Appeal No. 2017AP774-CR **Cir. Ct. No. 2013CF428**

WISCONSIN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

COURTNEY C. BROWN,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Pursuant to WIS. STAT. RULE 809.61 (2015-16),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

The Wisconsin Supreme Court recently granted the petition for review in ***State v. Wright***, No. 2017AP2006-CR, unpublished slip op. (WI App June 12, 2018). In ***Wright***, the court determined that the authority for stopping a vehicle for a broken headlight ended when the citation reasonably could have been issued and that inquiries about weapons during the course of the stop impermissibly expanded the scope of the stop, relying on ***Rodriguez v. United***

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

States, 135 S. Ct. 1609 (2015). ***Wright***, No. 2017AP2006-CR, ¶¶14-16. The supreme court granted the petition in order to consider: "Does asking a lawfully stopped motorist as to whether he is carrying any weapons, in the absence of reasonable suspicion, unlawfully extend a routine traffic stop."

This case involves a legally similar but factually different scenario: after a ticket has been written but before delivery, and in the absence of reasonable suspicion, does asking a lawfully stopped motorist to exit the car, whether he or she possesses anything of concern, and to consent to a search unlawfully extend a traffic stop?

Both cases address the permissible scope and duration of a lawful noncriminal traffic stop.

BACKGROUND

The relevant facts were testified to by Officer Christopher Deering of the Fond du Lac Police Department at the hearing on Courtney C. Brown's motion to suppress and are largely undisputed, except as noted. Brown also testified.

On August 23, 2013, at 2:44 a.m., Deering observed a vehicle coming from a cul-de-sac of closed businesses. Deering ran a records check and learned that the vehicle was a rental car. According to Deering, "people that traffic drugs often use rental cars." Deering followed the car and saw that it did not properly stop at a stop sign. He initiated a traffic stop.

As Brown identified himself, the officer noticed that Brown was not wearing a seat belt. When asked, Brown stated that he was coming from the "Speedway," which was inconsistent with Deering's observation that Brown came

from the cul-de-sac. To confirm, Deering asked if Brown was "coming directly from Speedway to here," to which Brown replied in the affirmative. Brown stated he had been at his girlfriend's house earlier. He knew the intersection by the house, but he did not know the address or her last name. When asked where he was headed, Brown said, "nowhere really, right now." Brown said he was from Milwaukee. Deering testified that Milwaukee is considered a "source city for drugs."

Deering returned to his car with Brown's driver's license to write a warning for the no seat belt violation. Two other officers arrived in separate vehicles to assist. Both officers stood on the side of Brown's car, but made no contact with Brown at any point. Deering described their roles as "safety officer[s]."

Deering ran a records check and learned that Brown had many drug arrests and had been convicted of possession with intent to distribute cocaine and armed robbery. Deering inquired as to whether a canine was available to conduct a dog sniff, but was told neither the city nor county had one on duty. Deering completed the warning ticket.

Deering returned to Brown's car, opened the door, and asked him to step out. They walked to the officer's car with Brown's hands behind his back. When asked why he wanted Brown out of the car, Deering explained it "would be an awkward encounter" to search someone by reaching through the window, as Deering had already planned to ask Brown to consent to a search.

Deering asked if Brown had anything on him that Deering should "be concerned about." Brown said "no." Deering made this inquiry to find out if Brown had "any illegal weapons or drugs on him." When asked if he considered

this traffic stop to be "high-risk," Deering testified "no." When asked if he had concerns that Brown had weapons, Deering testified, "He could have [weapons] but there was—I guess, there's no specific factors to lead to that."

Deering then asked for permission to search Brown. Deering testified that Brown consented; Brown testified he said "no." Deering searched Brown and found thirteen bags of crack cocaine and over $500 in cash. He still had Brown's driver's license and the warning ticket.

Brown was charged with one count of possession with the intent to deliver cocaine. Brown moved to suppress the evidence, asserting he was illegally stopped. After a hearing, the circuit court denied the motion, finding that the traffic stop was lawful. Brown does not appeal this ruling.

Brown then moved to suppress the evidence on the ground that the officer unlawfully extended the noncriminal traffic stop beyond the initial purpose. He argued once Deering had completed writing the ticket, the stop should have been over, and Deering lacked reasonable suspicion to continue the detention by asking Brown to exit the car and to consent to a search.

Noting that it may be the "closest case" it had seen in twenty years, the circuit court denied the motion, determining that the scope and length of the stop had been extended because of the officer's suspicions of drug-related activity and that there was sufficient evidence ("barely enough," in the words of the court) to support those suspicions as reasonable, thus permitting the extension of the stop. The court assumed without deciding that Brown gave consent, stating that consent was "a separate issue" "for a different day, with potentially additional witnesses."

Brown pled no contest to the sole count, with an enhancer dismissed, and a judgment of conviction for one count of possession with intent to deliver cocaine was entered. Brown was sentenced to two years of initial confinement followed by two years of extended supervision.

Brown appeals his conviction, challenging the circuit court's order denying his motion to suppress.

DISCUSSION

Brown contends the traffic stop should have ended once the ticket was completed, and the officer lacked reasonable suspicion to extend the stop beyond that point.[2] The State argues in support of the circuit court's decision—concluding that reasonable suspicion of drug-related activity existed to continue the stop—and also asserts it is unnecessary to determine whether such reasonable suspicion existed because requesting Brown to exit the car and to consent to a search did not impermissibly extend the stop pursuant to ***State v. Floyd***, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560, and other case authorities.

We certify this case in light of the recent grant of the petition for review in ***Wright***, which presents the following issue: "Does asking a lawfully stopped motorist as to whether he is carrying any weapons, in the absence of reasonable suspicion, unlawfully extend a routine traffic stop." In ***Wright***, the inquiries whether Wright was a concealed carry permit holder and if he had weapons in his vehicle took place at the beginning of the traffic stop. Here, the

[2] Brown pled to the charge without further pursuing a challenge to the voluntariness of his consent. On appeal, he argues only that the requests to exit the vehicle and to consent to a frisk improperly prolonged the stop, such that his consent was constitutionally invalid.

officer asked Brown to exit the vehicle, whether Brown had anything on him the officer should "be concerned about," and for consent to search after the traffic ticket had been written but before its delivery. The officer testified that the investigation sought to uncover illegal weapons or drugs. Assuming the absence of reasonable suspicion, as in ***Wright***, this case presents the issue of whether the weapons and/or general criminal investigation was reasonably related in scope to the purpose of the original traffic stop, and whether the duration was permissible.

The United States and Wisconsin Constitutions protect the right of individuals to be free from unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, §11; *see also* ***Floyd***, 377 Wis. 2d 394, ¶19 ("[W]e normally interpret [the Wisconsin counterpart] coextensively with the United States Supreme Court's interpretation of the Fourth Amendment."). A traffic stop is a form of seizure entitled to Fourth Amendment protections from unreasonable search and seizures. ***Floyd***, 377 Wis. 2d 394, ¶20; ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987).

A law enforcement officer may temporarily detain individuals and perform an investigatory stop of a vehicle based on reasonable suspicion of a noncriminal traffic violation. ***Floyd***, 377 Wis. 2d 394, ¶20. The purpose of such a stop includes determining whether to issue a ticket and conducting the ordinary or incidental inquiries. ***State v. Smith***, 2018 WI 2, ¶¶10, 15, 379 Wis. 2d 86, 905 N.W.2d 353. To decide whether a stop was reasonable requires answers to two questions: whether the initial seizure was justified and whether the ensuing conduct by the police "was reasonably related in scope to the circumstances that justified" the initial detention. ***Id.***, ¶10 (citation omitted).

As noted, the circuit court here found the initial stop to be lawful. That determination is not challenged on appeal. This case therefore concerns the second part of the inquiry: whether the requests to exit the vehicle, to identify possession of anything concerning, and to consent to a search were reasonably related in scope to the initial stop.

The State contends that Deering's request that Brown exit the vehicle meets the standard. A law enforcement officer may order a driver to exit a vehicle without violating the Fourth Amendment in the course of a noncriminal traffic stop. ***Floyd***, 377 Wis. 2d 394, ¶¶24, 26, 27 (citing ***Pennsylvania v. Mimms***, 434 U.S. 106, 110-11 & n.6 (1977) (per curiam) ("[O]nce a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment[]" because the "legitimate and weighty" interest in officer safety outweighs the "de minimis" additional intrusion)); ***State v. Johnson***, 2007 WI 32, ¶23, 299 Wis. 2d 675, 729 N.W.2d 182 (***Mimms*** "established a per se rule that an officer may order a person out of his or her vehicle incident to an otherwise valid stop for a traffic violation," but whether the officer may conduct a protective search of the person is a separate issue).

The State also contends that Deering's queries seeking information about the possession of drugs and weapons and for consent to frisk meet the standard as well pursuant to ***Floyd***. In ***Floyd***, the Wisconsin Supreme Court concluded that asking the driver if he had any weapons and asking for permission to frisk him, which he granted, were part of the original traffic stop mission. ***Floyd***, 377 Wis. 2d 394, ¶28. The inherent danger of traffic stops makes officer safety "an integral part of every traffic stop's mission" and permits the taking of "negligibly burdensome precautions" by the officer. ***Id.***, ¶¶26-27 (citations

omitted). The request to search for weapons did not unlawfully extend the stop. ***Id.***, ¶¶26-28; *see also* ***Rodriguez***, 135 S. Ct. at 1616 (officer's safety interest stems from the mission of the stop itself).

Here, before he returned to Brown's vehicle, Deering was aware of Brown's many drug-related arrests and convictions for possession with intent to deliver cocaine and armed robbery. It was 2:44 a.m.; the vehicle was coming from a dead-end road of closed businesses; the vehicle was a rental; the officer had reason to question Brown's claim that he was coming directly from a gas station; and Brown claimed to have driven from Milwaukee to Fond du Lac to visit his girlfriend, whose last name and precise address he did not know.

Viewed objectively, the totality of the facts relating to Brown's behavior and his criminal past added to the safety hazard inherent in all traffic stops, arguably supporting the request for consent to search. *See* ***State v. Richardson***, 156 Wis. 2d 128, 144, 456 N.W.2d 830 (1990) (drugs and guns often go hand in hand).

On the other hand, two other officers had already arrived at the scene, Deering testified that he did not consider the stop to be "high-risk," he saw "no specific factors" to lead to a concern that Brown had weapons, and he had Brown walk with hands behind his back to the officer's vehicle before asking for consent to search. *See* ***Smith***, 379 Wis. 2d 86, ¶82 (Kelly, J., dissenting) ("Is it really necessary to point out that concerns over the officer's safety would vanish if he ended the seizure?"). Under ***Floyd*** and the totality of facts, would these requests be considered part of the original mission of the stop—to ensure officer safety—particularly given that the traffic ticket had been written and the three officers could have sent Brown on his way? Notably, the State concedes that

Deering "did not mention weapons to Brown and testified that his primary motivation was to seek permission to search for drugs." Thus, this case presents the issue of if and when an investigation involving a consent to search for drugs and weapons brings additional inquiries within the original mission of the stop.

Alternatively, the State contends that even if the request for consent to search is viewed as a general criminal investigation for drugs, the extension of the traffic stop is permissible under ***Rodriguez***. Addressing a dog sniff initiated after a traffic stop was completed, the United States Supreme Court reasoned that "[o]n-scene investigation into other crimes," unlike a request for consent to frisk for safety purposes, "detours" from the mission of the stop itself. ***Rodriguez***, 135 S. Ct. at 1616. While the court affirmed its comments from prior cases addressing the constitutionality of questions unrelated to the purpose of the traffic stop, it held that a traffic stop "prolonged beyond" the time reasonably required to complete the stop's mission with a dog sniff—a dog sniff that "adds time to" the stop—is impermissible. ***Id.*** at 1614-16.

Brown contends that, under ***Rodriguez***, any time spent on an unrelated criminal investigation, which is admittedly beyond the scope of the noncriminal traffic stop, unlawfully "adds time" to the stop.

The State contends that, even under ***Rodriguez***, some additional time for an unrelated criminal investigation, and specifically for consent to search, is permissible. Among the cases recognized in ***Rodriguez*** is ***Arizona v. Johnson***, 555 U.S. 323 (2009), in which the United States Supreme Court stated that police inquiries into matters unconnected to the original basis for the stop do not change the encounter into an unlawful seizure as "long as [unrelated] inquiries do not measurably extend the duration of the stop." ***Rodriguez***, 135 S. Ct. at 1615

(alteration in original) (quoting ***Arizona v. Johnson***, 555 U.S. at 333) (also citing ***Muehler v. Mena***, 544 U.S. 93, 101 (2005) (police questioning itself does not constitute a seizure)). Another formulation the ***Rodriguez*** Court recognized is that the authority for the seizure "ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." ***Rodriguez***, 135 S. Ct. at 1614; *see* ***United States v. Sharpe***, 470 U.S. 675, 686 (1985) (it is appropriate to examine whether the police pursued the investigation diligently when assessing the reasonable duration of a stop).

Before ***Rodriguez***, many courts had held that some unrelated inquiries are permissible and can be part of the lawful stop, but not those that "measurably" extend the stop. Since ***Arizona v. Johnson***, "measurably" has been construed in many cases involving consent to mean more than a second, minute, or even a few minutes—with the touchstone being reasonableness under the totality of circumstances. *See* ***United States v. Everett***, 601 F.3d 484, 491-94 (6th Cir. 2010) (after a survey of cases involving unrelated inquiries (including requests to consent) during a stop, the court concluded that a request that "measurably extends" (and therefore impermissibly extends) a stop means a request that takes an unreasonable amount of time under a totality of the circumstances).

Consistent with the reasoning of ***Arizona v. Johnson***, Wisconsin courts have held that questions about drugs and weapons or for consent to search, if made reasonably and without unnecessary delay, do not run afoul of the Fourth Amendment. *See* ***Floyd***, 377 Wis. 2d 394, ¶28; ***State v. Gaulrapp***, 207 Wis. 2d 600, 609, 558 N.W.2d 696 (Ct. App. 1996). Such inquiries do not "measurably extend" the stop, even if they added some short period of time. *See* ***Gaulrapp***, 207 Wis. 2d at 609; *see also* ***Ohio v. Robinette***, 519 U.S. 33, 35-36, 39-40 (1996)

(supreme court found constitutionally valid consent to search after request was made during a stop for speeding).

Courts have concluded that the time ordinarily required to simply make a request for consent to search does not unreasonably prolong the original stop. ***State v. Griffith***, 2000 WI 72, ¶¶56-61, 236 Wis. 2d 48, 613 N.W.2d 72 (citing ***Gaulrapp***, 207 Wis. 2d at 609, and ***Robinette***, 519 U.S. at 39-40); *see also* ***State v. Jenkins***, 3 A.3d 806, 826 (Conn. 2010) (collecting cases) (rejecting defendant's argument that the stop was impermissibly extended when he was asked to exit the vehicle and consent to a search, the court reasoned that such "inquiries are permissible even if they are irrelevant to the initial purpose of the stop, namely, the traffic violation, so long as they do not 'measurably extend' the stop"); *But cf.* ***State v. Betow***, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999) (suppression appropriate where police continued investigative detention of motorist for speeding after motorist consented to search of himself but not of car; reasonable suspicion was lacking); ***State v. Gammons***, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W2d 623 (no basis to detain Gammons after he denied having drugs and refused consent to a search; reasonable suspicion for the subsequent continued detention was lacking).

The conduct at issue is Deering's request for consent to a search just before delivery of the ticket. The State contends that the duration of the request was arguably negligible, far from "measurably" extending the length of the stop. In ***Gaulrapp***, the court held that, after the driver stated that he did not have drugs or weapons, asking the driver for permission to search his person and truck did not unreasonably extend the traffic stop for a loud muffler. ***Gaulrapp***, 207 Wis. 2d at 609. The State contends that, under ***Gaulrapp***, Brown's stop "was not unreasonably prolonged by the asking of one question." ***Id.***; *see also* ***Everett***, 601

F.3d at 495 ("It cannot be said that this single question … constituted a *definitive* abandonment of the prosecution of the traffic stop in favor of a *sustained* investigation into drug or firearm offenses.").

This case presents the issue of whether the request to exit the vehicle, walking Brown with his hands behind his back to the squad car, inquiry about the possession of anything concerning, and request for consent to search—all performed after the ticket had been written and was ready to be delivered to Brown—are permissible after ***Rodriguez***'s statement that any unrelated criminal investigation that "adds time" to the stop is impermissible. Or does ***Arizona v. Johnson***'s statement that unrelated inquiries are permissible if they do not "measurably extend" the stop, control.

This court has previously decreed: "An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion." ***State v. Hogan***, 2015 WI 76, ¶35, 364 Wis. 2d 167, 868 N.W.2d 124. It can be argued that if there is neither reasonable suspicion nor articulable suspicion, then an officer must be acting on a "hunch" to continue the seizure for purposes of a request for consent to search. The State's position arguably permits the extension of a valid stop on nothing more than a hunch so long as an officer does not "unnecessarily delay" or "measurably extend" the stop for an "unreasonable" amount of time. ***Floyd***, 377 Wis. 2d 394, ¶22-23 (citations omitted). This approach is arguably at odds with well-established Fourth Amendment jurisprudence that a legal traffic stop may only be extended if additional suspicious factors come to the officer's attention that "are sufficient to give rise to an *articulable suspicion* that the person has committed or is committing an offense

or offenses separate and distinct from the acts that prompted the officer's intervention in the first place." ***Betow***, 226 Wis. 2d at 94-95 (emphasis added).

Here, arguably, Deering acted on his hunch that Brown was up to no good. As has been pointed out, this additional time provides for officer discretion to engage in a criminal investigation beyond the scope of the stop and without the solid foundation of reasonable suspicion and subjects our criminal justice system to charges of profiling and unequal application based on hunches. *See* ***Floyd***, 377 Wis. 2d 394, ¶48 (Bradley, Ann Walsh, J., dissenting).[3]

This case, as with ***Wright***, provides the supreme court with the opportunity to address these important issues of the permissible scope and duration of a lawful noncriminal traffic stop.

[3] For a discussion and critique of ***Rodriguez v. United States***, 135 S. Ct. 1609 (2015), see Tracey Maclin, *Anthony Amsterdam's Perspectives on the Fourth Amendment, and What It Teaches about the Good and Bad in* Rodriguez v. United States, 100 MINN. L. REV. 1939, 1950 (2016) (raising concerns that ***Rodriguez*** and other cases fail to "recognize that police interrogation of motorists about subjects unrelated to the reason for the traffic stop provides police with unchecked discretion to pursue criminal investigation and is beyond the scope of an ordinary traffic stop").

CONCLUSION

We believe the supreme court should accept certification of this appeal. A decision from the supreme court will help "develop, clarify [and] harmonize the law" on the permissible scope and duration of traffic stops involving inquiries about, and requests to consent to search for, weapons and/or drugs. *See* WIS. STAT. RULE 809.62(1r)(c). No doubt, noncriminal traffic stops are commonplace in every community in our state every day. Further clarification as to the permissible scope and duration of inquiries related to weapons and drugs in the course of routine traffic stops is necessary and critically important. Given the constitutional considerations involved, and in light of the supreme court's upcoming consideration of ***Wright***, the supreme court is the appropriate body to guide the courts, counsel, law enforcement and the public in Wisconsin.