Official Arkansas Court of Appeals Opinion

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ARKANSAS COURT OF APPEALS

DIVISIONS I & II
No. CR-21-593

Opinion Delivered June 1, 2022

MARILYN DUMOND
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

APPEAL FROM THE GRANT COUNTY CIRCUIT COURT
[NO. 27CR-19-104]

HONORABLE CHRIS E WILLIAMS, JUDGE

REVERSED AND REMANDED

MIKE MURPHY, Judge

Marilyn Dumond was convicted of possession of drug paraphernalia by a Grant County jury and sentenced to sixty months' imprisonment. On appeal, she argues that the circuit court erred in denying her motion to suppress the evidence. We agree and reverse and remand.

On December 9, 2019, Deputy Scott Norton pulled Dumond's vehicle over for speeding. Dumond was in the passenger's seat; her husband was driving. The husband did not have a license but stated that he was driving because Marilyn did not see as well at night. The deputy took their information back to his patrol car. Deputy Norton wrote the traffic ticket while waiting on dispatch to get information on the Dumonds back to him. Dispatch returned that they both had prior drug-related criminal history. Norton finished writing the ticket. Instead of taking the ticket to the Dumonds, however, Norton decided, solely on

the basis of their criminal records, that he wanted to question them and run his K-9 around the car for a free-air sniff.

Deputy Norton returned to the car and asked whether there was anything illegal in it, which they denied. He had them step out of the car. While doing so, Dumond appeared to trip. She tossed something into the ditch, but Norton did not see her throw the object. Norton began to have the dog search around the car, and when he opened the driver-side door the dog "hit." Norton thought it was due to the marijuana shake on the floor, but he did not see anything else in the vehicle. As he was walking to the other side of the car, though, Norton noticed the container in the ditch. He opened it and saw a crystal-like substance, syringes, a spoon, and a plastic sack. Norton arrested the Dumonds. Norton testified that when he later reviewed the dash-cam footage, it appeared that Dumond had thrown the container as she stumbled out of the car.

Dumond moved to suppress the evidence. She argued that the officer did not have reasonable suspicion to extend the traffic stop to conduct the free-air sniff, and any evidence therefrom should be suppressed. The State contended that Norton could perform a free-air sniff because the Dumonds were not stopped for an unreasonable amount of time, and the K-9 was already with Norton.

The circuit court denied the motion to suppress. It explained that there was no evidence that the traffic stop lasted more than fifteen minutes. It also noted that even if the citation was written, until it was delivered to the Dumonds, they had not been served with it, meaning that the traffic stop was ongoing. The court reasoned that as long as the officer

did not detain them longer than the fifteen-minute period of time, Norton was allowed to inquire further. The case was tried, Dumond was convicted, and this appeal followed.

In reviewing a circuit court's denial of a motion to suppress evidence, we conduct a de novo review considering the totality of the circumstances, reviewing findings of facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the circuit court and proper deference to the circuit court's findings. *Menne v. State*, 2012 Ark. 37, 386 S.W.3d 451. We reverse only if the circuit court's ruling is clearly against the preponderance of the evidence. *Id.*

Marilyn argues on appeal that the trial court erred in denying her motion to suppress evidence seized because Deputy Norton unconstitutionally extended the traffic stop beyond its original purpose. This presents us with two intertwined issues: first, whether the traffic stop was complete before Deputy Norton ran the K-9 for a free air sniff and, second, whether Deputy Norton had reasonable suspicion to continue to detain the Dumonds if the traffic stop was, in fact, complete.

A police officer may detain a traffic offender while the officer completes certain routine tasks as part of a traffic stop, such as checking on the vehicle's registration, the driver's license and criminal history and writing up a citation or warning. *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004). During this process, the officer may ask the motorist routine questions, such as the motorist's destination, the purpose of the trip, or whether the officer may search the vehicle, and the officer may act on whatever information is volunteered. *Id.*

However, "[o]nce the purpose of the traffic stop is completed, the officer may not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention." *Yarbrough v. State*, 370 Ark. 31, 38–39, 257 S.W.3d 50, 56–57 (2007) (quoting *Sims*, 56 Ark. at 514, 157 S.W.3d at 535); *see also* Ark. R. Crim. P. 3.1.

Now, it should be noted that the use of a drug dog during a traffic stop does not constitute an illegal search under the federal constitution. *Illinois v. Caballes*, 543 U.S. 405 (2005). If police have a reasonable suspicion to detain a vehicle, no separate suspicion is required to conduct a canine sniff. *State v. Harris*, 372 Ark. 492, 500, 277 S.W.3d 568, 575 (2008). The distinction is that the police may not *extend* the traffic stop to do so. *Rodriguez v. United States*, 575 U.S. 348 (2015) (holding that it was unconstitutional for police to extend an otherwise-completed traffic stop, absent reasonable suspicion, to conduct a dog sniff and remanding to determine if reasonable suspicion existed); *see also Sims*, 356 Ark. at 510, 157 S.W.3d at 532 (holding that pursuant to Ark. R. Crim. P. 3.1, reasonable suspicion was required to continue detaining the defendant after "the traffic stop was done.").

We have precedence demonstrating how these two precepts interact. For example, in *Mickens v. State*, 2020 Ark. App. 280, 599 S.W.3d 392, the officer was still in the process of writing the appellant a warning when a second officer arrived with the dog. The dog alerted on the vehicle during the course of the legitimate traffic stop. This was okay. Likewise, in *Jackson v. State*, 2013 Ark. 201, 427 S.W.3d 607, it was acceptable for the officer to deploy his dog while waiting on ACIC checks to return. And, while it was not the issue squarely before the court, in *State v. Thompson*, 2010 Ark. 294, 377 S.W.3d 207, it was

implicitly acceptable for an officer to show up and run the dog while the other officer was in the process of giving the driver a field-sobriety test.

In these cases, the purposes of the stops were still ongoing. The officers were in the process of handling business associated with the traffic violations, during which time the dogs were deployed to conduct free-air sniffs. Compare that with *Sims* and *Rodriguez*, where the officers had finished writing the citations, handed the tickets and information back to the drivers, and only then began to inquire about drugs in the cars and deploying the dogs. In the former cases the traffic stops are not prolonged; in the latter, they are.

Citing *Miller v. State*, 81 Ark. App. 401, 102 S.W.3d 896 (2003), and Arkansas Rule of Criminal Procedure 3.1, the dissent would hold that reasonable suspicion was unnecessary and affirm the denial of the motion to suppress because (1) the officer had not yet handed the Dumonds the citation or their information back (and thus, the traffic stop was ongoing); (2) the deputy had the dog readily available; and (3) the detention did not exceed fifteen minutes.

However, while it is true that in both *Sims* and *Rodriguez*, the officers had handed the tickets back to the drivers, we are not inclined, as the State and the dissent suggest, to draw so bright a line. Otherwise, any officer could thwart the Constitution and our rules by simply hanging on to the ticket. To the extent that prior cases appear to establish the return of the paperwork as a boundary, the better-reasoned analysis would be that those cases "should not be construed as creating some sort of safe harbor that immunizes an investigating officer's purposeful delay from judicial scrutiny." *Jackson*, 2013 Ark. 201, at 29, 427 S.W.3d at 624 (Jones, J., concurring). "A law-enforcement officer may not extend the time for

completion of the purpose of the traffic stop by retaining paperwork. Such a holding grants unfettered discretion and is impermissible." *Id.* at 20, 427 S.W.3d at 619) (Hannah, C.J., concurring); *see also Ayala v. State*, 90 Ark. App. 13, 16, 203 S.W.3d 659, 662 (2005) ("[I]t is evident that the purpose of the traffic stop was completed, and thus absent any reasonable suspicion it was the officer's duty to return the paperwork, issue a citation or warning if necessary, and discontinue the detention.").

Further, in *Sims*, our supreme court explained that *Miller* did not conduct its analysis in light of Arkansas Rule of Criminal Procedure 3.1.

Rule 3.1 states:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person *who he reasonably suspects* is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

(Emphasis added.) Rule 3.1 speaks first and foremost of reasonable suspicion. This is why it matters not that the officer had the dog at his immediate disposal *or* that the stop took less than fifteen minutes—without reasonable suspicion, the officer may not detain a citizen.

In *Rodriguez*, the Supreme Court wrote that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." 575 U.S. at 350–51. A seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation. *Id.*

Accordingly, when Deputy Norton finished writing the ticket and had no other business pertaining to the traffic stop itself, the traffic stop was concluded, and reasonable suspicion was required to continue detaining the Dumonds.

We must next determine, then, if reasonable suspicion existed.

Arkansas Rule of Criminal Procedure is precise in stating that the reasonable suspicion must be tied to commission of a felony or a misdemeanor involving forcible injury to persons or property. *MacKintrush v. State*, 2016 Ark. 14, at 5–7, 479 S.W.3d 14, 17–18. As defined by our criminal rules, "reasonable suspicion" is

> a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

Ark. R. Crim. P. 2.1.

Whether there is reasonable suspicion depends on whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person may be involved in criminal activity. *See Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005). Factors to be considered when determining whether an officer has grounds to "reasonably suspect" a person include, but are not limited to, the following:

> (1) The demeanor of the suspect;
>
> (2) The gait and manner of the suspect;
>
> (3) Any knowledge the officer may have of the suspect's background or character;
>
> (4) Whether the suspect is carrying anything, and what he or she is carrying;
>
> (5) The manner in which the suspect is dressed, including bulges in clothing, when considered in light of all of the other factors;

(6) The time of the day or night the suspect is observed;

(7) Any overheard conversation of the suspect;

(8) The particular streets and areas involved;

(9) Any information received from third persons, whether they are known or unknown;

(10) Whether the suspect is consorting with others whose conduct is reasonably suspect;

(11) The suspect's proximity to known criminal conduct;

(12) The incidence of crime in the immediate neighborhood;

(13) The suspect's apparent effort to conceal an article; and

(14) The apparent effort of the suspect to avoid identification or confrontation by a law enforcement officer.

Ark. Code Ann. § 16-81-203 (Repl. 2005).

Reasonable suspicion to further detain must be developed before the legitimate purpose of the traffic stop has ended. *Menne v. State*, 2012 Ark. 37, at 6, 386 S.W.3d 451, 455. Here, Deputy Norton testified that the *only* reason he continued detaining the Dumonds was because of the report from dispatch that they had prior drug offenses. But a prior offense is not a factor listed in section 16-18-203. Again, *Sims* is instructive.

In *Sims*, an officer ran the information of a driver and passenger during a routine traffic stop. He learned they had prior drug arrests. The officer said that Sims looked nervous, was sweating, and made a "strange" comment about having just come from a store. Sims and his passenger also gave inconsistent answers when asked where they were going. The officer finished writing the warning and handed it and the information back to Sims, but then began to question Sims about whether he had anything illegal in his vehicle. The

officer asked if he could search the car. Sims said he did not have anything illegal, and he did not have time for the officer to search his vehicle. The officer ran the dog around the vehicle for a free-air sniff, and the dog hit. On the resulting motion to suppress, the supreme court said there were not sufficient facts to establish reasonable suspicion to extend the traffic stop once the purpose of the stop was completed.

In the case before us today, Deputy Norton had even less justification to prolong the stop than the officer in *Sims*. Prior criminal history, standing alone, is not sufficient to establish reasonable suspicion.

Accordingly, we hold that Rule 3.1, *Sims*, and *Rodriguez* require reasonable suspicion to continue a traffic stop once the purpose of the stop is concluded; the stop here was concluded before Deputy Norton deployed his K-9, and Deputy Norton did not have reasonable suspicion to continue the stop upon its conclusion. The denial of the motion to suppress is reversed.

Because we reverse the circuit court's denial of Dumond's motion to suppress, we must reverse her conviction and sentence and remand.

Reversed and remanded.

ABRAMSON, GLADWIN, KLAPPENBACH, and BROWN, JJ., agree.

BARRETT, J., dissents.

STEPHANIE POTTER BARRETT, Judge, dissenting (substituted dissenting opinion on denial of rehearing). I respectfully dissent. The majority acknowledges *Illinois v. Caballes*, 543 U.S. 405 (2005), holds that a drug-dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment. In addition to that precedent, this court, in

Miller v. State, 81 Ark. App. 401, 102 S.W.3d 896 (2003), held that "a canine sniff of the exterior of the vehicle does not amount to a Fourth Amendment search," and "when an officer has a police dog at his immediate disposal, a motorist's detention may be briefly extended for a canine sniff of the vehicle in the absence of reasonable suspicion without violating the Fourth Amendment." *Miller*, 81 Ark. App at 411–12, 102 S.W.3d at 902. In this case, the officer had a police dog at his immediate disposal, and the motorist's detention was briefly extended for a canine sniff of the vehicle in accordance with *Miller*, *supra.*

The majority holds that Deputy Norton unconstitutionally extended the traffic stop beyond its original purpose without reasonable suspicion of criminal activity. In support of this assertion, the majority cites *Rodriguez v. Unites States*, 575 U.S. 348 (2015), arguing that the purpose of the stop was completed before Deputy Norton performed the canine sniff; therefore, the stop was wrongfully prolonged beyond the time reasonably necessary to complete the traffic stop. I disagree.

Rule 3.1 of the Arkansas Rules of Criminal Procedure states:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

In this case, there was no argument made that the original stop was not valid, nor was there any argument that the stop exceeded the fifteen-minute limitation of Rule 3.1.

A key distinction between *Rodriguez* and the present case is that the ticket and documentation—Marilyn's driver's license—were not returned by Norton before the canine sniff was performed. Our appellate courts have consistently held that a stop is not concluded when the officer has not returned the license, paperwork, or ticket. *Jackson v. State*, 2013 Ark. 201, 427 S.W.3d 607; *see also Menne v. State*, 2012 Ark. 37, 386 S.W.3d 451; *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007); *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004); *Mickens v. State*, 2020 Ark. App. 280, 599 S.W.3d 392. A drug dog's alert on a vehicle then provides reasonable cause for the search of the vehicle. *Mickens*, *supra*. Because Norton had not yet returned Marilyn's license and the traffic ticket, the stop had not yet ended. Norton had his K-9 with him in his patrol car at his immediate disposal and quickly performed the free-air sniff; when the dog alerted, there was then probable cause to search the vehicle.

The majority cites *Mickens*, 220 Ark. App. 280, 599 S.W.3d 392; *Jackson*, 2013 Ark. 201, 427 S.W.3d 607; and *State v. Thompson*, 2010 Ark. 294, 377 S.W.3d 207, for the proposition that if another officer shows up with a dog while the original officer is conducting routine tasks as a part of the traffic stop, or if the dog is deployed before ACIC checks are returned, then the deployment of the dog is "okay." This holding is an exercise in technicalities and dismissive of how policing works in much of the rural areas of this great state. It is a rarity, rather than normality, for a sheriff's department or police department to have the luxury of dispatching multiple officers to a routine traffic stop. It is not practical to require another officer to assist in the deployment of a dog while another officer completes the routine tasks associated with a stop. Furthermore, it is dangerous to the officers—as well

as the dog—to require an officer who has a dog readily available to employ the dog prior to fully assessing the situation and being fully advised of possible dangers present with the current situation, which can be done concurrently through the observations of the officer while he or she is speaking with the occupants, collecting documentation, running checks, and observing behavior. The fear that law enforcement would unlawfully detain a suspect on a routine traffic stop while developing reasonable suspicion for further detention is alleviated with the requirement of Rule 3.1 that the officer "may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances."

Furthermore, the stop had not been concluded because neither of the Dumonds was able to drive the vehicle away from the scene of the stop legally or safely. Mr. Dumond, who Norton ascertained was driving on a suspended license, informed Norton at the time he was pulled over that the reason he was driving was because Marilyn did not see well driving at night. As the State notes in its petition for rehearing, Norton could have detained Mr. Dumond for driving without a license. *See* Ark. Code Ann. § 27-16-303(a)(1) (Repl. 2022). Because neither could drive the vehicle—Marilyn because, by Mr. Dumond's explanation, she could not see well at night thus making her an unsafe driver, and Mr. Dumond because his driver's license was suspended—Deputy Norton could have conducted a free-air sniff of the vehicle with his K-9 while it was determined who could legally and safely drive the vehicle.

Officer Norton had a dog at his immediate disposal. He had not completed the stop as he had not returned the documentation and the ticket to the occupants, and neither

Marilyn nor Mr. Dumond could safely or legally operate the vehicle. A free-air sniff of the vehicle is not a search defined by the Fourth Amendment. The detention of the occupants of the vehicle was only briefly extended and did not violate Rule 3.1. The circuit court's denial of Marilyn's motion to suppress was not clearly erroneous, and I would affirm.

The Cannon Law Firm, PLC, by: *David R. Cannon*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Adam Jackson*, Ass't Att'y Gen., for appellee.