Appeal No. 2006AP974-CR **Cir. Ct. No. 2005CF131**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

RAMON LOPEZ ARIAS,

DEFENDANT-RESPONDENT.

FILED

APR 05, 2007

A. John Voelker
Acting Clerk of
Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

The issues we certify are whether a dog sniff of a vehicle is considered a search under the Wisconsin Constitution and, if it is not, whether the vehicle stop in this case was impermissibly prolonged in duration by the officer's investigation into controlled substance issues using questions and a dog sniff.

Ramon Lopez Arias was charged with weapons and controlled substance crimes. He moved to suppress certain evidence on the ground that it was obtained through an illegal search. After an evidentiary hearing, the circuit court granted the motion. The State appeals under WIS. STAT. § 974.05(1)(d)2. (2005-06).[1]

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[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Factual Background

The parties do not dispute the general outline of facts regarding the incident in this case. An officer testified that he saw Lopez Arias loading three twelve-packs of beer into a vehicle being operated by a woman he recognized as aged seventeen. After that vehicle left the grocery store parking lot, with Lopez Arias as a passenger, the officer stopped the vehicle. The officer walked to the car, discussed the above violation with the underage driver, and administered a preliminary breath test to her, which registered zero.

After the breath test, the officer asked the driver if there were any drugs in the car, and she said no. He also asked if she was carrying anything around, and she said she was not. This exchange is heard on a videotape made from a camera in the officer's patrol car. The tape shows that the officer then returned to his patrol car for a period of time, after which he went back to the stopped vehicle and spoke with the driver. At this point, the audio on the tape was not recording, but the officer testified that during that conversation he was advising the occupants to stay in the vehicle while the dog was around the car. The officer testified that the dog was trained to detect controlled substances. The video shows that the officer released the dog and the dog circled the car and then returned toward the patrol car. According to the officer, the dog twice signaled the presence of a controlled substance by sitting passively, something not apparent from the videotape. A search of the car produced a switchblade knife and cocaine.

The period of time from the officer's first question about drugs to the departure of the dog from the video image is approximately one minute and eighteen seconds, as measured by the time indicator on the video image.

The circuit court granted Lopez Arias's suppression motion. There was no factual finding by the circuit court as to whether the dog actually did indicate the presence of controlled substances. On the legal issues, the court concluded that there were no objective and articulable facts that would give reasonable suspicion to extend the duration of the stop beyond the original purpose.

Discussion

Whether A "Dog Sniff" Is A Search

The first issue we certify is whether, under the Wisconsin Constitution, a dog sniff of a stopped vehicle is a "search." In the present case, the circuit court did not reach this issue because it concluded that the search was illegal on other grounds.

The United States Supreme Court has held that a dog sniff of a vehicle from the outside of the vehicle is not a search under the Federal Constitution and, therefore, can be performed without reasonable suspicion or probable cause. ***Illinois v. Caballes***, 543 U.S. 405, 408-10 (2005). The Supreme Court reasoned that persons do not have a legitimate expectation of privacy in possessing contraband drugs and, because narcotics-detection dogs are trained to detect only contraband, the activity "'compromises no legitimate privacy interest.'" ***Id.*** at 408. Moreover, even if a dog falsely alerts, the dog sniff activity, in and of itself, does not reveal any legitimate private information. ***Id.*** at 409. Finally, because dog sniffs are generally reliable, once a dog alerts to the presence of contraband, police possess probable cause for a search. *See* ***id.*** at 409-10.

In two cases pre-dating ***Caballes***, but relying on federal precedent, we have concluded that a dog sniff is not a search. In ***State v. Garcia***, 195 Wis. 2d 68, 73-75, 535 N.W.2d 124 (Ct. App. 1995), we apparently reasoned that a dog sniff is not a search because the dog sniffs the air outside of the vehicle and, assuming the defendant has no expectation of privacy in the area surrounding the vehicle, no reasonable expectation of privacy has been violated. In ***State v. Miller***, 2002 WI App 150, ¶¶5-10, 256 Wis. 2d 80, 647 N.W.2d 348, we essentially adopted the reasoning used by the United States Supreme Court in ***United States v. Place***, 462 U.S. 696 (1983), reasoning that forms the basis for the Court's 2005 ***Caballes*** decision we summarize above.

The reasoning employed in ***Caballes*** and, necessarily, the reasoning we employed in both ***Garcia*** and ***Miller***, has been sharply criticized, most notably by dissenting Justice Souter in ***Caballes***. Justice Souter pointed out that it is undisputed that narcotics-detection dogs are fallible and it is this fallibility that undercuts the logic of ***Place*** and ***Caballes***:

> Once the dog's fallibility is recognized, … that ends the justification claimed in ***Place*** for treating the sniff as *sui generis* under the Fourth Amendment: the sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has sensed will not necessarily reveal contraband or any other evidence of crime.… [I]n practice the government's use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area. And given the fallibility of the dog, the sniff is the first step in a process that may disclose "intimate details" without revealing contraband, just as a thermal-imaging device might do ….

Caballes, 543 U.S. at 412-13 (Souter, J., dissenting); *see also* ***id.*** at 417-25 (Ginsburg, J., dissenting); ***Place***, 462 U.S. at 710-11, 719-20 (Brennan, J., concurring in the result).

Duration Of The Stop

The second issue we certify is whether the vehicle stop was unreasonably prolonged in duration by the officer's controlled substance investigation. Although federal and Wisconsin case law seems to approve of brief extensions of the duration of vehicle stops for investigative purposes unrelated to the justification for the stop, the permissible duration is not well defined.

We previously held in ***State v. Gaulrapp***, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996), that an officer is permitted to extend a vehicle stop for a brief time to ask a question about an investigatory issue not related to the original purpose of the stop. In ***Gaulrapp***, we held that a stop was "not unreasonably prolonged by the asking of one question." ***Id.*** at 609. We assumed that one brief question cannot cause an "extension of a detention past the point reasonably justified by the initial stop." ***Id.*** Thus, we declined to suppress evidence found as a result of Gaulrapp's consent to search given during this brief questioning.

In ***State v. Griffith***, 2000 WI 72, ¶56, 236 Wis. 2d 48, 613 N.W.2d 72, the supreme court adopted the ***Gaulrapp*** view that the time it takes to ask brief questions does not unreasonably prolong a temporary vehicle stop. The supreme court agreed with our observation in ***Gaulrapp*** that such a "conclusion is implied by the United States Supreme Court's holding in ***Ohio v. Robinette***, 519 U.S. 33 (1996)." ***Griffith***, 236 Wis. 2d 48, ¶56. The court went on to say: "We agree with the court of appeals' conclusion in ***Gaulrapp*** that the length of time required

to ask a question is not sufficiently intrusive to transform a reasonable, lawful stop into an unreasonable, unlawful one." ***Id.***, ¶61.

Thus, it appears to be settled law in Wisconsin that extending the duration of a traffic stop to ask a brief question or two unrelated to the reason justifying the stop is permissible. The question here is whether prolonging a stop for an investigative purpose unrelated to the justification for the stop for a somewhat longer time, here a little over one minute, is unreasonable.

The stop in this case was extended both by questions and by the dog sniff. Although the dog sniff is a different type of investigative procedure, it is not apparent why, if the sniff is not a search requiring reasonable suspicion or probable cause, this difference matters. It would seem that, for constitutional purposes, the key issue is whether the extension of the duration of the stop was within permissible limits. Or, perhaps, the supreme court may choose to reconsider whether any unrelated investigative activity that prolongs a stop is permissible.

Here, the period of time to consider is the time consumed by the officer asking drug questions and preparing to release the dog, and then by the dog sniff itself. As we set forth above, the videotape shows that this period was approximately one minute and eighteen seconds. In addressing this time period, we do not find helpful guidance in existing Wisconsin case law.

We note that the State argues the duration of a vehicle stop is always reasonable if it is within the amount of time that is reasonable for an officer to perform the tasks normally associated with such a stop, even if the officer does not actually perform those tasks. In response, Lopez Arias contends that the correct standard requires consideration of what actually occurred, not what hypothetically

might have occurred. Although the State's argument lacks apparent merit, the supreme court may wish to address it.

We also note that this is not a case where the State is arguing that police investigation unrelated to the original purpose of the stop was permissible because the stop had ended by the time of that investigation. *Cf.* ***State v. Williams***, 2002 WI 94, ¶¶26-27, 35, 255 Wis. 2d 1, 646 N.W.2d 834.

In sum, the facts of this case provide an opportunity for the supreme court to clarify the amount of time officers are permitted to prolong a vehicle stop for an investigative purpose unrelated to the original purpose of the stop.

Conclusion

For the above reasons, we certify this appeal.