

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

RECEIVED

08-11-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2016AP000622-CR

v.

Trial Case No. 2015CF000135

JORDAN A. BRANOVAN,

Defendant-Appellant.

STATE'S RESPONSE ON DEFENDANT'S APPEAL FROM OZAUCKEE
COUNTY CASE NO. 2015CF000135
HONORABLE PAUL V. MALLOY
CIRCUIT COURT JUDGE PRESIDING
OZAUCKEE COUNTY, WISCONSIN

Respectfully submitted,

JEFFREY A. SISLEY
Ozaukee County Assistant District Attorney
State Bar No. 1000017
1201 S. Spring Street
Port Washington, WI 53074
(262)284-8385

Attorney for Plaintiff-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT ON ORAL ARGUMENT AND PUBLICATION..	1
STATEMENT OF THE CASE	1
ARGUMENT	2
I. The Trial Court Did Not Err In Ruling That The Seizure of Evidence Was Constitutionally Valid.....	2
A. Applicable Law	2
B. Sgt. Heinen Property Remained on Mission and The Dog Sniff was Constitutional.....	4
1. The Facts.....	4
2. Application Of Law To Facts.....	13
CONCLUSION	15
CERTIFICATION	16
CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)	16
APPENDIX	17

TABLE OF AUTHORITIES

Cases

<i>Arizona v. Johnson</i> , 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009)	2, 3
<i>Berkemer v. McCarty</i> , 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).....	2
<i>Delaware v. Prouse</i> , 440 U.S. 648, 658–660, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).....	3
<i>Florida v. Jardines</i> , 569 U.S. 1, ———, 133 S.Ct. 1409, 1416–1417, 185 L.Ed.2d 495 (2013).....	3
<i>Florida v. Royer</i> , 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) ...	2
<i>Illinois v. Caballes</i> , 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)..	2, 3
<i>Knowles v. Iowa</i> , 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) ...	2
<i>Muehler v. Mena</i> , 544 U.S. 93, 101, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) ..	3
<i>Rodriguez v. United States</i> , 575 US _____, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015).....	2, 14
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	2
<i>United States v. Sharpe</i> , 470 U.S. 675, 685, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985).....	2

Other Authorities

4 W. LaFave, Search and Seizure § 9.3(c), pp. 507–517 (5th ed. 2012)	3
--	---

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent requests neither oral argument nor publication in this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of Defendant-Appellant, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

I. The Trial Court Did Not Err In Ruling That The Seizure of Evidence Was Constitutionally Valid

A. Applicable Law

In his brief, the defendant-Appellant did not cite the most recent Supreme Court case on this issue; *Rodriguez v. United States*, 575 US _____, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015).

In the following paragraphs, the Court in *Rodriguez* succinctly stated the law in this area.

A seizure for a traffic violation justifies a police investigation of that violation. “[A] relatively brief encounter,” a routine traffic stop is “more analogous to a so-called ‘Terry stop’ ... than to a formal arrest.” *Knowles v. Iowa*, 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), in turn citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). See also *Arizona v. Johnson*, 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009). Like a Terry stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's “mission”—to address the traffic violation that warranted the stop, [*Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)] and attend to related safety concerns, *infra*, at 1619 – 1620. See also *United States v. Sharpe*, 470 U.S. 675, 685, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985); *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (plurality opinion) (“The scope of the detention must be carefully tailored to its underlying justification.”). Because addressing the infraction is the purpose of the stop, it may “last no longer than is necessary to effectuate th[at] purpose.” *Ibid.* See also *Caballes*, 543 U.S., at 407, 125 S.Ct. 834. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. See *Sharpe*, 470 U.S., at 686, 105 S.Ct. 1568 (in determining

the reasonable duration of a stop, “it [is] appropriate to examine whether the police diligently pursued [the] investigation”).

Our decisions in *Caballes* and *Johnson* heed these constraints. In both cases, we concluded that the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention. *Johnson*, 555 U.S., at 327–328, 129 S.Ct. 781 (questioning); *Caballes*, 543 U.S., at 406, 408, 125 S.Ct. 834 (dog sniff). In *Caballes*, however, we cautioned that a traffic stop “can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission” of issuing a warning ticket. 543 U.S., at 407, 125 S.Ct. 834. And we repeated that admonition in *Johnson* : The seizure remains lawful only “so long as [unrelated] inquiries do not measurably extend the duration of the stop.” 555 U.S., at 333, 129 S.Ct. 781. See also *Muehler v. Mena*, 544 U.S. 93, 101, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) (because unrelated inquiries did not “exten[d] the time [petitioner] was detained[,] ... no additional Fourth Amendment justification ... was required”). An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But contrary to Justice ALITO's suggestion, post, at 1625, n. 2, he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual. But see post, at 1623 – 1624 (ALITO, J., dissenting) (premising opinion on the dissent's own finding of “reasonable suspicion,” although the District Court reached the opposite conclusion, and the Court of Appeals declined to consider the issue).

Beyond determining whether to issue a traffic ticket, an officer's mission includes “ordinary inquiries incident to [the traffic] stop.” *Caballes*, 543 U.S., at 408, 125 S.Ct. 834. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. See *Delaware v. Prouse*, 440 U.S. 648, 658–660, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). See also 4 W. LaFare, Search and Seizure § 9.3(c), pp. 507–517 (5th ed. 2012). These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See *Prouse*, 440 U.S., at 658–659, 99 S.Ct. 1391; LaFare, Search and Seizure § 9.3(c), at 516 (A “warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.”).

A dog sniff, by contrast, is a measure aimed at “detect[ing] evidence of ordinary criminal wrongdoing.” *Indianapolis v. Edmond*, 531 U.S. 32, 40–41, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). See also *Florida v. Jardines*, 569 U.S. 1, ———, 133 S.Ct. 1409, 1416–1417, 185 L.Ed.2d 495 (2013). Candidly, the Government acknowledged at oral

argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. See Tr. of Oral Arg. 33. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

135 S.Ct. 1615-1616

**B. Sgt. Heinen Properly Remained On Mission
And The Dog Sniff Was Constitutional**

1. The Facts

The facts with citations to the record are set forth below. Less than nine minutes from start of the traffic stop, the K9 indicated on the Toyota. During that time, Sgt. Heinen never deviated from his mission which involved the stop of the vehicle, the checking for wants and warrants for the occupants and the issuance of citations for failing to wear seatbelts.

(R 29, Exh 1 at 00:51 – 09:18)

Sgt. Heinen sees a vehicle with two persons who are not wearing seatbelts.

A I observed the vehicle in question that was observed in the video, the blue Toyota, pass my stopped squad; and the driver was not wearing a seat belt. Once I pulled up behind the blue vehicle, I observed that the passenger was also not wearing his seat belt . . .

(R 28: 10)

Before commencing a stop of the vehicle, Sgt. Heinen calls for a second officer whom he knows to be the K9 officer.

Q Now, at this point when you're behind it, you haven't yet activated your emergency equipment, correct?

A That's correct.

Q But you did activate the camera manually?

A I did activate the camera manually after — I forget how many seconds it was. I had to make the radio traffic also prior to that that was not captured on audio and the camera.

Q What was the radio traffic prior to that?

A Upon pulling behind the vehicle, I called the number 920 over the air, which is Officer Schiller's radio number. Then I notified dispatch that by stating 915 Mequon traffic stop and then provided the traffic stop data and my perceived location.

Q And 920 you said is Officer Schiller's squad car?

A That is correct.

Q Do you know Officer Schiller as being a K-9 officer at that time?

A Yes, I do.

Q Is there a reason you called 920 at that time?

A There is. When the vehicle passed my location, I observed that the driver was wearing a multicolored hat, and it appeared that there was a multicolored marijuana leaf on the top portion of his hat when he passed my location.

Q And so you called 920. Did you just call 920, did you ask for a backup, what did you do?

A I just merely stated his number, 9-2-0, and asked nothing further and then went into my traffic stop information.

Q And is there some meaning behind that; in other words, do you know that that would mean something to Officer Schiller?

A I knew that if I said 920 over the air that he would know that I may have a stop where I would use his assistance on and with the K-9. So when I said 920, he then responded to my location. I was in his assigned beat area.

Q And now that was before you even turned on your emergency equipment?

A Correct.

Q And before you even called in that you were going to do a traffic stop?

A That's correct.

(R 28: 12-14)

Sgt. Heinen then commences the stop of the vehicle by activating his emergency lights. (R 29, Exh 1 at 00:51)

After stopping the vehicle he obtains identification form the two occupants, returns to his squad and communicates the identification of the two occupants to his dispatcher to run checks on the two.

A After handing the empty pill bottle back to Mr. Branovan, I walked back to my squad and provided the driver and passenger's personal identifying information to dispatch to conduct a driver status wanted check and record check.

Q And just so we understand, so you call your dispatcher; your dispatcher does that and then calls you back?

A Correct. Calls me back, lets me know their status, whether they have a — any warrants and whether they have any prior criminal record.

Q And is that an instantaneous return from your dispatcher?

A No, it is not.

(R 28: 22)

The squad recording of the transaction shows that Sgt. Heinen first speaks to occupants in car at approximately 01:44 into the recording, asks for their identification at approximately 02:07 into the recording and returns to his squad with the IDs at approximately 03:39 into the recording.

(R 29, Exh 1 at 01:43 – 03:40)

In the squad recording Sgt. Heinen is heard calling into his dispatch giving the license plate number and the identification information for both occupants. He was then waiting for a response.

(R 29, Exh 1 at 03:29 – 04:17)

While Sgt. Heinen was waiting in his squad for his dispatcher to get back to him with the information on the checks, Officer Schiller arrives and briefly speaks to Sgt. Heinen

Q Now, you go back and radio this in to dispatch. You had earlier said you said Officer Schiller's number. At some point does Officer Schiller arrive?

A He does arrive after I'm back in my squad after I've given dispatch all of the driver and occupant's personal information for the record checks.

Q Was there a conversation between you and he that was captured on the video?

A Correct. I —

THE COURT: Officer, just backing up. Officer Schiller arrives while you're waiting for that information to come back from dispatch or simultaneously or —

THE WITNESS: He actually arrived while I was still talking on the radio I believe.

THE COURT: Okay.

THE WITNESS: And we did not have a conversation, he and I, until after I had given all that information to dispatch.

Q So you're still waiting for their reply now?

A Correct.

Q You and Officer Schiller have a conversation?

A Yes. I explain to him some of my observations and request that he have the occupants exit, and he was going to do a K-9 sniff of the vehicle. I'm not sure if I actually had that conversation with him, but based upon what I said, I knew he was going to perform a K-9 sniff.

Q Did Officer Schiller tell you whether he had any knowledge of the occupants in the vehicle?

A Yes, he did. He advised that we had a recent complaint with that vehicle and Mr. Branovan at a local business, and an independent citizen reported that there was marijuana smoke coming from the vehicle. Officer Schiller advised that he did follow up on that but was not able to locate Mr. Branovan but did speak with him at his residence, and Mr. Branovan stated that it was vaporizer smoke, an e-cigarette device.

Q And did Officer Schiller tell you about how long before that had occurred?

A I think he said a couple months prior, and he also stated that Mr. Branovan had been arrested for a prior possession of drug paraphernalia or possession of controlled substance within the last two years I think he stated.

Q Now, was this information relayed to you while you were still in your squad?

A While I was still in my squad after I had given dispatch the information.

Q Had you yet received the return information from your dispatch?

A No, I had not.

(R 28: 22-23)

In the squad recording Sgt. Heinen is heard speaking to Officer Schiller at approximately 04:18 – 5:09 in the recording.

(R 29, Exh 1 at 04:18 – 05:09)

Sgt. Heinen is still waiting in his squad for the information when Officer Schiller then speaks to the two occupants.

Q Now, you said that you had — either you had asked or Officer Schiller decided to take his dog K-9 around the vehicle. Do you recall if you asked or if he just did that?

A I don't recall if I specifically asked. I know I asked him to have the occupants step out of the vehicle, which in our world he's going to do a K-9 sniff; that I knew. Whether or not it was actually communicated, I knew that was going to occur.

Q And on the video we saw an officer go up to the car and both occupants get out. Was that officer Officer Schiller?

A That is Officer Schiller, yes.

Q And at some point then are the occupants, the defendant and his passenger, are they handcuffed at all at that point?

(R 28: 23)

The squad recording shows Officer Schiller at side of the defendant's car starting to talk to occupants at approximately 05:15. The passenger side door opens at 05:28 and the driver gets out at 05:30. Officer Schiller is then seen talking to both persons in front of Sgt. Heinen's squad and Sgt. Heinen is still in his squad. Sgt. Heinen is not participating in the transaction with the occupants. In fact, Sgt. Heinen is heard inside his squad talking to his citizen ride along who is also in the squad.

(R 29, Exh 1 at 05:37 – 06:51)

While still waiting for his dispatcher to get back to him, Sgt. Heinen again spoke to Officer Schiller asking if Officer Schiller had patted down the two occupants. This effectively demonstrates that Sgt. Heinen was not paying attention to what was happening with the two occupants in front of his squad. On the recording, Sgt. Heinen is heard telling Officer Schiller that he had safety concerns about the two occupants who were then standing next to Sgt. Heinen's squad.

(R 29, Exh 1 at 07:03-07:18)

Officer Schiller then goes out of view of the camera with both occupants. Sgt. Heinen is still in his squad, waiting for dispatch to call back and is heard talking to citizen ride along.

(R 29, Exh 1 at 07:20-08:36)

Sgt. Heinen is still waiting in his squad for the information when Officer Schiller commences to walk around the defendant's vehicle with his K9.

Q And are you in your squad as the dog is taken around the blue car?

A Correct. I'm in my squad, processing the citations electronically for Mr. Branovan and Mr. Dunn, his passenger. Mr. Branovan and Mr. Dunn are standing off to the right passenger side of our squad, kind of adjacent, maybe five or so feet.

Q And when you say processing the — the whatever, I'm not sure what you said.

A Processing the citations. I have to input manually data from both Mr. Branovan and Mr. Dunn into our electronic citation system and then print out those citations.

Q And what citations were you processing at that point?

A Citations for failure to wear seat belt by an operator and also by a passenger.

Q And now the dog goes around the car. From your observations did you believe the dog indicated on the car?

A I did. I think it's somewhat audible in my video; if not, Officer Schiller's video perhaps. He praises the dog, which is way of communicating with the dog. I'm not a handler. I can't —

(R 28: 25)

At approximately 08:36 into the recording, Officer Schiller starts walk around the car with his K9. Sgt. Heinen still in his squad waiting for dispatch to call him back with the information on the occupants. Sgt. Heinen continues to talk with the citizen ride along.

(R 29, Exh 1 at 08:36)

The K9 indicates that there is a presence of controlled substance in the vehicle at the same time as Sgt. Heinen is receiving the reply from his dispatcher.

Q And at some point now in this time frame, does the dispatch get back, to you with wants, warrants, that type of thing?

A As Officer Schiller's dog was indicating on the vehicle, dispatch was advising me via the radio that there were no warrants and that the individuals had prior drug convictions.

Q And just so we're clear, when you say "as," do you mean close in time, at the same time, before, after; what do you mean?

A It appeared to be simultaneous, and by simultaneous I should add the praise occurs after the indication.

Q But were you watching what the dog was doing?

A Correct.

(R 28: 27)

The following can be seen and heard on the squad recording:

08:36 K9 sniff begins

09:04 – 09:06	K9 seen indicating on the car
09:04	Dispatcher starts radio communication
09:06	Sgt. Heinen responds go ahead
09:12 – 09:16	Dispatcher radios with information
09:18	Sgt. Heinen responds 10-4
09:18	K9 sniff ended

(R 29, Exh 1 at 08:36 – 09:18)

2. Application Of Law To Facts

The facts clearly show that Sgt. Heinen stops a vehicle because the two occupants are not wearing their seatbelts. Once that stop commences, he keeps to his mission of getting identification from the occupants, having his dispatcher run that information, waiting for his dispatcher to get back to him regarding the checks on the two occupants and issuing citations. The stop lasted no longer than was necessary to effectuate that purpose.

Prior to starting the stop, Sgt. Heinen alerts Officer Schiller. Officer Schiller arrives without any further calls from Sgt. Heinen once the stop is commenced.

Sgt. Heinen did not delay calling his dispatcher. It was after calling his dispatcher and the start of his wait for the reply, that Sgt. Heinen spoke to Officer Schiller. The only other communication between Sgt. Heinen and Officer Schiller occurs during this waiting time when Sgt. Heinen would otherwise have just waited and talked to the citizen ride along.

To state it another way, if Officer Schiller and his K9 had not been present, nothing about the time the occupants were detained would have changed.

The Court in *Rodriguez* made it clear that the police asking for licenses, insurance, and doing criminal history checks are permissible because they are part of the traffic stop mission. Those are designed for safety purposes, which is part and parcel of any police contact.

Beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." . . . Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. . . . These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. . . . (A "warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.").

(citations omitted)

Rodriguez, 135 S.Ct. at 1615.

CONCLUSION

Sgt. Heinen's stop of the vehicle lasted no longer than was necessary to effectuate the purpose of the stop which was to investigate the occupants not wearing seatbelts and to issue citations for those offenses.

The Circuit Court's findings were not erroneous. The Circuit Court's order denying the suppression motion was correct as there was no Constitutional violation.

Dated this _____ day of August, 2016.

Respectfully submitted,

Jeffrey A. Sisley
Assistant District Attorney
State Bar No. 1000017
Attorney for Plaintiff-Respondent

Ozaukee District Attorney's Office
1201 S. Spring Street
Port Washington, WI 53074
(262)284-8380
(262) 284-8365
jeff.sisley@da.wi.gov

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. State § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,798 words.

Dated this ____ day of August, 2016.

Jeffrey A. Sisley
Assistant District Attorney

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

I hereby certify that:

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

I further certify that:

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

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

Dated this ____ day of August, 2016.

Jeffrey A. Sisley
Assistant District Attorney

APPENDIX

The State will not be submitting an appendix.

Index to Appendix.

The State has not submitted an appendix.