

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The evidence obtained as a result of a dog sniff of the vehicle should be suppressed because the dog sniff unreasonably prolonged the completed traffic stop without reasonable suspicion. Absent reasonable suspicion, police may not extend an otherwise completed traffic stop in order to conduct a dog sniff. *Rodriguez v. United States*, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015).

The dog sniff conducted after the completed traffic stop in the present case is distinguishable from the dog sniff conducted during the ongoing traffic stop in *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748. Officer Olson's reliance on *Arias* in conducting the dog sniff was not objectively reasonable. Therefore, the evidence obtained should be suppressed.

I. THE TRAFFIC STOP OF MS. DOWNER JOSSI WAS COMPLETED PRIOR TO THE DOG SNIFF.

Although *Rodriguez* was decided almost four months after the search and seizure conducted in the present case, the law established in *Rodriguez* still applies under the retroactivity rule. The retroactivity rule provides that "newly declared constitutional rules must apply to all similar cases pending on direct review." *State v. Dearborn*, 2010 WI 84, ¶ 31, 327 Wis. 2d 252, 269, 786 N.W.2d 97, 106.

Ms. Downer Jossi's case was still pending in the circuit court when the Supreme Court of the United States decided *Rodriguez*. Therefore, the rules established in *Rodriguez* apply to the present case.

Like the dog sniff in *Rodriguez*, 135 S. Ct. at 1616-17, the dog sniff in the present case was conducted after the traffic stop was completed. The State tried to distinguish *Rodriguez* from the present case by incorrectly reciting the facts from *Rodriguez*. In *Rodriguez*, an officer conducted a traffic stop based on a traffic violation. *Id.* at 1612. The officer who conducted the traffic stop was a canine officer and had his canine in his patrol car that night. *Id.* The State incorrectly indicated that the officer called for a second officer to arrive with a canine as he began writing a warning ticket for the driver. The State also indicated that after the officer gave the driver the warning and explained it, he continued to detain him until a second officer arrived with a drug-sniffing dog.

However, the canine was already on scene with the officer that conducted the traffic stop. *Id.* The officer did issue a written warning to the driver for the traffic violation and returned documents to the driver and passenger. *Id.* at 1613. The officer then asked the driver for permission to walk his dog around the car, which the

driver refused. *Id.* The officer then had the driver and passenger exit the vehicle and wait for a second officer to arrive on scene. *Id.* Once the second officer arrived, the first officer retrieved his own canine and led him around the vehicle. *Id.* Seven to eight minutes elapsed between issuing the written warning and the canine giving a positive alert to drugs in the vehicle. *Id.*

Like the traffic stop in *Rodriguez*, the traffic stop in the present case was prolonged. Officer Olson had all of the occupants removed from the vehicle in order to conduct the dog sniff. (R. 10, p. 20, lines 4-6.) He admitted that removing the occupants of the vehicle prolonged the explaining of the warning. (R. 10, p. 20, lines 7-10.) While it typically takes Officer Olson thirty seconds to a minute to explain a warning to a driver (R. 10, p. 20, lines 11-13), he took "maybe three minutes" in explaining the warning to the driver in this case. (R. 10, p. 13, lines 7-11.)

The State also tried to distinguish *Rodriguez* from the present case by explaining that the canine unit in *Rodriguez* was called after the warning had been given to the driver while the dog sniff in the present case occurred while Officer Olson explained the written warning. However, *Rodriguez* expressly stated "the critical question ... 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.'" *Id.* at 1616.

The traffic stop in the present case was prolonged because conducting the dog sniff added time to the stop. Time was added to the stop when: Officer Olson stopped writing the warning for the traffic violation when the canine officer arrived on scene (R. 10, p. 5, lines 2-9), Officer Olson explained the situation to the canine officer (R. 10, p. 5, lines 8-12), Officer Olson removed all of the occupants of the vehicle for the dog sniff (R. 10, p. 6, lines 3-7) and the dog sniff was conducted on the vehicle. (R. 10, p. 10, lines 15-16.) Additionally, Officer Olson admitted in his own testimony that time was added to this traffic stop. (R. 8, p. 12, lines 23-25, p. 13, lines 1-4.)

The State contends that the traffic stop was not prolonged because the purpose of the traffic stop was still being completed as Officer Olson was explaining the written warning to the driver while the dog sniff occurred. However, the authority for a seizure "ends when tasks tied to the traffic infraction are —or reasonably should have been— completed." *Rodriguez*, 135 S. Ct. at 1614.

Even though Officer Olson was explaining the written warning to the driver while the dog sniff occurred, the

tasks tied to the traffic infraction reasonably should have been completed. As Officer Olson testified that a normal traffic stop where he issues a citation takes him between eight to twelve minutes (R. 8, p. 13, lines 2-4), whereas this traffic stop took between fifteen and twenty minutes. (R. 8, p. 12, lines 23-25, p. 13, lines 1-2.)

The traffic stop was completed prior to the dog sniff because the tasks tied to the traffic infraction should reasonably have been completed. Ms. Downer Jossi does not claim, as the State asserted, that because Officer Olson's "investigation" of the traffic violation was complete once he verified that the license plates were current, that the "traffic stop" was then completed and the occupants should be free to leave.

Rather, once Officer Olson confirmed the license plates were current he had no further investigating to do, but he still had tasks tied to the traffic stop that he needed to complete, including preparing the written warning, printing it and explaining it to the driver.

Prior to the dog sniff, Officer Olson did prepare the written warning and printed it. (R. 10, p. 5, lines 8-16.) The only remaining task tied to the traffic stop was for Officer Olson to explain the warning to the driver, which he testified takes thirty seconds to a minute. (R. 8, p.

20, lines 11-13.) Instead of explaining the written warning to the driver in thirty seconds to a minute, Officer Olson removed all of the occupants of the vehicle for the dog sniff. (R. 10, p. 6, lines 5-7.)

The tasks tied to the traffic stop reasonably should have been completed prior to the dog sniff. Instead of completing the traffic stop within the usual eight to twelve minutes (R. 8, p. 13, lines 2-4), Officer Olson prolonged the traffic stop between fifteen and twenty minutes (R. 8, p. 12, lines 23-25, p. 13, lines 1-2), in order to conduct the dog sniff.

The traffic stop was prolonged without reasonable suspicion for the sole purpose of conducting a dog sniff. Therefore, the evidence obtained in violation of the Fourth Amendment should be suppressed.

II. OFFICER OLSON'S RELIANCE ON ARIAS WAS NOT OBJECTIVELY REASONABLE.

Even under *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748, the seizure of Ms. Downer Jossi was unreasonable. The State argued that even if the traffic stop was completed prior to the dog sniff, the continued seizure was reasonable because Officer Olson objectively reasonably relied on *Arias*.

However, *Arias* recognized that “an unconstitutional continuation of a once lawful seizure can occur when the extension of time for that needed to satisfy the original concern that caused the stop becomes unreasonable or when the means used to continue the seizure becomes unreasonable....” *Id.* at ¶ 38.

Although the seizure of Ms. Downer Jossi was initially lawful, her continued detention became unlawful because the extension of time for that needed to satisfy the original concern that caused the stop became unreasonable and the means used to continue the seizure became unreasonable. Officer Olson continued to detain Ms. Downer Jossi for a longer period of time than a normal traffic stop. (R. 8, p. 12, lines 23-25, p. 13, lines 1-4.) Additionally, the means used by Officer Olson to continue to detain Ms. Downer Jossi were unreasonable because she was removed from the vehicle in order for a dog sniff to be conducted. (R. 10, p. 6, lines 3-7.)

The State also pointed to the three-part test applied in *Arias* in arguing that Officer Olson’s reliance was reasonable. However, the three-part balancing test applied in *Arias* “helps quantify the reasonableness of a seizure during an ongoing stop....” *State v. House*, 2013 WI App 111, ¶ 8, 350 Wis. 2d. 478, 484, 837 N.W.2d 645, 648. The

traffic stop in this case was not ongoing, it was completed prior to the dog sniff. Additionally, it was not reasonable for Officer Olson to believe that the traffic stop was ongoing.

Even if the Court applies the three-part test in *Arias* under the totality of the circumstances, by weighing (1) "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," *Arias*, 2008 WI 28 at ¶ 34, the seizure of Ms. Downer Jossi was unreasonable.

Although there is public interest in preventing the flow of drugs that can be furthered by drug-sniffing dogs, *Id.* at ¶ 39, that is outweighed by the severity of the interference with Ms. Downer Jossi's liberty. Unlike the dog sniff in *Arias*, the dog sniff in the present case was not part of an ongoing traffic stop; it was prolonged beyond seventy-eight seconds (R. 8, p. 12, lines 23-25, p. 13, lines 1-4; and Ms. Downer Jossi was removed from the vehicle for the dog sniff. (R. 10, p. 20, lines 4-6.)

The intrusion on Ms. Downer Jossi's liberty was far more than the brief seventy-eight second intrusion on *Arias*. Therefore, her continued seizure was unreasonable

and the evidence obtained in violation of the Fourth Amendment should be suppressed.

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 July, 2016.

Respectfully Submitted,

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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 9 pages.

Dated this ____ day of July, 2016.

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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 July, 2016.

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