

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2005

Cornelia G. Clark
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. 04-1344-CR
STATE OF WISCONSIN**

Cir. Ct. No. 03CM000774

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

AARON J. GRENDER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County:
JAMES O. MILLER, Judge. *Reversed and cause remanded with directions.*

¶1 LUNDSTEN, J.¹ The State of Wisconsin appeals a circuit court order suppressing evidence supporting a charge of possession of drug

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

paraphernalia against Grender. We conclude that the evidence should not have been suppressed and, therefore, reverse and remand for further proceedings.

Background

¶2 The State charged Aaron Grender with possession of drug paraphernalia under WIS. STAT. § 961.573(1) (2001-02) after police found a pipe containing marijuana residue in his car following a traffic stop for speeding and tinted windows. Grender moved to suppress the pipe, arguing that the stop was illegal and, therefore, suppression of evidence acquired during the stop was required.

¶3 At the suppression hearing, State Trooper Jeff Berkley testified that he stopped Grender at approximately 6:30 in the evening after determining that Grender was speeding and that the windows of Grender's vehicle appeared to be excessively tinted in violation of state law. During Trooper Berkley's initial conversation with Grender, Berkley asked Grender where he was going, and Grender responded that he was going to Madison for a concert. Berkley observed that Grender "appeared to be fidgeting," was "a little shaky," and had "flushed cheeks." Berkley noticed that Grender was wearing a necklace that "may have been made from hemp" and that an object hanging from the headlight knob "was a marijuana leaf made from what could have been hemp."

¶4 Berkley also observed that Grender had "blood-shot, glassy eyes." In addition, Berkley noted that Grender displayed an abnormal level of nervousness compared to other drivers that he has stopped. In Berkley's experience, when a driver exhibits the level of nervousness that Grender did, it is usually an indicator that the driver is trying to hide something, either relating to

the status of the driver's license or registration, or to something the driver does not want Berkley to find.

¶5 Berkley returned to his vehicle, checked Grender's license and registration, and called for a canine unit. As Berkley waited for the canine unit to arrive, he wrote out warnings for Grender. Berkley testified that he requested the canine unit "[t]o provide some assistance for me in further investigation." Within a minute or two after Berkley had finished writing the warnings, but before Berkley had given the warnings to Grender, Deputy Sheriff Brian Pulvermacher, accompanied by a search dog, arrived on the scene.

¶6 Deputy Pulvermacher testified at the suppression hearing that he made contact with Grender and informed Grender that he was a canine handler with the sheriff's office and that part of his duties included a special focus on drug enforcement. Pulvermacher asked Grender if there was anything illegal in his vehicle, and Grender said no. Pulvermacher asked for Grender's consent to search his vehicle and to allow the dog into the vehicle as part of the search. Ultimately, Grender consented to this search.² When the dog entered the vehicle, the dog's behavior led Pulvermacher to discover the pipe.

¶7 Grender argued at the conclusion of the suppression hearing that the police had detained him in violation of the Fourth Amendment, rendering any consent to search invalid. The circuit court granted Grender's motion to suppress. The State appeals.³

² Grender disputed in the circuit court, but does not dispute on appeal, that he consented to the search of his vehicle.

³ See WIS. STAT. § 974.05(1)(d)2.

Discussion

¶8 In order to determine whether the circuit court properly granted Grender's suppression motion, we must address whether police obtained the pipe in Grender's vehicle in the course of an unlawful search or seizure under the Fourth Amendment. *See State v. Mieritz*, 193 Wis. 2d 571, 574, 534 N.W.2d 632 (Ct. App. 1995). If they did not, then the pipe should not have been suppressed. *See id.*

¶9 The temporary detention of an individual during the police stop of a vehicle, even if only for a brief period of time and for a limited purpose, constitutes a seizure within the meaning of the Fourth Amendment. *State v. Malone*, 2004 WI 108, ¶24, 274 Wis. 2d 540, 683 N.W.2d 1. We evaluate the reasonableness of the stop under principles similar to those used to analyze a *Terry* stop. *Id.* The stop must, of course, be justified at its inception, and it must be reasonably related in scope to the circumstances that justified the stop. *Id.* However, if, during a valid traffic stop, police become aware of suspicious factors or additional information that would give rise to a reasonable suspicion that further criminal activity is afoot, the police need not terminate the stop simply because further investigation is beyond the scope of the initial stop. *Id.* We consider both the nature and the duration of the police investigation in order to determine whether a stop remained reasonable within the meaning of the Fourth Amendment. *See id.*, ¶26.

¶10 Whether the circumstances of a stop or detention meet constitutional standards is a question of law, which we review *de novo*. *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623.

¶11 There is no dispute on appeal about the validity of the initial stop. The State argues that any additional incremental intrusions on Grender's liberty resulting from Trooper Berkley and Deputy Pulvermacher's investigation were reasonable within the Fourth Amendment, regardless of whether the police had a reasonable suspicion that Grender was engaged in illegal activity beyond the traffic violations for which he was stopped. In the alternative, the State argues that Trooper Berkley's initial observations of Grender gave Berkley the reasonable suspicion necessary to justify the police conduct that ensued after the initial stop of Grender.

¶12 We agree with the State's alternative argument and conclude that Trooper Berkley could form a reasonable suspicion that Grender was engaged in illegal activity, in addition to the traffic violations, at least by the time that Berkley had completed his initial questioning of Grender and summoned the canine unit. Thus, we conclude that even though the police here may have expanded the nature and duration of the stop beyond what was initially justified, there was no Fourth Amendment violation. Put another way, the scope of the police detention and investigation of Grender resulting in Grender's consent to search was justified by Berkley's reasonable suspicion that Grender was engaged in illegal activity *in addition to* the traffic violations for which Grender was stopped.

¶13 The facts that Trooper Berkley possessed at the time he completed his initial questioning of Grender and returned to his squad car to call for the canine unit included the following: Grender was speeding; Grender's windows appeared to be excessively tinted; Grender was going to Madison for a concert; Grender was fidgety, "a little shaky," and had "flushed cheeks"; Grender was wearing a necklace that "may have been made from hemp" and had an object hanging from his headlight knob that "was a marijuana leaf made from what could

have been hemp”; Grender had bloodshot, glassy eyes; and Grender displayed what Trooper Berkley believed to be an abnormal level of nervousness compared to other drivers that Berkley has stopped, something that Berkley usually associates with drivers hiding some further illegal activity. Based on all of these circumstances, Berkley could form a reasonable suspicion that Grender had drugs in his car.

¶14 Arguing in support of the circuit court’s order, Grender compares the facts of his case to the facts in *Gammons* and *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), two cases where we determined that traffic stops were transformed into unlawful detentions when police expanded the scope of their investigation during the stop without reasonable suspicion of illegal drug activity. See *Gammons*, 241 Wis. 2d 296, ¶24; *Betow*, 226 Wis. 2d at 98.

¶15 In *Gammons*, the vehicle was stopped in a “drug-related” or “drug crime” area; it was 10:00 p.m.; the vehicle was from Illinois; one of the investigating officers had personal knowledge of prior drug activity on the part of the suspect; and the suspect appeared to be nervous and uneasy. *Gammons*, 241 Wis. 2d 296, ¶21.

¶16 In *Betow*, the suspect’s wallet had a picture of a mushroom on it; the stop occurred late at night; the suspect appeared nervous; the suspect was returning to Appleton from Madison; and the investigating officer thought the suspect’s story about what he had been doing in Madison sounded implausible. *Betow*, 226 Wis. 2d at 95-97.

¶17 Grender contends that if there was no reasonable suspicion in either *Gammons* or *Betow*, there can be no reasonable suspicion here. We disagree.

¶18 At least two incriminating facts are present in this case that were not present in either *Gammons* or *Betow*. First, Grender’s eyes were glassy and bloodshot. Second, Grender was abnormally nervous, beyond what Trooper Berkley typically observed in the course of a traffic stop. When Grender’s nervous behavior and glassy, bloodshot eyes are considered in combination with all of Berkley’s other observations, we are satisfied that Berkley could form the requisite reasonable suspicion.

¶19 As the circuit court recognized in its decision, approximately 30 minutes elapsed between the time that Trooper Berkley stopped Grender and the time that Grender was arrested for possession of the marijuana pipe. The court concluded that this was “an inordinate amount of time” under the circumstances.⁴ While we understand and appreciate the circuit court’s vigilance in analyzing an extended traffic stop, we do not agree with the court’s apparent conclusion that the stop became constitutionally unreasonable.

¶20 A *Terry* stop “must at all times be temporary and last no longer than necessary to effectuate the purpose of the stop.” *State v. Quartana*, 213 Wis. 2d 440, 448, 570 N.W.2d 618 (Ct. App. 1997); *see also* 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 9.2(f), at 337 (4th ed. 2004) (“[A]s the Supreme Court has repeatedly stressed, it must be asked whether the police are diligently pursuing a

⁴ Specifically, the circuit court found that, from the time of the initial stop, it was “some 30 minutes later before Officer Pulvermacher is at the scene *or* the dog searches the car and the arrest is made” (emphasis added). The court correctly found, based on testimony at the suppression hearing, that the time between the initial stop and the arrest was 30 minutes, but the testimony does not support a finding that 30 minutes elapsed from the time of the initial stop until the time that Deputy Pulvermacher arrived on the scene. Trooper Berkley testified that he stopped Grender’s vehicle at 6:30 or 6:33 p.m. Pulvermacher testified that he arrived on the scene at 6:50 p.m. and arrested Grender at 7:04 p.m. Thus, the testimony shows that it was either 17 or 20 minutes after Berkley stopped Grender that Pulvermacher arrived.

means of investigation which is likely to resolve the matter one way or another *very soon*” (footnotes omitted; emphasis added)).

¶21 Here, Deputy Pulvermacher arrived on the scene within one or two minutes after Trooper Berkley had finished writing warnings for Grender’s traffic violations. Within fifteen minutes, Pulvermacher had completed his questioning of Grender, obtained Grender’s consent to search Grender’s car with the assistance of the dog, executed that search, and arrested Grender. Thus, the amount of time that the police prolonged Grender’s stop beyond what was already necessary for Grender’s traffic violations but before Grender’s consent to search was very brief. This short additional time, and the expanded nature of the stop, were justified by Trooper Berkley’s reasonable suspicion that Grender had drugs in his car.

¶22 Professor LaFave writes:

With regard to such uses of dogs in connection with a traffic stop, the courts have responded in much the same way as with the other investigative techniques First of all, if the detention was continuing or had been resumed when the sniff occurred but the time had run out on the traffic stop detention either because its immediate lawful objectives had been accomplished or they had not been accomplished only because of stalling (a likely tactic when a drug dog has been summoned from some distance and has not yet arrived), then the dog sniff and its fruits are all suppressible consequences of the illegal detention, *unless of course the continuation of the detention beyond its otherwise lawful limits was justified by the existence of reasonable suspicion of drug possession.*

4 LAFAVE, § 9.3(f), at 398-99 (footnotes omitted; emphasis added).

¶23 In sum, we conclude that both the nature and the duration of Grender’s detention were reasonable under the Fourth Amendment. It follows that police legally obtained the pipe during Grender’s detention. We therefore reverse

the circuit court's order and remand for further proceedings consistent with this decision.

By the Court.—Order reversed and cause remanded with directions.

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

