No. 15AP1294

In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

LEWIS O. FLOYD, JR.,
DEFENDANT-APPELLANT-PETITIONER.

On Appeal from the Racine County Circuit Court,
The Honorable Allan Torhorst, Presiding,
Case No. 2013-CF-982

BRIEF AND SUPPLEMENTAL APPENDIX OF THE STATE OF WISCONSIN

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ISSUES PRESENTED

1. *Was Deputy Ruffalo's pat-down search of Floyd during a traffic stop reasonable in light of Floyd's consent*?

   The Court of Appeals held that the pat-down search was reasonable.

   a. *Did Deputy Ruffalo extend the traffic stop?*

   The Court of Appeals held that Deputy Ruffalo did not extend the traffic stop, and therefore the consented-to search was reasonable. A6.

   b. *If Deputy Ruffalo did extend the traffic stop in order to ask two follow-up questions, was the extension justified by reasonable suspicion?*

   The Court of Appeals held, in the alternative, that any extension was justified by reasonable suspicion, and therefore the consented-to search was reasonable. A7–10.

2. *Was Floyd's counsel ineffective for failing to call a backup police officer to challenge whether Deputy Ruffalo in fact asked for consent*?

   The Court of Appeals held that Floyd was not prejudiced by any alleged failure to call the backup officer. A12–15.

INTRODUCTION

Deputy Troy Ruffalo pulled over Lewis Floyd's vehicle because Floyd's registration was suspended. During the roughly ten-minute stop, Deputy Ruffalo had Floyd exit his vehicle, asked if he had any weapons, and then requested consent to conduct a pat-down search for weapons. Floyd consented to the pat-down, and during the search, Deputy Ruffalo found marijuana and Vicodin.

Floyd argues that the few seconds it took to ask about weapons and request consent illegally "extended" the traffic stop, thereby automatically rendering his voluntary consent invalid. Pet. Br. 23–29. But asking about weapons is a reasonable safety precaution related to the "mission" of the stop and not an "extension" of the stop at all. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614–15 (2015). Furthermore, the Supreme Court and this Court have already held that taking a few seconds to ask about weapons or drugs and request consent to search is permissible. *See Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996); *State v. Griffith*, 2000 WI 72, ¶¶ 56–61, 236 Wis. 2d 48, 613 N.W.2d 72 (affirming *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996)).

Even if Deputy Ruffalo "extended" the stop, he had reasonable suspicion to do so. Floyd had air fresheners "positioned in every vent" and "hanging from the rearview mirror," he was "operating his vehicle, illegally, in an area with significant drug and gang activity," and his car had

tinted windows, "suggest[ing] a possible desire . . . to conceal" evidence of crime inside the vehicle. A8–9; *see State v. Malone,* 2004 WI 108, ¶ 36, 274 Wis. 2d 540, 683 N.W.2d 1; *State v. Morgan*, 197 Wis. 2d 200, 211, 539 N.W.2d 887 (1995); *United States v. Quintana-Garcia*, 343 F.3d 1266, 1273 (10th Cir. 2003).

This Court should affirm the Court of Appeals' holding that Deputy Ruffalo did not extend the stop—or that it was justified by reasonable suspicion—and that Floyd's voluntary consent was therefore valid.

ORAL ARGUMENT AND PUBLICATION

By granting Floyd's petition for review, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. Floyd and Deputy Ruffalo stopped at the same stoplight in Racine at 6:45 p.m. on July 23, 2013. A22–23. Ruffalo checked Floyd's license plates, discovered that his registration was suspended, and pulled him over a block later. A23.

When Ruffalo approached Floyd's vehicle, he saw "air fresheners in every vent of the vehicle as well as hanging off the rear view mirror," and noticed that the car "had tinted windows." A25, 42. He asked for Floyd's license and insurance information; Floyd did not have either, but provided a Wisconsin identification card. A24.

Deputy Ruffalo returned to his vehicle to begin processing three citations (for the registration, license, and insurance violations). A24. He suspected drug activity based on the air fresheners, which are often "used to mask the smell of narcotics," A26, the tinted windows, and because it was a "high crime" area, A42,[1] so he called to request a canine unit, A24. None was available, but a backup officer arrived within two minutes. A39.

After the "five or six minutes" it took to process the citations, Deputy Ruffalo returned to Floyd's vehicle. A24. He asked Floyd to exit the vehicle to "explain the citations to him," to "make sure that [Floyd] understood" that he could not "drive away from the scene" without a "valid driver's license," and because he believed "there might be some criminal activity going on in vehicle." A25, 34.

Before he explained the citations, Deputy Ruffalo asked Floyd if he had any weapons. A27. Floyd said no. A27. Deputy Ruffalo then asked Floyd if he "could search him for [his] safety," and Floyd responded, "yes, go ahead." A27. During the pat-down search, Ruffalo discovered a bag

[1] Deputy Ruffalo also mentioned the time of day and that Floyd was alone in the vehicle as factors indicating drug activity. It is possible that Deputy Ruffalo's many years of experience taught him that driving alone at 6:45 p.m. in that particular area tends to be associated with drug activity. He did not provide any such explanation, however, so the State does not rely on those factors before this Court.

containing marijuana and Vicodin wedged between Floyd's legs.[2]

B. The State charged Floyd with four counts, two drug-related and two related to bail-jumping. A2. Floyd moved to suppress the evidence that Deputy Ruffalo had found on his person, arguing that his consent was invalid because Deputy Ruffalo illegally extended the stop without reasonable suspicion in order to conduct a search. A45–47. The Racine County Circuit Court conducted an evidentiary hearing. A2, 4. At the hearing, Deputy Ruffalo testified about the encounter, as explained above, including that Floyd voluntarily consented to the pat-down search. As Ruffalo explained, I "asked him . . . if I could search him for my safety and he said yes." A27. At the hearing, Floyd did not testify or otherwise dispute this sequence of events in any respect, including as to his voluntary consent to the search upon request. A43 ("[The] Defense does not intend to present any evidence.").

The court found reasonable suspicion to conduct the search based on the factors that Deputy Ruffalo had listed.

[2] Floyd suggests, ominously, that it took "multiple attempts," "much difficulty," and "a knife" to dislodge the bag. Pet. Br. 5. But Floyd created the difficulty, first by holding the bag between his legs and then by pinning it against the squad car. A28–29. It fell free when Deputy Ruffalo asked Floyd to stand with a wide stance away from the vehicle. A29–30. But the bag was still tied to the drawstring on Floyd's pants, so Ruffalo cut the drawstring with a knife. A30. In any event, Floyd does not argue that the search itself was in any way unreasonable.

Compare A42, *with* A49.[3] With respect to whether Deputy Ruffalo "extended" the stop, the court noted that he did not "delay doing the citations," A49, that the stop had not yet "terminate[d]" when he asked Floyd to exit the vehicle, and that it was appropriate to ask Floyd to exit because he "wasn't licensed" and "couldn't drive the vehicle away," A51. The court also found that it was "not in dispute" that "Floyd in fact consented to the search of his person." A47, 49.

Floyd pleaded no contest in exchange for the State dismissing all but one of the drug-related charges. A5, 53. The court sentenced Floyd to six years' imprisonment, but stayed the sentence in favor of three years of probation. A53.

C. Floyd filed a post-conviction motion arguing that his trial counsel provided ineffective assistance, in violation of the Sixth Amendment. A5. Specifically, Floyd criticized his counsel for failing to call the backup officer, Aaron White, to establish that Deputy Ruffalo did not *ask* for consent to search, but rather *told* Floyd that he was going to search him. A5. Floyd based this argument on Officer White's report of the stop, which stated that Deputy Ruffalo "advised" Floyd that he was going to search him. A5.

Floyd called Officer White as a witness during a hearing on the post-conviction motion. When Floyd's attorney asked

[3] The Circuit Court described those factors as follows: "air freshener[s], . . . the tinted windows, the time of the day, that Mr. Floyd was alone in his vehicle, he's from Kenosha, and there's another one that was important to [Deputy Ruffalo]" (referring to the factor that it was a high-crime area). A49.

what he observed after Floyd exited the vehicle, Officer White responded, "[Deputy Ruffalo] *asked* [Floyd] if he could do an external pat down for weapons and [ ] he consented." SA6 (emphasis added). Floyd's attorney directed Officer White's attention to his report (the paragraph using the word "advised") and asked again what Deputy Ruffalo said. Officer White again responded that Deputy Ruffalo "*asked* [Floyd] if he could . . . pat [him] down." SA6–7 (emphasis added). Floyd's attorney then pointed out that Officer White's report "indicates that Deputy Ruffalo advised Floyd . . . that he was going to pat him down," and then asked Officer White, "So is that not accurate?" SA7. Officer White answered, "Yeah, . . . he . . . asked him to pat him down for weapons." SA7–8. Floyd's attorney then asked, "I guess I'm trying to find out did he ask him or tell Floyd he was going to pat him down?" SA8. White responded, "He asked him for the most part." SA8. Floyd's attorney pushed yet again, "So that would be contrary to what you wrote in your report?" SA8. Officer White took a moment to re-read the report, and then acknowledged, "Yeah, the way that I have it written it just says that [Deputy Ruffalo] advised [Floyd] that he's gonna pat him down." SA8. Floyd's attorney finished by asking, "And is this report accurate?" to which Officer White replied, "To the best of my knowledge I want to say yeah." SA8.

On cross examination, Officer White testified that he did not "have a clear recollection of the exact words that Deputy Ruffalo used," noting that as a backup officer, "you

can't always hear what's exactly going on." SA8, 10. The State's attorney observed that the report indicated that "Floyd consented to the search saying something along the lines of go ahead," which Officer White agreed "makes it sound like Deputy Ruffalo asked for permission to search." SA10.

The Circuit Court denied the motion. The court first reiterated that nothing during the post-conviction hearing altered its prior holdings: "that there was essentially no delay in this stop whatsoever," A57–58, that Deputy Ruffalo had "reasonable suspicions" of drug activity, A57, and that Floyd in fact consented to the search, A59. As to the ineffective assistance claim, the court held that Floyd's trial counsel "was not deficient in any way" by failing to call Officer White. A59. The court accepted Floyd's counsel's "tactical" explanations, and, regardless, "[Officer] White would have corroborated [Deputy] Ruffalo's version," notwithstanding that there was "some dichotomy from White's report." A58–59.

D. The Court of Appeals affirmed on both the Fourth Amendment and the Sixth Amendment issues.

With respect to the reasonableness of the pat-down search, the court primarily held that Deputy Ruffalo did not "extend" the traffic stop and that Floyd voluntarily consented to the search. A6, 10–12.

The traffic stop was not extended, the court held, because at the time Deputy Ruffalo asked for consent, the stop was ongoing, as he had yet to explain the three citations to

Floyd. A6. Asking Floyd to exit the vehicle was reasonable under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), which held that police may *always* ask drivers to step out of their vehicles during traffic stops. A6. Ruffalo also had a specific justification for asking Floyd to exit the vehicle—because "Floyd could not lawfully drive away" due to his "lack of a driver's license." A6.

The court found Floyd's consent valid because, having concluded that the stop was not extended, Floyd was "lawfully detained" when Deputy Ruffalo asked for consent, A12, and because there was no evidence to suggest that it was involuntary (like threats, deception, and the like), A11–12.

In the alternative, assuming for the sake of argument that the stop was extended, the court held that any extension was justified by reasonable suspicion based on the air fresheners "positioned in every vent" and "hanging from the rearview mirror," the fact that Floyd "was operating his vehicle, illegally, in an area with significant drug and gang activity," and the "tinted windows" "suggest[ing] a possible desire . . . to conceal" the inside of the vehicle. A8–9. Under this alternative, Floyd's consent would still be valid for the same reasons.[4]

As to the ineffective assistance claim, the court found "[no] reasonable probability the result of the suppression

[4] The court did not decide whether, in the absence of voluntary consent, the search also would have been justified by reasonable suspicion of dangerousness to Deputy Ruffalo. A2 n.1.

hearing would have been any different" because Officer White's post-conviction testimony did not undermine the Circuit Court's conclusion that Deputy Ruffalo in fact asked Floyd for consent to search, A15.

STANDARD OF REVIEW

This Court "uphold[s] the circuit court's findings of historical fact unless they are clearly erroneous" and then "independently appl[ies] constitutional principles to those facts." *State v. Hogan*, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 868 N.W.2d 124.

SUMMARY OF ARGUMENT

I. Floyd concedes that the traffic stop was lawful. Pet. Br. 14. He does not argue (and therefore forfeits any argument) that he did not in fact consent to the search. And he does not argue that his consent was involuntary, nor is there any evidence to suggest that it was. *See* A11–12.

Floyd's only argument as to why this Court should disregard his consent is that Deputy Ruffalo illegally "extended" the traffic stop by taking a few seconds to ask about weapons, automatically rendering any consent obtained after that "extension"—even though voluntary—invalid. Pet. Br. 23–29. In essence, Floyd asks for a *per se* rule that drivers may never consent to a search during a lawful traffic stop because *asking* for consent will nearly always take a few seconds.

Floyd's arguments fail for several, independently sufficient reasons.

A. Deputy Ruffalo did not "extend" the stop at all.

1. First, asking about weapons and for consent to pat-down for weapons is a reasonable safety precaution, core to the "mission" of the stop itself, and therefore does not "extend" the stop. *Rodriguez*, 135 S. Ct. at 1614–15 (citing *Mimms*, 434 U.S. 106).

2. Second, both the Supreme Court and the Wisconsin Court of Appeals have already held that drivers can validly consent during a lawful traffic stop, even if police take a few seconds to ask about weapons or drugs and request consent to search for them, *Robinette*, 519 U.S. at 39–40; *Gaulrapp*, 207 Wis. 2d 600; *see also Florida v. Royer*, 460 U.S. 491, 501 (1983) (plurality), and this Court explicitly affirmed the Wisconsin Court of Appeals' holdings in the course of deciding that "the length of time required to ask a question is not sufficiently intrusive to transform a reasonable, lawful stop into an unreasonable, unlawful one." *Griffith*, 236 Wis. 2d 48, ¶¶ 56–61 (citing *Robinette*, 519 U.S. at 39–40, and *Gaulrapp*, 207 Wis. 2d at 609). Many other courts have held the same. *E.g.*, *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) (en banc).

B. Even if Deputy Ruffalo did "extend" the stop, the few-second extension was justified by reasonable suspicion. Floyd had air fresheners "positioned in every vent" and "hanging from the rearview mirror," he was "operating his

vehicle, illegally, in an area with significant drug and gang activity," and his car had tinted windows, "suggest[ing] a possible desire . . . to conceal" the inside of the vehicle. A8–9. All of these are relevant factors that contribute to reasonable suspicion, sufficient to permit an officer to ask follow-up questions such as requesting consent to search. *See, e.g.*, *Malone,* 274 Wis. 2d 540, ¶ 36; *Morgan*, 197 Wis. 2d at 211; *United States v. Torres-Ramos*, 536 F.3d 542, 552 (6th Cir. 2008); *United States v. Bowman*, 660 F.3d 338, 345 (8th Cir. 2011); *United States v. Quintana-Garcia*, 343 F.3d 1266, 1273 (10th Cir. 2003).

C. Deputy Ruffalo's subjective motivations are irrelevant to this analysis, as the Supreme Court and this Court have repeatedly held. *See Whren v. United States*, 517 U.S. 806, 811–13 (1996); *Ashcroft v. al-Kidd*, 563 U.S. 731, 736–40 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006); *Robinette,* 519 U.S. at 420; *Malone*, 274 Wis. 2d 540, ¶ 23; *State v. Weber*, 2016 WI 96, ¶ 19 n.6, 372 Wis. 2d 202, 887 N.W.2d 554; *Gaulrapp*, 207 Wis. 2d at 609–10.

II. Floyd's argument that he was prejudiced by his trial counsel's failure to use a backup officer's report as evidence that Deputy Ruffalo never asked for consent is meritless. Floyd questioned the backup officer during a post-conviction hearing, and his testimony "corroborated" Deputy Ruffalo's testimony at the suppression hearing that Floyd, in fact, voluntarily consented to the search. A58–59. After hearing all this testimony, the Circuit Court "f[ound] no reason to

revisit [its] original ruling" that Floyd consented. A58–59. In any event, Deputy Ruffalo had reasonable suspicion to conduct a pat-down search even without consent.

ARGUMENT

I. The Consensual Pat-Down Search Was Valid

"It is well established that a search is reasonable when the subject consents." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016). "Consent searches are standard, accepted investigative devices used in law enforcement, and are not in any general sense constitutionally suspect." *State v. Williams*, 2002 WI 94, ¶ 19, 255 Wis. 2d 1, 646 N.W.2d 834. Consent, of course, "must have been given freely and voluntarily." *State v. Wantland*, 2014 WI 58, ¶ 23, 355 Wis. 2d 135, 848 N.W.2d 810 (citation omitted). It also must not "result [from] an illegal seizure," *Williams*, 255 Wis. 2d 1, ¶ 4, because "[c]onsent, even when voluntary, is not valid when obtained through exploitation of an illegal action by police," *Hogan*, 364 Wis. 2d 167, ¶ 57; *Royer*, 460 U.S. at 501 (plurality). But if a person is "*justifiably* being detained" and "voluntarily consent[s]," "the products of the search [are] admissible." *Id.* (emphasis added); *see Robinette*, 519 U.S. at 38–40.

Here, it is undisputed that Deputy Ruffalo lawfully stopped the car after he learned that Floyd's registration was expired. Pet. Br. 14. Floyd does not dispute that he consented "freely and voluntarily," *Wantland*, 355 Wis. 2d 135, ¶ 23

(citation omitted), to the pat-down search.[5] So the only Fourth Amendment question is whether there is a basis to disregard that voluntary consent because, before Floyd consented, Deputy Ruffalo had already unlawfully "extended" the stop. There are two alternative bases for rejecting Floyd's extension argument: (A) Deputy Ruffalo did not "extend" the stop before obtaining voluntary consent; and (B) if the stop was extended, such extension was justified because Deputy Ruffalo had reasonable articulable suspicion sufficient to ask some follow-up questions, including whether Floyd would consent to being searched.

A. Deputy Ruffalo Did Not "Extend" The Stop, Meaning Floyd's Voluntary Consent To The Follow-On Pat-Down Search Was Valid

Traffic stops may last only as long as "reasonably required" to address the stop's "mission," which is usually "the traffic violation that warranted the stop." *Rodriguez*, 135 S. Ct. at 1614–15. A traffic stop's "mission" includes "ordinary inquiries incident to the traffic stop," such as "checking the

[5] Floyd's second argument in this appeal is that his trial counsel provided ineffective assistance, in violation of the Sixth Amendment, by failing to introduce certain evidence relating to whether his consent was freely and voluntarily given. Pet. Br. 30–35. Floyd does not argue that the record, as it currently stands, supports an argument that his consent to the pat-down search was involuntary under the Fourth Amendment, nor could he. Instead, he merely argues that his counsel's failure to introduce certain additional evidence relating to the search was ineffective. In any event, as explained below, the evidence that he alleges his counsel should have introduced—the report and testimony of the backup officer—only supports the Circuit Court's conclusion that Floyd voluntarily consented. *See infra* pp. 36–38.

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. As part of completing the "mission" of the stop, the police may take "negligibly burdensome" precautions that are justified by "the government's legitimate and weighty interest in officer safety." *Rodriguez*, 135 S. Ct. at 1615 (citation omitted). Hence, as the Supreme Court held in *Mimms*, police may always ask drivers to step out of their vehicles. 434 U.S. at 108–11; *accord State v. Johnson*, 2007 WI 32, ¶ 23, 299 Wis. 2d 675, 729 N.W.2d 182.

Police may also pursue "inquiries" "unrelated" to the "mission" of a traffic stop so long as they "*do not measurably extend the duration of the stop*." *Rodriguez*, 135 S. Ct. at 1615 (emphasis added). Accordingly, during an otherwise lawful traffic stop, police may ask unrelated questions, including about "immigration status," *Muehler v. Mena*, 544 U.S. 93, 100–01 (2005), or "gang affiliation," *Arizona v. Johnson*, 555 U.S. 323, 332–33 (2009); *see also Griffith*, 236 Wis. 2d 48, ¶¶ 1–6 (identifying questions, such as name, age, date of birth, etc.). They may also conduct a dog sniff entirely while a stop is ongoing. *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005). However, they may not extend a stop "seven or eight minute[s]" to conduct such a dog sniff without reasonable

suspicion. *Rodriguez*, 135 S. Ct. at 1613–14, 1616.[6] Notably, the *content* of any questions is irrelevant to determining whether the questioning "extended" the stop. All that matters is the effect on the stop's *duration* because "mere police questioning does not constitute a seizure." *Muehler*, 544 U.S. at 101; *Johnson*, 555 U.S. at 333; *United States v. Stewart*, 473 F.3d 1265, 1268–69 (10th Cir. 2007).[7] Similarly irrelevant is the officer's subjective intent in asking the questions. *See generally Whren*, 517 U.S. at 811–13.

Floyd's theory of an illegal "extension" is based on Deputy Ruffalo's asking Floyd whether he had any weapons and then requesting consent to conduct a pat-down for weapons. Pet. Br. 23–29. Floyd's argument fails because these two brief questions were part of the core "mission" of the

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[6] Floyd does not, and cannot, argue that Deputy Ruffalo "extended" the stop by calling for a canine unit. No canine unit was available, and the backup officer who came instead arrived within "one to two minutes," A39, well before the "five or six minutes" it took Deputy Ruffalo to complete the citations, A24. And *Illinois v. Caballes*, which *upheld* a dog sniff conducted during a traffic stop, 543 U.S. at 407–10, strongly implies that *asking for* one is not automatically an illegal extension.

[7] In *Griffith*, this Court held that questioning during a traffic stop can result in an illegal seizure if it "unreasonably prolongs" a stop, 236 Wis. 2d 48, ¶¶ 54–65, *or* if it is "unreasonably intrusive," *id.* ¶¶ 40–53; *see also Malone*, 274 Wis. 2d 540, ¶ 26. That latter holding was arguably abrogated by *Muehler* and *Johnson*. *See Stewart*, 473 F.3d at 1268–69. On the other hand, the State is not aware of any Supreme Court case addressing an *extremely* intrusive question during a traffic stop, and one can easily think of some awful hypotheticals. This Court does not need to decide whether its "unreasonably intrusive" test from *Griffith* survives because Floyd does not argue that Deputy Ruffalo's *single* question about weapons was unreasonably intrusive. Put differently, the only issue in this case is the question's effect on the *duration* of the stop.

stop to begin with, *id.* at 1614–15; or, alternatively, because these questions did not "measurably extend the duration of the stop," *Rodriguez*, 135 S. Ct. at 1615.

1. As a threshold matter, the particular questions that Deputy Ruffalo asked here fell within "the mission of the stop itself," meaning no possible "extension" issue arises. *Rodriguez*, 135 S. Ct. at 1616. The Supreme Court in *Rodriguez* held that a traffic stop's "mission" includes "address[ing] the traffic violation . . . and *attend[ing] to related safety concerns*." *Id.* at 1614 (emphasis added). Because "[t]raffic stops are especially fraught with danger to police officers . . . an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id.* at 1616. This principle is what explained the *per se* rule from *Mimms*, permitting officers to ask drivers to exit their cars during traffic stops. *See Rodriguez*, 135 S. Ct. at 1615. Asking drivers to exit their vehicles is "negligibly burdensome" and is justified by the "legitimate and weighty interest in officer safety," which "stems from the mission of the stop itself." *Id.*

These principles apply to Deputy Ruffalo's questions here, which were all within the "mission of the stop itself." *Rodriguez*, 135 S. Ct. at 1616. Ruffalo asked Floyd to exit the vehicle to explain the citations and because Floyd could not legally drive away. A6. Given that it would be a face-to-face encounter, Ruffalo's "legitimate and weighty" safety interests justified *merely asking* about weapons and *seeking consent* to

do a pat-down search for weapons. And the few seconds it took to ask those questions was "negligibly burdensome," just like the time it takes to ask drivers to step out of their vehicles. *Mimms*, 434 U.S. at 108–111. Hence the requests fell within the "mission" of the stop and were not an extension.

To be clear, the State does not argue that officer safety always justifies pat-down searches during traffic stops, absent voluntary consent by the individual; police must have "reasonable suspicion that the person . . . is armed and dangerous" to conduct a *nonconsensual* pat-down search during a traffic stop. *Johnson*, 555 U.S. at 327. But a pat-down search itself is a greater intrusion than the *request for consent* to conduct a pat-down search, and all that matters is the "incremental intrusion" of police conduct. *Griffith*, 236 Wis. 2d at 64 (quoting *Mimms*, 434 U.S. at 109). Here the "incremental intrusion" is the few seconds it takes to ask about weapons and for consent. So while the "mission" of a traffic stop does not, itself, involve non-consensual pat-down searches, that mission does involve taking a few seconds to ask whether the individual has weapons and whether the individual consents to a pat-down.

2. Alternatively, even if Deputy Ruffalo's two questions relating to officer safety were outside the "mission" of the traffic stop, those questions were not an "extension" because they did not "measurably extend the duration of the stop." *Rodriguez*, 135 S. Ct. at 1615.

a. Controlling caselaw from the Supreme Court, this Court, and the Wisconsin Court of Appeals provides that an officer briefly asking a single question and then merely requesting consent to search does not measurably extend the duration of the stop.

In *Ohio v. Robinette*, 519 U.S. 33, the Supreme Court assumed that, during a lawful traffic stop, officers can ask about weapons *and drugs* and request consent to search. The driver in that case was pulled over for speeding. *Id.* at 35. After issuing a warning, the police officer asked two questions—whether the driver had any drugs in his car and whether the driver had any weapons in his car. *Id.* at 35–36. The driver responded "no" to both, and the officer asked whether he could search the vehicle (which takes much longer than a pat-down search). *Id.* at 36. The driver consented, and the officer found drugs. *Id.* The Ohio Supreme Court held that consent obtained after a traffic stop has ended is invalid unless the officer first tells the driver that he or she is "free to go." *Id.* The Supreme Court unanimously rejected this rule as a constitutional requirement. *Id.* at 39–40; *id.* at 42 (Ginsburg, J., concurring); *id.* at 45 (Stevens, J., dissenting); *accord Royer*, 460 U.S. at 501 (plurality) ("We also agree that had Royer voluntarily consented to the search of his luggage while he was justifiably being detained on reasonable suspicion"—implying that the officers could *ask* for consent—"the products of the search would be admissible.").

Wisconsin courts—including this Court—have properly understood the clear implication of *Robinette* for traffic stop cases: asking for consent to search during a traffic stop does not itself automatically render any consent invalid.

In *State v. Gaulrapp*, 207 Wis. 2d 600, an officer pulled over a truck with a loud muffler. *Id.* at 603–04. During the stop, the officer asked the driver if he had any drugs or weapons, and then asked for consent to search *both* the vehicle and the driver. *Id.* The driver consented, and the police found drugs. *Id.* The driver argued that his consent was invalid because the police "illegally expanded the scope of the detention by asking him about drugs and weapons and for permission to search his person and vehicle." *Id.* at 606. The *Gaulrapp* court carefully reviewed *Robinette*, noting that, like in *Gaulrapp*, the police "asked the suspect [whether he had drugs or weapons], immediately followed by a request to search." *Id.* at 608. And although *Robinette* "did not expressly decide whether asking of this question and asking permission to search" automatically "transformed the legal stop into an illegal stop," the Supreme Court's conclusion—"that Robinette's consent to search, if voluntary based on all the circumstances, is valid"—is "difficult[ ] [to] reconcil[e]" "with [the] proposition that the consent is invalid solely because the officers could not legally ask to search in the first place." *Id.* The court held that "Gaulrapp's detention was not unreasonably prolonged by the asking of one question," and upheld the consensual search. *Id.* at 609–10.

This Court has approved of *Gaulrapp*. In *State v. Griffith*, this Court considered whether the police unlawfully seized a passenger by asking a series of identifying questions (name, age, date of birth, etc.) during a lawful traffic stop. 236 Wis. 2d 48, ¶¶ 1–6. This Court held that, while lengthy questioning *can* convert a legal stop into an illegal seizure if it "unreasonably prolong[s]" the stop, "the length of time required to ask a [*single*] question is not sufficiently intrusive to transform a reasonable, lawful stop into an unreasonable, unlawful one." *Id.* ¶¶ 54, 61 (citing *Gaulrapp*, 207 Wis. 2d at 609). This Court "agree[d] with the court of appeals [in *Gaulrapp*] that this conclusion is implied by the United States Supreme Court's holding in *Ohio v. Robinette*" (where, like here, the officers asked about the presence of weapons followed by a request for consent). *Id.* ¶¶ 56–60. Although *Griffith* did not involve a request for consent to search, this Court noted that "[i]n the absence of any reasonable, articulable suspicion, police may . . . ask for consent to search, as long as the police do not convey a message that compliance with their requests is required." *Id.* ¶ 39 (citations omitted).

Courts around the country have similarly held that asking a question and/or asking for consent to search do not automatically transform a legal traffic stop into an illegal seizure. *See, e.g.*, *Childs*, 277 F.3d at 949 (7th Cir. 2002) (en banc) (questions, even those "outside the scope of the detention," that "do not increase the length of detention (or that extend it by only a brief time) do not make the custody

itself unreasonable"); *United States v. Herbin*, 343 F.3d 807, 810–11 (6th Cir. 2003) (police may request consent to search a vehicle during a traffic stop, even without reasonable suspicion); *United States v. Shabazz*, 993 F.2d 431, 436–38 (5th Cir. 1993); *United States v. Nassar*, 546 F.3d 569, 570 (8th Cir. 2008); *Stewart*, 473 F.3d at 1266–69 (10th Cir. 2007); *United States v. Purcell*, 236 F.3d 1274, 1277–80 (11th Cir. 2001).

b. Under these precedents, the outcome of this case is clear: Deputy Ruffalo did not "extend" the traffic stop by asking a single question about weapons and then by asking for consent to conduct a pat-down for weapons. Deputy Ruffalo asked Floyd to exit his vehicle so that he could explain the citations and because "Floyd could not lawfully drive away." A6. Before he explained the citations, he took a few seconds to ask whether Floyd had weapons and request consent for a pat-down. A6. And the time it takes to ask these questions is not an "extension" of a traffic stop. *See Robinette*, 519 U.S. at 39–40; *Royer*, 460 U.S. at 501 (plurality); *Gaulrapp*, 207 Wis. 2d at 608–09; *Griffith*, 236 Wis. 2d 48, ¶¶ 39, 56–60. Given that the stop was not extended, the consensual pat-down search was entirely lawful.

c. None of the cases Floyd cites support his contrary theory: that even though police may ask drivers to exit their cars during a traffic stop under *Mimms*, they are thereafter foreclosed from asking those drivers if they have weapons and whether they consent to a search.

Floyd first relies on the Supreme Court's recent decision in *Rodriguez*, but that case does not support his position. In *Rodriguez*, the Court held that (if not supported by individualized suspicion) a *seven-to-eight-minute extension* to conduct a dog sniff violated the Fourth Amendment, explaining that a traffic stop "become[s] unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation." 135 S. Ct. at 1612, 1616–17 (citations omitted). The *Rodriguez* Court explained that, in order to be an unlawful extension, a stop must "*measurably* extend the duration of the stop," *id.* at 1614 (emphasis added), a standard that the Court derived from its preexisting caselaw, *id.* at 1614–15 (citing *Johnson*, 555 U.S. at 327–28; *Caballes*, 543 U.S. at 406). As explained above, both this Court and courts around the country have long applied this rule and *Robinette* to permit asking for consent to conduct a search. *Supra* pp. 18–22. The Court in *Rodriguez* gave no indication that it was overruling those cases.

More generally, Floyd's interpretation of *Rodriguez* would have far-reaching results that the Supreme Court did not mandate or suggest. Under Floyd's reading of *Rodriguez*, police are entirely forbidden from *merely asking* drivers during traffic stops if they consent to search, even though such routine requests have long been upheld. *See Robinette*, 519 U.S. at 39–40; *Gaulrapp*, 207 Wis. 2d at 608–09; *Griffith*, 236 Wis. 2d 48, ¶¶ 39, 56–60; *Childs*, 277 F.3d at 951; *Herbin*, 343 F.3d at 810–11; *Shabazz*, 993 F.2d at 436; *Nassar*, 546

F.3d at 570; *Stewart*, 473 F.3d at 1266–69; *Purcell*, 236 F.3d at 1277–80. Such reasonable requests take merely a few seconds and therefore do not "*measurably* extend the duration of the stop." 135 S. Ct. at 1615 (emphasis added, citation omitted). They are a far cry from the seven-to-eight-minute extension that *Rodriguez* considered.

Floyd also relies on *State v. Hogan*, 364 Wis. 2d 167, Pet. Br. 26, but that case similarly does not aid his argument. There, this Court held that a driver's "[n]ervousness" and "shaking" did not justify detaining him for "eight minutes" to "perform four [field sobriety] tests," *id.* ¶¶ 13, 19, 49–53, but that a consensual search for weapons was sufficiently attenuated and therefore valid because the officer requested consent "16 seconds" after informing the driver that he was "free to leave," *id.* ¶¶ 54–73. Floyd reinterprets *Hogan* as holding that "the officer's decision to *ask for* . . . field sobriety tests was not permissible." Pet. Br. 26 (emphasis added). Although the *Hogan* opinion states in a few places that the officers "asked" the driver to perform the tests, *id.* ¶¶ 4, 18, the Court's analysis assumed that the officer *required* the driver to perform them, *id.* ¶ 19 ("Deputy Smith had Hogan perform four tests . . . ."). After all, the Court was aware of the consent exception, *id.* ¶¶ 54–73, yet never discussed the field sobriety tests in those terms, *id.* ¶¶ 34–53. *Hogan*'s only "extension"-related holding is that "nervous[ness]" and "shaking" do not justify an "*eight minute*" delay to conduct field sobriety tests; that holding has no bearing on whether

taking a few seconds to ask about weapons and request consent "extends" a traffic stop in the first place.

Finally, Floyd relies on the Court of Appeals' opinion in *State v. Luebeck*, 2006 WI App 87, 292 Wis. 2d 748, 715 N.W.2d 639. Pet. Br. 26. In *Luebeck*, during a lawful traffic stop, the officer required the driver to perform field sobriety tests because he smelled of intoxicants and admitted to having been at a bar. *Id.* ¶ 3. The driver passed all of the tests, so the officer "advised [the driver] that he was going to issue him a warning . . . and then release him." *Id.* Before issuing the warning, the officer asked whether the driver had "anything illegal" and requested consent to search the driver and the vehicle. *Id.* ¶ 4. During the search of the car, the officer found drugs. *Id.* ¶ 5. The court held that the search was illegal, primarily because the officer "retained" the "driver's license or other official documents" when asking for consent. *Id.* ¶ 16.

The State respectfully submits that *Luebeck* is irreconcilable with the cases discussed above and must be overruled. The court's reliance on the fact that the officer "retained" the driver's "license or other official documents" when asking for consent, *id.* ¶ 16, is tantamount to holding that police cannot request consent while a lawful seizure is ongoing, a proposition that *Robinette*, *Gaulrapp*, and *Griffith* reject, as discussed above. *Supra* pp. 19–21. *Luebeck* also confuses a number of other issues: it conflates "seiz[ure]" and "*illegal*[ ] seizure," *see id.* ¶ 7 (the latter *automatically*

invalidates consent, the former does not, *see Royer,* 460 U.S. at 501 (plurality)); and it confuses the issues of seizure and voluntariness, *id* ¶ 16 (consent can be voluntary during a seizure, *see Royer,* 460 U.S. at 501 (plurality); *Robinette*, 519 U.S. at 39–40, and an *illegal* seizure simply renders consent invalid, *even if voluntary*, *Hogan*, 364 Wis. 2d 167, ¶ 57).

B. Even If Deputy Ruffalo "Extended" The Stop, Such Extension Was Reasonable, And Thus Floyd's Voluntary Consent To The Pat-Down Search Was Valid

1. Officers may extend a traffic stop beyond the time "needed for the original stop" if the extension is "supported by reasonable suspicion." *Hogan*, 364 Wis. 2d 167, ¶ 35. This is a "common sense test"—whether "a reasonable police officer, in light of his or her training and experience, [would] suspect that the individual has committed, was committing, or is about to commit a crime." *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634. And "a combination of behaviors—all of which may [have an] innocent explanation—can give rise to reasonable suspicion." *Hogan*, 364 Wis. 2d 167, ¶ 36; *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

Many factors are relevant to whether there is reasonable suspicion of criminal activity. In *State v. Malone,* 274 Wis. 2d 540, this Court held that "[t]he presence of seven or eight air fresheners in a vehicle . . . certainly raises suspicion and justifies reasonable inquiry." *Id.* ¶ 36; *see also* A8–9 (listing cases from other jurisdictions). This Court has

also held that "an officer's perception of an area as 'high-crime'" is a "highly relevant consideration." *Morgan*, 197 Wis. 2d at 211; *see also Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("the fact that the stop occurred in a 'high crime area' [is a] relevant contextual consideration[ ]"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (plurality op.) ("Officers may consider the characteristics of the area in which they encounter a vehicle."); *United States v. Brown*, 188 F.3d 860, 865 (7th Cir. 1999) ("[C]ourts may consider the defendant's presence in a high crime area as part of the totality of circumstances confronting the officer at the time of the stop.") (citations omitted). And the presence of tinted windows in a car can contribute to reasonable suspicion. *See Torres-Ramos*, 536 F.3d at 552; *Bowman*, 660 F.3d at 345; *Quintana-Garcia*, 343 F.3d at 1273.

Notably, the reasonable suspicion needed to extend a stop (or initiate a stop in the first place), is lower than the reasonable suspicion needed to conduct a pat-down search without consent. To conduct a *nonconsensual* pat-down search, police need reasonable suspicion that the person is "armed and dangerous," *Johnson,* 555 U.S. at 327, not just that criminal activity is afoot, the test for initiating (or extending) a stop, *Post*, 301 Wis. 2d 1, ¶ 13. Although this Court has recognized the "link between dangerous weapons and the drug trade," *Johnson*, 299 Wis. 2d 675, ¶ 29; *State v. Richardson*, 156 Wis. 2d 128, 144, 456 N.W.2d 830 (1990) ("drug dealers and weapons go hand in hand"), it has also

noted that "[t]here are doubtless circumstances in which a frisk under *Terry* would not be justified following a *Terry* stop that is based upon a report of drug dealing," *State v. Williams*, 225 Wis. 2d 159, 187, 591 N.W.2d 823 (1999), *vacated on other grounds by* 529 U.S. 1050. Because Floyd consented to the pat-down search, the issue here is whether the few-second "extension" (assuming it was an extension, *but see supra* Part I.A) to ask about weapons and request consent was justified under the lower standard for extending a traffic stop.[8]

2. On the facts of this case, Deputy Ruffalo was reasonably suspicious of drug activity. Floyd had "air fresheners positioned in every vent" and "hanging from the rearview mirror," which is "indeed 'unusual.'" A8. Ruffalo testified that, in his experience, this is a common technique "used to mask the smell of narcotics." A26; *see Malone,* 274 Wis. 2d 540, ¶ 36; *see also* A8–9 (listing cases from other jurisdictions). Floyd was also "operating his vehicle, illegally, in an area with significant drug and gang activity." A9. Deputy Ruffalo testified that he had experienced "large quantities of drug" and "gang activity" in that area. A40; *see Morgan*, 197 Wis. 2d at 211; *Wardlow*, 528 U.S. at 124; *Brignoni-Ponce*, 422 U.S. at 884 (plurality op.); *Brown*, 188 F.3d at 865. And Floyd had tinted windows, which "suggest

[8] The State's position is that the pat-down search was also justified even without Floyd's consent, but that is admittedly a closer question, and only relevant if this Court otherwise accepts Floyd's ineffective-assistance argument. *See infra* Part II.C.

a possible desire . . . to conceal" the inside of the vehicle. A9; *see Torres-Ramos*, 536 F.3d at 552; *Bowman*, 660 F.3d at 345; *Quintana-Garcia*, 343 F.3d at 1273; *see also Brown*, 188 F.3d at 864–65.

These factors—the unusual number of air fresheners, driving illegally in a high-crime area, and tinted windows—when taken together, are enough to lead a "reasonable police officer, in light of his . . . experience," to suspect drug activity, *Post*, 301 Wis. 2d 1, ¶ 13—and certainly enough to support the "incremental intrusion" of taking a few seconds to ask two questions, *Griffith*, 236 Wis. 2d 48, ¶ 38.

3. Floyd argues that his tinted windows and his presence in a high crime area are not relevant factors, Pet. Br. 14–18, and that air fresheners—which he concedes are relevant, as he must, *see* Pet. Br. 18; *Malone*, 274 Wis. 2d 540, ¶ 36—are not enough, standing alone, Pet. Br. 18–21. These arguments misunderstand the law.

As an initial matter, reasonable suspicion analysis "precludes this sort of divide-and-conquer analysis." *Arvizu*, 534 U.S. at 274. Courts must give "due weight to the factual inferences drawn by [ ] law enforcement officer[s]," *id.* at 277, and a "series of [innocent] acts . . . taken together, [can] warrant[ ] further investigation," *id.* at 274 (citations omitted); *Hogan*, 364 Wis. 2d 167, ¶ 36. In any event, Floyd's specific attacks on two of the factors are misplaced.

Floyd makes two arguments for why his presence in a high crime area is irrelevant.

First, he argues that he was "simply traveling through the area" and that the State must show some greater "connection." Pet. Br. 14–15. Yet the very cases Floyd cites directly refute this argument. For example, Floyd recognizes that one relevant factor in *Malone* was "that highway I-43 was a primary area for drug interdiction." Pet. Br. 19 (quoting *Malone*, 274 Wis. 2d 540, ¶ 6). He also cites *United States v. Foreman*, 369 F.3d 776, 784–85 (4th Cir. 2004), and notes that the driver there "traveled along a known drug corridor." Pet. Br. 20. Yet in both these cases, the driver's only "connection" to the high crime area was "simply traveling through." *See Arvizu*, 534 U.S. at 277 (driver was "pass[ing] through" a "route used by smugglers").

Second, he argues that the State "failed to give any meaningful support to the claim that the area was [a] 'high crime' [area]." Pet. Br. 15–16. Floyd acknowledges that Deputy Ruffalo testified to his experience with drug and gang activity in the area, Pet. Br. 16, but argues that the State needed evidence of "specific examples," including "where particular crimes occur[red]," with what "regularity," and how "recently," Pet. Br. 15. This Court rejected that exact argument in *State v. Morgan*, 197 Wis. 2d 200. The Circuit Court in that case disregarded the officer's testimony that an area was a "fairly high-crime-rate area" because the officer did not provide a "clear and specific record." *Id.* at 204, 206. This Court disagreed, holding that "an officer's *perception* of an area as 'high-crime'" is a relevant factor. *Id.* at 211–15

(emphasis added); *see also Arvizu*, 534 U.S. at 277 (relying on the officer's "*experience* as a border patrol agent . . . [that a] route [was] used by smugglers.") (emphasis added).[9]

Floyd's only argument against considering tinted windows is that the Court of Appeals' decision was the first "published decision in Wisconsin" to do so. Pet. Br. 17. But many other courts have found that tinted windows contribute to reasonable suspicion "for their capacity to conceal what is inside the vehicle." *Quintana-Garcia*, 343 F.3d at 1273; *supra* p. 27. Floyd cites (Pet. Br. 17) only a single case to the contrary, *United States v. Diaz*, 977 F.2d 163, 165 n.5 (5th Cir. 1992)—but there the *officer* "de-emphasized" the tinted windows, *id.* at 165 n.5.

Finally, channeling the concurrence by Judge Reilly below, Floyd suggests that he was racially profiled. Pet. Br. 16. To be very clear: race has never once been mentioned, or considered, as a relevant factor—not by the State, the officers, the Circuit Court, or the Court of Appeals. The factors supporting reasonable suspicion here would apply equally to a "white, suburban, soccer mom from Kenosha," A17, just as they do to Floyd.

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[9] Floyd's only support for his rule—that the State needs more evidence than police officer testimony that an area is high crime—is an Illinois court-of-appeals case, *see* Pet. Br. 15 (citing *Illinois v. Harris*, 957 N.E.2d 930, 936 (Ill. Ct. App. 2011)), which cannot overcome a direct holding from this Court.

C. Deputy Ruffalo's Subjective Motivations Are Irrelevant

Floyd peppers his brief with allegations about Deputy Ruffalo's subjective motivations. *See, e.g.*, Pet. Br. 22 ("[Deputy] Ruffalo subjectively believed he could search everyone he asks to step outside of the car."); Pet. Br. 23 ("He *deliberately* exploited the stop in order to gain Floyd's consent.") (emphasis added); 27 ("Deputy Ruffalo's *desire* to investigate . . . was a clear deviation from the original mission.") (emphasis added); 28 ("[T]his case is . . . about [Deputy] Ruffalo's *decision* to ask Floyd about weapons [and] to perform a pat-down search.") (emphasis added).

Yet both the Supreme Court and this Court have repeatedly held that "[s]ubjective intentions play no role in ordinary, [ ] Fourth Amendment analysis," with only a few narrow exceptions not relevant here. *Whren*, 517 U.S. at 811–13; *see al-Kidd*, 563 U.S. at 736–40; *Brigham City*, 547 U.S. at 404. Most relevant here, *Robinette* held that "the subjective intentions of the officer [do] not make [a] continued detention . . . illegal," as long as it is "objectively justified." 519 U.S. at 38. And this Court held in *Malone* that "subjective motivations play no part in" "whether [an officer] had reasonable suspicion." 274 Wis. 2d 540, ¶ 23; *see also Weber*, 372 Wis. 2d 202, ¶ 19 n.6; *Gaulrapp*, 207 Wis. 2d at 610 ("[T]he officers' subjective reason for stopping [a person] does not create or contribute to a Fourth Amendment violation.").

Floyd cites *Rodriguez* for the proposition that "safety precautions taken in order to facilitate on-scene investigation into other crimes . . . is an impermissible detour." Pet. Br. 25 (citing *Rodriguez,* 135 S. Ct. at 1616). But *Rodriguez* said nothing about the officer's *subjective* intentions and certainly did not purport to overrule the bedrock principle that subjective motivations play no role in this Fourth Amendment inquiry. *See supra* p. 32. Rather, the Court was simply setting out an objective rule: an officer who has completed the mission of the stop and has no reasonable suspicions that other criminal activity is afoot may not thereafter extend the stop to search for unrelated crimes and take follow-up safety precautions in order to facilitate that impermissible detour. As explained above, the pat-down request here was part of the mission of the initial stop*, see supra* Part I.A.1, and, in any event, Deputy Ruffalo also had reasonable suspicion that Floyd was engaging in drug dealing, which would provide an independent, objective basis for the search, *see supra* Part I.B.

Floyd also cites *In re Refusal of Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675, and *State v. Kyles*, 2004 WI 15, 269 Wis. 2d 1, 675 N.W.2d 449, for the proposition that "an officer's subjective beliefs are relevant to . . . whether the officer's search was reasonable." Pet. Br. 13. But as *Kyles* explained, "[t]he law is very clear" that "an *objective* standard is applied to test for reasonable suspicion." *Kyles*, 269 Wis. 2d 1, ¶ 23 (emphasis added); *Anagnos*, 341 Wis. 2d 576, ¶ 60. These cases merely held that "an officer's perception" about

whether "*his safety was in danger*" is one factor to consider "in determining whether the objective standard of reasonable suspicion was met," *Kyles*, 269 Wis. 2d 1, ¶¶ 3–4, 32–39 (emphasis added); *see Anagnos*, 341 Wis. 2d 576, ¶ 60, because a *particular* officer's perception is some evidence of what "*reasonable* police officer[s] [might] suspect in light of [their] training and experience," *Anagnos*, 341 Wis. 2d 576, ¶ 60 (citation omitted); *see Kyles*, 269 Wis. 2d 1, ¶¶ 32–34. Neither case held that "ulterior motives can invalidate police conduct that is [otherwise] justifiable," a proposition the Supreme Court has squarely rejected. *Al-Kidd*, 563 U.S. at 739.

* * * * *

To recap: this Court should hold that Deputy Ruffalo did not "extend" the traffic stop, either because the particular questions here—about weapons—fell within the "related safety concerns" that are core to a traffic stop's "mission," or because *Robinette*, *Gaulrapp*, *Griffith*, and a host of other cases have already held that taking a few seconds to ask a single question and request consent is not an "extension." Alternatively, if this Court concludes that Deputy Ruffalo did "extend" the stop, it should hold that the negligible extension was justified by reasonable suspicion. Under either holding, the search must be upheld because Floyd provides no other reason to disregard his consent.

II. Floyd's Counsel's Performance Was Not Prejudicial

Floyd also argues that his trial counsel failed to present "significant evidence" that he did not in fact consent, and that this amounted to ineffective assistance of counsel, in violation of Floyd's Sixth Amendment rights. Pet. Br. 30–35. The allegedly "significant evidence" is Officer White's (the backup officer) report of the stop, which states that Deputy Ruffalo "advised Floyd that . . . he was going pat him down for weapons," and that Floyd "consented to the search, saying something along the line of, 'Go ahead.'" A13. Floyd argues that the report's use of the word "advised" implies that Deputy Ruffalo *told* Floyd, rather than *asked* him, that he was going to conduct a search, and therefore his counsel should have called Officer White at the suppression hearing to question him about the report. Pet. Br. 33–34. Floyd apparently believes that if this evidence is included he would be able to argue that his consent to the search was not voluntary, an argument he did *not* make as part of his Fourth Amendment appeal. *See supra* p. 10. Given that the undisputed evidence is that Floyd's consent to the pat-down search was entirely voluntary, and in light of the weakness of the evidence that Floyd wishes his counsel had presented, his Sixth Amendment ineffective assistance of counsel claim plainly fails.

A. Ineffective-assistance claims are analyzed under the familiar two-pronged test set forth in *Strickland v.*

Washington, 466 U.S. 668 (1984). A defendant "must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him." *State v. Allen*, 2017 WI 7, ¶ 45, 373 Wis. 2d 98, 890 N.W.2d 245. "Prejudice means that, but for counsel's unprofessional errors, there is a reasonable probability that the [ ] outcome would have been different." *State v. Williams*, 2015 WI 75, ¶ 74, 364 Wis. 2d 126, 867 N.W.2d 736. Courts may "forgo the deficient performance analysis altogether if the defendant has not shown prejudice." *Id.* Here, the most straightforward way to resolve this case is under a prejudice analysis.

B. On the facts of the present case, there is no "probability [that] the result of the suppression hearing would have been any different if [Officer White] had been called as a witness," as the Court of Appeals properly held. A15. As Deputy Ruffalo explained at the suppression hearing, "I asked [Floyd] [ ] if I could search him for my safety and [Floyd] said yes." A27. There are no allegations of threats, deceptive tactics, physical force, or intimidating circumstances. A10–12. Floyd did not present *any* evidence at the time of the suppression hearing—either in the guise of his own testimony or any other submissions—to contradict Deputy Ruffalo's version of the events. That is why the Circuit Court explained that the sequence of events was "not in dispute," including that "Floyd in fact consented to the search of his person." A47, 49.

Floyd now argues that he would have been able to refute Ruffalo's testimony if his attorney had introduced Officer White's report. But the content of both the report and Officer White's subsequent testimony about the report at the post-conviction hearing would have done nothing to undermine the undisputed evidence at the suppression hearing.

Officer White's testimony at the suppression hearing demonstrates that Floyd misconstrues the relevance of his report. During his testimony, Officer White repeatedly emphasized—four times in a row—that Deputy Ruffalo "asked" for consent to search. *Supra* pp. 6–8; SA6–8; A13–14. Even when Floyd's counsel pointed out to Officer White that his report "indicates that Deputy Ruffalo *advised* Floyd that . . . he was going to pat him down for weapons," Officer White did not see any discrepancy, responding, "Yeah, he . . . *asked* him to pat him down for weapons." SA6–8 (emphases added). That response highlights that one cannot read too much into Officer White's use of the word "advised" in his report; nonlawyers simply do not always use such words as precisely as lawyers do. Importantly, Officer White's report also states that Floyd "consented to the search, saying something along the line of, 'Go ahead,'" A13, which "makes it sound like Deputy Ruffalo asked for permission to search," SA8. On cross-examination, Officer White testified that he did not have "a clear recollection of the exact words that Deputy Ruffalo used." SA8.

After hearing all this testimony, the Circuit Court—the same court that ruled on the suppression motion—"f[ound] no reason to revisit [its] original ruling . . . [that] there was consent given by Mr. Floyd," because "[w]e know now after [Officer] White testified that . . . [Officer] White would have corroborated [Deputy] Ruffalo's version," notwithstanding that "[t]here is some dichotomy from [Officer] White's report." A58–59. This finding was not clearly erroneous, so there is no probability that the outcome of the suppression hearing would have been any different if Officer White had been called to testify. A15.

Floyd's only response is that both the Circuit Court and the Court of Appeals are simply wrong about the content and import of Officer White's report and testimony. Pet. Br. 32–34. But Officer White's report states that Floyd "consented to the search," A13, and he testified consistently and repeatedly that Deputy Ruffalo "asked" for consent, SA6–8. Officer White's use of the word "advised" in his report perhaps shows that he is not a lawyer—but proves little else. More generally, Deputy Ruffalo testified under oath that Floyd consented to the search after being asked. Given Officer White's testimony supporting this account, there is no reasonable probability that the stray use of the word "advised" in Officer White's report would have led to a different result at the suppression hearing.

C. Even if this Court disagrees with both the Circuit Court's and the Court of Appeals' analysis of the consent issue

discussed above, there still would be no prejudice because Deputy Ruffalo had reasonable suspicion to conduct a pat-down search for weapons even without consent. As noted above, *supra* p. 28 n.8, that is a closer question than whether reasonable suspicion justified the "incremental intrusion" of taking a few seconds to *ask* about weapons, *Griffith*, 236 Wis. 2d at 64.

In this case, as explained in detail above, Deputy Ruffalo had reasonable suspicion to suspect *drug activity* based upon the air fresheners, tinted windows, and the high-crime area in question. *See supra* Part I.B. This Court has explained that drug activity is "link[ed] [to] dangerous weapons," *Johnson*, 299 Wis. 2d at 695–96; *Richardson*, 156 Wis. 2d at 144, and Deputy Ruffalo also testified that, in his experience, the "criminal activity in *that [particular] area*" was "commonly associated" with weapons, A40 (emphasis added). So Deputy Ruffalo also had reasonable suspicion that Floyd was "armed and dangerous," *Johnson,* 555 U.S. at 327, and could lawfully conduct a pat-down search even without consent. Given that, there is no possible prejudice. After all, even if Floyd could establish that he did not consent—which, as explained above, he cannot—the search would still be valid in light of the circumstances that Deputy Ruffalo faced.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated this 29th day of March, 2017.

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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 9,896 words.

Dated this 29th day of March, 2017.

_____

LUKE N. BERG
Deputy Solicitor General

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

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 29th day of March, 2017.

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LUKE N. BERG
Deputy Solicitor General