

**IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO**

THE STATE OF OHIO)	CASE NO. 04CR000754
)	
Plaintiff)	JUDGE EUGENE A. LUCCI
)	
vs.)	
)	
JAMES F. MAY)	OPINION
)	and
Defendant)	ORDER DENYING MOTION TO SUPPRESS EVIDENCE

¶1 This matter came before the court on the motion to suppress evidence filed by the defendant, James F. May, on May 27, 2005, and the state’s response brief filed on June 20, 2005. The court conducted an evidentiary hearing on June 20, 2005 and concluded the hearing on September 8, 2005.

¶2 The defendant seeks to suppress evidence of a large amount of marijuana found in his vehicle as a result of an alleged unlawful and unreasonable search following a traffic stop in the City of Willoughby Hills, Ohio on November 27, 2004.

FINDINGS

¶3 Patrolman Shannon Vachet, a Willoughby Hills, Ohio police officer for four and a half years, is a K-9 handler, field training officer, and has been trained in search and seizure law and drug interdiction, and is familiar with marijuana and other drugs, having had contact with marijuana on hundreds of occasions.

¶4 The officer was on-duty, in uniform and in a marked police cruiser, patrolling Interstate Route 90, which the officer knows is a major drug trade pipeline. The defendant was driving a GMC Yukon sports utility vehicle eastbound on IR-90 near the 191 mile marker at about 9:00 a.m., when the officer was unable to read the rear registration plate on the defendant’s vehicle through a tinted cover. The officer stopped the vehicle for its obstructed plate, which was a violation of Willoughby Hills ordinance 335.09. The officer determined to give the defendant a warning instead of a citation because the vehicle bore out-of-state (Maine) registration.

¶5 The defendant told the officer he was returning to Maine from picking up a dog in California from his girlfriend in California. The defendant said he borrowed the vehicle from his girlfriend in Maine. The officer recalled he had just passed another vehicle with California

plates traveling behind the defendant's vehicle. The defendant told the officer that he was traveling alone. The officer saw, in plain view on the front seat of the defendant's vehicle, a two-way radio, set on channel 2 and turned on, which has a two to three mile range, at best. The officer noted the two-way limited range radio, along with the coincidence of a California registered vehicle traveling behind the defendant, with the defendant admitting that he was coming from California. This suggested to the officer the possibility that the defendant was engaged in two-way radio communication with the California-registered vehicle, despite the defendant's statement that he was traveling alone.

[¶6] The officer noted that the defendant's voice vibrated, and he was constantly swallowing, appeared nervous, and his Adam's apple was going up and down, although the officer could not know if this was usual for this defendant or an indication of normal or excessive nervousness because of being stopped by a police officer.

[¶7] The officer gave the defendant a written warning for the tinted plate, and told the defendant that he was free to leave and could remove the tinted plate cover at the next freeway exit or rest area.¹ The officer would have allowed the defendant to leave if the defendant had wanted to leave.

[¶8] Before the defendant left, the officer asked him if he had a moment, would he mind answering a few questions, as it was policy to ask about any illegal contraband in the vehicle.

[¶9] The defendant stayed and became very talkative, but changed the subject to the health of the dog in his vehicle. Although the officer did not pose any question about contraband to the defendant, the defendant was not responsive to the nature of the officer's inquiry. The defendant's speech became excited and louder, and the defendant became more nervous than he had been, which drew the officer's suspicion. The defendant interrupted the officer who was further inquiring about the officer's confusion about the defendant's girlfriend. The defendant said he borrowed the vehicle from his girlfriend in Maine, even though he earlier told the officer that he was picking up the dog from his girlfriend in California. The officer concluded that the two stories had changed or at least were inconsistent.

¹ Of course, the defendant would have left the City of Willoughby Hills corporate limit within a mile.

[¶10] The officer asked the defendant if he was carrying a lot of luggage, and the defendant told him that he was not. The defendant said he was carrying only one bag, but the officer could see in plain view several containers in the rear portion of the vehicle.

[¶11] The officer asked the defendant if he had any illegal contraband, guns, drugs, or money in the vehicle. The defendant denied any, and the officer requested to search the vehicle. The defendant told the officer not to search the back of the vehicle. The officer told the defendant that he would not search without his consent, and the defendant voluntarily gave permission to search only the front portion of the passenger compartment. The officer agreed to the parameters of the consent given by the defendant. The officer asked if he could frisk the defendant for weapons, and the defendant agreed. The officer frisked him and found no weapon on the defendant's person.

[¶12] The officer walked over to the passenger side of the defendant's vehicle and opened the glove compartment. The officer began to search the permitted area. The defendant accompanied the officer as he searched near the glove compartment, and the defendant requested to be able to sit in the rear seat while the officer searched the front portion. The officer denied the request, telling the defendant he needed to stay in front of his vehicle for safety purposes. The officer had the defendant go to the front of the vehicle. The officer then went over to the driver's side of the vehicle, and the defendant came over to the officer again.

[¶13] The officer found what he believed from his experience was leafy marijuana residue in the center console of the vehicle, along with a "zip-loc" bag, which is frequently used for packaging small amounts of marijuana, and he informed the defendant that he found marijuana in the center console. The defendant told the officer that marijuana should not be there. The officer seated the defendant in the patrol cruiser.

[¶14] The officer then brought out his K-9, applied the dog to the search, and found a large amount of marijuana (44.815 kilograms) in the rear portion of the passenger compartment of the defendant's vehicle.

[¶15] The court heard the testimony of Officer Vachet and Defendant May and was required to judge demeanor and credibility on several conflicting issues.

LAW

Warrantless searches and seizures

[¶16] The Fourth Amendment to the United States Constitution provides 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....” Section 14, Article I, Ohio Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated....” The Ohio constitutional provision is substantially the same as the Fourth Amendment of the United States Constitution.² The Supreme Court of Ohio has held that where the provisions are similar and there is no persuasive reason for a differing interpretation, the protections afforded by the Ohio Constitution are coextensive with those provided by the United States Constitution.³

[¶17] The Ohio and United States constitutions protect the people against searches and seizures which are unreasonable. “A ‘search’ occurs when a subjective expectation of privacy that society is prepared to consider reasonable is infringed.” The reasonableness of the expectation of privacy depends on “a location’s connection to concepts of intimacy, personal autonomy, and privacy.”⁴ “A ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interest in that property.”⁵ A person is “seized” when in view of all the circumstances, a reasonable person would believe that he was not free to leave.⁶ Whether a search or seizure is reasonable “depends ‘on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.’”⁷ Determination of the constitutionality of searches and seizures “involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”⁸

² *Cochran v. State* (1922), 105 Ohio St. 541, 543.

³ *State v. Robinette* (1997), 80 Ohio St.3d 234, 238.

⁴ *State v. Finnell* (1996), 115 Ohio App.3d 583, 588.

⁵ *United States v. Jacobsen* (1983), 466 U.S. 109, 113.

⁶ *State v. Gonsior* (1996), 117 Ohio App.3d 481, 485.

⁷ *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 109, quoting *U.S. v. Brignoni-Ponce* (1975), 422 U.S. 873, 878.

⁸ *Brown v. Texas* (1979), 443 U.S. 47, 50-51.

¶18] Warrantless searches and seizures are per se unreasonable unless they fall into one of the few recognized exceptions.⁹ “The courts must suppress evidence obtained in the course of a warrantless search and seizure upon a proper motion seeking that relief, unless the State demonstrates that an exception to the warrant requirement applies to the facts and circumstances involved in a way that renders the search and seizure constitutionally reasonable. The standard of proof applicable to that proposition is the preponderance of the evidence standard.”¹⁰

¶19] One exception to the warrant requirement is the investigatory detention, commonly referred to as a *Terry*¹¹ stop, which permits an officer to briefly stop an individual when the officer has a reasonable suspicion that the person is involved in criminal behavior.¹² Reasonable suspicion is something more than a hunch, but less than the level of suspicion required for probable cause.¹³ The officer must be able to point to specific, articulable facts, and the rational inferences from those facts, that reasonably warrant the intrusion.¹⁴ The court must consider the totality of the circumstances “viewed through the eyes of a reasonable and prudent police officer who must react to events as they unfold.”¹⁵ Deference must be given to the officer’s training and experience.¹⁶ The investigative detention must last no longer than necessary to effectuate the purpose of the stop and the scope of the detention must be narrowly tailored to its underlying justification.¹⁷

¶20] Another exception to the warrant requirement is the voluntary consent exception.¹⁸ A voluntary encounter, in which an officer approaches an individual and asks questions, does not constitute a seizure, so long as the officer does nothing to convey to the defendant that he is not

⁹ *State v. Gonsior* (1996), 117 Ohio App.3d 481, 486.

¹⁰ *State v. Botkin* (March 21, 1997), Montgomery App. No. 15843.

¹¹ *Terry v. Ohio* (1968), 392 U.S. 1.

¹² *State v. Miller* (1997), 117 Ohio App.3d 750, 756.

¹³ *State v. Shepherd* (1997), 122 Ohio App.3d 358, 364.

¹⁴ *State v. Miller* (1997), 117 Ohio App.3d 750, 757.

¹⁵ *State v. Ratcliff* (1994), 95 Ohio App.3d 199, 204.

¹⁶ *State v. Miller* (1997), 117 Ohio App.3d 750, 757.

¹⁷ *Florida v. Royer* (1983), 460 U.S. 491, 500.

¹⁸ *State v. Miller* (1997), 117 Ohio App.3d 750, 759.

free to leave or to refuse the officer's requests or refuse to answer.¹⁹ However, the detention preceding the consent must be lawful. "[C]onsent given during an investigatory detention is only valid if the police officer had reasonable suspicion to detain the person."²⁰ The state has the burden of proving voluntary consent by clear and convincing evidence.²¹ The state must show that there was no duress or coercion, and that the consent was and freely and intelligently given.²² Courts must look to the totality of the circumstances.²³ Submission to a claim of lawful authority does not constitute consent.²⁴

[¶21] Another exception exists when an officer has probable cause to believe that an individual has committed a traffic violation.²⁵ A vehicle may also be stopped pursuant to a valid *Terry* stop. Once an officer has validly stopped a vehicle, he or she may order the suspect to exit the vehicle.²⁶ Additionally, once an officer has made a valid traffic stop, even after the initial justification for the stop has ended, the officer may briefly detain the suspect to ask questions regarding contraband pursuant to a drug interdiction policy.²⁷

[¶22] Further, warrantless searches of automobiles are permitted when probable cause that the vehicle contains contraband exists.²⁸ Probable cause to search exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place."²⁹ In determining whether probable cause existed, courts must look to the totality of the circumstances.³⁰ The justification for this exception is based on both the mobility of automobiles, which creates an exigency, and the lesser expectation of privacy which results from

¹⁹ *Schneekloth v. Bustamonte* (1973), 412 U.S. 218; *United States v. Peters* (C.A. 6, 1999), 194 F.3d 692, 698.

²⁰ *State v. Shepherd* (1997), 122 Ohio App.3d 358, 370.

²¹ *State v. Jackson* (1996), 110 Ohio App.3d 137, 142.

²² *United States v. Tragash* (S.D. Ohio, 1988), 691 F.Supp. 1066, 1072.

²³ *State v. Dettling* (1998), 130 Ohio App.3d 812, 815.

²⁴ *State v. Jackson* (1996), 110 Ohio App.3d 137, 142.

²⁵ *Katz v. United States* (1967), 389 U.S. 347; *State v. Vest*, Ross App. No. 00CA2576, 2001-Ohio-2394.

²⁶ *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 110-112.

²⁷ *State v. Robinette* (1997), 80 Ohio St.3d 234.

²⁸ *United States v. Carroll* (1925), 267 U.S. 132; *State v. Welch* (1985), 18 Ohio St.3d 88, 91.

²⁹ *United States v. Rodriguez* (C.A. 6, 1995), 52 F.3d 120, 123, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 238.

³⁰ *United States v. Rodriguez* (C.A. 6, 1995), 52 F.3d 120, 123.

both the mobility of automobiles and from the pervasive regulation of automobiles.³¹ Thus, “the justification to conduct a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court’s assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.”³²

Robinette

[¶23] In *State v. Robinette*,³³ the Ohio Supreme Court addressed the validity of a search where the defendant was initially stopped for a speeding violation, but the officer continued to detain the defendant to ask questions pursuant to a drug interdiction policy, and then further detained the defendant to seek consent to search the vehicle. The officer, after issuing a verbal warning for the traffic violation, returned the defendant’s driver’s license, and, pursuant to a drug interdiction policy, asked “One question before you get gone [*sic*]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?” The defendant responded in the negative. The officer then asked if he could search the vehicle. The defendant testified that he was shocked by the question, automatically answered yes, and that he did not believe he was at liberty to refuse the request. The officer found a small amount of marijuana, put the defendant in the back seat of the cruiser, and continued the search. The officer then discovered a methylenedioxy methamphetamine pill. The Supreme Court of Ohio found that the initial stop was justified because the defendant was speeding. However, once the warning was issued, the reason for the stop ended. The court then found that the additional questioning pursuant to the drug interdiction policy was permissible, pursuant to *Royer*³⁴ and *Brown*,³⁵ because such a policy promotes the public interest in quelling the drug trade. Regarding the further detention to request to search the defendant’s car, the court noted that the officer was not justified in detaining the defendant to request to search his car because he did not have any reasonably articulable facts or individualized suspicion to justify further detention. The court

³¹ *United States v. Haynes* (C.A. 6, 2002), 301 F.3d 669, 677.

³² *Michigan v. Thomas* (1982), 458 U.S. 259, 261.

³³ *State v. Robinette* (1997), 80 Ohio St.3d 234.

³⁴ *Florida v. Royer* (1983), 460 U.S. 491.

³⁵ *Brown v. Texas* (1979), 443 U.S. 47.

noted that voluntary consent could validate an otherwise unlawful detention and search. However, the court found that the defendant had not voluntarily consented to the search, finding that under the totality of the circumstances, the defendant merely submitted to a claim of lawful authority.

[¶24] In *City of Mentor v. Bitsko*,³⁶ the Eleventh District Court of Appeals addressed a situation similar to that faced by the court in *Robinette*. The officer observed the defendant walking down the driveway of a known drug house. The officer then followed the defendant, but was unable to read the defendant's license plate. The officer stopped the defendant's vehicle to advise him that his plate was unreadable and that he was required to have a readable license plate. Before returning the defendant's license and insurance information, the officer asked if he could search the defendant's vehicle. The officer testified that the defendant consented, although he could not remember exactly how the defendant consented. The defendant testified that he never responded at all. The officer then ordered the defendant to exit the vehicle. The officer testified that at this point the defendant requested his jacket. When the officer retrieved the defendant's jacket, he discovered a cloth pouch in the jacket which contained drug paraphernalia. The court found that the initial stop of the defendant for a traffic violation was valid. The court noted that it had previously held that an officer may expand the scope of a detention beyond the purposes of the initial stop if the new or expanded investigation is supported by a reasonable, articulable suspicion that other criminal activity is occurring. However, the court found that the continued detention to ask permission to search was not valid because the initial detention did not lead to new facts giving rise to a reasonable suspicion of other criminal activity (beyond the traffic violation). Further, the court found that the trial court had erred in finding voluntary consent. The court found that the trial court had applied a preponderance of the evidence standard instead of a clear and convincing evidence standard, which is required pertaining to the validity of consent to search. The court, noting that the officer could not remember how the defendant consented, but only that he believed the defendant verbally consented, found that the state had not met its burden of proof.

³⁶ *City of Mentor v. Bitsko* (June 5, 1998), Lake App. No. 97-L-098, 97-L-106.

[¶25] In *State v. House*,³⁷ the Eleventh District Court of Appeals again addressed a situation similar to that in *Robinette*. The defendant was stopped for driving a vehicle without a light illuminating the rear license plate. As the officer approached the defendant, he detected an odor of alcohol, and noticed that his eyes were bloodshot. The defendant successfully completed several field sobriety tests. The officer decided to issue a warning for the license plate violation, but before returning the defendant's driver's license and administering the warning, began questioning the defendant as to whether he had any alcohol, drugs, or guns. Eventually, the defendant admitted he had a "bowl." A search of the vehicle resulted in the discovery of the drug paraphernalia. The court found that once the officer decided to issue a warning the reason for the stop had ended. Further, the court found that there was no objective reason to continue the detention. Finally, the court held that where there is no testimony presented that the officer was questioning pursuant to a drug interdiction policy, further questioning after the reason for a stop has ended is an unconstitutional fishing expedition.

[¶26] In *State v. Carter*,³⁸ the Eleventh District Court of Appeals once again addressed a situation similar to that in *Robinette*. The defendant was stopped for speeding. The officer, upon approaching the vehicle, noticed a heavy odor of air fresheners, a large group of air fresheners attached to the driver's side door, a cell phone in the center console, and a backpack at the passenger's feet. The officer obtained identification from both the defendant and his passenger. The officer observed that the defendant's license was from California, and the passenger's was from New York. The officer learned that the defendant had prior drug convictions. The officer questioned both the defendant and the passenger and noticed a conflict in their stories. The officer then questioned the defendant pursuant to a drug interdiction policy. The defendant denied having drugs, but exhibited signs of nervousness. The officer then obtained consent to search the vehicle and found 2.25 kilograms of cocaine. The court found that the officer did not unlawfully detain the defendant when he questioned the defendant regarding contraband because the questions were asked pursuant to a drug interdiction policy promoting the public interest.

³⁷ *State v. House*, Lake App. No. 2000-L-172, 2001-Ohio-4342.

³⁸ *State v. Carter*, Portage App. No. 2003-P-0007, 2004-Ohio-1181.

Drug courier profile

[¶27] “The suspect’s conformance to a drug courier profile does not, by itself, constitute reasonable suspicion.”³⁹ However, reasonable suspicion may be based on factors that fit into a drug courier profile.⁴⁰ The fact that the factors relied upon by an officer fit into a profile does not detract from their evidentiary significance.⁴¹

[¶28] In *Reid v. Georgia*,⁴² the Supreme Court of the United States found, as a matter of law, that the factors relied upon by the appellate court, which fit a drug courier profile, did not create a reasonable, articulable suspicion of criminal behavior. The defendant was stopped outside of the Atlanta airport after arriving on a flight from Fort Lauderdale, Florida, and ultimately was found to be carrying cocaine. The factors relied upon by the appellate court were that the defendant had arrived at the airport from Fort Lauderdale, a source city, that the defendant had arrived at the airport in the early morning, when law enforcement activity is diminished, that he and his companion appeared to be trying to conceal the fact that they were traveling together, and that they had no luggage other than shoulder bags.

[¶29] In *United States v. Sokolow*,⁴³ the Supreme Court of the United States found that factors which fit a drug courier profile did give rise to a reasonable suspicion of criminal activity. The defendant was stopped upon his arrival at Honolulu International Airport, and was found to be carrying 1,063 grams of cocaine. The factors cited as creating reasonable suspicion were that he paid \$2,100 for two airplane tickets from a roll of \$20 bills, he traveled under a name that did not match the name under which his telephone number was listed (it later turned out that the phone was listed in a roommate’s name), that his destination had been Miami, a source city, that he stayed in Miami for only 48 hours even though the round-trip flight from Honolulu to Miami was 20 hours, he appeared nervous, and did not check any of his luggage. The court found that

³⁹ *United States v. Cotton* (Mar. 12, 1991), Sixth Cir. No. 89-6291, 90-5080.

⁴⁰ *United States v. Cotton* (Mar. 12, 1991), Sixth Cir. No. 89-6291, 90-5080.

⁴¹ *United States v. Sokolow* (1989), 490 U.S. 1, 10.

⁴² *Reid v. Georgia* (1980), 448 U.S. 438.

⁴³ *United States v. Sokolow* (1989), 490 U.S. 1.

“[a]ny one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.”⁴⁴

Nervousness

[¶30] “Although there are a plethora of cases referring to a defendant appearing nervous, nervousness is generally included as one of several grounds for finding reasonable suspicion and not a ground in and of itself.”⁴⁵

[¶31] In *State v. Miller*,⁴⁶ the Eleventh District Court of Appeals found that a suspect’s nervous behavior contributed to a finding of probable cause to search a pop can in an automobile. The defendant was a passenger in a vehicle that was stopped by officers who had been conducting surveillance at a known drug house. The officers observed the defendant’s nervous and furtive movements with the pop can, followed by attempts to hide the can. The court found that the defendant’s furtive movements combined with the circumstances that led to the stop established probable cause to search the can.

[¶32] In *State v. Waldroup*,⁴⁷ the court found that reasonable suspicion existed for further detention after an initial traffic stop where the defendant appeared more nervous than usual for a traffic stop (profuse sweating on a cool day, heart visibly beating through his shirt, hand shaking), the car had been rented for only seven days for a round trip from New Mexico to Rhode Island, the car was littered with food and candy wrappers, the defendant was from a source city, and the officer did not believe the defendant, who had a Class A commercial driver’s license, when he told the officer he was a chiropractor, although it later turned out to be true.

[¶33] In *State v. Murphy*,⁴⁸ the court found that reasonable suspicion did not exist. The defendant was stopped for speeding while driving a commercial tractor-trailer, and was ultimately charged with violating the load limit for his tractor-trailer. The officer testified at the suppression hearing that he decided to look at the defendant’s load because the defendant, while looking for the papers requested by the officer, kept stating he could not find the papers, would

⁴⁴ *United States v. Sokolow* (1989), 490 U.S. 1, at 9.

⁴⁵ *United States v. Mesa* (1995), 62 F.3d 159, 162.

⁴⁶ *State v. Miller* (1997), 117 Ohio App.3d 750.

⁴⁷ *State v. Waldroup* (1995), 100 Ohio App.3d 508.

⁴⁸ *State v. Murphy*, Huron App. No. H-04-012, 2005-Ohio-135.

look for a while, change the subject, then look in a different area, began avoiding eye contact, and gave short answers. The court noted that it would not be unusual for the defendant to lose eye contact while searching for papers. Further, the court noted that the testimony did not indicate that the defendant acted overly nervous or evasive, and that the testimony established that the defendant was very polite and cooperative.

[¶34] In *United States v. Mesa*,⁴⁹ the court found that the state had not established reasonable suspicion. The defendant was driving a vehicle with her sister and her sister's two children as passengers, when she was stopped for speeding. After the defendant exited the vehicle to retrieve her driver's license from the trunk, she was placed in the back of the police car. The officer then informed her he was going to issue a traffic warning citation, and proceeded to ask her questions regarding her age, license, and destination. The officer then went back to the vehicle to retrieve the registration for the vehicle from the defendant's sister, and asked the sister about their destination. He then returned to the police car, wrote out the citation, and had the defendant sign it. However, he did not let the defendant leave at that point, but continued to question her in the back of the police car. The state argued that the officer had reasonable suspicion for the continued detention based upon the following: (1) the defendant said they were going to visit their grandfather in Kingsport, Tennessee, while the defendant's sister indicated that he lived in Nashville, Tennessee; (2) the defendant told the officer that their grandfather had a stroke, while the sister replied in the negative to the officer's question as to whether their grandfather had a heart attack; and (3) the defendant appeared nervous. The court noted that the defendant denied saying her grandfather lived in Kingsport, that she had told the officer her grandfather lived in Nashville, and that the videotape and sound recording of the stop supported this. The court found that the discrepancy regarding the grandfather's condition was not sufficient to generate reasonable suspicion. Finally, the court found that, under the circumstances, the defendant's nervous reaction was the norm rather than the exception.

Mistake

[¶35] In *Illinois v. Rodriguez*,⁵⁰ the Supreme Court of the United States held that a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the

⁴⁹ *United States v. Mesa* (C.A. 6, 1995), 62 F.3d 159.

⁵⁰ *Illinois v. Rodriguez* (1990), 497 U.S. 177.

entry, reasonably, but mistakenly believe has common authority over the premises. The court noted that the Fourth Amendment only protects against “unreasonable” searches, and that probable cause only requires a proper assessment of probabilities. The court cited examples of situations where mistakes did not invalidate a search, such as: when a magistrate issues a warrant based on seemingly reliable, but factually inaccurate information, when an officer conducts a search based on an overbroad warrant where the failure to realize the overbreadth of the warrant was reasonable, and when an officer conducts a search incident to arrest even when the wrong person had been arrested, where the belief that the person was the suspect was reasonable. The court stated “[i]t is apparent that in order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government – whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement – is not that they always be correct, but that they always be reasonable.”⁵¹

[¶36] In *United States v. Miguel*,⁵² the Ninth Circuit Court of Appeals addressed the question of whether the officer had reasonable suspicion to stop the defendant’s vehicle where the stop was pursuant to the officer’s mistaken belief that the vehicle’s registration had expired. The court found that the evidence showed that the officer’s mistake was both reasonable and in good faith, and therefore, held that the officer had reasonable suspicion to stop the vehicle based on that belief.

ANALYSIS

[¶37] The officer lawfully stopped the defendant, pursuant to probable cause, for a traffic violation. The detention of the defendant for the purpose of completing the traffic stop and warning took no longer than necessary, and was reasonable.

[¶38] Based upon a policy of making requests to search vehicles on Interstate Route 90, a known drug trade route, for contraband, and further based upon the nervousness of the defendant, apparent conflicting stories of the girlfriend, the two-way limited range radio, and the vehicle behind the defendant with California registration, the officer possessed individualized

⁵¹ *Illinois v. Rodriguez* (1990), 497 U.S. 177, at 185.

⁵² *United States v. Miguel* (C.A. 9, 2003), 368 F.3d 1150.

suspicion about the defendant justifying new or expanded reasonable investigation. Any mistake of fact or misunderstanding the officer may have had concerning the defendant's girlfriend, and what was being retrieved from her in California, or about the vehicle with California registration traveling behind the defendant just prior to the traffic stop, or with the two-way radio, were reasonable and in good faith. The officer asked the defendant if he had time to answer questions about contraband in the vehicle, after the officer told the defendant he was free to leave. The officer's asking the question in this fashion was not unlawful, and was reasonable. It was a legitimate question in the exercise of reasonable police practices to ferret out drug traffickers, and furthered the strong public interest. The defendant did not leave, but voluntarily stayed to talk with the officer.

[¶39] Upon being asked if he had a moment to answer questions about contraband, the defendant changed the subject and became very talkative and initiated further conversation about the dog's health.⁵³ He became more nervous, speaking louder and more rapidly. The defendant had several pieces of baggage despite his telling the officer that he had only one bag. The individualized suspicion about the defendant increased, justifying further reasonable detention and questions. Despite the defendant's initial refusal to allow a search of the rear portion of the vehicle, the defendant failed to walk away or to assert a refusal as to the whole vehicle, so that the defendant voluntarily consented to a limited search of the front of the vehicle. The defendant did not automatically accede to the officer's request, and had a significant period of time to mull it over – he did not simply submit to the officer's claim of authority. The request by the officer was made out in the open, on the interstate, rather than in a custodial or enclosed place. The initial detention was short, reasonable, and cordial. The officer did nothing to convey to the defendant that he was not free to leave or to refuse the officer's requests or refuse to answer his questions. The court finds, by clear and convincing evidence, consent was voluntarily given by the defendant to search the front portion of the passenger compartment of the vehicle.

[¶40] When, pursuant to the valid consent to search, the officer found what he recognized as marijuana residue⁵⁴ in the center console, the officer had probable cause to issue a citation to the defendant, despite the defendant's protestation that the marijuana should not be in the console.

⁵³ *State v. Taylor* (Twelfth Dist.), 2001-Ohio 8676.

⁵⁴ See *State v. Mason-Gaul* (Eleventh Dist.), 2005-Ohio-1561; *State v. Greenwood* (Second Dist.), 2004-Ohio-2737.

Any further search of the vehicle was based upon probable cause, and was permitted pursuant to the automobile exception to warrant requirement.⁵⁵

CONCLUSION

[¶41] The court finds no violation of the Fourth and Fourteenth Amendments to the United States Constitution or Article I, Section 14 of the Ohio Constitution, considering the totality of the circumstances. Accordingly, the defendant's motion to suppress, filed on May 27, 2005, is hereby denied. This case is hereby set for jury trial on November 7, 2005, at 8:30 a.m.

IT IS SO ORDERED.

JUDGE EUGENE A. LUCCI

c: Michelle M. Baeppler, Esq., Assistant Prosecuting Attorney
Michael H. Peterson, Esq., Attorney for Defendant
Timothy P. Hartory, Esq., Attorney for Defendant

⁵⁵ *United States v. Carroll* (1925), 267 U.S. 132.