BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF TED A. WARREN, Notice of Apparent Violation and Intent to Assess Forfeiture	))))))))	CASE NO.: 12-2100-TR-CVF (OH3257001617D) ATTORNEY EXAMINER BRYCE A. MCKENNEY

RESPONDENT, TED A. WARREN'S REPLY BRIEF

Respondent, Mr. Ted Warren, hereby respectfully responds to the Post Hearing Brief of the Staff of the Public Utilities Commission of Ohio (the "Staff").

A. THE STAFF'S ARGUMENT THAT THE TRAFFIC STOP WAS JUSTIFIED IS BOTH WRONG AND MISGUIDED. WHAT'S MORE, EVEN IF THE TRAFFIC STOP WAS LEGALLY JUSTIFIED – A PROPOSITION WITH WHICH RESPONDENT VEHEMENTLY ISAGREES – PHYSICALLY ENTERING RESPONDENT'S TRUCK WITHOUT IS CONSENT WAS CLEARLY NOT LEGALLY JUSTIFIED.

The Staff presented the Commission with no case authority justifying the traffic stop or

the subsequent intrusion into Respondent's truck and only insupportable conclusions in support of its position that the traffic stop was justified along with the subsequent warrantless search. The Staff is unquestionably mistaken.

1. REASONABLE ARTICULABLE SUSPICION WAS LACKING

First, with respect to the traffic stop, we agree that a police officer may derive articulable suspicion from one or more reliable sources, including information from other police officers. *State vs. Henderson*, 51 Ohio St.3d 54, 554 N.E.2d 104 (1990); *State v. Fultz*, 13 Ohio St.2d 79, 234 N.E.2d 593 (1968).. A stop or "seizure" must only be based upon reasonable and articulable facts indicating that the suspect is engaged in criminal activity. *Reid v. Georgia*, 448 U.S. 438, 440, 100 S.Ct. 2752, 65 L.Ed.2d 890. Such suspicion need not be based upon an officer's personal observations. *Adams v. Williams*, 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612, and it may be based upon hearsay. *Maumee v. Weisner*, 87 Ohio St.3d 295, 1999-Ohio-68, 720 N.E.2d 507.

To justify a traffic stop based upon less than probable cause, an officer must be able to articulate specific facts that would warrant a person of reasonable caution to believe that the person has committed, or is committing, a crime, including a minor traffic violation. See *Terry v. Ohio*, 392 U.S. 1, 21, 88. S.Ct. 1868, 20 L.Ed.2d 889 (1968). Reasonable suspicion sufficient to conduct a stop exists if there is "at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2008).

However, there still must be reasonable articulable suspicion. This is absent in this case. Indeed, the only evidence relating to the reason for the traffic stop was the testimony of Trooper Thomas. He merely testified that he stopped Respondent's truck because another officer in an

aircraft told him that there was "a vehicle was following too close to a vehicle ahead of him." (Tr. 22, line 22; Tr. 19). None of the facts or details, if any, supporting this conclusion were presented to the Commission and, in fact, the officer in the aircraft (a Trooper Meyers) never testified. Simply put, a police officer who testifies he did not see a traffic violation and who merely recited a purported violation by a motorist but without relaying *any* the facts supporting the traffic stop, whether or not hearsay, is not sufficient to validate the traffic stop.

The operative statute is R.C. 4511.34, which reads, in pertinent part, as follows:

> **R.C. 4511.34. SPACE BETWEEN MOVING VEHICLES.** (A) The operator of a motor vehicle . . . shall not follow another vehicle . . . more closely than is reasonable and prudent, having due regard for the speed of such vehicle . . .and the condition of the highway. The driver of any truck . . . when traveling upon a roadway outside a business or residence district shall maintain a sufficient space, whenever conditions permit, between such vehicle and another vehicle ahead so an overtaking motor vehicle may enter and occupy such space without danger. This paragraph does not prevent overtaking and passing nor does it apply to any lane specially designated for use by trucks. Outside a municipal corporation, the driver of any truck . . . while ascending to the crest of a grade beyond which the driver's view of a roadway is obstructed, shall not follow within three hundred feet of another truck, or motor vehicle drawing another vehicle. This paragraph shall not apply to any lane specially designated for use by trucks . . . (Emphasis supplied.)

None of the facts which would required to have given Trooper Thomas reasonable articulable suspicion to stop Respondent's vehicle for "following too close" are in the record. Accordingly, and contrary to the Staff's argument, there was insufficient evidence to stop Respondent's truck in the first place.

2. TROOPER THOMAS HAD NO RIGHT TO ENTER RESPONDENT'S TRUCK WITHOUT HIS CONSENT.

The Staff argues that the intrusion into Respondent's truck was justified by the "plain view" doctrine. There are three general requirements that must be met for the "plain view" doctrine. *State v. Halczyszak*, 25 Ohio St.3d 301, 303, 496 N.E.2d 925 (1986), citing *Coolidge v.*

New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). "First, the initial intrusion that brought the police into a position to view the object must have been legitimate. Second, the police must have inadvertently discovered the object. Third, the incriminating nature of the object must have been immediately apparent." *Id.*

In this case, the initial intrusion into Respondent's truck was unquestionably illegitimate. Trooper Thomas claimed that he climbed up onto Respondent's truck, opened the passenger side door and stepped into the cab was for "officer safety." However, no objective evidence was presented that Respondent posed any danger to him or that Thomas made any effort to have Respondent get out of the truck or speak with him through a window. Further, no evidence was adduced to show that Interstate 70 in Madison County, Ohio is a high crime area; after all, the only reason Thomas pulled over Respondent was that another officer told him, without any details (at least not in the record, see above) that he had been "following too close" to an unknown motor vehicle under undisclosed circumstances.

It is settled law that the owner and driver of a motor vehicle has a legitimate expectation of privacy in the vehicle. See, *United States v. Jones*, 565 U.S. --, 132 S.Ct. 945, 949 n. 2, 181 L.Ed.2d 911 (2012). What's more, there is not tenable no basis to dispute that when a vehicle is stopped, the driver (and any passenger for that matter) is seized. *State v. Carter* , 69 Ohio St.3d 57, 63, 1004-Ohio-343, 630 N.E.2d 355, 1994 -Ohio-343; *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). We agree that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection" since "what is in open view cannot be said to be embraced by any reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Thus,

where an officer can observe contraband without making a prior physical intrusion into a constitutionally protected area, such as when an officer "sees an object . . . within a vehicle," there "has been no search at all." *State v. Harris*, 98 Ohio App.3d 543, 547, 649 N.E.2d 7 (8th Dist.1994), quoting 1 LaFave, *Search and Seizure* 321-22, Section 2.2(a) (2d Ed.1987); See, too, *State v. Copper*, 4th Dist. No. 95 CA 2120, 1996 WL 46482 (Jan. 29, 1996) (noting the distinction between the traditional "plain view doctrine, in which there is a prior justification for a search, and the open view doctrine, in which there is no search at all").

In the case at bar, there is no evidence that Thomas could observe the alleged "pipe" unless and until he wrongfully entered Respondent's truck. It was therefore not in plain view and, moreover, it was not in "open view." Thus, these exceptions to the Fourth Amendment clearly do not apply.

Thus, the Commission should find that the evidence relied upon by the Staff was seized in violation of Respondent's Fourth Amendment rights and thus is not admissible.

B. THE STAFF HAS IGNORED THE SERIOUS EVIDENTIARY PROBLEMS WITH THE ANALYTICAL RESULTS.

The Staff simply parroted the direct testimony offered by Ms. Klontz, without even addressing the cross-examination which showed her conclusion that there was marijuana in plant material in the Altoids® tin was marijuana. After all, Ms. Klontz was clear that all three of the tests had to be positive before this result could be confirmed. She remembered doing *none of the tests* (r. 192-193; 196-197; 199; 201). What's more, she conceded that none of the documents she was shown refreshed her recollection (Tr. 175-176; Exhs. 12 and 13).

As we set forth in our initial brief, Klontz could not remember what "morphological" characteristics of the plant material in the tin suggested that it was marijuana (Tr. 12-193).

Further, while she claimed that the color test was "positive" for marijuana, she could not establish that the critical reagent – the Duquenois-Levine reagent – was actually prepared in accordance with any standard or even when, who, or how it was prepared (Tr. 195-196). In fact, no evidence was offered to show that the reagent was prepared properly or what it actually contained. And Klontz could not remember what the color distribution, if any, was when the sample was analyzed (Tr. 196-197).

Moreover, Klontz had no recollection of performing the thin layer chromatography test (Tr. 199). While she described how the test was supposed to have been done, she could not establish that the test was done as she had been trained. She did not know whether the "known standard" supposedly containing THC in fact contained that chemical and no evidence was offered by the Staff to demonstrate that it did (Tr. 209-210). While Kontz said that it was customary for the laboratory to test such materials, she admitted no knowing if this had been done when the "known standard" supposedly containing THC which used for the test was received by her laboratory or what the results were (Tr. 183; 184; 206) Furthermore, she conceded that if the known standard was wrong, then the conclusions she drew from testing the sample of the "evidence" submitted by Thomas would be wrong (Tr. 184).

Thus, the Staff did not adduce competent, credible evidence showing that the material tested by Klontz, in fact, was marijuana. It is critical to note that Klontz herself emphasized that all three tests combined are required to "confirm the identify of marijuana" and each of the tests, standing alone, are merely "presumptive." (Tr. 168; 190; 193; 198).

The field test result was insufficient to establish possession of marijuana as were the perceptions of the two troopers. Since the drug test results were not shown to be reliable, there is

simply no evidence that any of the materials seized from the truck contained a Schedule I drug prohibited by 49 C.F.R. § 392.4. Accordingly, Respondent was not shown to have violated any of the Commission's rules on March 1, 2012.

C. THE STAFF FAILED TO ADDRESS WHETHER THE COMMISSION'S RULES APPLIED TO RESPONDENT ON MARCH 1, 2012.

The Staff adduced no evidence that Respondent was driving for either an interstate or an intrastate motor carrier at the time of the purported violation. Inspector Bays testified that Respondent, based upon his review of documents and from a discussion with Respondent, was allegedly carrying freight from AK Steel in Middletown, Ohio to Wooster, Ohio (Tr. 102-103). However, no witness testified what that freight was, or whether there was even freight on the truck (Tr. 86-87). Bays did not identify AK Steel or the company for which Respondent was purportedly working in some capacity – Total Package Express, Inc. – (Tr. 102; 112), as either interstate or intrastate "motor carriers."

Even if AK Steel and/or Total Package Express, Inc. were "motor carriers" and notwithstanding the Federal Motor Carrier Safety Regulations apply, *inter alia*, to drivers (49 C.F.R. § 392.1), this does not mean that the Commission's rules – under which Respondent was charged with having violated– applied to him. Specifically, the Commission's rules only apply to "owners and drivers of motor vehicles leased to motor carriers are subject to these rules and regulations [only] during the periods covered by such lease agreements. (Emphasis supplied.) Ohio Adm. Code 4901:2-5-01(A). The Staff did not demonstrate that Respondent was "leased" to any motor carrier or that he was driving a commercial vehicle during "a period[] covered by" such a lease agreement" at the time of the purported violations. *Id.*

Because the Staff failed to prove with any evidence, much less by a preponderance of the

evidence that Respondent was subject to the Commission's rules, by virtue of being leased to a motor carrier on March 1, 2012, the charge must be dismissed.

D. RESPONDENT CONCEDES THAT MARIJUANA IS INCLUDED AS A SCHEDULE I SUBSTANCE UNDER 21 C.F.R. § 1308.11.

The Staff has properly pointed out that "marijuana," is, in fact, a Schedule I drug under 21 C.F.R. § 1308.11. We pointed out in our first brief that 49 C.F.R. § 392.4, *inter alia*, prohibits any driver from "be[ing] on duty and possess[ing]. . . any 21 C.F.R.1308.11 Schedule I substance." We maintain that the Staff had the burden to prove by a preponderance of the evidence that Respondent possessed Schedule I drug set forth in 21 C.F.R. § 21 § 1308.11. See, Ohio Adm. Code 4901:2-7-20(A). We initially read the incorporated regulation as not specifically including "marijuana" which is not defined in the regulation. Rather, we believed that the Schedule I drug in question was as follows:

> Tetrahydrocannabinols [DEA 7370] [m]eaning tetrahydrocannabinols naturally contained in a plant of the genus Cannabis (cannabis plant), as well as synthetic equivalents of the substances contained in the cannabis plant, or in the resinous extractives of such plant, and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant, such as the following: 1 cis or trans tetrahydrocannabinol, and their optical isomers[;] 6 cis or trans tetrahydrocannabinol, and their optical isomers[;] 3, 4 cis or trans tetrahydrocannabinol, and its optical isomers (Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.

21 C.F.R. § 1308.11(d)(31). However, we concede that "marijuana" is separately listed in 21 C.F.R. § 1308.11(d)(23).

Thus, Respondent agrees that the burden upon the Staff was to prove either that Respondent possessed "Marijuana" or "Tetrahydrocannabinols." However, the remainder of our

analysis showing a failure of proof remains in tact.

E. THE STAFF'S NEVER ADDRESSED SPOLIATION.

Respondent contents that the Staff had a duty to preserve the purported evidence on which it based its charge in this case. *Loukinas v. Roto-Rooter Servs. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272, ¶ 18. The Staff's failure to do so gives rise to a rebuttable presumption that Respondent was prejudiced by the destruction of relevant evidence. *Holiday v. Ford Motor Co.*, 8th Dist. No. 86069, 2006-Ohio-284, 2006 WL 178011 at ¶ 21. While the Staff could have attempted to show there was reasonable possibility that Respondent was prejudiced, it offered no evidence in this regard at all.

The record shows that all of the physical evidence which could have been inspected and tested by the Respondent to disprove the Staff's contentions was destroyed during the pendency of this case (Tr. 173-175; Exhibits 9, 11 and 15). No justification for this conduct was offered. (We note that the Staff had nothing to do with the destruction of the evidence but it was the Staff's responsibility to make sure the evidence was preserved.)

Because the Staff did not overcome the presumption that Respondent was prejudiced by the ill-advised destruction of the evidence, the Commission should conclude that the correct sanction is to dismiss the charge against Respondent.

CONCLUSION

Based upon the foregoing, and as set forth in our First Brief, the Staff did not meet its burden of proof in this case. Accordingly, the claimed violation(s) against the Respondent should be dismissed, with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of Respondent, Ted A. Warren's Reply to the Staff's Post-Hearing Brief was served by first class U.S. Mail, postage prepaid, upon John H. Jones, Assistant Attorney General of Ohio, Public Utilities Section, 180 East Broad Street, 6th Floor, Columbus, Ohio 43215-3793 and was further served by e-mail john.jones@puc.state.oh.us on this **16th** day of December 2013.

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