

**State of Wisconsin
Court of Appeals
District I**
Appeal No. 2008AP003089 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Patrick Gunther,

Defendant-Appellant.

**Appeal from an order denying the appellant's
motion to suppress evidence entered in the
Ozaukee County Circuit Court, the Honorable Tom
Wolfgram, presiding**

Defendant-Appellant's Brief

Law Offices of Jeffrey W. Jensen
735 W. Wisconsin Ave.
Twelfth Floor
Milwaukee, WI 53233
(414) 224-9484

Attorneys for Defendant-Appellant
By: Jeffrey W. Jensen
State Bar No. 01012529

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Statement on Oral Argument and Publication

The issues presented by this appeal are not clearly controlled by existing law and, therefore, the appellant recommends both oral argument and publication. The opinion of the Court of Appeals will develop the law and will be of state-wide application.

Statement of the Issues

I. Where a vehicle is stopped by the police for speeding, did the officer unreasonably broaden the scope of the detention by holding the occupants of the car while a drug-sniffing dog was brought to the scene- all because the vehicle had a Grateful Dead sticker (i.e. a "drug positive" sticker) on the bumper?

Answered by the trial court: No.

II. Whether the search of the interior of the appellant's vehicle was unreasonable under the Fourth Amendment where the drug-sniffing dog had already "indicated" on the trunk and a search of the trunk revealed no controlled substances.

Answered by the trial court: No.

Summary of the Argument

I. The scope of the detention was unreasonably broadened

Although a dog sniff is not a constitutionally protected search, a suspect may not be detained any longer than is necessary to dispel the officer's original suspicion. Here, the officer stopped Gunther's vehicle because it was speeding. From the outset, the

officer had no intention of issuing a speeding citation; rather, the officer broadened the scope of investigation to include a dog sniff of the exterior of the car for narcotics. The reason given by the officer for broadening the investigation was because the vehicle had a Grateful Dead sticker on the bumper. The presence of the Grateful Dead sticker does not permit a reasonable suspicion that the occupants of the vehicle may possess controlled substances. Thus, *any* additional detention of the occupants- however brief it may have been- in order to conduct a drug investigation, is unreasonable. Here, although the trial court could not make a finding of fact as to the length of the additional detention, it was clear that Wolf and Gunther were detained longer than was necessary to issue a warning for speeding. Moreover, Gunther and Wolf were removed from the vehicle and made to stand nearby, with their small child, while the dog sniff took place.

The broadening of the scope of the detention in order to include a narcotics investigation was patently unreasonable.

II. Probable cause to search Gunther's vehicle evaporated once no contraband was found in the trunk.

Although sniffing the air surrounding a motor vehicle is not a search; entry into the vehicle clearly is a search. The police must possess probable cause to search the vehicle. An "indication" by a drug sniffing dog may provide probable cause to search an enclosed area. Here, though, Vero (the drug sniffing dog) indicated on the trunk of the vehicle but, when the trunk was searched, no drugs were found. Thereafter, any reliance on Vero's ability to detect controlled substances- and only controlled substances- is unreasonable. In other words, once Vero falsely indicated on the

trunk of the car, any probable cause to search the vehicle evaporated.

Statement of the Case

I. Procedural Background

The defendant-appellant, Patrick Gunther ("Guther") was charged with possession of marijuana (second or subsequent offense) arising out of an incident that occurred on May 27, 2007 in Ozaukee County. (Complaint) Gunther waived his preliminary hearing and then entered a not guilty plea to the charge.

Gunther then filed a pretrial motion seeking to suppress all evidence seized by police after the initial stop of the vehicle for the reason that the police unreasonably broadened the scope of the detention by detaining Gunther (and the driver) at the scene simply because there was a Grateful Dead sticker on the bumper.

The trial court conducted hearing into the motion on September 5, 2007 and on September 25, 2007. On October 25, 2007 the court, by oral decision from the bench, denied Gunther's motion.

On May 19, 2008 Gunther entered a guilty plea to the charge. On August 18, 2008 the court withheld sentence and placed Gunther on probation for two years.

Gunther timely filed a notice of appeal.

II. Factual Background

On May 27, 2007, Gunther was a passenger in an automobile driven by Emily Wolf (9-25-07 Tr.:5). The couple's small child was

also in the car. Wolf was exceeding the speed limit and was stopped by a Mequon police officer, Lindsey Graycarek (9-5-07 Tr.:3). Graycarek testified that, as she was conducting the traffic stop, she saw that the Wolf vehicle had "multiple" Grateful Dead bumper stickers and, according to the officer, she believed this to be a "drug positive" indicator. (9-5-07 Tr.:5, 6)

Shortly after the stop, then, the officer radioed for the canine unit ("Vero") to be dispatched to the scene (9-5-07 Tr.:6)¹. The officer then approached the Wolf vehicle and informed Wolf that she would be receiving a written warning for the speeding violation. (9-25-07 Tr.:7) Graycarek then went back to the squad car to run "record checks" on Wolf and Gunther. (9-5-07 Tr.:7) While Graycarek was in the midst of running the record checks, the canine officer, Officer Hoell, arrived with the dog, Vero. (9-5-07 Tr.:8)² By Hoell's estimation, he arrived at the scene a "few minutes" after he received the radio request from Graycarek. (9-25-07 Tr.:33)

Wolf and Gunther remained seated in their vehicle for, by Wolf's estimate, between five and ten minutes while Graycarek wrote the warning for speeding. (9-5-07 Tr.:16) Hoell then ordered Wolf and Gunther out of the vehicle and they complied, taking the child with them (9-25-07 Tr.:8). Vero was then commanded to sniff the vehicle. The dog started at the right (driver's side) bumper of the

1 Graycarek admitted on cross-examination that she signed a probable cause statement, under oath, indicating that she radioed for Officer Hoell while she was running the record check. During the motion hearing, where an issue was made as to how long Wolf and Gunther had been detained while waiting for Hoell, Graycarek claimed that she radioed for Officer Hoell and the dog immediately upon stopping the vehicle and prior to having contact with the occupants. Regarding the sworn probable cause statement, Graycarek testified that the probable cause statement is not correct. (9-5-07 Tr.:20)

2 Officer Hoell had used Vero for drug searches on only five prior occasions (9-25-07 Tr.:45)- this, despite Graycarek's claim during her testimony that she had worked with Hoell and Vero "every day" (9-05-07 Tr.:23).

car. According to Hoell, Vero indicated at the right passenger door and then on the trunk (9-25-07 Tr.:34). Hoell testified that whenever Vero indicates, the sniff search is stopped and then the handler searches the area. Hoell failed to give any adequate explanation on cross-examination as to why, if Vero indicated on the passenger door, that he did not immediately search that area and, instead, searched the trunk first (i.e. the *second* indication given by Vero). (9-25-07 Tr.:47)

In any event, after Vero indicated on the trunk of the car, the officer then opened the trunk and allowed Vero to sniff that area. (9-25-07 Tr.:38) It turned out that Vero indicated on a bowling bag that contained a hemp necklace (9-25-07 Tr.:39). No marijuana or other drugs were found in the trunk. (9-25-07 Tr.:39)

Thereafter, Hoell decided to continue his search by opening the passenger door and letting Vero into the interior of the car (9-25-07 Tr.:41). At that point Vero indicated on a water bottle bag that contained a small amount of marijuana and a pipe. The bag was under the passenger seat. (9-25-07 Tr.:41)

At the conclusion of this hearing the trial court made findings of fact. The judge found:

[Graycarek] then returned to the vehicle. Her testimony was that she was obtaining further information, et cetera, about records, about the individuals in the vehicle. Prior to doing that during the initial couple of minutes she was in the vehicle she had radioed Officer Hoell to come to the scene knowing that he had the dog with him at that point for the purpose of doing a sniff of the vehicle while it was there. She continued to do her paperwork. Officer Hoell arrived on the scene again within a couple of minutes. I don't know the exact amount of time. But she was still in the process of working on the paperwork. She was inside her vehicle.

He asked the driver and the passenger to step from the vehicle. Got the dog out and deployed it. It alerted first on the front passenger door. Then alerted on the trunk of the vehicle. Put the dog away. He ultimately searched the trunk with the use of the

dog. He didn't find any controlled substances. He found a hemp necklace or something.

He deployed the dog inside the vehicle. He grabbed bag from underneath the seat which upon further search of the officer revealed a marijuana pipe and a substance that he believed reasonably to be marijuana. He then placed them both under arrest.

(9-25-07 Tr.:53, 54)

Argument

I. The officer unreasonably broadened the scope of Gunther's detention because the mere presence of a Grateful Dead sticker on one's bumper does not permit any reasonable suspicion that the occupants of the automobile possess controlled substances.

Although a dog sniff is not a constitutionally protected search, a suspect may not be detained any longer than is necessary to dispel the officer's original suspicion. Here, the officer stopped Gunther's vehicle because it was speeding. From the outset, the officer had no intention of issuing a speeding citation. Nonetheless, because of the Grateful Dead sticker, the officer radioed for a drug sniffing dog. The presence of the Grateful Dead sticker does not permit a reasonable suspicion that the occupants of the vehicle may possess controlled substances. Thus, *any* additional detention of the occupants- however brief it may be- in order to conduct a drug investigation, is unreasonable. Here, although the trial court could not make a finding of fact as to the length of the additional detention, it was clear that Wolf and Gunther were detained longer than was necessary to issue a warning for speeding. Moreover, Gunther and Wolf were removed from the vehicle and made to stand nearby, with

their small child, while the dog sniff took place.

The broadening of the scope of the detention in order to include a narcotics investigation was patently unreasonable.

A. Standard of Appellate Review

"Whether police conduct constitutes a 'search' within the meaning of the [Wisconsin Constitution] is a question of law" subject to independent review by the Court of Appeals. *State v. Miller*, 2002 WI App 150, P5, 256 Wis. 2d 80, 647 N.W.2d 348 (2002). "The question [of] whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact" that the appellate court reviews independently. *State v. Griffith*, 2000 WI 72, P23, 236 Wis. 2d 48, 613 N.W.2d 72 (2000) However, on appeal the court must uphold the circuit court's findings of historic fact unless they are clearly erroneous. *State v. Fonte*, 2005 WI 77, P11, 281 Wis. 2d 654, 698 N.W.2d 594 (2005). A finding is clearly erroneous if "it is against the great weight and clear preponderance of the evidence." *State v. Sykes*, 2005 WI 48, P21 n.7, 279 Wis. 2d 742, 695 N.W.2d 277 (2005)

B. The officer unreasonably broadened the temporal scope of the detention.

After Gunther's motion to suppress was decided, but before this appeal was taken, the Wisconsin Supreme Court held that a dog search of the air surrounding a motor vehicle parked in a public place is not a search. *State v. Arias*, 2008 WI 84, P24 (Wis. 2008). Thus, no probable cause or reasonable suspicion had to be established in order for the police to have Vero "work" the outside of

Gunther's vehicle.

The question here is whether the original, lawful, detention of Guthur was unreasonably extended into a narcotics investigation.

It is important, at the outset, to emphasize that in *Arias* the vehicle was stopped because the officer had observed *Arias* loading beer into the car of Megan Schillinger, whom the officer knew to be seventeen years old (i.e. not old enough to legally drink alcohol). Thus, the *purpose* of the stop was to investigate the unlawful possession of alcohol and, perhaps, other controlled substances.

Therefore, the Wisconsin Supreme Court explained:

[W]hen a seizure that was lawful at its inception and does not encompass an arrest is reviewed, the scope of the continued investigative detention is examined to determine whether it lasted "no longer than is necessary to effectuate the purpose of the stop," *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), and whether the investigative means used in the continued seizure are "the least intrusive means reasonably available to verify or dispel the officer's suspicion," *id.* n13 In [**380] that vein, we consider whether the officer diligently pursued [***759] his investigation to confirm or dispel his suspicions. *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985).

Arias, 2008 WI 84, P32 (Wis. 2008)

A seizure becomes unreasonable when the incremental liberty intrusion resulting from the investigation supersedes the public interest served by the investigation. *Id.* In sum, an unconstitutional continuation of a once lawful seizure can occur when the extension of time for that needed to satisfy the original concern that caused the stop becomes unreasonable or when the means used to continue the seizure becomes unreasonable, both of which are evaluated under the totality of the circumstances presented.

Arias, 2008 WI 84, P38 (Wis. 2008).

Bearing all of this in mind, the Supreme Court held in *Arias* that the brief detention necessary to conduct the dog sniff was not unreasonable given the officer's prior observations (*Arias* loading

beer into the car of a minor).

The reason for the stop in the present case was for speeding. This creates a critical factual distinction from *Arias*, where the purpose of the stop was to investigate illegal possession of alcohol. The court in *Arias* criticized, but it did not overrule, *State v. Betow*, 226 Wis. 2d 90 (Wis. Ct. App. 1999). In *Betow*, like here, the defendant was stopped for speeding and, merely because Betow had a mushroom on his wallet (which was a "drug positive" symbol in the mind of the police officer), Betow was detained while a dog sniff was conducted.

In *Betow*, the Court of Appeals wrote,

We agree with Betow that (the officer's) knowledge that 'some people' may regard a representation of a mushroom as an emblem of their use of hallucinogens is inadequate to support Betow's continued detention in this case-especially when, at the time he made the decision to extend the detention, Steffes had absolutely no evidence that Betow was "using" hallucinogenic or other drugs on the evening in question"

Betow, 226 Wis. 2d at 95.

The reasonableness of the additional detention is not measured only temporally³. The court must look to the totality of the circumstances- including the reason for the stop in the first place. Although in *Arias* the Supreme Court held that an additional "78 second" detention to conduct the dog sniff was not unreasonable, the court considered the totality of the circumstances and relied heavily on the fact that, "The dog sniff was part of the on-going traffic stop of Schillinger that occurred because she was a minor and was transporting alcohol that *Arias* had placed in her vehicle." *Arias*,

³ In other words, the Court of Appeals should not entertain the argument, which we expect the State to present, that, in *Arias*, the additional detention was only 78 seconds and, in Gunther's case, it was a "few minutes"; *ergo*, Gunther's additional detention was *ipso facto* not unreasonable.

2008 WI 84, P39 (Wis. 2008).

Here, the officer had no reasonable suspicion that Wolf or Gunther possessed controlled substances. The vehicle was stopped for speeding. During the course of the speeding investigation the officer made no additional observations that would permit an inference that the occupants possessed drugs. The fact that the vehicle had a Grateful Dead bumper sticker plainly permits no reasonable inference that the occupants of the vehicle are drug users. *See, Betow.*

Thus, if Gunther was detained even for an additional ten seconds while the dog sniff occurred it was unreasonable because there simply was no reason to believe that he possessed controlled substances. Gunther was not detained for only ten second, though.

Officer Graycarek was in the process of writing the speeding warning when Hoell showed up with Vero. At that point, Wolf, Gunther, and their small child, were removed from the vehicle and made to stand on the sidewalk nearby. Thus, the dog sniff that occurred here was hardly the sort of dog sniff contemplated by the Supreme Court in *Arias* where the court observed, "When a dog sniffs around the perimeter of a vehicle, the occupant of the vehicle is not subjected to the embarrassing disclosure or inconvenience that a search often entails." *Arias*, 2008 WI 84, P23 (Wis. 2008) Gunther and Wolf were not allowed to remain as "occupants" of the vehicle. They were in fact subjected to the embarrassment and inconvenience of having to remove the child from the car and stand by while the sniff took place.

Additionally, although "[T]here is no constitutionally protected interest in possessing contraband under the United States Constitution," *Arias*, 2008 WI 84, P22 (Wis. 2008); there is a

constitutionally protected interest in possessing hemp necklaces in the trunk of one's car. Gunther was forced to stand by while the police conducted a non-consensual search of the trunk of Wolf's car where the police found nothing that was against the law.

For these reasons, the additional detention of Gunther was unreasonable.

II. Although sniffing the air surrounding a motor vehicle is not a search, entry into the vehicle is; any probable cause that Vero provided to search the interior of the vehicle evaporated after a search of the trunk revealed no controlled substances.

As mentioned above, it is well-settled that a person has no reasonable expectation of privacy in the public air surrounding their car, luggage, house, and so forth. Thus, the courts have held that where the dog is in a public place while sniffing no search occurs (this is a version of the "plain view" doctrine that might properly be called the "plain sniff" doctrine). See, *Arias, supra*; *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983) and *State v. Garcia*, 195 Wis. 2d 68, 535 N.W.2d 124 (Ct. App. 1995). When the dog, while in a public place, alerts to the smell of marijuana the police then have a reasonable suspicion to search the enclosed area.

This is not what occurred here, though. Firstly, as mentioned above, Wolf and Gunther were detained longer than was necessary for the traffic stop and the scope of the investigation was broadened without reasonable suspicion. Additionally, though, the accuracy of the dog's ability to detect controlled substances must be considered;

and, after Vero falsely "indicated" to the trunk of Gunther's vehicle, any further intrusive search was unreasonable.

The "reasonable suspicion" to search an area that is a consequence of a dog alert is not automatic and enduring for all time. The ability of the dog to accurately detect controlled substances must also be considered as one of the totality of the circumstances. As was shown in *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980) the accuracy of drug-sniffing dogs is far from perfect. In *Doe*, officials at a junior high school in Indiana became concerned that a drug problem existed among some of the students. 475 F. Supp. at 1016. The school superintendent decided to use drug-sniffing dogs to combat the problem. *Id.* The dogs were walked down the aisles in each classroom as the students sat in their desks. *Id.* One of the dogs alerted on student Diane Doe. 475 F. Supp. at 1017. She was instructed to empty her pockets and her purse so that their contents could be checked for drugs. *Id.* No drugs were found. *Id.* Doe was then taken to the nurse's station. *Id.* She was asked if she had ever used marijuana and Doe replied that she had not. *Id.* She was then told to remove her clothing and officials conducted a strip search. *Id.* Still, no drugs or other illegal substances were found.

Here, Vero's ability to accurately detect controlled substances was demonstrated to be far from perfect. The dog alerted to the trunk of Wolf's car and, when the trunk was searched, police found no controlled substances (rather, they found a hemp necklace) The human officer's accounting of this incident attempts to put a spin on it that is intended to enhance Vero's drug-sniffing prowess.⁴

⁴ Hoell, with a degree of pride, testified that the fact that Vero alerted to the hemp necklace only demonstrates the sensitivity of the dog's olfactory powers. (9-25-07 Tr.:46). In science, though, the term "validity" refers to an instrument's ability to

However, quite the opposite is true- Vero obviously alerts to items that are not contraband.

At that point, then, what possible reasonable suspicion could there have been to put Vero inside of the vehicle to continue sniffing? Firstly, the "plain sniff" resulted in an inaccurate alert. Secondly, once inside the vehicle Vero was no longer in a public place and, therefore, the plain sniff doctrine does not apply.

Conclusion

For these reasons it is respectfully requested that the Court of Appeals reverse the order of the trial court denying Gunther's motion to suppress evidence, order that the motion be granted, and remand the matter for further proceedings consistent with the court's order.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2009.

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By: _____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Ave.
Twelfth Floor
Milwaukee, WI 53223
(414) 224-9484

measure that which it purports to measure. The fact that Vero alerted to a hemp necklace, then, in scientific parlance, means that the dog sniff instrument is not necessarily valid.

Certification

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3424 words.

This brief was prepared using *Open Office* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated this _____ day of _____,
2009:

Jeffrey W. Jensen

**State of Wisconsin
Court of Appeals
District I**
Appeal No. 2008AP003089 - CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Patrick Gunther,

Defendant-Appellant.

Appendix Certification

1. Excerpt of trial court's bench decision denying motion

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically

including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2009

Law Offices of Jeffrey W. Jensen
Attorneys for Appellant

By: _____
Jeffrey W. Jensen
State Bar No. 01012529

735 W. Wisconsin Avenue, 12th Floor
Milwaukee, WI 53233

414.224.9484