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**CLERK OF COURT OF APPEALS
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2016AP000618 CR

KATHERINE J. DOWNER JOSSI,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order from
Waukesha County Case No. 2015CM000329 Denying Defendant's
Motion to Suppress Evidence entered by the Honorable
Michael J. Aprahamian, Circuit Court, Branch 9, Waukesha
County

BRIEF OF DEFENDANT-APPELLANT

Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215
Mayer Law Office, LLC
120 N. Main Street, Suite 360
West Bend, WI 53095
262-338-1415

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STATEMENT OF THE ISSUES

I. Whether evidence should have been suppressed when it was obtained as a result of a dog sniff that occurred after the traffic stop was completed and prolonged the stop without reasonable suspicion.

A. Circuit Court's Answer: No. The good faith exception applies.

II. Whether the good faith exception does not apply when Wisconsin case law at the time of the traffic stop and United States Supreme Court case law decided after the stop require reasonable suspicion to prolong a completed stop to conduct a dog sniff.

B. Circuit Court's Answer: No. The Officer reasonably relied upon clear and controlling Wisconsin precedent that was later overruled.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record.

STATEMENT OF THE CASE

Katherine Downer Jossi was charged by a criminal complaint with Possession of Drug Paraphernalia, pursuant to Wisconsin Statute Section 961.573(1). (R. 1.)

Subsequently, Ms. Downer Jossi filed a motion to suppress physical evidence and statements obtained after a warrantless search of a vehicle. (R. 5.) A motion hearing was held on June 3, 2015 in the Waukesha County Circuit Court, the Honorable Michael J. Aprahamian presiding. (R. 8, p. 1.) The following facts were derived from the testimony of Officer Adam Olson at the motion hearing. (R. 8.)

On January 23, 2015, Officer Olson was on patrol and observed a vehicle with an expired license plate. (R. 8, p. 2, line 3, p. 5, lines 2-3, 6-8.) He performed a traffic stop of the vehicle. (R. 8, p. 5, line 25.)

Upon approaching the vehicle, Officer Olson observed three occupants in the vehicle: one male driver and two female passengers. (R. 8, p. 6, lines 3-5.) He also noted that all three occupants lit up a cigarette, which he believed to be important based on his interdiction training that smoke is a way to mask the odor of drugs. (R. 8, p. 6, lines 7, 11-13.)

Officer Olson made contact with the driver and asked him basic questions. (R. 8, p. 6, lines 18-19.) The driver admitted that the registration tabs were not on his license plates, however he indicated that his license plates were current. (R. 8, p. 6, lines 23-25, p. 7, line 1.) The driver also indicated that he was traveling from Racine to Menomonee Falls. (R. 8, P. 7, lines 5-6.) Officer Olson believed this was interesting based on his interdiction training that typically drugs come from larger cities and Racine is a very large city. (R. 8, p. 7, lines 8-11.)

Officer Olson also spoke to the female passengers inside of the vehicle. (R. 8, p. 7, lines 17-19.) One female passenger said that she was currently on probation for retail theft. (R. 8, p. 8, lines 13-14.) The other female passenger, Ms. Downer Jossi, said she was at one time addicted to marijuana. (R. 8, p. 8, lines 14-18.)

Officer Olson went back to his vehicle and requested a canine officer to respond to his location. (R. 8, p. 8, lines 21-22.) He also ran the license plate information, which showed it was current. (R. 8, p. 9, lines 10-12.) He then filled out a written warning for failure to attach rear registration decal. (R. 8, p. 9, lines 9-10.)

The canine officer arrived on the scene while Officer Olson was filling out the written warning. (R. 8, p. 9,

lines 15-18.) Officer Olson stopped working on the citation and explained the situation to the canine officer. (R. 8, p. 9, lines 23-24.)

Officer Olson printed the written warning and approached the vehicle again. (R. 8, p. 10, lines 12-13.) He ordered all of the occupants out of the vehicle and he explained the written warning to the driver. (R. 8, p. 10, lines 13-15.)

As Officer Olson explained the warning to the driver, the canine officer conducted the canine sniff. (R. 8, p. 10, line 25, p. 11, lines 1-3.) He also explained to the driver that a dog sniff would be conducted. (R. 8, p. 11, lines 6-7.) The driver then indicated that his friends had marijuana in the car a week prior. (R. 8, p. 11, lines 7-10.)

After Officer Olson explained the warning, he was advised that the dog had alerted to drugs or drug paraphernalia in the vehicle. (R. 8, p. 11, lines 16-22.) He then searched the vehicle based on the dog sniff. (R. 8, p. 11, line 25, p. 13, line 1.) The occupants of the vehicle did not consent to a search of the vehicle. (R. 8, p. 19, lines 13-14.) Officer Olson found heroin-related drug paraphernalia in the vehicle. (R. 8, p. 12, lines 3-4.)

Ms. Downer Jossitold Officer Olson that she had physical custody of the container that the drug paraphernalia was found in and she put it underneath the seat where it was found. (R. 8, p. 12, lines 10-12.) She also indicated that she was a recovering heroin addict and had used within the last week. (R. 8, p. 12, lines 15-16.)

Officer Olson testified that approximately fifteen to twenty minutes had elapsed between initiating the traffic stop and locating the drug paraphernalia in the vehicle. (R. 8, p. 12, lines 23-25, p. 13, lines 1-2.) However, he also testified that a normal traffic stop in which he would issue a citation or warning would typically take eight to twelve minutes. (R. 8, p. 13, lines 2-4.)

Officer Olson indicated that the law for canine usage has changed since he conducted this traffic stop. (R. 8, p. 13, line 23.) He believed that at the time of this traffic stop, reasonable suspicion or probable cause was not required to call a police canine. (R. 8, p. 13, lines 24-25.) Instead, he thought the police could wait a reasonable amount of time, but the amount of time was not defined by state statute. (R. 8, p. 13, line 25, p. 14, lines 1-2.)

Officer Olson also stated that if there was reasonable suspicion, the police could wait approximately forty minutes, but that "was never actually defined by state

statute.” (R. 8, p. 14, lines 3-5.) Officer Olson said this particular traffic stop was supported by reasonable suspicion because “of the cigarette smoke, the location where they were coming from[and] the past drug history admission of some of the occupants in the vehicle.” (R. 8, p. 14, lines 6-12.)

At the conclusion of the motion hearing, the court heard arguments from each party, (R. 8, p. 25, lines 18-25, p. 26-31), and ordered briefing on the issue. (R. 8, p. 31, line 18.) The parties later both submitted briefs on the issue to the court. (R. 7, R. 9.) On July 1, 2015 the court issued an oral decision. (R. 10.)

The court first found that there was no reasonable suspicion to detain the occupants of the vehicle in order to conduct a dog sniff. (R. 10, p. 10, lines 8-25, p. 11, lines 1-12.) Second, the court found the dog sniff of the vehicle prolonged the traffic stop, making the seizure of the occupants of the vehicle unreasonable. (R. 10, p. 13, lines 1-2.)

Finally, the court concluded although “the seizure was unreasonably prolonged and the dog sniff inappropriately added time to the stop in violation of *Rodriguez*,” the motion to suppress was denied because “Officer Olson reasonably relied upon clear and controlling Wisconsin

precedent. . . *State v. Arias* in conducting the dog sniff in a minimally intrusive manner to foster significant societal goals of combatting the use and distribution of illegal drugs.” (R. 10, p. 15, lines 3-11.)

In applying the good faith exception, the court reasoned that “Officer Olson testified that he relied upon established Wisconsin law that permitted a de minimus or minimal delay or intrusion to conduct a dog sniff.” (R. 10, p. 14, lines 4-5, 10-13.)

The circuit court went on to say that “the Supreme Court changed the law in *Rodriguez* but Officer Olson was justified in relying upon *Arias* at the time of the search which occurred on January [23rd] of 2015...before *Rodriguez* came down.” (R. 10, p. 14, lines 14-17.)

The court stated the other cases cited by defense counsel, *Betow*, *House* and *Gammons*, were all superseded by *Arias* and *Arias* distinguished them.

Subsequently, Ms. Downer Jossiwas convicted of Possession of Drug Paraphernalia. (R. 14.) She now appeals her conviction.

STANDARD OF REVIEW

In reviewing a motion to suppress, this Court should apply a two-step analysis. *State v. Scull*, 2015 WI 22, ¶ 16, 361 Wis. 2d 288, 298, 862 N.W.2d 562, 566,

reconsideration denied, 2015 WI 47, ¶ 16, 366 Wis. 2d 62, 862 N.W.2d 901. First, this Court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Second, this Court will apply constitutional principles to those facts independently. *Id.*

Additionally, the determination of whether the good faith exception to the exclusionary rule applies presents a question of law that this Court reviews independently. *Id.* at ¶ 17.

ARGUMENT

This Court should reverse the circuit court's decision that the evidence obtained as a result of an unreasonable seizure should not be suppressed. The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art.1, § 11.

The protection of the Fourth Amendment against unreasonable searches and seizures applies to all occupants of a vehicle, including passengers. *State v. Harris*, 206 Wis. 2d 243, 258, 557 N.W.2d 245, 251 (1996). All occupants in a vehicle are seized when police conduct a traffic stop of the vehicle. *Id.*

Police may not extend a completed traffic stop in order to conduct a dog sniff without reasonable suspicion. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614, 191 L. Ed. 2d 492 (2015). A dog sniff of a vehicle is not a search. *Illinois v. Caballes*, 543 U.S. 405, 410, 125 S. Ct. 834, 838, 160 L. Ed. 2d 842 (2005). However, a traffic stop that exceeds "the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez*, 135 S. Ct. at 1612, 191 L. Ed. 2d 492 (2015).

A violation of the Fourth Amendment based on an unlawful search or seizure can result in the suppression of the illegally obtained evidence pursuant to the exclusionary rule. *State v. Dearborn*, 2010 WI 84, ¶ 15, 327 Wis. 2d 252, 262, 786 N.W.2d 97, 102.

Although there is a good faith exception to the exclusionary rule that could prevent evidence from being suppressed, it would only apply in this case if the officer conducted the illegal search or seizure "in objectively reasonable reliance upon clear and settled Wisconsin precedent that [was] later deemed unconstitutional by the United States Supreme Court." *Id.*, ¶ 4.

The good faith exception should not apply in this case because Officer Olson did not conduct the search and

seizure in objectively reasonable reliance on Wisconsin precedent. Additionally, Wisconsin precedent at the time of the traffic stop was not later deemed unconstitutional by the United States Supreme Court.

The violation of Ms. Downer Jossi's Fourth Amendment right to be free from unreasonable searches and seizures should result in the suppression of evidence.

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S DECISION DENYING MS. DOWNER JOSSI'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE EXCLUSIONARY RULE SHOULD APPLY.

The exclusionary rule provides for the suppression of evidence that is obtained in violation of the Fourth Amendment. *Scull*, 2015 WI 22 at ¶ 20. It is a judicially created remedy. *Id.* The exclusionary rule is intended "to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Id.*

Deterrence of unlawful police conduct is one of the justifications in applying the exclusionary rule. *Id.* at ¶ 22. "Unlawful police conduct is deterred when evidence recovered in unreasonable searches is not admissible in courts." *Id.* at ¶ 23.

The evidence in this case should be suppressed because it was obtained as a result of an unreasonable seizure of Ms. Downer Jossi.

A. The Exclusionary Rule Should Apply Because Officer Olson Continued to Detain Ms. Downer Jossi After the Traffic Stop was Completed to Conduct a Dog Sniff of the Vehicle Without Reasonable Suspicion.

Absent reasonable suspicion, police may not extend an otherwise completed traffic stop in order to conduct a dog sniff. *Rodriguez*, 135 S. Ct. at 1614. Officer Olson extended the completed traffic stop in order to conduct a dog sniff of the vehicle without reasonable suspicion. He pulled a vehicle over, in which Ms. Downer Jossi was a passenger, for a traffic violation of expired license plates. (R. 10, p. 3, lines 13-20.) The initial stop and seizure was lawful because it was based on a traffic violation. *Rodriguez*, 135 S. Ct. at 1614.

However, a seizure based solely on a traffic violation observed by the police “‘becomes unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation.” *Rodriguez*, 135 S. Ct. at 1614-15 (quoting *Caballes*, 543 U.S. at 407).

The seizure of Ms. Downer Jossi was based solely on a traffic violation observed by Officer Olson. Her seizure became unlawful when it was prolonged beyond the time reasonably required to complete the mission of issuing a ticket to the driver for the violation.

The tolerable duration of police inquires during a traffic stop "is determined by the seizure's 'mission' -to address the traffic violation that warranted the stop." *Rodriguez*, 135 S. Ct. at 1614. The stop cannot last longer than is necessary to address the traffic violation that is the purpose for the stop. *Id.* "Authority for the seizure thus ends when tasks tied to the traffic infraction are -or reasonably should have been- completed." *Id.*

Officer Olson testified that a normal traffic stop where a warning or citation is issued typically takes him between eight to twelve minutes. (R. 8, p. 13, lines 2-4.) However, when he was asked how much time had elapsed in this case between initiating the traffic stop and finding the evidence in the vehicle, Officer Olson responded "between fifteen and twenty-five minutes. I would say probably more like fifteen and twenty." (R. 8, p. 12, lines 23-25, p. 13, lines 1-2.)

It is clear from Officer Olson's own testimony that the traffic stop in this case was prolonged beyond the time reasonably required to complete the mission of issuing a ticket. The traffic stop was prolonged because Officer Olson requested a police canine to respond to the scene to conduct a dog sniff of the vehicle. (R. 10, p. 4, lines 18-20.)

A traffic stop that exceeds "the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez*, 135 S. Ct. at 1612. Ms. Downer Jossi's seizure was unreasonable because Officer Olson exceeded the time needed to handle the traffic violation by prolonging the stop to conduct a dog sniff.

The circuit court also found that the dog sniff prolonged the traffic stop. (R. 10, p. 13, lines 1-2.) After Officer Olson began to write the warning for the driver for the traffic violation, he stopped writing it once the canine officer arrived on scene. (R. 10, p. 5, lines 2-9.) He then explained to the canine officer the situation. (R. 10, p. 5, lines 8-12.) This added time to the traffic stop. Officer Olson printed out the warning and returned to the occupants in the vehicle. (R. 10, p. 5, lines 13-14.) He then had all of the occupants step outside of the vehicle to explain the warning to the driver. (R. 10, p. 5, lines 14-16.) This also added time to the stop.

Officer Olson testified that removing all of the occupants from the vehicle was unusual. (R. 10, p. 5, lines 16-17.) He would typically only remove the driver to explain the warning in order to show that the tag sticker was not on the license plate. (R. 10, p. 5, lines 19-

22.)However, in this case, the driver admitted that the tag was not on his license plate. (R. 10, p. 5, lines 1-2.)

Officer Olson also admitted that having all of the occupants removed from the vehicle prolonged the explaining of the warning and was only done to facilitate the dog sniff. (R. 10, p. 6, lines 3-7.) After he removed the occupants from the vehicle, he explained the written warning to the driver while the dog sniff of the vehicle occurred. (R. 10, p. 6, lines 8-12.) However, the critical issue "is not whether the dog sniff occurs before or after the officer issues a ticket. . . but whether conducting the sniff 'prolongs'-i.e., adds time to- 'the stop.'" *Rodriguez*, 135 S. Ct. at 1616.

Officer Olson prolonged the stop without reasonable suspicion. The circuit court also concluded that Officer Olson did not have reasonable suspicion to prolong the stop. (R. 10, p. 10, lines 21-23.) The circuit court found the facts relied on by Officer Olson to conduct the dog sniff were insufficient: the fact that the occupants of the vehicle were smoking cigarettes was innocuous, the fact that they were coming from Racine was irrelevant, the fact that one passenger was on probation for retail theft did not add anything to the mix, and the fact that Ms. Downer Jossi stated she was previously addicted to marijuana did

not provide reasonable suspicion that drugs were inside of the vehicle. (R. 10, p. 10 lines 23-25, p. 11, lines 4-8.)

Additionally, Officer Olson testified that he did not smell or detect any physical indications of drugs or alcohol inside of the vehicle. (R. 8, p. 20, line 25, p. 21, lines 1-3, 8-11.) Officer Olson did indicate that after he removed the occupants from the vehicle and explained that a dog sniff would be conducted, the driver then admitted that marijuana had been in the vehicle a week prior. (R. 10, p. 6, lines 8-14.)

However, the circuit court correctly concluded that the seizure had already been unreasonably prolonged, absent reasonable suspicion, prior to the driver's admission. (R. 10, p. 13, lines 3-10.) Officer Olson then conducted a search of the vehicle based solely on the alert from the canine, in which he located drug paraphernalia. (R. 10, p. 6, lines 19-21.) Officer Olson did not have consent to search the vehicle. (R. 10, p. 13, lines 11-12.)

The evidence in this case was obtained as a result of an unreasonable seizure, in violation of Ms. Downer Jossi's Fourth Amendment rights. Therefore, the evidence obtained should be suppressed under the exclusionary rule.

Applying the exclusionary rule in this case would serve the purpose of deterring unlawful police conduct.

Officer Olson violated Ms. Downer Jossi's Fourth Amendment rights by prolonging a completed traffic stop in order to conduct a dog sniff, without reasonable suspicion.

Rodriguez, 135 S. Ct. at 1614.

Although Officer Olson testified that he relied on established Wisconsin case law to conduct the dog sniff, (R. 10, p. 14, lines 10-13) that reliance was not objectively reasonable. Therefore, the good faith exception should not apply.

II. The Good Faith Exception Should not Apply Because Officer Olson did not Objectively Reasonably Rely on Wisconsin Case Law to Conduct the Dog Sniff and Wisconsin Case Law was not Subsequently Overruled.

The good faith exception to the exclusionary rule can prevent evidence from being suppressed if the officers conducted the illegal search or seizure "in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court." *Dearborn*, 2010 WI 84 at ¶ 4.

The circuit court found that "Officer Olson testified that he relied upon established Wisconsin law that permitted a de minimus or minimal delay or intrusion to conduct a dog sniff. It was the law in Wisconsin under *Arias*." (R. 10, p. 14, lines 10-13.) The circuit court further found that "The Supreme Court changed the law in

Rodriguez but Officer Olson was justified in relying upon *Arias* at the time of the search which occurred on January [23rd] of 2015. . . before *Rodriguez* came down.” (R. 10, p. 14, lines 14-17.)

In denying Ms. Downer Jossi’s motion to suppress, the circuit court concluded “Officer Olson reasonably relied upon clear and controlling Wisconsin precedent. . . *State v. Arias*, in conducting the dog sniff in a minimally intrusive manner to foster significant societal goals of combatting the use and distribution of illegal drugs.” (R. 10, p. 15, lines 6-11.)

A. Officer Olson’s Belief that his Conduct Did Not Violate the Fourth Amendment is Not Objectively Reasonable.

The present case is distinguishable from *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748. In *Arias*, a police officer observed *Arias* come out of a grocery store with beer and get into another person’s vehicle with the beer. *Id.* at ¶ 4. The officer knew the driver was only seventeen years old. *Id.* The officer conducted a traffic stop on the vehicle based on his belief that the law prohibited minors from operating vehicles that contain intoxicants. *Id.*

The officer asked the minor driver questions and she denied that anything was inside of her vehicle. *Id.* at ¶

5. The officer then released his canine from his squad car to perform a sniff around the vehicle. *Id.* The canine gave a positive alert on the vehicle, which led to the officer patting down the occupants of the vehicle and searching the vehicle. *Id.* at ¶ 7. The officer located drugs and a weapon that led to the arrest of Arias. *Id.* at ¶¶ 8-9. Arias filed a motion to suppress, arguing that the traffic stop was unreasonably prolonged by the officer's drug investigation. *Id.* at ¶ 2.

The court found that the dog sniff of the vehicle was part of an "ongoing" traffic stop that prolonged the detention by seventy-eight seconds and therefore was not an unreasonable incremental intrusion on Arias's liberty. *Id.* at ¶¶ 39, 48.

The court expressly made a distinction between a dog sniff that occurs during an "ongoing" traffic stop and a "concluded" traffic stop. *Id.* at ¶¶ 43-44. The court found that *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999) was distinguishable because "the incremental intrusion on Betow's liberty interest was unreasonable under the totality of the circumstances presented... because Betow's traffic stop for speeding had been 'concluded' when the officer asked if he could search

Betow's vehicle." *Id.* at ¶ 43 (emphasis added). Whereas, the traffic stop in *Arias* was "ongoing." *Id.* at ¶ 43.

Unlike the traffic stop in *Arias*, the traffic stop in the present case was "concluded" before the dog sniff was conducted. Officer Olson pulled the vehicle over for expired license plates. (R. 10, p. 3, lines 13-18.) The driver admitted the tabs were not on the license plate, but indicated that the license plates were current. (R. 8, p. 6, lines 23-25, p. 7, lines 1-2.) Officer Olson then concluded his investigation by confirming that the license plates were current. (R. 8, p. 9, lines 10-12.) He then prepared and printed a written warning for the driver prior to the dog sniff. (R. 10, p. 5, lines 8-16.)

The investigation of the traffic violation was concluded prior to the dog sniff. Officer Olson only needed to explain the warning to the driver, which he testified typically takes thirty seconds to a minute. (R. 8, p. 20, lines 11-13.) Instead of giving the warning to the driver, Officer Olson prolonged the stop by having all of the occupants removed from the vehicle in order to facilitate the dog sniff. (R. 10, p. 6, lines 5-7.) Officer Olson then explained the warning to the driver and the dog sniff was conducted on the vehicle. (R. 10, p. 6, lines 15-17.)

"A traffic stop may become unlawful if it is 'prolonged beyond the time reasonably required to complete' the activities attendant to the stop." *Arias*, 2008 WI 84 at ¶ 42 (quoting *Caballes*, 543 U.S. at 407). The traffic stop of Ms. Downer Jossi was unlawful because it was prolonged beyond the time reasonably required to complete the activities attendant to the stop.

Officer Olson admitted in his own testimony that having all of the occupants removed from the vehicle prolonged the explaining of the warning and was only done to facilitate the dog sniff. (R. 10, p. 6, lines 3-7.) Additionally, Officer Olson testified that a normal traffic stop where a warning or citation is issued typically takes him between eight to twelve minutes. (R. 8, p. 13, lines 2-4.) However, he testified that the traffic stop in this case took between fifteen and twenty minutes. (R. 8, p. 12, lines 23-25, p. 13, lines 1-2.)

The scope of a continued seizure "is examined to determine whether it lasted no longer than is necessary to effectuate the purpose of the stop and whether the investigative means used in the continued seizure are the least intrusive means reasonably available to verify or dispel the officer's suspicion."

Officer Olson did not use the least intrusive means to verify or dispel his suspicions. The intrusion on Ms. Downer Jossi's liberty was more significant than the intrusion on Arias. In the present case: the traffic stop was completed prior to the dog sniff, the dog sniff prolonged the traffic stop beyond seventy-eight seconds, the stop was prolonged without reasonable suspicion and Ms. Downer Jossi was removed from the vehicle for the dog sniff. (R. 10, p. 6, lines 5-7.)

The evidence obtained as a result of the dog sniff should be suppressed. The good faith exception should not apply because Officer Olson did not objectively reasonably rely on Arias in conducting the dog sniff and Arias was not subsequently overruled.

B. Wisconsin Case Law on Dog Sniffs of a Vehicle was not Subsequently Overruled by the United States Supreme Court.

The Supreme Court of the United States decided *Rodriguez*, 135 S. Ct. 1609, on April 21, 2015. The court held that absent reasonable suspicion, police may not extend an otherwise "completed" traffic stop in order to conduct a dog sniff. *Id.* at 1614. The traffic stop in the present case was conducted on January 23, 2015, approximately three months prior to the decision in *Rodriguez*.

However, *Rodriguez* did not overrule Wisconsin precedent regarding dog sniffs of a vehicle during a traffic stop. The decision in *Rodriguez* overruled Eighth Circuit precedent that held “dog sniffs that occur within a short time following the ‘completion’ of a traffic stop are not constitutionally prohibited if they constitute only de minimus intrusion.” *Id.* at 1613-14 (emphasis added). The holding in *Rodriguez* only applies to a “completed” traffic stop, not an “ongoing” traffic stop. See *Id.* at 1614.

The court in *Rodriguez* distinguished between a dog sniff that occurs during an “ongoing” traffic stop and a dog sniff that occurs after a “completed” traffic stop. *Id.* at 1612. The court did not overrule *Caballes*, 543 U.S. 405, which held that “a dog sniff conducted ‘during’ a lawful traffic stop does not violate the Fourth Amendment’s proscription of unreasonable seizures.” *Id.* (emphasis added). However, the issue presented in *Rodriguez* was “whether the Fourth Amendment tolerates a dog sniff conducted ‘after completion’ of a traffic stop.” *Id.* (emphasis added).

In adhering to the line drawn in *Caballes*, the court in *Rodriguez* found that “a seizure justified only by a police-observed traffic violation, therefore, ‘become[s] unlawful if it is prolonged beyond the time reasonably

required to complete th[e] mission' of issuing a ticket for the violation." *Id.* (quoting *Caballes*, 543 U.S. at 407).

Wisconsin case law, decided prior to *Rodriguez*, also distinguished between a dog sniff conducted during an "ongoing" traffic stop and a "completed" traffic stop. See *Arias*, 2008 WI 84; *State v. Salonen*, 2011 WI App 157, 338 Wis. 2d 104, 808 N.W.2d 162; *State v. House*, 2013 WI App 111, 350 Wis. 2d 478, 837 N.W.2d 645; *Betow*, 226 Wis. 2d, 593 N.W.2d; *State v. Gammons*, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623.

Wisconsin courts have found the seizure of occupants in a vehicle reasonable when a dog sniff of the vehicle is conducted during an "ongoing" traffic stop, consistent with *Caballes*. See *Arias*, 2008 WI 84; *Salonen*, 2011 WI App 157. In *Arias*, 2008 WI 84 at ¶¶ 39, 48, the Wisconsin Supreme Court concluded that the dog sniff occurred during an "ongoing" traffic stop and the detention of *Arias* was reasonable because the intrusion on her liberty was minimal.

The court in *Arias* expressly distinguished between a dog sniff conducted during an "ongoing" traffic stop and a dog sniff conducted after a "completed" traffic stop. *Id.* at ¶¶ 43-44. *Arias* distinguished the dog sniff in that case, conducted during an ongoing traffic, from the dog

sniff conducted in *Betow*, 226 Wis. 2d, 593 N.W.2d, which occurred after a "completed" traffic stop. *Id.* The court found that the intrusion on Betow's liberty from the dog sniff was unreasonable because the traffic stop for speeding had been "concluded" when the officer asked to search his vehicle. *Id.* at ¶ 43.

Similarly, in *State v. Salonen*, 2011 WI App 157, ¶¶ 1,4,338 Wis. 2d 104, 106-07, 808 N.W.2d 162, 163-64 the court held that the detention of a passenger during a traffic stop in which a dog sniff of a vehicle was conducted was reasonable. The officer pulled the vehicle over for speeding. *Id.* at ¶ 2. He called a canine officer to respond because he was aware that two of the people in the vehicle were recently involved with illegal drugs. *Id.* During the traffic stop, the passenger asked to leave for work, but the backup officer told her she was not free to leave. *Id.* at ¶ 4. The first officer was still working on the citations for the driver. *Id.* The canine officer then conducted a dog sniff of the vehicle. *Id.* at ¶ 5.

The dog sniff of the vehicle and the passenger's detention were a part of an "ongoing" traffic stop as the court concluded that "the detention of a passenger ordinarily remains reasonable for the duration of the stop." *Id.* at ¶ 15. The court followed the general

guideline as stated in *Arizona v. Johnson*, 555 U.S. 232, 325, 129 S. Ct. 781, 783, 172 L. Ed. 2d 694 (2009), that “The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.” *Id.* at 10.

Like the court in *Arias*, the court in *Salonen* ultimately concluded that the dog sniff occurred during an “ongoing” traffic stop and the detention of *Salonen* was reasonable because the intrusion on her liberty was minimal. *Id.* at ¶ 15.

However, Wisconsin courts have reached a different result when a dog sniff is conducted after a “completed” traffic stop, consistent with *Rodriguez*. See *House*, 2013 WI App 111; *Betow*, 226 Wis. 2d, 593 N.W.2d; *Gammons*, 2001 WI App 36. In *House*, 2013 WI App at ¶ 1, the court held that the officer unreasonably extended the traffic stop in order to conduct a dog sniff after the traffic stop was “completed.” *House* was pulled over for driving with a suspended registration. *Id.* The officer issued a warning to *House* and returned his driver’s license. *Id.* After doing so, the officer conducted a dog sniff on the vehicle. *Id.*

The court concluded the reasons justifying the initial traffic stop no longer existed because the purpose of the stop had been completed. *Id.* at ¶ 10. Therefore, House's continued detention in order to conduct the dog sniff was unreasonable as it was beyond the scope of the initial stop. *Id.*

In reaching its decision, the court in *House* expressly distinguished between a dog sniff conducted during an "ongoing" traffic stop and a dog sniff conducted after a "completed" traffic stop. *Id.* at ¶ 9. The court found that "unlike in *Arias*, the dog sniff attendant to House's seizure occurred *after* [the officer] had completed everything related to the initial stop." *Id.* at ¶ 9.

The court reasoned that a dog sniff of a vehicle can unreasonably prolong the seizure of the occupant in the vehicle. *Id.* at ¶ 6. The purpose of the traffic stop is concluded when the reasons justifying the initial stop no longer exist, making any further seizure outside of the scope of the initial stop. *Id.* at ¶ 6. This is consistent with the decision in *Rodriguez*.

Also consistent with the decision in *Rodriguez*, is the decision in *Betow*. The court in *Betow*, 226 Wis. 2d at 91-92, 593 N.W.2d at 501, held that the continued detention of *Betow* in order to conduct a dog sniff of his vehicle was

unreasonable because the officer did not have reasonable suspicion. In *Betow*, an officer conducted a traffic stop for speeding. *Id.* at 92, 593 N.W.2d at 501. The officer noted that the driver, Betow, appeared nervous and when he asked for his driver's license he noticed a picture of a mushroom sewn on his wallet. *Id.* The officer did not give Betow a citation for speeding. *Id.*

Instead, the officer asked if he could search his vehicle as he believed the mushroom to be a symbol of drug use, but Betow refused. *Id.* The officer then retrieved his canine and conducted a dog sniff of the vehicle. *Id.* at 93, 593 N.W.2d at 501. He ultimately put the dog inside of the vehicle and located marijuana. *Id.* The court found that the officer lacked reasonable suspicion to extend the traffic stop to conduct the dog sniff. *Id.* at 98, 593 N.W.2d at 503-04.

Similarly, in *State v. Gammons*, 2001 WI App 36, ¶¶1, 20, 241 Wis. 2d 296, 299, 306, 625 N.W.2d 623, 625, 629, the court held that the continued detention of a vehicle for a dog sniff without reasonable suspicion exceeded the scope of the investigation. In *Gammons*, an officer stopped a vehicle because it did not have a rear license plate. *Id.* at ¶ 2. The officer approached the vehicle and realized it had a temporary registration sticker. *Id.* The officer ran a

driver's license check on the driver and warrant checks on the two passengers in the vehicle. *Id.*

The officer asked if any drugs were inside of the vehicle and the driver told him no. *Id.* at ¶ 3. The officer asked for permission to search the vehicle and the driver refused. *Id.* The officer indicated that he would get a canine to conduct a dog sniff of the vehicle. *Id.* The driver then consented to a search of his vehicle. *Id.* Additional officers arrived and ordered the driver and passengers out of the vehicle. *Id.* at ¶ 4. Gammons, one of the passengers, was patted down in which officers located marijuana. *Id.*

The court found that the officer did not have reasonable suspicion of drug activity to justify the continued detention of the occupants in the vehicle for a dog sniff. *Id.* at ¶ 20. Even though the State argued that the officer did have reasonable suspicion of drug activity based on the fact that the vehicle was stopped in a drug crime area, it was at night, the vehicle was from Illinois, the officer knew the occupants in the vehicle were involved in prior drug activity and Gammons was nervous and uneasy. *Id.* at ¶ 21.

The court found there was no basis to continue to detain the occupants in the vehicle after they denied that

any drugs were in the vehicle and denied the officer's request to search the vehicle. *Id.* at ¶ 24. "At that point, the Fourth Amendment required [the officer] to terminate the stop and allow Gammons and the other men to continue their business." *Id.* But the officer continued to detain the vehicle to conduct a dog sniff. *Id.* The traffic stop was then transformed into an unlawful detention. *Id.*

The court ultimately concluded that the evidence should have been suppressed because it was obtained in violation of Gammons' Fourth Amendment rights. *Id.*

The evidence obtained in the present case should also be suppressed. The decisions in the aforementioned Wisconsin cases are consistent with *Rodriguez*. *Rodriguez* did not overrule Wisconsin case law that existed at the time of the traffic stop in this case. Therefore, the good faith exception should not apply.

CONCLUSION

For the foregoing reasons, Ms. Downer Jossi respectfully requests that the Court reverse the circuit court's decision and grant her motion to suppress evidence.

Dated this ____ day of June, 2016.

Respectfully Submitted,

Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215

Mayer Law Office, LLC
120 N. Main Street, Suite 360
West Bend, WI 53095
262-338-1415

CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 29 pages.

Dated this ____ day of June, 2016.

Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, 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 as of this date.

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

Dated this ____ day of June, 2016.

Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215

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