COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1420-CR **Cir. Ct. No. 2007CF66**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ASHLEY N. HEBERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Ashley Hebert appeals a judgment of conviction for one count each of possessing tetrahydrocannabinols (THC) with intent to deliver and possessing drug paraphernalia. Hebert argues the circuit court erred

by denying her motion to suppress evidence obtained after the traffic stop was concluded. We agree. We therefore reverse and remand.

Background

¶2 Deputy Tyler Rich of the Shawano County Sheriff's Department pulled Hebert over after he observed the car she was driving had a burned out rear registration lamp, missing rearview mirror, and cracked windshield. Rich recounted the following facts during the suppression motion hearing.[1] After pulling Hebert over, Rich asked Hebert a few questions about where she was coming from, took her license back to his squad car, and ran a license check. The check revealed no warrants. Rich returned to Hebert's car, asked her to turn the heating fan on, roll up the window, and get out of the car. Rich then returned her driver's license and registration to her, and gave her a verbal warning for the equipment violations.

¶3 Rich then told Hebert he was going to walk his dog around her vehicle, and asked if there was anything illegal in the vehicle. Hebert replied that a marijuana pipe belonging to her had fallen onto the ground next to the vehicle when she had gotten out, and that there was marijuana in the car. Rich testified that he had not noticed the pipe until Hebert pointed it out. Rich and another deputy then walked the dog around Hebert's car. The dog alerted at the front door seams on both the driver's and passenger's side of the car. Rich then let the dog in the car and the dog located the marijuana Hebert had admitted was in the car.

[1] Hebert and Rich's testimony about the stop differed somewhat; however, the differences between the two accounts does not alter the substance of our analysis. The trial court found Rich's explanation more credible than Hebert's. Therefore, we adopt his explanation of the events.

¶4 Hebert filed a motion to suppress, arguing that the evidence of her possession of THC and drug paraphernalia was obtained while she was illegally seized. The circuit court denied her motion. Following the denial of her motion, Hebert agreed to plead guilty.

Discussion

¶5 The constitutionality of a search and seizure is a question of constitutional fact. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. We will uphold a circuit court's findings of fact unless clearly erroneous. ***Id.*** However, whether the facts pass constitutional muster is a question of law we review independently. ***Id.***

¶6 The United States and Wisconsin Constitutions both protect the right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, § 11. Whether a seizure is reasonable within the context of a traffic stop depends on whether (1) "the seizure was justified at its inception," and (2) the "officer's action 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" ***State v. Arias***, 2008 WI 84, ¶30, 752 N.W.2d 748 (quoting ***Terry v. Ohio***, 392 U.S. 1, 19-20 (1968)). Hebert does not challenge the validity of the initial stop. Therefore, the only issue is whether Hebert's detention after Rich returned her license and issued a warning was reasonably related in scope to the purpose of the stop.

¶7 Neither the federal nor Wisconsin Constitutions require scope to be defined so narrowly that an officer's actions are confined solely to the circumstances justifying the stop. *See, e.g.*, ***Pennsylvania v. Mimms***, 434 U.S. 106 (1977) (an officer may order the driver of a lawfully stopped car to get out of the car when issuing a traffic citation). Rather, the United States Supreme Court

has held that whether a seizure is reasonable "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference from police officers.'" ***Brown v. Texas***, 443 U.S. 47, 50 (1979) (quoting ***Mimms***, 434 U.S. at 109). Balancing these concerns requires "a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." ***Brown***, 443 U.S. at 50.

¶8 Recently, our state supreme court employed the ***Brown*** framework to analyze the constitutionality of a dog sniff of the exterior of a vehicle during an ongoing traffic stop. ***Arias***, 752 N.W.2d at 759 (incorporating the ***Brown*** analysis as articulated in ***State v. Griffith***, 2000 WI 72, ¶37, 236 Wis. 2d 48, 613 N.W.2d 72). The ***Arias*** court identified the public interest as preventing the flow of narcotics, and weighed this interest against the intrusion of prolonging the stop for an extra seventy-eight seconds for a dog sniff. It held that under the totality of the circumstances, the seventy-eight seconds the stop was prolonged was not an unreasonable intrusion upon the defendant's liberty. ***Arias***, 752 N.W.2d at 763.

¶9 The State argues that just as in ***Arias***, the gravity of the public concern in deterring the flow of narcotics outweighs the intrusion of extending a stop after the officer has issued a warning and returned the driver's license. We disagree.

¶10 Unlike in ***Arias***, Hebert's seizure occurred after the officer had accomplished everything related to the initial stop. In ***Arias***, officer Brian Rennie pulled over a vehicle after he observed Arias place beer into a vehicle he knew

belonged to a minor.[2] Rennie explained to the driver why he had stopped her and took her driver's license to his squad car. He then administered a breath test, asked if there were any drugs in the car, returned to his squad car, and released his police dog to perform a sniff around the vehicle. The dog sniff uncovered drugs and a weapon belonging to the passenger, Arias. After Arias was handcuffed and placed in Rennie's squad car, Rennie removed the beer from the car and told the driver she was free to leave. He did not issue a citation for transporting intoxicants until the next day. ***Id.*** at 751-52.

¶11 Here, deputy Rich concluded everything related to the purpose of the stop before he informed Hebert that he was going to conduct a dog sniff of the exterior of her vehicle. Rich informed her he intended to conduct a dog sniff only after he asked investigatory questions, ran her driver's license, explained and issued a warning, and returned her license.

¶12 Wisconsin courts have held that actions similar to Rich's demonstrate a stop has been concluded. In ***State v. Williams***, 2002 WI 94, ¶26, 255 Wis. 2d 1, 646 N.W.2d 834, our supreme court held a stop was concluded when the officer returned the defendant's license and rental papers and then told the defendant he would be free to go after he signed the warning citation. Likewise, in ***State v. Jones***, 2005 WI App 26, 278 Wis. 2d 774, 693 N.W.2d 104, we agreed the traffic stop ended with the issuance of the warning citation and return of the defendant's and the driver's identification cards. We noted in ***Jones*** that the ***Williams*** court had observed that "there is case law holding that a traffic

[2] WISCONSIN STAT. § 346.93 (2005-06) prohibits a minor from driving a vehicle containing intoxicants.

stop is concluded when the driver has received his or her citation and driver's license." ***Id.*** ¶7 n.4 (internal citations omitted).

¶13 When a traffic stop has concluded, an individual is unlawfully seized if a reasonable person would not feel free to leave or decline the officer's requests. ***Williams***, 255 Wis. 2d 1, ¶22 n.6 (citing ***Florida v. Bostick***, 501 U.S. 429 (1991)). Because Rich gave Hebert no choice in the matter when he announced he was going to conduct a dog sniff around her car, a reasonable person in Hebert's place would not have felt free to leave or decline to answer his questions.

¶14 This situation is similar to the one we examined in ***Jones***. In that case, the officer asked whether there was anything in the vehicle and then requested permission to search the vehicle seconds after returning the driver's license and issuing the citation. We held the driver's consent to search the car was not validly obtained because the officer's attempt to obtain consent for a search was seamlessly woven together with the traffic stop. ***Jones***, 278 Wis. 2d 774, ¶18. We concluded "there was no significant demarcation between the conclusion of the traffic matter and [the officer's] attempt to obtain … consent to a search of the vehicle." ***Id.*** The same is true here.

¶15 The ***Arias*** court expressly distinguished the brief period of time an ongoing traffic stop was prolonged for a dog sniff from cases, such as the one here, where the seizure occurred after an officer had concluded the stop.

> [***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999)] is distinguishable from the case before us because the incremental intrusion on Betow's liberty interest was unreasonable under the totality of the circumstances presented. This is so because Betow's traffic stop for speeding had been concluded when the officer asked if he could search Betow's vehicle.
>
> ….

> By contrast, the traffic stop of Schillinger was ongoing when the dog sniff of the outside of the vehicle occurred.

Arias, 752 N.W.2d at 762.

> [***State v. Gammons***, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623] is also distinguishable from the totality of the circumstances presented here. … [I]n examining the totality of the relevant circumstances we note that the reason for the initial seizure had been satisfied; the driver and the two passengers had provided identification; the officer had run computer checks on all three; the officer asked to search the vehicle and the driver had refused. Thereafter, the officer threatened the driver with the further detainment so that he could use a drug sniffing dog, and the driver then consented to the search of the vehicle. Accordingly, the incremental intrusion upon Gammons's liberty interest was significantly greater than the intrusion upon Arias's liberty interest.

Arias, 752 N.W.2d at 763 (internal citations omitted).

¶16 The ***Arias*** court's conclusion that the liberty intrusions in ***Betow*** and ***Gammons*** were significant because they occurred after the purpose of the traffic stops had ended accords with the ***Brown*** analysis. The ***Brown*** framework helps quantify the reasonableness of a seizure, but this reasonableness must still fit within the ***Terry*** requirements. Thus, a seizure is reasonable only if it is justified at its inception and is reasonably related in scope to the circumstances which justified interference in the first place. As the ***Arias*** court noted, whether an investigative detention is reasonably related in scope to the circumstances justifying the stop depends on "whether it lasted 'no longer than is necessary to effectuate the purpose of the stop.'" ***Arias***, 752 N.W.2d at 758 (quoting ***Florida v. Royer***, 460 U.S. 491, 500 (1983)).

¶17 By these terms, once the initial stop has been concluded, further detention would exceed the scope of the circumstances justifying the stop. *See*

Brown, 443 U.S. at 52 (in the absence of reasonable suspicion, the balance between the public interest and right to personal security and privacy tilts in favor of freedom from police interference). Therefore, Rich's statement to Hebert that he was going to conduct a dog sniff of the exterior of her vehicle was not reasonably related in scope to the circumstances justifying the stop.

By the Court.—Judgment reversed and cause remanded.

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