

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 7, 2011

A. John Voelker
Acting 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. 2011AP125-CR

Cir. Ct. No. 2009CM700

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN R. NELSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
PAUL V. MALLOY, Judge. *Affirmed.*

¶1 REILLY, J.¹ John R. Nelson appeals from a judgment of the circuit court convicting him of possession of marijuana. Nelson argues that the police did

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

not have reasonable suspicion to stop his car, and that the stop of his vehicle was unlawfully extended to allow a K-9 police dog to sniff the exterior of his vehicle. We hold that there was reasonable suspicion to stop Nelson's vehicle and that the stop was not unlawfully extended. Nelson's conviction is affirmed.

BACKGROUND

¶2 In the early morning of July 21, 2009, Officer Jarrod Ray of the Village of Grafton Police Department was on patrol when he observed a vehicle with a defective license plate light. Ray began to follow the vehicle and subsequently observed it fail to make a complete stop at a stop sign. Ray pulled the vehicle over at 12:16 a.m.

¶3 As Ray approached the vehicle, he realized that the license plate light was in fact working. Ray requested identification from the driver, Nelson, and the two passengers. Ray returned to his squad car to run the names through the Wisconsin Department of Transportation and discovered that all three had a history of drug activity. While Ray was conducting the background checks and printing out a warning for Nelson to get the license plate light fixed within fifteen days, he summoned the K-9 police dog unit at 12:22. When the K-9 unit arrived at 12:32, Ray briefed the officer on the situation and requested that he walk his dog around Nelson's vehicle. The transcript from the police video of the stop indicates that the dog began walking around the vehicle at 12:34 and reacted a minute later. A search of the vehicle revealed marijuana. Nelson was arrested. Ray decided not to issue a warning for the license plate light and instead issued a written warning for Nelson's stop sign violation.

¶4 Nelson moved to suppress the evidence obtained from the stop on the grounds that he was unlawfully detained. The circuit court denied the motion.

The court reviewed a video of the traffic stop and found that, while it was unclear whether Nelson's license plate light was out, his vehicle made a stop "somewhat into the intersection." The court found that Ray had the authority to stop Nelson's vehicle and that Ray did not unnecessarily lengthen the stop so as to allow the K-9 dog to walk around the vehicle. Nelson was subsequently convicted of marijuana possession and now appeals.

STANDARD OF REVIEW

¶5 An officer may perform an investigatory stop of a vehicle for a noncriminal traffic violation if the officer has reasonable suspicion that a violation occurred. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394. Whether there is reasonable suspicion to conduct a traffic stop is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. We apply a two-step standard of review to questions of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. First, we review the circuit court's findings of fact and uphold them unless they are clearly erroneous. *Id.* Second, we review the determination of reasonable suspicion de novo. *Id.* An officer may broaden the scope of a lawful stop if the officer becomes aware of additional suspicious factors that give rise to an articulable suspicion that the person has committed or is committing an offense that is separate and distinct from the reason for the stop. *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999).

DISCUSSION

¶6 Nelson argues that the traffic stop was not supported by reasonable suspicion, and even if it was, that Officer Ray unlawfully prolonged the stop. Ray stopped Nelson for two violations: a defective license plate light and for failing to

make a complete stop at a stop sign. The circuit court found that while it was unclear whether Nelson's license plate light was out, his vehicle made a stop "somewhat into the intersection." Nelson's stop thus violated WIS. STAT. § 346.46(1). As this finding of the circuit court is not clearly erroneous, we affirm the court's ruling that there was reasonable suspicion.

¶7 We also conclude that the stop was not unlawfully extended. Nelson's primary argument is that Ray should have provided a warning to Nelson regarding the license plate light and the improper stop, and then ended the traffic stop without summoning the K-9 unit. We reject Nelson's argument.

¶8 We first note that a dog sniff conducted around a vehicle incident to a lawful traffic stop is not a search. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005); *State v. Arias*, 2008 WI 84, ¶24, 311 Wis. 2d 358, 752 N.W.2d 748. Ray thus did not need probable cause or reasonable suspicion to call the K-9 unit and have the dog sniff around Nelson's vehicle. See *State v. Miller*, 2002 WI App 150, ¶10, 256 Wis. 2d 80, 647 N.W.2d 348. The question is whether Ray unlawfully extended the traffic stop during the time between calling for the K-9 unit and the dog sniff. As the United States Supreme Court has said:

A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court had made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

Arizona v. Johnson, 555 U.S. 323, 333 (2009) (citations omitted).

¶9 The circuit court found that Ray did not unnecessarily delay the traffic stop in order to give the K-9 unit more time to arrive, as its review of a tape of the traffic stop revealed that Ray did not take an unduly long time with his paperwork while he was awaiting the K-9 unit. As this finding was not clearly erroneous, we affirm the circuit court's conclusion that Ray did not unlawfully extend the stop. *See State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898 (a circuit court's findings of fact based on testimony and a video police recording are reviewed under the clearly erroneous standard of review).²

CONCLUSION

¶10 We affirm Nelson's conviction.

By the Court.—Judgment affirmed.

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

² We note that we were unable to watch the police video of the stop, as the video included in the record was not compatible with the court's DVD player. The parties do not, however, dispute the timeline of the events. We therefore rely on the transcript of the police stop and testimony from the trial to conclude that the circuit court's findings were not clearly erroneous.

