

APPENDIX A

Case No. 20-3163

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BENJAMIN R. ROSS

Defendant - Appellant

BEFORE: GILMAN, GIBBONS, and SUTTON, Circuit Judges.

Upon consideration of the appellant's motion to extend the filing of the petition for rehearing,

It is **ORDERED** that the motion be, and it hereby is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk



Issued: March 29, 2021

APPENDIX B

NOT RECOMMENDED FOR PUBLICATION

File Name: 21a0113n.06

Case No. 20-3163

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**
Mar 02, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BENJAMIN ROSS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
OHIO

OPINION

BEFORE: GILMAN, GIBBONS, and SUTTON, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. In June 2019, Benjamin Ross was indicted on one count of attempted possession with the intent to distribute fentanyl, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 846. Ross moved to suppress the evidence obtained during the traffic stop that led to his arrest, but the district court denied the motion after a suppression hearing.

In October 2019, Ross pleaded guilty to the charged offense. The court subsequently sentenced Ross to 120 months in prison, which was a 15-month upward variance from the Guidelines range of 84 to 105 months of imprisonment. Ross now appeals, claiming that the district court erred in (1) denying his motion to suppress, and (2) imposing the upward variance. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

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I. BACKGROUND

In May 2019, in Youngstown, Ohio, Ohio State Highway Patrol Sergeant Alan Dunbar observed a BMW sedan pull out in front of him. He had been waiting for the car to leave the house because other officers suspected its driver (Ross) of drug activity. Dunbar noticed that the car had heavily tinted passenger windows and, upon following the car, watched Ross make a left-hand turn without signaling in advance. This caused Dunbar to activate his siren, pull over the BMW sedan, and inform Ross of the traffic violations that Dunbar had observed: the dark window tint and the delayed use of a turn signal. Upon noticing that Ross seemed nervous and was avoiding eye contact, Dunbar requested that Ross step out of the car. When Ross complied, Dunbar conducted a consensual pat-down, which revealed no weapons or contraband.

Sergeant Dunbar was working at the time in tandem with a canine unit, led by Trooper James Baker. Baker arrived while Dunbar was still interacting with Ross, and the drug-detection dog alerted by the rear door on the driver's side of the BMW. Due to the alert, the officers searched the car and found a child's toy train perched on the back seat. Inside the toy was a vacuum-sealed bag containing several hundred blue pills that were later determined to contain 117 grams of fentanyl.

Ross moved to suppress the evidence found during the vehicle search, arguing that Sergeant Dunbar had neither probable cause nor reasonable suspicion to pull him over. The district court denied the motion. Citing Dunbar's testimony and dash-camera footage, the court held that Dunbar had probable cause to believe that Ross had committed the two Ohio traffic violations in question.

Ross pleaded guilty soon after, but he reserved the right to appeal the denial of his motion to suppress. The Presentence Report, authored by Ross's probation officer, recommended an

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upward variance of 15 months from the Guidelines range in order to provide just punishment, protect the public, and reflect the seriousness of the offense. Notice of a possible upward variance was filed by the district court a day later.

At Ross's sentencing hearing in February 2020, the district court adopted the 15-month upward variance and sentenced Ross to 120 months in prison. The court noted, among other things, Ross's lengthy criminal history, his supervised-release status when he committed the instant offense, the proximity in time of the offense to his recent release from prison, his drug-related behavior while in custody, and the seriousness of the offense.

When the district court asked whether either party had any objections to the imposed sentence, Ross neither objected nor asked the court to further explain its reasoning. Ross now appeals, arguing again that Sergeant Dunbar's initial stop of his car was improper, and contending for the first time that the court failed to adequately explain its reasons for varying upward from the Guidelines range when imposing the 120-month sentence. We address each of Ross's arguments in turn.

II. ANALYSIS

A. Motion to suppress

1. *Standard of review*

When a defendant appeals the denial of a motion to suppress evidence, we review the district court's legal conclusions de novo, but set aside the court's factual findings only if they are clearly erroneous. *United States v. Lee*, 793 F.3d 680, 684 (6th Cir. 2015). A factual finding is clearly erroneous when an appellate court, upon reviewing the evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. Navarro-Camacho*, 186 F.3d 701, 705 (6th Cir. 1999). Because the district court denied Ross's motion to suppress, all

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evidence is reviewed in the light most favorable to the government. *United States v. Gunter*, 551 F.3d 472, 479 (6th Cir. 2009).

2. Discussion

“In order to effect a traffic stop, an officer must possess either probable cause of a civil infraction or reasonable suspicion of criminal activity.” *United States v. Lyons*, 687 F.3d 754, 763 (6th Cir. 2012). Ross argues that Sergeant Dunbar had neither probable cause nor reasonable suspicion to pull him over. He first contends that Dunbar could not have seen the window tint prior to deciding to pull him over because of both the distance between the two cars and the angle of Dunbar’s view at the time in question. Second, he argues that the dash-cam footage reveals that he in fact used his signal in a manner consistent with Ohio law.

As to the first argument, we have held that an officer’s traffic stop of an individual for unlawful window tinting does not run afoul of the Fourth Amendment where the officer has “substantial experience enforcing this traffic regulation” and is “familiar[] with window tinting.” *United States v. Shank*, 543 F.3d 309, 313 (6th Cir. 2008) (affirming the denial of a motion to suppress); *see also United States v. Shelton*, 817 F. App’x 217, 219 (6th Cir. 2020) (same). Ohio law requires that tinting on certain windows allow at least 50 percent of the light to pass through. Ohio Rev. Code § 4513.241; Ohio Admin. Code § 4501-41-03(A)(3).

The issue here is that the district court erred twice in its written analysis. First, it incorrectly recited the law. The court stated that Section 4513.241 of the Ohio Revised Code “makes it unlawful to use tinted glass in ‘windshields, side windows, sidewings, and rear windows.’” But Ohio law does not place restrictions on the tint of a rear-side window or the back window. *See* Ohio Rev. Code 4513.241 (directing the Director of Public Safety to adopt regulations governing window tinting); Ohio Admin. Code 4501-41-03(A)(4) (adopting regulations that exempt any

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windows “not otherwise listed in paragraphs (A)(1) through (A)(3) or (A)(5) of this rule”); *id.* at (A)(1)–(A)(3), (A)(5) (not listing rear-side window or back window). As an aside, we note that if the back window is tinted to allow “less than fifty per cent plus or minus three per cent” light transmittance, then “outside left and right rear view mirrors are required.” *See* Ohio Admin. Code 4501-41-03(A)(4). But that portion of the regulation is not at issue in this case because Ross’s car had outside rear-view mirrors.

Second, the district court found that Dunbar had probable cause to stop Ross because “Dunbar had ample opportunity to observe and evaluate the rear side window on the driver’s side of the vehicle as well as the back window of the vehicle.” The problem with the court’s finding is that Ohio law permits such windows to be tinted, to say nothing of the fact Dunbar explicitly testified that the back window was not tinted. Moreover, the government argued to the court that Dunbar had stopped Ross due to the tinting on the passenger-side windows—not the driver’s rear-side window or back window.

In apparent recognition of the district court’s errors, the government argues again that Dunbar had probable cause to stop Ross because of the unlawful tint on the front-passenger window. Dunbar indeed testified that he noticed the tint on the front-passenger window before pulling over Ross, and the dash-cam footage reveals that Dunbar could likely see the front-passenger window before activating his siren. But the government’s plausible argument does not ameliorate the problems created by the district court’s misstatement of the facts and law in its written opinion. We need not belabor this point further, however, because we find no error with the district court’s finding regarding the turn-signal violation.

Turning to that argument, Ohio law provides: “When required, a signal of intention to turn or move right or left shall be given continuously during not less than the last one hundred feet

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traveled by the vehicle . . . before turning.” Ohio Rev. Code § 4511.39(A). The district court concluded that, based on both Sergeant Dunbar’s testimony as well as the dash-cam footage, Dunbar had observed Ross commit a turn-signal violation. Upon review of the dash-cam footage, we cannot discern precisely when Ross initiated his turn signal. But that alone does not leave us with a “definite and firm conviction that a mistake” was committed by the district court in reaching its factual finding, *see Navarro–Camacho*, 186 F.3d at 705, especially because the court also considered Dunbar’s testimony. Indeed, the court made its finding only after hearing counsel spar back and forth on the issue. Ross thus fails to show that the district court clearly erred in its finding regarding the turn-signal violation.

B. Sentencing

1. Standard of review

Ross next challenges the procedural reasonableness of the district court’s sentencing decision. We typically review sentencing decisions under the abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 56 (2007). But where, as here, a defendant fails to contemporaneously object to the district court’s sentencing calculation, we review a claim of procedural unreasonableness under the more deferential plain-error standard. *United States v. Bostic*, 371 F.3d 865, 872–73 (6th Cir. 2004). Under that standard, “a defendant must show (1) error (2) that was obvious or clear, (3) that affected defendant’s substantial rights and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings.” *United States v. Wallace*, 597 F.3d 794, 802 (6th Cir. 2010).

2. Discussion

“For a sentence to be procedurally reasonable, ‘a district court must explain its reasoning to a sufficient degree to allow for meaningful appellate review.’” *United States v. Zobel*, 696 F.3d

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558, 566 (6th Cir. 2012) (quoting *United States v. Brogdon*, 503 F.3d 555, 559 (6th Cir. 2007)).

A court that imposes a sentence outside the Guidelines range is required to state “the specific reason” for the imposition of its variance. 18 U.S.C. § 3553(c)(2); *United States v. Blackie*, 548 F.3d 395, 401 (6th Cir. 2008). Reversible procedural error is committed where a court “fail[s] to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Gall*, 552 U.S. at 51.

Ross contends that the sentence imposed by the district court was not procedurally reasonable because the court insufficiently explained its decision to vary upward from the Guidelines range by 15 months. In particular, he contends that the court’s written statement of reasons was inadequate.

The following three boxes are checked on the written statement of reasons: (1) “To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A)),” (2) “To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B)),” and (3) “To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C)).” A short statement is also included: “The court varied upward to a sentence of 120 months. Defendant was just released from prison and almost immediately began to see[k] fentanyl. Nothing deters this defendant. Defendant was on supervised release in case #4:14CR148 when this conduct occurred.”

This written statement of reasons, which includes the checked boxes and the short summary, likely reaches the requisite level of specificity. See *United States v. Feinman*, 930 F.2d 495, 501 (6th Cir. 1991) (holding that the specificity requirement is satisfied by “a short clear written statement”) (citation omitted); cf. *Zobel*, 696 F.3d at 566–67 (finding that “merely check[ing] off a box” would result in remand). But we need not determine whether the written

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explanation is alone sufficient. Although we prefer that the reasoning for an upward variance be reduced to writing, oral explanations can compensate for any deficiency in the written explanation. *Zobel*, 696 F.3d at 566–67. The district court’s oral explanations here are more than adequate.

At the sentencing hearing, the district court methodically explained the various factors driving its sentencing decision. The court first touched on the fact that Ross was raised in a “positive home environment,” but suffers from learning disabilities, mental-health problems, and addiction. It also recognized Ross’s need for drug and alcohol treatment while incarcerated and compared Ross’s 120-month sentence with the average 132-month sentences of similarly situated defendants.

The district court then emphasized the circumstances and seriousness of the instant offense, commenting both on Ross’s knowledge that he was purchasing and distributing counterfeit pain pills across state lines and on fentanyl’s harm to the community. It also highlighted Ross’s recidivism and his continuing danger to the public by noting that not only did Ross have a long history of violent offenses, but that the instant offense occurred just two months after Ross was released from confinement for his previous offense. “[I]t is certainly relevant,” said the court, that an individual who just “started supervision . . . has the wherewithal and the ability to, once again, reconnect with drug traffickers in California, to bring fentanyl to this state [That’s] why [he] clearly is a danger to the community, clearly has to be deterred.” The court further pointed out that Ross was caught with contraband pills while awaiting sentencing—a violation reminiscent of a previous violation where Ross was found, while incarcerated, with pills stored in his rectal cavity.

We therefore conclude that, in detailing Ross’s serious offense, recidivism risk, and threat to the community, the district court explained its upward variance from the Guidelines range with sufficient specificity to easily survive a procedural-reasonableness challenge on plain-error review.

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See Zobel, 696 F.3d at 567–68 (finding the above-Guidelines sentence to be procedurally reasonable where the district court considered, in its oral explanation, the defendant's characteristics and need for treatment, and emphasized the defendant's risk of recidivism and his threat to the community) (collecting similar cases).

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX C

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	CASE NO. 1:19CR351
)	
Plaintiff,)	
)	
vs.)	JUDGE JOHN R. ADAMS
)	
BENJAMIN ROSS,)	
)	
Defendant.)	<u>ORDER</u>

This matter comes before the Court on a motion to suppress (Doc. 24) filed by Defendant Benjamin Ross. The Government timely opposed the motion, and the Court conducted an evidentiary hearing on September 23, 2019. Upon review of the relevant findings, the evidence introduced at the hearing on this matter, and applicable law, Ross's motion to suppress is DENIED.

I. FACTS

On May 15, 2019, Sergeant Alan Dunbar initiated a traffic stop of Ross's vehicle near the intersection of Lowell Avenue and Southern Boulevard in Youngstown, Ohio. Upon initiating the traffic stop, Sergeant Dunbar informed Ross that he had been pulled over for the darkness of his window tint and the late use of his turn signal. Sergeant Dunbar testified that during his initial interaction with Ross, Ross was very nervous. Ross avoided eye contact and Sergeant Dunbar "advised him that [he] could practically see his heart beating through his shirt[.]" Sergeant Dunbar then requested that Ross step out of the vehicle and requested permission to perform a pat-down of Ross's person. Ross consented to the pat-down. No weapons or contraband were found during the pat-down.

While Sergeant Dunbar again explained the reasons that Ross had been pulled over, Trooper James Baker appeared on scene with drug-detection dog, Rexey. Rexey alerted on the driver's side of the vehicle near the rear door. Based upon that alert, the officers searched the vehicle. Specifically, they searched a child's toy train package that was sitting on the back seat of the vehicle. Inside the child's toy box, the officers found a vacuum-sealed bag. The bag contained several hundred blue pills that ultimately were determined to be 117 grams of fentanyl.

Ross has sought to suppress the evidence seized from the vehicle, evidence obtained from a subsequent search of his cell phones, and his statements. The Court now reviews his arguments.

II. LAW & ANALYSIS

It is well-settled that a traffic stop is proper "so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring," *United States v. Palomino*, 100 F.3d 446, 448 (6th Cir. 1996), and therefore a defendant's traffic violations are more than sufficient probable cause to initiate a stop. *See also United States v. Puckett*, 422 F.3d 340 (6th Cir. 2005). "Probable cause is defined as 'reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion.'" *United States v. Smith*, 182 F.3d 473, 477 (6th Cir. 1999) (quoting *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990)).

Applicable Ohio law requires window tinting to allow at least fifty percent of the light to pass through. *See Ohio Rev. Code § 4513.241; Ohio Admin. Code § 4501-41-03(A)(3)*. Sergeant Dunbar, based on his substantial prior experience, believed that upon observation that Ross's windows violated that standard. These facts alone provide a proper basis for the initial stop. *See United States v. Shank*, 543 F.3d 309, 313 (6th Cir. 2008) ("Due to the officers' familiarity with window tinting and their estimate that the vehicle was tinted substantially darker

than permitted by law, we agree with the district court's determination that the officers had a proper basis to initiate the traffic stop.). A later test revealed that Sergeant Dunbar was correct and that the window tinting allowed only 6% of light to pass through.

Ross appears to take issue with Sergeant Dunbar's observation by asserting that the driver's window was rolled down when any observation could have occurred. While the dash camera appears to substantiate this view, Ohio law does not limit its application to the driver's side window. Section 4513.241 makes it unlawful to use tinted glass in "windshields, side windows, sidewings, and rear windows[.]" The dash camera reveals that prior to initiate the traffic stop, Sergeant Dunbar had ample opportunity to observe and evaluate the rear side window on the driver's side of the vehicle as well as the back window of the vehicle. Accordingly, the fact that the driver had his window rolled down has no impact on the ability of Sergeant Dunbar to ascertain that the vehicle appeared to have improperly tinted windows.

In addition, Sergeant Dunbar's dash camera supported his testimony that Ross's use of his turn signal did not occur until his turn on Southern Boulevard was essentially complete. Sergeant Dunbar's direct observation of this fact provided an additional, independent reason that justified the traffic stop. Ohio law provides: "When required, a signal of intention to turn or move right or left shall be given continuously during not less than the last one hundred feet traveled by the vehicle ... before turning[.] Ohio Rev. Code. § 4511.39(A). The dash camera footage suggests that Ross did not utilize his turn signal until *after* his movement left on Southern Boulevard was nearly complete. Accordingly, Sergeant Dunbar had ample reason to initiate the traffic stop.

The Court also finds no merit in any challenge to the search of Ross's vehicle. A warrantless search of an automobile is permissible if probable cause exists to believe it contains

evidence of a crime. *United States v. Ross*, 456 U.S. 798, 809 (1982). There is probable cause to justify a warrantless search of a vehicle once a properly trained and reliable drug detection dog alerts positively to the presence of drugs. *United States v. Hill*, 195 F.3d 258, 273 (6th Cir. 1999). The evidence and testimony herein revealed that Rexey and his handler arrived on scene within roughly three minutes of the stop beginning. Rexey then alerted within 30 seconds of beginning his sniff of the vehicle.

Initially, the Court notes that the Sixth Circuit has noted that reasonable suspicion is not required to perform a canine inspection of the exterior of a vehicle because no legitimate privacy interests are impacted. *United States v. Perez*, 440 F.3d 363, 375 (6th Cir. 2006). Accordingly, the Court need not analyze whether Sergeant Dunbar's observations of Ross's nervous behavior were sufficient to justify the canine sniff. Moreover, there is no dispute based on the testimony provided that Rexey is a "well-trained and reliable drug dog[]" and therefore his "positive alerts provided the necessary probable cause to justify the warrantless search[.]" *Id.*

The record also does not support any contention that the canine sniff improperly extended the duration of the traffic stop. Once officers use "all of the appropriate means available to them to allay their concerns of criminal activity," they may not further detain a suspect absent probable cause. *United States v. Heath*, 259 F.3d 522, 530 (6th Cir.2001). Herein, Sergeant Dunbar did not delay his own activities in any manner while the search was performed. When Rexey alerted, Sergeant Dunbar had not yet verified Ross's identity, checked for active warrants, or completed his citation. Accordingly, it cannot be said that the canine sniff improperly extended the duration of the traffic stop.

To the extent that Ross's initial motion challenged the search of his phones, the Court finds no merit in any argument made in support of that contention. The record reveals that the

phones were not searched until after a warrant was obtained from a neutral magistrate judge. Ross has not challenged that process, and the Court finds no basis to suggest that the warrant was improperly obtained. Accordingly, Ross's final argument also lacks merit.

III. CONCLUSION

For the reasons set forth herein, Defendant Benjamin Ross's motion to suppress is DENIED.

IT IS SO ORDERED.

Date: October 15, 2019

/s/ Judge John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT COURT

APPENDIX D