CLIFTON JACKSON AFFIDAVIT AND APPENDIX OF EXHIBTS ARE NUMBERED [first two cover pages of affidavit unnumbered, iii-lxiii] IN ROMAN NUMERAL. EXHIBIT PAGES ARE CROSS REFERENCED AS APPENDIX [Appendix Pages are numbered1-655] PAGES. AFFIDAVIT AND EXHIBITS ARE IN SUPPORT OF 26B MOTION TO REOPEN STATE OF OHIO v. CLIFTON JACKSON, CASE NO. 11CR083104, NINTH DISTRICT COURT OF APPEALS CASE NO. 14CA010555, Not Limited Too.

# EXHIBIT

# AAAA

EXHIBITS A-AAAE IN SUPPORT OF CLIFTON JACKSON ENCLOSED AFFIDAVIT AND APPENDIX PREPARED MARCH OF 2016 OF A DETAILED TIME LINE OF FACTUAL EVENTS BETWEEN JUNE 14th, 2011 AND OCTOBER OF 2015 TO THE BEST OF MY LAYMEN LEGAL ABILITIES.THIS EXHIBIT "AAAA" IS REFERENCED IN ¶ 152 not limited too.

# The Supreme Court of Ohio

OFFICE OF THE CLERK
65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
MAUREEN O'CONNOR

JUSTICES
PAUL E. PFEIFER
TERRENCE O'DONNELL
JUDITH ANN LANZINGER
SHARON L. KENNEDY
JUDITH L. FRENCH
WILLIAM M. O'NEILL

CLERK OF THE COURT
SANDRA H. GROSKO

TELEPHONE 614.387.9530
FACSIMILE 614.387.9539
www.supremecourt.ohio.gov

August 25, 2015

Clifton Jackson 652-163
Lake Erie Correctional Institution
501 Thompson Road, P.O. Box 8000
Conneaut, Ohio 44030

Dear Mr. Jackson:

The enclosed notice of appeal, motion for delayed appeal, and affidavit of indigence were not filed because they do not meet the requirements of the Rules of Practice of the Supreme Court of Ohio. Specifically:

- You did not attach to your motion for delayed appeal a copy of the court of appeals' opinion and judgment entry being appealed as required by Rule 7.01(A)(4)(a)(iii);
- Your notice of appeal and motion for delayed appeal are not signed as required by Rule 3.08(A);
- The certificate of service in your notice of appeal and motion for delayed appeal is not signed as required by Rule 3.11(D)(1)(a).

You may correct the above-noted deficiencies and resubmit your documents for filing. For further guidance please see the copy of the Rules of Practice and copy of our pro se guide that are on file with your institution's library.

Sincerely,

Nathan
Deputy Clerk

Enclosures

# The Supreme Court of Ohio & The Ohio Judicial System

Clerk's Office
65 South Front Street, 8th Floor
Columbus, Ohio 43215-3431
800.826.9010
614.387.9530

**Sandra H. Grosko**
Clerk

## Search Results: Case Number 2015-1458

## The Supreme Court of Ohio

### CASE INFORMATION

### GENERAL INFORMATION

**Case: 2015-1458** Jurisdictional Appeal
**Filed:** 09/03/15
**Status:** Case Is Open

**State of Ohio v. Clifton A. Jackson**

### PARTIES and ATTORNEYS

| |
|---|
| Jackson, Clifton (Appellant) |
| State of Ohio (Appellee)<br>Represented by:<br>Slanczka, Mary **(66350)** , Counsel of Record<br>Will, Dennis **(38129)** |

### PRIOR JURISDICTION

| Jurisdiction Information | Prior Decision Date | Case Number(s) |
|---|---|---|
| Lorain County, 9th District Court of Appeals | 06/22/2015 | 14CA010555 |

### DOCKET ITEMS

- Most documents that were filed in Supreme Court cases after December 1, 2006, are scanned. They are available for viewing via the online dockets, generally within one

business day from their date of filing.

- Supreme Court orders that were issued after January 1, 2007, are also available via the online docket as PDFs. Orders scanned prior to April 6, 2009, may not bear the signature of the Chief Justice. These online orders are identical to the original orders in all other respects.
- A symbol in an online docket denotes a scanned filing or an electronic version of a Supreme Court order. Clicking the icon opens an image of the filing or order.

| Date Filed | Description |
|---|---|
| 09/03/15 View | **Notice of appeal of Clifton Jackson**<br>*Filed by:* Jackson, Clifton |
| 09/03/15 View | **Motion for delayed appeal**<br>*Filed by:* Jackson, Clifton |
| 09/03/15 See Above | **And lower court decision**<br>*Filed by:* Jackson, Clifton |
| 09/03/15 View | **Affidavit of indigence**<br>*Filed by:* Jackson, Clifton |
| 09/04/15 | **Copy of notice of appeal sent to clerk of court of appeals** |

Back

**Question or Comments?**

ECMS Online 1.2.9

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | Case No. 15-1458 |
| Plaintiff-Appellee, | : | On Appeal from the Lorain County Court of Appeals, Ninth Appellate District |
| vs. | : | |
| CLIFTON JACKSON, | : | Court of Appeals Case No. 14CA010555 |
| Defendant-Appellant. | : | |

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**NOTICE OF APPEAL OF APPELLANT CLIFTON JACKSON**

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Clifton Jackson #A652-163

Lake Erie Correctional Institution

501 Thompson Road / P.O. Box 8000

Conneaut, Ohio 44030

DEFENDANT-APPELLANT PRO SE

Mary R. Slanczka (0066350)

Assistant Prosecuting Attorney

225 Court Street, 3rd Floor

Elyria, Ohio 44035

COUNSEL FOR APPELLEE

## Notice of Appeal of Appellant Clifton Jackson

Now comes the Defendant-Appellant, Clifton Jackson, acting in pro se, and hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lorain County Court of Appeals, Ninth Appellate District affirming his conviction in Court of Appeals Case No. 14CA010555, entered on the 22nd day of June, 2015.

This felony case involves a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

Clifton Jackson

Clifton Jackson #A652-163
Lake Erie Correctional Inst.
501 Thompson Road
P.O. Box 8000
Conneaut, Ohio 44030

DEFENDANT-APPELLANT PRO SE

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by regular U.S. Mail to the office of the Lorain County Prosecutor, at 225 Court Street, 3rd Floor, Elyria, Ohio 44035 on this 20th day of August, 2015.

Clifton Jackson

DEFENDANT-APPELLANT PRO SE

ORIGINAL

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | Case No. 15-1458 |
| Plaintiff-Appellee, | : | On Appeal from the Lorain |
| vs. | : | County Court of Appeals, Ninth Appellate District |
| CLIFTON JACKSON, | : | Court of Appeals |
| Defendant-Appellant. | : | Case No. 14CA010555 |

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**MOTION FOR LEAVE TO FILE DELAYED APPEAL OF APPELLANT CLIFTON JACKSON**

---

Clifton Jackson #A652-163

Lake Erie Correctional Institution

501 Thompson Road / P.O. Box 8000

Conneaut, Ohio 44030

DEFENDANT-APPELLANT PRO SE

Mary R. Slanczka (0066350)

Assistant Prosecuting Attorney

225 Court Street, 3rd Floor

Elyria, Ohio 44035

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | Case No. |
| Plaintiff-Appellee, | : | On Appeal from the Lorain |
| vs. | : | County Court of Appeals, Ninth Appellate District |
| CLIFTON JACKSON, | : | Court of Appeals |
| Defendant-Appellant. | : | Case No. 14CA010555 |

**MOTION FOR LEAVE TO FILE DELAYED APPEAL OF APPELLANT CLIFTON JACKSON**

Now comes the Defendant-Appellant, Clifton Jackson [hereinafter "Appellant"], acting in pro se, and respectfully moves this Honorable Court pursuant to S.Ct.Prac.R. 7.01(A)(4) for leave to file a delayed appeal and a notice of appeal. This case involves a felony and more than 45 days has passed since the decision of the Court of Appeals was filed in this Case.

A Memorandum in Support is attached to more fully set forth the reasons for the delay.

Respectfully submitted,

Clifton Jackson

Clifton Jackson #A652-163
Lake Erie Correctional Inst.
501 Thompson Road
P.O. Box 8000
Conneaut, Ohio 44030

DEFENDANT-APPELLANT PRO SE

MEMORANDUM IN SUPPORT

On the 22nd day of June, 2015, the Ninth District Court of Appeals filed its Decision and Journal Entry in the above-styled case. A copy of the Court of Appeals Decision and Journal Entry is attached to this motion.

Appellant was unable to file a notice of appeal and memorandum in support of jurisdiction within 45 days of the Court of Appeals Decision and Journal Entry, and now moves the Court for the reasons set forth below to grant leave to file a delayed appeal:

1. On or around November of 2014, the Appellant had been in transit under federal custody due to his pending federal trial in the Western District of New York - **U.S. v. Clifton Jackson, Docket No. 13-CR-098-S.** Appellant was held in Niagara County Jail, P.O. Box 496, Lockport, New York 14094.

2. In late November of 2014 to late December of 2014, Appellant was held in a Federal Prison - N.E.O.C.C., 2240 Hubbard Road, Youngstown, Ohio 44505.

3. In late December of 2014 through early July of 2015, Appellant was once again held in Niagara County Jail, P.O. Box 496, Lockport, New York 14094.

4. While still in New York on or around July 11th, 2015, Appellant was notified by appellate counsel of the 45 day rule, in which his appeal to the Supreme Court of Ohio must be filed, with instruction to immediately contact the Ohio Public Defenders Office for assistance in the filing of an appeal in the Supreme Court of Ohio. **See attached cover letter dated July 14th, 2015.**

5. Appellant immediately contact the Ohio Public Defenders Office as instructed by appellate counsel, informing them of his transit status due to his pending Federal Case.

6. However, within the next week, Appellant was transferred to N.E.O.C.C., 2240 Hubbard Road, Youngstown, Ohio 44505.

7. Once back at N.E.O.C.C., Appellant sent a **Notice of Address Change** to the Public Defender (amongest others) dated July 20th, 2015, which was attached to a supplement.

8. Once again Appellant within 7 to 11 days, was transferred to Lake Erie Correctional Institution, 501 Thompson Road, P.O. Box 8000, Conneaut, Ohio 44030.

9. Once back at Lake Erie Corr. Inst. (LaECI), Appellant sent an up-dated **Notice of Address Change** on August 3rd, 2015 to the Public Defender seeking assistance with the filing of his appeal as of right to the Ohio Supreme Court.

10. Appellant has yet to receive a response from the Public Defender as of August 18th, 2015.

11. So with no other remedy available to him at law, Appellant is throwing himself on the mercy of this Honorable Court, and requesting leave to filing delayed based on the above-stated reasons in lines 1 through 10.

If this Court grant leave to file a delayed appeal, Appellant would present the following issues for review:

I. Whether defendant was denied due process of law when the court overruled his motion to suppress.

II. Whether defendant was denied due process of law when the prosecutor offered evidence of defendant's exercise of his constitutional rights. (Tr. 170, 171, 172, 178)(Tr. 17; 6/4/12).

III. Whether defendant was denied due process of law when the court overruled his motion to dismiss based on the violation of the speedy trial statute.

IV. Whether defendant was denied effective assistance of counsel (Tr. 97-98, 155, 172, 178-79, 188, 212, 213)(Tr. 17; 6/4/12).

V. Whether defendant was denied his Sixth Amendment right to present a defense when the court would not either re-open the evidence to allow recall of witnesses or have witnesses recalled who testified during defendant's absence. (Tr. 82, 97, 178-79, 190-92, 211-12, 213-14, 216).

VI. Whether defendant was denied his constitutional right to be present when the court commenced trial when defendant belatedly appeared on the second day of the trial. (Tr. 168, 209, 210-11, 213-14).

VII. Whether defendant was denied a fair trial when the jurors were informed that defendant was under restraint.

VIII. Whether defendant was denied due process of law when the sentence for a felony version of possession of criminal tools and the verdict did not support a felony version. (Tr. 264).

IX. Whether the court erred in ordering defendant to repay attorney fees. (Tr. 274, 277-78).

X. Whether defendant was denied due process of law when the court overruled his motion for judgment of acquittal. (Tr. 106, 119, 154, 161, 208-09, 263).

XI. Whether the court erred and committed plain error by it's failure to compel the state to comply with defendant's Crim.R. 16 request of Brady Material. See Crim.R. 52(B).

## CONCLUSION

Based on the foregoing argument and authorities, Appellant prays the Court grant leave to file a delayed appeal and notice of appeal.

Respectfully submitted,

Clifton Jackson

Clifton Jackson #A652-163
Lake Erie Correctional Inst.
501 Thompson Road
P.O. Box 8000
Conneaut, Ohio 44030

DEFENDANT-APPELLANT PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion For Leave To File Delayed Appeal was sent by regular U.S. Mail to the office of the Lorain County Prosecutor, at 225 Court Street, 3rd Floor, Elyria, Ohio 44035 on this 20th day of August, 2015.

Clifton Jackson

DEFENDANT-APPELLANT PRO SE

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | Case No. |
| Plaintiff-Appellee, | : | On Appeal from the Lorain |
| vs. | : | County Court of Appeals, Ninth Appellate District |
| CLIFTON JACKSON, | : | Court of Appeals |
| Defendant-Appellant. | : | Case No. 14CA010555 |

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**AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE A DELAYED APPEAL OF DEFENDANT-APPELLANT CLIFTON JACKSON**

---

Clifton Jackson #A652-163

Lake Erie Correctional Institution

501 Thompson Road / P.O. Box 8000

Conneaut, Ohio 44030

DEFENDANT-APPELLANT PRO SE

Mary R. Slanczka (0066350)

Assistant Prosecuting Attorney

225 Court Street, 3rd Floor

Elyria, Ohio 44035

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | |
| | | Case No. |
| Plaintiff-Appellee, | : | |
| | | On Appeal from the Lorain |
| vs. | : | County Court of Appeals, Ninth Appellate District |
| CLIFTON JACKSON, | : | |
| | | Court of Appeals |
| Defendant-Appellant. | : | Case No. 14CA010555 |

**AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE A DELAYED APPEAL OF DEFENDANT-APPELLANT CLIFTON JACKSON**

I, Clifton Jackson, being first duly sworn according to the laws of the State of Ohio, depose and assert a sworn statement pursuant to **S.Ct.Prac.R. 7.01(A)(4)(a)(ii)** of the basis for the claim in support of Motion for Leave to File a Delayed Appeal.

1. I am the Defendant-Appellant, Clifton Jackson, and have first-hand knowledge of and am competent to make the following statements.

2. I was unable to file a notice of appeal and memorandum in support of jurisdiction within 45 days of the Court of Appeals' Decision and Journal Entry for the following reasons:

(a) I have been fighting both a Federal Case and a State of Ohio Case, and during that process since November of 2014, I have been in **Transit** transferred back and forth from both the Fed and State, so it takes time for legal papers to catch-up with me. And once I was made aware of any legal process I was required to follow or instructions as to what steps to take, I followed those instruction immediately. Now even though the public defenders office has not contact me concerning my appeal to the Supreme Court of Ohio filing, I am proceeding in pro se capacity, and have requested leave of this Court.

Further Affiant sayeth naught.

Clifton Jackson A652163

**Sworn to and subscribed to in my presence on this** 19 **day of August, 2015**

NOTARIAL SEAL STATE OF OHIO

Denise McManus
Notary Public - State of Ohio
Recorded in Ashtabula County
My Commission Expires
November 11, 2018

Denise McManus
NOTARY PUBLIC

[Cite as *State v. Jackson*, 2015-Ohio-2473.]

| | | |
|---|---|---|
| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF LORAIN | ) | |
| STATE OF OHIO | | C.A. No. 14CA010555 |
| Appellee | | |
| v. | | APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO |
| CLIFTON A. JACKSON | | CASE No. 11CR083104 |
| Appellant | | |

DECISION AND JOURNAL ENTRY

Dated: June 22, 2015

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SCHAFER, Judge.

{¶1} Defendant-Appellant, Clifton Jackson, appeals the judgment of the Lorain County Court of Common Pleas convicting him of three drug-related offenses, sentencing him to a total prison term of 11 years, and ordering him to repay the fees incurred by his court-appointed counsel. After review, we affirm Jackson's conviction and prison term. However, we reverse the trial court's order that Jackson repay his court-appointed attorney fees and remand this matter for the limited purpose of deciding his ability to repay the amount of the fees.

I.

{¶2} On August 21, 2011, Jackson was indicted on (1) one count of trafficking in drugs in violation of R.C. 2925.03(A)(2), a felony of the first degree; (2) one count of possession of drugs in violation of R.C. 2925.11(A), a felony of the first degree; and (3) one count of possessing criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree. The

trafficking in drugs and possession of drugs counts both included a major drug offender specification. The trafficking count also included a forfeiture specification.

{¶3} These charges arose from a June 14, 2011 incident in which law enforcement officials conducted an investigatory stop of Jackson's vehicle. Ohio State Highway Patrol Trooper Christopher Beyer indicated that he pulled Jackson's vehicle over because he observed it driving too close behind a recreational vehicle. After initiating the stop and receiving contradictory answers from Jackson regarding the ownership of the vehicle and his destination, Trooper Beyer went to his patrol car, called for a canine unit to perform a sniff test, and attempted to run a background check on Jackson. However, at that time, the LEADS background check system was down.

{¶4} Trooper Beyer then returned to the vehicle and asked Jackson to get out and sit in the backseat of the patrol car while Trooper Beyer performed the background check. Approximately seven minutes and 30 seconds after the stop's initiation, Trooper Michael Trader of the canine unit arrived and the sniff test was conducted. The dog alerted at the back door on the driver side of Jackson's vehicle approximately eight minutes after the stop was initiated. At the time of the positive alert, the LEADS system still had not been restored nor had Jackson's background check been completed. Upon learning of the positive sniff test, Jackson informed Trooper Beyer that all of the vehicle's contents belonged to him. Trooper Beyer and Trooper Trader then searched the vehicle, found a duffle bag in the vehicle's trunk, and discovered that it contained over two kilograms of cocaine and drug packaging materials. Trooper Beyer also found $1,262.00 in cash on Jackson's person.

{¶5} The trial court held a pretrial hearing on September 19, 2011. The journal entry from this hearing noted that "**DEFENDANT [JACKSON] WAIVES STATUTORY TIME**

**FOR SPEEDY TRIAL PURSUANT TO RC 2945.71 et. [sic] seq."** Jackson signed the entry containing the waiver of his rights, which contained no time limitation. He subsequently filed a motion to suppress the evidence obtained from the investigatory stop on the basis that the stop was unsupported by reasonable suspicion and that its duration was unjustifiably extended.

{¶6} After a hearing on the motion to suppress, the trial court denied Jackson's motion to suppress by judgment entry dated September 28, 2012. In November 2012, Jackson requested that the trial court reconsider its denial of the motion to suppress and he filed a supplemental brief in support on December 7, 2012. The trial court summarily denied the motion to reconsider on December 11, 2012.

{¶7} Beginning with the May 22, 2013 pretrial hearing, Jackson stopped signing the speedy trial waivers that were contained in the trial court's entries journalizing the results of pretrial hearings. Instead, he interlineated into the standard form language that he was not waiving his speedy trial rights. However, Jackson never filed a jury trial demand and objection that specifically re-invoked his speedy trial rights. Nevertheless, on February 7, 2014, Jackson filed a motion to dismiss the indictment on the basis that his speedy trial rights were violated. The trial court denied the motion.

{¶8} Trial commenced on February 11, 2014 and concluded the next day. The State offered the testimony of the investigating police officers and a forensic chemist as well as the discovered cocaine, packaging materials, and $1,262.00 in cash into evidence. It also offered the video and audio recording of the traffic stop. The jury returned guilty verdicts on all counts alleged in the indictment. It additionally found that Jackson was a major drug offender for both the trafficking and possession counts. However, it did not find that the forfeiture specification was proven. As to the possessing criminal tools count, the jury's verdict form included the

following caption: "**Verdict, Count No. 3** Possessing Criminal Tools R.C. §2923.24(A) – F5." It also contained the following language regarding the conviction: "We, the jury, find the Defendant CLIFTON A. JACKSON, * guilty of Possessing Criminal Tools, as charged in Count No. 3 of the indictment."

{¶9} The trial court immediately proceeded to sentencing. It merged the possession and trafficking offenses for sentencing purposes and the State elected to proceed on the trafficking count. The trial court subsequently sentenced Jackson to 11 years for the drug trafficking conviction with a major drug offender specification. It also imposed an 11 month sentence for the possessing criminal tools conviction, but this sentence was ordered to run concurrently with the sentence for drug trafficking. At the sentencing hearing, the trial court also ordered that Jackson repay the attorney fees incurred by his court-appointed counsel. However, before issuing this order, the trial court did not inquire into Jackson's ability to pay. Further, this order was not included in the judgment entry of conviction and sentence but the trial court subsequently issued a judgment entry ordering Jackson to repay $3,113.56 in attorney fees.

{¶10} Jackson now appeals his conviction and sentence, presenting ten assignments of error for our review. To facilitate our analysis, we address the assignments out of order.

II.

ASSIGNMENT OF ERROR I

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION TO SUPPRESS.

{¶11} In his first assignment of error, Jackson contends that the trial court erred in denying his motion to suppress the evidence obtained after the investigatory stop of his vehicle. We disagree.

A. Standard of Review for Motions to Suppress

{¶12} Our review of a trial court's ruling on a motion to suppress "presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. In considering this mixed question, we view the trial court as serving as the trier of fact and primary judge of witness credibility and the weight of the evidence presented. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Consequently, we must accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 100. However, we afford no such deference when considering the trial court's application of the law to the facts. Rather, we apply de novo review on this point. *Burnside* at ¶ 8; *accord State v. Clayton*, 9th Dist. Summit No. 27290, 2015-Ohio-663, ¶ 7 ("[T]his Court reviews the trial court's factual findings for competent, credible evidence and considers the legal conclusions de novo.").

B. The Fourth Amendment and Investigatory Stops

{¶13} Both the Fourth Amendment to the United States Constitution, which is incorporated against the States by the Fourteenth Amendment, and Article I, Section 14 of the Ohio Constitution protect individuals against unreasonable searches and seizures. Searches or seizures that are conducted without a warrant are presumptively unreasonable. *See, e.g., State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 98. To overcome this presumption, the State has the burden of establishing that the warrantless search falls within one of the recognized exceptions to the warrant requirement, *State v. Kessler*, 53 Ohio St.3d 204, 207 (1978), and satisfies "Fourth Amendment standards of reasonableness," *Maumee v. Weisner*, 87 Ohio St.3d 295, 297 (1999). One well-delineated exception to the warrant requirement occurs where police officers perform an investigatory stop based on their reasonable suspicion that criminal activity

is afoot. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("But we deal here with an entire rubric of police conduct – necessarily swift action predicated upon the on-the-spot observations of the officer on the beat – which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."); *State v. Jones*, 9th Dist. Summit No. 20810, 2002 WL 389055, * 2 (Mar. 13, 2002) ("Under the Fourth Amendment, a police officer is justified in conducting an investigative stop of an individual only if he has reasonable and articulable suspicion that the individual is engaged in criminal activity.").

{¶14} "Reasonable suspicion constitutes something less than probable cause." *Brunswick v. Ware*, 9th Dist. Medina No. 11CA0114-M, 2011-Ohio-6791, ¶ 7. Accordingly, when considering the propriety of an investigatory stop, we merely engage in a two-step inquiry to decide "whether the officer's action was justified at [the stop's] inception" and "whether [stop] was reasonably related to the circumstances which justified the interference in the first place." *Terry* at 19-20. In conducting this review, we must assess whether the officer is able to enunciate "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Id.* The emphasis in a reasonable suspicion analysis is not on any one factor alone, but on the totality of the circumstances. *State v. Bobo*, 37 Ohio St.3d 177 (1988), paragraph one of the syllabus. We have previously recognized that a totality of the circumstances review requires us to consider: "(1) [the] location [of the stop]; (2) the officer's experience, training, or knowledge; (3) the suspect's conduct or appearance; and (4) the surrounding circumstances." *State v. Biehl*, 9th Dist. Summit No. 22054, 2004-Ohio-6532, ¶ 14, citing *Bobo* at 178-179.

{¶15} It is well-established that a police officer who observes a traffic violation possesses reasonable suspicion to conduct an investigatory stop. *See, e.g., Dayton v. Erickson*, 76 Ohio St.3d 3 (1996), syllabus ("Where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution[.]"); *State v. Johnson*, 9th Dist. Medina No. 03CA0127-M, 2004-Ohio-3409, ¶ 11 ("The question of whether an insubstantial or minor violation of a traffic law will give rise to a reasonable suspicion to make an investigatory stop was resolved when the United States Supreme Court and the Ohio Supreme Court both held that *any* violation of a traffic law gives rise to a reasonable suspicion to make an investigatory stop of a vehicle."). But, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Indeed, "[t]he lawfulness of the initial stop will not support a fishing expedition for evidence of crime." *State v. Gonyou*, 108 Ohio App.3d 369, 372 (6th Dist.1995). Still, "the detention of a stopped driver may continue beyond the normal time frame when additional facts are encountered to give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop." *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, ¶ 15. With these principles in mind, we now turn to the stop of Jackson's vehicle.

C. Reasonable Suspicion for the Traffic Stop

{¶16} The State contends that Trooper Beyer had reasonable suspicion to effectuate the traffic stop based on his observation of Jackson's vehicle following a recreational vehicle too closely. This argument implicates R.C. 4511.34(A), which relevantly provides that "[t]he 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 traffic upon and the condition of the highway." *Id.*

{¶17} At the suppression hearing, Trooper Beyer testified that he was positioned in the median at mile marker 133 of the Ohio Turnpike when he first observed Jackson's vehicle following a recreational vehicle too closely. After this observation, Trooper Beyer pulled out of the median and then followed Jackson's vehicle until mile marker 137. Throughout his pursuit, Trooper Beyer never lost sight of Jackson's vehicle and he consistently saw that the vehicle was only two to three car lengths away from the recreational vehicle, "which is extremely close and a traffic hazard." The trooper explained his basis for concluding that Jackson's vehicle was too close to the recreational vehicle as follows:

> Because, from the calculations that our reconstruction unit has done, you need quite a bit distance more than [two to three car lengths] to safely stop if you had to from the vehicles in front of you. At the speed I later paced [Jackson] at, between 65 and 60 [miles per hour], you need 143 feet of distance. So two to three car lengths away, it's maybe 45 to 50 feet. So you would need better than two times more than that stopping distance.

This testimony provided some competent credible evidence to support the trial court's determination that Office Beyer had the necessary reasonable suspicion of a R.C. 4511.34(A) violation to effectuate a traffic stop of Jackson's vehicle.

{¶18} Jackson counters that Trooper Beyer did not observe a R.C. 4511.34(A) violation and he claims that the video of the traffic stop supports his argument. In advancing his argument, Jackson relies on *State v. Harper*, 9th Dist. Medina No. 12CA0076-M, 2014-Ohio-347. There, we reversed the trial court's denial of a motion to suppress where we found that the video of the subject traffic stop refuted the police officer's testimony regarding his observation of a R.C. 4511.34(A) violation. *Id.* at ¶ 16. However, upon review of the video in this matter, we find that it supports the trial court's finding that Trooper Beyer observed a R.C. 4511.34(A)

violation, which renders *Harper* inapplicable here. Consequently, we conclude that there is competent credible evidence in the record to support the trial court's finding that Trooper Beyer had reasonable suspicion to stop Jackson's vehicle for a violation of R.C. 4511.34(A).

D. Canine Sniff Test

**{¶19}** Jackson asserts that even if the original traffic stop was proper, his Fourth Amendment rights were still violated when the investigating officers extended the duration of the traffic stop to perform a canine sniff test without reasonable suspicion. We disagree.

**{¶20}** The United States Supreme Court has recognized that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). The Ohio Supreme Court has previously stated that the time reasonably required to complete the mission of issuing a traffic citation "includes the period of time sufficient to run a computer check on the driver's license, registration, and vehicle plates." *Batchili*, 2007-Ohio-2204, at ¶ 12. Based on this reasoning, "[a] traffic stop is not unconstitutionally prolonged when permissible backgrounds checks have been diligently undertaken and not yet completed at the time a drug dog alerts on the vehicle." *Id.* at paragraph one of the syllabus. This rule complements the United States Supreme Court's declaration that "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Caballes* at 410.

{¶21} Here, Trooper Beyer initiated the traffic stop of Jackson's vehicle at 8:44 a.m.[1] He approached the vehicle and asked Jackson several questions. Jackson stated that his cousin owned the vehicle, but then produced a rental agreement that identified the renter as an individual named Latrice Thomas and made no reference to Jackson. This led to the following exchange between Trooper Beyer and Jackson:

> I asked when she rented the vehicle. He stated, "Yesterday, actually." He then stated that she had the vehicle for a while and gave it to him. And he goes on to state that his girlfriend's name was Latrice Thomas as well, which was kind of confusing. I'm not sure what that was all about. There was something going on there. * * * He had told me his cousin owned the vehicle, which wasn't the case. It was actually rented by Latrice. Then he was saying now his girlfriend is his cousin. That was kind of – okay.

Jackson then gave a confusing response when pressed as to his destination. He indicated that he was going to "Stoney Brook" or "Stoney Point" in the Cleveland area, but Trooper Beyer testified that he knew of no such locations.

{¶22} After this two minute discussion with Jackson, Trooper Beyer returned to his police cruiser to review the rental agreement, which he described as "cumbersome" and containing fine print, and to begin checking Jackson's license and registration. Trooper Beyer also called for the canine unit to assist him. However, at this time, the LEADS system was down and the background check could not be completed. At approximately 8:49 a.m., Trooper Beyer went back to Jackson's vehicle and said: "Mind coming back for a minute. See if everything checks out, we'll get you outta here." Jackson complied and sat in the backseat of Trooper Beyer's cruiser. Trooper Beyer testified that Jackson was removed from his vehicle to ensure safety during the canine sniff test.

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[1] The video of the traffic stop has different times listed than Trooper Beyer's testimony. However, he indicated that the video had the incorrect times listed and that his testimony was based on the notes contained in the computer-aided dispatch system.

{¶23} The canine unit arrived five to six minutes after Trooper Beyer called for its dispatch to his location and approximately seven minutes and 30 seconds after the traffic stop. The dog alerted at the back door of the car's driver side on its first sniff of the vehicle's exterior. The total duration of the traffic stop, with the canine sniff test, was approximately eight minutes. At the time that the dog alerted on the vehicle, the LEADS system was still down, Jackson's license and registration check still had not been completed, and the traffic citation still had not been issued.

{¶24} These facts fit squarely within those we addressed in *State v. Delossantos*, 9th Dist. Lorain No. 11CA009951, 2012-Ohio-1383. There, the defendant, who was stopped for a traffic violation, was driving a vehicle rented to another individual and despite stating that the vehicle was rented to his girlfriend, he could not state her last name. The canine unit arrived and the defendant was asked to get out of the vehicle and wait in the police cruiser while the background check and citation were completed. *Id.* at ¶ 9. The dog subsequently alerted on the defendant's vehicle for the presence of drugs. We rejected the defendant's argument that evidence obtained from the search should have been suppressed since the traffic stop was impermissibly extended. Rather than find a constitutional violation, we reasoned that "[w]hen the dog alerted, [the officer] had not completed the license and registration checks, nor written the citation. Given the facts in this case, we cannot conclude that [the officer] impermissibly extended the stop." *Id.* at ¶ 10.

{¶25} Nearly the same facts are present here, which compels us to reach the same result as we did in *Delossantos*. At the time that the dog alerted on Jackson's vehicle, no background check had been performed and Trooper Beyer had not completed a citation. Also, like the defendant in *Delossantos*, Jackson had given answers to Trooper Beyer that were contradictory

and suspicious. In light of these critical similarities between *Delossantos* and this matter, we do not find that the trial court erred in finding that Trooper Beyer did not impermissibly extend the duration of the traffic stop. *See also Caballes*, 543 U.S. at 410 (finding no constitutional violation where canine sniff test occurred less than 10 minutes after the initiation of the traffic stop, the defendant was placed in a police cruiser, the police officer had not yet issued a citation at the time of the alert on the defendant's vehicle); *Batchili*, 2007-Ohio-2204, at ¶ 14 (stating that there "simply [was] no evidence to suggest that [the defendant]'s detention for the traffic violation was of sufficient length to make it constitutionally dubious" where the dog alerted eight minutes and 56 seconds into the stop and neither the background check nor the traffic citation had been completed yet). Our finding that this matter does not implicate a constitutional violation is further bolstered by the fact that the canine sniff test produced a positive alert less than 10 minutes after the traffic stop of Jackson's vehicle started. *Compare State v. Ramos*, 155 Ohio App.3d 396, 2003-Ohio-6535, ¶ 24 (2d Dist.) (finding constitutional violation where canine sniff test was conducted 53 minutes after the initiation of the traffic stop) *with State v. Carlson*, 102 Ohio App.3d 585, 599 (9th Dist.1995) (finding no constitutional violation where canine sniff test was conducted 19 minutes after initiation of the traffic stop and police officer was still waiting for results of background check).

{¶26} In his argument for reversal, Jackson relies on *State v. Lewis*, 9th Dist. Lorain No. 12CA010146, 2012-Ohio-5114, and *State v. Davenport*, 9th Dist. Lorain No. 11CA010136, 2012-Ohio-4427. But, those companion cases have significant differences from this matter that render them inapposite here. There, the police officer who originally effectuated the stop had already completed the necessary background checks, which revealed no outstanding warrants for the defendants, and had issued the warning citation for the traffic violation before the canine unit

even arrived on the scene to perform the sniff test. *Lewis* at ¶ 2; *Davenport* at ¶ 2. Due to these crucial differences, we decline to apply *Lewis* and *Davenport* to this matter.

{¶27} Jackson also analogizes to *United States v. Bonilla*, 357 Fed.Appx. 693 (6th Cir.2009), but the comparison is not apt and we likewise reject its application here. There, the canine unit did not arrive until 22 minutes after the initiation of the investigatory stop. *Id.* at 697. At the time of the canine unit's arrival, the background checks of the defendant had already been completed and the original police officer had started to write the traffic citation. *Id.* at 694. It was under these facts that the Sixth Circuit Court of Appeals found that there was a constitutional violation arising from the impermissible extension of the investigatory stop's duration. *Id.* at 697. This matter presents a starkly different scenario. First, the total length of the stop from initiation to canine sniff test was approximately eight minutes, not 22. And, second, at the time of the canine sniff test, neither the background ground check nor the citation for Jackson's traffic citation had been completed. Consequently, we find that *Bonilla* is inapplicable here.

{¶28} We finally note that during the pendency of this matter, the United States Supreme Court handed down its decision in *Rodriguez v. United States*, 135 S.Ct. 1609, which addresses the issue of whether a canine sniff test after a traffic stop was constitutionally sustainable. There, a police officer conducted a traffic stop after observing a vehicle driving on the shoulder. After conducting background checks on both the driver and passenger of the vehicle, the officer completed a warning citation and gave it to the driver approximately 20 minutes after the traffic stop. At that point, the officer had "got[ten] all the reason[s] for the stop out of the way[.]" *Id.* at 1613. Still, the officer would not allow the vehicle to exit the scene and instead ordered the driver and passenger to get out of the vehicle and wait for the arrival of the

canine unit, which finally arrived seven or eight minutes after "all the reason[s] for the stop [were] out of the way." *Id.* Approximately 28 minutes after the traffic stop initiated, the dog alerted on the vehicle for the presence of drugs. The Court found that these facts demonstrated that the police officer unjustifiably prolonged the traffic stop for a purpose unrelated to the original traffic stop, namely, to conduct the canine sniff test. *Id.* at 8.

{¶29} The result in *Rodriguez* does not deter us from affirming the trial court's denial of the motion to suppress. The Court recognized that its precedent "tolerate[s] certain unrelated investigations that [do] not lengthen the roadside detention." *Id.* at 5. It further noted that "[a]n officer * * * may conduct certain unrelated checks during an otherwise lawful stop[, but] he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at 6. Accordingly, we view *Rodriguez* not as a departure from precedent, but merely as an illustrative example of the type of canine sniff test that unjustifiably prolongs a traffic stop. Indeed, when applying the example of *Rodriguez* to the facts of this matter, we are further convinced that the stop of Jackson's vehicle was not unjustifiably prolonged by the canine sniff test. Unlike the defendant in *Rodriguez*, Jackson was not ordered to wait for an additional seven minutes after the issuance of a traffic citation, and nearly 28 minutes after the initiation of the stop, so that police could conduct a canine sniff test. Rather, that test was conducted within eight minutes of the stop's initiation while Trooper Beyer was still investigating Jackson's background and in the process of producing the citation. Surely, we cannot glean from *Rodriguez* that a scenario including these facts establishes an unjustifiable extension of the traffic stop.

{¶30} In sum, Trooper Beyer had reasonable suspicion to initiate the traffic stop of Jackson's vehicle because he observed the vehicle following a recreational vehicle too closely in

violation of R.C. 4511.34(A). Additionally, Trooper Beyer did not impermissibly extend the duration of the traffic stop for the purpose of the canine sniff test since at the time of the test, the background check for Jackson was not complete and the citation had not yet been issued. Finally, there was no evidence indicating that the police were not diligent and timely in the exercise of their duties. As a result, we can find no error in the trial court's denial of the motion to suppress.

{¶31} Accordingly, we overrule Jackson's first assignment of error.

ASSIGNMENT OF ERROR III

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION TO DISMISS BASED ON THE VIOLATION OF THE SPEEDY TRIAL STATUTE.

{¶32} In his third assignment of error, Jackson argues that the trial court should have dismissed the indictment since trial commenced well over the 270 day limitation contained in Ohio's speedy trial statute, R.C. 2945.71. However, since we find that Jackson waived his speedy trial rights and failed to properly re-invoke them, we disagree.

{¶33} Speedy trial issues present a mixed question of fact and law. *State v. Kist*, 173 Ohio App.3d 158, 2007-Ohio-4773, ¶ 18 (11th Dist.). Accordingly, "[w]hen reviewing an appellant's claim that he was denied his right to a speedy trial, this Court applies the de novo standard of review to questions of law and the clearly erroneous standard of review to questions of fact." *State v. Downing*, 9th Dist. Summit No. 22012, 2004-Ohio-5952, ¶ 36.

{¶34} Both the United States Constitution and the Ohio Constitution provide individuals with the right to a speedy trial. Sixth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 10. "[T]o enforce the constitutional right to a public speedy trial," Ohio has enacted a speedy trial statute, R.C. 2945.71, that codifies the necessary time limitation for trial

based on the type of offense charged. *State v. Pachay*, 64 Ohio St.2d 218 (1980), syllabus. R.C. 2945.71 creates "a mandatory duty to try an accused within the timeframe provided by the statute" and trial courts must strictly comply with the statute. *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, ¶ 14. Since Jackson was charged with three felonies, R.C. 2945.71(C)(2)'s limitation applies. It requires that a person charged with a felony "be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(C)(2).

{¶35} "It is well-settled law that an accused may waive his constitutional right to a speedy trial provided that such a waiver is knowingly and voluntarily made." *State v. King*, 70 Ohio St.3d 158, 160 (1994). The waiver must either be "in writing or made in open court on the record." *Id.* at syllabus. If the executed waiver "does not mention a specific time period, it is unlimited in duration." *State v. Troutman*, 9th Dist. Lorain No. 09CA009590, 2010-Ohio-39, ¶ 24. The execution of an unlimited waiver of speedy trial rights has significant consequences for the accused since after signing the waiver, "the accused is not entitled to a discharge for delay in bringing him to trial unless [he] files a formal written objection and demand for trial[.]" *State v. O'Brien*, 34 Ohio St.3d 7 (1987), paragraph two of the syllabus. It is only upon the filing of such an objection that the State is required to "bring the accused to trial within a reasonable time." *Id.*

{¶36} Here, the trial commenced well over the 270 day limitation contained in R.C. 2945.71(C)(2). But, Jackson executed an unqualified waiver of his speedy trial rights at the September 19, 2011 pretrial hearing. The waiver does not list any time period so we treat Jackson's speedy trial waiver as unlimited in duration. To avoid the consequences of his waiver, Jackson had to file a formal demand for trial and objection to re-invoke his rights. *See State v. Skorvanek*, 9th Dist. Lorain No. 08CA009399, 2009-Ohio-3924, ¶ 19 (addressing same waiver as

one used in this matter). He never did so.[2] Consequently, Jackson's waiver was still in effect at the time of the trial's commencement and he was not entitled to a dismissal on speedy trial grounds.

{¶37} Jackson points out that after the May 22, 2013 pretrial hearing, he refused to sign the speedy trial waivers presented to him. Additionally, he handwrote into the waiver that he was not waiving his speedy trial rights. But, these interlineations in the speedy trial waivers are immaterial to our analysis. The Seventh District Court of Appeals addressed a similar factual scenario in *State v. Love*, 7th Dist. Mahoning No. 02 CA 245, 2006-Ohio-1762. There, the defendant had executed a speedy trial waiver. Three years later, he filed a pro se motion asking to withdraw the waiver. The Seventh District concluded that the motion was insufficient to re-invoke the defendant's speedy trial rights: "Although [the defendant] clearly indicated that he wanted to revoke his speedy trial waiver * * *, his attempt to withdraw the waiver did not include a demand for trial. As a result of [the defendant]'s failure to demand trial, the waiver * * * was still in effect because he did not follow the law as set forth in *O'Brien*." *Id.* at ¶ 134.

{¶38} Here, Jackson did even less than the defendant in *Love* since he never filed a motion asking to withdraw the waiver. But, like the defendant in *Love*, Jackson never filed a demand for trial. This is fatal to his speedy trial argument and we find no error in the trial

[2] Arguably, Jackson's motion to dismiss on speedy trial grounds asserted a formal demand for trial. Even if we were to treat this motion as a formal demand, we would still find that there was no speedy trial violation. Jackson's motion was filed on February 7, 2014 and the trial commenced four days later. Such a short duration between demand and trial would certainly satisfy *O'Brien*'s "reasonable time" requirement. *See Troutman* at ¶ 28 (finding that trial occurred within a reasonable time, as required by *O'Brien*, where there was a 41 day delay between formal demand and resolution); *State v. Bray*, 9th Dist. Lorain No. 03CA008241, 2004-Ohio-1067, ¶ 9 (finding that trial occurred within a reasonable time where there was a 20 day delay).

court's denial of his motion to dismiss on that basis. *See also State v. Howard*, 7th Dist. Mahoning No. 06-MA-31, 2007-Ohio-3170, ¶ 18 (following *Love*).

{¶39} Accordingly, we overrule Jackson's third assignment of error.

ASSIGNMENT OF ERROR X

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE COURT OVERRULED HIS MOTION FOR JUDGMENT OF ACQUITTAL.

{¶40} In his tenth assignment of error, Jackson asserts that the trial court should have granted his Crim.R. 29 motion for acquittal. We disagree.

{¶41} "We review a denial of a defendant's Crim.R. 29 motion for acquittal by assessing the sufficiency of the State's evidence." *State v. Slevin*, 9th Dist. Summit No. 25956, 2012-Ohio-2043, ¶ 15. A sufficiency challenge of a criminal conviction presents a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In carrying out this review, our "function * * * is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. After such an examination and taking the evidence in the light most favorable to the prosecution, we must decide whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* Although we conduct de novo review when considering a sufficiency of the evidence challenge, "we neither resolve evidence conflicts nor assess the credibility of witnesses, as both are functions reserved for the trier of fact." *State v. Jones*, 1st Dist. Hamilton Nos. C-120570, C-120571, 2013-Ohio-4775, ¶ 33.

{¶42} Jackson was charged with violations of R.C. 2925.03(A)(2), R.C. 2925.11(A), and R.C. 2923.24(A). R.C. 2925.03(A)(2) provides that "[n]o person shall knowingly * * * [p]repare for shipment, ship, transport, prepare for distribution, or distribute a controlled substance * * *,

when the offender knows or has reasonable cause to believe that the controlled substance * * * is intended for sale or resale by the offender or another person." R.C. 2925.11(A) proscribes individuals from "knowingly obtain[ing], possess[ing], or us[ing] a controlled substance * * *." R.C. 2923.24(A) bars individuals from "possess[ing] or hav[ing] under [their] control any substance, device, instrument, or article, with purpose to use it criminally." A person is guilty of a felony of the fifth degree under R.C. 2932.24(A) when "circumstances indicate that the substance, device, instrument, or article involved in the offense was intended for use in the commission of a felony[.]" R.C. 2923.24(C).

{¶43} Jackson challenges the evidence regarding his mental state. Specifically, he claims that the State did not offer sufficient evidence to show that he knowingly trafficked or possessed the cocaine or that he possessed the packaging materials for the purpose of using it criminally. R.C. 2901.22(B), which applies to the trafficking in drugs and possession of drugs counts, states that "[a] person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." Moreover, "[a] person has knowledge of circumstances when the person is aware that such circumstances probably exist." *Id.* R.C. 2901.22(A), which applies to the possessing criminal tools count, states that "[a] person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature."

{¶44} Both Trooper Beyer and Trooper Trader testified to finding a duffle bag in Jackson's trunk and then finding a wrapped brick inside that contained an illegal substance, specifically, over two kilograms of cocaine. They also testified to finding other packaging

materials, which Trooper Trader described as "wrapping materials they use to mask or try to conceal the cocaine that was in the vehicle." The State also played the video and audio recording of the traffic stop. Trooper Beyer testified that when he placed Jackson in the police cruiser, he activated the recording device that tapes all conversation in the cruiser's interior. He also indicated that there is a sign in the front seat of the cruiser stating that the interior of the cruiser was subject to audio recording. In the recording of the traffic stop, Jackson is heard telling Trooper Beyer that everything in the vehicle is his. He is then heard talking on a cell phone to an unnamed subject. In this conversation, Jackson is heard saying, after the police's discovery of the duffle bag and its contents, "They [Troopers Breyer and Trader] just found it in my luggage." The testimonies of both Trooper Beyer and Trooper Trader, combined with the audio recording of Jackson's own statements, provided a sufficient basis for the jury to convict Jackson on all three counts alleged in the indictment.

{¶45} Jackson argues that since the duffle bag and its contents were found in the trunk of the vehicle, and not the passenger compartment, and since the vehicle was rented to Latrice Thomas, not him, there was insufficient evidence to show that he knowingly possessed the bag and its contents. But, under the circumstances in this case, these facts are immaterial to a sufficiency analysis and this argument is unavailing. Here, Jackson told the investigating officers that everything in the vehicle was his, including the duffle bag, and the record reflects that he was the sole occupant and driver of the vehicle before the traffic stop. These facts are sufficient to prove that Jackson's knowledge of the cocaine's presence and his intent to use the packaging materials for criminal purposes. *See State v. Reed*, 10th Dist. Franklin No. 09AP-84, 2009-Ohio-6900, ¶ 21-24 (finding sufficient evidence that the defendant knowingly possessed crack cocaine in trunk of vehicle since he was previously seen driving the vehicle); *State v.*

*Carpenter*, 9th Dist. Medina No. 2667-M, 1998 WL 161289, * 7 (Apr. 8, 1998) (finding that sufficient evidence existed to find that the defendant knowingly possessed marijuana found in the trunk of a vehicle not owned by the defendant since the defendant was driving the vehicle and stated that the marijuana was "our head smoke"); *State v. Thomas*, 107 Ohio App.3d 239, 244-245 (5th Dist.1995) (finding sufficient evidence that the defendant knowingly possessed heroin in a locked briefcase that was found in the trunk of the vehicle because he was a passenger in the vehicle and he hid from police, indicating a consciousness of guilt).

**{¶46}** Accordingly, we overrule Jackson's tenth assignment of error.

ASSIGNMENT OF ERROR II

DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE PROSECUTOR OFFERED EVIDENCE OF DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

**{¶47}** In his second assignment of error, Jackson claims that the trial court improperly allowed the State to offer evidence of Jackson's exercise of his right to remain silent during the investigation. Because the State did not offer any evidence of silence as substantive evidence of guilt, we disagree.

**{¶48}** We preliminarily note that Jackson did not object to any of the testimony regarding the exercise of his right against self-incrimination. As a result, he has forfeited all but plain error. *See State v. Hess*, 9th Dist. Wayne No. 12CA0064, 2013-Ohio-4268, ¶ 18 (applying plain error to pre-*Miranda* silence evidence that was not objected to). The plain error doctrine, as it is outlined in Crim.R. 52(B), may only be invoked where the following three elements apply:

> First, there must be an error, i.e., a deviation from the legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error

> must have affected "substantial rights" * * * [and] affected the outcome of the trial.

(Citations omitted.) *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). We are cautioned that plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶49} The United States Constitution provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." Fifth Amendment to the United States Constitution. This federal constitutional protection has been incorporated against the States through the Fourteenth Amendment.[3] *State v. Graham*, 136 Ohio St.3d 125, 2013-Ohio-2114, ¶ 19. Once a criminal defendant invokes his right against self-incrimination, "the State cannot use the person's silence as substantive evidence in its case-in-chief." *State v. Bennett*, 9th Dist. Lorain No. 12CA010286, 2014-Ohio-160, ¶ 63, citing *Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986) and *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, ¶ 30. This rule flows from the determination that "the [S]tate's substantive use of the defendant's * * * silence subverts the policies behind the Fifth Amendment privilege against self-incrimination and is not

[3] The incorporation of the federal protection against self-incrimination through the Fourteenth Amendment has particular significance since the Ohio Constitution's analog for this right is significantly different. Unlike the federal protection, the Ohio Constitution states that a witness's silence "may be considered by the court and jury and may be the subject of comment by counsel." Ohio Constitution, Article I, Section 10. But, our state Constitution's allowances for the jury to consider a defendant's silence and for counsel to comment on it are unenforceable due to the prevailing federal case law proscribing such allowances. *See Arnold v. Cleveland*, 67 Ohio St.3d 35, 42 (1993) ("In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall.").

a legitimate governmental practice." *Leach* at ¶ 37. We have previously applied these principles and found that "where references to the criminal defendant's post-*Miranda* silence in both the State's case-in-chief and its closing argument have permeated the trial, the effect is prejudicial so as to deny the defendant the right to a fair trial." *State v. Harris*, 9th Dist. Lorain No. 11CA009991, 2012-Ohio-2973, ¶ 6, citing *State v. Riffle*, 9th Dist. Medina No. 07CA0114-M, 2008-Ohio-4155, ¶ 16.

{¶50} Jackson identifies two isolated instances from the two-day trial where investigating police officers commented on his invocation of the right against self-incrimination. The first instance involved the following exchange between the prosecutor and Detective Geno Taliano, a member of the Lorain County Drug Task Force:

> Q: And what, if anything, did you do with that investigation [at the site of the traffic stop]; did you assist in the investigation at all?
>
> A: [Another agent] attempted to interview Clifton Jackson, who was the suspect in the investigation, advised him of his Miranda rights, both verbally and written form. He signed the form, understood that, understood the rights, and opted not to speak with us, so there was no question.

The second instance was the following exchange between the prosecutor and Special Agent James Goodwin of the Drug Enforcement Agency:

> Q: And what did you do [when you responded to the site of the traffic stop]?
>
> A: * * * [The agents] responded to meet with the troopers in an effort to possibly interview the subject. If the person would cooperate, maybe we could attempt to further the investigation, possibly control delivery, determine maybe where the drugs came from, where they were going to, that we could send LEADS out to other offices.
>
> Q: Ultimately, were you able to do any of those things?
>
> A: No.

{¶51} After reviewing this testimony regarding Jackson's silence, we are unable to conclude that its admission constitutes plain error. The State did not seek to elicit the testimony and rather it was merely volunteered by its witnesses without any prodding. *Compare Riffle* at ¶ 11 (finding that State offered evidence of the defendant's silence as substantive evidence of guilt where the prosecutor asked questions designed to elicit testimony about that silence) *with State v. Abraham*, 9th Dist. Summit No. 26258, 2012-Ohio-4248, ¶ 45 (finding that State did not offer evidence of the defendant's silence as evidence of guilt since there was "no evidence that the State sought to elicit the [the testimony regarding silence]"). Moreover, the State made no comment about Jackson's silence during its summation or at any other point during the proceedings. Under these circumstances, we are unable to find that the evidence of Jackson's silence permeated the trial and that the State offered it as substantive evidence of guilt. *Compare State v. Stephens*, 24 Ohio St.2d 76 (1970), paragraph three of the syllabus ("Where, during an in-custody interrogation, a defendant chooses to remain silent, it is prejudicial error for the prosecutor, during his final argument to the jury, to comment upon that silence or any implications which may be drawn therefrom.") *with State v. Bennett*, 9th Dist. Lorain No. 12CA010286, 2014-Ohio-160, ¶ 66 (finding no plain error where evidence of the defendant's silence was volunteered by investigating officers during their testimony since "the prosecutor made no references to [the defendant] invoking his right to remain silent, his request for an attorney, or to the testimony of the [investigating officers regarding the silence]"). Finally, we are unable to see how the introduction of this evidence, even if it was improper substantive evidence of guilt, affected the outcome of the trial as required by plain error analysis. Excising the testimony regarding Jackson's silence still leaves the significant evidence offered by the State to prove each count alleged in the indictment, which precludes us from finding that this is

the exceptional case that requires reversal on plain error grounds. *See State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, ¶ 163 (finding that prosecutor's argument regarding the defendant's silence was harmless error "since overwhelming evidence was presented that established [the defendant]'s guilt").

{¶52} Accordingly, we overrule Jackson's second assignment of error.

ASSIGNMENT OF ERROR VI

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT WHEN THE COURT COMMENCED TRIAL WHEN DEFENDANT BELATEDLY APPEARED ON THE SECOND DAY OF THE TRIAL.

{¶53} In his sixth assignment of error, Jackson asserts that the trial court erred in starting the second day of trial proceedings without him present. We disagree.

{¶54} A defendant has "a fundamental right to be present at all critical stages of his criminal trial." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 100. This right is enshrined in both the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. Nevertheless, this right "is not absolute," *State v. White*, 82 Ohio St.3d 16, 26 (1998), and a defendant's absence "does not necessarily result in prejudicial or constitutional error," *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 90. Crim.R. 43(A)(1) contemplates such non-prejudicial absences: "In all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict." Accordingly, "the right to be present at trial may be waived by the defendant's own act." *State v. Meade*, 80 Ohio St.3d 419, 421 (1997).

{¶55} Whether a defendant was voluntarily absent for the purposes of Crim.R. 43(A) is a question of fact for the trial court to decide. *State v. Perez*, 9th Dist. Medina No. 3045-M, 2000 WL 1420341, * 2 (Sept. 27, 2000). "An appellate court's review of the trial court's

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IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | : | Case No. 15-1458 |
| Plaintiff-Appellee, | : | On Appeal from the Lorain County Court of Appeals, Ninth Appellate District |
| vs. | : | |
| CLIFTON JACKSON, | : | Court of Appeals Case No. 14CA010555 |
| Defendant-Appellant. | : | |

## AFFIDAVIT OF INDIGENCY OF APPELLANT CLIFTON JACKSON


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225 Court Street, 3rd Floor

Elyria, Ohio 44035

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| STATE OF OHIO, | : | |
| | | Case No. |
| Plaintiff-Appellee, | : | |
| | | On Appeal from the Lorain |
| vs. | : | County Court of Appeals, Ninth Appellate District |
| CLIFTON JACKSON, | : | |
| | | Court of Appeals |
| Defendant-Appellant. | : | Case No. 14CA010555 |

**AFFIDAVIT OF INDIGENCY**

I, Clifton Jackson, do hereby state that I am without the necessary funds to pay the costs of this action for the following reason(s):

I am currently incarcerated at Lake Erie Correctional Institution. I have been incarcerated since February, 2014. I work at the prison bur receive only $12 per month for state pay.

Pursuant to Rule 3.06 of the Rules of Practice of the Supreme Court of Ohio, I am requesting that the filing fee and security deposit, if applicable, be waived.

Clifton Jackson

**Sworn to and subscribed to in my presence on this 20 day of August, 2015.**

Denise McManus

**NOTARY PUBLIC**

NOTARIAL SEAL STATE OF OHIO

Denise McManus
Notary Public - State of Ohio
Recorded in Ashtabula County
My Commission Expires
November 11, 2018