STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP0756-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

FREDERICK S. SMITH,

Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AN ORDER OF THE CIRCUIT COURT FOR DANE COUNTY, STEPHEN E. EHLKE, JUDGE

REPLY BRIEF OF THE PLAINTIFF-RESPONDENT-PETITIONER

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Smith appears to concede that Sergeant Gonzalez could approach the vehicle to explain the basis for the stop. (Smith's Br. 19.)[1] The dispute is over whether Sergeant Gonzalez was limited to only explaining the basis of the stop, and only through a closed window. This Court should conclude that Sergeant Gonzalez was permitted to perform all "ordinary inquiries" related to a traffic stop. The court should further conclude that Sergeant Gonzalez was permitted to perform those inquiries by opening the door of Smith's lawfully stopped vehicle.

I. Sergeant Gonzalez was permitted to perform the "ordinary inquiries" of a traffic stop even though reasonable suspicion had dispelled by the time he reached Smith's door.

Smith frames the first issue as "whether Sergeant Gonzalez could prolong the traffic stop and continue to detain Mr. Smith after reasonable suspicion . . . dissipated." (Smith's Br. 5.) Smith's framing begs the question of whether making contact to ask for the driver's name and identification was a separate Fourth Amendment event. A more accurate statement of the issue is whether Sergeant Gonzalez was allowed to make contact to ask for the driver's name and identification as a part of the scope of the traffic stop, or if doing so was a separate Fourth Amendment event requiring independent justification.

Smith argues that the Fourth Amendment prohibited Sergeant Gonzalez from doing anything but explaining the basis for the stop and advising Smith that he was free to go

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[1] "In this case, as a matter of courtesy, Sergeant Gonzalez could have explained the reason for the stop through the broken driver's side window and then let Mr. Smith go." (Smith's Br. 19.)

because Sergeant Gonzalez no longer had reasonable suspicion of a traffic violation, and thus, no basis to issue a citation. (Smith's Br. 17–19.) Smith recognizes that his position is contrary to established Wisconsin law, and he asks this Court to overrule *State v. Williams*, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462, and *State v. Ellenbecker*, 159 Wis. 2d 91, 464 N.W.2d 427 (Ct. App. 1990). (Smith's Br. 13.) The Court should decline that request.

The U.S. Supreme Court has clarified that "the tolerable duration" of a traffic stop "is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns." *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (citations omitted). The "mission" of the traffic stop includes "ordinary inquiries" such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* at 1615 (citation omitted). While *Williams* and *Ellenbecker* were decided well before *Rodriguez*, the Wisconsin Court of Appeals reached the same conclusion in each case largely based on the same rationale. *Williams,* 258 Wis. 2d 395, ¶ 18; *Ellenbecker*, 159 Wis. 2d at 96–98.

While, under the facts of *Rodriguez*, reasonable suspicion had not completely dispelled, the principle that the "mission" of the traffic stop includes "ordinary inquiries" equally applies to cases in which it has. This is so because the reasons permitting officers to conduct these ordinary inquiries are not completely tied to the reasons justifying the traffic stop. After issuing *Rodriguez*, the supreme court remanded *People v. Cummings*, 46 N.E.3d 248, 252 (Ill. 2016), a case where reasonable suspicion was completely dispelled, with directions to reconsider its prior decision in light of *Rodriguez*. The Illinois Supreme Court unanimously

concluded that even if reasonable suspicion was completely dispelled, officers were permitted to make "ordinary inquiries" such as checking the driver's license, running a warrant check, and inspecting the vehicle's registration and proof of insurance. *Id.* at 251.

Smith argues that *Rodriguez* is not as expansive as the State, and the Illinois Supreme Court suppose. But in support of his position, Smith relies almost entirely on case law decided before *Rodriguez*. Those cases are now outdated. *Rodriguez* clarified *Illinois v. Caballes*, 543 U.S. 405, 408 (2005), and *Delaware v. Prouse*, 440 U.S. 648, 658–60 (1979), insofar as it provided examples of "ordinary inquiries" and explained *why* those inquiries are permissible. *Rodriguez*, 135 S. Ct. at 1615. Officers are permitted to perform these inquiries not because they are intertwined with the reasonable suspicion or with the need to write a citation or warning; rather, they are permissible because they "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.* (citing 4 W. LaFave, *Search and Seizure* § 9.3(c), 507–17 (5th ed. 2012)). In light of this reasoning, the reasoning permitting such inquiries in *Ellenbecker*, and thus *Williams*, is not on shaky ground.

The only post-*Rodriguez* support for Smith's position is *State v. Coleman*, 890 N.W.2d 284 (Iowa 2017). *Coleman* provides weak support for three reasons.

First, the Iowa Supreme Court's decision was a splintered 4-3 vote, with the dissent noting that all nine Justices in *Rodriguez* had agreed that an officer may check a driver's license and registration as an "ordinary inquiry" of any lawful traffic stop. *Coleman*, 890 N.W.2d at 306–07 (Waterman, J., dissenting). The dissent collected relevant case law and concluded that "[t]hese checks do not require

separate, articulable, individualized suspicion because they fall within the scope of the stop." *Id.* at 307–09 (Waterman, J., dissenting).

Second, the majority erred in treating the *Rodriguez* Court's discussion of the "ordinary inquiries" related to a traffic stop as dicta and narrowly read *Rodriguez* as limited to "a valid, ongoing stop, not a traffic stop in which the underlying reason for the stop has been satisfied." *Coleman*, 890 N.W.2d at 300. But the *Rodriguez* Court's discussion and definition of "ordinary inquiries" was necessary to define the scope of traffic stop. Thus it is not *obiter* dicta. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

Third, and most importantly, the case was decided under Iowa's state constitution. The court explained that even if the holding of *Rodriguez* was broader than it believed, "we would not be deterred from pursuing our own independent path under the Iowa Constitution." *Coleman*, 890 N.W.2d at 300. The court concluded "that when the reason for a traffic stop is resolved and there is no other basis for reasonable suspicion, article I, section 8 of the Iowa Constitution requires that the driver must be allowed to go his or her way without further ado." *Id.* at 301.

This Court should adopt the *Cummings* Court's interpretation and reject the positon taken by the majority in *Coleman*. The Court should conclude, as previously established in *Williams* and *Ellenbecker*, that an officer who performs a lawful traffic stop is permitted to perform the "ordinary inquiries" related to traffic enforcement, even after reasonable suspicion supporting the stop has dissipated. An officer does not prolong or extend the seizure by performing

these inquiries; rather, these inquiries are a part of the scope or "mission" of traffic stop.

II. Opening the passenger door was a reasonable, *de minimis* intrusion that Sergeant Gonzalez was permitted to make in order to complete the "ordinary inquiries" of the traffic stop.

Smith argues that even if Sergeant Gonzalez was permitted to make contact with him to ask for his name and identification, Sergeant Gonzalez was not permitted to open the door of his vehicle to do so. (Smith's Br. 20.) Again, Smith attempts to characterize a single, lawful seizure as series of separate Fourth Amendment events. He does so because he wants this Court to conclude that the Fourth Amendment allows drivers to remain shielded behind a closed window, and prohibits officers from physically possessing, for even a moment to verify authenticity, a driver's license or registration documents. (Smith's Br. 21.)

The U.S. Supreme Court has already rejected Smith's view in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). Here, this Court should conclude that Sergeant Gonzalez's actions were reasonable, permissible, and within the scope of the initial, lawful traffic stop.

A. This case involves one continuous Fourth Amendment event.

Smith casts Sergeant Gonzalez's opening the passenger door to talk to Smith as both a separate seizure and a separate search of Smith's car; he then claims that Sergeant Gonzalez needed reasonable suspicion or probable cause, independent from the basis for the initial stop, to open the passenger-side door. (*See* Smith's Br. 23–27.) That contention is refuted by the facts and unsupported by the law.

The seizure was one continuous, lawful traffic stop. When he opened the door, Sergeant Gonzalez was attempting to make contact with Smith to "handle the matter for which the stop was made." *Rodriguez*, 135 S. Ct. at 1612. As Smith himself points out, Sergeant Gonzalez had not yet even had a chance to ask for Smith's driver's license or explain why Smith had been pulled over. (Smith's Br. 21.) The traffic stop had not concluded when Sergeant Gonzalez opened the door.

Consequently, Smith's claim that Sergeant Gonzalez "illegally detained Mr. Smith when he opened the passenger side door" "to force [his] compliance with his investigation" is baseless. (Smith's Br. 22–23.) There was no investigation at that point. Sergeant Gonzalez was simply trying to make reasonable contact with the driver of a vehicle that had been lawfully stopped. Once Sergeant Gonzalez made reasonable, unobstructed contact, he was immediately presented with evidence of intoxication. (36:20–22.) Opening the door created no separate investigation and no extra detention of Smith. The traffic stop had not ended at the time Sergeant Gonzalez opened the door. Smith could not be seized a second time because the first seizure had yet to end.

Smith alternatively argues that opening the door was a search requiring probable cause. (Smith's Br. 27.) He claims "other jurisdictions" have come to this conclusion, but cites to only one case from the New Jersey Court of Appeals that involved a substantially different set of facts than what occurred here. (Smith's Br. 27 (discussing *State v. Woodson*, 566 A.2d 550 (N.J. Super. Ct. App. Div. 1989).)

In *Woodson*, the defendant was pulled over for speeding. *Id.* at 538–39. The trooper made no preliminary attempt to communicate with either the driver or the passenger of the vehicle before walking up and opening the

passenger-side door. *Id.* at 539. When the trooper opened the door, an open can of beer fell out; the trooper then searched the interior of the vehicle for other containers. *Id.* His search revealed a bag of marijuana on the front seat between the driver and the passenger. *Id.* The trooper then ordered the occupants out of the car, searched both of them, and seized "unspecified quantities of controlled dangerous substances." *Id.*

The New Jersey Court of Appeals held that the evidence must be suppressed as the product of an unconstitutional search. *Id.* at 541. The court's analysis hinged on two salient facts that are not present here. First, the court found the trooper's actions unconstitutionally invasive because he had acted "without permission, without reasonable warning and without first trying to speak to the driver." *Id.* at 540. Second, the seized evidence was the product of an actual search of things in which the occupants had legitimate expectations of privacy: the person and the interior of a vehicle. *Id.* at 539.

That is far afield from what occurred in this case. Sergeant Gonzalez first walked up to the driver's side of the car and attempted to communicate with Smith through the broken window for almost a minute. (17:2, 4/6/2014 10:25:14–10:26:00.)[2] Smith began to move to the passenger side of the car before Sergeant Gonzalez opened the door. (36:31–33.) Sergeant Gonzalez did not lean into the interior of the car to visually inspect the interior—his head was clearly visible above the car's roof as he spoke to Smith. (17:2, 26:39–27:30.) And as soon as Sergeant Gonzalez began

[2] The State is citing the video using the DateTime stamp from Sergeant Gonzalez's dash-cam video. For ease of reading, further cites will drop the date and hour and refer only to the minutes and seconds.

speaking to Smith, he "smelled a strong odor of intoxicants" and saw that Smith's "eyes were red and bloodshot." (36:10–11.)

Sergeant Gonzalez did not surprise Smith by walking up unannounced and opening the passenger-side door, and he did not search the interior of the car or Smith's person. Unlike the officer in *Woodson*, Sergeant Gonzalez simply made observations about Smith's intoxication while explaining the reason for the stop. (36:10–11.) As the State explained, and as Smith has not attempted to rebut, Smith had no reasonable expectation of privacy in the evidence of intoxication emanating from his person or in his ability to remain in the closed vehicle. (State's Br. 23–24.) Where the government invades no reasonable expectation of privacy, there is no search implicating the Fourth Amendment. *Caballes*, 543 U.S. at 408. This was not a search.

B. *Mimms* established a per se rule that an officer is permitted to require face-to-face contact during a traffic stop.

The U.S. Supreme Court already created a per se rule in *Mimms* that an officer can require face-to-face contact as part of a stop. Smith misinterprets *Mimms* as requiring courts to weigh the public interest served by requiring face-to-face communication against the incremental liberty intrusion on a case-by-case basis. (*See, e.g.*, Smith's Br. 25.) That is incorrect.

In *Mimms*, the court held that when weighed against the general public interest in officer safety, the additional intrusion of being ordered to get out of the car can "only be described as *de minimis*." *Mimms,* 434 U.S. at 111. That was so even though the officer "had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his

behavior." *Mimms*, 434 U.S. at 109. The additional intrusion of requiring face-to-face contact with a police officer during a traffic stop is also *de minimis*, while the danger to an officer posed by an occupant the officer cannot see or hear well is substantial. This Court should follow *Mimms*.

C. It was reasonable for Sergeant Gonzalez to open the door.

The "central inquiry" of any Fourth Amendment analysis is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

Smith mistakes the least intrusive means *reasonably available* to mean the least intrusive means possible. (Smith's Br. 21–22.) Neither *Florida v. Royer*, 460 U.S. 491 (1983), nor subsequent cases applying it embrace that interpretation. Rather, the court has held the "fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render [police action] unreasonable." *United States v. Sharpe*, 470 U.S. 675, 687 (1985) (citation omitted). "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or pursue it." *Id.*

Smith argues that pursuant to *Royer* and *Williams*, Sergeant Gonzalez was required to ask Smith for his name and identification *before* establishing face-to-face contact. (Smith's Br. 21–22.) Smith is wrong. First, there is nothing in *Williams* suggesting that an officer must make requests of a driver through a closed window. And Smith ignores the facts: Sergeant Gonzalez did request that Smith roll down the window or open the driver-side door. (36:9.)

Smith's arguments under *Brown v. Texas*, 443 U.S. 47 (1979), that a person may refuse to identify himself (Smith's Br. 23), are also misplaced. Smith gave every indication that had they been functional, he would have complied with Sergeant Gonzalez's requests. Smith communicated as best he could through the broken window and then moved to the passenger side of the car. (36:31–33.) Sergeant Gonzalez had no reason to think that Smith would refuse to talk to him or refuse to open the passenger-side door. The fact that Sergeant Gonzalez could have asked Smith for permission to open that door, or could have asked Smith to do so, does not make Sergeant Gonzalez's actions unreasonable.

III. Even if Sergeant Gonzalez had not opened the door, he would have inevitably discovered Smith's intoxication.

Smith's argument against inevitable discovery is contingent on his claim that once reasonable suspicion dissipated, Sergeant Gonzalez was limited to telling Smith, through a closed window, that Smith was free to go about his business. The State has explained why that is not so. Sergeant Gonzalez was permitted to establish face-to-face contact with Smith through reasonable means. He did so, and that there is no set of circumstances in which Sergeant Gonzalez would not have discovered Smith was drunk once he made face-to-face contact. Sergeant Gonzalez was permitted to ask for Smith's name and identification, *Williams*, 258 Wis. 2d 395, ¶ 22, and expecting him to do so through the closed window is not reasonable. The inevitable discovery doctrine applies in this case.

IV. The court should not apply the forfeiture rule to this case.

Smith argues that the State forfeited its argument that Sergeant Gonzalez was permitted to open the door and

that Sergeant Gonzalez would have inevitably discovered Smith's intoxication by not meaningfully raising it in the court of appeals. (Smith's Br. 28–29.) The State admits that it should have done more in the court of appeals. However, because the forfeiture rule is one of judicial administration, *State v. Huebner*, 2000 WI 59, ¶ 11 n.2, 235 Wis. 2d 486, 611 N.W.2d 727, the Court should decline to apply it here. This case presents important substantive issues, and a decision on the merits is necessary to inform and shape law enforcement officers' interactions with citizens of this State.

CONCLUSION

For the foregoing reasons, the State asks that this Court reverse the court of appeals decision and affirm Smith's judgment of conviction.

Dated this 4th day of April, 2017.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

Dated this 4th day of April, 2017.

_____
TIFFANY M. WINTER
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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 4th day of April, 2017.

_____
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