COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP509-CR **Cir. Ct. No. 2015CF567**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA VUE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Joshua Vue appeals a judgment convicting him of possession of methamphetamine. The parties argue several issues, but we conclude that the resolution of just one dispute is dispositive. We agree with the circuit court that all of the police officer's initial investigative activities, including taking steps to have a canine brought to the scene to "sniff" Vue's car, were supported by reasonable suspicion. Accordingly, we affirm the circuit court.

Background

¶2 On April 16, 2015, at about 6:23 p.m., a police officer pulled over a car for the sole reason that a back-seat passenger was not wearing a seat belt. During the course of the stop, the officer called for a canine to conduct an "exterior free air sniff" of the car. Later, while the officer was explaining to the driver, Joshua Vue, that the dog would sniff Vue's car, Vue admitted that there were marijuana pipes in the car. Vue consented to a search of his person, and the officer searched the car based on probable cause supplied by Vue's admission and other circumstances. The search of the car revealed two pipes with what appeared to be marijuana residue, another pipe with what the officer believed was "meth" residue, and a baggie containing about one gram of methamphetamine.

¶3 Vue was charged with possession of methamphetamine and possession of drug paraphernalia. Vue moved to suppress the evidence, arguing that the stop was prolonged beyond the time needed to issue the seat belt citation and that the additional duration of the seizure was not supported by reasonable suspicion of criminal activity apart from the seat belt violation.

¶4 The circuit court rejected the suppression motion for two reasons. First, the circuit court found that the officer's actions with respect to the canine sniff "did not *measurably* extend the length of the traffic stop beyond the point

reasonably required to issue the citation." Thus, there was no need for reasonable suspicion or probable cause in addition to the information relating to the seat belt violation. Second, the circuit court concluded that, even if the duration of the stop was measurably extended, that extension of time was supported by reasonable suspicion of criminal activity.

Discussion

¶5 The parties address four topics: (1) whether canine-sniff-preparation activities by the stopping officer were supported by reasonable suspicion; (2) whether the duration of the stop was "measurably" extended, for the purpose of preparing for a canine sniff, within the meaning of ***Rodriguez v. United States***, __ U.S. __, 135 S. Ct. 1609, 1615 (2015); (3) assuming a "measurably" extended stop and a lack of reasonable suspicion to support that extended stop, whether the good faith exception to the exclusionary rule applies; and (4) whether the State's good faith exception argument is forfeited because it is raised for the first time on appeal.

¶6 We conclude that the officer's canine-sniff-preparation activities were supported by reasonable suspicion. If the officer's canine-sniff-preparation activities were supported by reasonable suspicion, we perceive no dispute that we need not address the remaining issues.

¶7 The officer here observed that a passenger in the rear seat of the car that Vue was driving was not wearing a seat belt. The officer stopped Vue's car. There is no dispute that the officer properly stopped the car to investigate and issue a citation for a seat belt violation. The court in ***State v. Hogan***, 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124, explained that the duration and scope of such a stop may be expanded if supported by additional reasonable suspicion:

> After a justifiable stop is made, the officer may expand the scope of the inquiry only to investigate "additional suspicious factors [that] come to the officer's attention." An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion. In this regard, the legal extension of a traffic stop is essentially a *Terry* investigatory stop.
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> "The focus of an investigatory stop is on reasonableness, and the determination of reasonableness depends on the totality of circumstances...." Although officers sometimes will be confronted with behavior that has a possible innocent explanation, a combination of behaviors—all of which may provide the possibility of innocent explanation—can give rise to reasonable suspicion.

Id., ¶¶35-36 (citations omitted). To this we add that reasonable suspicion is dependent on whether the officer's suspicion was grounded in specific, articulable facts, and reasonable inferences from those facts, that an individual was committing a crime. *See* ***State v. Waldner***, 206 Wis. 2d 51, 55-56, 556 N.W.2d 681 (1996). "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***State v. Young***, 212 Wis. 2d 417, 424, 569 N.W.2d 84 (Ct. App. 1997).

¶8 The unchallenged specific fact finding by the circuit court, and the officer's testimony, credited by the circuit court, tell the following account.

¶9 While driving on a highway, the officer could see that a passenger in the rear seat of Vue's car was not wearing a seat belt, but the officer observed no signs of impaired or "bad" driving. After stopping Vue's car and approaching the passenger-side window, the officer saw three people in the car: a back-seat passenger, Vue in the driver's seat, and a front-seat passenger. The officer did not notice any odor of alcohol or a controlled substance.

¶10 The officer explained that he had stopped the car because of a seat belt violation. The back-seat passenger stated that she "just forgot to put her seatbelt on" and that she "was having a weird day." The officer thought this response was "kind of ... odd." The back-seat passenger did not have photo identification.

¶11 The officer asked Vue whether he had documentation of vehicle registration and insurance. Vue did not attempt to look for documentation. Rather, Vue simply answered "no" as to each. The officer thought this was unusual because people typically make some attempt to search for documentation.

¶12 The officer observed that Vue's eyes were "very red and bloodshot." Based on his training and experience, the officer opined that this was an indication that Vue was "probably under the influence of some type of drug or alcohol."

¶13 The officer saw a bottle of Clear Eyes in "the passenger side door handle." The officer thought this was an "odd" place in the car for that bottle to be. The officer stated that, during prior "drug stops" he made, when drugs were found in a car, "more times than not" there were "little bottles of [Clear Eyes] or Visine" in the car.

¶14 The officer noticed that the front-seat passenger did not make "any eye contact" with the officer "at all," but rather looked straight forward out the windshield. The circuit court inferred from the officer's testimony that the passenger "stared directly out the windshield throughout the encounter."

¶15 After making these observations, the officer returned to his squad and radioed a request for a canine for purposes of conducting a "sniff" for drugs. Vue argues that the officer's time spent making this request and other canine-sniff-

preparation activities extended the duration of the stop beyond the time reasonably needed to issue the back-seat passenger a seat belt violation citation. But if, prior to making this request, the officer had reasonable suspicion of criminal activity relating to illegal drugs, then there is no dispute that the remainder of the investigation was legal.

¶16 We agree with the circuit court that the officer possessed reasonable suspicion of illegal drug activity before the officer returned to his squad and requested the canine.

¶17 There are some observations that the circuit court seemed to rely on that we do not rely on. For example, we do not rely on the fact that the officer thought it was odd that the passenger commented that she was having a "weird day" and that the "Clear Eyes" bottle was located in the front passenger-side door "handle." However, the following factors, considered collectively, would cause a reasonable officer to suspect that drug-related criminal activity was afoot.

¶18 We conclude that Vue's failure to search for documentation is suspicious, but not for the reason articulated by the officer. We agree with Vue that it is not suspicious to fail to search for something you know you do not have. However, it remains true that most motorists will open a glove compartment or similar compartment to look for proof of insurance or registration, and a reasonable officer could have wondered if Vue's simple no answer was because Vue did not want to open, and thus expose to the officer's view, the interior of his glove compartment or other compartment.

¶19 The officer observed that Vue's eyes were "very red and bloodshot." There was no challenge to the officer's testimony that this was an indication that Vue was "probably under the influence of some type of drug or alcohol." The

officer gave foundational testimony indicating that he had conducted many drug stops. We discern no reason why the circuit court or this court cannot rely on this assertion.

¶20 The bottle of Clear Eyes in plain view was suspicious in light of the officer's additional testimony based on the officer's experience. The officer testified, again without challenge, that, during prior "drug stops" he made, when drugs were found, "more times than not" there were "little bottles of [Clear Eyes] or Visine" in the car.

¶21 Finally, the front-seat passenger's behavior contributes to reasonable suspicion. The officer was standing at the front-seat passenger-side window. Common sense dictates that, when an officer stands at a car side window, talking to occupants and asking questions, the natural reaction of the person sitting next to that window is to look toward the officer, even if briefly. The fact that the front-seat passenger did not look at the officer at all, but instead "stared directly out the windshield throughout the encounter," would suggest to a reasonable officer that the passenger might be impaired by drugs or alcohol in some manner that would be apparent if the passenger did the normal thing and turned toward the officer. To be clear, it does not seem suspicious to mostly look forward while the officer stands next to the passenger's side window. Rather, the reason that this was suspicious is that the passenger never even glanced toward the officer.

¶22 Collectively, these observations would cause a reasonable officer to suspect that evidence of illegal drug activity was in the car.

¶23 We have reviewed the cases Vue relies on for factual comparisons: ***Hogan***, 364 Wis. 2d 167; ***State v. Gammons***, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623; ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App.

1999); and ***Young***, 212 Wis. 2d 417. We decline to address the details of each. Rather, it is sufficient to say that the facts here are sufficiently different from the facts in those cases, such that none of those cases control the result here.

Conclusion

¶24 For the reasons above, we affirm the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16).