stop line to initiate a right turn on red, a permissible maneuver at that intersection. Thus, the near-miss was precipitated by appellant's illegal driving, not the officer's alleged violation the steady red indication statute.

3. It is worth noting that appellant was not required to enter the Station via the curb cut on State Street; he could have proceeded West on Erie Street and entered the station immediately after the intersection without attempting to cross traffic and, therefore, with greater convenience.

{¶37} R.C. 4511.30(A)(3) provides, in relevant part, that "[n]o vehicle *** shall be driven on the left side of the roadway *** [w]hen approaching within one hundred feet of or traversing any intersection." Entering State Street and continuing perpendicular to traffic into the gas station would create a reasonable suspicion appellant was driving left of center "approaching within one hundred feet" of the intersection.

{¶38} R.C. 4511.33(A)(1) provides, in relevant part, that "[w]henever any roadway has been divided into two or more clearly marked lanes for traffic, *** [a] vehicle *** shall be driven, as nearly as practicable, entirely within a single lane *** and shall not be moved from such lane *** until the driver has first ascertained that such movement can be made with safety." Appellant's decision to veer right onto State Street and proceed directly into the Sunoco station, demonstrates he did not remain, as nearly as practicable, within a single lane; further, appellant's action of crossing traffic under the misconception that he had the right-of-way and almost causing a collision indicates he failed to ascertain that his maneuver would be made safely.

{¶39} R.C. 4511.39(A) provides, in relevant part, that "[n]o person shall turn a vehicle or *** move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety nor without giving an appropriate signal in the manner hereinafter provided." Commencing a right turn onto State Street, continuing straight across traffic, and nearly colliding with a police cruiser creates a reasonable suspicion that appellant did not exercise due care to ascertain his movements were safe.

{¶40} Whether the foregoing represents an exhaustive list of potential traffic violations appellant may have committed is irrelevant. The point is Officer McNeely had reasonable suspicion, if not probable cause, to stop appellant for multiple traffic

infractions. Therefore, contrary to appellant's belief that his actions were lawful, we hold the officer's decision to initiate the traffic stop constitutionally valid.

{¶41} Appellant's first assignment of error is overruled.

{¶42} His second assignment of error argues:

{¶43} "The trial court erred to the prejudice of the defendant-appellant in denying his motion to suppress evidence on the grounds that the arresting officer conducted an unlawful search of defendant-appellant and subsequent K-9 search of his vehicle without probable cause and in violation of his Fourth Amendment right against unreasonable searches and seizures as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution."

{¶44} Under his second assignment of error, appellant argues that Officer McNeely unlawfully extended the traffic stop by subjecting him and his passenger to a search without probable cause and subsequently conducting a canine search of his vehicle without reasonable suspicion in violation of the Fourth Amendment. We disagree.

{¶45} Appellant first asserts that, after she stopped his vehicle, the officer unlawfully required appellant and his passenger to exit their vehicle. The United States Supreme Court has held that an officer may permissibly require a motorist, who has been lawfully stopped for a traffic violation, to exit his or her vehicle. In *Pennsylvania v. Mimms* (1977), 434 U.S. 106, the Court determined that such an order can only be deemed as a de minimus intrusion of a motorist's personal liberty. Id. at 111. The Court reasoned:

{¶46} "The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall

be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it." Id.

{¶47} Accordingly, the Court concluded it is within the officer's discretion to allow a lawfully stopped motorist to remain in his or her vehicle for the duration of the traffic stop or require that motorist to exit. Id; see, also, *Village of Kirtland Hills v. Strogin*, 11th Dist. No. 2005-L-073, 2006-Ohio-1450, at ¶19.

{¶48} Moreover, a search of one's person is valid if it is a product of one's voluntary consent. See *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, at ¶30. Where a vehicle is stopped for a traffic violation, consent to search, either a vehicle or person, is valid "if obtained within the period of time required to process the traffic violation, even if the officer suspects no other criminal activity." Id. at ¶25, citing *State v. Loffer*, 2d Dist. No. 19594, 2003-Ohio-4980, at ¶22; accord *State v. Riggins*, 1st Dist. No. C-030626, 2004-Ohio-4247, at ¶19; *State v. Lattimore*, 10th Dist. No. 03AP-467, 2003-Ohio-6829, at ¶12.

{¶49} After appellant and his passenger were asked to exit the vehicle, the officer obtained their consent to pat-down their persons. This occurred prior to the exterior sweep by the canine, which, according to Officer McNeely, took place approximately four minutes after appellant was stopped. Officer McNeely further testified that the majority of traffic stops in which she is involved take usually between ten and fifteen minutes. Because she sought and obtained consent to search appellant and his passenger almost immediately after the inception of the traffic stop (and well within the timeframe of an average traffic stop), we hold the officer's request as well as appellant's consent were valid under the Fourth Amendment.

{¶50} Next, appellant asserts Officer McNeely's decision to deploy her canine partner violated his rights as the officer had no reasonable, articulable suspicion that he or his passenger were engaged in criminal activity. Without some reasonable suspicion of criminal activity that would justify prolonging the traffic stop for purposes of conducting the canine sweep, appellant insists that any evidence gathered from the deployment of the dog should have been suppressed. In support, appellant cites the Supreme Court of Ohio's decision in *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204.

{¶51} In *Batchili*, the arresting officer observed the defendant commit a marked-lanes violation and initiated a traffic stop. Upon approaching the vehicle, the officer observed the defendant's van contained numerous boxes scattered about its cargo hold, many of which were covered in blankets. The officer discovered the defendant did not own the vehicle, but gave conflicting answers regarding its ownership. The defendant did not make regular eye contact with the officer and, during the encounter, his hands were shaking. The officer also detected the smell of deodorizer in the vehicle.

{¶52} The officer returned to her cruiser to check the validity of the defendant's driver's license and determine whether there were any outstanding warrants against him. She then called for backup which included a canine officer to conduct an exterior sweep of the van. The backup officer arrived and the canine alerted on the van immediately. As a result of the dog's response, the officers conducted a warrantless search of the van, in which they found boxes of pirated videotapes and DVDs. The defendant was subsequently arrested and indicted on various counts. After a trial by jury, the defendant was convicted.

{¶53} On appeal, the Sixth Appellate District reversed the trial court's decision denying the defendant's motion to suppress. The court held that the state failed to present evidence of "specific and articulable facts giving rise to a reasonable suspicion of criminal activity beyond that which prompted the stop." *State v. Batchili*, 6th Dist. No. L-04-1039, 2005-Ohio-6001, at ¶14. The Supreme Court of Ohio accepted jurisdiction of the state's appeal and reversed the Sixth District's judgment, holding:

{¶54} "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." *Batchili*, supra, at paragraph one of the syllabus.

{¶55} The Court pointed out that the dog alerted eight minutes and 56 seconds into the stop, at which time the arresting officer was still waiting for the results of the criminal-background check. The officer also 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. The Court additionally pointed out that, even 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. ***'" (Internal citations omitted.) Id. at 406-407, quoting *State v. Howard*, 12th Dist. Nos. CA2006-02-002 and CA2006-02-003, 2006-Ohio-5656, at ¶16. It is this point upon which appellant seizes.

{¶56} In the case sub judice, the record demonstrates, and the state does not dispute, that Officer McNeely had no suspicion of criminal activity when she deployed the dog. In fact, she testified she decided to run the dog upon initiating the traffic stop, i.e., prior to making contact with appellant and his passenger, due to a departmental

mandate. Appellant maintains that because Officer McNeely almost immediately confirmed his license and insurance were valid, she could not detain him beyond this point without some indicia of criminal activity, which she concededly did not possess. Hence, pursuant to *Batchili*, the deployment of the dog resulted in an unreasonably prolonged and therefore unconstitutional detention. We cannot agree.

{¶57} By law, we measure the reasonableness of a traffic stop under the totality of the circumstances. *Batchili*, supra, at 406. Accordingly, an officer may delay the motorist for a time period sufficient to issue a ticket or a warning. Id. Such a measure includes the time it takes to run a computer check on a driver's license, registration, and vehicle plates. Id.

{¶58} Furthermore, and contrary to appellant's assertions, 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. Corpening*, 11th Dist. No. 2007-A-0083, 2008-Ohio-6407, at ¶27; see, also, *State v. Matteucci*, 11th Dist. No. 2001-L-205, 2003-Ohio-702, at ¶34. 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. *Illinois* v. *Andreas* (1983) 463 U.S. 765, 771. It follows, therefore, that any interest in possessing contraband cannot be characterized as "legitimate," and a dog sweep, which *only* reveals the possession of contraband, does not compromise a legitimate privacy interest. *Illinois v. Caballes* (2005), 543 U.S. 405, 408-409.

{¶59} Here, the record reveals Officer McNeely deployed the dog a mere three or four minutes after initiating the traffic stop. She testified she intended on citing appellant regardless of the results of the exterior sweep, but, at that point, she had yet

to issue the citation. Moreover, the officer testified that a usual traffic stop, during which she checks a motorist's driving information and issues a citation, takes between ten and 15 minutes. And, overall, the stop, including the exterior sweep and search, lasted only 15 minutes.

{¶60} 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.

{¶61} Appellant's second assignment of error is without merit.

{¶62} For the reasons discussed in this opinion, appellant's two assignments of error are overruled and the judgment of the Lake County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur