STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP0003-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES R. STIB,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE SANDY A. WILLIAMS, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ISSUES PRESENTED

The State reframes the issues.

1. Did the trooper act reasonably and in good faith reliance on existing case law when he briefly prolonged a traffic stop for the purpose of conducting a canine sniff of the car in which James R. Stib was a passenger?

The circuit court held that the trooper did not prolong the traffic stop. It did not address the reasonableness of the trooper's detention of Stib for the purpose of conducting a canine sniff of the car under the applicable case law when the seizure occurred.

2. If the circuit court erroneously denied Stib's motion to suppress, is Stib automatically entitled to withdraw his plea on remand?

The circuit court did not answer.

INTRODUCTION

Trooper Brendan Braun initiated a traffic stop of a speeding car in which Stib was a passenger. While Braun was processing the speeding citation and an equipment violation warning, he requested a canine unit to conduct a drug sniff of the car. The canine unit arrived after Braun completed the speeding citation but before he finished writing the warning. Within five minutes of the canine unit's arrival, and after Braun removed and frisked the car's occupants, the canine alerted to the car.

Braun's actions were constitutionally reasonable under the law existing when the stop occurred. Under *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748, the

supreme court held that an officer could briefly prolong a traffic stop to conduct a canine sniff because the public's interest served through the sniff outweighed the incremental intrusion on the car's occupants. *Id.* ¶ 40.

After Braun stopped Stib, the U.S. Supreme Court held that an officer could not prolong a traffic stop beyond its original purpose absent reasonable suspicion. *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). But Braun's actions were constitutionally reasonable under the law existing at the time of the stop. The circuit court erred in finding that Braun's actions did not prolong the stop. But this Court should affirm the denial of Stib's motion to suppress evidence under the good faith exception to the exclusionary rule.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties have fully developed the arguments in their briefs and the issues presented involve the application of settled legal principles to the facts.

STATEMENT OF THE CASE

I. Factual Statement.[1]

The traffic violation. On February 8, 2015, Trooper Brendan Braun of the Wisconsin State Patrol clocked a car

[1] In addition to the testimony at the suppression hearing (R. 55; 56) and the hearing on the motion to reconsider (R. 61), the State basis its factual statement on a DVD audio and video recording of the traffic stop received into evidence (R. 21, Ex. 2). The circuit court viewed a portion of the recording, "stopping the playback at 21:18:07." (R. 57:4–5.)

travelling at 81 miles per hour in a 65 miles-per-hour zone on Interstate 43 in Mequon, Wisconsin. (R. 55:4; 61:7.) Braun did not otherwise see any evidence that the driver was impaired based on the driver's handling of the car or observe any other illegal activity. (R. 55:12.) Braun activated his squad's emergency lights to stop it. (R. 55:4.)

The traffic stop. As the car exited at Highway C, Braun observed that the reverse lights briefly came on and shut off. Braun also saw the car had a "jerking motion," prompting him to believe that the driver might lose control and raising concerns about the car's occupant's behaviors. (R. 55:5.) Braun had previously witnessed similar jerking motions during traffic stops. He explained, "[u]sually, they're trying to hide something, taking their attention off controlling the vehicle and moving about the vehicle." (*Id.*) The car travelled west on Highway C and turned north on Port Washington Road, stopping in a gas station parking lot. (*Id.*)

Trooper Braun's initial contact with the driver. Braun made contact with the driver, Kayla Mertes, who stated that her speedometer was not working and that they were on their way to Milwaukee. (R. 15:1; 55:6.) Two passengers, brothers James Stib and Michael Stib,[2] were in the car. (R. 15:2; 55:13.) Braun did not observe anything illegal or any odd behavior. (R. 55:13–14.) Braun acknowledged that nothing from this initial contact gave him any reason to suspect that there were drugs in the car. (R. 55:14.)

After Braun spoke to Mertes and obtained her driver's license (R. 55:17), he returned to his squad (R. 55:6). Before

[2] The State will refer to James Stib as "Stib" and Michael Stib as "Michael Stib."

Braun began writing the citations on his computer (R. 55:7), he requested assistance from a canine officer. Mequon's canine officer was not available, but a Cedarburg canine officer was. (R. 55:6–7.) Braun stated that it took no more than two minutes to locate a canine officer. (R. 55:7.) Later he testified that it took "maybe a little over a minute." (R. 61:9.) The squad video reflects that Braun made the call for a drug dog at 21:12:36. (R. 21, Ex. 2.) While Braun was making radio calls for a drug dog, he was also receiving returns through his computer for records related to the driver and the car. (R. 61:10.) While Braun waited for the canine officer, he completed and printed out the citation for speeding. (R. 55:7; 61:7.)

Braun was preparing a warning for a cracked windshield when the Cedarburg Police Officer Brian Emmerich and his canine, Jake, arrived, less than five minutes later at 21:17:58. (R. 55:7; 56:5; 61:7–8; 21, Ex. 2.) Braun stopped working on the warning and explained the situation to Emmerich in less than one minute. (R. 55:7–8.) Emmerich asked Braun to have Mertes and the passengers exit the car before his canine searched the car. (R. 55:8.)

While Braun was with Mertes, Emmerich noted that Stib, who was in the front passenger seat, was moving around in the car, "looking back at us like he was worried about what we were doing." (R. 56:7.) Emmerich could not see what Stib was doing with his hands. (R. 56:7.) Braun subsequently removed Stib and his brother from the car. (R. 56:8.) Braun testified that it took less than two minutes to frisk Mertes and the passengers. (R. 55:8.)

The squad video reflects that after Braun finished speaking to Emmerich, Braun reapproached Mertes at 21:18:36. Braun explained why he stopped her and informed her of the canine sniff. He then had Mertes and the

passengers exit the car, one at a time, frisking each one during the process. Braun completed the frisks at 21:22:04. (R. 21:Ex. 2). Braun asked Stib, who was in shirt sleeves, if he had a jacket or hoodie at 21:22:08. Meanwhile, Emmerich and his canine Jake approached the car at 21:22:23. Braun handed Stib a sweatshirt at 21:22:36. (R. 21, Ex. 2.)

When Emmerich walked Jake around the car, Jake indicated to the presence of a controlled substance. (R. 56:8, 14.) Jake began barking at 21:22:40. (R. 21, Ex. 2.) Emmerich told Braun that his dog alerted (R. 55:8; 56:9), prompting Braun to search the car. During the search, Braun found a small black case that had marijuana and a marijuana pipe inside next to the front passenger's seatbelt buckle. Braun also found other contraband under the seat. (R. 55:9.)

Because of the cold weather, Braun grabbed a coat behind the passenger's seat, searched it and offered it to Stib. (R. 55:9–10.) Stib appeared agitated and denied that it was his coat. (R. 55:10.) Braun told Stib that he was placing him under arrest for possession of drug paraphernalia because it was found where Stib was sitting. (R. 55:10.) When Braun attempted to place Stib in handcuffs, Braun's arm tensed up and he pulled it away. Stib then ran from the traffic stop location. (R. 55:10.) Officers apprehended Stib approximately 30 minutes later. (R. 1:3.)

After Stib was in custody, Braun completed the search of the car and finished preparing the warning. (R. 55:10–11.) Braun reported that it typically takes ten to fifteen minutes to issue a traffic ticket. (R. 55:11.) Braun found a jacket that contained Stib's identification card and a small hand gun in a holster when he searched the car. (R. 1:3.)

II. Procedural Status of the Case.

The State charged Stib with possession of tetrahydrocannabinols as a second or subsequent offense, concealing a stolen firearm, resisting an officer, two counts of possession of drug paraphernalia, and possession of a firearm by a felon. (R. 1:1–2; 9:1–2.) Stib moved to suppress the evidence seized based on an allegedly unlawful seizure. (R. 12:1.)

Following an evidentiary hearing, the circuit court denied Stib's motion. The circuit court found that the canine officer arrived while Braun was writing the citation. Braun then stopped writing the citation to tell the canine officer what was going on. The circuit court determined that it was appropriate for Braun to direct the driver and passengers to exit the car and frisk them. (R. 57:11.) It found that Braun had not "completed the actual traffic citation process by handing the citation, giving the license back, and allowing the person to go on their way." (R. 57:11–12.) The circuit court declined to address the State's argument that officers extended the traffic stop based on reasonable suspicion. (R. 57:5–6, 12.) Instead, the circuit court determined that it could not "find on this record that the trooper prolonged the stop in order to have the canine go around the vehicle; and based on that, I don't find that this falls under *Rodriguez*, and therefore will deny [Stib's] motion." (R. 57:12.)

Stib moved for reconsideration. (R. 28:1.) Based on the squad video, he contended that Braun had completed writing the citation before the canine officer arrived. (R. 28:3.) At a hearing, Braun testified he had completed the speeding citation but not the warning for a cracked windshield when the canine officer arrived. (R. 61:7–8, 11.) The circuit court found that Braun was "multitasking," that is, he was "still working on the original reason for the traffic stop, and as he

is doing that, the drug dog does arrive with the officer and then they conduct that portion of the business. And the traffic stop is not prolonged from this." (R. 61:12–13.) The circuit court reaffirmed its original ruling denying Stib's motion to suppress. (R. 61:13.)

As part of a plea agreement (R. 30:1–2), Stib pled guilty to charges of resisting or obstructing an officer and concealing a stolen firearm (R. 62:8–9). The circuit court dismissed the remaining counts on the State's motion. (R. 62:9.) The circuit court withheld sentence on the concealing a stolen firearm conviction and placed Stib on probation for a period of three years. (R. 42.) It sentenced Stib to six months in the county jail for the resisting an officer conviction. (R. 41.)

This appeal follows.

STANDARD OF REVIEW

Review of a decision denying a motion to suppress evidence presents this Court with a question of constitutional fact that requires a two-step analysis. First, this Court applies a deferential standard to the circuit court's findings of historical fact, upholding them unless they are clearly erroneous. Second, this Court independently applies the relevant constitutional principles to these facts. *State v. Matalonis*, 2016 WI 7, ¶ 28, 366 Wis. 2d 443, 875 N.W.2d 567. This Court may affirm a circuit court's order affirming or denying a motion to suppress on grounds different from the grounds that the circuit court relied on. *State v. Smiter*, 2011 WI App 15, ¶ 9, 331 Wis. 2d 431, 793 N.W.2d 920.

ARGUMENT

I. Trooper Braun acted reasonably and in good faith reliance on clear and settled case law when he briefly prolonged the traffic stop and Stib's detention for the purpose of conducting a canine sniff of the car.

A. General legal principles.

The touchstone of a Fourth Amendment claim is reasonableness. The Fourth Amendment to the United States Constitution, and Article I, § 11 of the Wisconsin Constitution, protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV; Wis. Const. art. I, § 11. This Court has generally conformed its "interpretation of Article I, Section 11 and its attendant protections with the law developed by the United States Supreme Court under the Fourth Amendment." *See State v. Rutzinski*, 2001 WI 22, ¶ 13, 241 Wis. 2d 729, 623 N.W.2d 516.

"The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *State v. Tullberg*, 2014 WI 134, ¶ 29, 359 Wis. 2d 421, 857 N.W.2d 120 (citations omitted). While a warrantless search is presumptively unreasonable, a court will uphold the search if it falls within an exception to the warrant requirement. *Id.* ¶ 30.

Case law guiding the extension of traffic stops when Trooper Braun stopped Stib on February 8, 2015. Under *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748, an officer could extend a traffic stop for a canine sniff as long as the extension was reasonable, which "depends 'on a

balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Id.* ¶ 38 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)). "A seizure becomes unreasonable when the incremental liberty intrusion resulting from the investigation supersedes the public interest served by the investigation." *Arias*, 311 Wis. 2d 358, ¶ 38. An otherwise lawful stop could become unconstitutionally continued if the extension of the time needed to satisfy the original concern that prompted the stop became unreasonable or the means used to continue the seizures became unreasonable. *Id.*

In *Arias*, the supreme court observed that the public interest in preventing the distribution of illegal drugs "has long been recognized as significant." *Arias*, 311 Wis. 2d 358, ¶ 39 (citation omitted). The use of drug dogs furthers the public's interest in locating drugs that officers might not otherwise detect. *Id.* Therefore, the supreme court concluded that the public's interest served through a dog sniff outweighed any incremental intrusion on the car's occupants and was constitutionally reasonable. *Id.* ¶ 40.

The law after United States Supreme Court decided Rodriguez v. United States on April 21, 2015. In *Rodriguez*, the U.S. Supreme Court held that officers may not routinely extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff. *Rodriguez,* 135 S. Ct. at 1612, 1615. "[T]he 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 and attend to related safety concerns." *Id.* at 1614. The stop may last no longer than necessary to effectuate the purpose of the traffic stop, i.e., addressing the infraction that is the purpose of the stop. *Id.*

The "mission" of the traffic stop includes "ordinary inquiries" such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id*. at 1615 (citation omitted). In addition, because an officer's safety interest stems from the mission of a traffic stop, an officer may take "certain negligibly burdensome precautions" to safely complete the mission. *Id*. at 1616. An on-scene investigation into other crimes detours from the traffic stop's mission. *Id*. at 1616. Because a dog sniff is aimed at detecting evidence of ordinary criminal wrongdoing, it is not an ordinary incident of a traffic stop and is not "fairly characterized as part of the officer's traffic mission." *Id*. at 1615.

The officer's authority to seize an individual "ends when tasks tied to the traffic infraction are—*or reasonably should have been*—completed." *Id*. at 1614. Said another way, "[t]he 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. An officer may detain an individual beyond the time needed to complete the traffic infraction investigation only if the officer has reasonable suspicion that other criminal activity is afoot. *Id*. at 1616–17; *see also State v. Hogan*, 2015 WI 76, ¶ 35, 364 Wis. 2d 167, 868 N.W.2d 124.

The good faith exception to the exclusionary rule. When the State obtains evidence in violation of a person's Fourth Amendment rights, the exclusionary rule usually precludes its use in a criminal proceeding. *Illinois v. Krull*, 480 U.S. 340, 347 (1987). Courts do not apply the exclusionary rule "when the officers conducting an illegal search 'acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.'" *State v. Dearborn*, 2010 WI

84, ¶ 33, 327 Wis. 2d 252, 786 N.W.2d 97. Accordingly, the exclusionary rule does not apply in situations "where the officers relied in good faith on clear and settled law that was only subsequently changed." *Id*. ¶ 34.

This Court recently recognized that *Rodriguez* fundamentally changed the law established in *Arias*. Since *Rodriguez*, this Court has applied the good-faith exception and relied on *Arias* to assess the reasonableness of a pre-*Rodriguez* stop that involved a prolonged traffic stop for the purpose of a canine sniff. *State v. Downer Jossi*, No. 2016AP618-CR, 2016WL4443410 (Wis. Ct. App. Aug. 24, 2016) (unpublished). (R-App. 101–102.)

B. Trooper Braun acted reasonably under the prevailing legal standards when he briefly prolonged the traffic stop for the purpose of a dog sniff of the car.

1. Under *Rodriguez* a traffic stop cannot be prolonged to conduct the dog sniff.

The circuit court determined that Stib's case did not fall under *Rodriguez* because Braun did not prolong the stop for the purpose of conducting a dog search. (R. 57:12.) Based on the State's review of *Rodriguez* and its application to the facts, the State disagrees with the circuit court's conclusion.[3] The State does not concede that *Rodriguez* applies to Stib's case, but if it does, then the record does not support the circuit court's reasoning.

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[3] A party's concession of law does not bind this Court's determination of the issue. *Bergmann v. McCaughtry*, 211 Wis. 2d 1, 7, 564 N.W.2d 712 (1997). Accordingly, the State explains why it concedes that Trooper Braun's actions would not be deemed reasonable if *Rodriguez* applied to Stib's case.

Braun stopped Mertes's car for speeding. (R. 55:12.) Braun did not observe evidence of illegal or otherwise strange behavior when he made contact with the car's occupants. (R. 55:13–14.) Nothing in Braun's initial contact gave him any reason to suspect that there were drugs in the car. (R. 55:14.) Based on this record, Braun did not have reasonable suspicion to suspect some other criminal activity that would justify prolonging the traffic stop for another lawful investigatory purpose.

Absent reasonable suspicion of other criminal activity, *Rodriguez*, if applicable to Stib's case, would have required Braun to continue the stop for the purpose of completing its original mission of addressing the traffic violation and attending to any related safety concerns. *Rodriguez*, 135 S.Ct. at 1614. As part of this mission, Braun could take the time necessary to complete the stop by "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id*. at 1615 (citation omitted).

Here, the circuit court concluded that Braun did not prolong the traffic stop because he had not completed the actual traffic citation process by serving the citation, returning the driver's license, and allowing the car's occupants to go on their way. (R. 57:11–12.) But under *Rodriguez*, the circuit court should not have been concerned with whether the sniff occurred before Braun completed issuing the citations. Rather, the circuit court should have focused on whether the sniff delayed completion of the traffic stop. *Rodriguez,* 135 S.Ct. at 1616. And the record here suggests that the canine sniff took Braun's attention from completing the traffic stop, potentially adding time to the stop.

By the time Officer Emmerich and Jake arrived, Braun had finished preparing the speeding citation, but had not completed the warning for a cracked windshield. (R. 55:7; 61:7.) After briefly explaining the situation to Emmerich, Braun did not immediately return to completing his duties associated with the traffic stop. Instead, Emmerich asked Braun to remove the driver and passengers from the car. Emmerich proceeded with the canine sniff only after Braun had removed each occupant from the car one at a time and frisked them. (R. 55:7–8.) Approximately four minutes and forty seconds, from 21:17:58 to 21:22:40, lapsed between Braun's initial contact with Emmerich and Jake's alert on the car.[4] (R. 21, Ex. 2; 56:8, 14.) During this time, Braun was focused on the canine search, a detour associated with ordinary criminal wrongdoing rather than the task of his traffic mission. *Rodriguez*, 135 S.Ct. at 1615.

2. Under the good faith exception to the exclusionary rule, Braun reasonably prolonged the stop under *Arias*, which was the controlling decision when Braun stopped Stib.

Braun's delay in completing the traffic mission does not require suppression here because his actions were constitutionally reasonable under settled law at the time of the stop. The Supreme Court decided *Rodriguez* on April 21, 2015, over two months after Braun seized Stib on February

[4] Jake's sniff of the car's exterior in the gas station parking lot does not constitute a search. *See State v. Arias*, 2008 WI 84, ¶ 3, 311 Wis. 2d 358, 752 N.W.2d 748. Jake's positive alert established probable cause to search the car. *See State v. Miller*, 2002 WI App 150, ¶¶ 13–14, 256 Wis. 2d 80, 647 N.W.2d 348. The alert justified an investigatory detention of the car's occupants, including Stib, for the purpose of determining whether any of them had committed or was committing a drug offense.

8, 2015. (R. 1:1.) *Rodriguez*, 135 S.Ct. at 1609. Under *Arias*, which was the law when Braun seized Stib, Braun was authorized to briefly prolong a traffic stop for the purpose of conducting a dog sniff. The time between Emmerich's and Jake's arrival and Jake's alert, approximately 4 minutes and 40 seconds, was three minutes longer than the 78-second extension upheld as reasonable in *Arias*. *Arias*, 311 Wis. 2d 358, ¶¶ 3, 38. But the delay for conducting the sniff in Stib's case still falls within the time frame that other appellate courts upheld before the Supreme Court decided *Rodriguez*.

For example, in *Rodriguez*, the Eighth Circuit characterized the seven- to eight-minute delay to deploy a dog as "a *de minimis* intrusion on Rodriguez's personal liberty." *United States v. Rodriguez*, 741 F.3d 905, 907–08 (8th Cir. 2014) (citation omitted), *vacated and remanded*, 135 S. Ct. 1609 (2015). The Eighth Circuit noted that this delay was "similar to delay that we have found to be reasonable in other circumstances." *Id*. at 907; *see also United States v. Englehart*, 811 F.3d 1034, 1041 (8th Cir. 2016) (citing pre-*Rodriguez* cases that upheld seizures less than ten minutes as *de minimis* intrusions that were not unreasonable even without reasonable suspicion). In *United States v. Harrison*, 606 F.3d 42, 45 (2d Cir. 2010), the Second Circuit noted that traffic stops prolonged for more than five to six minutes without additional reasonable suspicion "have been deemed tolerable." *Id*. (and cases cited therein).

Less than five minutes elapsed between the time when Braun and Emmerich first spoke to each other at 21:17:58 and Jake's alert at 21:22:40. (R. 21, Ex. 2). Braun explained the reason for the stop to Emmerich, who then asked Braun to remove the car's occupants before conducting the dog sniff. This conversation between Braun and Emmerich lasted less than 30 seconds, between 21:17:58 and 21:18:25. (R. 21, Ex. 2).

Braun took approximately three and a half minutes, between 21:18:36 and 21:22:04, to remove each occupant of the car and frisk them. (R. 21, Ex. 2). The Supreme Court has recognized the safety risks inherent in traffic stops and has upheld the authority of officers to remove the car's occupants without additional justification during a traffic stop. *See Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997). Braun's actions in removing the occupants from the car were constitutionally reasonable under *Wilson*.

Stib contends that Braun's radio request for canine units also prolonged the stop. (Stib's Br. 13.) Braun stated that it took no more than two minutes to locate a canine officer. (R. 55:7.) Later he testified that it took "maybe a little over a minute." (R. 61:9.)[5] While Braun was making radio calls for a drug dog, he was also receiving returns through his computer for record checks that he had previously run related to the driver and the car. (R. 61:9–10.) While Braun waited for the canine officer, he completed and printed out the citation for speeding. (R. 55:7; 61:7.) The circuit court found that Braun was "multitasking." (R. 61:12.) Braun was engaged in a variety of tasks when he asked for the canine unit. His request for a canine unit did not unreasonably extend the stop.

Finally, according to Braun, it takes between 10 and 15 minutes to issue a traffic ticket during a typical traffic stop. (R. 55:11.) The stop occurred at 21:08:02. (R. 21, Ex. 2.) Jake's barking, which indicated an alert and provided a separate grounds to continue the seizure, occurred at 21:22:40, just within the time frame of a typical traffic stop. (R. 21, Ex. 2.) Braun's extension of the traffic stop to conduct

[5] The squad video reflects that Braun made the call for a drug dog at 21:12:36. (R. 21, Ex. 2.) That conversation is fairly brief. It is not clear whether it was his first or second request.

a dog sniff was a *de minimis* intrusion on Stib's liberty. The intrusion did "not outweigh the public interest served by it; therefore, the incremental intrusion occasioned by the dog sniff satisfies [the] test for reasonableness." *Arias*, 311 Wis. 2d 358, ¶ 47.

3. This Court may remand the case for additional fact-finding for the purpose of assessing whether good faith applies.

The circuit court determined that Braun's conduct did not prolong the stop. It did not consider whether Braun's conduct was unreasonable if, in fact, his actions prolonged the stop beyond its original mission. Assuming that his actions did and that this Court concludes that it should assess the reasonableness of Braun's actions under *Arias*, the State believes that the record supports application of the good faith doctrine and a finding that Braun's conduct was reasonable. But if this Court believes that the record is inadequate to make this determination, it may remand the matter for additional fact-finding for the purpose of how long Braun's actions actually prolonged the stop and whether it was constitutionally reasonable under *Arias*. *See e.g. State v. Marquardt*, 2001 WI App 219, ¶¶ 22–23, 247 Wis. 2d 765, 635 N.W.2d 188 (court remanding case to circuit court to determine whether the good faith exception applies when the trial court had not addressed that issue). [6]

[6] Based on the record, the State does not suggest that Braun had reasonable suspicion apart from the traffic violation and before Jake's alert to detain the car's occupants. While Mertes' jerky driving concerned Braun (R. 55:5), Braun did not observe illegal or odd behavior in the car during his initial contact with its occupants. Nothing during his initial encounter gave him any reason to suspect drugs were in the car. (R. 55:13–14.) Emmerich noted that Stib, who was in the front passenger seat, was moving

II. While suppression is generally the remedy for an unconstitutional seizure, plea withdrawal is permitted only if the circuit court's decision denying the motion to suppress was not harmless.

Should this Court reverse the circuit court's decision and judgment, Stib asks that this Court "order that he be permitted to withdraw his guilty pleas[.]" (Stib's Br. 17.) A decision from this Court directing the circuit court to grant Stib's motion to suppress does not automatically entitle Stib to plea withdrawal. "In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction." *State v. Semrau*, 2000 WI 54, ¶ 22, 233 Wis. 2d 508, 608 N.W.2d 376. Said another way, the question is whether there is a "reasonable probability that, but for the trial court's failure to suppress the disputed evidence, [the defendant] would have refused to plead and would have insisted on going to trial." *Id*. ¶ 26.

If this Court concludes that the circuit court erred when it denied Stib's motion to suppress evidence, the remedy is to remand the case to the circuit court to enter an order granting his motion to suppress evidence. The circuit court may then entertain a motion from Stib to withdraw his guilty plea. The circuit court should grant plea withdrawal only if the State cannot meet its burden of demonstrating that the circuit court's error in refusing to suppress error

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around in the car, "looking back at us like he was worried about what we were doing." (R. 56:7.) Emmerich could not see what Stib was doing with his hands. (R. 56:7.) While this point was not otherwise developed in the record and the circuit court expressly declined to consider it (R. 57:12), this may be a factor in assessing the reasonableness of the officers' actions should this Court decide to remand the matter.

was harmless, guided by the factors this Court identified in *Semrau*. *Id.* ¶ 22.[7] This Court should decide the suppression question only and leave the matter of plea withdrawal to the circuit court on remand, if needed.

CONCLUSION

Based on the above reasons, the State respectfully asks that this Court affirm Stib's judgment of conviction.

Dated this 6th day of June, 2017.

Respectfully submitted,

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[7] Here, Stib pled to both receiving stolen property, i.e., the firearm, and resisting or obstructing an officer. While an order suppressing evidence directly impacts Stib's conviction for receiving stolen property, it has, at best, marginal impact on his conviction for resisting or obstructing Braun. Stib had no right to resist a potentially unlawful arrest by fleeing in the absence of excessive force. *State v. Hobson*, 218 Wis. 2d 350, 379–80, 577 N.W.2d 825 (1998).

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 4,901 words.

Dated this 6th day of June, 2017.

_____
DONALD V. LATORRACA
Assistant Attorney General

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 6th day of June, 2017.

_____
DONALD V. LATORRACA
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. James R. Stib
Case No. 2017AP0003-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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DONALD V. LATORRACA
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 6th day of June, 2017.

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DONALD V. LATORRACA
Assistant Attorney General