

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No.20180356
vs.)	
)	District Court No. 09-2018-CR-00869
Dylan Benjamin Vetter,)	
)	
Defendant/Appellant.)	

APPEAL FROM CRIMINAL JUDGMENT ENTERED SEPTEMBER 17, 2018
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JOHN C. IRBY, PRESIDING

APPELLEE’S BRIEF

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STATEMENT OF THE ISSUE

[¶ 1] Whether the district court properly concluded that the canine sniff occurred during a traffic stop that was reasonable in duration.

STATEMENT OF THE CASE

[¶ 2] Dylan Vetter was arrested for possession of controlled substances and paraphernalia after contraband was found in his vehicle during a traffic stop. Vetter filed a motion to suppress evidence, arguing the scope of the stop of his vehicle was unlawfully expanded to include a canine sniff. An evidentiary hearing was held and the district court denied the motion. Vetter entered a conditional guilty plea, reserving his right to appeal. He now appeals.

STATEMENT OF FACTS

[¶ 3] On March 1, 2018, at around 11:33 p.m., Cass County Sheriff's Deputy Chad Thompson stopped a vehicle for speeding near the intersection of Interstate 94 and State Highway 18. (Transcript "Tr." 6:20-24.) As the vehicle came to a stop, or shortly thereafter, Deputy Thompson observed the occupants of the vehicle moving around and causing the vehicle to rock back and forth. (Tr. 7:14-17.) Deputy Thompson suspected the occupants were trying to move or hide something. (Tr. 7:23-25, 8:1-2.) Deputy Thompson approached the vehicle and made contact with the driver who was identified as Dylan Vetter. (Tr. 9:3-7.)

[¶ 4] Deputy Thompson observed an empty can of an alcoholic beverage, "Twisted Tea," on the vehicle's floorboard. (Tr. 8:10-12.) Deputy Thompson asked Vetter if he had consumed any alcohol that evening. (Tr. 16:2-4.) Vetter stated that he had consumed some alcohol a few hours prior. (Tr. 16:2-4.) Deputy Thompson requested Vetter

return to his squad car. (Tr. 9:1-2.) Deputy Thompson then administered field sobriety tests including a horizontal gaze nystagmus test, partial alphabet test, and backward counting test. (Tr. 8:16-25.) Deputy Thompson also administered a preliminary breath test. (Tr. 8:18.) The tests suggested that Vetter was not impaired. (Tr. 8:22-25.)

[¶ 5] While Deputy Thompson was administering a preliminary breath test, Corporal Joe Hedin arrived as backup. (Tr. 9:18-19.) Corporal Hedin arrived on the scene around 11:47 p.m. (Appellant's Appendix "App." at 4, ¶ 5.) Deputy Thompson testified at the suppression hearing that having another officer for backup in a stop like this is normal. (Tr. 9:21-22.) Deputy Thompson asked Corporal Hedin to fill out a written warning for the speeding violation. (Tr. 9:25, 10:1-2.) Deputy Thompson testified at the suppression hearing that filling out a ticket or written warning usually takes about seven to ten minutes. (Tr. 19:19-22.) While Corporal Hedin was writing the warning, Deputy Thompson deployed his canine, Zena, to sniff around Vetter's vehicle. (Tr. 10:3-5.) Zena indicated the presence of a trained odor near the passenger door at approximately 11:49 p.m. (Tr. 11:2-6; App. at 4, ¶ 6.) Deputy Thompson and Corporal Hedin searched the vehicle and found controlled substances and paraphernalia. (Tr. 12:18-21.) Vetter was arrested for possession of those items.

[¶ 6] Vetter filed a motion to suppress, arguing that the scope of the stop was unlawfully expanded by the use of a narcotics detection dog. An evidentiary hearing was held on June 4, 2018. (Tr. 3:1-5.) The district court denied the motion to suppress, concluding that the scope of the stop was not unlawfully expanded because Corporal Hedin was still in the process of writing a warning for the traffic violation when the canine "hit" on the odor coming from the car. (App. at 3, ¶ 7.)

STANDARD OF REVIEW

[¶ 7] “Generally, a district court’s decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the district court’s findings, and if its decision is not contrary to the manifest weight of the evidence.” State v. Demars, 2007 ND 145, ¶ 7, 738 N.W.2d 486 (internal citation omitted). This Court defers to the district court’s factual findings while the district court’s legal conclusions are fully reviewable. State v. Keilen, 2002 ND 133, ¶ 10, 649 N.W.2d 224 (internal citation omitted). This Court resolves conflicts in testimony in favor of affirmance. Demars, 2007 ND 145, ¶ 7, 738 N.W.2d 486 (internal citation omitted).

LAW AND ARGUMENT

I. The district court properly concluded that the traffic stop was not unlawfully expanded.

[¶ 8] The Fourth Amendment to the United States Constitution and Article I, section 8 of the North Dakota Constitution protect against unreasonable searches and seizures. State v. Holly, 2013 ND 94, ¶ 12, 833 N.W.2d 15. “The Fourth Amendment of the United States Constitution is violated by the continued seizure of a traffic violator after the purposes of the initial traffic stop are completed.” State v. Asbach, 2015 ND 280, ¶ 12, 871 N.W.2d 820. Vetter’s Fourth Amendment rights were not violated because the duration and scope of the stop were reasonably related to law enforcement duties stemming from the stop.

A. The traffic stop was not unreasonably expanded in duration.

[¶ 9] A law enforcement officer may stop a driver for a traffic violation. Whren v. United States, 517 U.S. 806, 819 (1996). The “officer may detain an individual at the scene of a traffic stop for a reasonable period of time necessary for the officer to complete

his duties resulting from the traffic stop.” State v. Deviley, 2011 ND 182, ¶ 9, 803 N.W.2d 561 (internal citation omitted). This Court has held that those duties may include:

request[ing] the driver's license and registration, request[ing] that the driver step out of the vehicle, request[ing] that the driver wait in the patrol car, conduct[ing] computer inquiries to determine the validity of the license and registration, conduct[ing] computer searches to investigate the driver's criminal history and to determine if the driver has outstanding warrants, and mak[ing] inquiries as to the motorist's destination and purpose.

State v. Fields, 2003 ND 81, ¶ 8, 662 N.W.2d 242 (quoting United States v. Jones, 269 F.3d 919, 924 (8th Cir. 2001)). “If, during the course of completing the duties resulting from a traffic stop, ‘the officer develops reasonable suspicion that other criminal activity is afoot, the officer may expand the scope of the encounter to address that suspicion.’” Asbach, 2015 ND 280, ¶ 12, 871 N.W.2d 820. The legitimate investigative purposes of the traffic stop are completed when the officer issues a warning or citation. Fields, 2003 ND 81, ¶ 9, 662 N.W.2d 242 (citing Jones, 269 F.3d at 925).

[¶ 10] In State v. Fields, an officer stopped the defendant for expired tabs. Id. at ¶ 4. The officer issued a citation, said goodbye, and began walking away. Id. He then turned around, asked the defendant if he could search his vehicle and detained the defendant until a canine unit arrived. Id. This Court held that the defendant was unlawfully seized after the citation was issued because at that point, the legitimate investigative purposes of the traffic stop were completed. Id. at ¶ 9.

[¶ 11] This case is distinguishable from Fields because the canine sniff happened while Corporal Hedin was still writing the warning for speeding. Because the warning had not yet been issued, the legitimate investigative purpose of the stop was not yet completed. There was no unlawful detention because the canine was deployed during the completion of other duties related to the stop.

[¶ 12] The only measurable delay in the stop was for the DUI investigation. However, the stop was justifiably lengthened for a DUI investigation. Two factors—Deputy Thompson’s observation of an empty alcoholic beverage can in Vetter’s car and Vetter’s admission that he had been drinking—created reasonable suspicion to support expanding the traffic stop to investigate a DUI. See State v. Baxter, 2015 ND 107, ¶ 9, 863 N.W.2d 208 (“[w]hen law enforcement has reason to believe a moving violation has occurred, along with information to form an opinion that the driver’s body contains alcohol, the officer has a reasonable and articulable suspicion the person was driving under the influence and may request an onsite screening test”) vacated on other grounds, 2016 ND 181, 885 N.W.2d 64.

[¶ 13] The district court properly concluded that the dog “hit” on the trained odor while the investigative purpose of the stop was ongoing. Because the legitimate investigative purpose of the stop had not ceased when the canine indicated the presence of a trained odor, the stop was not unlawfully lengthened in violation of the Fourth Amendment.

B. The traffic stop was not unreasonably expanded in scope.

[¶ 14] Vetter argues that Deputy Thompson lacked reasonable suspicion to “interrogate” him regarding illegal narcotics in the vehicle. (Appellant’s Brief “App. Br.” at ¶ 12.) The record reflects that Deputy Thompson asked Vetter whether he had anything illegal in his vehicle. (Tr. 18:25, 19:1-2.) “An officer’s inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.” Arizona v. Johnson, 555 U.S. 323, 333 (2009). The brief question about illegal

items was minimal and appropriate under the circumstances, given Deputy Thompson's knowledge of Vetter's prior criminal conviction for drugs, his observation of the vehicle "rocking back and forth," and his perception that the vehicle's movement was caused by its occupants trying to hide something.

[¶ 15] Vetter also argues that Deputy Thompson lacked reasonable suspicion to conduct a canine sniff of the vehicle. (App. Br. at ¶ 12.) This argument fails because a canine sniff is not a search under the Fourth Amendment and thus, does not require quantum of proof such as probable cause or reasonable suspicion. In Illinois v. Caballes, the United States Supreme Court held that a canine sniff does not "change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner[.]" 543 U.S. 405, 408 (2005). A canine sniff is not a search under the Fourth Amendment because it does not "compromise any legitimate privacy interest." Id. A canine sniff by a well-trained narcotics-detection dog "discloses only the presence or absence of narcotics, a contraband item." Id. at 409. An "interest in possessing contraband cannot be deemed 'legitimate,' thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'" Id. at 408 (emphasis in original) (internal citation omitted). "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." Id. at 409.

[¶ 16] Because the canine sniff around Vetter's vehicle was capable of indicating only the presence of narcotics, its use did not violate any legitimate privacy interests and was not a search under the Fourth Amendment. See id. Moreover, the canine sniff did not "change the character of the traffic stop" which was lawful from its inception. Because the

canine sniff is not a search, there was no Fourth Amendment violation.

CONCLUSION

[¶ 17] For the foregoing reasons, the State respectfully requests this Court **AFFIRM** the district court's criminal judgment entered on September 17, 2018.

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CERTIFICATE OF SERVICE

[¶ 18] A true and correct copy of the foregoing document was sent by email on the 15th day of January, 2019, to: lheck@vogellaw.com.

Kara Schmitz Olson