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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

07-08-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 2016AP000618

KATHERINE DOWNER JOSSI,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order Denying Defendant's
Motion to Suppress Evidence Entered by the Honorable Michael J. Aprahamian
Circuit Judge, Branch 9, Waukesha County

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

- I. Whether the dog sniff unlawfully prolonged the traffic stop, resulting in an unlawful detention.
 - a. Circuit Court's Answer: Yes. The stop was prolonged and the defendant detained.
- II. Whether the good faith exception applies when the Officer relies on case law at the time that is later overruled.
 - a. Circuit Court's Answer: Yes. The good faith exception applies because the officer reasonably relied upon clear and controlling Wisconsin precedent that was later overruled.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent (“State”) submits that 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

On January 23, 2015, Officer Adam Olson was on routine patrol. (Trans. Mot., 6/3/2015, 5:5-6.) Officer Olson observed a vehicle that had expired rear license plates. *Id.* 5:6-8. Officer Olson then conducted a routine traffic stop for the violation. *Id.* 5:22-25, 6:1.

While approaching the vehicle, Officer Olson observed that there was one male driver and two female passengers. *Id.* 6:3-5. As Officer Olson was approaching the vehicle, he noticed all three occupants light up cigarettes inside the car. *Id.* 6:5-7. Based on his training and experience, Officer Olson thought that it was unusual to start smoking cigarettes, unless the occupants were trying to mask an odor coming from inside the automobile. *Id.* 6:9-12.

When Officer Olson made contact with the driver, he asked the driver routine questions, including where he and his passengers were coming from, and where they were going. *Id.* 6:16-20. Officer Olson also requested the driver's identification, which the driver provided. *Id.* 6:21-23. The driver stated that he and his passengers were coming from Racine and going to Menomonee Falls. *Id.* 7:3-6. This answer struck Officer Olson as unusual because there is a significant distance between Menomonee Falls and Racine. Based on the officer's interdiction training, he knew Racine was a drug distribution city for southern Wisconsin. *Id.* As the conversation continued, Officer Olson asked routine traffic stop questions,

and it was revealed that one passenger was currently on probation for a retail theft and the other passenger suffered from a marijuana addiction. *Id.* 7:21-25, 8:1-20. The second passenger was later identified as Katherine Downer-Jossi, hereinafter referred to as the Defendant.

Once the conversation was concluded, Officer Olson started walking back to his vehicle. As he was walking back to his vehicle, he used his radio to call for a canine unit. *Id.* 8:21-22. Once in his squad car, Officer Olson began filling out a written warning for the traffic violation of Failure to Attach Rear Registration Decal. *Id.* 9:9-12. While Officer Olson was working on the written warning, the canine unit arrived at the scene. *Id.* 9:13-19. The canine unit arrived within five minutes of Officer Olson's request. It took Officer Olson approximately seven to eight minutes to complete the written warning. *Id.* 18:1-6. While working on the written warning, Officer Olson informed the canine officer of the interaction and conversation he had with the occupants of the vehicle. *Id.* 9:22-25, 10:1-5.

After the warning ticket printed, Officer Olson returned to the vehicle and asked the occupants—since this was an equipment violation—to step out of the vehicle to explain the written warning and the basis of the warning. *Id.* 10:13-15. During the explanation, Officer Olson asked the driver whether there was anything illegal in the vehicle, and the driver confessed to having marijuana in the car less than a week prior to the stop. *Id.* 11:6-10. After the driver made that statement, two things happened simultaneously: Officer Olson explained the traffic warning

to the driver which did not last more than three minutes, *id.* 13:7-14, and the canine unit sniffed the vehicle, *id.* 23:17-20. During the sniff, the canine indicated on the vehicle—a positive sign of contraband—and Officer Olson conducted a probable cause search on the vehicle. *Id.* 11:20-25, 12:1. During the search, Officer Olson found several items of drug paraphernalia, the Defendant admitted possession of the items. *Id.* 12:2-12.

The Defendant was subsequently arrested with Possession of Drug Paraphernalia contrary to Wisconsin Statute Section 961.573(1). The defendant moved the Circuit Court to suppress evidence collected from Officer Olson's search of the vehicle, which was denied. The defendant appeals the conviction and the denial of the motion to suppress.

STANDARD OF REVIEW

In reviewing a motion to suppress, this Court should apply a two-step standard of review. *State v. Scull*, 2015 WI 22, ¶16, Wis. 2d 288, 289, 862 N.W.2d 562, 566 *reconsideration denied*, 2015 WI 47, ¶16, 366 Wis. 2d 62, 862 N.W. 2d 901. First, this Court should uphold the Circuit Court's findings of fact, unless they are clearly erroneous. *Id.* Second, this Court should independently review the application of constitutional principles to those facts. *Id.*

Further, the question of whether the good faith exception applies to the exclusionary rule is an issue of law which, this Court should review independently of the decisions rendered in the Circuit Court. *Id.*

ARGUMENT

This Court should uphold the Circuit Court's finding that Officer Olson relied in good faith on well-settled controlling Wisconsin precedent when he called in a canine unit to search the vehicle, which resulted in the discovery of the Defendant's drug paraphernalia.

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.

In regards to vehicles, the Fourth Amendment protection against unreasonable searches and seizures applies to all occupants of the vehicle. *State v. Harris*, 206 Wis. 2d 243, 258, 557 N.W.2d 245, 251 (1996).

First, the defendant in the present case was not unreasonably detained during the stop because the traffic stop was not prolonged to facilitate the canine sniff. If this court does find that the stop was prolonged, the court should nevertheless, uphold the Circuit Court's ruling that Officer Olson acted in good faith relying on Wisconsin precedent during the search.

A violation of the Fourth Amendment's protection against unreasonable searches and seizures can sometimes result in the suppression of evidence under the exclusionary rule. *State v. Dearborn*, 2010 WI 84, ¶15, 237 Wis. 2d 252, 262, 786 N.W.2d 97, 102. The exclusionary rule is not a constitutional right, rather a judicially created tool used to deter bad police conduct.

Even when the court finds that there has been a violation of the Fourth Amendment by a state actor the exclusionary rule does not always apply; there are exceptions. One of those exceptions is the good faith exception. The good faith exception applies when an officer conducts an illegal search or seizure based on an objectively reasonable reliance on “clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court.” *Id.*, ¶ 4.

The good faith exception should apply in this case because Officer Olson acted with an objectively reasonable reliance on well-settled controlling Wisconsin precedent when performing the traffic stop and administering the canine sniff of the vehicle.

I. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT’S DECISION DENYING THE DEFENDANT’S MOTION TO SUPPRESS EVIDENCE BECAUSE THE EXCLUSIONARY RULE DOES NOT APPLY.

The exclusionary rule allows for suppression of evidence gained as a result of a Fourth Amendment violation. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961). The court in *Scull* held that the Wisconsin Supreme Court has given two rationales for the exclusionary rule, “assurance of judicial integrity and deterrence of unlawful police conduct.” *Scull*, 2015 WI 22 at ¶ 22. However, when, as in the instant case, the officer believes that he is acting within the confines of the law the second rationale does not apply. Excluding evidence that the officer believed was collected within the parameters

of the Fourth Amendment at the time of the search and seizure does not deter unlawful police conduct.

A. The Exclusionary Rule Should Not Apply Because Officer Olson Did Not Detain The Defendant After the Traffic Stop was Completed to Conduct a Canine Sniff.

The defendant's argument relies heavily upon the recent case *Rodriguez v. United States*, 135 S. Ct. 1609, 191 L. Ed. 2d 492. *Rodriguez* was decided almost four months after the search and seizure that took place in the present case. However, even if the incident in the present case took place after *Rodriguez* was law, the Defendant's case would still be distinguishable from *Rodriguez*.

In *Rodriguez*, an officer conducted a lawful traffic stop of a vehicle and subsequently made contact with the driver. *Id.* at 1612. The officer asked for the driver and passenger's identification, ran records, and returned to the vehicle. *Id.* at 1613. The officer asked the occupants simple preliminary questions: where they were coming from, where they were going, etc. *Id.* The officer called for a second officer to arrive with a canine and began writing a warning ticket for the driver. *Id.* The officer returned to the vehicle and gave the driver the warning, explained the warning, and gave back the identification documents. *Id.* After all the documents were handed over, the occupants continued to be detained for *seven to eight minutes* until a second officer arrived with a drug-sniffing dog. *Id.* (emphasis added) During the canine sniff of the car, the dog indicated the presence of drugs and methamphetamine was found in the vehicle. *Id.*

The Supreme Court reversed the defendant's conviction of possession with intent to deliver methamphetamine. *Id.* The Court reasoned that the once-complete traffic stop cannot be extended absent reasonable suspicion to conduct a canine drug sniff. *Id.* The Court elaborated that the Fourth Amendment tolerates certain investigations so long as they do not unreasonably prolong the time required to complete the mission of the stop. *Id.* at 1614. (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *Arizona v. Johnson*, 555 U.S. 323, 327-28(2009)).

The facts in the present case are distinguishable. First, Officer Olson's traffic stop was not prolonged to accommodate for the canine unit to arrive, but rather the canine arrived while Officer Olson was still completing the mission of the stop. As Officer Olson testified, the canine unit arrived while he was still filling out the written warning. Further, Officer Olson called for the canine unit while he was walking from the suspect's car to his own, adding no additional time to the stop. In *Rodriguez*, the canine unit was called after the warning had been given and explained to the driver, which prolonged the stop an extra seven minutes. In the present case the canine sniff occurred while Officer Olson explained the written warning. Transcript 9: 13-18. Because the canine sniff took place while the purpose of the traffic stop was still being completed, the stop in the present case was not prolonged. Therefore, the defendant was not unreasonably detained.

The instant case is more closely related to the facts in *Cabelles*, where the drug-sniffing dog responded to the scene and conducted the sniff while the passengers were still lawfully seized for a traffic warning, which had not been given out. 543 U.S. at 406, 409. Like in this case, the traffic stop would not have been concluded until the documents were passed to the driver and the warning explained.

Further, the defense relies on *Rodriguez*, “[a]n officer..., may conduct certain unrelated checks during an otherwise lawful stop... he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” 135 S. Ct. at 1615. However, because the stop in the present case was not concluded when the drug-sniffing dog did its walk around the vehicle, this Court need not make a determination as to reasonable suspicion.

II. OFFICER OLSON HAD AN OBJECTIVELY REASONABLE GOOD FAITH RELIANCE ON BINDING WISCONSIN PRECEDENT AT THE TIME OF THE OFFENSE SO THE GOOD FAITH EXCEPTION SHOULD APPLY.

The long-standing “good faith” exception to the exclusionary rule provides that the rule should be not be applied when officers had an objectively reasonable belief that their conduct complied with the Fourth Amendment, *see United States v. Leon*, 468 U.S. 897, 918 (1984), including reasonable reliance on clear and settled precedent, *Dearborn* 2010 WI at ¶46. This Court should uphold the Circuit Court’s finding that Officer Olson had an objectively reasonable good faith reliance on *State v. Arias* 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748. *Arias*

allowed for a minimal delay or intrusion to conduct a canine sniff and was controlling precedent in Wisconsin at the time of the traffic stop in this case.

A. This Court Should Uphold The Circuit Court's Findings That Officer Olson Had An Objectively Reasonable Belief That His Conduct Did Not Violate The Fourth Amendment.

The defendant argues that the facts in the present case and those in *State v. Arias*, are distinguishable and therefore, Officer Olson's reliance on *Arias* as the settled precedent in regards to dog sniffs was not objectively reasonable; the state disagrees.

In *Arias*, a police officer initiated a lawful traffic stop based on his belief that the car had intoxicants and that the driver was a minor. *Id.* at ¶¶4, 5. After administering a PBT on the driver, the officer asked the occupants whether there were any drugs in the vehicle, to which they said no. *Id.* at ¶5. The officer performed a canine sniff of the car and the sniff alerted the officer to the presence of drugs, specifically cocaine. *Id.* at ¶¶5, 6. The Wisconsin Supreme Court found that even though the stop was based on open intoxicants in a vehicle with a minor and that the officer did not have reasonable suspicion prior to the dog sniff, the sniff was still valid and the evidence was not suppressed. *Id.* at ¶48. The court relied on *Caballes* to reaffirm that a dog sniff does not constitute a search under the Fourth Amendment, *see id.* at ¶24. Further concluded that deploying the dog

sniff on the defendant's vehicle was within the scope and purpose of the officer's investigation, even after the purpose of the stop was concluded, *see id.* at ¶48.

The defendant relies heavily on the fact that the court makes a distinction between "ongoing" traffic stops and "concluded" traffic stops. *Id.* at ¶43. The court finds that the traffic stop in *Arias* was ongoing and therefore, the incremental intrusion upon *Arias*' liberty by extending the stop seventy-eight seconds to allow the dog to sniff the vehicle was reasonable. *Id.* at ¶48.

The same is true of the present case. The stop conducted by Officer Olson was ongoing when the dog sniff occurred. As noted, Officer Olson was still explaining the warning to the driver and passengers while the canine conducted its sniff around the car. The defendant asserts that when Officer Olson confirmed that the license plate was current his investigation was concluded even before he began preparing the written warning. If traffic stops were deemed concluded once the officer made a determination that either a violation occurred or did not occur, citizens would be free to leave after the officer determined they were speeding and before an officer handed them their ticket or warning.

Further, even if the court finds that the stop was no longer ongoing during the dog sniff, what is important is that Officer Olson reasonably believed the stop was ongoing and under *Arias* an extension of the stop and the dog sniff were reasonable. A reasonable officer in Officer Olson's position could believe that the situation was similar to *Arias* therefore, under the circumstances the incremental

intrusion on the defendant's liberty was reasonable and the good faith exception should apply.

In *Arias*, the court explained when a seizure is lawful at its inception, the scope of the continued detention is examined, specifically whether an incremental intrusion by the officer is reasonable. *Id.* at ¶¶32, 33 (citing *State v. Griffith*, 2000 WI 72, ¶4). To determine this, the Court adopted the three-part test first articulated in *Griffith* to determine the reasonableness of the continued seizure, considering 1) the gravity of the public concerns served by the seizure, 2) the degree to which the seizure advances the public interest, and 3) the severity of the interference with individual liberty. *Id.* at ¶34 (citing *Griffith*, at ¶37). Each of those factors is considered under the totality of the circumstances. *Id.*

Officer Olson relied on this analysis cited in *Arias* when calling in a canine unit that eventually conducted a sniff of the vehicle. Additionally, Officer Olson testified that a normal traffic stop takes between eight and twelve minutes (R. 8, p. 13, lines 2-4) and this traffic stop, which included the dog sniff, took between fifteen and twenty minutes. (R. 8, p. 12 lines 23-25). If the stop took as little as fifteen minutes it is possible the stop was only three minutes longer than a normal stop for the officer. Although the stop in *Arias* was only extended by seventy-eight seconds (*Arias* at ¶28) the court found that there was no rule as to how long a stop could be extended before it became unreasonable. *Id.* at ¶34. For these reasons, a reasonable officer in Officer Olson's position relying on *Arias* would have found

that an extension of as little as three minutes to be reasonable under the totality of the circumstances to further the goal of finding illegal drugs.

For all of these reason, the Circuit Court correctly found that, “Officer Olson reasonably relied upon clear and controlling Wisconsin precedent, that is, *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.” (Decision Hearing Transcript 15: 6-11).

B. The Decision in Rodriguez did Change The Standard For Extending Traffic Stops to Conduct Dog Sniffs in Wisconsin

The defendant argues that *Rodriguez* did not overrule *Arias* and thus even if Officer Olson did rely on *Arias* the case was not overrule and the exclusionary rule articulated in *Dearborn* cannot apply. However, the defendant fails to address the tests used in each case to determine when a stop becomes unreasonable.

In *Arias*, the Court takes a totality of the circumstances approach when deciding if extending a traffic stop to conduct a dog sniff is reasonable. The court weighed 1) the gravity of the public concerns served by the seizure, 2) the degree to which the seizure advances the public interest, and 3) the severity of the interference with individual liberty. *State v. Arias* at ¶34 (citing *Griffith*, at ¶37). In *Rodriguez*, the court ruled that “a seizure justified only by a police-observed traffic violations, 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.” *Rodriguez* at 1614-15 (quoting *Caballes*, 543 U.S. at 407). The ruling in *Rodriguez* creates a bright line rule that the traffic stop may not be extended any amount of time to allow for a dog sniff. On the other hand, *Arias* allowed for some extension of a traffic stop as long as it was reasonable under the totality of the circumstances.

Further, the court in *Rodriguez* focuses only on what the police actually do when determining the reasonableness of a seizure (*Id.* at 1616) and the court in *Arias* focuses on the actual time that the stop is prolonged to determine the reasonableness. *State v. Arias* at ¶47. In *Arias*, the court found that the incremental intrusion on the defendant’s liberty by the seventy-eight second extension was reasonable.

The two cases cannot be reconciled. *Rodriguez*’s bright line rule changed the way that traffic stops involving dog sniffs could be conducted in Wisconsin. Because *Rodriguez* overruled *Arias* and Officer Olson relied upon the current controlling precedent in Wisconsin at the time of the stop the good faith exception should apply as it did in *Dearborn*.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that the Court affirm the circuit court's decision and deny the motion to suppress.

Dated this ____7____ day of __July__, 2016.

Respectfully,

____/s/_____
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CERTIFICATION OF BRIEF

I hereby certify that this document conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief and appendix produced with proportional serif font. The length of this brief is 3,796 words long.

Dated this ____7____ day of _July_, 2016.

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this ____7____ day of _July_, 2016.

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