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**DISTRICT IV**

January 28, 2015

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

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2013AP2192-CR

State of Wisconsin v. Christopher M. Clark (L.C. # 2011CF87)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Christopher Clark appeals a judgment convicting him on two drug charges. He also appeals an order denying his postconviction motion for plea withdrawal. Clark raises three issues on appeal, all stemming from his postconviction discovery of the training and performance records of a police dog that alerted to the presence of drugs in Clark's vehicle during a traffic

stop. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).<sup>1</sup> We affirm.

The parties do not dispute the basic facts of the traffic stop as found by the circuit court in an order deciding Clark's original suppression motion. A police officer pulled Clark's vehicle over because its taillights were not working. As the officer approached the vehicle, he observed Clark making quick furtive movements as though he were reaching for something. Clark appeared "very nervous," to the extent that his carotid artery appeared to be jumping out in his neck. The officer watched Clark search through a stack of credit cards, business cards, and money for about three minutes looking for his identification before finally locating an expired Louisiana driver's license that Clark had passed over several times. Clark continued making quick movements, displaying edginess throughout the stop, alternating with periods where he appeared to be falling asleep, putting his head down, and closing his eyes. Clark also displayed short-term memory problems, requiring the officer to repeat information, such as the reason for the stop, several times throughout the encounter. These observations led the officer to believe that Clark was displaying the symptoms of someone on methamphetamines.

Additionally, the officer saw a film canister in the driver's side door pocket that appeared to have something other than film in it, and noticed several energy drinks inside the vehicle. The officer, who had special training in drug investigation, had in the past found drugs in similar canisters, and was also aware that energy drinks are sometimes used to counteract drug effects.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The officer asked dispatch to conduct a criminal record check, and learned that Clark had an open methamphetamine case in Minnesota as well as a 1998 LSD conviction from Louisiana. At that point, a police sergeant granted the officer's request to send a canine unit to the scene of the traffic stop. The canine unit arrived just as the officer finished issuing a citation to Clark. The circuit court determined that activities related to the criminal background check and request for a dog sniff delayed Clark's detention about fourteen minutes beyond what was reasonable with respect to the traffic violations that had prompted the stop.

In response to a postconviction discovery request, the district attorney's office turned over to Clark nearly 700 pages of training and performance records related to the reliability of the dog that had performed the drug-sniff and the dog's handler. Based on those records, Clark filed a plea withdrawal motion, alleging that the State had violated his Fourth Amendment rights by extending his detention to wait for an unreliable dog, and by seizing items from the vehicle after an alert from an unreliable dog, as well as violating his due process rights by failing to turn over materials relating to the dog's reliability in response to an earlier discovery request for any exculpatory evidence in the State's possession.

Clark alleged that the training and performance records of the police dog showed that drugs had only been recovered 39 out of 74 times that the dog had alerted to the presence of drugs in the field. Clark argued that that constituted about a 53% success rate, little better than a coin toss. Additionally, Clark noted that only a limited number of the dog's training sessions involved searching for methamphetamines, and that the dog had only successfully alerted to methamphetamines in three of five blind training tests, and never before in the field.

The circuit court did not, however, agree with Clark's criteria for what constituted a "successful" drug sniff, and therefore came up with different numbers. For instance, the court counted a drug sniff in training as successful if the dog correctly alerted on a second or third pass; counted multiple alerts or non-alerts in a single training session as separate instances; and counted alerts in the field where no drugs were found to be successful if there were other indicators (such as interviews with witnesses or the presence of marijuana seeds or stems) that drugs had previously been in the location sniffed, and non-alerts in the field to be successful if a subsequent search by consent found no drugs. Based on its own analysis of the records, the court found that overall the dog was successful about 90% of the time in training and between 76% and 81% of the time in the field. The court attributed the dog's lower success rate in the field to instances in which the dog alerted to drugs that had been removed or were too well hidden or were in too small a quantity to be found in searches.

In sum, the circuit court did not conclude as a matter of law that the police could reasonably rely upon the drug-sniffing abilities of a dog that had little more than a 50% success rate in order to extend a traffic stop and search Clark's car. Rather, the court made a factual finding that the dog at issue had a much higher success rate before reaching the conclusion that the dog was reliable enough to satisfy constitutional standards. The circuit court's factual finding regarding the dog's success rate was based upon its thorough assessment of how to weigh and interpret the results of several hundred pages of data, and is not clearly erroneous.

Based upon the circuit court's determination that the police dog was reliable, the court properly determined that having the dog's training and performance records earlier would not have altered the outcome of the suppression hearing, and therefore provided no grounds for plea withdrawal.

IT IS ORDERED that the judgment of conviction and the postconviction order denying plea withdrawal are summarily affirmed under WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*