No.

in the

Supreme Court

of the

United States

Term,

BORN MURRAY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Where a police officer admittedly abandons the initial basis for a traffic stop to pursue a new investigation unsupported by reasonable suspicion, does the continued detention of a citizen violate the Fourth Amendment, even though the officer is within the "time frame" of pursuing and dispelling the initial basis for the stop?

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The Petitioner, Born Murray, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on April 25, 2019.

OPINION BELOW

The Sixth Circuit's opinion in this matter was unpublished, and is attached hereto in Appendix 1. The district court's order denying the suppression of evidence was also unpublished, and is attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on April 25, 2019. This petition is timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people *to be secure in their persons*, houses, papers, and effects, *against unreasonable searches and seizures, shall not be violated*, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On November 29, 2016, Petitioner Born Murray and his brother Elstarheem were overnight visitors at a Comfort Inn in Dayton, Ohio. Unbeknownst to the Murray brothers, that particular motel was a target of the Miami Valley Bulk Smuggling Task Force. The Task Force believed that large-scale multi-state drug trafficking was occurring at the motel.

Ohio State trooper Joseph Weeks was part of that Task Force, and was on duty that day. Weeks' role was to find traffic violations for those persons targeted by the Task Force for drug trafficking investigations. The task force operated in the following manner: police conducted undercover surveillance of the Comfort Inn. When they identified a possible drug trafficking suspect, they radioed Weeks in order for him to find a traffic violation, and then pull the suspect over for drug investigation. For whatever reason, the task force identified the Murray brothers as persons of interest.

On that morning, the Murray brothers entered a vehicle and left the Comfort Inn. Weeks was told by other members of the Task Force to wait for a traffic violation, and stop the Murray brothers. Specifically, Weeks testified, "I was advised that the undercover officers felt that the individuals were going towards the west side of Dayton, and possibly that is a high- trafficking crime area, and that there may be some type of criminal activity occurring presently." Another undercover

officer (who was also following the Murray vehicle) radioed to Weeks that the Murray brothers' vehicle had made an improper lane change.

Weeks performed a traffic stop for the improper lane change. He obtained identification, ran a report, and found that both brothers had been previously arrested. He then asked consent to search the vehicle, which was granted. Weeks found nothing; in fact, Weeks noted that "[t]he vehicle was abnormally clean in my opinion for a couple of individuals who had been traveling from North Carolina, maybe had the vehicle for multiple days. There was some energy drinks, some receipts, and multiple cell phones inside of the vehicle." Weeks gave them a warning (because Elstarheem had been driving the vehicle without a valid license), and sent them on their way. Weeks also gave them driving information to the nearest hospital (Petitioner Born Murray was complaining of an asthma attack during the stop.)

The Murray brothers did not go immediately to the hospital suggested by Weeks, but returned to the Comfort Inn. Nor too did the Task Force give up on the Murray brothers – despite the search of their vehicle, the Task Force maintained undercover surveillance on them, from the stop all the way back to the Inn. Back at the motel, the Murray brothers went into their room, packed their bags, loaded them into a different rental vehicle, and left the property. During this surveillance, Officer Weeks was updated as to their movements.

The Task Force decided to again stop the Murray brothers. They again radioed Weeks, and asked him to perform another traffic stop. Once again, another undercover officer noticed an additional traffic violation (an improper turn on a red light without coming to a stop) and Weeks again performed a stop. According to Weeks, "[t]he belief was, again, that a crime potentially could be occurring and that Mr. Elstarheem and Born were fleeing from that hotel or leaving the hotel because of said crime potentially."

Petitioner Born Murray, now the driver, was immediately taken out of the vehicle, handcuffed, and placed in Weeks' cruiser. Petitioner Murray was cooperative, but was not free to leave. His brother, however, was a different story. He got out of the vehicle and ran. Elstarheem was quickly apprehended, and brought back to the scene.

Officer Weeks admitted that, at the time he pulled Petitioner Murray out of the vehicle, it was not a normal traffic stop; rather, it was an undercover drug interdiction investigation. Further, Weeks admitted that at the beginning of the stop, he planned to get Murray out of the vehicle, and into the cruiser, which was not part of the process of a traffic stop for an improper right hand turn.

After recovering Elstarheem, Weeks' canine was deployed for a "fresh air" sniff for drugs. The dog alerted to the trunk of the vehicle, and the vehicle was searched for drugs. No drugs were found; however, officers recovered "clothing or luggage, and there was also white envelopes containing multiple checks." The

officers opened the white envelopes without a warrant. As a result of finding these checks, the Murray brothers were taken into custody.

The Murray brothers were named in a two count indictment charging: conspiracy to possess stolen mail, in violation of 18 U.S.C. § 371, and one count of possession of stolen mail, in violation of 18 U.S.C. § 1708. On January 27, 2017, Petitioner Murray filed a motion to suppress the evidence seized as a result of the traffic stop. A hearing was held on that motion on March 21, 2017. On June 8, 2017, the district court denied suppression of the evidence, finding that the motivations of the officers were irrelevant, and because officers observed a traffic violation, they could detain Petitioner Murray. (Exhibit 2, p.7) The court further found that "neither Born nor Elstarheem were detained for a period of time that was unreasonable nor was the open air sniff conducted in a way that impermissibly extended the length of the traffic stop." (Exhibit 2, p.8)

As a result of this decision, Petitioner Murray entered into a conditional guilty plea to the indictment on August 11, 2017, reserving the right to appeal the suppression decision. On January 17, 2018, the court sentenced Murray to 54 months incarceration, to be followed by 5 years supervised release.

Petitioner Murray appealed his conviction to the Sixth Circuit Court of Appeals, raising one issue: "Any basis for stopping Murray's vehicle for a traffic violation was abandoned immediately upon Murray's stop and seizure, such that his

continued detention to investigate further, unknown criminal activity violated the Fourth Amendment." The Sixth Circuit denied the appeal on April 25, 2019, finding:

> [T]he district court found "it would not have been possible for Weeks to process and issue a traffic citation" in the "very brief passage of time" between his driver's side approach and Elstarheem's flight from the car. R. 35, PageID 258–59. In that one-minute interval, Weeks asked Born to exit the car, performed a consensual pat-down search, and was in the process of escorting Born to his cruiser when Elstarheem fled. Weeks had barely started at the tasks tied to issuing a traffic ticket, let alone the "ordinary inquiries incident to [a] traffic stop." Rodriguez, 135 S.Ct. at 1615 ("Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance."). True, Weeks's prior encounter with the brothers obviated some of these ordinary inquiries. But others remained, such as verifying proper registration and insurance for the Hyundai.
>
> The Murrays's claim that Weeks abandoned his traffic-stop investigation to embark on another also lacks support in the record. They stress that Weeks had not yet questioned them about the traffic violation. An officer's failure to ask for a motorist's driver's license may suggest abandonment in some cases, but not here, given that Weeks verified Born's license during the first stop. Nor does Weeks's decision to order Born out of the car point to abandonment. See United States v. Lash, 665 F. App'x 428, 431 (6th Cir. 2016) ("Even without a reason to be suspicious, an officer may order the driver to get out of the vehicle during a traffic stop to ensure his own safety during the encounter." (internal quotation marks omitted)). The district court credited Weeks's testimony that—in light of the brothers' earlier story about the need to get to a hospital for an emergency that no longer appeared to exist—he removed Born from the car to separate the brothers while he figured out what was going

on. The Murrays offer no argument that would allow us to set aside that finding as clearly erroneous.

(Appendix 1, pp.4-5)

REASONS FOR GRANTING THE WRIT

1. Where a police officer abandons the objective basis for a traffic stop to investigate other criminal activity not supported by reasonable suspicion, a citizen's continued detention violates the Fourth Amendment

In order to detain a citizen for a traffic stop, a police officer must have reasonable suspicion that criminal activity is afoot. A violation of traffic laws justifies such a stop, regardless of the officer's subjective intent for the stop. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996). However, there is a requirement that the officer actually investigate the basis for the stop. What happens in the situation where an officer stops a vehicle for a traffic violation, but then immediately abandons that investigation to go on a fishing expedition for other criminal activity? This case presents the Court with such a scenario. Petitioner Murray submits that the answer to this question is that without independent reasonable suspicion of other criminal activity, the continued seizure of a citizen violates the Fourth Amendment – even when the officer is within the "time frame" for disposing of the legitimate basis for the stop. Further, the Sixth Circuit's decision, holding to the contrary, creates a circuit split which should be resolved by this Court.

The Fourth Amendment guardrails pertaining to traffic stops are at this point well set: "A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth

Amendment." *Heien v. North Carolina*, 574 U.S. 54, 135 S. Ct. 530, 536, 190 L. Ed. 2d 475 (2014). However, "there is a diminished expectation of privacy in automobiles, which often permits officers to dispense with obtaining a warrant before conducting a lawful search." *Byrd v. United States*, 138 S. Ct. 1518, 1526, 200 L. Ed. 2d 805 (2018). "The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Navarette v. California*, 572 U.S. 393, 396, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680 (2014). "To ensure that the resulting seizure is constitutionally reasonable, a Terry stop must be limited. The officer's action must be 'justified at its inception, and ... reasonably related in scope to the circumstances which justified the interference in the first place.' " *Hiibel v. Sixth Judicial Dist. Court of Nevada*, Humboldt Cty., 542 U.S. 177, 185, 124 S. Ct. 2451, 2458, 159 L. Ed. 2d 292 (2004).

In 2005, this Court held that "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. [ ] 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, 125 S. Ct. 834,837 (2005). Building on this standard, the Court in *Rodriguez v. United States*, -- U.S. ---, 135 S.Ct. 1609 (2015), found that "a seizure for a traffic violation justifies a police investigation of that violation." 135

S.Ct. at 1614. "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.* at 1615. "The reasonableness of a seizure [ ] depends on what the police in fact do." *Id.* at 1616.

This case presents the question not addressed in *Rodriguez*: does the "reasonably should have been completed" time frame for completing a traffic stop apply if the police officer abandons the traffic stop basis for the search? Many circuits have held, contrary to the Sixth Circuit in the instant case, that an officer's abandonment of the basis for the stop, even while there is "time on the clock" for completing a traffic stop, does result in a Fourth Amendment violation.

The Fourth Circuit has held that, upon a legal traffic stop, where a police officer did not pursue that stop, but instead "embarked on a sustained course of investigation into the presence of drugs in the car", that the Fourth Amendment was violated. *United States v. Digiovanni*, 650 F.3d 498, 509 (4th Cir. 2011)(abrogation on other grounds recognized by *United States v. Bowman*, 884 F.3d 200 (4th Cir. 2018). That court rejected the Government's claim that, because on average a traffic stop lasts 15 minutes, a police officer has that period of time during a traffic stop to conduct any investigation, related or not. "Creating a rule that allows a police officer fifteen minutes to do as he pleases reduces the duration component to a bright-line rule and eliminates the scope inquiry altogether." *Id.* at 511. Thus, the officer in that case was found to have violated the Fourth Amendment a mere three minutes into a traffic stop.

In *United States v. Green*, 897 F.3d 173 (3d Cir. 2018), the Third Circuit coined the phrase "*Rodriguez* moment" to identify when, within the time frame for a valid traffic stop, the stop turns to an event in violation of the Fourth Amendment. The police officer in *Green* stopped the defendant for speeding, engaged with him, and then returned to his patrol vehicle with the driver's license and registration. However, instead of pursuing the traffic violation, the officer instead: called a colleague for a dog sniff, and called another colleague to obtain information on the defendant. The officer was playing a hunch that drug trafficking was afoot. The Third Circuit held that, although the officer was still within the "time frame" for a traffic stop when he returned to his patrol vehicle, a "*Rodriguez* moment" occurred when the officer abandoned the traffic stop for the hunch. *Id.* at 182.

These cases seem to align with this Court's admonition in *Rodriguez* that "[t]he reasonableness of a seizure, however, depends on what the police in fact do." 132 S.Ct. at 1616. The Court made that statement to refute the Government's argument that, so long as the police officer stayed within a reasonable time limit, he or she could make any investigation.

This is, in essence, what the Sixth Circuit found in this case. Instead of focusing on the intent of the officer, and whether that intent met Fourth Amendment standards, the court instead found that ""it would not have been possible for Weeks to process and issue a traffic citation in the 'very brief passage of time' between his driver's side approach and Elstarheem's flight from the car." (Appendix 1, p.4) While

true, this misses the point of Murray's argument that Weeks' abandonment of the basis for the stop created a Fourth Amendment problem. The Sixth Circuit's analysis is purely a "time frame" one, and therefore is contrary to *Rodriguez* and the other circuits to have dealt with this issue. The Sixth Circuit's ruling in effect revitalizes the Government's argument made (and rejected by this Court) in *Rodriguez*, that "by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation." 132 S.Ct. at 1616.

Further, the fact that Elstarheem Murray absconded within a short period of time after the stop is nothing more than a red herring. Once Officer Weeks abandoned the basis for the stop, the Fourth Amendment was implicated. For instance, in *United States v. Bey*, 911 F.3d 139 (3d Cir. 2018), officers stopped the defendant coming out of a bar, believing him to be a person they were pursuing. The Third Circuit determined that the defendant and the suspect were so dissimilar in appearance that it should have been obvious, once the defendant came into view, that he was not the person officers were pursuing. Therefore, the continued interaction with the defendant, even though brief, violated the Fourth Amendment. *Id.* at 147. Thus, the short time frame before Elstarheem fled was more than adequate to trigger the Fourth Amendment in this case.

Finally, the Sixth Circuit held that, even if the legal argument on which Petitioner Murray rested was accurate, the evidence did not support the inference that Officer Weeks abandoned the stop. (Exhibit 1, p.5) The record shows otherwise.

Officer Weeks admitted that "[t]he belief was, again, that a crime potentially could be occurring and that Mr. Elstarheem and Born were fleeing from that hotel or leaving the hotel because of said crime potentially." Further, Weeks testified that at the time he stopped the vehicle, it was not a normal traffic stop; rather, it was an undercover drug interdiction investigation. Finally, Weeks admitted that at the beginning of the stop, he planned removing Murray out of the vehicle and placing him into the cruiser, which was not part of the process of a traffic violation stop. It is clear that the "traffic stop" purpose of the stop was abandoned at the beginning of the detention.

"The mission of a traffic stop is 'to address the traffic violation that warranted the stop ... and attend to related safety concerns[.]'" *United States v. Campbell*, 912 F.3d 1340, 1350 (11th Cir. 2019). Here, when Officer Weeks abandoned that mission, he violated the Fourth Amendment. This Court should grant certiorari review, so hold, and remand for further proceedings.

CONCLUSION

Murray requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for further proceedings in the district court.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS ORDER April 25, 2019
2. DISTRICT COURT ORDER June 8, 2017

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 19a0209n.06

Case Nos. 18-3083/3241

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE SOUTHERN DISTRICT OF
BORN MURRAY (18-3083);	)	OHIO
ELSTARHEEM MURRAY (18-3241),	)	
	)	
Defendants-Appellants.	)	

BEFORE: DAUGHTREY, COOK, and GRIFFIN, Circuit Judges.

COOK, Circuit Judge. After unsuccessfully fleeing from a traffic stop, Elstarheem Murray found himself in police custody, along with his brother Born Murray. A search of their car revealed two large batches of commercial checks stolen from the mail. The brothers claim that the district court should have suppressed those checks as evidence because officers seized them after an unreasonably extended traffic stop. Because the district court properly denied their suppression motions, we AFFIRM.

I.

Ohio State Highway Patrol Trooper Joseph Weeks stopped brothers Born and Elstarheem Murray twice on a November morning in 2016. As part of a drug-trafficking task force, Weeks patrolled a high-crime area in his marked cruiser but initiated traffic stops only at the request of

undercover agents surveilling a nearby hotel frequented by drug traffickers. So when an agent saw the brothers leave the hotel in a Chrysler sedan, he followed until Elstarheem executed an illegal lane change and then radioed Weeks to initiate a stop.

In his first encounter with the brothers, Weeks told Elstarheem, the driver, why he'd been stopped, then requested licenses from them both. Elstarheem nervously admitted to driving without a valid license but explained that they were seeking medical attention for Born's asthma. Weeks asked Elstarheem out of the vehicle while he ran a records check. It confirmed that Elstarheem was not licensed to drive and revealed the brothers' prior convictions; Elstarheem's involving narcotics and Born's for check fraud. After Born, who was licensed, agreed to drive, Weeks sent them off with a warning for the illegal lane change and directions to the nearest hospital.

Once released, the brothers never followed Weeks's directions to the hospital, returning instead to the hotel where surveillance continued. This time, undercover agents watched the brothers load luggage into a different vehicle before driving away. When Born, now in a Hyundai sedan, failed to stop at a red light before turning, the agents called on Weeks to initiate another traffic stop.

So about ninety minutes after their first encounter, Weeks again stopped the Murrays. As with the first stop, he asked the driver—this time, Born—to get out for a brief interview during which Weeks checked the vehicle's records back at his cruiser. Weeks directed Elstarheem to stay put with his hands on the dashboard. But as Weeks walked Born to his cruiser, Elstarheem bolted. With Born seated in the back of the cruiser but the door still ajar, Weeks gave chase and ordered Elstarheem to stop. Elstarheem heeded that command only after Weeks warned that he was armed with a taser.

Then, with both brothers secured in his cruiser, Weeks led his narcotics-detection canine around the Hyundai for a free-air sniff. The dog alerted to the trunk and arriving officers searched the car for drugs. They found none; however, officers did seize two envelopes holding roughly 150 commercial checks stolen from the mail.

Those checks, together worth approximately $1.5 million, provided the basis for charging Born and Elstarheem with possession of stolen mail and conspiracy to commit bank fraud and to possess stolen mail. *See* 18 U.S.C. §§ 2, 371, 1344, 1708. After the district court denied their motions to suppress the stolen checks, the brothers conditionally pleaded guilty. The district court sentenced each brother to 54-months' imprisonment. As permitted by their plea agreements, Born and Elstarheem appeal the rejection of their suppression motions.

II.

To make their Fourth Amendment claim, the Murrays focus on the very short temporal window beginning when Weeks initiated the second traffic stop and ending with Elstarheem's flight from the Hyundai. They argue that during this period—less than one minute by all accounts—Weeks unlawfully detained them because he abandoned his traffic violation investigation "almost immediately" and asked Born out of the car to investigate drug trafficking without any reasonable suspicion supporting detention. If their detention exceeded its investigative scope, then the stolen checks must be suppressed as fruits of an illegal search. *United States v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999). We review for clear error the district court's conclusion that Weeks lawfully detained the brothers before Elstarheem's flight, taking "the

evidence in the light most likely to support the district court's decision." *United States v. Navarro-Camacho*, 186 F.3d 701, 705 (6th Cir. 1999).

The Murrays do not argue that the traffic stop was unlawful at its outset—nor could they. Though Weeks admits the traffic violation was pretext to fish for drug-trafficking evidence, the constitutional reasonableness of the brothers' detention turns on Weeks's objective justifications, not his subjective motivation. *Whren v. United States*, 517 U.S. 806, 813–14 (1996). Born's failure to obey a red light suffices to render the stop lawful under the Fourth Amendment at its initiation. *See United States v. Copeland*, 321 F.3d 582, 593 (6th Cir. 2003).

But what starts as reasonable may become unreasonable in "its manner of execution." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). As the brothers correctly note, the Fourth Amendment will not tolerate unrelated inquiries that measurably extend the duration of an otherwise lawful traffic stop. *Rodriguez v. United States*, 135 S.Ct. 1609, 1614 (2015). Thus, "[a] seizure justified only by a police-observed traffic violation . . . becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation." *Id.* at 1612 (internal quotation omitted). But, judging the record by that standard, this case is not close.

Critically, the district court found "it would not have been possible for Weeks to process and issue a traffic citation" in the "very brief passage of time" between his driver's side approach and Elstarheem's flight from the car. R. 35, PageID 258–59. In that one-minute interval, Weeks asked Born to exit the car, performed a consensual pat-down search, and was in the process of escorting Born to his cruiser when Elstarheem fled. Weeks had barely started at the tasks tied to issuing a traffic ticket, let alone the "ordinary inquiries incident to [a] traffic stop." *Rodriguez*, 135 S.Ct. at 1615 ("Typically such inquiries involve checking the driver's license, determining

whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance."). True, Weeks's prior encounter with the brothers obviated some of these ordinary inquiries. But others remained, such as verifying proper registration and insurance for the Hyundai.

The Murrays's claim that Weeks abandoned his traffic-stop investigation to embark on another also lacks support in the record. They stress that Weeks had not yet questioned them about the traffic violation. An officer's failure to ask for a motorist's driver's license may suggest abandonment in some cases, but not here, given that Weeks verified Born's license during the first stop. Nor does Weeks's decision to order Born out of the car point to abandonment. *See United States v. Lash*, 665 F. App'x 428, 431 (6th Cir. 2016) ("Even without a reason to be suspicious, an officer may order the driver to get out of the vehicle during a traffic stop to ensure his own safety during the encounter." (internal quotation marks omitted)). The district court credited Weeks's testimony that—in light of the brothers' earlier story about the need to get to a hospital for an emergency that no longer appeared to exist—he removed Born from the car to separate the brothers while he figured out what was going on. The Murrays offer no argument that would allow us to set aside that finding as clearly erroneous.

III.

As the district court concluded, Weeks lawfully detained the brothers before Elstarheem's flight—and reasonably pursued and seized the brothers thereafter. We AFFIRM.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

UNITED STATES OF AMERICA,	:	Case No. 3:16-cr-160
Plaintiff,	:	Judge Thomas M. Rose
v.	:	
BORN MURRAY (1) ELSTARHEEM MURRAY (2),	:	
Defendants.	:	

ENTRY AND ORDER DENYING THE MOTION TO SUPPRESS (DOCS. 21) FILED BY DEFENDANTS BORN MURRAY AND ELSTARHEEM MURRAY

Under a two count Indictment, Defendants Elstarheem Murray ("Elstarheem") and Born Murray ("Born") were charged with conspiracy to possess stolen mail and commit bank fraud as well as possession of stolen mail. (Doc. 12). Under Count 1, both Defendants are alleged to have engaged in a conspiracy to remove business checks from the United States mail, alter the business names on the checks, and attempt to present the checks to banking institutions in Dayton, Ohio, in order to fraudulently obtain cash in violation of 18 U.S.C. §§ 37 and 1349. Under Count 2, both Defendants are alleged to have knowingly possessed stolen United States mail taken or abstracted from letter boxes in violation of 18 U.S.C. §§ 1708 and 2. This matter is set for trial on June 26, 2017.

Now pending before the Court is Defendants' Motion to Suppress. (Docs. 21). Defendants argue that the allegedly stolen checks were discovered during an unconstitutional, pretextual traffic stop. In opposition, the Government argues that the law enforcement officers who conducted the traffic stop did not violate Defendants' rights under the Fourth Amendment.

On March 21, 2017, the Court held a hearing on the Motion to Suppress. (Doc. 26.) After the hearing, Defendants submitted post-hearing memoranda (Docs. 29-30), in response to which the Government filed a memorandum in opposition (Doc. 31). Defendants each filed a reply (Docs. 33-34) to the Government's memorandum. The Court has reviewed the parties' briefing and the Motion is ripe for review. For the reasons stated below, the Court **DENIES** the Motion to Suppress.[1]

I. BACKGROUND

On November 29, 2016, law enforcement officers working with the Miami Valley Bulk Smuggling Task Force ("Task Force") observed Elstarheem and Born get into a car and leave a motel on Miller Lane in Dayton, Ohio. Task Force agents followed the car and observed Elstarheem, who was driving, execute an illegal lane change. Based on this violation, the Task Force agents called Ohio State Patrol Trooper Joseph Weeks ("Weeks") via radio and requested that he initiate a traffic stop. Both the Task Force agents and Weeks admit that the purpose of the traffic stop was to conduct an investigation into possible criminal activity.

After stopping Defendants' car on Interstate 75, Weeks conducted NCIC and LEADS records checks on both Defendants. The records checks revealed that Elstarheem had a conviction involving narcotics and was not licensed to drive, and that Born had a conviction for check fraud. Defendants told Weeks that they were seeking medical attention for Born. Weeks did not issue a traffic citation and allowed Defendants to continue traveling after Born, who was licensed, agreed to drive.

Shortly after this traffic stop, Task Force agents observed Defendants again at the same motel on Miller Lane. Defendants placed luggage into two different cars and then left the motel

[1] The Court acknowledges the valuable contribution and assistance of judicial extern Anthony Satariano in drafting this opinion.

together in one of the cars. The other car left the motel traveling in the opposite direction. Task Force agents followed Defendants' car and observed it make a right turn on red without coming to a complete stop. The agents radioed Weeks to conduct another traffic stop, which he did. Again, both the Task Force agents and Weeks admit that the purpose of the traffic stop was to conduct a criminal investigation.

When Weeks reached the car, he asked Born, who was the driver, to come with him to his police cruiser. Weeks told Elstarheem to remain seated and to keep his hands on the dashboard. While Weeks walked with Born to the police cruiser, Elstarheem fled from the car. Weeks gave chase, told Elstarheem to stop, and warned him that he was armed with a Taser. Elstarheem heeded the command to stop and Weeks secured each of the Defendants in a police cruiser—after additional officers arrived to support him. Weeks then deployed Ryo, a canine trained in the detection of narcotics, to conduct an open-air sniff test around Defendants' car. Ryo alerted to the trunk of the vehicle indicating that he detected the smell of narcotics in that area. Based on Ryo's alert, Task Force Officers conducted a search of the trunk compartment and found an envelope containing 150 business checks. The Officers seized the checks, which are the primary evidence at issue in this Motion.

II. LEGAL STANDARD

The Fourth Amendment to the United States Constitution protects the rights of individuals against unreasonable searches and seizures conducted by state actors. *United States v. Ganias*, 755 F.3d 125, 133 (6th Cir. 2014). A search occurs when the Government acquires information by either "physically intruding on persons, houses, papers, or effects" or otherwise invading an area in which the individual has a reasonable expectation of privacy. *Id.* (citing *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013)). "A seizure occurs when the Government

interferes in some meaningful way with the individual's possession of property." *Id.* (citing *United States v. Jones*, 565 U.S. 400 n.5 (2012)). The party seeking suppression of evidence obtained by a search has the burden of proving that the search was unlawful. *United States v. Blakeney*, 942 F.2d 1001, 1014 (6th Cir. 1991).

A traffic stop involves a seizure in terms of the Fourth Amendment. *Bendlin v. California*, 551 U.S. 249, 255 (2007). The Sixth Circuit applies a probable cause standard to traffic stops executed to investigate a civil infraction. *United States v. Lyons*, 687 F.3d 754, 763 (6th Cir. 2012). The Sixth Circuit defines probable cause as "reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion" and it has determined it exists when "there is a fair probability, given the totality of the circumstances, that" an offense has occurred or evidence will be found. *United States v. Howard*, 621 F.3d 43, 453 (6th Cir. 2010). The reasonableness of a traffic stop does not depend on the motivations of an officer and so long as an officer has probable cause to believe a traffic violation has occurred a resulting stop does not violate the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 812-13 (1996); *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993).

The "collective knowledge" doctrine allows an officer to conduct a traffic stop pursuant to information obtained by a fellow officer. *United States v. Lyons*, 687 F.3d at 766-67. The Sixth Circuit has stated that the "collective knowledge" doctrine applies when an officer effectuates a stop at the direction of another officer who possesses the requisite knowledge to render the stop Constitutionally allowable. *Id.* at 767. The court utilizes a three factor test to determine if a stop is allowable under the "collective knowledge" doctrine and those factors are: (1) the officer taking action must act in objective reliance based on the information received, (2) the officer providing the information must have facts that support the probable cause required,

and (3) the stop can be no more intrusive than would have been allowed had the requesting officer been the one to conduct it. *Id.*

The Fourth Amendment allows officers to investigate crimes not related to the reason for a traffic stop so long as the investigation does not exceed the time reasonably required to issue a traffic citation. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614-15 (2015). The Supreme Court has been clear in stating "[a]n officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop." *Id.* at 1615.

When an officer conducts an open air sniff with a trained drug dog during a lawful traffic stop, the sniff does not constitute a "search" in terms of the Fourth Amendment and does not represent an unreasonable delay when the dog is already present at the scene where the stop is occurring. *United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998). If a properly trained drug dog alerts to the presence of drugs, probable cause exists for a lawful search as long as the facts surrounding the alert would make a reasonably prudent person think a search would uncover contraband. *United States v. Holleman*, 743 F.3d 1152, 1156 (8th Cir. 2014); *Florida v. Harris*, 133 S. Ct. 1050, 1058 (2013). If officers have probable cause to search a lawfully stopped vehicle, they may search any part of the vehicle or its contents that may contain the object of the search. *Wyo. V. Houghton*, 526 U.S. 295, 301 (1999).

When the government seeks to seize an item during a search there must be a nexus between the item being seized and a suspected criminal activity. *United States v. Fisk*, 255 F.Supp 2d 694, 705 (2003). When the item being seized represents fruits of a crime, instrumentalities or contraband the nexus is automatically provided. *Id.*

III. ANALYSIS

Defendants make three primary arguments: (1) the process leading to the traffic stop was unlawful or unconstitutional, (2) the detention of Born was impermissible, and (3) there was no probable cause to conduct a search of the vehicle. Defendants assert that these reasons, jointly or separately, render any evidence recovered by the Task Force Officers "Fruit of the Poisonous Tree" and thus require the evidence be suppressed. The Court addresses each of these arguments in turn below.

A. The Process Leading Up to the Traffic Stop

Defendants assert that the Task Force Officers' primary objective in stopping Defendants' vehicle was to conduct a narcotics investigation, but the Officers did not have probable cause to search the vehicle for that purpose. They refer to this form of stop as "pretextual," in that the reason for stopping the vehicle—to address a traffic violation—is not the actual purpose of the stop. In support, Defendants cite Weeks' testimony that he pulled over Defendants' vehicle, not with the sole intent of issuing a traffic citation, but also with the intent to further a possible narcotics investigation.

Be that as it may, that the Task Force Officers or Weeks had an ulterior motive in stopping Defendants' vehicle is not relevant. The constitutionality of a traffic stop is premised on whether the acting officer had probable cause to believe a traffic violation occurred, not his subjective mental state. *Whren*, 517 U.S. at 812-13. When assessing whether he had probable cause to stop Defendants' vehicle, Weeks was entitled to rely on the Task Force Officers' knowledge under the collective knowledge doctrine. *Lyons*, 687 F.3d at 766-67. Weeks' stop conformed with that doctrine because he (1) acted in objective reliance on the facts before him when he initiated the stop based on a traffic violation reported to him by his colleagues, (2) the

Task Force Officers observing Defendants' vehicle witnessed the traffic violation firsthand, and (3) the stop was no more intrusive than would have been allowed had one of the witnessing officers conducted it, as Weeks initiated a standard procedure stop. *Id.*

When Weeks stopped Defendants' vehicle, he did so in objective reliance on Task Force Officers' having witnessed the vehicle change lanes without signaling (the first stop) and turning right at a red light without stopping (the second stop). Nothing in the record would cause a reasonable officer in Weeks' shoes to doubt that he had probable cause to believe that these traffic violations (both civil infractions under the Ohio Code) had occurred. The process leading to the execution of the traffic stop therefore conformed with the requirements of the Fourth Amendment.

B. The Detention of Born

Defendants also assert that Born was impermissibly detained when Weeks removed him from Defendants' vehicle at the beginning of the traffic stop. Defendants argue that Weeks had not yet asked any questions related to the traffic violation and, therefore, Weeks did not have any reason to remove Born from the vehicle—thereby detaining him.

The law is clear, however, that an officer may conduct an investigation into an unrelated matter during the execution of a lawful traffic stop, so long as the resultant detention does not last longer than what would be reasonably allowable in order to complete the mission of issuing a citation. *Rodriguez*, 135 S. Ct. at 1614-15. Weeks testified that he removed Born from the vehicle to separate the two Defendants while he ascertained what was occurring. This is a form of investigation. The record shows a very brief passage of time between when Weeks ordered Born out of the car and when Elstarheem exited the vehicle. After this brief passage of time and once the Defendants were secured, Weeks deployed his drug dog Ryo within one to two minutes.

Probable cause to search a vehicle need not exist before conducting an open air sniff because an open air sniff is not a search under the Fourth Amendment. *Reed*, 141 F.3d at 650. The evidence does not suggest that an "unreasonable" amount of time passed between initiation of the traffic stop and Ryo's deployment. Certainly, it would not have been possible for Weeks to process and issue a traffic citation in the amount of time between Born's removal and Elstarheem's exit. After Elstarheem left the vehicle, a delay in the normal citation issuing procedure may have occurred, but any such delay is attributable to Elstarheem's actions and not those of the officers.

For these reasons, neither Born nor Elstarheem were detained for a period of time that was unreasonable nor was the open air sniff conducted in a way that impermissibly extended the length of the traffic stop.

C. Probable Cause to Search the Vehicle

Defendants argue that the evidence seized should be suppressed because the Task Force Officers and Weeks did not have probable cause to search the vehicle. The record is uncontroverted that Ryo is a trained drug dog specifically taught to alert to the scent of narcotics. It is well settled that when a train drug dog alerts to a vehicle probable cause to search the vehicle then exists. *Holleman*, 743 F.3d at 1156. This probable cause is created so long as the facts and circumstances present would allow a prudent officer to believe contraband may be found. *Harris*, 133 S. Ct. at 1058. Once probable cause has been established, any container large enough to conceal the object of the search may be searched. *Houghton*, 526 U.S. at 301.

Weeks testified that Ryo is trained to detect the odor of narcotics and alerts officers to its presence by exhibiting certain behavior, including increased respiration, perked ears, and increased speed. When Ryo alerted to the trunk of Defendants' car, it established probable cause

to search any container large enough to conceal narcotics, which would include the envelope that contained the checks at issue. Defendants' counsel questioned Ryo's accuracy at the hearing, but there is no evidence that Weeks had reason to doubt Ryo's reliability. As such, the search of the trunk and examination of the envelope were both permissible.

The officers also were permitted to seize any object that was identifiable as fruits of a crime or contraband as long as a nexus could be identified between the item and the suspected crime. *Fisk*, 255 F.Supp 2d at 705. The officers uncovered a large amount of business checks totaling a value of over $1 million, none of which were made out to either of the Defendants. Combined with their knowledge that Born had a prior conviction for check fraud and the suspicion created when Elstarheem fled, it was reasonable for the officers to believe the checks may represent fruits of a criminal activity. A reasonable officer would possess more than a suspicion the checks represented the fruits of a crime.

In sum, the search of Defendants' vehicle and seizure of the checks at issue did not violate Defendants' Fourth Amendment rights.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the Motion to Suppress (Doc. 21).

DONE and **ORDERED** in Dayton, Ohio, this Thursday, June 8, 2017.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE