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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

08-05-2018

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2017AP1807-CR

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 OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

QUESTION PRESENTED

Did the circuit court err in finding that Officer Lemanczyk had reasonable suspicion to extend the traffic stop in order to pursue a drug and/or OWI investigation?

BRIEF ANSWER

No. The circuit court correctly held that Officer Lemanczyk had reasonable suspicion to have the occupants of the vehicle Smith was driving exit in order to have a dog sniff conducted, and properly denied Smith's motion to suppress evidence. Alternatively, Smith's motion to suppress evidence should be denied because the officer did not, in fact, extend the duration of the traffic stop.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent (“State”) submits that oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE

On January 27, 2016, at approximately 1:08 am Officer Lemanczyk conducted a traffic stop on a vehicle after running a license plate check and learning the registered owner's license was suspended. (R.38:5, 7). The driver of the vehicle was identified as Jasetta Smith. (*Id.*:9, 10). As the officer was initially at the car, he noted an overpowering odor of perfume and cigarettes. (*Id.*:10). The officer further noted that neither Smith nor her passenger wanted to make eye contact with the officer, Smith would mostly have slight side eye contact while speaking with the officer, but when she did turn her head and look at him he could see that her eyes were glassy and bloodshot. (*Id.*:10, 11). At that time of day, the body language was suspicious to the officer. (*Id.*:11).

The officer intended to run the vehicle occupants' information, and also issue Smith a compliance order for no insurance in her vehicle. (*Id.*). The officer returned to his squad car and began to run the driver and passenger's information at approximately 1:10:55 am and begins talking with City of New Berlin Canine Officer Ament, who had also arrived at the scene of the traffic stop, at approximately 1:13:21 am. (*Id.*:12, 13). Officer Lemanczyk requested an additional officer so that as he was issuing the citation, the additional officer and Officer Ament could manage the vehicle

occupants and Officer Ament could have his canine perform a dog sniff on Smith's vehicle. (*Id.*:13, 14).

Officer Lemanczyk stated, based on experience, that the time of night, the noted odor, and the blood shot and glassy eyes, that he believed the occupants of the vehicle could be trying to cover up the odor of something else. (*Id.*:14). Based on the officer's training and experience, he noted that an uncommon amount of air fresheners or a large amount of dryer sheets in vehicles have almost always had some sort of drugs in the car. (*Id.*:15). Officer Lemanczyk continues running his checks and learns that Jasetta Smith was arrested for a similar OWI investigation which he knew from talking with the other officer was drug related. (*Id.*:18).

At approximately 1:17:21 am Officer Lemanczyk is still writing the citation for Smith, but is also speaking with other officers, as the intention was for Officer Petz to get the occupants of Smith's vehicle out and Officer Ament to walk around the vehicle with his canine. (*Id.*:20). At 1:20:58 Officer Lemanczyk is still working on the citation, and had started and continuously worked on the citation. (*Id.*:22). At 1:21:12 am Officer Ament has notified over his radio that there was a positive canine alert on Smith's vehicle. (*Id.*:23). At 1:22:10 am Officer Lemanczyk has exited his vehicle to discuss the positive alert with Smith, but had been continuously working on the insurance citation up to that point. (*Id.*:24, 25). Smith

admitted there would be “roaches” in the car, admitted to smoking that day, marijuana roaches were found in the car, and Officer Lemanczyk then continued with an OWI investigation. (*Id.*:25-27).

ARGUMENT

THE CIRCUIT COURT PROPERLY DENIED MS. SMITH'S MOTION TO SUPPRESS.

On June 22, 2016, the Honorable Michael J. Aprahamian, presiding over the Waukesha County Court, denied the Defendant-Appellant Jasetta Smith's motion to suppress evidence based upon the officer allegedly unreasonably extending a traffic stop. The State attempted to argue that taking the occupants out of the vehicle and performing the dog sniff did not extend the stop, and thus was lawful. (R.38:48-49). The court determined that removing the occupants was an extension of the stop, and cut off that argument. (*Id.*:49).

The court then requested argument as to what reasonable suspicion existed to extend the stop at the point the occupants were removed. (*Id.*). After hearing argument, the court noted "at the initial stop...[Officer Lemanczyk] did detect an odor of perfume and cigarettes and some glassy eyes at the time." (*Id.*:56). Additionally, "a prior OWI with this particular witness just recent. [Officer Lemanczyk] had personal knowledge of it and related to a drug incident and other drug related offenses." (*Id.*). The court further noted "the body language, the perfume that was overpowering, the glassy eyes, and then also specifically the prior OWI offense just recently and having personal knowledge of the drug related offenses with this

particular defendant.” (*Id.*:56-57). The court found that under the totality of the circumstances, the officer had reasonable suspicion to prolong the stop. (*Id.*:57).

Ms. Smith subsequently pled guilty to operating a motor vehicle under the influence of a restricted controlled substance, second offense, contrary to Wis. Stat. § 346.63(1)(am). Ms. Smith now appeals from the judgment of conviction, again asserting that the circuit court erred in denying her pre-conviction motion to suppress evidence. Ms. Smith argues that Officer Lemanczyk lacked reasonable suspicion to extend the traffic stop of Ms. Smith based upon the facts presented.

When reviewing a circuit court’s denial of a motion to suppress evidence, this court will uphold the court’s factual findings unless clearly erroneous, but will review the court’s application of the facts to constitutional principles de novo. *State v. Stout*, 2002 WI App 41, ¶9, 250 Wis. 2d 768, 641 N.W.2d 474. The existence of reasonable suspicion is a question of both law and fact. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. This Court should uphold the factual findings concerning the existence of reasonable suspicion unless clearly erroneous, and review de novo the application of these factual findings to constitutional principles.

Here, Ms. Smith's argument fails because it is based upon an incorrect application of the pertinent constitutional principles and law. The circuit court properly denied Ms. Smith's motion to suppress, and this court should affirm the judgment of conviction.

I. OFFICER LEMANCZYK HAD REASONABLE SUSPICION TO EXTEND THE TRAFFIC STOP, REMOVE THE OCCUPANTS OF THE VEHICLE, AND HAVE A DOG SNIFF PERFORMED ON THE VEHICLE, SO THE TRIAL COURT DID NOT ERR.

The circuit court correctly held that Officer Lemanczyk had reasonable suspicion to extend the traffic stop. An officer can conduct a traffic stop based upon reasonable suspicion that a traffic violation has or is occurring. *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).

Reasonable suspicion is "'more than a police officer's inchoate and unparticularized suspicion or hunch.'" Rather, the officer 'must be able to

point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop.” *Post*, 2007 WI at ¶ 10 (quoting *Terry v. Ohio*, 88 S. Ct. 1868, 1883, 392 U.S. 1 (1968)). The test for reasonable suspicion is based upon the totality of the facts and circumstances. *Post*, 2007 WI at ¶ 13.

On appeal, Ms. Smith is not challenging the validity of her initial traffic stop. She merely argues that it was extended, and the officer did not have reasonable suspicion for this extension. If this traffic stop was in fact extended for the purpose of performing a dog sniff, the officer did have reasonable suspicion based on specific and articulable facts to extend the initial traffic stop. In this case, Officer Lemanczyk performed a traffic stop on a vehicle Ms. Smith was driving at approximately 1:08 am. (R.38:5. As the officer was initially at the car, he noted an overpowering odor of perfume and cigarettes. (*Id.*:10). The officer further noted that neither Smith nor her passenger wanted to make eye contact with the officer, Smith would mostly have slight side eye contact while speaking with the officer, but when she did turn her head and look at him he could see that her eyes were glassy and bloodshot. (*Id.*:10, 11). At that time of day, the body language was suspicious to the officer. (*Id.*:11).

Officer Lemanczyk stated, based on experience, that the time of night, the noted odor, and the blood shot and glassy eyes, that he believed the occupants of the vehicle could be trying to cover up the odor of

something else. (*Id.*:14). Based on the officer's training and experience, he noted that an uncommon amount of air fresheners or a large amount of dryer sheets in vehicles have almost always had some sort of drugs in the car. (*Id.*:15). Officer Lemanczyk continues running his checks and learns that Ms. Smith was arrested for a similar OWI investigation which he knew from talking with the other officer was drug related. (*Id.*:18). Ms. Smith and her passenger are subsequently removed from their vehicle, and a dog sniff is performed. (*Id.*:23).

If removing the occupants from the vehicle in order to perform a dog sniff in this case is considered an extension of the traffic stop, based upon the testimony of the officer, he did have reasonable suspicion to expand the scope of the stop, and accordingly the defendant's motion to suppress evidence was properly denied.

II. ALTERNATIVELY, THE DENIAL OF THE DEFENDANT'S SUPPRESSION MOTION SHOULD BE UPHOLD BECAUSE THE OFFICER DID NOT EXTEND THE LENGTH OF THE TRAFFIC STOP BEYOND THE TIME NEEDED TO ISSUE THE CITATION WHEN THE DOG SNIFF WAS CONDUCTED.

A police officer can lawfully order the driver of a vehicle during a traffic stop to exit the vehicle. *Pennsylvania v. Mimms*, 98 S. Ct. 330, 333, 434 U.S. 106 (1977). A police officer can also require passengers of a

vehicle that has been stopped to exit the vehicle during the stop. *Maryland v. Wilson*, 117 S. Ct. 882, 886, 519 U.S. 408 (1997). Law enforcement officers can also conduct a dog sniff of a vehicle during a traffic stop without violating the fourth amendment. *Illinois v. Caballes*, 125 S. Ct. 834, 838, 543 U.S. 405 (2005). This is true so long as the dog sniff does not prolong beyond “the amount of time ‘reasonably required to complete [the stop’s] mission.’” *Rodriguez v. U.S.*, 135 S. Ct. 1609, 1616, 191 L.Ed.2d 492 (2015) (quoting *Caballes*, 125 S. Ct. at 837).

In this case, at approximately 1:08 am Officer Lemanczyk conducted a traffic stop on a vehicle Ms. Smith was driving. (R.38:5). The officer intended to run the vehicle occupants’ information, and also issue Smith a compliance order for no insurance in her vehicle. (*Id.*:11). The officer returned to his squad car and began to run the driver and passenger’s information at approximately 1:10:55 am and begins talking with City of New Berlin Canine Officer Ament, who had also arrived at the scene of the traffic stop, at approximately 1:13:21 am. (*Id.*:12, 13). Officer Lemanczyk requested an additional officer so that as he was issuing the citation, the additional officer and Officer Ament could manage the vehicle occupants and Officer Ament could have his canine perform a dog sniff on Smith’s vehicle. (*Id.*:13, 14).

Officer Lemanczyk continues running his checks and learns that Jasetta Smith was arrested for a similar OWI investigation which he knew from talking with the other officer was drug related. (*Id.*:18). At approximately 1:17:21 am Officer Lemanczyk is still writing the citation for Smith, but is also speaking with other officers, as the intention was for Officer Petz to get the occupants of Smith's vehicle out and Officer Ament to walk around the vehicle with his canine. (*Id.*:20). At 1:20:58 Officer Lemanczyk is still working on the citation, and had started and continuously worked on the citation. (*Id.*:22). At 1:21:12 am Officer Ament has notified over his radio that there was a positive canine alert on Smith's vehicle. (*Id.*:23). At 1:22:10 am Officer Lemanczyk has exited his vehicle to discuss the positive alert with Smith, but had been continuously working on the insurance citation up to that point. (*Id.*:24, 25).

Officer Lemanczyk had lawfully stopped Ms. Smith's vehicle. He gathered information from her and her passenger and began running that information as he would for any traffic stop. He also began filling out the compliance order for no insurance. He continuously worked on that, and as he did so different officers requested Ms. Smith and her passenger exit the vehicle, which they are lawfully allowed to do. A canine officer was present and a dog sniff was conducted of the vehicle Ms. Smith was driving, which is also lawful. The dog alerted on the vehicle. Officer

Lemanczyk was still working on the compliance order when this occurred. Thus, as the State attempted to argue at the original motion hearing, the traffic stop was not prolonged due to the dog sniff, and accordingly the defendant's motion to suppress should have been denied.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that the Court affirm the circuit court's decision denying the defendant's motion to suppress.

Dated this 2nd day of March, 2018.

Respectfully,

s/David Behm
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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced with proportional font. The length of this brief is 2,353 words long.

Dated this 2nd day of March, 2018.

s/David Behm
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § 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 certification has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of March, 2018.

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