STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2017AP000003-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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Police Violated Stib's Fourth Amendment Rights by Unlawfully Prolonging the Traffic Stop for Purposes of Conducting a Dog Sniff; this Court Should Therefore Reverse the Circuit Court's Order Denying Stib's Motion to Suppress.

The State concedes that the circuit court erred in concluding that Trooper Brendan Braun did not prolong the traffic stop for purposes of conducting a dog sniff. (State's Resp. Br. at 11-13). The State also concedes that Braun did not have reasonable suspicion of any criminal activity that would have justified prolonging the stop to investigate matters unrelated to the original justification for the stop. (*Id.* at 12).

In other words, the State concedes that Braun violated James Stib's Fourth Amendment rights as established by current United States Supreme Court precedent. As the State acknowledges, in ***Rodriguez v. United States***, __ U.S. __, 135 S. Ct. 1609 (2015), the Supreme Court held that police may not—absent reasonable suspicion—extend a routine traffic stop for purposes of conducting a dog sniff.[1] (State's Resp. Br. at 9-10).

The State, however, insists that Braun's unconstitutional actions do not require suppression. It argues that the good faith exception should prelude application of the exclusionary rule here because, in its view, Braun's actions

[1] Pursuant to the retroactivity rule, the Supreme Court's decision in ***Rodriguez*** applies in this case even though it was decided after the stop occurred. *See* ***State v. Dearborn***, 2010 WI 84, ¶ 31, 327 Wis. 2d 252, 786 N.W.2d 97 (stating that the retroactivity rule provides that newly declared constitutional rules must apply to all similar cases pending on direct review).

were consistent with clear and settled Wisconsin precedent existing at the time of the stop, namely, ***State v. Arias***, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748. According to the State, ***Rodriguez***, which was decided approximately two months after the stop in this case, fundamentally change the law that had previously existed in Wisconsin under ***Arias***. (State's Resp. Br. at 13-16).

When an unconstitutional search occurs, the typical judicial remedy is the exclusion (or suppression) of the evidence obtained as a result of the search. ***State v. Dearborn***, 2010 WI 84, ¶ 15, 311 Wis. 2d 252, 786 N.W.2d 97. However, an exception to the exclusionary rule exists "when the officers conducting an illegal search 'acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.'" ***Id.***, ¶ 33 (quoting ***United States v. Leon***, 468 U.S. 897, 918 (1984)). This "good faith exception" applies "where the officers relied in good faith on clear and settled law that was only subsequently changed." ***Id.***, ¶ 34. In other words, "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." ***Davis v. United States***, 564 U.S. 229 (2011).

As an initial matter, Stib asserts that the State has forfeited its right to raise a good faith defense because it failed to raise this argument before the circuit court. At the circuit court level, the State never once claimed that Braun's conduct was justified based a good faith reliance on ***Arias*** or any other pre-***Rodriguez*** case. Instead, it claimed Braun's conduct was justified because he had reasonable suspicion to extend the stop due the car's "jerking motion" before it stopped and because of Stib's alleged "furtive movements" in the car after Officer Brian Emmerich arrived on scene. (57:5-6, 9-10; App. 146-48, 151-52).

This court generally does not consider arguments raised for the first time on appeal, and it should refuse to consider the State's good faith argument in this case. *See, e.g.,* ***City of Madison v. State Dept. of Health Services***, 2017 WI App 25, ¶ 20, 375 Wis.2d 203, 895 N.W.2d 844 (arguments not raised in the circuit court are forfeited on appeal.); ***State v. Keith***, 216 Wis. 2d 61, 80, 573 N.W.2d 888 (Ct. App. 1997) (same). The good faith doctrine, like the inevitable discovery rule, is a specific exception to the exclusionary rule, and it is incumbent on the State to affirmatively and timely assert this defense. Had the State timely asserted its good faith defense before the circuit court, then its current request for this court to remand the case for additional fact-finding would be entirely unnecessary. (*See* State's Resp. Br. at 16). By raising this argument for the first time on appeal, the State has created the risk of needlessly wasting judicial time and resources. This court should therefore rule that the State has forfeited its right to raise a good faith argument.

However, even if this court chooses to consider the State's good faith defense on the merits, the defense fails for two reasons. First, at the time of the traffic stop in this case, ***Arias***'s reasoning and holding had already been seriously called into question by ***Arizona v. Johnson***, 555 U.S. 323 (2009), a case which the United States Supreme Court decided just six months after ***Arias***. ***Arias*** was thus no longer "clear and settled law" at the time of the stop in this case. The good faith exception therefore does not apply. *See* ***Dearborn***, 327 Wis. 2d 252, ¶¶ 4, 46. (The good faith exception applies only when police "conduct a search in objectively reasonable reliance upon *clear and settled* Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court.") (emphasis added).

In ***Arias***, the Wisconsin Supreme Court held that a seventy-eight second extension of a traffic stop for a dog sniff was not an unreasonable incremental intrusion upon the defendant's liberty. 311 Wis. 2d 358, ¶ 47. The court reasoned 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 become unreasonable, both of which are evaluated under the totality of the circumstances presented." ***Id.***, ¶ 38. Reasonableness, according to the court, "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" ***Id.*** "A seizure becomes unreasonable when the incremental liberty intrusion resulting from investigation supersedes the public interest served by the investigation." ***Id.***

In considering the totality of the circumstances, the court in ***Arias*** examined three factors: (1) the public interest; (2) the degree to which the continued seizure advances the public interest; and (3) the severity of the interference of the defendant's liberty interest. ***Id.***, ¶ 39. With respect to the public interest, the court stated that "'prevent[ing] the flow of narcotics into distribution channels' has long been recognized as significant." ***Id.*** (quoting ***United States v. Place***, 462 U.S. 696, 704 (1983)). The court also noted that "[t]he use of a narcotics sniffing dog furthers this public interest by locating narcotics that may not otherwise be detected." ***Id.*** Finally, with regard to the severity of the interference with the defendant's liberty interest, the court observed that the dog sniff in that case was part of an on-going traffic stop, was relatively brief (only seventy-eight seconds), the defendant was not taken to a non-public location, and he remained seated in the vehicle while the search was conducted. ***Id.***,

¶¶ 39-40. The court therefore concluded "that the incremental intrusion upon Arias's liberty interest that resulted from the 78-second dog sniff [was] outweighed by the public interest." ***Id.***, ¶ 40.

Accordingly, ***Arias*** stands for the limited proposition that a seventy-eight second extension of a traffic stop for purposes of a dog sniff, under the facts presented in that case, is not an unreasonable incremental intrusion upon Fourth Amendment liberty.

However, even before ***Rodriguez*** was decided, ***Arias***'s holding was significantly undercut by ***Johnson***. In ***Johnson***, the Supreme Court considered the authority of police officers to "stop and frisk" a passenger in a vehicle temporarily seized for a traffic violation. 555 U.S. at 326. The lower state appellate court in that case had concluded that Johnson—who was a passenger—had been lawfully seized when the officers stopped the car. ***Id.*** at 329. During the stop, however, one of the officers asked Johnson to step out of the car so she could question him about suspected gang involvement. When Johnson got out of the car, the officer then patted him down for safety concerns. ***Id.*** at 328. The lower court concluded that, prior to the frisk, the detention had "evolved into a separate, consensual encounter stemming from an unrelated investigation by the officer into Johnson's possible gang affiliation." ***Id.*** at 329. The court therefore held that absent reasonable suspicion to believe Johnson was involved in criminal activity, the officer had no right to pat him down for weapons, even if she had reason to suspect he was armed and dangerous. ***Id.***

The Supreme Court reversed, issuing the following holding:

> Accordingly, we hold that, in a traffic-stop setting, the first ***Terry*** condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.

Id. at 327.

The Court also clarified that "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, *so long as those inquiries do not measurably extend the duration of the stop*." ***Id.*** at 333. This language establishes that a routine traffic stop remains lawful only so long as unrelated inquiries do not "measurably extend" the stop.

A dog sniff certainly qualifies as a matter unrelated to the justification of a stop for a routine traffic violation. Pursuant to ***Johnson***'s reasoning, a dog sniff is therefore unlawful if it measurably extends a traffic stop. Indeed, ***Rodriguez*** cited ***Johnson*** as support for its holding in this respect. *See* ***Rodriguez***, 135 S. Ct. at 1614-15.

Accordingly, ***Johnson*** seriously called into question ***Arias***'s conclusion that police can extend a traffic stop to conduct a dog sniff so long as the extension is incremental

and reasonable under the totality of the circumstances. According to ***Johnson***, the question is not whether the unrelated inquiry is incremental and/or reasonable, but simply whether it measurably extends the stop. As a result, after ***Johnson***, ***Arias*** could no longer be considered "clear and settled" law in Wisconsin. Braun was therefore not justified in relying on ***Arias*** as a basis for extending the traffic stop. The good faith exception is thus inapplicable here.[2]

The second reasons why the good faith exception is inapplicable here is because ***Arias***—even assuming it was still clear and settled law—does not constitute "binding appellate precedent" with respect to the facts of this particular case. *See* ***Davis***, 564 U.S. at 231. (the good faith exception applies when a search is "conducted in objectively reasonable reliance on binding appellate precedent"). Again, ***Arias***'s holding is limited. In that case, the Wisconsin Supreme Court simply concluded that a seventy-eight second extension of a traffic stop for a dog sniff, under the totality of the circumstances of that case, was not an unreasonable incremental intrusion on Fourth Amendment liberty. 311 Wis. 2d 358, ¶ 47.

The facts of this case, however, are different from ***Arias*** in significant respects. For starters, the dog sniff itself in this case extended the traffic stop by at least four minutes and forty seconds (State's Resp. Br. at 13), not to mention the

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[2] The State points out that in ***State v. Downer Jossi***, No. 2016AP618-CR, 2016WL4443410 (Wis. Ct. App. Aug. 24, 2016), this court held that ***Rodriguez*** fundamentally changed the law established in ***Arias***. (State's Resp. Br. at 11). ***Downer Jossi*** was an unpublished decision, however. It is therefore not binding on this court. Wis. Stat. § 809.23(3)(b). Furthermore, the court in ***Downer Jossi*** did not consider whether ***Johnson*** had already undercut ***Arias***'s holding. ***Downer Jossi*** is thus not persuasive and this court should not follow it.

one to two minutes Braun took to call for a canine unit. (55:7; 61:9; App. 107, 166). This is significantly longer than the seventy-eight seconds in ***Arias***. Additionally, unlike the defendant in ***Arias***, Stib was forced to exit the vehicle for purposes of the dog sniff, and to do so during February weather in Wisconsin. (21, Ex. 2 at 21:17:55 to 21:23:07). He was also forced to submit to a pat-down, even though Braun lacked reasonable suspicion to believe that Stib had committed a crime or that he was otherwise armed and dangerous. Given these facts, the dog sniff in this case was an unreasonable intrusion on Stib's liberty.

But more to the point, ***Arias*** simply does not constitute clear and settled precedent regarding whether a dog sniff is reasonable under these circumstances. Again, the Wisconsin Supreme Court has held that the good faith exception only applies "when the officer reasonably relies on clear and settled precedent." ***Dearborn***, 327 Wis. 2d 252, ¶ 46. It does not apply "where neither [the Wisconsin Supreme Court] nor the United States Supreme Court have spoken with specificity in a particular fact situation." ***Id.***

The State points out that two federal circuit courts have held that delays of more than five minutes constituted *de minimis* intrusions on personal liberty. (State's Resp. Br. at 14 (citing ***United States v. Rodriguez***, 741 F.3d 905, 907-08 (8th Cir. 2014) (seven to eight minute delay), *vacated and remanded*, 135 S. Ct. 1609 (2015); ***United States v. Englehart***, 811 F.3d 1034, 1041 (8th Cir. 2016) (citing pre-***Rodriguez*** cases from the Eighth Circuit upholding seizures that were less than ten minutes); ***United States v. Harrison***, 606 F.3d 42, 45 (2d Cir. 2010) (five to six minute delay)).

These case, however, are not binding appellate precedent in Wisconsin. *See* ***State v. Mechtel***, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993) ("determinations on federal questions by either the federal circuit courts of appeal or the federal district courts are not binding upon state courts") (internal citations omitted). Braun therefore could not have reasonably relied on these cases as "binding appellate precedent."

The State also points out that police have the authority to remove a car's occupants during a traffic stop without additional justification. (State's Resp. Br. at 15 (citing ***Maryland v. Wilson***, 519 U.S. 408, 414-15 (1997)). As the State recognizes, however, this authority stems from the mission of the traffic stop itself, as traffic stops are inherently risky for police officers. (State's Resp. Br. at 15); *see also* ***Rodriguez***, 135 S. Ct. at 1616. "On-scene investigation into other crimes, in contrast, detours from that mission. *So too do safety precautions taken in order to facilitate such detours*." ***Id.*** (emphasis added).

In this case, Braun had Stib and the other occupants exit the vehicle, not as part of the mission of the original traffic stop, but simply to facilitate the dog sniff. (55:8; App. 108). Because Braun's command to exit the vehicle was part-and-parcel to a dog sniff that was unrelated to the mission of the traffic stop, it was also part of the intrusion on Stib's liberty caused by the dog sniff. Braun's command to exit the vehicle, as well as his baseless pat down of Stib, therefore further distinguishes this case from ***Arias***.

Consequently, Braun did not act in good faith, reasonable reliance on clear and settled appellate precedent when he prolonged the traffic stop for purposes of conducting a dog sniff. This court should therefore reverse the decision

of the circuit court and order the suppression of all evidence obtained as a result of the unlawful traffic stop.

This court should also order that Stib be permitted to withdraw his guilty pleas. As the State acknowledges, an order suppressing the evidence obtained as a result of the stop would directly impact Stib's conviction for concealing a stolen firearm. (State's Resp. Br. at 18 n.7). Without the unlawfully obtain gun, there would have been no evidence to support this charge, and the charge would necessarily have been dismissed. The circuit court's error in denying the suppression motion was therefore not harmless.

The State asserts that suppression would have only a marginal impact on Stib's conviction for resisting or obstructing an officer. (*Id.*) However, even if this is true, Stib's plea to this charge was part of a larger plea agreement, the purpose of which was to resolve the entire case. Denying plea withdrawal for only this charge would frustrate the purpose of the entire agreement. Stib should therefore be permitted to withdraw his pleas to both counts and the original information should be reinstated to restore the parties to their pre-plea agreement positions. *See* ***State v. Robinson***, 2002 WI 9, ¶ 31, 249 Wis. 2d 553, 638 N.W.2d 564 *abrogated on other grounds*, ***State v. Kelly***, 2006 WI 101, ¶ 39, 294 Wis. 2d 62, 716 N.W.2s 886; *see also* ***State v. Briggs***, 218 Wis. 2d 61, 73-74, 579 N.W.2d 783 (Ct. App. 1998).

CONCLUSION

For these reasons, James Stib respectfully requests that this court reverse the decision and judgment of the circuit court, order that he be permitted to withdraw his guilty pleas, order the evidence obtained as a result of the unlawful traffic stop to be suppressed, and remand the case to the circuit court for further proceedings.

Dated this 11th day of July 2017.

Respectfully submitted,

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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 2,918 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 11th day of July 2017.

Signed:

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