

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2009

David R. Schanker
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. 2008AP3089-CR

Cir. Ct. No. 2007CF122

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICK R. GUNTHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Patrick Gunther appeals from a judgment convicting him of possession of tetrahydrocannabinols (second or subsequent

offense) contrary to WIS. STAT. § 961.41(3g)(e) (2007-08),¹ and possession of drug paraphernalia contrary to WIS. STAT. § 961.573(1). On appeal, Gunther challenges the denial of his motion to suppress drug evidence located during a search of a vehicle in which he was a passenger after a traffic stop for speeding. We agree with the circuit court that the use of a police dog to sniff the vehicle's exterior while the traffic officer finished writing a warning for speeding did not extend the seizure associated with the traffic stop. The drug evidence subsequently located inside the vehicle was lawfully obtained. We affirm the judgment.

¶2 Officer Graycarek testified that she stopped the vehicle in which Gunther was a passenger because the vehicle was travelling fifty-five miles per hour in a forty mile per hour zone. In the officer's training and experience, the presence of "Grateful Dead" stickers on the vehicle suggested involvement in "the drug world," and the officer had previous contact with the vehicle's driver in a drug case. The officer then requested that the canine unit report to the traffic stop. While Graycarek was retrieving the driver's and Gunther's records, the canine unit arrived, and she asked the canine officer to have the dog sniff the vehicle's exterior. When the officer exited her squad and returned to the stopped vehicle, she learned that the dog had "hit" on the vehicle, i.e., the dog had alerted to the presence of drugs. The traffic stop was not yet completed when the dog sniffed the interior of the passenger compartment. By the time the traffic stop ended, the dog was back in the squad car after retrieving a bag of marijuana from the passenger compartment.

¹ All subsequent references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 The driver testified that Graycarek approached her vehicle, obtained drivers' licenses, returned to her squad car, and then advised the driver that she would receive a warning for speeding. The officer then returned to the squad to complete the paperwork. The canine officer then approached the stopped vehicle and asked the occupants to exit the vehicle. The dog walked around the vehicle, alerted on the trunk and entered the trunk. The driver did not see the dog alert on the passenger door. On cross-examination, the driver admitted Gunther had asked her to lie during the traffic stop.

¶4 The canine officer testified to his experience with drug investigations and canine unit training. His dog is trained to detect odors of controlled substances and derivatives of those substances. The dog was already trained when the officer began working with it. The dog alerts by scratching, barking or biting. The dog can smell odors through closed objects, including vehicles.

¶5 Upon arriving at the scene, Gunther and the driver were still in the vehicle; Graycarek was in her squad doing paperwork. The canine officer approached the vehicle and asked the occupants to exit for a dog sniff. On the first pass, the dog alerted by scratching on the front passenger door and then scratching on the trunk. The dog returned to the squad but was later brought back to the vehicle to sniff inside the trunk. The dog bit a bag in the trunk in which the canine officer found a hemp necklace. The officer testified that the scents of hemp and marijuana are very similar, and a trained dog will alert on hemp as well as marijuana. The dog then entered the vehicle through the front passenger door because he had previously alerted at the area of the vehicle. The dog immediately stuck his head under the passenger seat and pulled out a pouch containing drug paraphernalia (a pipe) and a substance that appeared to be marijuana. The initial

vehicle sniff took a minute or two and the followup searches perhaps fifteen to twenty minutes. The canine officer testified that he has never seen the dog alert falsely or indicate the presence of a controlled substance when no such substance was present.

¶6 Gunther argued that the traffic stop was extended to accommodate the dog sniff and that “Grateful Dead” bumper stickers do not create reasonable suspicion to convert a traffic stop into a dog sniff stop. The State disagreed.

¶7 The circuit court found that the traffic stop was appropriate because the vehicle was speeding. Graycarek summoned the canine unit, and the canine unit did its work while she processed the speeding warning. The court noted the testimony about the dog’s training, ability and reliability. The dog sniffed the vehicle’s exterior and alerted twice. Thereafter, a hemp necklace, drugs and drug paraphernalia were found. The court concluded that the dog sniff of the vehicle’s exterior was legal, and the traffic stop was not extended to accommodate the canine unit’s work with the vehicle. Given the training of the canine officer and the dog, the dog’s alerts on the vehicle’s exterior provided probable cause to search the interior of the vehicle. The court denied the motion to suppress the drug evidence.

¶8 We will uphold the circuit court’s findings of fact unless they are clearly erroneous. *State v. Arias*, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748. “[W]hether police conduct violated the constitutional guarantees against unreasonable searches and seizures is a question of constitutional fact” that we independently review. *Id.*, ¶11.

¶9 The following principles guide our analysis. Gunther concedes that a dog sniff of a vehicle’s exterior is not a search within the meaning of either the

Fourth Amendment to the United States Constitution, *see Arias*, 311 Wis. 2d 358, ¶14, or article I, section 11 of the Wisconsin Constitution, *see Arias*, 311 Wis. 2d 358, ¶24. Because a dog sniff is not a search, there was no need for either reasonable suspicion or probable cause before conducting a dog sniff of the vehicle's exterior. *State v. Miller*, 2002 WI App 150, ¶10, 256 Wis. 2d 80, 647 N.W.2d 348. Gunther does not cite any authority for the proposition that asking the occupants to exit a vehicle for a dog sniff renders the sniff unlawful.

¶10 On appeal, Gunther argues that the scope of his detention was unreasonably broadened by the dog sniff. *See Arias*, 311 Wis. 2d 358, ¶¶38, 41. This argument lacks merit on this record and under controlling law. The circuit court specifically found that Gunther's detention was not extended to accommodate the dog sniff. Rather, Graycarek was still doing paperwork by the time the dog sniff concluded and the drug evidence was found. This finding is not clearly erroneous.

¶11 Gunther argues that once the dog located a hemp necklace in the trunk, rather than marijuana, probable cause for a further search of the interior of the vehicle evaporated. Gunther's argument disregards the record. The dog alerted on two parts of the vehicle: the passenger door and the trunk. Therefore, even if the trunk did not contain contraband, there was cause to deploy the dog in the passenger compartment. Second, the canine officer testified that the dog is trained to detect odors of controlled substances and their derivatives. Dogs do not detect contraband; they detect odors associated with contraband. In this case, the

dog detected both a hemp necklace and marijuana.² The dog properly alerted on the hemp necklace, exactly as it was trained to do. Finally, after a trained narcotics dog alerts on the exterior of a vehicle, probable cause exists to search the interior of the vehicle. *Miller*, 256 Wis. 2d 80, ¶¶12-14.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

² In marijuana, the tiny hairs covering the flowers of Cannabis plants accumulate high amounts of THC, “whereas in hemp the hairs have little. Hemp and marijuana are difficult to distinguish apart from differences in THC.” <http://www.sciencedaily.com/releases/2009/09/090915113538.html>.

