

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Ted A. Warren, Notice of	:	
Apparent Violation and Intent to Assess	:	Case No. 12-2100-TR-CVF
Forfeiture,	:	
	:	
Respondent.	:	

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

Ted Warren possessed marijuana while on duty and in the course of operating a commercial motor vehicle. This constitutes a violation of 49 C.F.R. 392.4(a)(1). The facts adduced from a lawful traffic stop show that Warren owned the vehicle and was the only person in the vehicle who had access to the marijuana, which was discovered above the driver's side door of the cab. The marijuana was within his physical reach and under his dominion or control. By virtue of this, Staff has established that Warren had constructive possession of the marijuana.

The touchstone of the Fourth Amendment is reasonableness. Warren was subject to a lawful stop for following another vehicle too closely. Trooper Thomas made contact with Warren by opening the passenger side door. Trooper Thomas – given the constraints on his field of vision and not knowing how many occupants were in the cab and whether they were armed – opened the door for his safety. This intrusion was minimal

and lawful under court precedent addressing officer safety in similar traffic stop situations. The console area, located between where Warren was sitting in the driver's seat and where Trooper Thomas was positioned in the opened passenger-door frame, had a cup holder containing a copper pipe with a burnt end sitting in plain view. It was immediately apparent to Trooper Thomas, based upon his many years of drug-identification experience, that the pipe was drug paraphernalia because of its incriminating character and burnt end. The drug paraphernalia gave Trooper Thomas probable cause and reasonable suspicion to conduct a warrantless search of Warren's vehicle.

Reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.¹ Under this balancing test, the Supreme Court has consistently approved of protective searches of persons, vehicles, and even homes, during routine and other lawful investigatory detentions, in recognition of the paramount interest in officer safety and the extraordinary risks to which law enforcement officials are exposed during such detentions.² Trooper Thomas' actions were reasonable and did not infringe on Warren's privacy and liberty interests.

Warren has the burden of establishing that his own Fourth Amendment rights were violated. The two-part test requires him to "show: (1) he had a subjective expectation of

¹ *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330 (1977).

² *U.S. v. Stanfield*, 109 F.3d 976, 979-980 (4th Cir. 1997).

privacy in the searched premises (vehicle here) and (2) that society is prepared to recognize that expectation as legitimate.”³ Warren failed to meet his burden in this case.

The seizure of Warren’s drug paraphernalia that was discovered in plain view and subsequent search of his vehicle, which resulted in the seizure of marijuana, did not violate his Fourth Amendment rights. The marijuana was properly handled after being seized by the Ohio State Highway Patrol (OSHP) for chain of custody and properly tested following established standards and protocols. Warren’s expectation of privacy in the interior of his vehicle was greatly diminished by the fact that he, his vehicle, and load, are heavily regulated by the state of Ohio, which has adopted the Federal Motor Carrier Safety Regulations (FMCSRs) for compliance and enforcement. Staff established that Warren was subject to the Public Utilities Commission of Ohio’s (Commission) rules and violated 49 C.F.R. 392.4 (a) (1).

ARGUMENT

A. The Commission, as a creature of statute, has no power to decide constitutional questions.

Warren suggests that the stop and search of his vehicle violated the Fourth Amendment’s prohibition on unreasonable searches and seizures, but the Commission lacks the power to decide this question. The Ohio Supreme Court has repeatedly held that the Commission, as a creature of statute, has no power to decide constitutional ques-

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U.S. v. McRae, 156 F.3d 708, 711 (6th Cir. 1998).

tions.⁴ The Commission's function in this setting is to develop a factual record, pursuant to R.C. 4903.09, so that a reviewing court, in the event of an appeal, can decide the constitutional question.⁵ Following this precedent, the Commission should refrain from deciding Warren's Fourth Amendment challenge. Even if the Commission decides to reach the constitutional question, Warren cannot establish a Fourth Amendment violation, as we now explain.

B. Trooper Thomas acted reasonably in stopping Warren based on Trooper Meyer's observation and simultaneous report that he was following another vehicle too closely.

On March 12, 2012, the OSHP observed Warren commit a traffic violation and stopped him for that reason. Among other things, Warren was cited for following another vehicle too closely pursuant to R.C. 4511.34.⁶ The Commission does not have jurisdiction to adjudicate that citation, which was the basis or cause for the stop, nor the legality of the stop leading to that citation. On October 10, 2013, a hearing was held in this case. At no time during the course of our proceeding did Warren produce or request judicial notice be taken of any court decision that found the initial stop illegal under the Fourth

⁴ *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181, ¶ 13-15; *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 247, 638 N.E.2d 550 (1994); *E. Ohio Gas Co. v. Pub. Util. Comm.*, 137 Ohio St. 225, 239, 28 N.E.2d 599 (1940). *See also State ex rel. Bays v. Indus. Comm.*, 10th Dict. Franklin No. 03AP-424, 2004-Ohio-2944, ¶ 4, 2004 WL 1244352 (June 8, 2004).

⁵ *Reading*, 2006-Ohio-2181, ¶ 13-15.

⁶ Staff Ex. 7 (Driver/Vehicle Examination Report) (Mar. 1, 2012); Tr. at 106.

Amendment. The initial stop is presumed to be legal absent any notice of authority or proof being offered to the contrary in the case record.

Here, Warren was charged with possession of marijuana while on duty as a driver operating a commercial motor vehicle under the FMCSRs. The charge of marijuana possession under the FMSCRs in this case followed the initial stop for following too closely. The scope of this proceeding, in terms of the facts that are relevant to the FCMSR charge to be scrutinized under the Fourth Amendment, begins with the discovery of the copper pipe in the console and ends with the search and seizure of marijuana. In this proceeding, Warren is precluded from raising a Fourth Amendment claim with regard to the legality of the stop for following too closely. That is a traffic offense cited under state law, which the Commission has no jurisdiction to decide.

The Staff showed, through the testimony of Trooper Thomas, why and how the stop was made but it did not have the burden of proving a traffic offense was committed by Warren to justify the stop. That burden lied with the prosecuting authority having jurisdiction over the traffic citation. Staff established that Trooper Meyers had a present sense impression of Warren following another vehicle too closely. He communicated what he observed from the air simultaneously to Trooper Thomas, who was on the ground at the same location where Mr. Warren was passing through the speed zone. Trooper Thomas immediately acted on the information relayed by Trooper Meyers and quickly made the stop of Warren's vehicle based on Trooper Meyers' description and confirmation that he had the right vehicle.

A police officer may conduct a traffic stop on reasonable suspicion that the motorist is violating a traffic law governing operation of a motor vehicle.⁷ The stop may be legal even if the person stopped cannot be convicted of the traffic violation.⁸ The Ohio Supreme Court found reasonable suspicion for a traffic stop “when a law enforcement officer witnesses a motorist drift over the lane markings in violation of RC 4511.33” even without further evidence of erratic driving.⁹ Similarly, the Franklin County Court of Appeals upheld a stop on reasonable suspicion that a defendant had failed to maintain a safe minimum following distance.¹⁰

Probable cause can exist even if the officer incorrectly determines that a traffic violation has occurred.¹¹

Trooper Thomas testified to what Trooper Meyers stated he observed while flying in an airplane and patrolling a marked speed zone that both officers were working that

⁷ *State v. Adams*, 2011-Ohio-4008, 2011 WL 3557842 (Ohio Ct. App. 2d Dist. Montgomery County 2011).

⁸ *Bowling Green v. Lynn*, 165 Ohio App. 3d 825, 2006-Ohio-1401(6th Dist. Wood County 2006).

⁹ *State v. Mays*, 119 Ohio St. 3d 406, 409, 2008-Ohio-4539.

¹⁰ *State v. Stokes*, 2008-Ohio-5222, 2008 WL 4482800 (Ohio Ct. App. 10th Dist. Franklin County 2008).

¹¹ *State v. Cronin*, 2011-Ohio-1479, 2011 WL 1195818 (Ohio Ct. App. 1st Dist. Hamilton County 2011) (“The proper focus is not on whether a defendant could have been stopped because a traffic violation had in fact occurred, but on whether the officer had probable cause to believe an offense had occurred. The fact that a defendant could not ultimately be convicted of failure to obey a traffic signal is not determinative of whether an officer acted reasonably in stopping him for that offense.”).

day.¹² Trooper Meyers communicated by radio to Trooper Thomas, who was on the ground in the speed zone, that Warren was following another vehicle too closely and advised Trooper Thomas to stop him.¹³ This communication between Troopers Meyers and Thomas was made while the traffic offense was still in progress.¹⁴ The present sense impression exception to the hearsay rule allows the admission of a hearsay statement if it “describe[s] or explain[s] an event or condition while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.”¹⁵

“The principle underlying this exception is the assumption that statements or perceptions, describing the event and uttered in close temporal proximity to the event, bear a high degree of trustworthiness.”¹⁶ “The key to the statement’s trustworthiness is the spontaneity of the statement, either contemporaneous with the event or immediately thereafter.”¹⁷ Trooper Meyers’ statement to Trooper Thomas occurred either contemporaneously with Warren following another vehicle too closely or immediately thereafter.

¹² Tr. at 18-23.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Evid. R. 803(1).

¹⁶ *Cox v. Machinery Co.*, 41 Ohio App. 3d 28, 35 (12th Dist. 1987).

¹⁷ *Id.* at 35-36.

The cases of *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675 (1985), and *Whiteley v. Warden*, 401 U.S. 560, 91 S. Ct. 1031 (1971), stand for the proposition that when an investigative stop is made on reliance upon the information contained in a radio dispatch, the admissibility of evidence obtained after the stop turns on whether the officer who issued the dispatch possessed a reasonable suspicion to justify the stop. In this case, Trooper Meyers had a reasonable suspicion to believe that Warren was following another vehicle too closely based on his observation. Trooper Meyers communicated what he observed to Trooper Thomas contemporaneously with the traffic offense, which was still in progress.

C. Having already established reasonable suspicion to stop Warren for the traffic violation, Trooper Thomas’ subsequent act of opening the passenger-side door to safely initiate contact with Warren was reasonable.

An automobile affords a lesser expectation of privacy than a house for Fourth Amendment purposes.¹⁸ Stops for traffic violations are the area where most Americans come in contact with police. The police may take reasonable actions to protect themselves after a lawful stop of a motor vehicle. The additional intrusion of opening the passenger-side door, as opposed to looking through the passenger-side window, to make contact with Mr. Warren was minimal. “Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.”¹⁹

¹⁸ See *Rakas v. Illinois*, 439 U.S. 128, 148, 99 S. Ct. 421 (1978).

¹⁹ *Terry v. Ohio*, 392 U.S. 1, 23, 88 S. Ct. 1868 (1968).

The United States Supreme Court held it was a minimal intrusion for police officers to order a driver to get out of a motor vehicle that has been lawfully detained for a traffic violation, even without suspicion of criminal activity. This action can be taken by an officer without violating the Fourth Amendment's proscription of unreasonable searches and seizures.²⁰ Furthermore, an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.²¹

“Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel.”²² In this case, Mr. Warren was operating a commercial motor vehicle that is regulated by the FMCSRs.

There is an abundance of case law upholding the actions of officers opening the door to a vehicle that is subject to a lawful stop. The following cases were found to be reasonable under the Fourth Amendment. Police officers may lawfully inspect the vehicle identification number (VIN) following a lawful stop for a traffic violation. If the VIN is not visible from the outside of the vehicle, the officer may open the door to search for the number, provided that the search is no more intrusive than necessary to locate the

²⁰ *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6, 98 S. Ct. 330 (1977).

²¹ *Maryland v. Wilson*, 519 U.S. 408, 413-15, 117 S. Ct. 882 (1997).

²² *South Dakota v. Opperman*, 428 U.S. 364, 367-68, 96 S. Ct. 3092 (1976).

VIN.²³ Under the theory of officer safety, an officer's act of opening the passenger door, when the passenger did not show his hand, was not a violation of the Fourth Amendment.²⁴ And, the Fourth Amendment was not violated when heavily tinted windows caused an officer to open the passenger-side door of a vehicle during a traffic stop to ensure that the driver was unarmed and that there were no other occupants who might threaten his safety.²⁵

In *Stanfield*, the court stated the substantial government interest in officer safety--which exists when law enforcement officers must approach vehicles with heavily tinted windows--far outweighs any minimal privacy interest the suspect retains in the otherwise visible interior compartment of the vehicle.²⁶ As a consequence of the officers' inability to see inside the vehicle as they approached, the officer opened the front passenger side door to determine whether the driver was armed and alone.²⁷ When he opened the door, the officer saw in plain view a clear plastic bag of cocaine protruding from a paper bag

²³ *New York v. Class*, 475 U.S. 106, 106 S. Ct. 960 (1986).

²⁴ *State v. Nimely*, 2002-Ohio-725, 2002 WL 228790 (Ohio Ct. App. 5th Dist. Ashland County 2002).

²⁵ *United States v. Stanfield*, 109 F.3d 976 (4th Cir. 1997).

²⁶ *Id.* at 978.

²⁷ *Id.* at 978-979.

that had overturned on the back seat.²⁸ The officer arrested the driver and conducted a warrantless search of the vehicle.²⁹

Trooper Thomas testified that the reason why he opened the passenger door to make contact with Mr. Warren was for officer safety.³⁰ He described the vehicle as being 60-some feet long and that he avoided approaching the driver's side because of the risk of getting hit by a car.³¹ This is why he approached the passenger side.³² He explained that he was not six foot six, so either Warren would have to come to the passenger side door or he could open it.³³ For officer safety, Trooper Thomas felt more comfortable opening the passenger door, stepping up to the rail, because at any time Warren could have a weapon in the vehicle.³⁴ Trooper Thomas had one foot in the vehicle and leaned against the passenger seat to see if anyone was in the back of the cab and had a weapon, so he could take cover that way.³⁵

Assuming *arguendo* the officer's act of opening the passenger door was a constitutional violation, the copper pipe would have inevitably been discovered by the officer

²⁸ *United States v. Stanfield* at 979.

²⁹ *Id.*

³⁰ Tr. at 69.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Tr. at 70.

making contact with the driver through the passenger window. The Ohio Supreme Court adopted the ultimate or inevitable discovery exception to the Exclusionary Rule in *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501 (1984).³⁶ Here, the copper pipe was in plain view in a cup holder in the console of Warren's cab. Trooper Thomas would have seen the pipe with or without the door being open because the window would have put him in the same position and vantage point to see the pipe in the cup holder located in the console between the driver and passenger seats.

The State's obligation to respect an individual's Fourth Amendment rights does not command that the police officer forsake reasonable precautionary measures during the performance of his duties.³⁷ This was a common sense safety measure taken by Trooper Thomas and the government has a legitimate and weighty interest in officer safety under such circumstances. Opening the door was reasonable and minimally intrusive to Mr. Warren. Trooper Thomas was not able to see who or what he was dealing with after making this lawful traffic stop and approaching the vehicle, so he opened the door for his safety.

³⁶ See also *State v. Perkins*, 18 Ohio St.3d 193 (1985).

³⁷ *State v. Evans*, 67 Ohio St.3d 405, 410 (1993).

D. Seeing the copper pipe with a burnt end in plain view gave Trooper Thomas reasonable suspicion to conduct a warrantless search of Warren’s vehicle for other criminal activity.

In *Harris v. U.S.*, the United States Supreme Court stated that “it has long been settled that objects falling in the plain view of an officer who has a right to be in a position to have that view are subject to seizure and may be introduced in evidence.”³⁸ In *Coolidge v. New Hampshire*, the plurality opinion put some limits on the scope of the plain view doctrine.³⁹ The Ohio Supreme Court in a series of opinions closely adhered to the Coolidge plurality’s guidance in setting forth the three requirements that must be met to justify a plain view search and seizure: (1) The *intrusion* affording the plain view must be lawful; (2) The discovery of the evidence must be *inadvertent*; and (3) The incriminating nature of the evidence must be *immediately apparent* to the seizing authority.⁴⁰

In this case, the intrusion affording the plain view occurred as a result of a lawful traffic stop for following too closely. Trooper Thomas was lawfully in a position to see the copper pipe. An officer at the scene of an automobile stop, who can see the butt of a handgun under the passenger seat while standing outside the vehicle, can confiscate the gun under the plain view exception to the warrant requirement.⁴¹ Here the discovery of

³⁸ *Harris v. U.S.*, 390 U.S. 234, 236, 88 S. Ct. 992 (1968).

³⁹ *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022 (1971).

⁴⁰ *State v. Wilmoth*, 1 Ohio St.3d 118 (1982) (holding modified by *State v. Halczynszak*, 25 Ohio St. 3d 301 (1986)); *State v. Williams*, 55 Ohio St.2d 82 (1978) (holding modified by *State v. Halczynszak*, 25 Ohio St. 3d 301 (1986)); *State v. Benner*, 40 Ohio St. 3d 301 (1988) (abrogated by *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301 (1990)).

⁴¹ *U.S. v. Campbell*, 549 F.3d 364 (6th Cir. 2008).

the copper pipe was inadvertent. Trooper Thomas was not searching for any evidence when he made contact with Warren about the traffic stop. The copper pipe was between Warren and Trooper Thomas in a cup holder in the console of the cab that separated the driver and passenger sides of the vehicle. The incriminating character of the copper pipe was immediately apparent to Trooper Thomas based upon his years of drug-identification experience.

A motorist has no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.⁴² If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.⁴³ In this case, the cup holder in the console of the cab could have been viewed by anyone looking into the cab from either the driver or passenger side of the vehicle. It is not reasonable to believe that Warren had an expectation or privacy in the area of the cup holder in the console of his vehicle. Trooper Thomas had probable cause and reasonable suspicion to search Warren's vehicle, based on the copper pipe with a burnt end that he discovered in plain view when speaking to Warren.

⁴² *Campbell*, 549 F.3d at 364.

⁴³ *Pennsylvania v. Labron*, 518 U.S. 938, 940, 116 S. Ct. 2485 (1996).

E. The evidence shows that Mr. Warren was subject to the Commission's rules.

It is clear from the inspection report that Mr. Warren was transporting steel as his cargo.⁴⁴ Mr. Warren was transporting this load from Middletown, Ohio to Wooster, Ohio.⁴⁵ Mr. Warren was identified as the driver and AK Steel was identified as the shipper, and Total Package Express Inc. was identified as the carrier in Inspector Bays' report.⁴⁶ Inspector Bays identified the USDOT # for this commercial motor vehicle and he identified the number for the bill of lading.⁴⁷ The DOT # came back registered to the carrier, who Inspector Bays looked up from the federal database to see what the safety rating was for the company.⁴⁸ Inspector Bays further identified the equipment and its gross vehicle weight ratings for the power unit and trailer.⁴⁹

Inspector Bays, who is a trained and experienced Motor Carrier Inspector, conducted a level II inspection of Warren's vehicle for any violation of the FMCSRs.⁵⁰ Inspector Bays testified that his report identified the driver, Warren, and the trucking company or carrier Warren was hauling for as Total Package Express.⁵¹ He testified that

⁴⁴ Staff Ex. 7 (Driver/Vehicle Examination Report) (Mar. 1, 2012).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Tr. at 114-115.

⁴⁹ Staff Ex. 7 (Driver/Vehicle Examination Report) (Mar. 1, 2012).

⁵⁰ Tr. at 95-97.

⁵¹ *Id.* at 102.

the shipper of the freight being transported was AK Steel.⁵² Inspector Bays testified where the shipment originated and its destination.⁵³ This evidence is sufficient to establish that Warren was subject to the Commission's rules.

All motor carriers operating in intrastate commerce within Ohio shall conduct their operations in accordance with the regulations and provisions of Chapter 4901:2-5 Safety Standards.⁵⁴ Under Ohio Adm. Code 4901:2-5-01 (A), the term "motor carrier" includes for hire motor transportation companies as defined in R.C. 4921.02, transporting property. The owners and drivers of motor vehicles leased to motor carriers are subject to these rules and regulations.⁵⁵ The term also includes all offices, agents, representatives, and employees of carriers by motor carrier responsible for the driving of motor vehicles.⁵⁶

Inspector Bays identified all of the business parties involved in the load of steel being transported on Warren's vehicle in his report and testimony. Warren was acting either as an agent or employee of the carrier Total Package Express Inc. Inspector Bays identified the shipper of the steel as AK Steel. The business relationship between these three parties was clear to Inspector Bays, who confirmed all the information provided in his report from Mr. Warren, the vehicle itself, and the shipping papers for the cargo. In

⁵² Tr. at 102.

⁵³ Tr. at 102-103.

⁵⁴ Ohio Adm. Code 4901:2-5-02(A).

⁵⁵ Ohio Adm. Code 4901:2-5-01(A).

⁵⁶ *Id.*

the locally defined fields of the report Inspector Bays answered “Y” for yes that it was a “For-Hire Carrier.” Mr. Warren’s argument that Staff did not show that he was subject to the Commission’s rules is without merit and should be denied.

F. Staff established the “chain of custody” of the marijuana.

The state has the burden of establishing the chain of custody of a specific piece of evidence but the State’s burden is not absolute; “[t]he state need only establish that it is reasonably certain that substitution, alteration or tampering did not occur.”⁵⁷ As a general matter, “the state [is] not required to prove a perfect, unbroken chain of custody.”⁵⁸

While authentication of evidence is a condition precedent to its admission, the condition is satisfied when the evidence is “sufficient to support a finding that the matter in question is what its proponent claims.”⁵⁹ Evidence of a process or system to produce an accurate result is sufficient to satisfy the rule.⁶⁰ Breaks in the chain of custody go the weight afforded the evidence, not its admissibility.⁶¹

⁵⁷ *State v. Brooks*, 2012-Ohio-5235, 2012 WL 5507092 (Ohio Ct. App. 3rd Dist. Hancock County 2012), ¶ 39, citing *State v. Barzacchini*, 96 Ohio App. 3d 440 (6th Dist. 1994).

⁵⁸ *Brooks, supra*, ¶ 39, citing *State v. Gross*, 97 Ohio St. 3d 121, 2002-Ohio-5524, ¶ 57, citing *State v. Keene*, 81 Ohio St. 3d 646, 662 (1998).

⁵⁹ *Brooks, supra*, ¶ 39, citing Evid. R. 901 (A); *State v. Hunter*, 169 Ohio App. 3d 65, 2006-Ohio-5113, ¶ 16.

⁶⁰ Evid. R. 901 (B) (9).

⁶¹ *State v. Blevins*, 36 Ohio App. 3d 147, 150 (10th Dist. 1987).

Trooper Thomas testified that he followed an established “chain of custody” process for securing, handling, packaging, and then shipping the evidence to the OSHP crime lab.⁶² Kara Klontz, Criminalist at the OSHP crime lab, also testified that she followed an established “chain of custody” process for receiving, securing and handling the evidence in the crime lab.⁶³

G. Staff established that Mr. Warren had possession of the marijuana.

As a result of the OSHP having probable cause and reasonable suspicion to search Mr. Warren’s vehicle, marijuana was discovered and seized from the cab of Warren’s vehicle. The marijuana was located in a small Altoids tin in a cubby above the driver’s side door.⁶⁴ Warren was cited under the FMCSRs for being a driver on duty and in possession of a controlled substance: to wit, marijuana. Possession may be actual or constructive.⁶⁵

For constructive possession to exist, the State must demonstrate that the defendant was able to exercise dominion or control over the item, even if he does not have immediate physical possession of it, and was conscious of the objects presence.⁶⁶ The State may

⁶² Tr. at 32-52

⁶³ Tr. at 137-155, 169-175.

⁶⁴ Tr. at 79.

⁶⁵ *State v. Brooks*, 2012-Ohio-5235, 2012 WL 5507092 (Ohio Ct. App. 3rd Dist. Hancock County 2012), ¶ 45, *citing* *State v. Worley*, 46 Ohio St.2d 316, 329 (1976).

⁶⁶ *Brooks, supra*, ¶ 45, *citing* *State v. Hankerson*, 70 Ohio St.2d 87, 91 (1982); *State v. Messer*, 107 Ohio App. 3d 51, 56 (9th Dist. 1995).

prove the existence of the various elements of constructive possession of contraband by circumstantial evidence.⁶⁷

In this case, Warren was driving the vehicle at the time with no passengers and the tin containing the marijuana was located in an open cubby above the door and within his reach.⁶⁸ Trooper Thomas testified he ran the registration of the vehicle and confirmed that Warren owned the vehicle.⁶⁹ “Mere presence in the vicinity of drugs, coupled with another factor probative of dominion or control over the contraband, may establish constructive possession.”⁷⁰ Staff proved that Warren had constructive possession of marijuana located in a tin in an open cubby above his door.

H. Staff proved, by the preponderance of the evidence, that Mr. Warren possessed marijuana, which is a controlled substance under 21 C.F.R. 1308.11 – Schedule I (d) (23).

A portion of Warren’s brief erects and then clobbers a straw-man—that being, the false notion that Staff bore the burden of proving that Warren “possessed, used, or was under the influence ‘tetrahydrocannabinols’ as defined in 21 C.F.R. § 1308.11(d)(31) on March 1, 2012.”⁷¹ Warren then goes on to mention tetrahydrocannabinols no less than

⁶⁷ *Brooks, supra*, ¶ 45, citing *State v. Jenks*, 61 Ohio St. 3d at 259, 272-73.

⁶⁸ Tr. at 79.

⁶⁹ Tr. at 28.

⁷⁰ *Brooks, supra*, ¶ 51, citing *State v. Cooper*, 3d Dist. No. 9-06-49, 2007-Ohio-4937 at ¶ 26.

⁷¹ Warren’s Brief at 22.

nine times⁷², but Staff never charged Warren with possessing tetrahydrocannabinols. Staff charged Warren with violating 49 C.F.R. 392.4(a) by virtue of his possession of marihuana, not tetrahydrocannabinols, while on-duty.⁷³ The Commission should not be distracted by Warren’s attempt to murky the waters. The focal point here is whether Warren possessed marihuana, not tetrahydrocannabinols.

Perhaps even stranger is Warren’s insistence that “marihuana is not a listed Schedule I drug in 21 C.F.R. § 1308.11.”⁷⁴ While Staff has certainly seen its fair share of imaginative arguments over the years, Warren’s denial that the word “marihuana” is even in the regulations may very well take the cake. All the Commission needs to do here to confirm that Warren is wrong is to read the plain language of 21 C.F.R. 1308.11(d)(23) – the word marihuana is listed plain-as-day right there in the regulation. This is not a debatable point.

Having established that Staff charged Warren with violating 49 C.F.R. 392.4(a) by virtue of his possession of marihuana, and that marihuana is indeed a 21 C.F.R. 1308.11 Schedule I substance, the next step in the analysis is to determine whether Staff met its burden of establishing that the material in the Altoids tin was in-fact marihuana. Staff comfortably met its burden here and the Commission should so find.

⁷² See Warren’s Brief at 21-25.

⁷³ See Staff Exs. 1 (charging Warren with violating 49 C.F.R. 392.4(a)) and 7 (notes to inspection report stating Warren “possess[ed] marijuana”).

⁷⁴ Warren’s Brief at 21.

There is no singular method that Staff must follow to establish that a substance is marihuana. Though “most substances * * * cannot be positively identified without analysis or testing * * * the recognized exception in controlled substance cases is marijuana.”⁷⁵ Marijuana is excepted from testing requirements because it “consist[s] of the dried leaves, stems, and seeds of a plant which anyone reasonably familiar therewith should be able to identify by appearance * * * .”⁷⁶ Thus, “police officers trained and qualified may identify marijuana without a laboratory test as long as there is a sufficient foundation laid to establish familiarity.”⁷⁷

It would be difficult to imagine an officer better trained to identify a substance as marijuana than Trooper Woodyard. He has served on the Patrol for 20 years.⁷⁸ One of his job duties involves service in the drug interdiction unit along with handling a drug sniffing canine.⁷⁹ He has received six weeks of canine training which involved both nar-

⁷⁵ *State v. Baker*, 12th Dist. Fayette No. CA99-10-030, 2000 WL 1875827, *5 (Dec. 21, 2000). *See also State v. Jack*, 3rd Dist. Marion No. 9-11-59, 2012 WL 1664128, *4 (May 14, 2012) (“courts in Ohio have held that lab testing is not always necessary to prove the contents of a substance.”).

⁷⁶ *State v. Maupin*, 42 Ohio St.2d 473, 480 (1975) (quoting 23 C.J.S. Criminal Law s 864, p. 408).

⁷⁷ *Jack*, *supra* (citing *Maupin*). Importantly, these decisions arose in the criminal context where the State’s burden of proof, a reasonable doubt, is higher. In contrast, the case here arises in the civil context where Staff’s burden of proof, a preponderance of the evidence, is lower. If it is permissible for a trained officer to identify a substance as marijuana in the criminal context, surely then an officer is permitted to make the same identification in the civil context as well.

⁷⁸ Tr. at 71.

⁷⁹ Tr. at 74.

cotics detection as well as various aspects of criminal apprehension.⁸⁰ The training involved real narcotics. He stated that from his training and experience, 15 years of which primarily dealt with drug interdiction, he knows what marijuana looks and smells like.⁸¹

During the stop of Warren's vehicle, Trooper Thomas called in Trooper Woodyard to assist with a drug sweep of the vehicle's cab area.⁸² Trooper Woodyard's sweep of the cab uncovered, among other things⁸³, an Altoids tin "in a cubby above the door."⁸⁴ The cubby is located in a position where Warren might have been able to reach it sitting down, but it would be a reach.⁸⁵ When Trooper Woodyard opened the Altoids tin he "saw what appeared to be marijuana. It looked like marijuana, and it smelled like marijuana."⁸⁶ He based this conclusion "from the training at the academy, training over the years, of seeing it, seeing it raw, seeing it, smelling it burnt, and then training with it in the raw form as well."⁸⁷ Trooper Woodyard identified Staff Exhibits 3 and 4 as accu-

⁸⁰ Tr. at 74.

⁸¹ Tr. at 75-76, 80.

⁸² Tr. at 75.

⁸³ Trooper Woodyard also found a lip balm container containing marijuana during the sweep. Tr. at 78. But the contents of the lip balm container are not at issue and thus not discussed here.

⁸⁴ *Id.*

⁸⁵ Tr. at 79.

⁸⁶ Tr. at 80.

⁸⁷ *Id.*

rately representing the items that he seized during the sweep of Warren's cab.⁸⁸ After determining that the Altoids tin contained marijuana, Trooper Woodyard handed the tin and its contents over to Trooper Thomas and left the scene.⁸⁹

Trooper Woodyard's testimony easily establishes that the substance in the Altoids tin is marijuana. Under *Maupin*, *Jack*, and *Baker*, all Staff must do is lay an adequate foundation and offer the testimony of a trained officer who is familiar with identifying marijuana. Staff complied with this precedent by offering the testimony of Trooper Woodyard, an officer with extensive years of experience involving the identification of marijuana. He identified the substance in the Altoids tin as marijuana and Warren presented no evidence or testimony to controvert this. Nothing more is required from Staff – it comfortably met its burden here.

Though Ohio law does not require testing to identify a substance as marijuana, the Patrol took a belt-and-suspenders approach here: both Trooper Thomas and the OSHP's crime lab tested the material taken from the Altoids tin for marijuana, and the results from each of these tests confirmed the presence of marijuana. These test results, coupled with Trooper Woodyard's testimony, powerfully show that the substance in question is marijuana as defined in 21 C.F.R. 1308.11(d)(23).

⁸⁸ Tr. at 78.

⁸⁹ Tr. at 80.

Trooper Thomas performed a NIK test on the material contained in the Altoids tin before sending it off to the Patrol's crime lab for further testing.⁹⁰ In a NIK test, chemicals are applied to the substance in question, and if after shaking, the substance turns purple, the substance is marijuana.⁹¹ NIK test kits are provided by the patrol for troopers to conduct field tests and have been used by the patrol for no less than 24 years.⁹² Trooper Thomas has performed the NIK test between 50 and 100 times; he was trained by his coach along with instructions set forth in a pamphlet.⁹³

Trooper Thomas stated that the substance from the Altoids tin turned purple from the NIK test, which means that the substance is marijuana.⁹⁴ While Warren has tried to create confusion over what color the substance actually turned, Trooper Thomas explained that the substance did in-fact turn purple even though the picture reflected in Staff Ex. 5 – a picture he took – did not adequately capture the color as it appeared to his naked eye.⁹⁵

After performing the NIK test Trooper Thomas sent the evidence (*i.e.*, the Altoids tin, the pipe, and the lip balm container) off to the OSHP's crime lab for yet more test-

⁹⁰ Tr. at 42; Staff Ex. 5 (Photograph of NIK Test).

⁹¹ Tr. at 42.

⁹² Tr. at 42-43, 63.

⁹³ Tr. at 62.

⁹⁴ Tr. at 64-66.

⁹⁵ Tr. at 37-38, 66.

ing.⁹⁶ The evidence was housed in a sealed container along with a property control form.⁹⁷ The evidence receipt form – a form that’s customarily kept in the course of conducting the lab’s business – shows that the lab received the evidence on March 7, 2012 and assigned a unique case number to it (Case No. 12-003046).⁹⁸

Klontz, a criminalist with the patrol’s crime lab, performed three different tests on the material contained in the Altoids tin. Klontz has a B.S. in forensic science with a biology concentration and has been with the crime lab for over two-and-a-half years.⁹⁹ Her job duties include testing substances for the presence of controlled substances; an activity she has done about 1,800 times.¹⁰⁰

The three tests that Klontz performed on the material from the Altoids tin were: (1) a macroscopic test; (2) a Duquenois-Levine test; and (3) a thin layer chromatography test.¹⁰¹ The results of these three tests, when taken together, are sufficient to confirm the presence of marijuana.¹⁰² Based on the results of her testing, Klontz’s expert opinion to a reasonable degree of scientific certainty was that the material from the Altoids tin was

⁹⁶ Tr. at 67-68.

⁹⁷ Tr. at 49-51.

⁹⁸ Tr. at 144-146; Staff Ex. 10 (Evidence Receipt form) (Mar. 7, 2012).

⁹⁹ Tr. at 133.

¹⁰⁰ Tr. at 134-136.

¹⁰¹ Tr. at 154-163.

¹⁰² Tr. at 168.

marihuana.¹⁰³ Under Ohio law, Klontz's statement suffices for the purpose of establishing that the substance is marijuana.¹⁰⁴

Warren has tried to poke holes in Klontz's testimony in two ways. The first line of attack challenges the powers of Klontz's memory. The second questions the reliability of the testing standards (sometime called testing reagents) that Klontz used in the Duquenois-Levine test and the thin layer chromatography test. Neither attack is persuasive.

Staff's response to Warren's first line of attack is perhaps a truism, but it illustrates the extremity of his position. Human beings are rarely endowed with photographic memories and powers of total recall, especially when it comes to remembering run-of-the-mill tasks from long ago. And because of this limitation of human memory, notes are made to record observations. This is what Klontz did here. On June 11, 2012, Klontz performed the three tests mentioned above and recorded the results of her tests in a report styled controlled substance worksheet.¹⁰⁵ Over a year later, and with roughly 1,800 tests under her belt, Klontz was asked if she could remember performing the three tests at issue here. Predictably enough, she couldn't. (Who could?) But what she did say is that she wouldn't report the results of her analysis on a worksheet unless she had personal

¹⁰³ Tr. at 168-169; Staff Ex. 14 (Report of Analysis, Controlled Substance Examination).

¹⁰⁴ See *State v. Elam*, 3rd Dist. Hancock No. 5-02-57, 2003-Ohio-1577, ¶ 7 (Mar. 31, 2003) ("an expert opinion is competent only if it is held to a reasonable degree of scientific certainty") (quotations and citations omitted).

¹⁰⁵ Staff Ex. 12 (Controlled Substance Worksheet) (Jun. 11, 2012).

knowledge of what those results were.¹⁰⁶ And the worksheet showed a positive test result for each of the three tests Klontz performed.¹⁰⁷ Klontz's notes are sufficient to establish the competency of her testimony.

Warren's second line of attack focuses on the testing standards used in the Duquenois-Levine and thin layer chromatography tests. Attacking the testing standard is neither a novel nor a winning strategy. Instructive here is *State v. Beyer*, 3rd Dist. Allen No. 1-83-6, 1984 WL 7994 (Mar. 23, 1984). In that case, defense counsel, in a line of questioning almost identical to the questioning here, sought to undermine the state's case by attacking the testing standard used by the state's criminalist in the course of testing a substance for LSD.¹⁰⁸ The criminalist did not prepare the testing standard, nor did she independently test the standard; rather, a company supplied the testing standard. But the Court held this was permissible: "Many scientific experimentations require reliance on either known or acceptable standards established other than by the person performing the experiment. To require an expert witness to substantiate all standards accepted in scientific and technical evaluations would render many acceptable tests a nullity."¹⁰⁹

The same logic applies here. A criminalist in Klontz's lab – a lab accredited by the American Society of Crime Lab Directors – prepared the Duquenois-Levine testing

¹⁰⁶ Tr. at 208.

¹⁰⁷ Staff Ex. 12.

¹⁰⁸ *State v. Beyer* at *2.

¹⁰⁹ *Id.*

standard and Klontz relied on this standard in performing the test.¹¹⁰ Under *Beyer* this is permissible. Similarly, a company called Cerrilant prepared the standard used in the thin layer chromatography test.¹¹¹ *Beyer* permits this too.

Accepting Warren's logic would demand that criminalists never-endingly test the standards they use in their day-to-day work. The end result of this regime would ultimately grind their work to a halt. To illustrate, assume standard A is used by a criminalist to test a substance for the presence of marijuana. Further assume that a criminalist tested standard A for the presence of marijuana against a known standard, call it standard B. Testing A against B confirms that standard A contains marijuana. Initially, this sounds acceptable. But what about standard B? What assurance is there that standard B is actually what it purports to be? Following Warren's logic, to confirm the reliability of standard B, it (Standard B) would have to be tested against some other known standard, call it, standard C. But what about the reliability of standard C? Wouldn't it have to be tested against standard D? Yes, under Warren's logic. And how about standards E, F, and G? On and on we go until we're back where we started. Warren's argument has no endpoint and, as *Beyer* illustrated, would render every scientific test a nullity.

In short, the material from the Altoids tin was marijuana. Trooper Woodyard, confirmed this, Trooper Thomas confirmed this, and Klontz confirmed this. Staff comfortably met its burden of proof.

¹¹⁰ Tr. at 138, 195.

¹¹¹ Tr. at 210.

I. Warren cannot claim prejudice when he failed to make a request to preserve the evidence for independent testing within a span of eight months before it was destroyed.

The evidence seized during the stop of Warren’s vehicle was destroyed pursuant to a clear directive issued from the OSHP to its crime lab.¹¹² By virtue of the destruction, Warren claims Staff has failed to prove its case.¹¹³ But Warren conveniently neglects to mention that he never submitted a request to preserve the evidence for independent testing.

There is no prejudice when evidence is destroyed pursuant to a good-faith law enforcement directive and the defendant fails to make a request to preserve the evidence.¹¹⁴ And even where a request to preserve is made, the defendant forfeits any claim of prejudice if the request is not made immediately.¹¹⁵

Here, despite a lapse of eight months from the time his vehicle was stopped-and-searched to the time the OSHP issued its request to destroy the evidence, Warren never once contacted a court, the OSHP, the Staff, or the Commission to preserve the evidence for independent testing. Consider the relevant timeline:

¹¹² Staff Ex. 15 (Request for Destruction of Evidence).

¹¹³ Warren’s Brief at 24-25.

¹¹⁴ *State v. Fuller*, 2nd Dist. Montgomery No. 18994, 2002-Ohio-2055, 2002 WL 857671, *3 (April 26, 2002).

¹¹⁵ *State v. Tarleton*, 7th Dist. Harrison No. 02-HA-541, 2003-Ohio-3492, 2003 WL 21505839, *4-5 (June 30, 2003) (“specific request” to preserve evidence not made “until several months had passed.”).

- March 1, 2012 – stop and search of Warren’s vehicle;¹¹⁶
- June 18, 2012 – notice of preliminary determination sent to Warren’s counsel;¹¹⁷
- November 4, 2012 – OSHP’s request to destroy the evidence.¹¹⁸

The timeline shows that Warren had ample opportunities to submit a request, but he failed to act. Under the reasoning of *Fuller* and *Tarleton*, there is no prejudice to Warren.

Tellingly, Warren cites no cases concerning the rules that apply when the state, in the course of performing a law enforcement function, seizes and then later destroys evidence. Instead, he relies on cases arising from spoliation disputes between private litigants; one, a products-liability case, the other, a negligent-installation case. The Commission should reject Warren’s attempt to import the rules of civil discovery governing spoliation into this proceeding. *Fuller* and *Tarleton* instruct that there is no prejudice to the defendant when the state, acting in good-faith pursuant to a law-enforcement directive, destroys evidence in the absence of a request to preserve from the defendant. Warren cannot overcome this precedent.

¹¹⁶ Staff Ex. 7 (Driver/Vehicle Examination Report) (Mar. 1, 2012).

¹¹⁷ Staff Ex. 1 (Notice of Preliminary Determination) (Jun. 18, 2012).

¹¹⁸ Staff Ex. 15 (Request for Destruction of Evidence).

CONCLUSION

The Staff met its burden in this case by showing that Warren was on duty as a driver for Total Express Inc., carrying steel for AK Steel, and in possession of marijuana, which is a controlled substance under 21 C.F.R. 1308.11 – Schedule I (d) (23). The Staff respectfully requests that the Commission find that Warren was on duty as a driver and possessed a controlled substance in violation of 49 C.F.R. 392.4 (a)(1), and assess an appropriate forfeiture as supported by the record of evidence in this case.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served this 16th day of December, 2013, via electronic mail upon the Respondent's counsel, Brent L. English, Esq., at benglish@englishlaw.com, and via U.S. Mail at The 820 Building, 820 West Superior Avenue, 9th Floor, Cleveland, Ohio, 44113-1818.

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