

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 23, 2018

Sheila T. Reiff
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. 2017AP1807-CR

Cir. Ct. No. 2016CM216

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASSETTA M. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

¶1 NEUBAUER, C.J.¹ Jassetta M. Smith appeals from a judgment of conviction for operating a motor vehicle with a restricted controlled substance.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Her conviction followed the discovery of marijuana in the car Smith was driving when she was pulled over for a suspected traffic violation and her subsequent admission that she smoked marijuana the prior afternoon. A dog sniff was conducted by other officers while the officer who stopped Smith was writing a temporary compliance citation after no proof of insurance was provided. Smith argues the circuit court erred in denying her motion to suppress on grounds that the officers unreasonably extended the duration of the traffic stop for the purpose of conducting a dog sniff. We disagree and therefore affirm.

BACKGROUND

¶2 On January 27, 2016, at approximately 1:08 a.m., Officer Lemanczyk initiated a traffic stop after he ran a license plate check and learned that the registered owner's driver's license was suspended. Lemanczyk testified to the following undisputed facts at the hearing on the suppression motion. The officer's testimony was accompanied by a review of the video of the incident, which began when the emergency lights were activated.

¶3 After Lemanczyk stopped the vehicle he learned that Smith was not the owner and that she had a valid license. The officer noted an overpowering odor of perfume and cigarettes. The smell was particularly notable because he had a sinus infection, and yet, he still perceived the perfume to be overpowering when he approached the vehicle and made contact with the driver. Lemanczyk had specific training at a drug interdiction school, and attended an Advanced Road Impaired Driving class focused on drug and impaired driving, in addition to his law enforcement officer certification and over two years of experience as an officer. Based on his experience and training, he believed that the overpowering

perfume indicated an attempt to mask the odor of drugs—it is a common sign to look for when conducting drug investigations.

¶4 Lemanczyk further noted that neither Smith nor the passenger wanted to make eye contact with him, staring forward at the windshield. When Smith spoke with the officer, she made slight side eye contact. When she did turn her head to look at him, he noted that her eyes were glassy and bloodshot.

¶5 After Smith was not able to find her insurance, Lemanczyk returned to his vehicle at 1:10 a.m. to begin the process of issuing a compliance order for no insurance in the vehicle (which gives the individual a certain period of time to show proof of insurance) and to run the passenger's information.

¶6 In the meantime, Canine Officer Ament arrived at the scene at around 1:13 a.m. Ament came to the scene after hearing of the traffic stop over the radio. Lemanczyk did not call for Ament. He did request an additional officer based on his observations. Officer Petz responded to that request.

¶7 Around 1:15 a.m., Lemanczyk learned when running the occupants' checks that Smith was arrested for a similar OWI investigation. Lemanczyk recalled that the incident was drug related, which he personally knew from talking with the involved officer at the time.

¶8 Around 1:17 a.m., Lemanczyk was writing the citation and also speaking with the other officers. He asked Ament to walk his dog around the vehicle. Lemanczyk continued working on the citation while Petz asked the occupants to exit the vehicle and Ament walked around the car with the canine. At approximately 1:21 a.m., Ament notified Lemanczyk that there was a positive alert on the vehicle, indicating an illegal substance. At approximately 1:22 a.m.,

Lemanczyk exited his vehicle to discuss the positive alert. He testified that he had been continuously working on the insurance compliance citation up to that point.

¶9 Smith admitted there would be “roaches” in the car, admitted to smoking that day, and marijuana roaches were in fact found in the car. The entire traffic stop up through the dog alert lasted less than thirteen minutes.

¶10 The State charged Smith with possession of THC and one count of operating a motor vehicle under the influence of a restricted controlled substance, second offense, pursuant to WIS. STAT. § 346.63(1)(am). Smith moved to suppress the evidence, arguing that the marijuana was obtained while she was illegally seized. The circuit court denied Smith’s motion. Smith pled guilty to operating with a restricted controlled substance. Smith’s sentence was stayed pending appeal.

¶11 Smith now challenges the circuit court’s order denying her motion to suppress.

STANDARD OF REVIEW

¶12 The constitutionality of a seizure is a question of constitutional fact. *State v. Floyd*, 2017 WI 78, ¶11, 377 Wis. 2d 394, 898 N.W.2d 560. We uphold a circuit court’s findings of historical fact unless clearly erroneous, but whether those facts pass constitutional muster is a question of law we review de novo. *Id.*

DISCUSSION

¶13 Smith does not challenge the initial traffic stop. She contends that the dog sniff, which took place while Lemanczyk was writing the insurance compliance citation and before the stop was ended, unlawfully extended the stop.

The State contends that the dog sniff did not unreasonably extend the stop because the officer had reasonable suspicion to extend the initial traffic stop. The circuit court agreed with the State, as do we.

¶14 The United States and Wisconsin Constitutions protect the right of individuals to be free from unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11; *see also Floyd*, 377 Wis. 2d 394, ¶19 (“[W]e normally interpret [the Wisconsin counterpart] coextensively with the United States Supreme Court’s interpretation of the Fourth Amendment.”).

¶15 A traffic stop is a form of seizure entitled to Fourth Amendment protections from unreasonable search and seizures. *Floyd*, 377 Wis. 2d 394, ¶20; *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987). A law enforcement officer may temporarily detain individuals and perform an investigatory stop of a vehicle based on a reasonable suspicion of a noncriminal traffic violation. *Floyd*, 377 Wis. 2d 394, ¶20.

If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer’s intervention in the first place, the stop may be extended and a new investigation begun.

State v. Betow, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999). “The validity of the extension is tested in the same manner, and under the same criteria, as the initial stop.” *Id.* at 94-95.

¶16 Reasonable suspicion is a commonsense test which “requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot.” *State v. Wortman*, 2017 WI App 61, ¶5, 378

Wis. 2d 105, 111, 902 N.W.2d 561 (quoting *State v. Young*, 2006 WI 98, ¶21, 294 Wis. 2d 1, 717 N.W.2d 729). “Whether the reasonable suspicion standard is met is determined by considering the facts known to the officer at the time the stop occurred, together with rational inferences and inferences drawn by officers in light of policing experience and training.” *Wortman*, 378 Wis. 2d 105, ¶6. Knowledge of a suspect’s prior drug activity is a legitimate factor to consider in the reasonable suspicion analysis. See *State v. Lange*, 2009 WI 49, ¶33, 317 Wis. 2d 383, 766 N.W.2d 551.

¶17 Here, there were several factors which, taken together, supported the officers’ reasonable suspicion that Smith had committed a drug-related crime.

¶18 Smith’s eyes were glassy and bloodshot, an indication that Smith may be under the influence of some type of drug or alcohol. She and her passenger evaded direct eye contact with the officer—behavior that indicates something to hide. When Lemanczyk checked, he found that Smith had a recent prior drug-related arrest. The strong odor of perfume and cigarettes indicated a possible attempt to cover up the smell of drugs. While Smith points to other facts indicating that there was no issue, the facts known to the police at the time the dog sniff was conducted, and the reasonable inferences drawn from the facts, provided reasonable suspicion of criminal activity and supported the extension of the stop to continue the investigation with the dog sniff.

¶19 Officers need an objectively reasonable inference of wrongful conduct to support a finding of reasonable suspicion. We agree with the circuit court that the officers’ decision to conduct a canine sniff was reasonable under the totality of the circumstances. The main goal of an investigative stop is to quickly resolve ambiguity associated with suspicious conduct. That is exactly what the

officers did here. Given our decision, we need not reach the State's argument that, even absent reasonable suspicion, the dog sniff itself did not unreasonably extend the stop as it was performed contemporaneously and within the reasonable period of time it took for the officer to write up the traffic citation.

CONCLUSION

¶20 Based on the totality of the circumstances, we conclude that the officers had the requisite reasonable suspicion to conduct the dog sniff based on observations made and information gathered during a lawful stop for a suspected noncriminal traffic violation. We therefore uphold the circuit court's order denying Smith's motion to suppress and affirm the judgment.

By the Court.—Judgment affirmed.

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

