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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2020AP1813-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ASHLEY JEAN CAMPBELL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in the
Circuit Court for Sawyer County,
the Honorable John M. Yackel, Presiding

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did law enforcement violate Ms. Campbell's Fourth Amendment rights when a narcotics-trained dog instinctually entered into her vehicle without any facilitation by law enforcement?

The circuit court answered the entry and sniff of the interior of the vehicle was not a violation of the Fourth Amendment.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication may be appropriate, as this case involves a legal issue presently unresolved in Wisconsin.

INTRODUCTION

This case presents the question of whether a drug-detecting canine conducting a free air sniff around a motor vehicle on the side of a public roadway violates the Fourth Amendment when the trained dog alerts his handler to the presence of drugs by entering a car door left open by the driver of the vehicle. The Court applying Fourth Amendment law and the specific facts of this case should conclude the alert inside the vehicle did not convert the free air sniff to an illegal search.

SUPPLEMENTAL STATEMENT OF THE CASE*Suppression hearing testimony*

Sergeant Nick Al-Moghrabi of the Sawyer County Sherriff's Department testified that on December 15, 2017, while working as a canine handler, he was called to assist Wisconsin State Trooper Mitch Kraetke on a traffic stop on State Highway 70 in Sawyer County. (R. 25:6-7)

Upon arrival at the scene, Sergeant Al-Moghrabi saw Trooper Kraetke seated in his squad car and briefly met with him. (R. 25:7) Sergeant Al-Moghrabi learned the driver, Ashley Campbell, was suspended and there was a revoked passenger inside the vehicle the Trooper had stopped. (R 25:8)

Sergeant Al-Moghrabi then approached the passenger side of the vehicle and had a conversation with the occupants through the window. (R. 25: 10, 12) After speaking with the occupants, they both agree to step out of the vehicle at the sergeant's direction and moved to the front of Trooper Kraetke's squad. (R.25:12) While doing so, Sergeant Al-Moghrabi returned to his vehicle and retrieved his K-9, Trace. (R.25:4, 12) The sergeant placed a 6-foot leash on Trace and together they walked to the front of Ms. Campbell's vehicle. (R.25:12)

At the front of the vehicle Sergeant Al-Moghrabi placed Trace in a prescribed stance and gave the dog the command to begin his scan of the vehicle. (R.25:12) A "scan" was defined by Sergeant Al-Moghrabi as allowing the dog to sniff without direction of his handler versus "detailing" where the handler points to specific locations to be sniffed. (R.25:13-14) Trace began to scan the front then driver's side of the vehicle. (R.25:14) As Trace approached the driver's side door, Sergeant Al-Moghrabi noted the door was left open by Ashley Campbell. (R.25:14) Neither the sergeant nor the trooper directed Ms. Campbell to leave her door open. (R.25:15, 23)

Trace entered the open driver's side door without the direction of his handler and immediately started sniffing intently and scratching at a brown purse on the floor of the vehicle and would not leave it. (R.25:16) Sergeant Al-Moghrabi described the actions of Trace entering the car, going to the purse, sniffing intently, scratching at the item and refusal to leave the purse as an alert. (R.25:16-17) Through his training, Sergeant Al-Moghrabi described the dog scratching or biting to be an aggressive alert. (R.25:25)

The sergeant pulled Trace out of the vehicle and continued to scan the rest of the vehicle. (R.25:17) Upon completing the scan, Sergeant Al-Moghrabi attempted to begin to "detail" the vehicle, but Trace returned to the open driver's door and entered. (R.25:17-18) Again, the dog lead his handler to the purse and, as it appeared the dog was about to bite the purse, Sergeant Al-Moghrabi removed the dog from the vehicle. (R.25:18) After backing out of the vehicle the canine produced a final response by coming to a sit. (R.25:19) Through his training, Sergeant Al-Moghrabi described the dog coming to a sit to be a passive alert. (R.25:25)

Based upon the alerts to the brown purse, Sergeant Al-Moghrabi searched the purse and found marijuana. (R.25:20, 23) The State charged Campbell with two crimes, possession of tetrahydrocannabinols (THC) and possession of drug paraphernalia. (R.1:1-5)

Campbell, through defense counsel, filed a motion seeking an order suppressing evidence, arguing that law enforcement violated her Fourth Amendment rights. (R.10). The court convened an evidentiary hearing on March 28, 2019 and heard the testimony of Sergeant Al-Moghrabi. (R.25) In

addition, the State offered video footage of the encounter into evidence. (R. 30)

After hearing argument from both parties, the circuit court made the following factual findings based on the evidence presented at the hearing:

- The door to the vehicle was left open
- The dog was on a loose leash
- During the initial sniff of the vehicle the dog, without any direction from a law enforcement officer, jumped into the vehicle
- Law enforcement did not ask the occupants of the vehicle to leave the door open

(R.22:2-3)

Comparing United States v. Guidry, 817 F.3d 997 (7th Cir. 2016) to United States v. Winningham, 140 F.3d 1328 (10th Cir. 1998) the court found "that there is no 4th Amendment violation here when a dog jumps instinctively through an open car door without any facilitation by its handler." (R.22:3)

After denying the suppression motion, the court accepted Ms. Campbell's plea and found her guilty. (R. 24:3) The court ordered Campbell to pay a fine including costs of \$673.50. (R.24:4)

Campbell now appeals her judgment of conviction resulting from the court's denial of her suppression motion.

ARGUMENT

The circuit court properly denied Campbell's motion to suppress because the dog sniff did not violate her Fourth Amendment rights.

Campbell asserts that law enforcement, by use of a drug-detection dog, unlawfully searched her vehicle when the dog entered her vehicle. (Campbell Br. 10) Her claim fails because a drug-detection dog's entry into a vehicle without facilitation by law enforcement does not constitute a search within the meaning of the Fourth Amendment.

I. Standard of review

This Court is reviewing the circuit court's denial of Campbell's motion to suppress evidence that asserted law enforcement unlawfully allowed a drug-detection dog to enter Ms. Campbell's vehicle.

The determination of whether to uphold an order denying a motion to suppress evidence is a question of constitutional fact, to which this Court applies a two-step standard of review. State v. Samuel, 2002 WI 34 ¶ 15, 252 Wis.2d 26, 643 N.W.2d 423. This Court will uphold the circuit court's factual findings unless clearly erroneous,

but reviews whether those facts meet the constitutional standard de novo. Id.

II. Fourth Amendment protections of a vehicle

The Fourth Amendment to the United States Constitution and article I, § 11 of the Wisconsin Constitution, protect a person's right against unreasonable searches and seizures.¹ State v. Miller, 2002 WI App 150, ¶5, 256 Wis.2d 80, 647 N.W.2d 348. Those protections extend to vehicles. United States v. Jones, 565 U.S. 404 (2012). "Whether police conduct constitutes a "search" within the meaning of the state and federal constitutions is a question of law" Miller, 256 Wis.2d 80, ¶5 (citing, State v. Edgeberg, 188 Wis.2d 339, 344-45, 524 N.W.2d 911 (Ct. App. 1994)).

Although Wisconsin has no case directly on point, many Federal Courts have held that dog sniffs in circumstances similar to these were not "searches" within the meaning of the Fourth Amendment.

In United States v. Place, 462 U.S. 696, 707 (1983) the Supreme Court held a canine sniff of luggage in an airport was not considered a search under the Fourth

¹ Wisconsin courts have generally viewed the scope of art. I, sec. 11 of the state constitution to be coterminous with the Fourth Amendment. State v. Robinson, 2010 WI 80, ¶ 24 n.11, 327 Wis. 2d 302, 786 N.W.2d 463.

Amendment. The Court stated dog sniffs to be "sui generis" in that they are less intrusive than a typical search, only disclose contraband if it exists inside the item and produces limited information. Id.

The Tenth Circuit, in United States v. Stone, 866 F.2d 359, 365 (10th Cir. 1989) found a dog's instinctive actions of jumping in the back of an open hatchback did not violate the Fourth Amendment. Mr. Stone was the one who opened the hatchback and the Court found the dog jumped into the vehicle on his own without the encouragement of his handler. Id. at 361-362.

In another case, by contrast, the Tenth Circuit found when officers opened the door to a van and unleashed the dog to facilitate a dog sniff in the interior of the van, this conduct by law enforcement constituted a search under the Fourth Amendment. United States v. Winningham, 140 F.3d 1328, 1331 (1998).

Like Place, City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) and Illinois v. Caballes, 543 U.S. 405, 409 (2005) found a canine sniff around the exterior of a vehicle not to be a search under the Fourth Amendment. "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a

substance that no individual has any right to possess does not violate the Fourth Amendment.” Caballes at 409-410.

The instinctive actions of a trained canine were again reviewed by the Eighth Circuit in United States v. Kelvin R. Lyons, 486 F.3d 367 (2007). There, Sgt. Duis gave his dog the command to search and as they walked around the vehicle the dog alerted and nearly indicated to the presence of narcotics. Id. at 370. However, before doing so, the dog stuck his head through the open passenger-side window. Id. The Eighth Circuit affirmed the district court’s ruling denying suppression because the passenger, not police, opened the passenger side window without any direction from the officer, and Sgt. Duis did not encourage or facilitate the dog placing his head inside the window. Id. at 373. “Absent police misconduct,” the court stated, “the instinctive actions of a trained canine do not violate the Fourth Amendment.” Id. at 373, (citing, United States v. Reed, 141 F.3d 644, 650 (6th Cir.1998); United States v. Lyons, 957 F.2d 615, 617 (8th Cir. 1992); Stone, 866 F.2d at 364).

Similarly, in 2009, the Tenth Circuit found no search where “a sniff [occurred] during a lawful detention when ... (1) the dog’s leap into the car was instinctual rather

than orchestrated and (2) the officers did not ask the driver to open the point of entry.” United States v. Vazquez, 555 F.3d 923, 930 (10th Cir. 2009).

Likewise, in Pierce, a dog entered the front seat through the open driver’s door and alerted in the areas of the passenger seat and glove box. United States v. Pierce, 622 F.3d 209, 210 (3rd Cir. 2010). Pierce claimed the handler facilitated the entry into the car by extending the leash. Id. The Third Circuit affirmed, however, finding the sniff of the interior of the car not to be a search because the dog instinctively jumped in the car on his own without assistance from his handler and the door was left open by Pierce. Id. at 212. The word instinctive was defined as when a “dog enters the car without assistance, facilitation, or other intentional action by its handler.” Id. at 214.

III. Trace’s entry into Campbell’s vehicle was not a “search.”

Here, the circuit court properly denied Campbell’s motion to suppress because Trace’s entry into the vehicle was not a “search” within the meaning of the Fourth Amendment. See Stone, 866 F.2d at 365; Pierce, 622 F.3d at 210; Lyons, 486 F.3d at 373. Once Trace alerted to the

presence of drugs in the car, police had probable cause to search it without a warrant. See Carrol v. United States, 267 U.S. 132, 149 (1925). Thus, the circuit court correctly found that there was no Fourth Amendment violation.

Campbell offers United States v. Jones, 565 U.S. 400 (2012) for the proposition that police conduct may become a search if it was conducted by a physical intrusion into a protected place, like a vehicle. (Campbell Br. at 10, 13). Further, Campbell offers Florida v. Jardines, 569 U.S. 1 (2013) as a pivotal decision changing the law to prevent dog sniffs conducted in constitutionally protected places (as opposed to public places). (Campbell Br. at 12). Neither of these cases dictates Campbell's desired result.

Jones involved an ongoing intrusion into the defendant's vehicle following the placement of a GPS device that occurred as a result of police activity. Jones, 565 U.S. at 403. The Court concluded that this was a "search" within the meaning of the Fourth Amendment because police "physically occupied private property for the purpose of obtaining information." Id. at 404. Here, by contrast, Trace's entry into the car was the result of an animal acting on its instincts, not directed police action. In other words, police did not "physically occup[y] private

property for the purpose of obtaining information" here because police did not have a purpose for the brief intrusion into the vehicle; it occurred accidentally. "[P]roperty rights are not the sole measure of Fourth Amendment violations." Id. at 407 (quoted source omitted). A brief intrusion into a suspect's vehicle, without more, is not a Fourth Amendment violation. Cf. id.

Jardines, on the other hand, involved a police-directed dog sniff on a suspect's front porch. Jardines, 569 U.S. at 3-4. The Supreme Court concluded this was an unlawful search within the meaning of the Fourth Amendment largely based on the home's particular importance to Fourth Amendment jurisprudence and the home's porch as part of its curtilage. Id. at 6-9. Vehicles, however, do not receive the same consideration under the Fourth Amendment as homes. Jardines is thus of limited value in resolving this case.

Moreover, courts have continued to recognize the lawfulness of dog sniffs that accidentally intrude on suspects' vehicles even after Jardines. For example, in 2015, the Tenth Circuit again found a drug detection dog who snapped his head around and jumped through the driver's side window left open by the defendant was not a search pursuant to the Fourth Amendment. United States v. Moore,

795 F.3d 1224, 1227 (10th Cir. 2015). The Court opined, “even if we were to conclude that Jester did not sufficiently “alert” to establish probable cause until after he jumped into Moore’s vehicle, Moore’s Fourth Amendment rights would still not be violated.” Id. at 1232, (citing, Vazquez, 555 F.3d 923.

In 2016, the Seventh Circuit reached the issue in United States v. Guidry. 817 F.3d 997 (7th Cir. 2016). The handler in Guidry kept the dog on a leash and despite her efforts to keep the dog out of the car his head entered a window left open. Id. at 1006. The Seventh Circuit noted the decisions in Pierce, Lyons, and Stone more closely matched than Winningham, suggesting the instinctive entry to a vehicle without facilitation by law enforcement may still lead to the finding of no violation of the Fourth Amendment. Id.

Ultimately, a search does not occur where a police dog briefly, and without direction, enters the vehicle of a suspect through an opening left by the suspect. That is what occurred here, and the circuit court properly denied Campbell’s motion to suppress.

CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm the circuit court's judgment of conviction.

Dated this 21st day of June, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), and (c) for a brief produced using monospaced font. The length of this brief is 14 pages.

**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 the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 21th day of June, 2021.

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