[Cite as *State v. McDade*, 2008-Ohio-4885.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2007CA00092
ISAIAH MCDADE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas Court Case No. 06-CR-212

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 9, 2008

APPEARANCES:

For Plaintiff-Appellee:
Kenneth W. Oswalt
Licking County Prosecuting Attorney's Office
20 South Second Street
Newark, Ohio 43055

For Defendant-Appellant:
Lawrence L. Levinson
David H. Thomas

R. William Meeks Co., LPA
511 South High Street
Columbus, Ohio 43215

Delaney, J.

{¶1} Defendant-appellant Isaiah McDade appeals the decision of the Licking County Common Pleas Court to deny his Motion to Suppress. The following facts give rise to this appeal.

{¶2} On April 26, 2006, Detective Doug Bline with the Newark Police Department was assigned to the Central Ohio Drug Task Force. The task force assignment was highway interdiction on Interstate 70 in Licking County, Ohio. Detective Bline was in uniform and driving a marked cruiser. At approximately 2:00 p.m., Detective Bline was sitting in a cruiser at mile post 115 watching eastbound traffic. He observed a black Cavalier driven by appellant following a white four door vehicle too closely. Appellant was only two car lengths behind the white vehicle. There were two semis in the right lane traveling at an estimated speed of 55 miles per hour. The white and black vehicles were in the left lane traveling at approximately 63 miles per hour. Detective Bline observed appellant brake heavily and change lanes. Detective Bline testified that this abrupt change was unsafe but was not a lane change violation.

{¶3} Detective Bline testified that when he is assigned to highway interdiction, he looks for unusual reactions in drivers. He observed that appellant and his passenger avoided looking at him. Detective Bline thought this was unusual because drivers and/or passengers typically look at marked cruisers. He further observed appellant was extremely rigid with his hands at ten and two on the steering wheel. Detective Bline believed the driver and passenger were nervous.

{¶4} Detective Bline pulled behind the vehicle and activated the cruiser lights to affect a traffic stop for following too closely, in violation of R.C. 4511.34, a minor

misdemeanor. Detective Bline marked on the radio that he was initiating a traffic stop. Officer Edme, a K-9 officer with the Heath Police Department, proceeded to the location. Detective Bline approached the passenger side of the vehicle and requested the license and registration of the driver. The driver produced a West Virginia operator's license which indicated his name was Isaiah McDade. The passenger gave the detective the registration and rental agreement for the vehicle. The passenger volunteered that the vehicle was rented in his aunt's name. The passenger's name was Joe Todd. Detective Bline determined that Mr. Todd and appellant were not authorized drivers on the rental agreement.

{¶5} Detective Bline requested that appellant exit the vehicle to speak with him. Detective Bline noted that appellant was extremely nervous and he could see an artery in his neck beating as well as his hands shaking. The detective radioed dispatch with the operator's licenses of appellant and Mr. Todd and the license plate and registration of the vehicle. While waiting for the information, Detective Bline asked appellant where he had been in Columbus. Appellant told him north Columbus and could not give a location upon further questioning. Further, he told Detective Bline he had traveled to Columbus alone.

{¶6} Next, Detective Bline spoke with Mr. Todd. Mr. Todd stated that he and appellant had ridden to Columbus together. Detective Bline noted the inconsistency. About this time, Officer Edme arrived at the scene with his dog approximately one minute after Detective Bline initiated the stop. Based on the inconsistent statements of appellant and Mr. Todd, Detective Bline asked Officer Edme to have the dog sweep the vehicle. While the dog was performing a sweep of the vehicle, the dispatcher radioed

Detective Bline with the results of the traffic check. The dog alerted on the driver's door and twice on the trunk. Based on his experience with the dog, Officer Edme believed there were drugs in the trunk of the black vehicle.

{¶7} Detective Bline placed the traffic citation on hold to search the vehicle. Detective Bline opened the car door and smelled green marijuana. The detective could not smell the marijuana from outside the vehicle. Officer Edme opened the trunk and found a trash bag filled with individual pound bags of marijuana.

{¶8} Appellant and Mr. Todd were placed under arrest for possession. Appellant was also charged with following too closely in violation of R.C. 4511.34.

{¶9} On May 4, 2006, the Licking County Grand Jury indicted appellant on one count of trafficking in marijuana in violation of R.C. 2925.03(A)(2)(C)(3)(d), a felony of the third degree, and one count of possession of marijuana in violation of R.C. 2925.11(A)(C)(3)(d), a felony of the third degree, with a forfeiture specification on the $243.00 in cash in violation of R.C. 2925.42(A)(1)(a) and (b).

{¶10} The Licking County Municipal Court in case number 06TRD05908-A held a bench trial on July 25, 2006 on the traffic charge. The municipal court found appellant guilty of the traffic citation and fined him $100.00 plus court costs.

{¶11} In the case *sub judice*, appellant filed a motion to suppress challenging his detention after the initial stop and the contraband seized from the vehicle. Appellant did not challenge the validity of the initial stop itself (eg. the existence of reasonable suspicion or probable cause for the traffic citation) in the motion.

{¶12} On February 27, 2007, the trial court held a hearing on appellant's motion to suppress. Officer Bline and Officer Edme testified at the suppression hearing. In

addition, the State filed a response to appellant's motion to suppress on the day of hearing alleging appellant's motion was barred by res judicata because appellant should have filed a motion to suppress in the Licking County Municipal Court challenging the stop. Further, the State argued appellant lacked standing to suppress the vehicle search because the car was a rental and appellant was not listed as an authorized driver on the rental contract. Appellant's counsel asked for time to brief these issues. The trial court granted appellant additional time to respond.

{¶13} Appellant's counsel filed a brief alleging that the State's res judicata and standing arguments do not apply because (1) a motion to suppress on the issue of the unlawful detention would not have created a defense to the traffic violation and (2) appellant was only challenging his detention and not a vehicle search.

{¶14} On April 20, 2007, the trial court denied appellant's motion to suppress finding "the state possessed reasonable suspicion to stop the Defendants after observing the traffic offense of following too closely, specifically two to two and one-half car lengths at 63 miles per hour on an interstate highway, that Defendant McDade was properly removed from the car for purpose of identification and to conduct a traffic citation, that the sweep of the vehicle by the canine was conducted without any delay in the preparation of a citation for a traffic violation and further that the dog was properly trained and certified and that on a basis of a positive result from the canine on the vehicle that the state possessed reasonable suspicion and sufficient probable cause to search the vehicle for narcotics." See, Judgment Entry dated April 20, 2007.

{¶15} The trial court did not address the State's arguments that appellant's claim is barred by res judicata and lack of standing.

{¶16} On June 11, 2007, appellant entered a plea of no contest to the charges in the indictment. The trial court sentenced appellant to four years in prison.

{¶17} Appellant raises one Assignment of Error:

{¶18} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS EVIDENCE, BECAUSE OFFICERS DID NOT HAVE A REASONABLE, ARTICULABLE BASIS UPON WHICH TO DETAIN APPELLANT AND THEREFORE VIOLATED APPELLANT'S RIGHTS AS GUARANTEED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

I.

{¶19} Appellant claims the trial court erred in denying his motion to suppress because the police detained him without reasonable suspicion to justify a detention in violation of the Fourth Amendment.

{¶20} Our standard of review was discussed in *State v. Burnside*, 100 Ohio St.3d 152, 797 N.E.2d 71, 2003-Ohio-5372, wherein the Ohio Supreme Court stated: "[a]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether

the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539." Id. at ¶ 8.

{¶21} We therefore consider whether the trial court decided the ultimate issue in the motion to suppress under a de novo standard of review.

{¶22} The State re-asserts that appellant's suppression motion is barred by res judicata and lack of standing. We disagree with the State's position.

{¶23} Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or an appeal from that judgment. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, syllabus 9.

{¶24} The issue before the municipal court was the merits of the traffic charge against appellant. Appellant in the instant suppression motion did not challenge constitutionality of the initial stop rather he challenges the detention after the initial stop. Appellant's challenge to the roadside detention would not have been a defense to the traffic charge since the detention occurred after the stop. In addition, the issue of roadside detention would not have been necessarily litigated in the traffic action. Consequently, res judicata does not apply to this case.

{¶25} Next, the State argues appellant does not have standing to challenge the search of the vehicle. The State relies on the fact that appellant was driving a rental car and his name was not on the rental agreement. This argument would have merit if appellant were challenging the search of the vehicle. The State cites *State v. Burton*

(July 14, 2000), 5th App. No. 00CA0013 and *State v. Hale*, 5th App. No. 02CA00024, 2002-Ohio-4537, *State v. Crickon* (1988), 43 Ohio App.3d 171, 540 N.E.2d 287. These cases are distinguishable as the defendants in those cases are challenging the search. Appellant's assignment of error and basis of the suppression motion was that he was unlawfully detained out of the traffic stop not that the search of the vehicle was unlawful. See, Appellant's Supplemental Brief filed April 6, 2007 at p. 4 ("McDade challenges his initial detention by Detective Bline and not a vehicle search for purposes of impoundment.").

{¶26} We will now turn to appellant's assignment of error. The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. An initiation of a traffic stop by a police officer constitutes a seizure under the Fourth Amendment. *Berkemer v. McCarty* (1984), 468 U.S. 420, 436-37, 104 S.Ct. 3138, 3148, 82 L.Ed.2d 317, 332-333; *Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 11, 665 N.E.2d 1091. The stop of a vehicle requires a balancing of the public's privacy interest against legitimate government interests to determine if the seizure was reasonable. *Delaware v. Prouse* (1979), 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660.

{¶27} As a challenge to the legality of the traffic stop is not presented in appellant's assignment of error, the focus of our inquiry is whether the prolonged detention by the police violated the appellant's Fourth Amendment rights.

{¶28} We find this case to be factually similar to *State v. Batchili*, 113 Ohio St.3d 403, 865 N.E.2d 1282, 2007-Ohio-2204, decided last year by the Ohio Supreme Court. In *Batchili*, a state trooper was following a van on the Ohio Turnpike. Id. at 404. The

trooper witnessed a marked-lanes violation and activated the cruiser lights to initiate a traffic stop. Id. The trooper requested the driver's license and registration and discovered Batchili did not own the van. Id. The trooper returned to the cruiser and ran the license. The trooper also called a K-9 officer to "walk around with the canine." Id. The K-9 officer arrived and the dog immediately alerted on the van. Id. Because the dog alerted on the van, the troopers conducted a warrantless search of the van. Id. at 405. The troopers did not find drugs, but they found pirated videotapes and DVDs. Id. Batchili was then arrested and indicted on one count of theft, one count of receiving stolen property, on count of trademark counterfeiting, one count of money laundering, and one count of forgery. Id. Upon trial, he was convicted of theft and receiving stolen property.

{¶29} Batchili appealed his conviction, arguing that the evidence should have been suppressed because it was found during a routine traffic stop that became an unconstitutionally lengthy search and seizure. The Ohio Supreme Court disagreed, finding that "[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." Id. at syllabus 1.

{¶30} In addition, the Court held: "[t]he 'reasonable and articulable' standard applied to a prolong traffic stop encompasses the totality of the circumstances, and a court may not evaluate in isolation each articulated reason for the stop. Id. at syllabus 2, citing *United States v. Arvizu* (2002) 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 applied.

{¶31} See also, *Blue Ash v. Kavanagh*, 113 Ohio St.3d 67, 862 N.E.2d 810, 2007-Ohio-1103, ¶ 24 (approving the deployment of a drug-sniffing dog when it did prolong the traffic stop beyond the time reasonably required to complete the original mission of citing the defendant for the traffic violation); *State v. Bell*, 12th App. No. CA2001-06-009, 2002-Ohio-561 (the use of a dog to sniff the exterior of a vehicle that is lawfully detained does not constitute a search that violates the Fourth Amendment).

{¶32} Appellant, like Batchilil, contends the police lack sufficient cause to prolong the traffic stop until another trooper responded with the dog and that his continued detention for that purpose constituted an illegal seizure.

{¶33} The record establishes that Detective Bline asked appellant "general questions" while he performed a routine check of appellant's driver's license, his passenger's identification, the license plate and registration of the vehicle. Tr. at 23-24. It was during this time period that Officer Edme arrived with his canine. Tr. 24-25. It was during this general questioning and prior to results from the routine traffic check that Detective Bline discovered inconsistencies which made him suspicious. Tr. 26. This is when Detecive Bline had Officer Edme sweep the car with the dog and it alerted on the driver's side door and the trunk. Tr. 27. As Officer Edme was sweeping the car, Detecitve Bline received results the traffic check from dispatch. Id. Detective Bline placed the citation on hold since he had reasonable suspicion of drug activity. Id.

{¶34} Under the totality of circumstances, we find appellant's roadside detention by the police was not unreasonably prolonged so as to violate the Fourth Amendment. Officer Edme arrived within a minute of the initial stop, so there was no appreciable delay for the arrival of the K-9 unit and the sweep of the car. Detective Bline testified his

suspicion was aroused when appellant appeared very nervous and gave inconsistent statements. In addition, appellant was not an authorized driver of the rental vehicle. Thus, the police had reasonable suspicion to continue the ongoing investigation beyond that which prompted the initial stop.

{¶35} Accordingly, we overrule appellant's sole assignment of error.

{¶36} The judgment of the Licking County Common Pleas Court is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

S/L Patricia A. Delaney

S/L Sheila G. Farmer

S/L John W. Wise

JUDGES

PAD:kgb

[Cite as *State v. McDade*, 2008-Ohio-4885.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ISAIAH MCDADE	:	
	:	
Defendant-Appellant	:	Case No. 2007CA00092
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.

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S/L Patricia A. Delaney

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S/L Sheila G. Farmer

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S/L John W. Wise

JUDGES