COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-2566-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

JUSTIN I. PECK,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Reversed.*

¶1 ROGGENSACK, J.[1] The State of Wisconsin appeals an order of the circuit court suppressing evidence seized by a police officer during a traffic stop. The circuit court concluded that the seizure of marijuana and drug

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

paraphernalia was unreasonable under the Fourth Amendment. Because we conclude that asking a driver about possession of and consent to search for guns and drugs after a legal traffic stop does not impermissibly extend that traffic stop, we reverse the circuit court's order suppressing the evidence.

BACKGROUND

¶2 Officer Merrill stopped a vehicle for a traffic violation in which Justin Peck was a passenger. After completing the inquiry regarding the traffic violation, Merrill asked if there were any drugs or guns in the vehicle. The driver said that there were none. Merrill then asked the driver for consent to search the car for guns and drugs. The driver gave consent and a subsequent search of the vehicle revealed a bag of marijuana and a pipe of the type normally used to smoke marijuana. Peck admitted that the marijuana and pipe were his and he was charged with possession of marijuana and drug paraphernalia.

¶3 Peck then filed a motion to suppress the marijuana and pipe, claiming that the search was invalid. He argued that Merrill violated the Fourth Amendment by asking about the presence of guns and drugs and asking for consent to search without having any reasonable suspicion that there were guns and drugs in the vehicle. The circuit court agreed, concluding that the asking of those two questions transformed a permissible detention under the Fourth Amendment into an unlawful one. The State appeals.

DISCUSSION

Standard of Review.

¶4 When we review a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *See* ***State v.***

Eckert, 203 Wis. 2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). However, the application of constitutional principles to those facts is a question of law that we decide without deference to the circuit court's decision. *See* ***State v. Patricia A.P.***, 195 Wis. 2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995). Further, "the constitutional significance of the undisputed facts regarding the issue of consent must receive independent, appellate review." ***State v. Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876, 879 (Ct. App. 1993).

Consent to Search.

¶5 The Fourth Amendment prohibits unreasonable searches and seizures.[2] *See* U.S. CONST. amend. IV. The detention of a motorist by a law enforcement officer constitutes a "seizure" of the person within the meaning of the Fourth Amendment. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 436-37 (1984). Statements given and items seized during a period of illegal detention are inadmissible. *See* ***Florida v. Royer***, 460 U.S. 491, 501 (1983). However, an investigative detention is not "unreasonable" if it is brief in nature, and justified by a reasonable suspicion that the motorist has committed, or is about to commit, a crime. *See* ***Berkemer***, 468 U.S. at 439.

¶6 Peck does not dispute that Merrill had reasonable suspicion to stop the driver for a traffic violation. Instead, Peck argues that even though the initial detention was justified, Merrill illegally expanded the scope of the detention by asking about drugs and weapons and for permission to search the vehicle. Peck claims that because Merrill did not acquire information during the traffic stop that

[2] The same standards which have been established for Fourth Amendment rights arising under the United States Constitution apply to rights derived from the Wisconsin Constitution in art. I, § 11. *See* ***State v. Harris***, 206 Wis. 2d 243, 259, 557 N.W.2d 245, 252 (1996).

provided a reasonable suspicion that there were drugs or weapons in the vehicle, he could not ask a question about those items nor ask for consent to search. We disagree.

¶7 We recently considered this same issue in ***State v. Gaulrapp***, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996). In that case, Gaulrapp was stopped by a police officer because of a loud muffler. After bringing the muffler to his attention, the officer asked Gaulrapp if there were drugs or weapons in the vehicle. When he said there were none, the officer asked for permission to search the vehicle.[3] Gaulrapp consented to the search and the officer found a bag of marijuana in the vehicle.

¶8 Prior to trial, Gaulrapp moved to suppress the evidence on the grounds that the police officer illegally expanded the scope of the traffic stop when he asked Gaulrapp about drugs and weapons and for permission to search his vehicle. Citing ***Ohio v. Robinette***, 519 U.S. 33 (1996), we stated that the touchstone of the Fourth Amendment is reasonableness, "which is measured in objective terms by examining the totality of the circumstances." *See* ***Gaulrapp***, 207 Wis. 2d at 607, 558 N.W.2d at 699 (citation omitted). We then noted that Gaulrapp's focus on the subject matter of the questions instead of their effect on the duration of the seizure was not consistent with Fourth Amendment case law. *See* ***id.*** at 609, 558 N.W.2d at 700. We explained that once there is justification for a traffic stop, it is the extension of the detention past the point of reasonableness, not the nature of the questions that are asked, that violates the

[3] The officers also asked for consent to search Gaulrapp's person. Gaulrapp gave consent for this search as well which resulted in the officers finding a small bottle of cocaine in his pocket.

Fourth Amendment. *See* ***id.*** (citation omitted). We then concluded that "Gaulrapp's detention was not unreasonably prolonged by the asking of one question [about the presence of guns and drugs]." ***Id.*** We reasoned that once that question was asked, the detention was prolonged only because Gaulrapp consented to the search. *See* ***id.***

¶9 Peck argues that this case is controlled by ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999). In that case, Betow was stopped for speeding. The officer noticed that Betow appeared nervous and when Betow pulled out his license, the officer noticed that Betow's wallet had a picture of a mushroom sewn on it. The officer then told Betow that based on his experience, mushrooms were often symbols for drug use. He asked Betow for permission to search the car for drugs. Betow refused. The officer decided to conduct a search without Betow's consent and found a bag of marijuana. We held that the extended detention and subsequent search were improper because the officer did not have reasonable suspicion to justify detaining Betow for the search. *See* ***id.*** at 91-92, 593 N.W.2d at 501.

¶10 However, in the case before us, Peck's reliance on ***Betow*** is misplaced. In ***Betow***, we analyzed whether the officer had reasonable suspicion to extend the traffic stop and search the vehicle because the driver of the vehicle would *not* give consent to search his vehicle. Because Betow refused to give consent for the search, the officer was required to have reasonable suspicion for the continued detention and the search. Here, Peck's circumstances are on all fours with those presented in ***Gaulrapp***: (1) Merrill's asking about the presence of guns and drugs did not unreasonably prolong a reasonable traffic stop; (2) once the driver of the vehicle gave consent to search, it was the consent, not the police action, that was the basis for the continued detention; (3) the consent was

voluntarily and knowingly given; and (4) the search did not exceed the scope of the consent. Because the driver consented to the search, no reasonable suspicion was needed to do so. Therefore, we conclude that the court erred in failing to apply ***Gaulrapp***.

CONCLUSION

¶11 Because we conclude that asking a driver about possession of and consent to search for guns and drugs after a legal traffic stop does not impermissibly extend that detention, we reverse the circuit court's order suppressing the evidence.

By the Court.—Order reversed.

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