[Cite as *State v. Roseberry*, 2010-Ohio-1112.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-78
ONEIDA R. ROSEBERRY	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 09-CR-52
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 19, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH W. OSWALT LICKING COUNTY PROSECUTOR BY: RACHEL OKTAVEC 20 S. Second Street, 4th Floor Newark, OH 43055	TERRY B. JAMISON-GARY 580 S. High Street, Ste. 200 Columbus, OH 43215-5644

Gwin, P.J.

{¶1} Defendant-appellant Oneida Rosenberry appeals the May 12, 2009 Judgment of the Licking County Court of Common Pleas overruling her motion to suppress evidence. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On January 3, 2009, at some time after dark, Officer Doug Wells of the Newark Police Department was working the Neighborhood Impact Team, which works low-level street crimes and drug-related matters. Officer Wells observed a dark colored vehicle, in which appellant was a passenger, in a parking lot in the area of Simms Avenue and Washington Street. A black male was standing outside the vehicle near the rear passenger door. The area in which the observation had occurred is known to be an area with high drug traffic.

{¶3} Officer Wells saw the vehicle pull out of the parking lot and up to a stop sign, where the vehicle turned without using a turn signal. Officer Wells pursued the vehicle for approximately two and a quarter miles, without using lights and sirens, before he pulled the vehicle over to issue the citation for failing to utilize a turn signal.

{¶4} Officer Wells requested identification from the driver and all three adult passengers in the vehicle. Officer Wells testified that checking the identification of passengers in order to check for warrants or outstanding holders is standard practice.

{¶5} As he was walking back to his cruiser after obtaining identification from all adults in the vehicle, Officer Wells radioed the K-9 Officer, Officer Benner, to ask him to come do a sweep of the vehicle with his canine partner. When Officer Wells returned to his cruiser, he called the dispatcher to give all the identification information from the

vehicle's occupants. While waiting for a response from the dispatcher, he began writing a traffic citation for the driver. While he was doing so, the dispatcher responded that all the identification that had been provided by all the individuals in the car were valid and no person had any outstanding warrants. Before Officer Wells was able to complete the citation for the driver, Officer Fleming arrived on the scene to assist Officer Wells and keep an eye on the vehicle and occupants for officer safety purposes.

{¶6} While Officer Wells was still writing the citation, Officer Benner arrived. Officer Wells stopped writing the citation and got out of his cruiser to explain to Officer Benner why he wanted the canine sweep done. Officer Wells remained out of his cruiser and observed the sweep, in addition to Officer Fleming who was on the scene as well.

{¶7} The canine gave a positive alert on the vehicle, and a substance, which was later tested and confirmed to be marijuana, was in the vehicle. As a result, Officer Wells explained the situation to the driver who admitted to having marijuana in the glove box. The driver stated that she called the appellant and asked appellant to obtain some marijuana for her. The driver stated that appellant agreed to obtain the marijuana for her, the driver. The driver then picked up appellant and drove her to the location where Officer Wells initially observed them. After the discussion with the driver, appellant was placed under arrest and transported to the police station, where she made a statement to Officer Wells.

{¶8} On February 6, 2009, the appellant was indicted for Complicity to Trafficking in Marijuana, a violation of R.C. 2923.03(A) (1), a felony of the fourth degree.

{¶9} Appellant filed a Motion to Suppress March 17, 2009. The trial court conducted an evidentiary hearing on the motion on May 12, 2009, at which time the Motion to Suppress was denied. Subsequently, on May 18, 2009, the appellant pled "No Contest" to the charge, was found guilty, and was sentenced to nine (9) months in prison, to run consecutive to the sentence appellant was serving on another case.

{¶10} Appellant has timely appealed, raising as her sole assignment of error,

{¶11} "I. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT-APPELLANT'S MOTION TO SUPPRESS EVIDENCE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 14, SECTION 1 OF THE OHIO CONSTITUTION."

I.

{¶12} Appellant argues in her sole assignment of error that her detention was unlawfully prolonged in order to conduct a canine walk-around of the vehicle. We disagree.

{¶13} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside,* 100 Ohio St.3d 152, 154-155, 797 N.E.2d 71, 74, 20030-Ohio-5372 at ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness credibility. See *State v. Dunlap* (1995), 73 Ohio St.3d 308, 314, 652 N.E.2d 988; *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583. Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap,* supra. However, once an appellate court has accepted those facts as true, it must

independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside,* supra, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539; See, also, *United States v. Arvizu* (2002), 534 U.S. 266, 122 S.Ct. 744; *Ornelas v. United States* (1996), 517 U.S. 690, 116 S.Ct. 1657. That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review. *Ornelas*, supra. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, supra at 698, 116 S.Ct. at 1663.

{¶14} In the case at bar, the parties do not challenge that the car in which appellant was a passenger was lawfully stopped for a traffic violation. The question in the case at bar is whether the lawful detention for the traffic violation and the subsequent warrant checks upon all of the occupants of the car became an unlawful detention when the officer decided to request a narcotics-detection dog to sniff around the exterior of the vehicle in which appellee was seated. See, *State v. Batchili*, 113 Ohio St.3d 403, 865 N.E.2d 282, 2007-Ohio-2204 at ¶ 8; *State v. Woodson*, Stark App. No. 2007-CA-00151, 2008-Ohio-670 at ¶ 19.

{¶15} "'[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. 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." *Batchili*, supra. (Citing *State v. Bolden,* 12th Dist. No. CA2003-03-007, 2004-Ohio-184, ¶ 17)….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.'" *Batchili,* supra. (Quoting *State v. Carlson* (1995), 102 Ohio App.3d 585, 598-599, and citing *State v. Cook* (1992), 65 Ohio St.3d 516, 521-522; *U.S. v. Sharpe* (1985), 470 U.S. 675). See, also *Woodson,* supra at ¶ 21.

{¶16} However, "[a]n officer may not expand the investigative scope of the detention beyond that which is reasonably necessary to effectuate the purposes of the initial stop unless any new or expanded investigation is supported by a reasonable, articulable suspicion that some further criminal activity is afoot." *Batchili, supra* at ¶ 34.(Citing *State v. Retherford* (1994), 93 Ohio App.3d 586, 600, citing *U.S. v. Brignoni-Ponce* (1975), 422 U.S. 873, 881-882). "In determining whether a detention is reasonable, the court must look at the totality of the circumstances." *State v. Matteucci,* 11th Dist. No.2001-L-205, 2003-Ohio-702, ¶ 30. (Citing *State v. Bobo* (1988), 37 Ohio St.3d 177, 178). See, also *Woodson,* supra at ¶ 22.

{¶17} A canine walk-around of a vehicle, which occurs during a lawful stop and does not go beyond the period necessary to effectuate the stop and issue a citation does not violate the individual's constitutional rights. *Illinois v. Caballes* (2005), 543 U.S. 405, 409, 125 S.Ct. 834, 838. This is so because the detention was not illegally prolonged in order to make the walk-around. See, *State v. Batchili,* 113 Ohio St.3d 403, 2007-Ohio-2204. If a trained narcotics dog alerts to the odor of drugs from a lawfully detained vehicle, an officer has probable cause to search the vehicle for contraband. *United States v. Reed* (6th Cir.1998), 141 F.3d 644 (quoting *United States v. Berry* (6th Cir.), 90 F.3d 148, 153, cert. denied 519 U.S. 999 (1996); accord, *United States v. Hill*

(6th Cir.1999), 195 F.3d 258, 273 *United States v. Diaz* (6th Cir.1994), 25 F.3d 392, 394; *State v. French* (1995), 104 Ohio App.3d 740, 663 N.E.2d 367, abrogated on different grounds, *City of Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 665 N.E.2d 1091.

{¶18} "What is sought to be justified here is not an arrest, but a *Terry* stop for investigation. Logically, there must be some set of circumstances short of probable cause but sufficient for reasonable suspicion which will warrant the officer in proceeding further in his or her investigation; the evidence needed for a *Terry* stop is by definition less than probable cause for arrest. *United States v. Sokolow,* 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)". *United States v. Frantz* (SD OH 2001), 177 F.Supp.2d 760, 762-763; *Batchili*, supra 2007-Ohio-2204 at ¶15. (Citing *State v. Howard,* Preble App. Nos. CA2006-02-002 and CA2006-02-003, 2006-Ohio-5656 at ¶16).

{¶19} Appellant argues that the Officer Wells' request for identification from the passengers is constitutionally impermissible because the occupants were detained during the traffic stop and, further, the request caused the traffic stop to last longer than necessary. [Appellant's Brief at 14-15]. We disagree.

{¶20} Recently, in *Arizona v. Johnson* (2009), __U.S.__, 129 S.Ct. 781, 786-878, the United States Supreme Court noted, "[t]hree decisions cumulatively portray *Terry's[v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868] application in a traffic-stop setting… In [*Pennsylvania v.*] *Mimms,* [434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 *(per curiam)*], the Court held that '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,' id., at 111, n. 6, 98 S.Ct. 330, because the government's 'legitimate and weighty' interest in officer safety outweighs the '*de minimi'*

additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle, id., at 110-111, 98 S.Ct. 330. [*Maryland v.*] *Wilson,* [519 U.S. 408, 414, 117 S.Ct. 882] held that the *Mimms* rule applies to passengers as well as drivers, based on 'the same weighty interest in officer safety…' *Brendlin [v. California,* 551 U.S. 249, 263, 127 S.Ct. 2400,] held that a passenger is seized, just as the driver is, 'from the moment [a car stopped by the police comes] to a halt on the side of the road.' A passenger's motivation to use violence during the stop to prevent apprehension for a crime more grave than a traffic violation is just as great as that of the driver. 519 U.S., at 414, 117 S.Ct. 882. And as 'the passengers are already stopped by virtue of the stop of the vehicle,' id., at 413-414, 117 S.Ct. 882, 'the additional intrusion on the passenger is minimal,' id., at 415, 117 S.Ct. 882. Pp. 786 - 787."

{¶21} In addition, officers may request identification from the passengers of a vehicle lawfully stopped for a traffic violation without running afoul of the Fourth Amendment. See *State v. Jackson* (Apr. 25, 2006), Pickaway App. No. 05CA12, citing *State v. Brown,* Montgomery App. No. 20336, 2004- Ohio-4058, at ¶ 14. Interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. See*, I.N.S. v. Delgado* (1984), 466 U.S. 210, 216, 104 S.Ct. 1758, 1762. (Citing *Florida v. Royer* (1983), 460 U.S. 491, 103 S.Ct. 1319 (Plurality opinion)). Requesting identification from a passenger is "routine questioning" that is "but a minimal intrusion." *State v. Chagaris* (1995), 107 Ohio App.3d 551, 556, 669 N.E.2d 92; *State v. Rose,* Highland App. No. 06CA5, 2006-Ohio-5292 at ¶18.

{¶22} “In contrast, a much different situation prevailed in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), when two policemen physically detained the defendant to determine his identity, after the defendant refused the officers' request to identify himself. The Court held that absent some reasonable suspicion of misconduct, the detention of the defendant to determine his identity violated the defendant's Fourth Amendment right to be free from an unreasonable seizure. Id., at 52, 99 S.Ct. at 2641”. *Delgado*, supra 466 U.S. 210, 216, 104 S.Ct. at 1762.

{¶23} In the case at bar, the officers had lawfully stopped the automobile for a traffic violation. “The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. See *Brendlin,* 551 U.S., at 258, 127 S.Ct. 2400**.** An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. See *Muehler v. Mena,* 544 U.S. 93, 100-101, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005).” *Arizona v. Johnson*, supra, 129 S.Ct. at 788.

{¶24} In *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, the Court recognized that “a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.” Id., at 22, 88 S.Ct. at 1880. The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime

to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. Id. at 23, 88 S.Ct. at 1881. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Id., at 21-22, 88 S.Ct. at 1879-1880. See *Adams v. Williams* (1972), 407 U.S. 143, 146, 92 S.Ct. 1921, 1923.

{¶25} In the case at bar, there simply is no evidence to suggest that appellant's detention while the officers investigated the traffic violation was of sufficient length to make it constitutionally dubious. Prior to the canine giving a positive alert on the car, the traffic stop so far had not exceeded four or five minutes. Further, Officer Wells had not completed writing the traffic citation. When the canine gave a positive alert on the vehicle, the traffic stop was lawfully extended in order to further investigate the possible criminal activity. There was no delay caused by calling for a narcotics-detection dog and waiting for it to arrive.

{¶26} Appellant's sole assignment of error is overruled.

{¶27} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY

WSG:clw 0302

[Cite as *State v. Roseberry*, 2010-Ohio-1112.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ONEIDA R. ROSEBERRY	:	
Defendant-Appellant	:	CASE NO. 2009-CA-78

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

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY