



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT II

June 2, 2021

To:

Hon. Faye M. Flancher
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

John W. Kellis
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Avenue
Racine, WI 53403

Annice Kelly
4623 75th St., #278
Kenosha, WI 53142

Patricia J. Hanson
District Attorney
730 Wisconsin Ave.
Racine, WI 53403

You are hereby notified that the Court has entered the following opinion and order:

2019AP1721-CR

State of Wisconsin v. Tremaine J. Brown (L.C. #2015CF1676)

Before Reilly, P.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Tremaine J. Brown appeals from a judgment convicting him of possessing a firearm as a felon. The judgment was entered upon Brown's no-contest plea after the denial of his suppression motion. Brown maintains that the firearm should be suppressed as the fruit of an unlawful warrantless vehicle search. Upon reviewing the briefs and the record, we conclude at conference this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-

20).¹ Because we conclude that the search of Brown's car was supported by probable cause to believe it contained evidence of drugs and was not excessive in scope or duration, we affirm.

Brown was stopped for speeding. Law enforcement detected the odor of marijuana and requested a canine unit. Once deployed, the canine alerted on Brown's car, indicating that the dog detected the odor of drugs. Law enforcement then searched Brown's car and found a handgun in the center console. No marijuana or other drugs were located.

Brown was charged with possessing a firearm while a felon and carrying a concealed weapon. His trial counsel filed a motion to suppress the handgun, asserting that by conducting a canine sniff, deputies unlawfully extended the traffic stop beyond the time necessary to fulfill the purpose of the stop.

The following relevant facts are taken from the suppression hearing. Deputies Scott Butler and Jimmy Wallace were on duty in the same squad car and initiated a traffic stop after observing Brown traveling twenty-five miles per hour over the speed limit. Butler exited his squad and made contact with Brown. There was a passenger in Brown's car. Brown's car window was down and he handed Butler his driver's license and insurance information. Butler smelled the odor of fresh marijuana in Brown's car.

Butler returned to the squad car and advised Wallace that he smelled marijuana during his contact with Brown. Butler provided Wallace the information needed to run Brown and his passenger through the computer system and called for backup and a police canine unit. Wallace

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

testified about the process of running the occupants' information through the computer system and writing a citation. When asked about the time necessary to write citations, he estimated that on average, it took him nine to eleven minutes "to do a traffic stop from beginning to end."

Deputy Edward Drewitz arrived with his drug canine, Friday. Wallace had not completed Brown's citation. About thirty seconds after leaving Drewitz's squad, Friday alerted on Brown's car by aggressively scratching at the driver's door. The alert occurred a little more than eight minutes after the traffic stop was initiated. Drewitz testified about his experience and credentials as a police canine handler and about Friday's qualifications to detect the odor of various drugs, including marijuana.

Brown testified that he had not smoked marijuana on the date of the traffic stop, and he denied that there was any marijuana in his car that day. Butler testified that he explained to Brown that he could smell marijuana in his car, and Brown responded by saying that he "found some the other day" and "threw it out."

After hearing the parties' arguments, the circuit court denied Brown's suppression motion. It found that in the process of gathering information from Brown, Butler detected the odor of fresh marijuana recognized from "on-the-job training." The court found that Butler told Wallace he had smelled marijuana and that he called for a police dog because he knew Drewitz was patrolling in the area. The court found that Drewitz arrived approximately six and one-half minutes after the traffic stop was initiated.

The circuit court credited Wallace's testimony that it would take "roughly nine to eleven minutes ... to write a citation for a traffic stop," and found "that in terms of processing the ticket that the deputies were within that time frame by the time that the dog had arrived on scene." The

court found that Friday gave “a positive alert” and concluded that “the traffic stop was not prolonged by reason of the dog sniff.” Brown appeals.

There is no dispute that the traffic stop of Brown for speeding was lawful. *See, e.g., State v. Floyd*, 2017 WI 78, ¶20, 377 Wis. 2d 394, 898 N.W.2d 560 (officers may perform an investigatory stop of a vehicle based on reasonable suspicion of a noncriminal traffic violation). Brown does not challenge the circuit court’s finding that Friday alerted on his car, or the determination that Friday’s alert provided deputies with probable cause to search his car for drugs. *See State v. Secrist*, 224 Wis. 2d 201, 210, 589 N.W.2d 387 (1999) (law enforcement may conduct a warrantless vehicle search upon probable cause to believe it contains evidence of a crime; an “unmistakable odor of marijuana coming from an automobile provides probable cause” to search). *See also State v. Miller*, 2002 WI App 150, ¶¶12-14, 256 Wis. 2d 80, 647 N.W.2d 348 (holding that a trained drug canine’s positive alert provided probable cause to search where the canine was shown to be reliable). The question for this court is whether Friday’s open air drug sniff and subsequent alert occurred during an unlawfully extended traffic stop.

“[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s ‘mission’—to address the traffic violation that warranted the stop and attend to related safety concerns.” *Rodriguez v. United States*, 575 U.S. 348, 354 (2015) (citation omitted). In addition to investigating the violation and determining whether to issue a citation or citations, permissible inquiries incident to a stop include running the driver’s license, checking to see if there are outstanding warrants, and inspecting a vehicle’s registration and proof of insurance. *Id.* at 355. An officer’s authority to seize an individual “ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.” *Id.* at 354. However, if, during a valid traffic stop, an officer becomes aware of factors supporting a reasonable suspicion

that a separate offense has been committed, the stop may be extended to allow for additional investigation. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394.

A canine sniff around the exterior of a lawfully stopped car need not be supported by reasonable suspicion of drug activity because a dog sniff is not a search. *Illinois v. Caballes*, 543 U.S. 405, 408-10 (2005). Put differently, a canine sniff is permissible even without particularized concern of drug activity so long as it does not prolong the traffic stop past its mission. *Rodriguez*, 575 U.S. 348, 357.

Applying these principles, we conclude that the traffic stop was not improperly extended. The undisputed evidence was that Wallace remained on task but had not yet finished Brown's traffic citation at the point at which Friday alerted on Brown's car. Brown does not argue, and there is no evidence, that the deputies should have finished their mission before Friday alerted. To the contrary, the circuit court credited Wallace's testimony concerning the length of an average traffic stop and found that deputies acted "within that time frame." Because the canine sniff was conducted while deputies were lawfully executing the speeding-ticket mission of the traffic stop, it did not cause any delay to Brown. *Id.* at 354.

Even if there had been some delay due to the request for and deployment of Friday, deputies would have been entitled to extend Brown's traffic stop because Butler smelled the odor of marijuana. See *Colstad*, 260 Wis. 2d 406, ¶19; *State v. Betow*, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499 (Ct. App. 1999). Butler testified that he was trained to detect marijuana odors and that he smelled that distinct scent while bending down to speak with Brown and take his license. To validate his reasonable suspicion, he called for a canine unit. Drewitz quickly arrived and

deployed Friday, who alerted within thirty seconds. In terms of the entire encounter, Friday alerted within eight minutes and eight seconds of the initial traffic stop.

Brown disputes that Butler formed reasonable suspicion to extend the traffic stop, asserting that the circuit court (1) erroneously found that Butler smelled the odor of marijuana, and (2) improperly required Brown to prove that Butler lied when testifying. He suggests that these factors invalidate the search of his car. We disagree. First and foremost, Brown's argument overlooks the dispositive fact that deputies were properly executing the mission of the traffic stop when Friday alerted. Because no quantum of suspicion is required to perform an open air dog sniff, it is immaterial whether or not Butler smelled marijuana or had reasonable suspicion of drug activity prior to Friday's alert.²

Second, Brown has not shown that the circuit court erred in finding that Butler smelled the odor of marijuana. When finding facts, the circuit court is the ultimate arbiter of credibility. *Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Though Butler's testimony alone was sufficient to support its finding, the court also pointed to several factors bolstering Butler's credibility. We reject as speculative and unsupported Brown's assertion that the other scents in his car "would have made it impossible to distinguish fresh marijuana." We similarly

² Brown argues that the fact of Friday's alert "is irrelevant as Deputy Butler testified that he would have conducted a search whether the sniff dog indicated a smell or not." We are not persuaded. We determine the propriety of a legal intrusion using an objective test. *See, e.g., State v. Baudhuin*, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987). Brown offers no authority for why we should disregard the fact of Friday's alert, a relevant circumstance known to deputies when they began their vehicle search.

We agree with the State that we could have stopped our analysis after concluding that the drug dog arrived and alerted before the traffic stop's speeding-related mission was complete. However, the circuit court took care to discuss whether Butler had reasonable suspicion to expand the scope of the stop and the parties address this issue in their appellate briefs. Further, that Butler smelled marijuana supports our conclusion that deputies had probable cause to search Brown's car.

reject his contention that Butler could not have smelled marijuana because none was located during the search. Here, Brown ignores that the odor of marijuana can linger even after it has been removed or smoked and that reasonable suspicion does not hinge on whether that suspicion turns out to be correct.

Finally, Brown's assertion that the circuit court required him to prove that Butler was lying is factually unsupported and legally undeveloped. That the court made a credibility finding adverse to Brown does not constitute burden shifting.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals