STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 16AP622-CR

JORDAN A. BRANOVAN,

Defendant-Appellant.

APPEAL FROM AN ORDER OF THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE PAUL V. MALLOY, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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TABLE OF AUTHORITIES

Cases

TABLE OF CONTENTS

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant contends that oral argument and publication are not warranted in this case. The legal issues addressed herein are not factually difficult, and there is ample legal authority for this Court to issue a decision without the need for oral argument or publication.

ISSUE PRESENTED

ISSUE: Did the trial court err as a matter of law that the seizure of evidence from the defendant's automobile was constitutionally valid?

ANSWERED BY THE TRIAL COURT: No. The Court ruled in an oral Order that the seizure of evidence from the automobile was not prolonged as a result of a K9 dog search.

STATEMENT OF THE CASE

The defendant-appellant, Jordan A. Branovan ("Branovan"), was charged in a Criminal Complaint filed on June 1, 2015 with one felony count of Possession of Marijuana (2nd or Subsequent Office), contrary to sec. 961.41(3g)(e), Wis. Stats., and one misdemeanor count of Possession of Drug Paraphernalia, contrary to sec. 961.573(1), Wis. Stats. (R. 1)1 A preliminary hearing was held on July 23, 2015, and Branovan was bound over before the circuit court for trial. An Information alleging the same counts was also filed on that date. (R. 6)

Branovan filed a Motion to Suppress Evidence challenging the traffic stop and arrest (R. 11) and a Motion to Suppress Statements (R. 10) on August 24, 2015. An evidentiary motion hearing was held before the trial court on November 4, 2015. (R. 28) After hearing the evidence presented, the Court denied the motion to suppress as to the stop/search/seizure but granted the motion to suppress as to a portion of Branovan's statements to law enforcement at the scene of the arrest. (R. 28) The motion as to the statements is not a subject of this appeal. The only relevant issue on appeal is the trial Court's denial of the stop/search/seizure motion.

Branovan pled guilty to an amended charge of misdemeanor Possession of Marijuana and the misdemeanor charge of Possession of Drug Paraphernalia on February 1, 2016. The Court sentenced him to a withheld sentence on each count and 15 months probation. The sentence was stayed pending this appeal. (R. 31)

A timely Notice of Intent to Seek Postconviction Relief was filed with the trial court clerk on February 4, 2016. A timely Notice of Appeal was filed on March 24, 2016. (R. 25) An Amended Notice of Appeal was filed on March 28, 2016. (R. 30) A briefing schedule has now been established by this Court.

STATEMENT OF THE FACTS

It is important to note at the outset of this brief that the majority of the facts that relate to the legal arguments in this case are contained in the DVD video marked and admitted as *Exhibit 1* (R. 29) at the motion hearing held on February 1, 2016. As such, the testimony at the motion hearing was largely a rehashing of the events depicted on the video. The video should put the entire traffic stop and arrest into full perspective for this Court.

Sgt. Ben Heinen ("Heinen") was operating a marked City of Mequon police squad southbound in the 11100 block of Port Washington Road approaching the intersection of Mequon Road. The squad passed through the intersection southbound, and he witnessed a blue Toyota driving northbound on Port Washington Road approaching the same intersection. As the vehicle passed his squad, Heinen made eye contact with the driver (later found to be "Branovan") and saw that Branovan was not wearing a seatbelt. Heinen made a u-turn on Port Washington Road and got directly behind the blue Toyota as the car made a stop at the red light at the Mequon Road intersection, and Heinen saw that the passenger was also not wearing a seatbelt. (R.

1 All references to the record shall be cited as (R. 3, p._____), where appropriate.

28, pp. 10-12)

Heinen did not initially activate his siren or emergency lights. (R. 28, p. 12) He noticed that the driver was wearing a multicolored hat, and it appeared that there was a multicolored marijuana leaf on the top portion of the hat. (R. 28, p. 13) It later turned out after the stop was effectuated that it was a Hawaiian flower type hat and not actually a marijuana leaf (R. 28, p. 40-41) Prior to the traffic stop and when his squad was behind the blue Toyota, Heinen immediately called into dispatch the number 9-2-0 as he knew there was an officer in the area with a K9 dog. The number 9-2-0 is the code request for a K9 dog to assist with a traffic stop, and Heinen did so while also calling in his traffic stop information. All of this was done before Heinen's lights or sirens were activated and before the traffic stop. (R. 28, pp. 13-14).

As soon as the traffic light on northbound Port Washington Road turned green, Heinen activated his squad's emergency lights. (R. 28, p. 14; p. 41) At this point, he had only witnessed the driver and passenger not wearing seatbelts, and the driver was wearing a multicolored hat with what he believed was a marijuana leaf. (R. 28, p. 42) The Toyota immediately put its left turn signal on and took a left turn (westbound) into the Bank Mutual parking lot on the west side of Port Washington Road. (R. 28, p. 42) Once the Toyota was stopped in the parking lot, Heinen witnessed one or more of the occupants smoking cigarettes. (R. 28, p. 15) Heinen testified that smoking cigarettes can be used as a cover odor for alcohol. (R. 28, pp 15-16)

Heinen exited his squad car and made contact with the driver, Branovan. He did not smell the odor of alcohol or marijuana, only cigarette smoke. (R. 28, p. 42) Heinen explained the nature of the traffic stop, and Branovan admitted that he knew he was going to be pulled over because he had made eye contact with Heinen while he was attempting to put on his seat belt. (R. 28, p. 17) Heinen obtained Branovan's driver's license (R. 28, p. 17) and saw what appeared to be a pill bottle in the middle of the center console with a missing label. (R. 28, p. 43) A picture of the pill bottle was marked and admitted as *Exhibit 3* at the motion hearing. (R. 29; R. 28, p. 43-44) The pill bottle was handed to Heinen by Branovan at Heinen's request, and there were no drugs in the bottle. (R. 28, p. 45) Heinen opened the container and smelled it. There was no indicia upon his smell of there being any marijuana or other drug inside the bottle. (R. 28, pp. 45-46) Branovan informed Heinen that the label was missing because he "just fidgets" (R. 28, p. 19) and that the bottle previously held his prescription Adderol medication. (R. 28, 49)

The K9 officer, City of Mequon Officer Schiller ("Schiller"), arrived on scene a few minutes later. (R. 28, p. 48) Schiller informed Heinen about a prior contact stop that he'd had with Branovan for possession of paraphernalia or controlled substances, and Schiller ordered Branovan and the passenger out of the vehicle. (R. 28, p. 48) There had been no drugs or weapons found in the vehicle at this point (R. 28, p. 46), and the two occupants of the vehicle were ordered to stand off to the side by the curb.

(R. 28, p. 50) Neither Branovan or the passenger were free to leave at that point. (R. 28, p. 51)

Schiller commenced his K9 around the vehicle at 8:37 of the video that was shown in court. (R. 29, Ex. 1) This was roughly 9 minutes after the initial traffic stop. The K9 search concluded at 9:20 on the video, and the K9 alerted on the vehicle. Branovan and the passenger were patted down and searched. No evidence of drugs or weapons were found on either. (R. 28, pp. 53-57) The police then commenced a full search of the automobile and found the controlled substance and paraphernalia that form the basis for the charges in this case. Branovan was arrested shortly after the search and seizure of evidence.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THE SEIZURE OF EVIDENCE WAS CONSTITIONALLY VALID

A. Standard of Review

The constitutionality of a seizure is a question of constitutional fact. *State v. Kieffer*, 217 Wis.2d 531, 541, 577 N.W.2d 352 (1998). We uphold a trial court's findings of historical fact unless clearly erroneous, but whether those facts pass constitutional muster is a question of law we review de novo. *State v. Vorburger*, 2002 WI 105, ¶ 32, 255 Wis.2d 537, 648 N.W.2d 829. "Whether police conduct constitutes a 'search' within the meaning of the [Wisconsin Constitution] is a question of law" subject to our independent review. *State v. Miller*, 2002 WI App 150, ¶ 5, 256

Wis.2d 80, 647 N.W.2d 348. "The question [of] whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact" that we also review independently. *State v. Griffith*, 2000 WI 72, ¶ 23, 236 Wis.2d 48, 613 N.W.2d 72. Accordingly, the legal review to this Court on the issue of the constitutionality of the search and seizure is *de novo*.

B. Branovan's detention after his initial contact with Sgt. Heinen was not reasonably related in scope to the purpose of the trafficstop

The United States and Wisconsin Constitutions protect the right of individuals to be free from unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11.

As this Court is well aware from the holding in *State v. Arias*, 2008 WI 84, the United States Supreme Court has determined that a dog sniff of the exterior of a vehicle is not a search within the meaning of the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 410, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005); see also *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). However, a seizure differs from a search, as it "deprives the individual of dominion over his or her person or property." *Horton v. California*, 496 U.S. 128, 133, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

Whether a seizure is reasonable within the context of a traffic stop depends on whether (1) "the seizure was justified at its inception" and (2) the "officer's action 'was reasonably related in scope to the circumstances which justified the interference

in the first place.' " *State v. Arias*, 2008 WI 84, ¶ 30, 311 Wis.2d 358, 752 N.W.2d 748 (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

"Reasonableness ... depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' " *Pennsylvania v. Mimms*, 434 U.S. 106, 109, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (citation omitted). A seizure becomes unreasonable when the incremental liberty intrusion resulting from the investigation supersedes the public interest served by the investigation. *Id*. In sum, an unconstitutional continuation of a once lawful seizure can occur when the extension of time for that needed to satisfy the original concern that caused the stop becomes unreasonable or when the means used to continue the seizure becomes unreasonable, both of which are evaluated under the totality of the circumstances presented. *State v. Arias*, ¶ 37.

Under the totality of the circumstances of the facts of this case, it is for this Court to examine the public interest, the degree to which the continued seizure advanced that public interest and the severity of the interference of Branovan's liberty interest. See *State v. Griffith*, 2000 WI 72, 236 Wis.2d 48, ¶ 37, 613 N.W.2d 72. In examining the reasonableness of Branovan's seizure, this Court must balance the public's interest in preventing the distribution of illegal drugs, the furtherance of that interest by the continued seizure of Branovan's vehicle and the effect on Branovan's liberty interest under the Fourth Amendment.

First off, this case does not present us with a case regarding the *distribution* of controlled substances. There was never any indication nor evidence that either the driver or passenger of the Toyota were engaged in selling drugs. The only limited inferences present before the arresting officers regarded finding seizing evidence of drug possession, nothing more.

The bare bones facts of the traffic stop are that Heinen sees Branovan not wearing a seat belt. He makes eye contact with him. He sees what appears to be a hat with a marijuana leaf on it. He gets directly behind the vehicle. Heinen immediately calls into dispatch with his location and requests a K9 officer to be on scene with a dog in order to do a search. In essence, Heinen made a conscious decision to call in a K9 officer to do a dog sniff simply because the driver did not have on a seat belt and was wearing a hat that appeared to have a marijuana leaf on it (which turned out not to be true).

The video evidence clearly shows that Branovan's car immediately put on its left turn signal, pulled into the bank parking lot and stopped after being alerted by Heinen's emergency lights. The occupants were smoking cigarettes. Branovan and the passenger remained in the vehicle. Heinen made contact with him and advised him that he was being stopped for not wearing a seat belt. Branovan admitted to not wearing a seat belt. Heinen did not smell an odor of alcohol or marijuana emanating from the automobile. He did not see any drugs or the indicia of drugs in plain view.

There were no signs of weapons. He saw the hat with a Hawaiian flower on it. He saw an empty pill bottle with the label peeled off and asked Branovan about it. Branovan said that the bottle was his, that it was an old bottle of his prescription Adderol and that the label was peeled as he "fidgets." When Heinen smelled inside the bottle, he did not smell any indicia of marijuana or any other illegal substance.

At that point, Heinen could have either (1) given Branovan and the passenger a warning for not wearing seat belts and sent them on their way or (2) issued citations to Branovan and/or the passenger for not wearing seat belts and sent them on their way. However, the important point about the facts of this case is that Heinen had no intention of doing that, and he knew it. He was going to keep Branovan and the passenger at bay until Schiller showed up at some subsequent point in time to conduct a K9 sniff of the car. He readily admitted to this on the witness stand, and this was made clear when he testified that he called in the 9-2-0 to dispatch *even before* he made any move to effectuate the traffic stop. That fact alone makes this particular detention unreasonable.

The video evidence shows that Heinen effectuated the traffic stop at 00:50. (R. 29, Exh 1) The Toyota stops in the bank parking lot at 01:32. (R. 29, Exh. 1) Heinen approaches the vehicle at 01:45. (R. 29, Exh 1) His initial contact with Branovan outside the vehicle ends at 03:10. (R. 29, Exh. 1) The video depicts Heinen saying it'll just be a moment. (R. 29, Exh. 1 at 03:09) There is no indication that Heinen is

doing anything to write a citation for a seat belt violation as he is simply awaiting the arrival of Schiller. (R. 29, Exh 1 at 03:10 – 05:29).

Schiller arrives on scene and gets Branovan and the passenger out of the vehicle at 05:29. (R. 29, Exh 1) He sends the K9 around the vehicle at 08:37. (R. 29, Exh 1) The sniff ends at 09:20. (R. 29, Exh 1) Branovan and the passenger are frisked by Heinen and Schiller at 10:35. (R. 29, Exh 1) The search of the vehicle commences at 12:55 and ends at 27:17. (R. 29, Exh 1) Branovan is arrested and handcuffed at 28:35 for possession of a controlled substance.

This traffic stop could have ended in less than 5 minutes. However, there was no possibility of that occurring as Heinen knew all along that he would be extending the stop to allow for a dog sniff. All of this simply because the occupants were not wearing seat belts and the driver had on a hat that "appeared" to have a marijuana leaf on it. Upon looking at the totality of the circumstances, this is simply unreasonable law enforcement activity. When balancing the public's interest against drug activity versus Branovan's liberty interests, the liberty interest has to win out.

Hypothetically speaking, one could ask if it would be reasonable for the police to detain an individual late for a tee time for a half hour for a dog sniff on a Sunday morning simply because he or she is wearing a Hawaiian hat without a seat belt on? One would trust that the answer to that question is a resounding "No." However, if this prolonged detention is upheld by this Court on these facts, then it is entirely

possible that such could be the case for law abiding citizens not only in Ozaukee County but in other counties in Wisconsin.

CONCLUSION

Based upon the arguments contained in this brief, Branovan moves the Court to reverse and remand the matter back to the trial court for entry of an Order granting Branovan's Motion to Suppress Evidence on the grounds that Branovan's detention after his initial contact with Sgt. Heinen was not reasonably related in scope to the purpose of the traffic stop. The subsequent seizure of evidence is therefore unconstitutional.

Dated this 13th day of June, 2016

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BRIEF CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,982 words. This brief was prepared using Microsoft Word word processing software. The length of the brief was obtained by use of the Word Count function of the software.

Dated this 13th day of June, 2016

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Attorney Christopher J. Cherella

CERTIFICATE 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 sec. 809.19(12), Wis. Stats. 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 13th day of June, 2016

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Attorney Christopher J. Cherella

APPENDIX CERTIFICATION

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 13th day of June, 2016

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Attorney Christopher J. Cherella

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DEFENDANT-APPELLANT'S APPENDIX

A. Notice of Compilation of Record

B. Amended Notice of Appeal

C. Criminal Complaint

D. Judgment of Conviction

E. Trial Court's Oral Decision (R. 28, pp. 69 - 74)