

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II**

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2017AP1807CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASETTA M. SMITH

Defendant-Appellant.

**AN APPEAL FROM THE DENIAL OF SMITH'S MOTION TO
SUPPRESS ENTERED ON JUNE 22, 2016 AND THE JUDGMENT
OF CONVICTION ENTERED AND SENTENCE IMPOSED ON
DECEMBER 9, 2016, IN THE CIRCUIT COURT OF WAUKESHA
COUNTY, BY THE HONORABLE MICHAEL J. APRAHAMIAN**

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

Did the trial court err by denying Smith's suppression motion?

Answer by Circuit Court: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The claims raised by Jasetta Smith do not present any change in law or warrant an extension in existing law therefore, oral argument and publication are not requested.

STATEMENT OF THE CASE

This is an appeal from a misdemeanor case in the circuit court for Waukesha County. On June 22, 2016, a motion to suppress evidence based on illegal seizure was heard and denied by the trial court. (38; App. 101-106). On, November 11, 2016, Smith plead guilty to operating with a restricted controlled substance. (36). On December 9, 2016, the Honorable Michael J. Aprahamian presiding sentenced Smith to 10 days jail and stayed that sentence pending appeal. (37). Smith now appeals.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In a criminal complaint, filed on February 2, 2016, Smith, was charged with one count of possession of THC and one count of operating with a restricted controlled substance. (1). Smith was stopped by the police, questioned and then a dog sniff was competed wherein a small amount of marijuana was found in the vehicle. (1). On June 22, 2016, the trial court heard Smith's suppression motion and denied the motion. (38; App. 107-167).

On, November 11, 2016, Smith plead guilty to operating with a restricted controlled substance. (36). On December 9, 2016, the Honorable Michael J. Aprahamian presiding sentenced Smith to 10 days jail and stayed that sentence pending appeal.

Trial counsel timely filed a Notice of Intent to Pursue Postconviction Relief on December 9, 2016. (15). A timely Notice of Appeal was filed on September 11, 2017. (24).

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DID NOT GRANT SMITH'S SUPPRESSION MOTION

The question of whether a traffic stop is reasonable is a question of constitutional fact. *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis.2d 86, 700 N.W.2d 899. A question of constitutional fact is a mixed question of law and fact to which a two step standard of review is applied. *State v. Martwick*, 2000 WI 5, ¶16, 231 Wis.2d 801, 604 N.W.2d 552. First the circuit court's findings of historical fact are reviewed under the clearly erroneous standard, and then an independent review of the application of those facts to constitutional principles. *State v. Payano-Roman*, 2006 WI 47, ¶16, 290 Wis.2d 380, 714 N.W.2d 548.

On January 27, 2016, Officer Lemanczyk testified that he initiated a traffic stop at 1:08am of Smith, after he saw the vehicle in front of him, ran a license plate check which revealed that the registered owner's drivers license was suspended. (38:5,29; App.112,136). Officer Lemanczyk testified that he didn't stop the car for bad driving, speeding or deviating within the lane of travel. (38:30; App.137). Officer Lemanczyk approached the vehicle and asked if she was "Gladys" the owner of the vehicle and she said she wasn't. (38:8-9; App.115-116). Officer Lemanczyk also testified that he didn't smell marijuana at the time of the stop. (38:41,46; App. 148,153). Officer Lemanczyk was able to learn that Smith has a valid driver's license. (38:9; App. 116).

At this point, Smith is not able to find her insurance and the officer was going to run a temporary compliance order for her. (38:11; App. 118). Officer Lemanczyk testified that when he was initially at the car, he smelled overpowering perfume and cigarettes

and that the driver did not want to make eye contact and when she did her eyes were glassy and bloodshot. (38:10-11; App. 117-118). Officer Lemanczyk testified that he did not put in his report that Smith had bloodshot eyes. (38:33-34; App. 140-141). Officer Lemanczyk also testified that Smith answered all of the questions that she was asked and her words were not slurred or labored. (38:35-36; App. 142-143). Officer Lemanczyk decides to have Officer Petz remove the passengers from the vehicle based on the eyes and the overpowering odor of perfume and cigarettes. (38:43; App. 150). Officer Lemanczyk also learns through records check that Smith was arrested for a similar OWI that was drug related. (38:18; App. 125). A dog sniff is then completed and a small amount of marijuana was found in the car. (38:43; App. 150). Officer Lemanczyk testifies that the entire traffic stop is about 13 minutes. (38:44; App. 151).

A traffic stop is a form of seizure triggering Fourth Amendment protections from unreasonable searches and seizures. *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987); *State v. Longcore*, 226 Wis. 2d 1, 6, 594 N.W.2d 412 (Ct. App.1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. “[A]n officer may perform an investigatory stop of a vehicle based on a reasonable suspicion of a non-criminal traffic violation” *State v. Colstad*, 2003 WI App 25, 260 Wis. 2d 406, ¶11, 659 N.W. 2d 394.(citing *State v. Griffin*, 183 Wis.2d 327, 331-34, 515 N.W.2d 535 (Ct. App. 1994). “If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun.” *State v. Betow*, 226 Wis.2d 90, 94–95, 593 N.W.2d 499 (Ct.App.1999). “The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.” *Id.*¶8.

The officer did not have reasonable suspicion to extend the investigation. “[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *See Rodriguez v. United States*, 135 S. Ct. 1609, 1614(2015). In the context of a traffic stop, “the tolerable duration of police inquiries” is determined by the mission of the seizure, the mission being “to address the traffic violation that warranted the stop ... and [to] attend to related safety concerns.” *Id.* at 1614. (citing *Illinois v. Caballes*, 543 U.S. 405 (2005)). Besides “determining whether to issue a traffic ticket, an officer’s mission includes ‘ordinary inquiries incident to [the traffic] stop,’” such as checking the driver’s license, determining whether the driver has any outstanding warrants, and inspecting the vehicle’s registration and proof of insurance. *Rodriguez*, at 1615. Once the tasks tied to the traffic infraction are completed, or within the time it should have reasonably taken to complete them, the authority for the seizure ends. *Id.* at 1614.

The overpowering smell of perfume cigarettes glassy eyes and the driver not wanting to make eye contact are not additional suspicious factors that are sufficient to give rise to an articulable suspicion that Smith has committed or is committing a crime. Even coupled with the fact of the prior OWI for drug related offense it was not enough additional suspicious factors that are sufficient to give rise to an articulable suspicion that Smith has committed or is committing a crime. There was no odor of marijuana when the officer came up to the car. Smith was able to answer questions and speak in a normal manner. Smith had a valid driver's license and was only going to be given a compliance order. The traffic stop was extended unreasonably as the officer could have easily handed Smith the compliance order and been on his way. Instead the seizure of Smith was extended in order to effectuate the drug sniff.

CONCLUSION

For, the reasons stated above Smith asks this Court to grant her suppression motion.

Respectfully submitted this
6th day of December, 2017.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is **1,125** words.

Respectfully submitted this 6th day
of December, 2017.

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CERTIFICATION OF ELECTRONIC FILING

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief report 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: December 6, 2017

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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 Wis. Stats. §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings, or opinion of the trial court; (3) a copy of any unpublished opinion cited under §909.23(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 trial court's reasoning regarding those issues.

I further certify that if this appeal is taken for 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juvenile 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: December 6, 2017

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