COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1858-CR **Cir. Ct. No. 2006CM144**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD W. LORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Reversed and cause remanded for further proceedings.*

¶1 PETERSON, J.[1] Richard Lord appeals a judgment of conviction for possession of tetrahydrocannabinols (THC). Lord argues the circuit court erred by

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

concluding there was reasonable suspicion for the officer to extend the duration of a traffic stop for the purpose of conducting a canine vehicle sniff. We agree. We therefore reverse the judgment and remand for further proceedings.

BACKGROUND

¶2 Trooper Tim Smith stopped Lord's car because the muffler was too loud. After pulling Lord over, Smith explained the reason for the stop and asked several investigatory questions. Smith noticed a heavy odor of air freshener and cologne emanating from the vehicle, which he suspected was masking the smell of drugs. Smith took Lord's driver's license back to the car, summoned a K-9 officer by radio, and ran a driver's license and registration check. Smith returned to Lord's car and asked him to get out of the car. He then returned Lord's license and registration, issued him a warning, and read him the statute prohibiting individuals from modifying mufflers to amplify the vehicle's noise.

¶3 As Smith was concluding the traffic matter, the K-9 officer arrived. Smith told Lord, "This guy here, this is a K-9 officer. He's going to sniff your car real quick. We're … working in the area today. … You don't have anything in that car that shouldn't be there?" Lord glanced at his watch, and responded that he was busy. Smith cut Lord off and said, "Well he's right here, the dog's right here." Lord said, "all right." The officers asked Lord's passenger to exit the car and directed her to wait with Lord next to the squad car. The officers then asked Lord if there was anything in the vehicle he wanted to tell them about. Lord admitted there was a marijuana pipe and some marijuana in the center console. The K-9 officer walked the dog around the outside of the car. He then released the dog into the car and the dog located the pipe and marijuana.

¶4 The circuit court denied Lord's motion to suppress, concluding that Smith's identification of a heavy odor of cologne provided independent reasonable suspicion to extend the stop for a drug sniff.[2] Lord subsequently pled guilty.

DISCUSSION

¶5 The issue in this case is whether Lord was lawfully seized when Smith told him the K-9 officer was going to conduct a dog sniff of his vehicle. This is a question of constitutional fact that "[w]e analyze … within a bifurcated framework." ***State v. Malone***, 2004 WI 108, ¶14, 274 Wis. 2d 540, 683 N.W.2d 1. We defer to a circuit court's findings of fact unless clearly erroneous. ***Id.*** However, we review the court's application of these facts to constitutional standards independently. ***Id.***

¶6 The right to be free from unreasonable searches and seizures is protected by the United States and Wisconsin Constitutions. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. "A traffic stop is a form of seizure triggering Fourth Amendment protections." ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623 (citation omitted). The reasonableness of a seizure for a traffic stop depends on "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interaction in the first place." ***Terry v. Ohio***, 392 U.S. 1, 19-20 (1968). For the stop to be justified at its inception, an officer "must have a

[2] Although Smith testified he detected a heavy odor of air fresheners and cologne, the circuit court only mentioned the cologne in its decision. For simplicity, we likewise refer to the odor only as cologne for the remainder of this opinion. That Smith also smelled air fresheners does not alter the substance of our analysis. Smith did not distinguish between the smells, but only described them together as a masking odor.

reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." ***Gammons***, 241 Wis. 2d 296, ¶6.

¶7 Lord concedes the initial stop was justified. However, he argues that the odor of cologne did not give Smith reasonable suspicion to extend the stop for a dog sniff. We agree.

¶8 A heavy odor of cologne may be one fact contributing to an officer's belief that an individual is violating the law; however, this fact must be viewed within the totality of the circumstances. *See* ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). In ***Malone***, our supreme court recognized that the presence of seven or eight air fresheners in a vehicle "certainly raises suspicion and justifies reasonable inquiry," but explained that this was only one of a number of "facts, which, under the totality of the circumstances, suggested that the group might be involved in narcotics." ***Malone***, 274 Wis. 2d 540, ¶¶36, 44. *See also* ***United States v. Staples***, 194 F. Supp. 2d 582, 588 (W.D. Tex. 2002) ("Though the smell of cologne might not *dispel* an officer's suspicion, it is unreasonable to infer that the smell of cologne—without other direct evidence of illegal drugs—*indicates* drug-related activity.").

¶9 Although the circuit court found that the odor of cologne provided Smith with reasonable suspicion to extend the stop, the State appears to abandon that reasoning on appeal. Instead, the State argues that the totality of the circumstances made it reasonable for Smith to extend the stop. The State asserts without elaboration that it was reasonable for Smith to call a K-9 unit because the address Lord gave Smith was not coming up on Smith's computer, Lord's passenger did not have a driver's license or other identification, and Smith thought

the odor of cologne might be masking the smell of narcotics. It then relies on ***State v. Arias***, 2008 WI 84, __ Wis. 2d. __, 752 N.W.2d 748, to argue that it was reasonable for Smith to extend the traffic stop because the dog sniff itself took a minimal amount of time and the public has a strong interest in deterring the flow of illegal narcotics. In ***Arias***, our supreme court held that the seventy-eight seconds a stop was prolonged for a dog sniff during an ongoing traffic stop was not an unreasonable intrusion when weighed against the public interest in deterring the flow of narcotics. ***Arias***, 752 N.W.2d 748, ¶47. ***Arias***, however, concerned a significantly different factual scenario than the present case.

¶10 In ***Arias***, the dog sniff occurred before the original traffic stop had been concluded. Here, however, Smith completed everything related to the initial traffic matter before conducting the sniff. Smith only initiated the dog sniff after returning Lord's driver's license and issuing and explaining a warning. *See* ***State v. Jones***, 2005 WI App 26, 278 Wis. 2d 774, 693 N.W.2d 104 (traffic stop ended with issuance of warning and return of identification cards). The ***Arias*** court explicitly distinguished between prolonging an ongoing stop, as the officer did in that case, from cases in which the original stop had been concluded. "[***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999),] is distinguishable from the case before us … because Betow's traffic stop had been concluded when the officer asked if he could search Betow's vehicle." ***Arias***, 752 N.W.2d 748, ¶43. "***Gammons*** is also distinguishable from the totality of the circumstances presented here. … In examining the totality of the relevant circumstances, we note that the reason for the initial seizure had been satisfied when the officer asked to search the vehicle [and the driver refused]." ***Id.***, ¶46.

¶11 ***Arias*** is also distinguishable because the officer in that case conducted the dog sniff quickly and efficiently with minimal intrusion. The ***Arias***

court observed that courts must consider whether "the investigative means used in the continued seizure are the least intrusive means reasonably available to verify or dispel the officer's suspicion." ***Id.***, ¶32 (internal quotation omitted). In this vein, the ***Arias*** court found it significant that "[Arias] remained seated in the passenger compartment of … [the car]. Therefore, the incremental intrusion on Arias's liberty is time-focused as it was in [***State v. Griffith***, 2000 WI 72, 236 Wis. 2d 48, 613 N.W.2d 72]." ***Arias***, 752 N.W.2d 748, ¶40. Further, in ***Arias*** the police officer "diligently pursued his investigation in a manner that could quickly confirm or dispel his suspicions relative to the stop." ***Id.*** By contrast, here, Smith needed to wait until the stop had been concluded to conduct the sniff, because the K-9 officer arrived only as Smith was wrapping up the traffic matter.[3] Smith then removed Lord's passenger from the car and directed both individuals to wait next to the squad car while the dog sniffed the exterior and interior of the car.

¶12 Further, the State's argument confuses the ***Arias*** balancing test and reasonable suspicion. ***Arias*** dealt with the prolonging of a stop for a dog sniff absent reasonable suspicion of narcotics. Smith's difficulty finding Lord's address, Lord's passenger's lack of identification,[4] and the odor of cologne,

[3] Whether a dog is present at the commencement of the stop is not dispositive. In ***Illinois v. Caballes***, 543 U.S. 405 (2005), the United States Supreme Court held a dog sniff constitutional when an officer arrived during a stop in progress and walked a drug-sniffing dog around the car. That was not the case here.

[4] We are not persuaded that Smith's initial difficulty locating Lord's address and Lord's passenger's lack of documentation provided Smith with reasonable suspicion, either alone or in combination with the odor of cologne. Smith testified that he called for a K-9 unit right away when he returned to his squad car. Further, when Lord's address did not come up immediately, Smith easily remedied the problem by returning to Lord's car and asking to take the registration back to his squad car. Lord's passenger's lack of identifying documentation is likewise insignificant. The passenger complied with all of Smith's requests and identified herself verbally. Even if she had declined to identify herself, "passengers are free to decline to [identify themselves], and refusal to answer will not justify prosecution nor give rise to any reasonable suspicion of wrongdoing." ***State v. Griffith***, 2000 WI 72, ¶65, 236 Wis. 2d 48, 613 N.W.2d 72.

however, are all factors the State indicates warrant Smith's suspicion of criminal activity. Factors that may contribute to reasonable suspicion are not the same as considerations that the ***Arias*** test weighs to determine the reasonableness of the intrusion.

¶13 We are also not persuaded by the State's argument that the extension of the stop became consensual when Lord, after indicating he did not have time for the search, said "all right" to Smith. After a traffic stop has ended, an individual is unlawfully seized if a reasonable person would not feel free to leave or decline the officer's requests. ***State v. Williams***, 2002 WI 94, ¶22 n.6, 255 Wis. 2d 1, 646 N.W.2d 834 (citing ***Florida v. Bostick***, 501 U.S. 429 (1991)). A reasonable person would not have felt free to leave here. Smith did not seek Lord's consent, but rather told him the K-9 officer was going to conduct a dog sniff and then rebuffed Lord's response that he was busy. Lord's "all right" at best indicates compliance with Smith's directions.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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