

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2010AP2769-CR

Cir. Ct. No. 2009CF353

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRENDA L. CAPETILLO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
DAVID T. FLANAGAN, III, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Brenda Capetillo appeals from a judgment of conviction of the possession of marijuana with intent to deliver. She argues that she was illegally stopped, detained and searched when she stepped off a bus arriving in Sun Prairie, Wisconsin, from Dallas, Texas, and that evidence of the

sixty-three pounds of marijuana found in her two suitcases should have been suppressed. We affirm the circuit court's denial of Capetillo's motion to suppress evidence and the judgment of conviction.

¶2 In February 2009, a citizen informant from a Texas bus company called Sun Prairie police reporting his observation that in the past two months a couple was traveling frequently by bus between Texas and Sun Prairie. The informant gave his name and telephone number. He explained that he had ten years' experience with the bus company and was a co-owner. He explained the bus ticket cost \$130 one way. In his experience, the couple's travel pattern was unusual for that time of year and the expense. He also relayed that the bus driver had reported to him that the couple never got off the bus on the long journey between Texas and Wisconsin and he found that very odd. He expressed his concern that the couple was perhaps engaged in illegal activity, particularly the transportation of drugs. The informant told police that the couple would be arriving by bus in Sun Prairie at approximately 11:00 a.m. on February 20, 2009. He described the couple as a Hispanic male and female in their twenties and that the male was wearing a white jacket and that the female had a piercing in or near her lower lip.

¶3 Police officers made plans to meet the bus. While waiting for the bus to arrive, officers observed a man waiting in a pickup truck nearby the bus stop. The bus arrived early, between 10:00 and 10:10 a.m. A Hispanic couple matching the informant's description departed from the bus and walked toward the waiting pickup truck. The couple had two rolling suitcases. When officers approached the couple, the female identified herself as Capetillo. Within thirty

minutes after the bus arrived, an officer with a drug-sniffing dog arrived.¹ After the dog examined the pickup truck, Capetillo was asked for consent to search the luggage and she gave it.² The dog alerted to the presence of drugs in the suitcases. The suitcases were opened and marijuana was found inside. Capetillo was arrested at 10:37 a.m.

¶4 To execute a valid investigatory detention of a person, an officer must “reasonably suspect, in light of his or her experience, that some kind of criminal activity has taken or is taking place.” *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). The officer’s reasonable suspicion must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). Whether an investigative detention was based on reasonable suspicion is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. The circuit court’s findings of historical fact will be upheld unless clearly erroneous. *Id.* This court reviews de novo whether an investigatory detention was justified by reasonable suspicion. *Id.*

¶5 The determination of reasonableness depends on the totality of the circumstances. *Richardson*, 156 Wis. 2d at 139. The totality of circumstances test requires an assessment of the content and degree of reliability of information

¹ The testimony varied on whether fifteen, twenty-five, or thirty minutes passed before the dog’s arrival. The circuit court did not find it necessary to determine the exact amount of time that passed. The circuit court utilized the longest waiting period and we do too.

² Although Capetillo testified she only gave consent to search a duffle bag that had been placed in the back of the pickup, the circuit court found her testimony not credible. Capetillo does not challenge the circuit court’s finding that she gave consent for the suitcases.

available to an officer. *State v. Williams*, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106. Information from a citizen informant who provides his or her name is subjected to a relaxed test of reliability which focuses on observational rather than personal reliability. *State v. Kolk*, 2006 WI App 261, ¶13, 298 Wis. 2d 99, 726 N.W.2d 337. We may look to whether the informant explained how he or she came to know about the suspected criminal activity and whether innocent details of the information can be confirmed by police observation. *Id.*, ¶14.

¶6 Capetillo first claims that the information provided by the citizen informant lacked any content suggesting illegal activity. She points out the informant did not see the couple obtain, possess, or deliver drugs. However, “neither direct observation of a crime nor predictive information are rigid requirements for a tip to be reliable.” *Id.*, ¶19. Because we look to the totality of the circumstances, we consider the reliability of the information from the citizen informant. The bus company’s co-owner explained how he came to know the information he was relaying to the police and why the behavior he observed, frequent trips to Wisconsin’s colder climate, was unusual. The informant told police he had seen the couple travel the week before he called and he had seen them one or two times every two or three weeks. The police were able to confirm certain innocent details the informant gave them about the couple’s arrival time, place and appearance.

¶7 The totality of the circumstances also includes the officers’ training and experience. *See State v. Young*, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997). Here, the officers knew the practice of growing marijuana in Mexico and its transportation from border states such as Texas.

¶8 Common sense is also part of the test of reasonableness. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). As the circuit court observed, “[c]ertainly anyone familiar with Wisconsin weather would question the logic of repeatedly traveling from Dallas to Sun Prairie in the dead of winter; and, anyone who has ever ridden a Greyhound would wonder why the couple was not flying instead.”

¶9 In summary, the police were not required to rule out possible innocent explanations for the suspicious travel pattern. See *Williams*, 241 Wis. 2d 631, ¶46. The police were entitled to rely on the citizen informant’s information. The training and experience of police led them to link the travel pattern with possible illegal activity. The police had a reasonable suspicion authorizing the investigative detention of Capetillo.

¶10 Having determined that the investigative detention was justified, we consider Capetillo’s claim that her detention lasted longer than reasonably necessary to effectuate its purpose. An investigative detention is examined to determine whether it lasted only as long as necessary to effectuate its purpose and whether the investigative means used in the continued detention “are ‘the least intrusive means reasonably available to verify or dispel the officer’s suspicion.’” *State v. Arias*, 2008 WI 84, ¶32, 311 Wis. 2d 358, 752 N.W.2d 748 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). We will uphold the circuit court’s factual findings unless they are clearly erroneous. *Arias*, 311 Wis. 2d 358, ¶12. Capetillo argues that the duration of the detention was unlawfully extended to allow for the arrival of the drug-sniffing dog. We disagree.

¶11 Again, the totality of the circumstances is examined. *Id.*, ¶34. Reasonableness balances the public interest, the degree to which the continued

detention advances the public interest, and the severity of the interference with the detained person's liberty interest. *Id.*, ¶39.

¶12 Capetillo points out that during her interaction with the officer she did not appear evasive, nervous, or uncooperative and a check of her identification could not have revealed any past criminal history because she had none. Therefore, she contends there was no reason for the officers to continue to detain her. Without any contact with Capetillo, the officers had a reasonable suspicion that Capetillo and her traveling companion were transporting drugs. Just as the interaction with Capetillo did not add anything to the officers' suspicion, neither did it dispel it. Because the public interest in preventing the transportation of illegal drugs is significant, *id.*, the officers were not required to abandon their suspicion.

¶13 Based on their suspicion the officers intended to meet the bus with the drug-sniffing dog on hand. A dog sniff in a public location is a less intrusive investigative tool than most. *Id.*, ¶23. Unfortunately, the bus arrived earlier than expected, nearly an hour earlier. The circuit court found that as soon as an officer learned that the bus would arrive early, he requested all officers scheduled to be involved in the investigative detention to meet directly at the bus stop. Thus, officers were diligent in their efforts to deploy the least intrusive investigative tool necessary to dispel their suspicion of drug dealing. Further, upon arriving at the bus stop, the man waiting in the pickup truck was observed and the possibility of a third individual being involved in the drug transportation was introduced. There is no suggestion that the officers were less than diligent in their identification checks of all three individuals. The continued detention significantly advanced the public's interest.

¶14 With respect to the interference with her liberty, Capetillo complains about the length of time she was asked to stand out in the cold and hostile weather conditions with only a light jacket on. Capetillo's detention was, at most, approximately thirty-seven minutes long. Capetillo admitted that she had made the bus trip to Wisconsin on at least two prior occasions since the preceding November. Capetillo was capable of knowing that Wisconsin weather could be cold and that she should dress appropriately. That Capetillo was not dressed appropriately for the cold weather was not the officers' fault. Moreover, Capetillo was not standing out in the cold the entire thirty-seven minutes. At some point before the dog sniff was completed, Capetillo and her traveling companion returned to the inside of the warm bus.

¶15 There is "no hard-and-fast time limit for when a detention has become too long and therefore becomes unreasonable." *Id.*, ¶34. In *State v. Wilkens*, 159 Wis. 2d 618, 628, 465 N.W.2d 206 (Ct. App. 1990), the defendant's detention for one hour to one hour and twenty minutes was not unreasonable in light of the officers' diligence in investigating the reported assault and calming the victim to obtain her statement. In *State v. Colstad*, 2003 WI App 25, ¶¶17-18, 260 Wis. 2d 406, 659 N.W.2d 394, questioning of the defendant did not resume for approximately thirty to forty-five minutes while an officer provided medical attention to a crash victim, investigated the scene, took photographs, and marked the scene; the wait time was held to be reasonable. In *State v. Vorburger*, 2002 WI 105, ¶¶40, 63, 255 Wis. 2d 537, 648 N.W.2d 829, a suspect who had been handcuffed was detained in a hotel room for one hour and ten minutes while police obtained a search warrant and the detention was not deemed unreasonable in light of the time of day and distance separating persons necessary to obtain the warrant.

¶16 Here, Capetillo was asked to wait approximately thirty minutes. Aside from allowing Capetillo to return to the warmth of the bus, she was not moved to any location and she was not subjected to any physical restraint. The interference with her liberty was as non-intrusive as possible given the circumstances. The public interest in investigating a possible crime outweighs the minimal discomfort Capetillo experienced waiting in the cold and the length of the wait time.

¶17 Neither the investigative detention nor its length was unreasonable. The circuit court properly denied Capetillo's motion to suppress the marijuana recovered from the suitcases.³

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

³ In a summary fashion, Capetillo argues that the police did not have valid consent to search the suitcases. She does not challenge the circuit court's factual finding that she gave consent; she contends that any consent given during the encounter was invalid as a matter of law because of the illegal detention and continued seizure. We have determined that the detention and its length were valid. Therefore, Capetillo's consent was not invalid as a matter of law. We need not address the issue of consent.

