[Cite as *State v. Sherrod*, 2010-Ohio-1273.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2009-L-086**
AUBREY E. SHERROD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 06 CR 000012.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, 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).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Aubrey E. Sherrod, appeals the denial of his Motion to Suppress, Motion to Dismiss, and subsequent conviction for Possession of Cocaine, in the Lake County Court of Common Pleas. For the following reasons, we affirm the decision of the court below.

{¶2} On February 13, 2006, Sherrod was indicted by the Lake County Grand Jury for one count of Possession of Cocaine, a felony of the second degree in violation of R.C. 2925.11, one count of Trafficking in Cocaine, a felony of the second degree in violation of R.C. 2925.03(A)(2), and one count of Permitting Drug Abuse, a felony of the fifth degree in violation of 2925.13(A).

{¶3} On April 13, 2006, Sherrod filed a Motion to Suppress. On April 28, 2006, a hearing was held on Sherrod's Motion. At the hearing, Officer Jeffrey R. Bilicic, of the Kirtland Hills Police Department, testified on behalf of the State.

{¶4} On January 8, 2007, the trial court denied Sherrod's Motion. The court made the following findings of fact:

{¶5} During the early morning hours of December 19, 2005, Kirtland Hills Police Officer Jeffrey Bilicic was stopped in his patrol car near mile marker 197 on Interstate 90 running stationary radar. At 1:37 a.m., Officer Bilicic stopped a motor vehicle for traveling 75 miles per hour in a 65 per mile zone. Officer Bilicic approached the driver's side of the motor vehicle and observed three male occupants. Officer Bilicic also observed several air fresheners hanging inside the vehicle. Specifically, there was one air freshener on each of the four doors, one on the back dash, one hanging from the rearview mirror, and three to four hanging from the ceiling, for a total of eight or nine air fresheners inside the vehicle. Officer Bilicic began speaking with [Sherrod] who was the driver of the vehicle and informed him of the reason for the stop. In speaking with the driver, Officer Bilicic was told that they were coming from visiting family in Toledo. Officer Bilicic asked the defendant the names of the two passengers in the vehicle with him. [Sherrod] told Officer Bilicic the name of the front passenger, identifying him as Shontel Jackson. [Sherrod], however, did not know the name of the rear seat passenger which did not make sense to the officer since they had allegedly been visiting family and traveling in a car together all the way from Toledo. The passengers of the vehicle each personally identified themselves, and Officer Bilicic learned the identity of the rear passenger to be Lemuel Henry. During this time while he was speaking with [Sherrod], Officer Bilicic noted that [Sherrod] appeared to be nervous and that his hands were shaking. This initial stop took approximately two minutes.

{¶6} Officer Bilicic returned to his patrol car to verify [Sherrod's] driver's license. He also requested a backup officer along with a K-9 unit from the Willoughby Hills Police Department. Within five to six minutes after the initial stop, Officer Bilicic learned that [Sherrod] had a valid out-of-state driver's license. The Officer also learned that

none of the occupants of the vehicle had a warrant for their arrest, though neither passenger had a valid driver's license.

{¶7} Officer Bilicic then returned to the motor vehicle and asked [Sherrod] to exit the car so he could obtain information from him for the traffic citation. Officer Bilicic needed to obtain this information directly from [Sherrod] because central dispatch is not able to obtain complete operator's information from out-of-state drivers. While obtaining [Sherrod's] information and filling out the citation, Officer Gerardi from the Willoughby Hills Police Department arrived with his canine. This was fifteen (15) minutes after the traffic stop. A canine sniff of the exterior of the vehicle was done, and the drug dog alerted to the presence of drugs near the rear passenger door. Upon observing this, the Officers then conducted a search of the vehicle in which approximately two hundred and fifty-six (256) grams of cocaine was found in a plastic bag behind the glove box. The occupants of the vehicle, including [Sherrod], were then transported to the Kirtland Hills Police Department.

{¶8} On January 11, 2007, Sherrod filed a Motion to Dismiss, based on his statutory and constitutional rights to a speedy trial and due process.

{¶9} On January 22, 2007, the trial court denied Sherrod's Motion to Dismiss.

{¶10} On January 30, 2007, Sherrod entered a Written Plea of No Contest to Possession of Cocaine, a felony of the second degree in violation of R.C. 2925.11.

{¶11} On June 15, 2009, the trial court issued its Judgment Entry of Sentence, ordering Sherrod to serve a three-year term of imprisonment followed by a period of postrelease control and suspending his driver's license for a period of two years.

{¶12} On July 1, 2009, Sherrod filed his Notice of Appeal. On appeal, Sherrod raises the following assignments of error:

{¶13} "[1.] The trial court erred by denying the defendant-appellant's motion to suppress in violation of his due process rights and rights against unreasonable search and seizure as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 14, Article I of the Ohio Constitution."

{¶14} "[2.] The trial court erred by denying the defendant-appellant's motion to dismiss in violation of his due process and rights to speedy trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution."

{¶15} We begin by considering Sherrod's first assignment of error.

{¶16} "The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses." *State v. Morgan*, 11th Dist. No. 2008-P-0098, 2009-Ohio-2795, at ¶13 (citations omitted). "The trial court is best able to decide facts and evaluate the credibility of witnesses. Its findings of fact are to be accepted if they are supported by competent, credible evidence." *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, at ¶41. "Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial court's application of the law to these facts." *Morgan*, 2009-Ohio-2795, at ¶13 (citation omitted); *Mayl*, 2005-Ohio-2304, at ¶41 ("we are to independently determine whether [the trial court's factual findings] satisfy the applicable legal standard") (citation omitted).

{¶17} The Fourth Amendment to the Constitution of the United States[1] imposes a reasonableness standard upon the conduct of government officials with respect to the privacy and security of its citizens. *Delaware v. Prouse* (1979), 440 U.S. 648, 653-654. "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of

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1. The Fourth Amendment 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."

legitimate governmental interests." Id. at 654. To justify a particular intrusion, the State must demonstrate "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio* (1968), 392 U.S. 1, 21.

{¶18} Sherrod concedes that his initial stop or seizure for speeding was justified, but asserts that his continued detention for the purposes of a "canine sniff" of the vehicle was illegal inasmuch as it was not based "on any articulable facts that criminal activity was afoot." Sherrod argues that had Officer Bilicic diligently performed the task of issuing the citation for speeding, there would have been no justification for his continued detention. Sherrod notes that the presence of multiple air fresheners hanging inside a car is not criminal and that nervousness/forgetfulness is "understandable" in the context of an encounter with law enforcement officers. We disagree.

{¶19} In *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, the Ohio Supreme Court considered similar issues raised with respect to a canine search during a automobile stop initiated for a moving violation. In *Batchili*, the defendant had been stopped for a marked-lanes violation. Id. at ¶3. The officer noted that the defendant continued driving for two miles before stopping, was nervous, and gave conflicting answers as to who owned the vehicle, and that the vehicle had tinted windows, smelled of deodorizers, and contained boxes covered by a blanket in its cargo hold. Id. at ¶4 and ¶19. The court held that these circumstances "provided a sufficient reason for additional detention for the purposes of a canine walk-around." Id. at ¶19.

{¶20} The court held as follows: "[A]ssuming 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.'" Id. at ¶15 (emphasis sic), citing *State v. Howard*, 12th Dist. Case Nos. CA2006-02-002 and CA2006-02-003, 2006-Ohio-5656, at ¶16. "The 'reasonable and articulable' standard applied to a prolonged traffic stop encompasses the totality of the circumstances, and a court may not evaluate in isolation each articulated reason for the stop." Id. at paragraph two of the syllabus, following *United States v. Arvizu* (2002), 534 U.S. 266, 274.

{¶21} In the present case, the totality of the circumstances justified Officer Bilicic's continued detention of Sherrod. While the unusual number of air fresheners, nervousness, and inability to name one of his passengers may be understandable and/or not criminal in themselves, they do constitute reasonable and articulable suspicion of criminal activity, such as the possession of contraband. *State v. Henry*, 11th Dist. No. 2007-L-082, 2007-Ohio-6732, at ¶29 (affirming the stop and detention by Officer Bilicic in an appeal by one of the occupants of the vehicle Sherrod was operating); also *State v. Graham*, 12th Dist. No. CA2008-07-095, 2009-Ohio-2814, at ¶21 (conflicting stories, nervousness, and air fresheners sufficient articulable facts to justify continued detention to perform canine search).

{¶22} Moreover, in assessing this issue with regard for the Fourth Amendment, we must consider the nature of the intrusion. Under the present facts, the only infringement of Sherrod's privacy/security was his continued detention for a few minutes beyond the time required for a normal traffic stop. The canine search does not constitute a further intrusion of Sherrod's privacy interest for the purposes of the Fourth

Amendment. *State v. Melone*, 11th Dist. No. 2009-L-047, 2009-Ohio-6710, at ¶58 (citations omitted). Compared with the administration of field sobriety tests, a canine search is a lesser imposition upon the person detained. Balanced against the State's legitimate interest in investigating suspected criminal activity, Sherrod's detention was a reasonable and minimal compromise of the interests protected by the Fourth Amendment. Cf. *United States v. Sharpe* (1985), 470 U.S. 675, 686 ("[i]n assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant").

{¶23} Sherrod relies on several cases in support of his position, which we do not find persuasive. *State v. Taylor* (2000), 138 Ohio App.3d 139, is cited for the proposition that a defendant's nervousness, possession of a small amount of marijuana, use of air fresheners, and possession of a cellular phone do not constitute articulable grounds for his continued detention to conduct a canine search. Sherrod misreads the *Taylor* case. The defendant in *Taylor* was an occupant of the vehicle, not the driver. It was the driver of the vehicle, not the defendant, who demonstrated nervousness and was in possession of marijuana. Id. at 147. The only articulable facts relevant to the defendant noted by the court were the possession of a cellular phone and the unkempt condition of the passenger compartment. Id. at 149. These facts bear no comparison to the facts on which Officer Bilicic's suspicion of Sherrod were based.

{¶24} Moreover, we note that *Taylor* was decided before the Ohio Supreme Court's decision in *Batchili* and may have been decided differently in light of the later

holding. The *Taylor* court further acknowledged that it was not holding "that the circumstances in this case can never congeal with other facts not present here to form a reasonable articulable suspicion that criminal activity is occurring or about to occur." Id.

{¶25} Sherrod cites *United States v. Urrieta* (C.A.6, 2008), 520 F.3d 569, for the proposition that, "[u]nder the Fourth Amendment, even the briefest of detentions is too long if the police lack a reasonable suspicion of specific criminal activity." Id. at 578. In the present case, however, Officer Bilicic did have a reasonable suspicion of specific criminal activity as explained above. Sherrod was nervous to the point of shaking, had an unusual number of air fresheners located in peculiar places, such as the door handles, and was unable to provide the name of a passenger who was purportedly a "family friend." In *Urrieta*, the officer's suspicion of the defendant was largely based on his status as an undocumented immigrant and resemblance to the generic profile of a "drug courier." Id. at 575, and 578 (the officer "was relying on an impermissible, ill-defined hunch that Urrieta, as a presumptively undocumented immigrant from Mexico, was likely to be transporting drugs"). Our holding in the present case is not inconsistent with *Urrieta*.

{¶26} The first assignment of error is without merit.

{¶27} In the second assignment of error, Sherrod argues the trial court erred in overruling his Motion to Dismiss on speedy-trial grounds, thereby violating his statutory and constitutional rights. We will first consider whether Sherrod's statutory speedy rights were violated.

{¶28} "The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a speedy

trial." *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, at ¶10. Ohio's speedy trial statute was enacted to "incorporate the constitutional protection of the right to a speedy trial." *Brecksville v. Cook*, 75 Ohio St.3d 53, 55, 1996-Ohio-171.

{¶29} "The standard of review of a speedy trial issue is to count the days of delay chargeable to either side and determine whether the case was tried within the time limits set by R.C. 2945.71." *State v. Bradley*, 11th Dist. No. 2004-T-0080, 2005-Ohio-6572, at ¶19 (citation omitted).

{¶30} A person charged with a felony "[s]hall be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(C)(2). "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." R.C. 2945.73(B). "[S]uch discharge is a bar to any further criminal proceedings against him based on the same conduct." R.C. 2945.73(D).

{¶31} For the purposes of calculating time under the speedy trial statute, "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E). Moreover, "[t]he time within which an accused must be brought to trial *** may be extended" for "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused." R.C. 2945.72(E).

{¶32} A total of 466 days[2] elapsed from the date of Sherrod's arrest until the entry of his no-contest plea. Of this time, the State maintains that 281 days were tolled,

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2. Ninety of these days are calculated under the "triple-count" provision of R.C. 2945.71(E); the actual number of days elapsed was 406 days.

pursuant to R.C. 2945.72(E). Crediting the State with 281 days tolled, a total of 185 days elapsed between Sherrod's arrest and the entry of his no-contest plea. The significant events in the chronology of this case are as follows:

{¶33} From December 20, 2005, to January 18, 2006, a period of 90 days elapsed while Sherrod was in jail, pursuant to R.C. 2945.71(E).[3]

{¶34} From January 19, 2006, to April 12, 2006, a period of 85 days elapsed.

{¶35} From April 13, 2006, when Sherrod filed his Motion to Suppress, to April 27, 2006, a period of fifteen days elapsed.

{¶36} From April 28, 2006, the date of the hearing, to January 7, 2007, a period of 255 days elapsed.

{¶37} From January 8, 2007, when the trial court issued its Judgment Entry denying the Motion to Suppress, to January 10, 2007, a period of three days elapsed.

{¶38} From January 11, 2007, when Sherrod filed his Motion to Dismiss, to January 21, 2007, a period of eleven days elapsed.

{¶39} From January 22, 2007, when the trial court issued its Judgment Entry denying the Motion to Dismiss, to January 28, 2007, a period of seven days elapsed.

{¶40} On January 29, 2007, Sherrod entered a plea of no-contest.

{¶41} Sherrod contends that the 270 days from the filing of his Motion to Suppress until the trial court's ruling on the Motion should not be tolled, inasmuch as that delay is unreasonable and excessive. The Ohio Supreme Court has held that a trial court does not have "unbridled discretion concerning the amount of time it takes to rule on a defense motion. *** A strict adherence to the spirit of the speedy trial statutes requires a trial judge, in the sound exercise of his judicial discretion, to rule on these motions in as expeditious a manner as possible." *State v. Martin* (1978), 56 Ohio St.2d

3. For the purpose of calculating the time within which Sherrod had to be brought to trial, the count began on December 20, 2005, the day after his arrest. Crim.R. 45(A) ("[i]n computing any period of time prescribed *** by any applicable statute, the date of the act or event from which the designated period of time begins to run shall not be included").

289, 297. Stated otherwise, "the extension of time to rule on a defendant's motion to suppress is subject to a requirement of reasonableness." *State v. Arrizola* (1992), 79 Ohio App.3d 72, 76. This court has held: "There are no specific criteria to apply when considering the reasonableness of a delay in ruling on a defense motion. The determination of whether a delay was inordinate is simply a judgment call." *State v. Ritter*, 11th Dist. No. 98-A-0065, 1999 Ohio App. LEXIS 6100, at *10.

{¶42} In support of this position, Sherrod cites to Ohio Rules of Superintendence 40(A)(3), which provides that "[a]ll motions shall be ruled upon within one hundred twenty days from the date the motion was filed." Sherrod acknowledges that the Rules of Superintendence are "only a guide," but may nevertheless serve "as an indication of what amount of time would be appropriate in the usual case." Id. at 76. Sherrod further cites to cases holding similar delays unreasonable. *State v. McNutt*, 11th Dist. No. 96-A-0019, 1996 Ohio App. LEXIS 4095, at *5 (a delay of approximately twelve months in ruling on a motion to suppress "is clearly outside the area of reasonableness"); *State v. Fields*, 5th Dist. No. 05-CA-17, 2006-Ohio-223, at ¶28 (delay of 311 days in ruling on a motion to suppress is unreasonable).

{¶43} The State counters that the delay in ruling on the Motion to Suppress was reasonable in light of the circumstances of this case. Initially, the State notes that Sherrod's Motion was filed out of Rule. In a criminal proceeding, "[a]ll pretrial motions *** shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier." Crim.R. 12(D). The failure to file a timely motion to suppress evidence is grounds for denying the motion. *State v. Wade* (1978), 53 Ohio St.2d 182, at paragraph three of the syllabus, vacated on other grounds (1978), 438 U.S. 911

("[t]he failure to move within the time specified by Crim.R. 12[D] for the suppression of evidence on the basis of its illegal obtainment constitutes a waiver of the error").

{¶44} In the present case, Sherrod was arraigned on February 24, 2006, but did not file his Motion to Suppress until April 13, 2006. By this time, however, Sherrod's case had been set for jury trial on May 9, 2006.

{¶45} The State further asserts that the issue raised in the Motion to Suppress was a difficult one and that we should defer to the trial court's "aware[ness] of its own docket and the complexity of the matters before it."

{¶46} Finally, the State urges this court to adopt the reasoning of a prior decision of this court, *State v. Beam* (1991), 77 Ohio App.3d 200. In *Beam*, the municipal court took 109 days to rule on a motion to suppress. In considering the reasonableness of such a delay, this court determined that the State had a surplus of 36 days "which could have been applied against untolled time" for bringing the defendant to trial. Id. at 209.[4] When this 36-day surplus is subtracted from the 109 days it took the trial court to rule on the motion to suppress, the actual delay in ruling on the motion was only 73 days, a period of time deemed reasonable by this court. Id.

{¶47} Applying this reasoning to the present case, the State urges us to consider the actual delay in ruling on Sherrod's Motion to Dismiss to be 170 days, a delay considered reasonable in other decisions from this court.[5] See, e.g. *Ritter*, 1999 Ohio App. LEXIS 6100, at *12; *Beam*, 77 Ohio App.3d at 109.

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4. In *Beam*, the defendant was charged with a misdemeanor offense and, thus, the State had 90 days in which to bring him to trial. 77 Ohio App.3d at 207. According to the State's calculation, i.e. tolling the period of time from the filing of the motion to suppress until the trial court's ruling thereupon, a total of 54 days had elapsed. When these 54 days are subtracted from the 90 days allowed to bring the defendant to trial, a "surplus" of 36 days remains. Id. at 209.

5. In the present case, a total of 185 days had elapsed from Sherrod's arrest until he entered his plea, assuming the 255 days for ruling on the Motion to Dismiss is tolled. When these 85 days are subtracted

{¶48} Given the facts of the present case, a delay of 255 days in not an unreasonable amount of time to rule on Sherrod's Motion to Dismiss and the trial court properly credited the State for this period of time in its speedy trial calculation. It is significant that Sherrod filed his Motion to Dismiss out of rule and after his case had been set for trial, effectively delaying the resolution of his case. We further note that comparable periods of time have been found reasonable in other cases. E.g. *State v. Price*, 9th Dist. No. 07CA0003-M, 2008-Ohio-2252, at ¶48 (216 days tolled from the filing of the motion until the court's ruling); *State v. Driver*, 7th Dist. No. 03 MA 210, 2006-Ohio-494, at ¶29 and ¶36 (204 days tolled from the date of the hearing until the court's ruling); *Ritter*, 1999 Ohio App. LEXIS 6100, at *11 n. 1 (180 days tolled from the filing of the motion until the court's ruling).

{¶49} The second assignment of error is without merit.

{¶50} For the foregoing reasons, the Judgments of the Lake County Court of Common Pleas, denying Sherrod's Motions to Suppress and Dismiss, are affirmed. Costs to be taxed against appellant.

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

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

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from the 270 days allowed for felony defendants, a surplus of 85 days remains. When this surplus is deducted from the 255 days spent to rule on the Motion to Dismiss, 170 days remain.

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

{¶51} I concur, and write separately to review our holding in the companion case, *State v. Henry*, 11th Dist. No. 2007-L-082, 2007-Ohio-6732, in which we affirmed the trial court's denial of the motion to suppress filed by the codefendant and backseat passenger, Mr. Lemuel Henry, and applied the tenants of Fourth Amendment jurisprudence as interpreted by the Supreme Court of Ohio in *Batchili*.

{¶52} In *Henry*, we affirmed the trial court's denial of Mr. Henry's motion to suppress. We did so by reviewing the crucial facts presented by this case and applying the totality of the circumstances test: "*** the background checks had been completed, no outstanding warrants found, all three occupants of the vehicle had been frisked, separately questioned, and placed in cruisers. The three officers had already conducted a plain view search of the vehicle, and still no K-9 officer [had appeared]. Officer Bilicic had just started to write the speeding ticket when Arrow arrived. After viewing the videotape of the stop and reviewing the records from the suppression hearing, it does appear that the officers prolonged the stop so that Arrow could arrive on the scene. But according to *Batchili*, our analysis may not end." Id. at ¶41.

{¶53} Therefore, what is crucial in this case, and what the dissent ignores, is that the "collection" of factors cited by the officer underlying his suspicion of drug activity and decision to call for a K-9 officer must be viewed as a whole in light of *Batchili.* In *Batchili*, the Supreme Court of Ohio held that "'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.'" Id. at 42, quoting *Batchili* at ¶15. Thus, we look to the totality

of the circumstances, and we may not "evaluate in isolation each articulated reason for the stop." *Batchili* at paragraph two of the syllabus.

{¶54} It bears repeating, however, that, "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 depends upon the existence of established and known rules of law limiting the authority and discretion of men wielding the power of government.'" *Henry* at ¶44, quoting Perry & Cooper, Sources of Our Liberties, (Chicago: American Bar Association, 1959), 1.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶55} I respectfully dissent.

{¶56} In his first assignment of error, appellant argues that the trial court erred by denying his motion to suppress evidence obtained as a result of an unlawful search of his vehicle because the officer had no reasonable suspicion that he was involved in any criminal activity other than a minor traffic offense.

{¶57} This court stated in *State v. Jones*, 11th Dist. No. 2001-A-0041, 2002-Ohio-6569, at ¶16:

{¶58} "[a]t a hearing on a motion to suppress, the trial court assumes the role of the trier of facts and, therefore, is in the best position to resolve questions of fact and

evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366 ***. When reviewing a motion to suppress, an appellate court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594 ***. Accepting these findings of facts as true, a reviewing court must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard. *State v. Curry* (1994), 95 Ohio App.3d 93, 96 ***." (Parallel citations omitted.)

{¶59} "'Initially, a law enforcement officer may momentarily stop and detain an individual without a warrant (a *Terry* stop) when the officer has a reasonable suspicion based on specific, articulable facts that criminal activity has just occurred or is about to take place.' *State v. Evans* (1998), 127 Ohio App.3d 56, 60 ***, citing *Terry v. Ohio* (1968), 392 U.S. 1 ***. 'This is an exception to the warrant requirement under the Fourth Amendment. Id. Whether police have a "reasonable suspicion" is gleaned from considering the totality of the circumstances.' *State v. Andrews* (1991), 57 Ohio St.3d 86, 87 ***." (Parallel citations omitted.) *State v. Maloney*, 11th Dist. No. 2007-G-2788, 2008-Ohio-1492, at ¶22.

{¶60} "'*** [A] minor violation of a traffic regulation (***) that is witnessed by a police officer is, standing alone, sufficient justification to warrant a limited stop for the issuance of a citation.'" *State v. Montes*, 11th Dist. No. 2003-L-072, 2004-Ohio-6475, at ¶19, quoting *State v. Yemma* (Aug. 9, 1996), 11th Dist. No. 95-P-0156, 1996 Ohio App. LEXIS 3361, at 6-7.

{¶61} In the case at bar, Officer Bilicic observed appellant speeding on Interstate 90. As such, Officer Bilicic had probable cause to stop appellant due to the traffic

violation. However, the next determination must be whether the continued detention was based on specific and articulable facts that criminal activity was afoot.

{¶62} "'*** (W)hen detaining a motorist for a traffic violation, an officer may delay a motorist for a time period sufficient to issue a ticket or a warning.'" *State v. Batchili,* 113 Ohio St.3d 403, 2007-Ohio-2204, at ¶12, quoting *State v. Howard*, 12th Dist. Nos. CA2006-02-002 and CA2006-02-003, at ¶15, citing *State v. Keathley* (1988), 55 Ohio App.3d 130, 131. "'This measure 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, citing *State v. Bolden,* 12th Dist. No. CA2003-03-007, 2004-Ohio-184, ¶17, citing *Delaware v. Prouse* (1979), 440 U.S. 648, 659. "Further, '[i]n determining if an officer completed these tasks within a reasonable length of time, 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.'" Id., quoting *Howard* at ¶15, quoting *State v. Carlson* (1995), 102 Ohio App.3d 585, 598-599, citing *State v. Cook* (1992), 65 Ohio St.3d 516, 521-522, and *U.S. v. Sharpe* (1985), 470 U.S. 675.

{¶63} In the case sub judice, although Officer Bilicic testified that he detained appellant simply to write a citation for speeding, the record shows that he did not write or issue the citation until after appellant had been taken to the police station. Officer Bilicic had all the information he needed to write the ticket within about five minutes of the stop. Appellant should have been issued a ticket and sent on his way. However, he was unlawfully detained for an additional period of approximately fifteen minutes, waiting for the K-9 unit to arrive. The stop was unconstitutionally prolonged, since the record shows that Officer Bilicic did not have, under the totality of the circumstances, a

reasonable and articulable suspicion to suspect further criminal activity, beyond the original traffic stop, justifying waiting for the K-9 unit. Cf. *Batchili*, supra, at ¶15-17.

{¶64} Officer Bilicic felt that appellant and the passengers "were up to something" and adduced the following reasons for believing further criminal activity was afoot: appellant, the driver, seemed nervous; he had trouble identifying one of the passengers; and the car contained multiple air fresheners. These reasons are simply insufficient to create a reasonable and articulable suspicion of criminal activity. Officer Bilicic's inarticulate hunch that criminal activity was involved resulted in an unlawful fishing expedition.

{¶65} "Many citizens become nervous during a traffic stop, even when they have nothing to hide or fear." *United States v. Richardson* (C.A.6, 2004), 385 F.3d 625, 630-631. However, nervousness is "an unreliable indicator [of illegal activity], especially in the context of a traffic stop[.]" Id. Also, the mere presence of air fresheners and other heavy scents in an automobile is insufficient to support a reasonable and articulable suspicion of criminal activity, even when combined with other indicia of potential drug-related activity. *State v. Henderson*, 11th Dist. No. 2006-L-110, 2007-Ohio-2315.[6] The only remaining reason for suspecting further criminal activity was appellant's difficulty identifying one of his passengers. This was not a reasonable and articulable suspicion, due to his nervousness.

{¶66} On December 14, 2007, this court decided Mr. Henry's case, the backseat passenger in the instant matter, in *State v. Henry*, 11th Dist. No. 2007-L-082, 2007-

6. The appellant in *Henderson* had a history of prior drug use; an outstanding protection order against him; was unemployed, while driving a late model luxury car filled with air fresheners; carried multiple cell phones; and wore heavy cologne.

Ohio-6732 (O'Toole, J., dissenting). In *Henry*, the majority affirmed the judgment of the trial court, holding that the trial court properly overruled Mr. Henry's motion to suppress.

{¶67} However, since *Henry*, on April 21, 2009, the Supreme Court of the United States decided *Arizona v. Gant*, 129 S.Ct. 1710, holding the following:

{¶68} "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or it is reasonable to believe the vehicle contains evidence of the offense of arrest.* When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." Id. at 1723-1724. (Emphasis added.)

{¶69} In the case sub judice, again, appellant was stopped for a speeding violation. He should have been issued a ticket and sent on his way. However, the stop was unconstitutionally prolonged, since the record shows that Officer Bilicic did not have, under the totality of the circumstances, a reasonable and articulable suspicion to suspect further criminal activity, beyond the original traffic stop, justifying waiting for the K-9 unit.

{¶70} I believe that the trial court erred in failing to grant appellant's motion to suppress, thereby rendering appellant's first assignment of error with merit and his second assignment of error moot. See App.R. 12(A)(1)(c).

{¶71} For the foregoing reasons, I dissent.