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STATE OF WISCONSIN **07-05-2016**

COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT II

Case No. 2016AP000456-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TROY M. PAULSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER
DENYING SUPPRESSION ENTERED IN CALUMET COUNTY CIRCUIT
COURT, THE HONORABLE JEFFREY S. FROEHLICH PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

Did Law Enforcement unreasonably prolong the seizure of Mr. Paulson's vehicle?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent believes that the written briefs presented will adequately present the relative positions of the parties, and therefore, oral argument is not requested. This case does not qualify for publication because it is an appeal from misdemeanor convictions. Wis. Stat. §§ 809.23(1)(b)4 and 751.31(2)(f).

STATEMENT OF THE CASE

The Statement of the Case and Statement of the Facts included in defendant-appellant brief are sufficient to frame the issues presented for review. The State will include any additional relevant facts in the Argument section.

ARGUMENT

Mr. Paulson's Vehicle was Reasonably Seized at the Time Police Conducted a Dog Sniff; Therefore, the Dog Sniff Could Provide Probable Cause to Justify the Subsequent Search of the Vehicle, and the Evidence Obtained Should Not be Suppressed

A. Standard of Review

The question of whether police conduct violated the constitutional guarantees against unreasonable searches and seizures is a question of constitutional fact. *State v. Griffith*, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. A question of constitutional fact is reviewed under a mixed, two-step standard of review. *State v. Hajicak*, 2001 WI 3, 240 Wis. 2d 349, 620 N.W.2d 781. An appellate court reviews the circuit court's findings of the historical facts under the clearly erroneous standard, however, it reviews the circuit court's determination of constitutional fact de novo. *Id.* ¶15.

In analyzing the constitutionality of a seizure, a reviewing court first determines whether the seizure was justified at its inception by either probable cause or reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1 (1968). Reasonable suspicion means "suspicion grounded in specific articulable facts and reasonable inferences from those facts, that the individual has committed [or was committing or is about to commit] a crime. An inchoate and unparticularized suspicion or hunch... will not suffice." *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

Second, the court must determine whether the detention lasted no longer than was necessary to effectuate the purpose of the stop and whether the investigation means used were “the least intrusive means reasonably available to verify or dispel the officer’s suspicion.” *Florida v. Boyer*, 460 U.S. 491, 500 (1983). In sum, “a seizure is reasonable and therefore lawful, if (1) the seizure was justified at its inception, and (2) the officer’s actions were reasonably related in scope to the circumstances justifying the interference.” *State v. House*, 2011 WI App 111, ¶5, 350 Wis. 2d 478, 837 N.W.2d 645.

An officer may extend the seizure if s/he becomes aware of other factors that justify the seizure, such as probable cause or reasonable suspicion of other criminal activity. These factors, like the factors justifying the stop in the first place, must be “particularized” and “objective.” *State v. Gammon*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623. If the continued seizure is based on reasonable suspicion, a reviewing court should consider whether the officer “diligently pursued his investigation to confirm or dispel his suspicion.” *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

B. The Officer had Reasonable Suspicion to Prolong the Seizure of Mr. Paulson’s Vehicle.

The State is in agreement that the original contact by Deputy Coleman was justified. In addition, as the court concluded the State believes that based on the totality of the circumstances surrounding the contact by Deputy Coleman that

reasonable suspicion existed to prolong the seizure in order to get a dog on scene to perform a sniff.

The court concluded that Firelane 8 was a somewhat secluded location. (App. 140, line 10). The court further indicated that an appropriate stop had occurred at 2353 hours (App. 140, lines 14-15). Deputy Coleman then makes contact with the vehicle and finds that there are two occupants in the vehicle. (App. 140, lines 15-16). They appear to be nervous, Mr. Paulson exceedingly so, to the point where he's visibly shaking. The young lady in the vehicle is not being overly cooperative with providing her information to the deputy, mumbling not speaking clearly, and it takes several attempts to get her information. Based on the way she gives the information, Deputy Coleman is probably a little bit concerned whether or not it's accurate and makes arrangements for Deputy Meyer to come to the scene and bring the mobile fingerprinting unit with him. (App. 140-141, lines 19-28, and lines 1-3). The court also noted that while at the vehicle, Deputy Coleman makes observations that there was a coat in the backseat, but it's not just laying across the backseat where one would normally expect a jacket to be laid down or hung on a garment hook or something like that. The deputy indicates that it's on the floor and not just on the floor but tucked down in such a fashion that he could tell it's over something, can't tell what it is, but it does appear to be tucked into place. (App. 141, lines 4-11). Finally, Deputy Coleman goes back to his vehicle and ascertains that Mr. Paulson does have some drug history. (App 141, lines 12-13). Based upon his nervous behavior, the drug history, something

concealed on the floor, the time of night, the remote location with a sixteen-year-old juvenile in the vehicle Deputy Coleman makes efforts to get a dog there. (App. 141 lines 12-17).

A officer may extend the seizure if s/he becomes aware of other factors that justify the seizure, such as probable cause or reasonable suspicion of other criminal activity. *State v. Gammon*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623.

If the continued seizure is based on reasonable suspicion, a reviewing court should consider whether the officer “diligently pursued his investigation to confirm or dispel his suspicion.” *United States v. Sharpe*, 470 U.S. 675, 686 (1985). In this case, Deputy Coleman called for a dog four minutes after making contact with defendant’s vehicle. He is trying to get one from Appleton, finds out there’s one at another location, and then begins to try and identify who the juvenile is and to make contact with her parents, utilizes the remote—or the mobile fingerprint unit once Deputy Meyer arrives, which is about seventeen minutes into his contact with the vehicle. (App 141, lines 17-23). So in this case it is clear that Deputy Coleman diligently pursued his investigation to confirm or dispel his suspicion. Within four minutes of making contact with the vehicle, he was calling for a dog to come to the scene. In addition, Deputy Coleman was still doing other investigative functions up until the dog arrived on scene, which included attempting to contact the juvenile’s parents. It does not appear that at any

time during the seizure that Deputy Coleman was stalling or dragging his feet to allow more time for the dog to arrive on the scene.

C. There was no Delay in the Seizure of the Defendant to Accommodate the Arrival of the Dog to Perform the Sniff.

In this case the court indicated that if he goes up to the vehicle and it's nothing more than a parking violation, we would expect that either you're going to issue him a citation if there's someone in the vehicle or you're going to call in and have the vehicle towed out of there, but since there's someone in the vehicle, he makes contact with them to figure out why they are there and who they are. (App. 148, lines 1-7).

The court further reasoned that at that point something else pops up. We've got a juvenile female in the vehicle with someone who is ten years older than she is after curfew, so now this is something else that the officer has to work with. (App. 148, lines 8-11).

A officer may extend the seizure if s/he becomes aware of other factors that justify the seizure, such as probable cause or reasonable suspicion of other criminal activity. *State v. Gammon*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623.

If the continued seizure is based on reasonable suspicion, a reviewing court should consider whether the officer "diligently pursued his investigation to confirm or dispel his suspicion." *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

The court made mention of the timeframe of the initial contact and the arrival of the dog and it surmised it was 27 minutes. During that time period Deputy Coleman had to attempt to identify the juvenile female, made several attempts to contact the juvenile's parents and allowed the juvenile to also attempt to call her parents on her cell phone. Neither Deputy Coleman nor the juvenile female were successful in contacting the parents at the time of the dog's arrival.

The State agrees, as did the court, that there was nothing to indicate Deputy Coleman was out there intentionally dragging his feet waiting for the dog to get there. The court noted that any parent whose juvenile child is out after curfew at some remote location with someone who's ten years older than them is going to want to have the officer make an effort to contact those parents to see if that juvenile is supposed to be at that location, and that's the officer's job. (App. 145, lines 12-17).

The court further found the inquiries he's asking out on the scene were entirely appropriate, and this entire contact from the time that he first sees the vehicle until the dog is on scene or the walk around and the sniff, it's only 25 minutes to start with, and given everything that was going on within that time frame, trying to get the portable scanner there, trying to get accurate information and confirm that information from the juvenile, making several attempts to contact parents and leave a reasonable time for them to call back in response. (App. 145-146, lines 22-25 and 1-6). The State agrees with the circuit court finding that this was not a situation where the deputy was going out of his way to slow things down

and wait for the dog to get there. The court found that the deputy was doing a number of things to diligently investigate the situation. (App.146, lines 7-11).

CONCLUSION

Based on the arguments stated above the State believes that Deputy Coleman did not delay the seizure of Mr. Paulson based on the circumstances and investigative needs at the scene. However, if this court believes that there was a delay in the original seizure, the State believes that Deputy Coleman had reasonable suspicion to extend the seizure to allow the dog to perform the sniff. Finally, the State would respectfully request this court to affirm the conviction of Mr. Paulson and uphold the findings of the circuit court.

Dated this 1st day of July, 2016.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c), for a brief and appendix produced with a proportional serif font. The length of this brief is 2,210 words.

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of July, 2016.

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APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 1st day of July, 2016.

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