

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2015AP2656-CR

Cir. Ct. No. 2014CM694

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA J. HAMS,

DEFENDANT-APPELLANT.

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

¶1 BLANCHARD, J.¹ Joshua Hams appeals a judgment of conviction for possession of tetrahydrocannabinols, THC, in the form of hashish oil.² The

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

judgment was entered following Hams's plea, after the circuit court denied his motion to suppress evidence obtained after an officer extended a traffic stop briefly to pursue concerns based on apparently abnormally nervous behavior by Hams and the driver of the vehicle that Hams was riding in at the time. Hams concedes on appeal that the challenged evidence was obtained following a lawful stop based on dark-tinted windows and a loud muffler, and further concedes that it was reasonable under the Fourth Amendment for the deputy to ask the driver and Hams at the outset of the stop whether any drugs or weapons were present. Hams argues that the deputy lacked reasonable suspicion to extend the stop thereafter, by asking the driver to step out of his vehicle for a brief discussion to satisfy the deputy's concerns based on the appearance of abnormally nervous behavior. Applying precedent that includes *State v. Sumner*, 2008 WI 94, ¶38, 312 Wis. 2d 292, 752 N.W.2d 783, and *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), I conclude that the extension of the stop that involved asking the driver to get out of his vehicle for a brief discussion was reasonable under the circumstances, and accordingly affirm.

¶2 The arresting deputy, who was the only witness to testify at the suppression hearing, provided the following pertinent, uncontested facts.

¶3 The deputy stopped a vehicle based on concern regarding dark-tinted windows and a loud muffler. The deputy made contact with the driver of the vehicle and with Hams, the only passenger, while the driver and Hams were still

² The Honorable Alan J. White presided over the hearing on Hams's suppression motion. The Honorable Daniel George presided over the plea hearing and sentencing hearing and entered the judgment of conviction.

sitting in the vehicle. The deputy was a canine handler, and at the time of the stop he had his police dog with him.

¶4 Upon encountering the driver and Hams, the deputy “immediately noticed nervous behavior” on the part of both the driver and Hams. As a result, the deputy inquired if there was anything in the vehicle that the deputy should be aware of, such as guns, knives, or drugs.

¶5 I pause to note that Hams does not now argue that the deputy’s initial inquiry was unreasonable in extending the lawful stop, and this concession is consistent with *Gaulrapp*, 207 Wis. 2d 600, 608-09 (detention during lawful traffic stop not unreasonably prolonged by officer asking about potential presence of drugs or weapons).

¶6 Resuming with the background facts, the deputy noticed that, after he made this initial inquiry about drugs or weapons, the occupants became even more visibly nervous, that is, “extremely nervous with their body language.” Specifically, “[t]hey were looking down and away from me, looking at the floor, looking at each other, but wouldn’t make eye contact with me.” In addition, the deputy observed that the driver was “slurring” or “stuttering his words” “in a nervous manner.”

¶7 After making these observations, the deputy asked the driver to step out of the vehicle and walk to the rear of the vehicle, in order to separate the driver and the passenger. The driver complied. While the deputy and the driver were standing near the rear of the vehicle, the deputy informed the driver that the deputy planned to conduct a canine sniff for the odor of controlled substances on the exterior of the vehicle.

¶8 I note that the action of the deputy that is the focus of the suppression motion is his request that the driver exit the car and talk with him at the rear of the vehicle. The argument is that this unreasonably prolonged the stop, and that therefore all evidence obtained as a result of the inquiry that followed should be suppressed.

¶9 Resuming the background facts, while the two stood at the rear of the stopped vehicle, the driver told the deputy that there were “narcotics” in the vehicle, specifically in a pocket of the passenger door, and that the drugs belonged to Hams.

¶10 In total, approximately two to three minutes elapsed between the deputy pulling the vehicle over and the driver admitting that there were illegal drugs in the vehicle that belonged to Hams.

¶11 After the above discussion, the deputy had the driver step to the front of his police vehicle, and the deputy requested that another deputy be dispatched to assist with the investigation. The deputy testified that this was “for safety reasons,” because the deputy did not want to conduct a search alone, with two subjects present. In a search of the vehicle after backup arrived, the deputy found an e-cigarette and hashish oil.

¶12 Hams does not appear to dispute that, if the deputy’s conduct was constitutionally permitted up to the point when the driver told the deputy that there were drugs in the vehicle, then the deputy had reasonable suspicion that Hams or the driver had committed a crime as well as probable cause to search the vehicle for the drugs. In any case, an argument to the contrary would be meritless. *See State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394.

¶13 At the conclusion of the hearing, the circuit court denied the motion to suppress. My review is under the second part of the two-part standard of review, because there are no disputes about the facts on appeal. *See State v. Hess*, 2010 WI 82, ¶19, 327 Wis. 2d 524, 785 N.W.2d 568 (first step is to uphold circuit court findings of historical fact that are not clearly erroneous; second step is to independently apply the applicable constitutional principles to those facts).

¶14 The State concedes that the driver and Hams were temporarily detained from the time the deputy pulled over their vehicle to the time the vehicle was searched.

¶15 With that background, Hams argues, as stated above, that the deputy did not have reasonable suspicion justifying the deputy's request, after seeing the reaction to the deputy's inquiry about drugs or weapons, that the driver exit his vehicle for a brief discussion on that topic of drugs or weapons. I disagree, following *Gaulrapp* and *Sumner*, which teach that, depending on all circumstances: (1) it requires little to no justification for an officer conducting a traffic stop to briefly inquire about potential drugs or weapons, *see Gaulrapp*, 207 Wis. 2d 600; and (2) minimally extending a lawful stop based on abnormal signs of nervousness may be constitutional, *see Sumner*, 312 Wis. 2d 292.

¶16 Explaining the *Sumner* principle further, it is well established that if an officer making a valid traffic stop becomes reasonably suspicious of an individual, the officer may reasonably extend the encounter with that individual as necessary to address those suspicions. *See State v. Malone*, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. That is, if the officer becomes aware of circumstances giving rise to an inference that the driver has committed or is committing a crime apart from that prompting the initial stop, the general rule is

that the officer may extend the stop for further reasonable investigation. *See Colstad*, 260 Wis. 2d 406, ¶19. This is what occurred here.

¶17 The deputy initially observed nervous behavior by the driver and Hams, and for that reason was reasonably concerned about the presence of contraband or weapons. *See Sumner*, 312 Wis. 2d 292, ¶38 (a suspect's unusual nervousness is a legitimate factor to consider in evaluating an officer's reasonableness during a search or seizure). Then, after making an inquiry on this topic, as permitted under *Gaulrapp*, the circumstances became more suspicious, because the question appeared to trigger even more pronounced nervous behavior. Under these circumstances, it was not unreasonable for the deputy to continue to detain the driver and Hams, at least briefly, for the short discussion at the back of the vehicle.

¶18 It is only common sense that an officer would be particularly concerned, both about his own safety and about the possibility of criminality afoot, whenever an inquiry about the possible presence of drugs or weapons triggers reactions such as those described by the deputy here. This scenario justifies steps that are minimally intrusive to the liberty interests of occupants of a stopped vehicle.

¶19 In arguing that the extension of the stop was unreasonable, Hams relies on one reference contained in the Wisconsin supreme court's recent decision in *State v. Hogan*, 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124. In *Hogan*, the court ultimately upheld the circuit court's denial of Hogan's motion to suppress on other grounds, but concluded that, although it was "a close question," it was not reasonable for the officer in that case to extend the traffic stop for 24 minutes to conduct field sobriety tests. *See id.*, ¶¶2, 4, 9-10, 53-54. Hams's argument rests

on the following statement that the court made in that context: “police cannot expect to conduct field sobriety tests on every motorist who is shaking and nervous when stopped by an officer.” *See id.*, ¶50.

¶20 However, Hams omits significant language from this passage from *Hogan*. I now emphasize the language omitted by Hams in his briefing: “*The possibility that innocent explanations may exist for observed behavior does not preclude a finding of reasonable suspicion*, but as a practical matter, police cannot expect to conduct field sobriety tests on every motorist who is shaking and nervous when stopped by an officer.” *Id.* (emphasis added). The full sentence, not only the portion presented by Hams, suggests that the following is part of the legal standard: abnormal behavior suggesting nervousness by a driver or passenger may provide a basis for reasonable suspicion during a traffic stop, depending on all pertinent circumstances. *See Sumner*, 312 Wis. 2d 292, ¶38 (“Nervousness during a routine traffic stop is typical, but unusual nervousness of a suspect may indicate wrongdoing.”).

¶21 I understand the full passage in *Hogan* to stand for the obvious propositions that innocent people stopped by police are often made at least somewhat nervous by the fact of the stop and that not all signs of nervousness will be sufficient to justify all extensions of lawful stops. The State could not and does not try to dispute these self-evident propositions.³

³ As for the substance of the opinion in *State v. Hogan*, 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124, through his silence on the general topic, Hams appears to recognize that its facts are easily distinguished from the facts here. *Hogan* involved a 24-minute extension of the stop and a police decision to conduct field sobriety tests based on observations of nervousness alone. *See id.*, ¶49.

¶22 This leaves *Sumner* and related cases, which support the conclusion that *abnormal* signs of nervousness displayed by occupants of a lawfully stopped vehicle—in response to the question of whether they had illegal drugs or weapons—may be sufficient to justify an extension of the stop that involves only requiring an occupant to briefly get out of the vehicle for a discussion on the topic of drugs or weapons. And I conclude that here the abnormal apparent manifestations of nervousness when the drugs-or-weapons topic was raised gave the deputy sufficient reason to be concerned for his safety and to extend the stop briefly. See *Sumner*, 312 Wis. 2d 292, ¶38 (“The record reflects that Sumner was ‘very nervous,’ and this type of behavior might reasonably indicate that a threat of harm to [the deputy] was present.”).

¶23 Hams argues that there is nothing to suggest that the reactions of the driver and Hams to the deputy’s drugs-or-weapons question were anything more than the normal nervousness that an innocent driver or passenger might often exhibit under like circumstances. But the testimony of the deputy that the circuit court credited (a decision that Hams does not argue was clear error) paints a different picture. The deputy’s testimony indicated multiple concrete indicators of abnormal nervousness, including a characterization that the driver and Hams were “extremely nervous.”

¶24 In sum, the State carries its burden of showing that the deputy reasonably extended the stop under these circumstances, given the case law in this area. Accordingly, I affirm the judgment.

By the Court.—Judgment affirmed.

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

