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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2015AP756-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

FREDERICK S. SMITH,
Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION TO
SUPPRESS EVIDENCE AND JUDGMENT OF
CONVICTION, ENTERED IN DANE COUNTY CIRCUIT
COURT, THE HONORABLE STEPHEN E. EHLKE,
PRESIDING.

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

**STATEMENT ON ORAL ARGUMENT AND
PUBLICATION**

The State requests neither oral argument nor publication. This court may resolve this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.¹ Instead, the State offers the following summary and will present additional facts, if necessary, in the argument portion of its brief.

Following a traffic stop on April 6, 2014, Frederick Smith was charged with his seventh drunk driving offense and operating a motor vehicle while revoked (4; 8). The arresting officer discovered Smith was intoxicated when he stopped the car Smith was driving after running the car's plates and discovering that the registered owner's operating privileges were suspended (4:2). Smith filed a motion to suppress evidence, including the arresting officer's observations of him during the traffic stop, arguing that the officer improperly failed to terminate the stop immediately when he saw that the driver was Smith (a man) and not the registered owner (a female) (12:2-3).

Both Sergeant Bernie Gonzalez, the arresting officer, and Smith testified at the evidentiary hearing on Smith's motion (36). On the night in question, Sergeant Gonzalez saw a car stop in the middle of the road to drop off a

¹ Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

passenger in a neighborhood where there had been some gang-related gunfire the night before (36:6). Sergeant Gonzalez followed the car as it drove away, and he checked the car's license plate (36:6). Sergeant Gonzalez learned that the car was registered to a woman named Amber Smith and that her Smith's driving privileges were suspended (36:7). Sergeant Gonzalez turned on his emergency lights to initiate a traffic stop (36:8). He could not see who was driving the car at that time (36:8).

The car turned into a parking lot and parked in a stall (36:8). Sergeant Gonzalez walked up to the car and could see that the driver was a man (Smith) (36:9, 11, 17-18). Sergeant Gonzalez asked Smith to open his door, but Smith said he couldn't because it was broken (36:9). Smith made clear that he could neither roll down the window nor open the car door (36:9). Sergeant Gonzalez could hear Smith from inside the car, and he remembered that Smith said "It's broken" (36:9).

Sergeant Gonzalez assumed that Smith must have gotten in the car through the passenger door (36:21). As a result, he walked around to the passenger side of the car and opened the door so that he could speak with Smith (36:9, 21). Sergeant Gonzalez testified that Smith leaned over to help open the passenger door, and that he and Smith opened the door simultaneously (36:9-10). Smith testified that he did not help open the door; he was simply maneuvering to the

passenger seat and put his hand on a different handle to pull himself over to the passenger seat (36:31-33, 35).²

For the same reason that he asks other drivers to roll down their windows during traffic stops, Sergeant Gonzalez went to door that could be opened so that he could speak to Smith more effectively and clearly (36:23). When the door opened, Sergeant Gonzalez talked with Smith about the reason for the stop, and he noticed that the car was filled with cigarette smoke (36:10). Sergeant Gonzalez also smelled a strong odor of intoxicants and saw that Smith's eyes were red and bloodshot (36:10). Based on additional information, Sergeant Gonzalez ultimately arrested Smith for drunk driving.

On October 6, 2014, the circuit court issued an oral ruling on Smith's motion (37). First, the court found that there was reasonable suspicion to stop the car Smith was driving (37:3-6). The court also concluded that given the circumstances of the stop, Sergeant Gonzalez was permitted

² When it issued its oral ruling on the motion, the circuit court indicated that it was accepting Smith's version of events (18:2-3; 37:2-3). When Smith's attorney asked for a more specific finding that Sergeant Gonzalez opened the door, the court explained that it did not find either Sergeant Gonzalez's or Smith's testimony on that point to be more persuasive (37:9). As discussed below, the court then "found" that if Sergeant Gonzalez was the one who opened the door, it was lawful and reasonable (37:9).

to open the passenger door to speak with Smith and to request Smith's identification:

In Williams,³ our Court of Appeals held that once there is reasonable suspicion to stop the vehicle, then the officer can go further and ask for identification and the name of the person who they had stopped. The court says at page 407, in part, "In any event, we conclude that even if Officer Garcia realized that the driver was not Phillips, before she asked his name and requested identification, it was reasonable for her to do this."

And the court goes on the next page at 408 discussing the Wisconsin Statutes which give law enforcement officers the authority to require a driver of a motor vehicle to display his or her license on demand. The court discusses that and eventually indicates that the public interest in requesting the license and running the check does not outweigh the very minimal intrusion it imposes on the driving.

So in Williams, the court, I think, answered the question that's presented here, and that is what the officer can do after they've stopped the car based on reasonable suspicion.

Now, the defense argues that it was unreasonable for Sergeant Gonzalez to go around the vehicle to the passenger side of the vehicle and to open the door to begin discussions with Mr. Smith and that that extension of the stop was unreasonable. I disagree based on the facts of this case. Sergeant Gonzalez testified that [it] was difficult to speak with Mr. Smith. The door was not functioning – the window was not functioning properly. Sergeant Gonzalez is a very experienced officer. I forget the number of years he's been working offhand, but it was quite a few years, so he's not a rookie cop or anything. And he testified that it was easier to communicate and discuss things with Mr. Smith.

So whether Sergeant Gonzalez first started to open the door or whether they opened it simultaneously, either

³ *State v. Williams*, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W. 2d 462.

way I conclude that under the Fourth Amendment reasonableness standards that it was a reasonable thing to do, Sergeant Gonzalez was within his rights to seek and identification of Mr. Smith and to look at his license, and that what he did in reaction to the situation with the door and the window was reasonable.

So for those reasons, the stop was reasonable and the request for the license was reasonable.

So what I'm saying is that even if Sergeant Gonzalez was the first to, you know, touch that door and start to open it, that was a reasonable thing for him to do because he was trying to simply better communicate with Mr. Smith and see his license or have that license presented to him.

(37:6-9).

Smith appeals.

STANDARD OF REVIEW

Review of a motion to suppress evidence involves a two-step analysis. *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463 (citations omitted); *State v. Sloan*, 2007 WI App 146, ¶ 7, 303 Wis. 2d 438, 736 N.W.2d 189. First, an appellate court evaluates and upholds the circuit court's findings of fact unless they are clearly erroneous. *Id.* Then, the reviewing court independently applies constitutional law to those facts. *Id.*

ARGUMENT

OPENING SMITH'S DOOR WAS A REASONABLE AND LAWFUL MEANS TO PERMIT SERGEANT GONZALEZ TO SPEAK WITH SMITH AND REQUEST SMITH'S LICENSE.

The United States Constitution and the Wisconsin Constitution prohibit unreasonable searches and seizures, U.S. Const. amend. IV; Wis. Const. art. 1, § 11, and a traffic stop is a seizure within the meaning of the Fourth Amendment. *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. An officer may perform an investigative stop when the officer has grounds reasonable to suspect, based on the totality of the circumstances that a traffic violation has been or will be committed. *State v. Colstad*, 2003 WI App 25, ¶¶ 8-9, 260 Wis. 2d 406, 659 N.W.2d 394. The essential inquiry is whether the officer's actions were reasonable under all the facts and circumstances present. *State v. Williams*, 2002 WI App 306, ¶ 12, 258 Wis. 2d 395, 655 N.W.2d 462 (citation omitted).

Smith does not argue that there was no reasonable suspicion of the initial traffic stop.⁴ He claims that Sergeant Gonzalez improperly extended the stop by walking around the car and opening the passenger door to speak with him because the reasonable suspicion for the stop dissipated

⁴ The stop was lawful under *State v. Newer*, 2007 WI App 236, ¶¶ 5 & 7, 306 Wis. 2d 193, 742 N.W.2d 923.

when Sergeant Gonzalez observed that it was Smith behind the wheel instead of the unlicensed registered owner, who Sergeant Gonzalez knew was a woman. This court has rejected similar claims in several cases.

In *Williams*, this court held that when an officer has reasonable suspicion to make a traffic stop, the officer is permitted to ask for the driver's name and identification even if the officer realizes that the driver is not the party that the officer is looking for:

Having concluded that Officer Garcia had reasonable suspicion to stop Williams' vehicle to investigate whether the driver was [the suspect in a domestic violence complaint], we next consider whether the conduct of the officers subsequent to the initial stop made the stop unlawful, as Williams contends. Williams asserts that, as soon as Officer Garcia saw the driver, she had to terminate the stop because she had seen a photograph of [the suspect] and would have known the driver was not [the suspect]. ... [W]e conclude that, even if Officer Garcia realized that the driver was not [the suspect] before she asked his name and requested identification, it was reasonable for her to do this.

Williams, 258 Wis. 2d 395, ¶ 18.⁵ The officer's request for identification did not transform the lawful stop into an unlawful seizure. *Id.*, ¶¶ 21-22.

⁵ As the *Williams* court also noted, Wisconsin law requires its drivers to carry their driver's licenses at all times when they are driving and to show them on demand from traffic officers. Wis. Stat. § 343.18(1).

This court reached the same conclusion on highly similar facts in *State v. Winberg*, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905.⁶ In *Winberg*, the police stopped a vehicle because it was registered to a female owner with a revoked driver's license. After the officer stopped the car, but before he made contact with the driver, the officer realized that the driver was a man and therefore not the registered female owner. The defendant argued that as soon as the officer realized that he was not the registered female owner, any further contact with him was unlawful. This court disagreed:

Here, unlike *House*,⁷ [the officer's] action in making contact with Winberg after he realized that Winberg was not the registered driver was still related in scope to the circumstances justifying the initial stop. As established in *Williams*, if a driver is lawfully stopped, it is reasonable for the officer to ask the driver for his or her name and identification, even if at the time the officer makes this request, the suspicion supporting the stop has dispelled. Nothing in *House* establishes that an officer must abandon the traffic stop before making contact with the driver. Rather, *House* prohibits officers from prolonging traffic stops to conduct separate investigations without reasonable suspicion. [The officer's] action of asking for Winberg's name and identification was not a separate investigation and therefore did not constitute an unlawful seizure.

⁶ *Winberg*, an unpublished, one-judge opinion issued after July 1, 2009, is cited as persuasive authority, and the State has included a copy of the decision in its appendix (R-Ap. 101-105). Wis. Stat. § 809.23(3)(b) and (c).

⁷ *State v. House*, 2013 WI App 111, 350 Wis. 2d 478, 837 N.W.2d 645.

Winberg, 354 Wis 2d 625, ¶ 19 (R-Ap.103) (citation omitted). Based on the officer's observations when he made contact with Winberg, the court also upheld the officer's related operating while intoxicated investigation. *Id.*, ¶¶ 20-22.⁸

The same reasoning applies in this case. It is undisputed that Sergeant Gonzalez had reasonable suspicion to stop the car Smith was driving. After he stopped the car, Sergeant Gonzalez was then permitted to make contact with Smith and to request Smith's license even though he realized that Smith was not the unlicensed registered owner of the car. *Williams*, 258 Wis. 2d 395, ¶ 18; *Winberg*, 354 Wis 2d 625, ¶ 19 (R-Ap. 103). The fact that Sergeant Gonzalez had to walk around to the passenger side of the car and open that door to accomplish this does not alter the analysis. Had they been operational, Sergeant Gonzalez would have talked with Smith through the open window or door on the driver's side of the car. And the result would have been the same – he would have detected the signs of Smith's intoxication, which would have culminated in further investigation and Smith's arrest for drunk driving. The circuit court correctly determined that Sergeant Gonzalez's actions were reasonable and lawful.

⁸ Again, Smith has not challenged the validity of the stop in that regard.

CONCLUSION

For the foregoing reasons, this court should affirm both the circuit court's decision denying Frederick Smith's motion to suppress evidence and Smith's judgment of conviction.

Dated this 29th day of October, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,286 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29th day of October, 2015.

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