COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP622-CR **Cir. Ct. No. 2015CF135**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JORDAN A. BRANOVAN,

DEFENDANT-APPELLANT.

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

¶1 NEUBAUER, C.J.[1] Jordan A. Branovan appeals from a judgment convicting him, upon his plea of guilty, of possession of tetrahydrocannabinols

[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.

(THC) and possession of drug paraphernalia. Branovan contends that the circuit court erred in denying his motion to suppress evidence recovered from his vehicle because the traffic stop was unreasonably extended in order to conduct a canine sniff. We disagree and, thus, affirm.

¶2 At a hearing on Branovan's motion to suppress, the only witness called, Ben Heinen, a sergeant with the City of Mequon Police Department, testified that on May 29, 2015, at approximately 5:30 p.m., he observed a blue Toyota heading in the opposite direction and the driver, later identified as Branovan, was not wearing his seat belt. Heinen turned his squad car around and behind Branovan's vehicle, at which point Heinen observed that Branovan's passenger was also not wearing his seat belt. Heinen radioed "920" for Officer Schiller, the K-9 officer. Heinen explained that he called for Schiller because while he was passing Branovan's car, it appeared that Branovan was wearing a hat with a multicolored marijuana leaf on it.[2] Heinen turned on his squad car's camera.[3] Once the light turned green, Branovan's vehicle proceeded through an intersection, and Heinen activated the emergency lights on his squad car. This occurred at 5:40 p.m. or fifty seconds into the recording. Branovan made a left-hand turn into a bank parking lot and pulled over about forty seconds later. It appeared to Heinen that Branovan or his passenger or both of them had ignited a cigarette.

[2] Later, Heinen saw that the hat had a Hawaiian flower, not a marijuana leaf.

[3] The camera starts visually recording thirty seconds before it is activated, with the audio beginning at the time it is activated. The video was entered into evidence and shown to the court. We have reviewed the video.

¶3 Heinen approached the vehicle. Heinen did not smell alcohol or marijuana emanating from the vehicle or its occupants, only cigarette smoke. Heinen explained the reason for the stop, and Branovan admitted that he knew he was going to be stopped because he had made eye contact with Heinen while attempting to put on his seat belt. Branovan's passenger explained that he figured that Heinen had seen him without a seat belt and, thus, did not attempt to put it on. Branovan and his passenger each produced a Wisconsin driver's license. Heinen noticed that Branovan was "visibly shaking" to the point where it seemed like he could not control it, which Heinen thought was unusual given the circumstances. While Heinen was speaking with Branovan and his passenger, Heinen observed in the front center console an orange medication bottle that had the label peeled off. Heinen inquired as to why the label had been peeled off, and Branovan answered that "he just fidgets." Heinen asked if he could see the bottle, and Branovan handed it to him. The bottle was empty. Heinen and Branovan "had a short conversation" about whether the bottle smelled of marijuana, but, when Heinen opened the bottle, it did not smell like a controlled substance. Branovan denied that the bottle had held marijuana and said it was his prescription for Adderall.

¶4 At three minutes and twenty seconds into the video, Heinen returned to his squad car and forwarded the identifying information he had received from Branovan and his passenger to dispatch in order to see whether they had any outstanding warrants and criminal history. Heinen explained that the results from his request were not instantaneous.[4] While Heinen was giving the information to dispatch, Schiller arrived on the scene. After Heinen finished giving the

[4] Heinen had a "citizen ride along" with him in his squad car, and Heinen was explaining the situation to his passenger while in the squad car.

information to dispatch, at 5:43 p.m. or four minutes and twenty seconds into the video, he spoke with Schiller. Schiller told Heinen that he had responded to a complaint about two months ago involving Branovan where someone had seen marijuana smoke coming from his vehicle—although Branovan denied it and said it was only smoke from "an e-cigarette device." In addition, Schiller told Heinen that within the last two years Branovan had been arrested for possession of a controlled substance or drug paraphernalia. Heinen asked Schiller to remove Branovan and his passenger from their vehicle, and then Schiller would conduct a dog sniff of the vehicle.

¶5 Heinen remained in his squad car while Schiller removed Branovan and his passenger from their vehicle and patted them down for weapons. Meanwhile, Heinen was inputting information into the police department's electronic citation system so that he could issue citations to Branovan and his passenger for failing to wear a seat belt. At 5:49 p.m. or eight minutes and thirty-nine seconds into the video, the dog went around Branovan's vehicle and, within forty seconds, indicated that there were drugs present. Nearly simultaneously with the dog indicating and Schiller praising him, or at nine minutes and twelve seconds into the video, dispatch advised Heinen that there were no outstanding warrants for Branovan or his passenger, but that they both had prior drug convictions.

¶6 Heinen and Schiller then conducted a search of Branovan's vehicle during which they discovered an electronic cigarette device that smelled of burnt marijuana and a container that had a wax-like substance inside and also smelled of

marijuana. Heinen had a conversation with Branovan and then placed him under arrest.[5]

¶7 The circuit court denied Branovan's motion to suppress the evidence recovered from his vehicle. As relevant, the circuit court found that historically, as Heinen was inputting information and conducting a warrant check, Schiller walked the dog around Branovan's vehicle. As indicated on the video, the court said, Schiller was rewarding the dog for having indicated on Branovan's vehicle while Heinen was "simultaneously … waiting" for dispatch to respond to Heinen's request. Based on the foregoing, the court concluded that the traffic stop was not prolonged in order to conduct a dog sniff.

¶8 Subsequently, Branovan pled guilty to possession of THC and drug paraphernalia and was sentenced to concurrent terms of fifteen months of probation, which was withheld and stayed pending appeal.

¶9 Branovan contends that the traffic stop was unreasonably prolonged in order to conduct a dog sniff of his vehicle. Heinen's intent was to extend the stop for a dog sniff, as indicated by him calling for Schiller even before initiating the stop. In effect, Branovan argues that Heinen delayed in issuing the citation, and that the "traffic stop could have ended in less than five minutes." Otherwise, reasonable suspicion to justify the continued detention of Branovan in order to conduct a dog sniff was lacking. Thus, Branovan's motion to suppress the evidence recovered from his vehicle should have been suppressed.

[5] The circuit court suppressed the contents of this conversation.

¶10 The question of whether a defendant's right to be free from unreasonable searches and seizures was violated, contrary to the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution, is a question of constitutional fact. *See* ***State v. House***, 2013 WI App 111, ¶4, 350 Wis. 2d 478, 837 N.W.2d 645. The circuit court's findings of facts following the suppression hearing will be upheld unless clearly erroneous, but the application of constitutional principles to those facts is reviewed de novo. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829.[6]

¶11 The reasonableness of a traffic stop involves a two-part inquiry: first, whether the initial seizure was justified and, second, "whether subsequent police conduct was reasonably related in scope to the circumstances that justified the initial interference." ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623; *see* ***United States v. Sharpe***, 470 U.S. 675, 682 (1985). "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." ***Sharpe***, 470 U.S. at 684 (citation omitted); *see* ***Rodriguez v. United States***, 135 S. Ct. 1609, 1614 (2015). In the context of a traffic stop, "the tolerable duration of police inquiries" is determined by the mission of the seizure, the mission being "to address the traffic violation that warranted the stop … and [to] attend to related safety concerns." ***Rodriguez***, 135 S. Ct. at 1614 (citation omitted). Besides "determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the

[6] When the evidence consists of disputed testimony and a video recording, we apply the clearly erroneous standard of review when reviewing the circuit court's findings of fact based on that recording. ***State v. Walli***, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898.

traffic] stop,'" such as checking the driver's license, determining whether the driver has any outstanding warrants, and inspecting the vehicle's registration and proof of insurance. ***Id.*** at 1615 (alteration in original; citation omitted). In addition, asking a passenger for identification and running a check on that information are "actions … reasonably related in scope to the purpose of a traffic stop, and no further justification is required." ***Gammons***, 241 Wis. 2d 296, ¶13; *see* ***Rodriguez***, 135 S. Ct. at 1613, 1624 (Alito, J., dissenting) (noting that the majority recognized that asking passenger for driver's license and completing a records check on him was "properly part of the traffic stop"). Once the tasks tied to the traffic infraction are completed, or within the time it should have reasonably taken to complete them, the authority for the seizure ends. ***Rodriguez***, 135 S. Ct. at 1614.

¶12 Here, Branovan does not challenge the initial stop of his vehicle. To the extent Branovan challenges the circuit court's findings of historical facts, they are not clearly erroneous. Those findings show that Heinen was still in the process of completing the "mission" of his seizure of Branovan's vehicle—to address seat belt violations—when the dog sniff occurred. Contrary to Branovan's contention, this mission included more than just issuing a citation to Branovan and his passenger. The tasks of checking the identification of Branovan and his passenger, and running a check for their criminal history and outstanding warrants, if any, were reasonably related to the scope of stopping Branovan and his

passenger for seat belt violations.[7] It is of no constitutional significance that Heinen called for Schiller and his dog before initiating the stop. A dog sniff of the exterior of an automobile while in a public place is not a search. *See* ***State v. Salonen***, 2011 WI App 157, ¶9, 338 Wis. 2d 104, 808 N.W.2d 162. Further, the police "may conduct certain unrelated checks during an otherwise lawful traffic stop," such as a dog sniff, so long as it is not done "in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." ***Rodriguez***, 135 S. Ct. at 1615.

¶13 Branovan complains that the video depicts that for two minutes Heinen is just sitting in his squad car not doing anything but simply waiting for the arrival of Schiller. The testimony, however, was that Heinen was in contact with dispatch, relaying the identification information he had obtained from Branovan and his passenger so that he could discover whether they had any outstanding warrants or criminal history. The video is consistent with Heinen's testimony. At three minutes and twenty seconds into the video, after Heinen speaks with Branovan and his passenger, Heinen returns to his squad car. At three minutes and thirty-three seconds and continuing for another approximately fifty seconds, Heinen relays the identifying information for Branovan, his car, and his passenger to dispatch. Immediately after doing so, Heinen starts talking with Schiller. Thus, contrary to Branovan's contention, there was no two-minute delay. Relatedly, Branovan argues that "the traffic stop could have ended in less than five minutes,"

[7] Branovan says that "there were no safety concerns attendant to this traffic stop." While not necessary to our disposition, we disagree with that statement. "Traffic stops are especially fraught with danger to police officers," and part of the reason why an officer may check the identification of the driver and any passengers, along with their criminal history and outstanding warrants is for officer safety. ***Rodriguez v. United States***, 135 S. Ct. 1609, 1616 (2015) (citations omitted); *see* ***State v. Salonen***, 2011 WI App 157, ¶12, 338 Wis. 2d 104, 808 N.W.2d 162.

but there is nothing in the record to support such a conclusion. Rather, the record shows that Heinen pursued his "traffic-based inquiries expeditiously," and the dog sniff did not add time to the stop. ***Id.*** at 1616.

¶14 Therefore, the seizure of Branovan was not unreasonably prolonged, his rights against unreasonable seizures was not violated, and his motion to suppress the evidence recovered from his vehicle was properly denied.

¶15 Accordingly, we affirm.

By the Court.—Judgment affirmed.

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