

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 29, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0927-CR

Cir. Ct. No. 00-CM-847

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES WELCH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
DANIEL S. GEORGE, Judge. *Affirmed.*

¶1 VERGERONT, P.J.¹ James Welch appeals the judgment of conviction for possession of tetrahydrocannabinols (THC) contrary to WIS. STAT. § 961.41(3g)(e), contending that the circuit court erred in denying his motion to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

suppress evidence found in his car as the result of a canine alert. The circuit court concluded that the initial detention was lawful because there was reasonable suspicion; the use of the dog was not a search within the meaning of the Fourth Amendment, and therefore did not need to be supported by probable cause; and the use of the dog did not extend the detention. We agree with the circuit court and therefore affirm.

BACKGROUND

¶2 Officer Matthew Alt of the Sauk Prairie Police Department stopped Welch's vehicle because it did not have a front license plate. The time was 5:16 p.m., and there were two other adults and a child in the car. As he approached the vehicle, Alt saw it had a valid rear license plate. Welch told Alt that he did not know he needed a front plate and he did not know if he had ever received one. Alt gave the plate number to dispatch. Another officer, Scott Jennings, had arrived, and Alt gave Jennings the driver's licenses of Welch and the other passengers so he could verify the validity of Welch's license and check them all for warrants. Alt did this because Jennings had a mobile data terminal in his car and Alt did not.

¶3 While Jennings was doing that, Alt asked Welch if he had anything illegal in his van, such as drugs, weapons, open alcohol containers, and Welch said no. Alt asked if he could search the interior of the vehicle, and Welch answered that he did not want Alt to search his vehicle. Alt told the passengers to roll up their windows and that he was going to do a canine search of the exterior of the vehicle. Alt was the canine officer for the Sauk Prairie Police Department and had with him a trained narcotics detection dog. Alt took the dog out of the car and walked around Welch's vehicle. The dog "alerted," indicating to Alt the presence of narcotics in the vehicle. Alt told Welch that because of the alert, he had the

right to search his vehicle, and he did search. Alt discovered what he believed to be marijuana and placed Welch under arrest.

¶4 There was a dispute in Alt's and Jennings's testimony over when Jennings finished checking the driver licenses in relation to the dog sniff. Alt testified that he had completed the dog sniff by the time Jennings came back with the information that the licenses were valid and there were no warrants. Jennings, on the other hand, testified that he had completed checking the licenses and given the information to Alt when he saw Alt walking the dog around Welch's vehicle. Jennings testified that it took between three to five minutes for him to check the licenses.

¶5 The testimony of Alt and Jennings was consistent, however, on the nature and timing of the contacts with dispatch over the plate number. Both testified that after Jennings informed Alt of the results of the driver license check, dispatch reported that the plate was not on file with the Department of Transportation. Both officers testified that Alt asked dispatch to check again to make sure he had not given them the wrong number. Dispatch responded a second time that the plate was not on file. Jennings testified this response came after the dog sniff, and Alt testified that Welch was in custody by this time. Alt gave dispatch the VIN number so that dispatch could check to make sure the vehicle was not stolen, and the records showed Welch was the owner.

¶6 The circuit court determined there was reasonable suspicion to stop Welch's vehicle because, under WIS. STAT. §§ 341.12 and 341.15, it was the type of vehicle that would ordinarily require a front license plate. The court concluded that checking the driver licenses and vehicle registration was permissible in the context of a routine traffic stop such as this. It further concluded that the brief

inquiry Alt made as to whether there was contraband in the vehicle and whether Welch would consent to a search did not unlawfully extend the stop. With respect to the dog sniff, the court stated that the case law indicated this was not an unlawful search and the issue, therefore, was whether the initial lawful stop was unreasonably expanded. The court recognized the conflict in the testimony over when Jennings returned the license information to Alt, but found it unnecessary to resolve, because the testimony was clear that the dog sniff took place while the vehicle registration was being checked. The court concluded that checking the vehicle registration was reasonably related to the original traffic stop, and, since the sniff occurred while the registration was being checked, it did not prolong the stop. The court therefore denied Welch's motion to suppress the evidence found in the vehicle.

DISCUSSION

¶7 On appeal, Welch contends the officers did not have reasonable suspicion of drug activity and, therefore, the scope of the investigative detention was not reasonably related to the purpose of the initial stop.

¶8 A traffic stop is a form of seizure triggering Fourth Amendment protections from unreasonable searches and seizures. *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 301, 625 N.W.2d 623. The police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law. *Id.* We first determine whether the initial interference with an individual's liberty was justified, and then consider whether subsequent police conduct was reasonably related to the circumstances that justified the initial interference. *Id.* We uphold the trial court's findings of fact unless they are clearly erroneous; whether the

circumstances of a stop or detention meet constitutional standards, however, is a question of law that we review de novo. *Id.* Similarly, whether police conduct constitutes a search within the meaning of the Fourth Amendment is a question of law, which we review de novo. *State v. Miller*, 2002 WI App 150, ¶ 5, 647 N.W.2d 348.

¶9 Welch does not challenge the lawfulness of the initial stop based on the absence of a front license plate, and we agree with the circuit court that the stop was lawful. Welch does not dispute that once he was stopped for that reason, it was reasonable for the officers to check the driver licenses and the vehicle registration. He also does not appear to dispute that the officer could lawfully ask him if he had drugs in his car, and if he could search the car. *See State v. Gaulrapp*, 207 Wis. 2d 600, 609, 558 N.W.2d 696 (Ct. App. 1996) (in which we held that the officers did not illegally extend the initially lawful detention by asking whether there were drugs or weapons in the vehicle and, upon being told no, asking whether the officer might search the vehicle).

¶10 Welch's position is that once he said there were no drugs in the vehicle and once he told Alt he did not want him to search it, further investigation for drugs was unlawful because the officer had no reasonable suspicion that there were any drugs in the vehicle. We agree with Welch that before the dog "alerted," there was neither reasonable suspicion nor probable cause to believe there were any drugs in the vehicle. The State does not argue otherwise. The question, as the circuit court correctly recognized, is whether the use of the dog to sniff the exterior of the vehicle for drugs transformed the lawful detention into an unlawful detention. A critical point to recognize in answering this question is that the use of a dog to sniff the exterior of a vehicle is not a search within the meaning of the Fourth Amendment. *Miller*, 2002 WI App 150 at ¶9. Therefore, the use of the

dog to sniff the exterior of Welch's vehicle did not need to be justified by reasonable suspicion of drug activity.

¶11 Welch contends, nonetheless, that the use of the dog unlawfully expanded the scope of the stop because it was not reasonably related to the initial purpose of the stop—the missing front license plate. There are two components to his scope argument—time and subject matter.

¶12 With respect to time, the court found that the dog sniff occurred while the vehicle registration was being checked, and therefore the dog sniff did not prolong the detention. Welch argues that Alt was not really concerned with checking for vehicle licensing, and if he had really wanted the information, he could have gotten it more quickly—by asking Jennings to run a check, for example. Welch also argues that the information of Welch's vehicle registration was in the TIME system at 5:19 p.m., as shown by a computer printout he submitted into evidence, and this knowledge should be imputed to Alt.

¶13 The court's finding that the dog sniff occurred while the vehicle registration was being checked is supported by the testimony of both Alt and Jennings. Although the court did not expressly find that Alt did not unnecessarily delay this task, that is implicit in the court's decision, and this implicit finding is supported by the record. *See State v. Hubanks*, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992) (if a finding is necessary to the circuit court's conclusion and is supported by the record, we affirm it even though not expressly stated). There was no evidence that Jennings could have obtained the information sooner than Alt did, and no evidence that Alt was responsible for the first two unsuccessful responses. Welch contends the logical inference from the record is that Alt was more concerned about the effect of the dog's sniffing than the vehicle registration.

The court did not so find. More importantly, the subjective intentions of the officer do not make a continued detention illegal if the officer's conduct is objectively reasonable. *See Gaulrapp*, 207 Wis. 2d at 609.

¶14 Welch also argues that the dog sniff shifted the purpose of the stop from the absent front license plate to drugs, and thus it was unlawful even if it did not prolong the stop. However, as we explained in *Gaulrapp*, the case law interpreting the permissible scope of a detention has focused on the extension of time past the point reasonably justified by the stop, not by the nature of the questions asked. *Id.* at 609. Welch has brought to our attention no case in which questions asked on a subject unrelated to the initial lawful detention were held to unlawfully expand the scope when they were asked while information reasonably related to the initial purpose of the stop was being gathered.

¶15 Welch contends that *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), and *Gammons* support his position, but we do not agree. In *Betow*, the driver was stopped for speeding. After the driver's license and vehicle registration check showed nothing amiss, the officer neither gave the driver a citation nor said he could leave. Instead, the officer questioned the driver about a picture of a mushroom on his wallet, obtained permission for a pat down search of his person, used a dog to sniff through the open window vehicle when the driver declined permission to search his vehicle, asked further questions, and eventually had the dog get in the car. *Id.* at 92-93. We concluded that officer did not have a reasonable suspicion of drug activity, and therefore the extension of the detention was unlawful. *Id.* at 98.

¶16 In *Gammons*, the officer initially stopped the driver because the vehicle did not have a rear license plate and then noticed the vehicle had a

temporary license sticker. The officer asked for the driver's license and ran a check. After the driver said no to the question whether there were drugs in the vehicle and no to a request to search, the officer said he would get a police dog to sniff around the vehicle, at which point the driver consented to a search. *Id.* at 299. We concluded that after the driver said no to the two questions about drugs and a search, the officer should have let the driver go; continuing to detain him and telling him that the officer was going to get a police dog transformed the stop into an unlawful detention. *Id.* at 308.

¶17 In neither *Betow* nor *Gammons* did we hold that the stop was unlawfully extended while the officer was obtaining information reasonably related to the purpose of the initial stops. Rather, in those cases the officers had completed the investigations reasonably related to the initial detention.

¶18 In summary, the circuit court's findings of fact are not clearly erroneous, and its conclusions of law based on those findings are correct. Since the dog sniff was not a search, and since that procedure did not prolong the detention, the dog sniff did not transform the initial lawful detention into an unlawful detention. Accordingly, the court properly denied Welch's motion to suppress the evidence found in his vehicle.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

