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DISTRICT III

January 30, 2024

To:

Hon. James A. Morrison
Circuit Court Judge
Electronic Notice

Sheila Dudka
Clerk of Circuit Court
Marinette County Courthouse
Electronic Notice

John Blimling
Electronic Notice

Kirk B. Obear
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You are hereby notified that the Court has entered the following opinion and order:

2021AP2012-CR State of Wisconsin v. Chad Eugene Arthur Schmitt
(L. C. No. 2017CF170)

Before Stark, P.J., Hruz and Gill, 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).

Chad Schmitt appeals a judgment, entered upon his no-contest plea, convicting him of possession with the intent to deliver more than 1,000, but not more than 2,500, grams of tetrahydrocannabinols (THC), as party to a crime.[1] Schmitt argues that the circuit court erred by denying his pretrial motion to suppress evidence. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. We

[1] The judgment of conviction also includes a "second and subsequent offense" penalty enhancer for Schmitt's crime. The record, however, shows that Schmitt pled no contest to the crime without that enhancer. Because the inclusion of this enhancer on the judgment appears to be a clerical error, upon remittitur, the circuit court shall enter an amended judgment of conviction removing the "second and subsequent offense" enhancer for Schmitt's crime. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-27, 239 Wis. 2d 244, 618 N.W.2d 857.

reject Schmitt's arguments and, subject to the correction of a clerical error on the judgment, as described herein, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21 (2021-22).[2]

The State charged Schmitt with possession with the intent to deliver more than 2,500, but not more than 10,000, grams of THC; maintaining a drug trafficking place; and possession of drug paraphernalia—all three counts as a party to a crime, and the first two counts as a second and subsequent offense. Schmitt filed a motion to suppress evidence discovered following a stop of his vehicle. The suppression motion was denied after a hearing, and the parties subsequently entered into a plea agreement.

In exchange for Schmitt's no-contest plea to an amended charge of possession with intent to deliver more than 1,000, but not more than 2,500, grams of THC, the State agreed to remove the "second and subsequent" enhancer and to recommend that the circuit court dismiss and read in the remaining counts. The State also agreed to recommend a withheld sentence and three years of probation, which would include ninety days of conditional jail time. The defense remained free to argue at sentencing. Out of a maximum possible ten-year sentence, the court imposed and stayed an eight-year term, consisting of three years of initial confinement followed by five years of extended supervision, and it placed Schmitt on probation for three years, with ninety days in jail as a condition of his probation. This appeal follows.

Schmitt argues that the circuit court erred by denying his pretrial suppression motion. Specifically, Schmitt claims that what may have been an otherwise lawful traffic stop for speeding was unreasonably prolonged in order to allow law enforcement to conduct a K-9 sniff

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

of the exterior of his vehicle, which violated his constitutional right to be protected from unreasonable searches and seizures. When reviewing a decision on a motion to suppress evidence, we uphold the circuit court's findings of fact unless they are clearly erroneous, and we review de novo the application of the constitutional principles to those facts. ***State v. Kramer***, 2008 WI App 62, ¶8, 311 Wis. 2d 468, 750 N.W.2d 941.

"[A] traffic stop is a seizure within the meaning of our Constitutions." ***State v. Floyd***, 2017 WI 78, ¶20, 377 Wis. 2d 394, 898 N.W.2d 560. "The reasonableness of a traffic stop involves a two-part inquiry: first, whether the initial seizure was justified and, second, whether subsequent police conduct 'was reasonably related in scope to the circumstances which justified' the initial interference." ***State v. Smith***, 2018 WI 2, ¶10, 379 Wis. 2d 86, 905 N.W.2d 353 (quoting ***Terry v. Ohio***, 392 U.S. 1, 19-20 (1968)). A traffic stop is constitutionally permissible when law enforcement has reasonable suspicion to believe a crime or traffic violation has been or will be committed. ***State v. Houghton***, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143. "[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." ***Rodriguez v. United States***, 575 U.S. 348, 354 (2015). Thus, authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should have been, completed. ***Id.***

Courts have rejected setting a "hard and fast time limit" on the reasonableness of the duration of a stop. ***State v. Gruen***, 218 Wis. 2d 581, 590-91, 582 N.W.2d 728 (Ct. App. 1998) (citation omitted). Rather, courts consider the totality of the circumstances when determining whether law enforcement officers were diligent in completing their tasks related to the traffic infraction. *See* ***id.*** That said, law enforcement may extend a stop and begin a new investigation

if reasonable suspicion for a new crime develops during the stop. ***State v. Betow***, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999).

At the suppression motion hearing, William Swanson, a narcotics investigator with the Marinette County Sheriff's Department, testified that during an April 2016 meeting of drug enforcement groups from northeast Wisconsin and the Upper Peninsula of Michigan, he learned that a number of marijuana grow house operators in Michigan were transporting and selling excess marijuana in Wisconsin. On September 21, 2017, Swanson received information from his law enforcement counterpart in Michigan that Schmitt—whom they believed to be transporting marijuana for sale—had left a grow operation in Michigan and was heading into Niagara, Wisconsin, driving a white Ford Excursion and pulling an enclosed white trailer. Swanson shared this information with Marinette County Sheriff's Deputy Brandon Erdman, and he also called a K-9 handler to ascertain his availability if Schmitt's vehicle were stopped. Erdman initiated a stop of Schmitt's vehicle at approximately 6:01 p.m., after radar clocked Schmitt's vehicle at thirty-seven miles-per-hour in a thirty-miles-per-hour zone.

Erdman testified that as soon as he stopped Schmitt's vehicle, he took approximately twenty to thirty seconds to request a K-9 unit before approaching and making contact with Schmitt. After obtaining Schmitt's driver's license and registration, Erdman returned to his vehicle to check Schmitt's name for any outstanding warrants and to work on a written warning for speeding. The K-9 unit arrived on the scene approximately six minutes after it was dispatched, which was before Erdman had completed the written warning. As the K-9 handler was informing Schmitt that Nina, a drug dog, would be conducting a sniff of the exterior of the vehicle, Nina alerted to the presence of illegal drugs. Nina also alerted multiple times toward the back of Schmitt's vehicle and trailer. Based on Nina's alerts, law enforcement searched the

vehicle and found $4,422 in cash and multiple containers of marijuana weighing approximately six pounds.[3]

Schmitt contends that authority for his seizure stopped at the time Erdman *should* have completed the warning. Erdman testified at the motion hearing that the fastest he could prepare a warning in a traffic stop is "[m]aybe five minutes if [he is] on [his] game." Schmitt notes that after initiating the stop and questioning Schmitt, Erdman was back in his vehicle at 6:03 p.m. and, therefore, the warning could have been completed by 6:08 p.m. Because the K-9 did not arrive until 6:09 p.m., Schmitt argues that the K-9 sniff of the vehicle prolonged the stop beyond its mission, regardless of whether Erdman had actually completed the warning. We are not persuaded.

While Erdman testified that he might be able to finish a written warning in as little as five minutes, he also testified that it would usually take an average of fifteen minutes to issue a written warning for speeding, inclusive of the time necessary to run the driver's information for outstanding warrants.[4] Erdman added that it would take approximately ten minutes to prepare a written warning once he had all the necessary information. Ultimately, Schmitt fails to establish that Erdman was required to complete the warning in the fastest time possible. Instead, the touchstone of the court's inquiry is reasonableness. *See* ***Rodriguez***, 575 U.S. at 354. To that end, the circuit court determined that the time from the traffic stop to the time the K-9 arrived on

[3] Although the complaint alleged that over six pounds of marijuana was recovered, an Information later amended the charge downward to account for the weight of the packaging.

[4] In his reply brief, Schmitt appears to fault Erdman for failing to ultimately issue the written warning. Erdman explained, however, that he did not ultimately provide Schmitt with the written warning because once the K-9 alerted to the presence of illegal drugs, "it really seemed like the warning was the least of the worries."

the scene was "completely within a reasonable period of time for an independent traffic stop." To the extent the court's determination was based on what it deemed to be Erdman's credible testimony, the circuit court acting as fact-finder is the "ultimate arbiter of the credibility of the witness." ***Noll v. Dimiceli's Inc.***, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983). Moreover, the record supports the conclusion that the seizure did not last longer than necessary to effectuate the original purpose of the stop.

Upon the foregoing,

IT IS ORDERED that the judgment is modified and, as modified, summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals