STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2016AP002257 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TRAVIS J. ROSE,

Defendant-Appellant.

ON REVIEW OF AN ORDER DENYING MOTION TO SUPPRESS AND JUDGMENT OF CONVICTION, BOTH ENTERED ON JUNE 30, 2016, IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, HON. JAMES A. MUEHLBAUER, PRESIDING.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

ARGUMENT

I. Officer Vonberethy Unlawfully Prolonged the Seizure of Rose; Therefore, the Consent Rose Gave During This Unlawfully Prolonged Seizure Was Invalid and the Evidence Obtained as a Result Must Be Suppressed.

After passing the field sobriety tests, Officer Vonberethy lacked additional articulable facts to prolong the seizure. Officer Vonberethy unconstitutionally seized Rose when Rose gave consent, and Rose's consent was therefore invalid. *See* (Rose Initial Brief at 11–16).

The State does not dispute that Rose was seized when he gave consent for the Officer to search his car. *See generally* (State's Response Brief).

Instead, the State argues that Officer Vonberethy was permitted to prolong the seizure after the field sobriety tests. The State asserts that (1) because the prolonged investigation "was extraordinarily short" and non-intrusive, Officer Vonberethy did not prolong the seizure longer than necessary to accomplish its purpose; and (2) Officer "Vonberethy's concern that Rose may have been drugged driving" justified prolonging the seizure. (State's Response Brief at 8-11).

The State's arguments fail. Rose responds to each in turn.

First, constitutional authority for a traffic stop ends when the tasks tied to the purpose of the traffic stop are completed. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015). In *Rodriguez*, the United States Supreme Court made clear that a seizure in this context may only last for the

amount of time "reasonably required to complete the stop's mission". *Id.* at 1616. A traffic stop "prolonged beyond that point is unlawful." *Id.* (internal quotations omitted).

The State argues that the seizure was not unreasonably prolonged because the extension of time between the passage of the field sobriety tests and Rose's consent to search was "extraordinarily short". (State's Response Brief at 8). As support, the State points to *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748. (State's Response Brief at 8).

The State overlooks that *Arias* was abrogated by the U.S. Supreme Court's decision in *Rodriguez*. As this Court explained in *State v. Downer Jossi*, No. 16AP618-CR, unpublished slip op. (August 24, 2016)(Supp.App.101-105):

> *Rodriguez* clearly changed the state of the law in Wisconsin. *Arias* allowed for a reasonable delay based on the totality of the circumstances, while the Supreme Court in *Rodriguez* made clear that a traffic stop prolonged beyond the time reasonably required to complete the stop's mission without reasonable suspicion is unlawful.

Id., ¶ 9 (internal citations and quotations omitted)(Supp.App. 104-105).

Both *Arias* and *Rodriguez* involved prolonged seizures for the purpose of dog sniffs; as this Court explained in *Downer Jossi*, the "critical question" now under *Rodriguez* "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.* (internal quotations omitted);(Supp.App.105).

"Thus, *Rodriguez* changed the analysis: instead of questioning whether the delay was reasonable we now only

consider what is a reasonable amount of time to complete the purpose of the original seizure." *Id.*;(Supp.App.105).[1]

The State asks this Court to conclude that the delay here was reasonable because it was short. But that is not the question—the question is: what was a reasonable amount of time for Officer Vonberethy to complete the purpose of the original seizure?

Officer Vonberethy's testimony reflects that the purpose of the original seizure was to investigate whether Rose was "operating while intoxicated," and that purpose "led to [his] need to run [Rose] through field sobriety tests." (39:22,24; Rose Initial Brief App.124,126). The circuit court found the same purpose for the traffic stop: "To locate Mr. Rose and investigate a possible OWI case." (39:45; Rose Initial Brief App. 147).

Thus, the moment Rose passed the field sobriety tests, the purpose for the traffic stop was completed under *Rodriguez* and the validity of Officer Vonberethy's initial seizure of Rose ended.

The State argues that "[i]t is hard to picture a less intrusive investigation than the one Vonberethy conducted". (State's Response Brief at 9). The "less intrusive" answer was also the one the Constitution demanded: the seizure ending when Officer Vonberethy no longer had reasonable suspicion to believe Rose was involved in criminal behavior. The lawful seizure ended when Rose passed the field sobriety tests. After that, all that the Officer had were subjective hunches.

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1 The stop in this case occurred on February 7, 2016, over nine months after the U.S. Supreme Court decided *Rodriguez* on April 21, 2015. (39:7;Initial Brief App.109); *Rodriguez*, 135 S. Ct. 1609 (2015).

This too is where the State's arguments that Officer Vonberethy had reasonable suspicion based on his concerns about drugged driving also fail.

"An expansion in the scope of the inquiry, when accompanied by an extension of time longer than would have been needed for the original stop, must be supported by reasonable suspicion." *State v. Hogan*, 2015 WI 76, ¶ 35, 364 Wis. 2d 167, 868 N.W.2d 124.

An "inchoate and unparticularized suspicion or 'hunch'" does not amount to reasonable suspicion. *State v. Guzy*, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987) (quoting *Terry v. Ohio*, 392 U.S. 1, 27, (1968)).

Officer Vonberethy testified that when Rose passed the field sobriety tests, he "did not have reason to arrest him for operating while intoxicated." (39:12; Rose Initial Brief App.114). He stated that he "also believed that there was something else going on." (39:12; Rose Initial Brief App.114).

"I wasn't sure what it was." (39:12; Initial Brief App.114).

Officer Vonberethy did not have the "specific and articulable facts," which, when "taken together with rational inferences from those facts," created reasonable suspicion to believe Rose was involved in illegal activity. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968). He had "unparticularized suspicion" and hunches. *See id.* at 27.

The State asserts that "Vonberethy testified that he understood that the field sobriety tests would not detect drugged driving." (State's Response Brief at 12). This misconstrues his testimony: Officer Vonberethy only testified that the horizontal gaze nystagmus test does not detect narcotics use. (39:13; Rose Initial Brief App.115).

He did *not* testify that the other tests—the "one legged stand" test and the "walk and turn" test—would not show signs of narcotics use. *See generally* (39; Rose Initial App.113-160).

The State claims that "Rose is mistaken to suggest that there is something magical about the completion of the field sobriety tests in this case." (State's Response Brief at 10). But the one-leg-stand and the walk-and-turn tests are *objective* tests that—by the plain names of the tests—assess impairment related walking and standing.

Rose passed the one-leg-stand test with no clues. (39:13; Rose Initial Brief App.115). Rose also passed the walk-and-turn test displaying only two clues—although Officer Vonberethy could only remember one of them (stepping off the line). (39:13; Rose Initial Brief App.115). Thus, the *objective* tests Officer Vonberethy used did not support a finding of reasonable suspicion. Though Officer Vonberethy observed Rose's speech and walking getting worse, (39:29; Rose Initial Brief App.131), he only had *subjective* hunches or guesses as to why that was happening and whether or not it potentially signified criminal behavior.

Such speculation, in conjunction with Rose passing objective tests aimed to assess impairment, does not amount to reasonable suspicion that Rose was drugged driving.

The State's attempts to distinguish this case from *State v. Hogan,* 364 Wis.2d 167, 868 N.W.2d 124, 2015 WI 76, are also unpersuasive. The State first notes that in *Hogan*, the Wisconsin Supreme Court found that the defendant's apparent nervousness when stopped by police—though possibly consistent with drug use—also could have had "innocent explanations". (State's Response Brief at 13); *see Hogan*, 2015 WI 76, ¶¶ 49-50. The State counters that here, on the other hand, "it is difficult to think of an innocent

explanation for the erratic driving, coupled with slurred speech and labored walking." (State's Response Brief at 13).

Officer Vonberethy thought of one: a "medical issue." (39:15; Rose Initial Brief App.117). He stated that he "wasn't sure if there was like some type of medical issue going on" or "if there was a drug issue going on." (39:15; Rose Initial Brief App.117). This further reflects that once Rose passed the field sobriety tests, Officer Vonberethy was just guessing as to what could be wrong and whether it was criminal.

Indeed, even though—as the State notes—Officer Vonberethy testified that he had training in drugged driving (whereas the officer in *Hogan* testified that the defendant's pupils were restricted without definitive information on how drug use would affect pupil size), *see* (State's Response Brief at 12), that still did not change the fact that Officer Vonberethy was speculating as to whether his observations were criminal or had "innocent explanations." *See Hogan*, 2015 WI 76, ¶¶ 49-50.

The State also argues that the information dispatch gave to Officer Vonberethy about Rose being a known IV drug user was more reliable than the tip received in *Hogan*. (State's Response Brief at 13). But the State had the burden to prove that the seizure complied with the Fourth Amendment. *State v. Blatterman*, 2015 WI 46, ¶ 17, 362 Wis. 2d 138, 864 N.W.2d 26.

The State provided no evidence about the source of the dispatch's information about Rose being a known IV drug user. *See generally* (39; Rose Initial Brief App.103–161). Nor did the State provide any evidence about whether that information was current or years old. (39; Rose Initial Brief App.103–161). Thus, just as in *Hogan*, the record only establishes that Officer Vonberethy was acting on "unsubstantiated information from a fellow law enforcement

officer." *See Hogan*, 2015 WI 76, ¶¶ 7, 51 (noting that the State made "[n]o effort" to show the reliability of information one officer relayed to the officer involved in the seizure about the defendant's drug history). [2]

After Rose passed the field sobriety tests, Officer Vonberethy only had subjective hunches; he did not have objective, reasonable suspicion that Rose committed a crime. As such, Officer Vonberethy obtained Rose's consent during an unconstitutionally-prolonged seizure. Therefore, Rose's consent is invalid and any evidence obtained therefrom should be suppressed. *See, e.g., State v. Jones*, 2005 WI App 26, ¶ 23, 278 Wis. 2d 774, 693 N.W.2d 104.

[2] The State also argues that *Hogan* is "significantly different" because the defendant there was stopped for a seatbelt violation. (State's Response Brief at 12). But again, the question here is not whether the original stop was valid—it is whether Officer Vonberethy had specific facts supporting reasonable suspicion that Rose was committing a crime after Rose passed the field sobriety tests.

CONCLUSION

For these reasons, and those stated in his Initial Brief, Rose asks that the court reverse the circuit court's decision denying his motion to suppress.

Respectfully submitted this 1st day of May, 2017.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,756 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 1st day of May, 2017.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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