



## State v. Parsons

2008 | Cited 0 times | Nebraska Court of Appeals | April 8, 2008

### MEMORANDUM OPINION AND JUDGMENT ON APPEAL

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SIEVERS, MOORE, and CASSEL, Judges.

Matthew Parsons appeals from the decision of the district court for Buffalo County that overruled his motion to suppress and then, after a stipulated bench trial, that convicted him of possession of marijuana with intent to deliver, a Class III felony. Parsons was sentenced to 7 to 12 years' imprisonment, with 125 days' credit for time served. We affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

On January 10, 2007, Trooper Samuel Mortensen observed a eastbound pickup truck driven by Parsons speeding on U.S. Highway 30, between Gibbon and Shelton, Nebraska. Trooper Mortensen pulled Parsons over with the intent of issuing a warning for the traffic violation, but also in part because the vehicle matched the description of a vehicle that avoided a "ruse" drug check point near the Shelton interchange on Interstate 80. During the stop, Trooper Mortensen became suspicious of further criminal activity, and a canine-sniff search was subsequently conducted on the vehicle. As a result of the canine sniff, 138.9 pounds of marijuana were found in the vehicle.

On January 24, 2007, the State filed an information charging Parsons with possession of a controlled substance (marijuana) with intent to deliver, a Class III felony.

Parsons filed a motion to suppress any and all evidence derived from the search of the vehicle he was driving on January 10, 2007. Parson alleged that (1) law enforcement officers lacked reasonable suspicion or probable cause to initially stop the vehicle or to continue to detain the vehicle and its occupant and conduct a warrantless search and seizure; (2) law enforcement officers conducted a warrantless search without probable cause or valid consent under the totality of the circumstances; (3) said warrantless search and seizure does not fall within any recognized exception to the requirement of a warrant or of probable cause to execute a warrantless search; and (4) the stop, detention, and search violated his constitutional rights.

A hearing on the motion to suppress was held on February 27, 2007. Trooper Dale Fahnholz testified



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that on the afternoon of January 10, 2007, he was working at the "ruse" checkpoint at the Shelton interchange. While it was referenced as a ruse drug checkpoint, that term was not precisely defined in the record. Nonetheless, we surmise that it means there is no real checkpoint, but merely indications of such so that law enforcement can watch for vehicles which take evasive measures to avoid the supposed checkpoint. Trooper Fahnholz testified that there were four metallic signs along the interstate west of the Shelton exit that said "Drug Dog" and "Police Checkpoint Ahead," and there was a large digital sign referencing the same. A van pulled up to the checkpoint, and a man got out of the van and waved his arms. Trooper Fahnholz drove his patrol car to where the man was standing, and the man told Fahnholz that he observed a tan Chevy pickup with out-of-state plates traveling eastbound and then it made a U-turn, crossing the median, and traveled back westbound. Trooper Fahnholz gave a brief radio explanation on what was going on to Trooper Mortensen and a Trooper Scott, who were also working at the ruse checkpoint--on cross-examination, Trooper Fahnholz said he reported Utah plates to the other troopers. Trooper Fahnholz proceeded westbound on I-80 at a high rate of speed in an attempt to catch up to the pickup. He observed a tan Chevy pickup moving in the parking lot of a gas station at the Gibbon exit, on the northwest corner of the interchange, which is 10 miles west of the Shelton exit. Trooper Fahnholz radioed back to Troopers Mortensen and Scott, and Trooper Scott advised Trooper Fahnholz that he was also traveling westbound at that time. Trooper Fahnholz asked Trooper Scott to look at the pickup at the gas station because Trooper Fahnholz wanted to continue west in the event that the pickup was not the correct vehicle. Trooper Fahnholz then traveled approximately 10 more miles to the Minden exit, but did not locate a vehicle matching the description. Trooper Fahnholz advised Troopers Mortensen and Scott that he was turning around and heading east.

Trooper Fahnholz testified that at some point Trooper Scott had gone to the Gibbon exit and said he had not seen the pickup. Trooper Scott radioed Trooper Mortensen, who was north of Gibbon, to travel west on Highway 30 to see if he could observe the vehicle on Highway 30. Trooper Fahnholz said that Trooper Mortensen headed west on Highway 30. Trooper Mortensen advised Trooper Fahnholz that he had contact with a vehicle similar in description and was making a vehicle stop on Highway 30 between Gibbon and Shelton. Trooper Fahnholz proceeded to that location. Trooper Fahnholz testified that when he arrived on the scene, Trooper Mortensen had a tan Chevy pickup stopped on the roadside.

Trooper Mortensen testified that on the afternoon of January 10, 2007, he was working at the Shelton interchange with Troopers Scott and Fahnholz. Trooper Mortensen recalled hearing some traffic over the radio, but "it was staticky and broken." Trooper Mortensen testified that he received some information that a citizen reported a silver pickup with out-of-state, possibly Utah, plates turning around in the median and returning to the west. Trooper Mortensen started west on Highway 30, "thinking possibly the vehicle might come up that way," but he did not remember being told to do anything.

Trooper Mortensen testified that he observed an eastbound silver Chevy Silverado vehicle with



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out-of-state plates for speeding. Trooper Mortensen said that his in-car radar has two clocks on it, and he clocked the pickup going 64 and 65 m.p.h., and the speed limit on that road was 60 m.p.h. Trooper Mortensen stopped the pickup at approximately mile marker 287 on Highway 30, between Gibbon and Shelton. Trooper Mortensen testified that in addition to speeding, part of the reason for the stop was that the pickup was similar in nature to the vehicle he thought Trooper Fahnholz was looking for. Parsons was identified as the driver of the pickup. The evidence, including Trooper Mortensen's testimony and the cruiser cam video which is in our record, reveals that Parsons' pickup was actually a silver-colored pickup.

During the stop, Trooper Mortensen requested the usual documentation--driver's license, registration, and insurance--from Parsons, and advised Parsons that he was being stopped for speeding. Trooper Mortensen had a conversation with Parsons regarding his travels. Parsons said he was headed to Wood River. Parsons then said that he was actually headed to Norfolk, but was having car problems. Trooper Mortensen testified that the pickup appeared to be running normally. Trooper Mortensen asked Parsons to go back to the patrol car so he could issue him a warning, and Parsons agreed.

In the patrol car, Trooper Mortensen ran a check of Parsons' driver's license and criminal history. While waiting, Trooper Mortensen continued to ask Parsons about his travels. Parsons said he was headed to Norfolk for a sales convention. When Trooper Mortensen asked Parsons where he would be staying in Norfolk, Parsons said he was supposed to call somebody when he got there and would be advised as to where he was staying. Parsons was not able to tell Trooper Mortensen who he was supposed to call or what the number was. Trooper Mortensen advised Parsons that there was a report of a vehicle that turned around in the median matching Parsons' vehicle's description, and asked if Parsons knew anything about it. Parsons denied turning around in the median and stated that he was at the Gibbon exit and got off at the Gibbon exit. When the driver's license and criminal history came back, it stated that Parsons' driver's license was valid, but that Parsons did have prior arrests for possession of marijuana for sale, possession of a controlled substance, and driving under the influence. Trooper Mortensen issued Parsons a warning for speeding and allowed him to leave the patrol car within 10 minutes of initiating the stop.

Trooper Mortensen said that Parsons got back into his pickup and turned on the ignition. At that point, Trooper Mortensen, who had followed Parsons back to the pickup, asked Parsons if he had anything illegal in his vehicle, and Parsons stated that he did not. Trooper Mortensen advised Parsons that "we have a lot of illegal contraband traveling up and down the roads of Nebraska" and asked Parsons for permission to search his vehicle. Parsons said that he did not have anything in his vehicle and would not allow the search, stating that he would "really like to get on the road." Trooper Mortensen advised Parsons that he was going to have Parsons "stand by" and that a police dog would be called to sniff the vehicle. Trooper Mortensen had Parsons place his keys on top of the roof.

Trooper Mortensen requested Trooper David Pohl to bring a drug dog to the scene. At some point,



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Trooper Fahnholz arrived, and essentially stood by and provided security. However, Trooper Fahnholz did advise Trooper Mortensen that Parsons' pickup was the vehicle he had seen at the Gibbon interchange. Trooper Pohl arrived less than 20 minutes after being called to the scene. The dog sniffed the pickup, and based upon the information provided by Trooper Pohl about his dog's actions, Parsons' vehicle was searched. Trooper Mortensen testified that the pickup bed had a hard plastic "tonneau" cover with locks. Trooper Mortensen said there "were two locks on the car at the rear of the vehicle that locked into the bed of the truck, and then there was a lock on the handle which opened the tailgate." Trooper Mortensen asked Parsons for the keys to the locks on the tonneau cover, but Parsons stated that he did not have the keys. A locksmith was summoned to the scene. Marijuana was found in the bed of the pickup after the tonneau cover was unlocked.

On cross-examination, Trooper Mortensen acknowledged that Highway 30 would be a direct route to Norfolk via Highway 30 to Columbus and then Highway 81 to Norfolk, and that Highway 30 pretty much parallels Interstate 80. Also on cross-examination, Trooper Mortensen stated that he was looking for a silver pickup with out-of-state plates, possibly Utah, and that "Colorado and Utah do resemble each other in some ways"--based upon such cross-examination testimony, we presume that Parsons' vehicle had a Colorado license plate, but there was no specific testimony to such and Parsons' license plate cannot be clearly seen on the cruiser cam video which is in our record.

Trooper Pohl testified that he is assigned to the police service dog division of the Nebraska State Patrol. On the afternoon of January 10, 2007, Trooper Pohl was requested to go to the area between Gibbon and Shelton on Highway 30. When he arrived at the scene, Trooper Pohl was informed that there was a denial of consent, and he made the determination to deploy his dog around the vehicle. Trooper Pohl ran the dog around the silver Chevy pickup. Trooper Pohl testified that when he and the dog first went to the vehicle, the dog was alerting, and then the dog indicated on the rear quarter panel area of the vehicle, which told Trooper Pohl that there was the odor of a narcotic there. Trooper Pohl said that an "alert is a dog being very nasal, coming back to an area, sniffing over it multiple times." Trooper Pohl said that an "indication is what the dog does when he detects the strongest odor of a narcotic," and "[t]he prescribed indication then is to sit and stare intently, lie down and stare intently." Trooper Pohl also testified that during a find located high, the dog will sometimes put his front paws up on something. The canine sniff took less than 2 minutes, and as stated previously, the dog indicated on the rear quarter panel area of the vehicle.

In an order filed on March 16, 2007, the district court found that under the circumstances of this case: (1) there was a sufficient factual basis to support stopping Parsons, (2) the continued detention of Parsons was justified, and (3) the duration of the detention was reasonable. The district court overruled Parsons' motion to suppress.

In a stipulated bench trial, the parties agreed that 138.9 pounds of marijuana were found in the vehicle. The district court found Parsons guilty of possession of marijuana with intent to deliver and sentenced him to 7 to 12 years' imprisonment, with 125 days' credit for time served. Parsons now



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appeals.

### ASSIGNMENTS OF ERROR

Parsons alleges that the district court erred in (1) overruling his motion to suppress the search and (2) imposing an excessive sentence.

### STANDARD OF REVIEW

A trial court's ruling on a motion to suppress based on the Fourth Amendment, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. White*, 15 Neb. App. 486, 732 N.W.2d 677 (2007). The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *Id.* When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

### ANALYSIS

#### Motion to Suppress

Parsons argues that the district court erred in denying his motion to suppress because the police lacked a reasonable and articulable suspicion to detain Parsons after the initial traffic stop concluded. Trooper Mortensen stopped Parsons to issue a written warning for speeding because Parsons was driving 64 or 65 m.p.h. in a 60-m.p.h. zone. And "a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle." *State v. Voichahoske*, 271 Neb. 64, 71, 709 N.W.2d 659, 668 (2006). Thus, the initial stop of the vehicle was permissible. "Once stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop." *Id.* at 71, 709 N.W.2d at 668. *Voichahoske* provides:

The investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. . . . Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. . . . The officer may engage in similar routine questioning of passengers in the vehicle to verify



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information provided by the driver. 271 Neb. at 71, 709 N.W.2d at 668. Clearly, the questioning which occurred here was within the parameters set forth in *Voichahoske*, supra.

*Voichahoske* further provides:

In order to expand the scope of a traffic stop and continue to detain the person for additional investigation, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the interference. . . . Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. . . . Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. . . . Reasonable suspicion must be determined on a case-by-case basis. . . . When a determination is made to detain a person during a traffic stop, even where each factor considered independently is consistent with innocent activities, those same factors may amount to reasonable suspicion when considered collectively.

271 Neb. at 72, 709 N.W.2d at 668-69.

Trooper Mortensen was tipped off by several factors that led him to believe that Parsons was involved in criminal activity beyond speeding. Among the factors were: (1) Parsons' pickup matched the description of the vehicle reported to have crossed the median on I-80 in order to avoid the ruse drug checkpoint; (2) Parsons was traveling on Highway 30 which paralleled I-80; (3) Parsons said he was traveling to Norfolk for a convention, but did not know where he would be staying and could not remember the name of the person he was supposed to contact; (4) Trooper Mortensen knows that "a lot of illegal contraband travel[s] up and down the roads of Nebraska"; and (5) Parsons had prior arrests for possession of marijuana for sale, as well as possession of a controlled substance. Trooper Mortensen testified that he wanted to search Parsons' vehicle because "through my interview, things didn't quite add up as to what his reason for going to Norfolk was and his -- as to why he was on Highway 30, and then with his past criminal history." Also, while there was some testimony that the vehicle that avoided the drug checkpoint had Utah plates, other testimony was that the vehicle had out-of-state plates, possibly Utah. Parsons' vehicle apparently had Colorado plates, and Trooper Mortensen testified that "Colorado and Utah do resemble each other in some ways." Based on the totality of the circumstances, Trooper Mortensen had a reasonable, articulable suspicion that Parsons was involved in criminal activity beyond the traffic violation. Thus, the detention was proper and there was no clear error by the district court.

### Sentence

Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence



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involved in the commission of the crime. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). Parsons was 30 years old at the time of the crime and sentencing. He had completed the 12th grade. His criminal history includes convictions for traffic violations and disturbing the peace, as well as several drug related arrests for which the disposition was not reported in the presentence investigation. Parsons admitted first using drugs in the ninth grade. He stated that he has never really sold drugs and that his involvement in drug distribution has been "more of a delivery boy," starting at age 29. Parsons stated that on a scale of 1 to 10, with 10 being the biggest thrill, his thrill from delivering drugs was a 7. Parsons was found to be at high risk for rearrest. The Adult Substance Abuse Questionnaire (SAQ) administered to Parsons as part of the presentence interview places him in the problem range for drug and alcohol abuse. The SAQ also put Parsons in the medium risk range for truthfulness which means that "there is a tendency for this person to deny common problems and to portray self in an overly favorable light." The probation officer found that Parsons was suitable for intensive supervision probation. All of this information is in the presentence investigation report which was received by the district court.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006). And it is the minimum portion of an indeterminate sentence which measures its severity. *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990). Class III felonies are punishable by 1 to 20 years' imprisonment, a \$25,000 fine, or both. Noting the substantial amount of marijuana that "was going to be dumped in a community for distribution," the district court sentenced Parsons to 7 to 12 years' imprisonment, with 125 days' credit for time served. Parsons' sentence is within statutory limits, and we find no abuse of discretion by the trial court. Parsons' sentence is therefore affirmed.

### CONCLUSION

For the reasons stated above, we find that Parsons' motions to suppress were properly denied and we affirm his conviction and sentence.

AFFIRMED.

