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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Case No. 2019AP248-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHELLE A. GREENWOOD,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered
in the Circuit Court for Marathon County,
the Honorable Gregory Huber, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did the officer unlawfully prolong the traffic stop for speeding when, after concluding his tasks related to the traffic infraction, and without reasonable suspicion of criminal activity, he asked Ms. Greenwood to perform field sobriety tests and allowed a K-9 to sniff her car?

The circuit court denied Ms. Greenwood's motion to suppress.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under Wis. Stat. § 752.31(2)(f) and (3), making publication inappropriate. Wis. Stat. § 809.23(1)(b)4; *see also Waukesha County v. Genevieve M.*, 2009 WI App 173, ¶5, 322 Wis. 2d 131, 776 N.W.2d 640. Oral argument is not requested.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Just before 11 p.m. on February 2, 2017, Michelle Greenwood was driving on I-39 in Marathon County. (36:5; App.107). With her in the car, were Ms. Greenwood's sister and her 15-year-old son. (2:3; 36:8; App. 110).

Rothschild Police Officer Richard Klieforth clocked Ms. Greenwood's speed at 81 miles per hour in a 70 miles per hour zone. The officer pulled Ms. Greenwood over. (36:5; App. 107).

Ms. Greenwood pulled to the shoulder of the road. (36:5; App. 107). When Officer Klieforth approached the vehicle, Ms. Greenwood did not appear nervous and was not making any movements that raised his suspicion. (36:9). She handed over her driver's license without any difficulty. (36:10).

During this time, Officer Klieforth noted that Ms. Greenwood's eyes were "blatantly" dilated, glassy and bloodshot. (36:6; App. 108). When he shined his flashlight on Ms. Greenwood, he noted that her pupils were slow to react to the light. (36:8; App. 110). He believed this was an indication that she was under the influence of marijuana. (36:8; App. 110).

At a suppression hearing, Officer Klieforth acknowledged that he is not a drug recognition expert and did not perform drug recognition tests. (36: 10; App. 112). He explained that many of the people he has seen who have used marijuana have dilated pupils and that he learned about the pupils being slow to react to light from a drug recognition expert. (36:14; App. 116). He also acknowledged that "everybody has different [] indications when they use different types of drugs." (36:14; App. 116).

Officer Klieforth did not smell any odors of drugs coming from the vehicle, nor did he notice any air fresheners being used. (36:10; App. 112). He did not see any drug paraphernalia or observe any signs of drug use on Ms. Greenwood such as sores or marks

on her arms indicating intravenous use of drugs. (36:10; App. 112).

The officer also noted that Ms. Greenwood's words were not slurred when they spoke. (36:10; App. 112). Ms. Greenwood indicated that she had been speeding because she needed to get to a restroom. (36:9; App. 111).

Officer Klieforth returned to his squad car and checked Ms. Greenwood's record. (36:11; App. 113; 2:4). His records check showed that Ms. Greenwood did not have any prior drug-related arrests. (35:15; App. 117; 2:4). Officer Klieforth issued a speeding ticket for Ms. Greenwood. (36:10; App. 112).

Officer Klieforth then returned to Ms. Greenwood's car and asked her to step outside. (36:12; App. 114). Officer Klieforth asked Ms. Greenwood when she had last smoked marijuana, and she responded it had been 3 days. (2:4). He asked again about her need to get to a restroom, Ms. Greenwood now said she had been able to use the restroom before she left home. (2:4). Officer Klieforth then conducted field sobriety tests. (2:4).

About 7 minutes after Officer Klieforth asked Ms. Greenwood to step outside, the K-9 unit that officer Klieforth called arrived. (36:13; App. 115). The K-9 alerted and the officers located smoking devices and a small plastic baggy of a green leafy substance of suspected marijuana. (2:5).

The state charged Ms. Greenwood with 1st offense operating while intoxicated with a minor in the vehicle, possession of THC, and possession of drug paraphernalia. (2).

Ms. Greenwood filed a motion to suppress alleging that there was no reasonable suspicion to extend the stop after the traffic ticket was issued in order to conduct field sobriety tests or to allow the K-9 to sniff the car. (20). The circuit court denied the motion to suppress after a hearing held on December 1, 2017. (36). The circuit court held:

Okay. The testimony and the facts are on the record that she was pulled over for speeding, that the officer testified that upon pulling her over, he detected her dilated eyes and said they were reddened and bloodshot, glassy, and that they explained the rebound effect, that they were slow to respond.

He testified that he's had approximately 100 or more contacts with people that have been using drugs, and apparently a large number of those people that use marijuana do have the same symptoms reflected in their eyes as Miss Greenwood did. And the officer said he had been trained to look for that by a drug recognition expert. So he saw that – he saw that she was speeding.

Then she admitted that she had at one point used marijuana, which would indicate that she's not unfamiliar with the use of marijuana. The fact that her eyes were that way, that she had been speeding, gave contradictory statements regarding the reason.

So I think the officer did have reasonable suspicion to continue, once he gave her the ticket for speeding, to continue the stop. And since the standard is not impaired driving, but rather driving with detectible amount of THC in the bloodstream, and the officer knew that she had been driving, and from his experience, believed

that she had been using marijuana as seen through looking at her eyes basically, that that would give him probable cause to at least commence the field sobriety tests. It is better to do the drug recognition field sobriety tests, but the other field sobriety tests, for what they're worth, can show some indicia of impairment.

So the motion to suppress will be denied.

(36:19-20; App. 121-122).

Ms. Greenwood entered a guilty plea to Count 1, operating while intoxicated with a minor in the vehicle, on December 19, 2017. The state agreed to move to dismiss and read-in the two remaining counts. On that same date, the court imposed a five-day jail sentence as well as a fine and court costs. (37:9-10).

ARGUMENT

The Continued Detention of Ms. Greenwood After Resolution of the Speeding Violation Was Not Supported by Reasonable Suspicion of Criminal Activity and Therefore Evidence Obtained During the Unlawful Seizure Must Be Suppressed.

While driving with her family, Ms. Greenwood was pulled over for speeding. After the officer issued a speeding ticket, having completed the task tied to the stop, he returned to her car. At that point, the seizure should have ended. Instead the officer asked her to perform field sobriety tests while awaiting a K-9 unit. The officer extended the seizure based on his impression of her dilated pupils and their slow reaction to light. This extension of the traffic stop

was without reasonable suspicion and therefore the evidence obtained during the unlawful seizure must be suppressed.

A traffic stop is a seizure triggering the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution. *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623.

Whether a seizure is lawful is a question of constitutional fact. *State v. House*, 2013 WI App 111, ¶4, 350 Wis. 2d 478, 837 N.W.2d 645. The circuit court's findings of historical fact will be upheld unless they are clearly erroneous. *State v. Hogan*, 2015 WI 76, ¶32, 364 Wis. 2d 167, 868 N.W.2d 124. But whether those facts "pass constitutional muster" is a question of law reviewed *de novo*. *House*, 350 Wis. 2d 478, ¶4.

An investigative detention pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), must last no longer than is necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983). When the purpose of the stop is to investigate a traffic violation, as occurred here, the permissible duration of the stop is determined by its "mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). In *Rodriguez v. United States*, 135 S.Ct. 1609, the Supreme Court made clear that the mission of a traffic stop is limited to two tasks: (1) addressing the traffic violation that warranted the stop; and (2) making inquiries related to vehicular safety, such as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the

vehicle's registration and proof of insurance. *Rodriguez*, 135 S.Ct. at 1614-1615.

The stop of Ms. Greenwood's car to address the speeding was lawful. The mission of the traffic stop ended when the officer checked Ms. Greenwood's record and issued a ticket for speeding.

Despite this, the officer asked Ms. Greenwood to step outside the vehicle and began asking additional questions about her destination and prior drug use. The officer ultimately administered field sobriety tests while awaiting the arrival of the K-9 unit. The officer turned from the mission of the traffic stop and extended the duration of the seizure by having her step out of the vehicle, conducting field sobriety tests and allowing the K-9 unit to arrive and circle the car. This new mission was pursued without reasonable suspicion of criminal activity.

An officer may expand the scope and duration of a traffic stop only if there is reasonable suspicion of criminal activity. *Hogan*, 364 Wis. 2d 167, ¶35. An officer's "inchoate and unparticularized suspicion or hunch" will not suffice. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634, quoting *Terry*, 392 U.S. at 27. The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the continued detention. *Id.*, quoting *Terry*, 392 U.S. at 21.

The officer's drug investigation was commenced based on the officer's observation about Ms. Greenwood's eyes. The officer noted that "her pupils were blatantly dilated, and her eyes were glassy and bloodshot. (36:6; App. 108). At the time the officer

completed the traffic ticket, he had already made the observations about her eyes. (36:15; App. 117). However, this alone does not support a finding of reasonable suspicion and none of the additional observations the officer made up until that point help to support a finding of reasonable suspicion. The officer knew that Ms. Greenwood pulled over to the shoulder of the road promptly, did not appear nervous, did not make furtive movements, was not slurring her words, and was able to locate her driver's license without issue. (36:10). Hid did not smell the odor of marijuana or notice any air fresheners. (36:10; App. 112). Finally, his records check indicated Ms. Greenwood did not have prior arrests related to drugs. (36:15; App. 117 2:4).

The officer's observations about Ms. Greenwood's eyes, without more, do not amount to reasonable suspicion that she was driving under the influence of marijuana. Ms. Greenwood's eyes may have been dilated because it was a dark winter night. Drivers may have red eyes at the end of a night of driving.

Certainly, conduct that could have an innocent explanation may give rise to reasonable suspicion. *State v. Waldner*, 206 Wis. 2d 51, 59-60, 556 N.W.2d 681 (1996). And when assessing an officer's actions, the court should give weight to his training and experience, as well as his knowledge acquired on the job. *State v. Betow*, 226 Wis. 2d 90, 98, 593 N.W.2d 499 (Ct. App. 1999). However, this court has recognized that while the officer's training and experience is one factor to consider, "that fact 'does not require a court to accept all of [the officer's] suspicions as reasonable, nor does mere experience

mean that an [officer's] perceptions are justified by the *objective* facts.” *Id.* at 98 n.5, quoting *State v. Young*, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997) (emphasis in original).

Here, the officer relied on his training and experience to conclude that the size of Ms. Greenwood’s pupils and their reaction to light indicated drug use. However, Officer Klieforth also acknowledged that he was not trained as a drug recognition expert and did not conduct any drug recognition tests. He also twice acknowledged that despite having experience with many people believed to be under the influence of marijuana, that “everybody’s different” in terms of their reactions to different drugs. (36:7; App. 109; 36:14; App. 116).

The Wisconsin Supreme Court has previously addressed an officer’s observations of a driver’s pupils in *State v. Hogan*, 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124. There, an officer with 12 and a half years of experience noted a driver’s restricted pupils and believed they provided a basis to extend a traffic stop in order to conduct field sobriety tests. *Id.*, ¶ 45-47. Although experienced, the officer was not a drug recognition expert. *Id.*, ¶ 47. He testified that he was familiar with the pupilometer and believed cocaine could cause a person’s pupils to restrict. *Id.* However, the circuit court “put no stock in the deputy’s testimony about restricted pupils as a factor establishing reasonable suspicion” because the officer did not have definitive information on how drug use may affect pupil size. *Id.*, ¶ 48. The Wisconsin Supreme Court affirmed the circuit court’s findings. *Id.*, ¶53.

Here too, Officer Klieforth had a similar number of years of experience, but was not a trained drug recognition expert. While he noted he had observed dilated pupils in people using marijuana before, he did not provide the kind of definitive information about pupil size and drug use that was similarly lacking in *Hogan*. Rather, he acknowledged that not everyone will have dilated eyes and that everyone has different indications when they use different types of drugs. (36:14; App. 116). Just as in *Hogan*, the observations of an officer not trained as a drug recognition expert who does not testify to definitive information about pupil size and its relation to drug use should not support a finding of reasonable suspicion.

State v. Hogan also illustrates that both constricted and dilated pupils can be attributed to drug use. If courts allow officers to detain drivers if an officer believes that their eyes are either constricted or dilated by a matter of millimeters, a huge number of drivers could be seized beyond the time necessary for the completion of routine traffic stops.

Here, the traffic stop should have concluded when the officer issued the speeding ticket. There was not reasonable suspicion to continue the detention.

CONCLUSION

For the reasons set forth above, Michelle Greenwood respectfully asks this court to reverse the judgment of conviction and remand to the circuit court with directions to suppress all evidence obtained during the unlawful seizure.

Dated this 5th day of June, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,373 words.

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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 5th day of June, 2019.

Signed:

ELLEN J. KRAHN
Assistant State Public Defender

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 § 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 one or more initials or other appropriate pseudonym or designation 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 5th day of June, 2019.

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APPENDIX

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