

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Appeal No. 16AP622-CR

JORDAN A. BRANOVAN,

Defendant-Appellant.

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APPEAL FROM AN ORDER OF THE OZAUKEE  
COUNTY CIRCUIT COURT, THE HONORABLE  
PAUL V. MALLOY, PRESIDING

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DEFENDANT-APPELLANT'S REPLY BRIEF

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## **LEGAL ARGUMENT**

### **I. Sgt. Heinen extended an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff**

The State cites to *Rodriguez v. United States*, 575 U.S. \_\_\_\_, 135 S. Ct. 1609, 191 L.Ed. 2d 492 (2015). The facts of *Rodriguez* are similar in nature to those before this Court. Briefly stated, Officer Struble, a K-9 officer, stopped Rodriguez for driving on a highway shoulder, a violation of Nebraska law. After Struble attended to everything relating to the stop, including checking the driver's licenses of Rodriguez and his passenger and issuing a warning for the traffic offense, he asked Rodriguez for permission to walk his dog around the vehicle. When Rodriguez refused, Struble detained him until a second officer arrived. Struble then retrieved his dog, who alerted to the presence of drugs in the vehicle. The ensuing search revealed methamphetamine. *Seven or eight minutes elapsed* from the time Struble issued the written warning until the dog alerted. *Rodriguez* at 135 S. Ct. 1609, 1610, 191 L. Ed. 2d 492 (2015). (emphasis supplied)

The holding of the case can be taken directly from the heading. The Court held as follows:

1. Absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution's shield against unreasonable seizures.

A routine traffic stop is more like a brief stop under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, than an arrest, see, e.g., *Arizona v. Johnson*, 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694. Its tolerable

duration is determined by the seizure's "mission," which is 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 and attend to related safety concerns. Authority for the seizure ends when tasks tied to the traffic infraction are—or reasonably should have been—completed. The Fourth Amendment may tolerate certain unrelated investigations that do 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), but a traffic stop “become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission” of issuing a warning ticket, *id.*, at 407, 125 S.Ct. 834.

Beyond determining whether to issue a traffic ticket, an officer's mission during a traffic stop typically includes 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. See *Delaware v. Prouse*, 440 U.S. 648, 658–659, 99 S.Ct. 1391, 59 L.Ed.2d 660. 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.

In concluding that the *de minimis* intrusion here could be offset by the Government's interest in stopping the flow of illegal drugs, the Eighth Circuit relied on *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331. The Court reasoned in *Mimms* that the government's “legitimate and weighty” interest in officer safety outweighed the “*de minimis*” additional intrusion of requiring a driver, lawfully stopped, to exit a vehicle, *id.*, at 110–111, 98 S.Ct. 330. The officer-safety interest recognized in *Mimms*, however, stemmed from the danger to the officer associated with the traffic stop itself. On-scene investigation into other crimes, in contrast, detours from the officer's traffic-control mission and therefore gains no support from *Mimms*. The Government's argument that an officer who completes all traffic-related tasks expeditiously should earn extra time to pursue an unrelated criminal investigation is unpersuasive, for a traffic stop “prolonged beyond” the time in fact needed for the officer to complete his traffic-based inquiries is “unlawful,” \*1612 *Caballes*, 543 U.S., at 407, 125 S.Ct. 834. The critical question is not whether the dog sniff occurs before or after the officer issues

a ticket, but whether conducting the sniff adds time to the stop. Pp. 1619 – 1621.

2. The determination adopted by the District Court that detention for the dog sniff was not independently supported by individualized suspicion was not reviewed by the Eighth Circuit. That question therefore remains open for consideration on remand. P. 1621.

741 F.3d 905, vacated and remanded.

Rodriguez v. United States, 135 S. Ct. 1609, 1611–12, 191 L. Ed. 2d 492 (2015)

As set forth in Branovan’s initial brief, the video time line evidence shows that Heinen effectuated the traffic stop at 00:50 (which is where the clock starts ticking). (R. 29, Exh 1) The Toyota stops in the bank parking lot at 01:32. (R. 29, Exh. 1) Heinen approaches the vehicle at 01:45. (R. 29, Exh 1) His initial contact with Branovan outside the vehicle ends at 03:10. (R. 29, Exh. 1) The video depicts Heinen saying it’ll just be a moment. (R. 29, Exh. 1 at 03:09) There is no indication that Heinen is doing anything to write a citation for a seat belt violation as he is simply awaiting the arrival of Schiller. (R. 29, Exh 1 at 03:10 – 05:29).

Schiller arrives on scene and gets Branovan and the passenger out of the vehicle at 05:29. (R. 29, Exh 1) He sends the K9 around the vehicle at 08:37. (R. 29, Exh 1) The sniff ends at 09:20 (which is the point where the clock stops ticking). (R. 29, Exh 1) Branovan and the passenger are frisked by Heinen and Schiller at 10:35. (R. 29, Exh 1) The search of the vehicle commences at 12:55 and ends at 27:17. (R. 29, Exh 1) Branovan is arrested and handcuffed at 28:35 for possession of a

controlled substance. In essence, almost a half hour passed before the entire seatbelt violation *Terry* stop was completed.

From the above time line, approximately 8 ½ minutes elapsed from the time Heinen makes contact with the driver (00:50) until the time that the dog alerted (09:20). This traffic stop could have ended in less than 5 minutes. However, there was no possibility of that occurring as Heinen knew all along that he would be extending the stop to allow for a dog sniff (as the facts dictate that the K-9 officer was called in before the traffic stop was effectuated). All of this simply because the occupants were not wearing seat belts and the driver had on a hat that “appeared” to have a marijuana leaf on it.

The most poignant statements contained in the Rodriguez decision can be found at paragraphs 10 and 11. The Court stated:

10 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.”).

11 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.

Rodriguez v. United States, 135 S. Ct. 1609, 1615, 191 L. Ed. 2d 492 (2015)

The increased detention for the dog sniff in this case was not independently supported with individualized suspicion by either of the arresting officers. The only independent information that the officers had before hand was the seatbelt violation, the Hawaiian hat and the fact that Heinen witnessed cigarette smoking prior to the traffic stop (yet, the video makes clear that the passenger was even allowed to smoke a cigarette after being taken out of the car). Nothing more.

Further, there were no safety concerns attendant to this traffic stop (with the exception of the one created by the Schiller *after* he had the two occupants out of the vehicle *before* he conducted the dog sniff). Any safety concerns were those created directly by the officers themselves and not by the vehicle occupants. Neither of the occupants created a risk of harm or flight to either of the officers.

The crux of this case is whether there was reasonable suspicion of criminal activity that justified detaining Branovan beyond completion of the minor traffic infraction. Based upon the facts supporting Branovan's detention, the simple answer

is “No.” For that reason, this matter should be remanded back to the trial court for entry of an Order granting Branovan’s Motion to Suppress Evidence.

### **CONCLUSION**

Based upon the arguments contained in this brief and the initial filing, Branovan moves the Court to reverse and remand the matter back to the trial court for entry of an Order granting his Motion to Suppress Evidence on the grounds that his detention after his initial contact with Sgt. Heinen was not reasonably related in scope to the purpose of the traffic stop and not supported by reasonable suspicion of criminal activity. The subsequent seizure of evidence is therefore unconstitutional.

Dated this 23<sup>rd</sup> day of August, 2016

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**BRIEF CERTIFICATION**

I hereby certify that this brief does not conform to the rules contained in §809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of the brief is 1,714 words. This brief was prepared using *Microsoft Word* word processing software. The length of the brief was obtained by use of the Word Count function of the software.

Dated this 23<sup>rd</sup> day of August, 2016

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Attorney Christopher J. Cherella

**CERTIFICATE OF COMPLIANCE WITH 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 sec. 809.19(12), Wis. Stats. 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 23<sup>rd</sup> day of August, 2016

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