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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2022AP001802 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

NOAH D. HARTWIG,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF THE TRIAL COURT SUPPRESSING
EVIDENCE, IN THE CIRCUIT COURT FOR JEFFERSON COUNTY, BRANCH
III, THE HON. ROBERT F. DEHRING, JR., PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

Respectfully submitted,

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STATEMENT OF THE ISSUES

Was the extension of the seizure of Mr. Hartwig for the purpose of having a drug detection dog respond to the scene to perform an exterior sniff of both vehicles lawful? The trial court answered: No.

STATEMENT ON PUBLICATION

As a one-judge appeal, this decision is not eligible for publication.

STATEMENT ON ORAL ARGUMENT

The State believes the briefs submitted in this matter fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigants.

STATEMENT OF THE CASE AND FACTS

On March 9, 2022, the Complaint in Jefferson County Case 2022CM000111 was filed charging Noah Hartwig with Felon Use of Oleoresin Device, contrary to §941.26(4)(l), Wis. Stats., Possession of THC, contrary to §961.41(3g)(e), Wis. Stats. and Possess Drug Paraphernalia, contrary to §961.573(1), Wis. Stats., which are all misdemeanor offenses. (R. 1:1-4, Pet-App.:3-6) On June 2, 2022, Mr. Hartwig filed a Motion to Suppress arguing that he was illegally seized on January 15, 2020, and that all of the items seized as a result of the illegal search and seizure should be excluded. (R. 11:1-2, Pet-App.:7-82) The court held an evidentiary hearing on September 9, 2022. (R. 18:1-59, Pet-App.:9-67)

At the hearing, Deputy Heggie of the Jefferson County Sheriff's Office testified that she has been at the Jefferson County Sheriff's Office for fifteen years. (R. 18:4, Pet-App.:12) On January 15, 2020 at approximately 6:20 p.m., Deputy Heggie was patrolling the area of the DNR boat launch off of Groeler Road in the Town of Koshkonong, Jefferson County, Wisconsin. (R. 18:5, Pet-App.:13) During her patrol, Deputy Heggie observed a car parked in the lot. (R. 18:5, Pet-App.:13) The car was "tucked away in the corner of the lot." (R. 18:5, Pet-App.:13) Deputy Heggie found this unusual because it was winter, and the boat launch usually isn't that busy. (R. 18:5, Pet-App.:13) Further, the vehicle did not have a boat trailer. (R. 18:6, Pet-App.:14) Deputy Heggie testified that it was cold outside that night, and there was ice on the ground. (R. 18:6, Pet-App.:14) It was dark outside. (R. 18:6, Pet-App.:14)

Deputy Heggie decided to check on the vehicle to make sure no one needed help. (R. 18:6, Pet-App.:14) There was no one in the vehicle, but Deputy Heggie saw that there was a purse on the front seat. (R. 18:6, Pet-App.:14) This caused Deputy Heggie concern because she did not think it was normal for someone to leave their purse in a vehicle, and she was worried that the individual that did so may be suicidal or need help. (R. 18:6-7, Pet-App.:14-15) As such, Deputy Heggie searched the area on foot for approximately ten minutes. (R. 18:7, Pet-App.:15) Finding nothing, Deputy Heggie radioed dispatch to have them look up information associated with the vehicle. (R. 18:7, Pet-App.:15)

As she was waiting for dispatch to provide information, a Jeep pulled up next to the driver's side of the parked vehicle. (R. 18:7-8, Pet-App.:15-16) Deputy Heggie observed a female subject exit the passenger side of the Jeep. (R. 18:9, Pet-App.:17) The subject looked at Deputy Heggie and then quickly got into the parked vehicle. (R. 18:9, 22, Pet-App.:17, 30) Deputy Heggie found this suspicious, so she activated her emergency lights and made contact with the female subject. (R. 18:9-10, 14, 22, Pet-App.:17-18, 22, 30)

When Deputy Heggie made contact, the subject, Savannah Wagner, rolled down the front passenger side window. (R. 18:9-10, 15, Pet-App.:17-18, 23) When Ms. Wagner rolled down the window, Deputy Heggie could immediately smell the odor of marijuana. (R. 18:10, Pet-App.:18) Deputy Heggie testified that due to her training and experience, she is familiar with the odor of raw and burnt marijuana, and that she encounters this odor several times a month while performing her job duties. (R. 18:5,

Pet-App.:13) Deputy Heggie asked Ms. Wagner if she had been smoking marijuana, and Ms. Wagner denied that she had. (R. 18:11, Pet-App.:19) The court later clarified with Deputy Heggie that when she made contact with Ms. Wagner, she did not know whether the marijuana odor she was smelling came from Ms. Wagner's person after exiting the Jeep or if it was coming from within Ms. Wagner's vehicle. (R. 18:32, Pet-App.:40)

Deputy Heggie was unsure if Ms. Wagner was a juvenile, so she asked Savannah how old she was, and Savannah advised that she was 20. (R. 18:10-11, Pet-App.:18-19)

Savannah stated that Noah Hartwig just dropped her off, and that she had been at his house. (R. 18:11, Pet-App.:19) Deputy Heggie was familiar with Noah Hartwig from past contacts and knew that he had previously been incarcerated for drug offenses. (R. 18:11-12, Pet-App.:19-20) Deputy Heggie also knew that he lived near the boat launch. (R. 18:11, Pet-App.:19)

The video of the stop shows that after making contact with Ms. Wagner, Deputy Heggie returned to her squad. State's Exhibit 1, at 18:38:34. Deputy Heggie radioed Deputy Jansen and asked for his location. State's Exhibit 1, at 18:39:03. Deputy Jansen replied that he was in Johnson Creek. State's Exhibit 1, at 18:39:06. Deputy Heggie advised that she may have a "961 issue." State's Exhibit 1, at 18:39:10. Deputy Heggie believed that one or both vehicles might have drugs inside, and her intention was to have the drug detection dog perform a sniff outside both vehicles. (R. 18:17, Pet-App.:25)

Deputy Heggie then made contact with Mr. Hartwig, who was sitting in the driver's side of the Jeep. State's Exhibit 1, at 18:41:34 (R. 18:12, Pet-App.:20) Deputy Heggie observed that Mr. Hartwig was smoking a cigarette. (R. 18:19-20, Pet-App.:27-28) Deputy Heggie testified that she did not smell marijuana when she made contact with Noah Hartwig, but that she did not know if the cigarette he was smoking was masking the smell. (R. 18:32-33, Pet-App.:40-41) Deputy Heggie testified that she made contact with Mr. Hartwig because the odor of marijuana led her to believe there was drug activity occurring between Mr. Hartwig and Ms. Wagner. (R. 18:13, Pet-App.:21)

Unfortunately, the State did not introduce evidence regarding when Deputy Jansen arrived and had his canine perform the sniff search. However, in giving its decision, the court stated, "If the Court adopts the plaintiff's position, it would mean that anybody giving somebody a ride to another car and then that car smells like marijuana, can be held for 20 minutes without calling that a reasonable suspicion." (R. 18:52-53, Pet-App.:60-61) Deputy Jansen's K-9 partner did the sniff search, and Deputy Jansen advised Deputy Heggie that the dog indicated on both vehicles. (R. 18:18, Pet-App.:26)

The State argued that Deputy Heggie had reasonable suspicion to extend the stop of Mr. Hartwig in order to have a canine perform a sniff search of his vehicle. (R. 18:48-51, Pet-App.:56-59)

The Court found that Mr. Hartwig was seized when Deputy Heggie turned on her squad lights. (R. 18:53-54, Pet-App.:61-62) The Court found that Deputy Heggie

was engaged in a “community caretaker function” prior to Mr. Hartwig and Ms. Wagner’s arrival. (R. 18:54, Pet-App.:62) However, the Court disagreed with Deputy Heggie that it was suspicious when Ms. Wagner quickly got out of Mr. Hartwig’s car and into her own. (R. 18:54, Pet-App.:62) The Court acknowledged that Deputy Heggie was allowed to request Mr. Hartwig’s license and run his information, but when that came back clean, she was not entitled to make Mr. Hartwig wait while an officer with a canine responded to the scene. (R. 18:56-57, Pet-App.:64-65) As such, the court found that extending the stop while Deputy Heggie waited for a canine and his handler to arrive was a violation of Mr. Hartwig’s Constitutional rights and granted Mr. Hartwig’s Motion to Suppress. (R. 18:56-57, 15:1-2, Pet-App.: 64-65, 68-69)

STANDARD OF REVIEW

Review of an Order granting or denying a motion to suppress evidence presents a question of constitutional fact. *State v. Iverson*, 2015 WI 101, ¶ 17, 365 Wis. 2d 302, 871 N.W.2d 661 (quoting *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463). The circuit court's findings of historical fact must be reviewed with deference unless clearly erroneous. *Id.* The reviewing court must then independently apply constitutional principles to those facts. *Id.* at ¶ 18 (citation omitted).

I. THE INITIAL SEIZURE OF MR. HARTWIG WAS LAWFUL UNDER THE COMMUNITY CARETAKER EXCEPTION.

Both the Fourth Amendment of the United States Constitution as well as Article I, section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. *State v. Floyd*, 2017 WI 78, ¶ 19, 377 Wis. 2d 394, 898 N.W.2d 560. An officer may perform a warrantless search and seizure and not violate an individual's Fourth Amendment rights if it can be demonstrated that the officer was acting pursuant to the community caretaker exception. *State v. Pinkard*,¹ 2010 WI 81, ¶ 14, 327 Wis. 2d 346, 785 N.W.2d 592 (citing *Cady v. Dombrowski*, 413 U.S. 433, 448, 93 S.Ct. 2523 and *State v. Ziedonis*, 2005 WI App 249, ¶ 14, 287 Wis. 2d 831, 707 N.W.2d 565). An officer acts as a community caretaker when he or she “discovers a member of the public who is in need of assistance” although he or she may also have valid law enforcement concerns. *State v. Kramer*, 2009 WI 14, ¶ 32, 315 Wis. 2d 414, 759 N.W.2d 598.

In *State v. Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411, 414 (1987), the Wisconsin Court of Appeals created a three-step test to determine whether a seizure conducted under the community caretaker function is reasonable. The court stated:

We conclude that when a community caretaker function is asserted as justification for the seizure of a person, the trial court must determine: (1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual.

Id.

¹ The State does not believe the Supreme Court ruling in *Caniglia v. Strom*, 114 S.Ct. 1596 (2021), which held that the community caretaker exception cannot be used to justify a warrantless search of a home, is applicable here because this case involves the stop of a vehicle.

The State bears the burden of proof to any challenge to a search or seizure conducted pursuant to the community caretaker exception. *Pinkard*, 2010 WI 81, ¶ 29.

The State does not dispute that a seizure within the meaning of the Fourth Amendment occurred. Deputy Heggie was parked behind both Mr. Hartwig and Ms. Wagner's vehicle when she activated her emergency lights. Because most people would not feel they were free to leave if an officer parked behind them activated her emergency lights, the State does not believe this was a consensual encounter. *See U.S. v. Mendenhall*, 446 U.S. 544, 554-55, 100 S.Ct. 1870 (1980). Considering where Deputy Heggie was parked, both Mr. Curtis and Ms. Wagner would have believed they were not free to leave when she activated her lights. As such, when Deputy Heggie activated her emergency lights, she effectively seized both Ms. Wagner and Mr. Curtis.

Regarding the second prong of the *Anderson* test, the State believes Deputy Heggie was engaged in a bona fide community caretaker function. On a cold winter night, Deputy Heggie encountered a vehicle parked in a remote area and observed a purse inside the vehicle. While investigating, another vehicle pulled up next to the parked car. A young female exited the vehicle and got into the parked vehicle. Given the time, season, location and circumstances, Deputy Heggie had reason to be concerned for the female subject.

Further, the public interest outweighs the intrusion in this case. Prior to Mr. Hartwig and Ms. Wagner's arrival at the boat launch, Deputy Heggie had genuine concern for the owner of the parked vehicle. That concern may have been alleviated somewhat when Deputy Heggie observed a young female get into the vehicle, but it

did not completely alleviate her concern. Deputy Heggie could not distinguish whether the female was a juvenile or not, and given the circumstances, she could not just leave the scene without investigating further to at least make sure the female subject was not in danger or need of assistance. As such, she activated her emergency lights so that the occupants of both vehicles would know that she wanted to speak with them. At this point, the intrusion was minimal, and the public interest in determining what was going on far outweighed Mr. Hartwig's privacy interests.

II. DEPUTY HEGGIE HAD REASONABLE SUSPICION TO BELIEVE BOTH INDIVIDUALS HAD BEEN INVOLVED IN DRUG ACTIVITY, AND THEREFORE, THE CONTINUED SEIZURE OF MR. HARTWIG TO CONFIRM THAT SUSPICION DID NOT VIOLATE MR. HARTWIG'S FOURTH AMENDMENT RIGHTS.

“After a justifiable stop is made, the officer may expand the scope of the inquiry only to investigate ‘additional suspicious factors [that] come to the officer’s attention.’” *State v. Hogan*, 2015 WI 76, ¶ 35, 364 Wis. 2d 167, 868 N.W.2d 124 (quoting *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999)(further citations omitted). An expansion of the scope of the investigation that results in extending the duration of the stop must be supported by reasonable suspicion. *Id.* “In this regard, the legal extension of a traffic stop is essentially a *Terry* investigatory stop.” *Id.* (citing *State v. Arias*, 2008 WI 84, ¶ 35, 311 Wis. 2d 358, 752 N.W.2d 748).

The reasonableness of an investigatory stop, which governs whether a defendant's Fourth Amendment rights have been violated, is determined by evaluating

the totality of the circumstances. *Id.* at ¶ 36 (citing *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990)).

The test is an objective one, focusing on the reasonableness of the officer's intrusion into the defendant's freedom of movement: Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed or was committing or is about to commit a crime. An inchoate and unparticularized suspicion or hunch will not suffice. *State v. Waldner*, 206 Wis.2d 51, 56, 556 N.W.2d 681 (1996) (*internal citations and quotations omitted*).

The Fourth Amendment requires that the detention “be temporary and last no longer than necessary to effectuate the purposes of the stop.” *State v. Quartana*, 213 Wis. 2d 440, 448, 570 N.W.2d 618 (Ct. App. 1997) (citing *Florida v. Royer*, 460 U.S. 491, 499, 103 S.Ct. 1319 (1983)). To determine whether the length of the stop was reasonable, a court “must determine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the person.” *Quartana*, 213 Wis. 2d at 448 (citing *United States v. Sharpe*, 470 U.S. 675, 686, 103 S.Ct. 1568 (1985)).

While the court found that Deputy Heggie was allowed to ask Mr. Hartwig for his identification and run his information, the court found that the constitutional violation occurred when Deputy Heggie made Mr. Hartwig wait for a canine to arrive.

In *State v. Secrist*, the Wisconsin Supreme Court held:

[T]he odor of a controlled substance provides probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the circumstance in which the odor is discovered or because other evidence links the odor to the person or persons. 224 Wis. 2d 201, ¶ 2, 589 N.W.2d 387 (1999)

The court further found that the link between the odor and the person or persons “must be reasonable and capable of articulation.” *Id.* at ¶ 30. The court stated:

The strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug. The probability diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor. *Id.* at ¶ 34.

In this case, the link between the odor of marijuana to Mr. Hartwig was somewhat diminished considering he was in a different vehicle than Ms. Wagner. As such, the probable cause to arrest that was present in *Secrist* is not present here. That does not mean that Deputy Heggie was required to end her contact with Mr. Hartwig after checking his information, as the circuit court found.

What Deputy Heggie did have, which allowed her to extend the stop of Mr. Hartwig for the purpose of having a canine respond to perform an exterior sniff of the vehicle, was reasonable suspicion to believe Mr. Hartwig had committed a crime. While there is not the immediate link between the smell of marijuana and Mr. Hartwig, there is enough of a link to meet the standard of reasonable suspicion. Ms. Wagner had just arrived at the boat launch when Deputy Heggie made contact with her. Upon making contact with Ms. Wagner, Deputy Heggie was hit with the marijuana odor. Considering Ms. Wagner had just left Mr. Hartwig’s vehicle, it follows that Deputy Heggie would conclude that Mr. Hartwig was with Ms. Wagner when she was engaged in the use of marijuana, and that he may have also used or possessed marijuana himself.

The fact that Deputy Heggie did not smell marijuana upon making contact with Mr. Hartwig does not remove that suspicion considering Deputy Heggie's testimony that she would have difficulty discerning marijuana odor in the presence of cigarette smoke. Law enforcement often encounter individuals who purposely light cigarettes when they are stopped to mask the odor of various substances. If anything, the fact that he was smoking a cigarette provided further ammunition in the category of reasonable suspicion to believe Mr. Hartwig was engaged in marijuana use or possession.

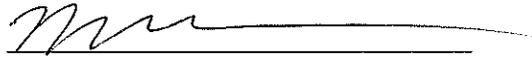
Having Mr. Hartwig wait for twenty minutes while a canine handler was sent for did not impermissibly extend the stop beyond what was reasonable. Immediately after making contact with Ms. Wagner and smelling the marijuana odor, Deputy Heggie radioed for the canine handler to respond. At the time, the canine handler was in Johnson Creek, and Deputy Heggie was in the Town of Koshkonong, so it would take him some time to get to the scene. Considering these circumstances, twenty minutes was not an unreasonable amount of time for Mr. Hartwig to wait. Deputy Heggie diligently pursued her investigation and did not hold Mr. Hartwig longer than was necessary to confirm or dispel her suspicions. As such, she did not violate Mr. Hartwig's constitutional rights by detaining him to wait for the canine to arrive to perform an exterior sniff of his vehicle.

CONCLUSION

For the reasons stated in this Brief, the order of the trial court suppressing evidence should be reversed, and this action be remanded to that court for further proceeding consistent with the order of this Court.

Dated this 22nd day of November, 2022 at Jefferson, Wisconsin.

Respectfully submitted,



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 18 pages (excluding the 69-page appendix) with 3,144 words.

I hereby certify that filed with this brief, as 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; and (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, 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 or 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 reference to the record.

Dated this 20th day of November, 2022 at Jefferson, Wisconsin.

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