STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP774-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COURTNEY C. BROWN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE FOND DU LAC COUNTY CIRCUIT COURT, THE HONORABLE DALE ENGLISH, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Officer Deering have reasonable suspicion of drug activity when he asked Brown for permission to search his person?

The trial court answered this question yes.

This Court should answer this question yes.

2. Was Officer Deering's asking for permission to search Brown's person, if there was no reasonable suspicion of drug activity, a permissible extension of the original traffic stop?

This issue was not raised at the trial court.

If this Court addresses this issue, this Court should answer this question yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying well established law to the facts.

INTRODUCTION

After lawfully stopping Brown for a traffic violation, Officer Deering suspected that Brown was engaging in illegal drug activity. Deering's suspicions were fueled by Brown's driving from Milwaukee in a rental car at 2:44 a.m. in a cul-de-sac of closed business establishments, Brown's inadequate explanation of why he was there, and Brown's history of prior drug convictions.

While issuing Brown a warning for wearing no seat belt, Officer Deering asked Brown if he had anything on him Deering should be aware of, and Brown stated no. Then

Brown consented to a search of his person.[1] The trial court properly concluded that Officer Deering had sufficient reasonable suspicion of drug activity to ask Brown if he had something on him and to ask for permission to search him.

Though not raised at the suppression motion, the very short time it took Officer Deering to ask Brown about whether he was carrying something the officer should know about, and to ask for consent to search, did not improperly extend the traffic stop.

STATEMENT OF THE CASE

Officer Christopher Deering, a four year veteran of the Fond du Lac Police Department trained in drug enforcement, was on duty at approximately 2:44 a.m. on August 23, 2013. (R. 64:9–10.) Officer Deering observed a vehicle coming from a dead end cul-de-sac of closed business establishments. (R. 64:10.) Deering's suspicions were raised by this observation and so he ran a records check of the vehicle, which showed to be a rental car. (R. 64:11.) Deering followed the vehicle and observed that it did not properly stop at a stop sign. (*Id.*) After observing the traffic violation, Deering stopped the vehicle. (*Id.*)

Deering made contact with the driver who identified himself as Courtney Brown, and Deering further observed that Brown was not wearing a seat belt. (R. 64:11–12.) Brown told Officer Deering that he was coming directly from the Speedway gas station, which did not match Deering's

[1] At the motion hearing Officer Deering testified that Brown consented to the search. (R. 64:18.) Brown also testified at the motion hearing and denied consenting. (R. 64:49.) The trial court held the consent issue in abeyance, but Brown does not raise the consent issue on appeal, thus in effect waiving it. *See A.O. Smith Corp. v. Allstate Ins. Co.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (holding that an issue raised in the trial court, but not raised on appeal is deemed abandoned).

observation of Brown's coming from a dead end cul-de-sac surrounded by closed businesses. (R. 64:12.) Brown further advised that he was in Fond du Lac visiting his girlfriend but he did not know her last name or her address. (R. 64:14.) Brown also told Deering that he was from Milwaukee. (R. 64:19.) After getting this information Deering went back to his squad to write a warning for the no seat belt violation, and to check on Brown's record. During this records check, Deering discovered that Brown had many drug arrests and had been convicted of possession with intent to distribute cocaine, and armed robbery. (R. 64:17, 30.) Deering was suspicious of Brown because he was driving a rental car, was not from Fond du Lac but from Milwaukee, had first been seen in a dead end cul-de-sac surrounded by closed businesses, was not forthcoming about where he had come from immediately prior to the stop, and had a prior record for possession of cocaine with the intent to deliver and possession of marijuana. (R. 64:30–32.) Based on these suspicious factors Deering decided to ask Brown for permission to search his person. (R. 64:40.)

When Deering returned to Brown's vehicle he asked Brown to step out of his vehicle and Brown complied. (R. 64:17.) Deering and Brown walked to the back of Brown's car and at that time Deering asked Brown if he had anything on him that Deering should know about and Brown said no. Then Deering asked for permission to search Brown and, after Brown consented, Deering searched Brown and found 13 bags of crack cocaine and approximately $500 in cash. (R. 64:18.)

On November 15, 2013, Brown was charged as a repeater in a criminal information with one count of possession with the intent to deliver cocaine. (R. 9:1.) On September 28, 2015, Brown filed a motion to suppress evidence alleging that he was illegally stopped by Officer Deering. (R. 22.) The motion was heard on February 8, 2016, and at the conclusion of testimony the Court denied Brown's

motion finding that there was sufficient reasonable suspicion for the traffic stop. (R. 63.) Brown does not appeal this ruling.

On June 16, 2016, Brown filed a motion to suppress evidence alleging that Officer Deering unlawfully prolonged the traffic stop beyond the purpose of the initial stop when he asked for consent to search Brown. (R. 33.) A hearing was conducted on this motion on July 5, 2016, and at the conclusion of testimony the Court denied Brown's motion, holding that Officer Deering had sufficient reasonable suspicion of drug activity to legally justify the extension of the traffic stop to ask Brown if he had anything on his person and to ask for permission to search Brown's person. (R. 64.) It is this ruling, which is the basis for Brown's appeal.

Brown entered a no contest plea, while preserving his appellate rights, and on October 26, 2016, a judgment of conviction for one count of possession with the intent to deliver cocaine was filed. (R. 42.) Brown was sentenced on this charge to two years of initial confinement followed by two years of extended supervision. (*Id.*) Brown appeals this conviction.

SUMMARY OF ARGUMENT

Having properly stopped Brown's vehicle, Officer Deering had ample reasons to formulate a reasonable suspicion that Brown was engaging in illegal drug activity. These reasons included: (1) Brown was observed at 2:44 a.m. in Fond du Lac driving in a dead end cul-de-sac surrounded by closed businesses, (2) Brown was driving in a rental car and advised that he had come from Milwaukee, (3) Brown was untruthful about his most recent route of travel and murky about details surrounding his claim that he was visiting a girlfriend, and (4) Brown had a prior conviction for possession of cocaine with the intent to deliver. Based on these facts, the trial court properly held that Deering was justified in extending the original traffic stop to ask Brown a question as

to what he might be carrying, and to ask Brown for consent to search. Brown then consented to a search of his person resulting in the discovery of 13 bags of crack cocaine and $500 in cash.

Brown disputes that there was reasonable suspicion for extending the traffic stop. He reaches this conclusion through a "divide and conquer" approach where he looks at each factor in isolation and dismisses each as too weak, but fails to look at the factors, as the law requires, in the aggregate. And Brown seeks support for his contention from the trial court's comments that this was a close case, which is irrelevant to the inquiry since the court did clearly hold that Deering had the requisite reasonable suspicion.

Although not discussed at the motion hearing, the State notes that asking Brown to get out of the vehicle is lawfully part of any traffic stop, and therefore the only extension to this stop was the few seconds it took to ask Brown if he had anything Deering should know about, and to ask for consent to search his person. Such an extension did not measurably extend the duration of the stop and is therefore permissible under controlling case law from the United States Supreme Court, the Wisconsin Supreme Court, and this Court. Consequently, even in the absence of reasonable suspicion of drug activity, the request for consent to search Brown did not unlawfully extend the original traffic stop and the subsequent search and discovery of the evidence was lawful.

STANDARD OF REVIEW

Whether or not evidence should be suppressed is a question of constitutional fact, where the circuit court's factual findings are evaluated under the clearly erroneous standard, but the circuit court's application of the historical facts to constitutional principles is reviewed de novo. *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560.

ARGUMENT

I. The circuit court correctly denied Brown's motion to suppress, finding that Officer Deering had the requisite reasonable suspicion of drug activity to ask Brown whether he had something on him, and to request for consent to search.

A. Controlling legal principles.

A law enforcement officer is justified in detaining a subject if the officer has suspicion, grounded in specific articulable facts and the reasonable inferences from those facts, that the individual has committed a crime. *State v. Malone*, 2004 WI 108, ¶ 35, 274 Wis. 2d 540, 683 N.W.2d 1. All the relevant factors are reviewed in the aggregate to determine if they constitute the requisite reasonable suspicion for a detention. *State v. Allen*, 226 Wis. 2d 66, 75, 593 N.W.2d 504 (Ct. App. 1999). Reasonable suspicion exists, if under the totality of the circumstances, the facts would warrant a reasonable police officer, in light of his training and experience, to reasonably suspect that a person has committed, was committing, or is about to commit a crime. *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634.

Any one fact standing alone might not constitute reasonable suspicion, but that is not the test; the test is whether the totality of the facts taken together and the reasonable inferences about their cumulative effect, give rise to reasonable suspicion. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). In evaluating the factors in a reasonable suspicion calculus, the sum of the whole is greater than the sum of its individual parts. *Id.* The police are not required to rule out the possibility of innocent behavior in the formulation of reasonable suspicion. *Id.* at 58–59.

Vagueness and lying in the explanation of where an individual had been coming from when stopped is a factor pointing to reasonable suspicion. *Malone*, 274 Wis. 2d 540, ¶ 37. A suspect's inadequate explanation for conduct is a legitimate factor in a reasonable suspicion analysis. *State v. Betow*, 226 Wis. 2d 90, 97, 593 N.W.2d 499 (Ct. App. 1999).

A suspect's prior criminal history is a legitimate factor in the formulation of suspicion of criminal activity. *State v. Lange*, 2009 WI 49, ¶ 33, 317 Wis. 2d 383, 766 N.W.2d 551. Knowledge of a subject's prior drug activity is a factor in a reasonable suspicion analysis. *State v. Gammons*, 2001 WI App 36, ¶¶ 22–23, 241 Wis. 2d 296, 625 N.W.2d 623. A police officer's training and experience is a factor in determining the reasonableness of the officer's suspicions. *Post*, 301 Wis. 2d 1, ¶ 13.

B. Officer Deering had reasonable suspicion of drug activity when he asked Brown if he had something on him that Deering should be aware of, and asked Brown for permission to search his person.

Officer Deering relied on four facts, and the inferences he drew from them, in formulating reasonable suspicion that Brown could be engaged in illegal drug activity.

1. Time and location when he first observed Brown's vehicle.

Officer Deering first observed Brown's vehicle coming from a dead end cul-de-sac of closed businesses at 2:44 a.m. (R. 64:10.) While being at a cul-de-sac, or driving at 2:44 a.m., are not by themselves particularly suspicious, in combination they raise a reasonable question of what a driver would be doing at such a spot at such a late hour. This suspicion is highlighted by the cul-de-sac being surrounded by closed businesses. To be sure, there is no case pointing to a nexus

between drug activity and cul-de-sacs or the lateness of the hour, but it is reasonable to infer that Deering's first observation of Brown's vehicle would raise curiosity, if not suspicion.

2. Brown was driving a rental car.

Officer Deering testified that after first observing Brown's vehicle at the business cul-de-sac, he ran a check on the vehicle, which showed it was a rental car. (R. 64:10–11.) Deering further testified that, based on his training related to drug enforcement, rental cars are commonly used by drug dealers. (R. 64:9, 19, 30.) Again, there is nothing by itself suspicious about driving a rental car, but when this fact is added to Brown driving from a cul-de-sac surrounded by closed businesses at 2:44 a.m., it enhances suspicion.

3. Brown was murky and deceitful about his route of travel and his reason for being at the location where he was stopped, and advised that he had come from Milwaukee.

After lawfully stopping Brown, Deering asked Brown where he was coming from and what he was doing. Brown replied that he was coming directly from the Speedway gas station when he was stopped. (R. 64:12.) This statement was untrue as Deering first observed Brown coming from a cul-de-sac of closed businesses and followed Brown's vehicle continuously from that point. (R. 64:12.) Then, Brown explained that he had come from Milwaukee to Fond du Lac to visit his girlfriend Brandy, but he did not know his girlfriend's last name, and he did not know her address. (R. 64:14, 16.) While it is possible that Brown went to the cul-de-sac as a way to change his direction, and he could be forgetful about his girlfriend's last name and never knew her actual address, these possible innocent explanations do not ameliorate the added suspicion caused by these statements

from a driver stopped at 2:44 a.m., far from his home. And obviously traveling from Milwaukee is not, by itself, suspicious. But this fact becomes suspect under the totality of the circumstances present here, as Deering testified that Milwaukee is known as a source city for drugs. (R. 64:19.)

4. Brown had a prior record of several drug arrests, and a conviction for possession of cocaine with the intent to deliver.

After stopping Brown, Deering noted that Brown was not wearing a seat belt. And after his initial contact with Brown, Deering returned to his squad to write a warning for not wearing a seatbelt and to check on Brown's record. (R. 64:17.) The record check revealed that Brown had numerous previous arrest for drugs, and that he had prior convictions for possession with the intent to distribute cocaine, and armed robbery. (*Id.*) This information was added to the reasonable suspicion mosaic, and at this time Deering determined that he was going to ask Brown for consent to search his person. (R. 64:40.)

So, Deering formulated his reasonable suspicion based on the fact that Brown was driving in a cul-de-sac of closed businesses at 2:44 a.m., that Brown was murky and untruthful about his travel motivations and travel route, was in a rental car he had driven from Milwaukee, and had a prior record of several drug arrests and a conviction for possession with the intent to deliver cocaine. While none of these facts by themselves are sufficient to show reasonable suspicion, in the composite they paint a clear picture of suspicion that Brown might be engaging in unlawful drug activity.

The question of whether or not there is reasonable suspicion of drug activity stemming from a traffic stop has been well ventilated in Wisconsin. Two cases where this Court found no reasonable suspicion are illustrative here.

In *Betow*, Betow was stopped late in the evening for speeding. *Betow*, 226 Wis. 2d at 92, 96. Betow appeared nervous and on his wallet was a picture of a mushroom. *Id.* at 92. Betow advised that he was coming from Madison, where he had dropped off a friend, and was on his way back to his home in Appleton. *Id.* at 97. The State argued reasonable suspicion based on the mushroom picture on the wallet, Betow's nervousness, Betow's traveling from Madison and the implausible nature of his claim that at a late evening hour he had dropped off a friend. *Id.* at 95–96. This Court rejected the State's claim and found no reasonable suspicion. Comparing our case to *Betow*, there are three facts in common: (1) the lateness in the evening,[2] (2) the implausible nature of what the driver was doing, and (3) both Betow and Brown had come from cities that are associated with drugs.[3]

The facts in *Betow*, not present here, were Betow's nervousness and a picture of a mushroom on Betow's wallet, which the officer testified as being a possible symbol that Betow used hallucinogens. *Id.* at 95–96. The facts that are present here, that were not present in *Betow*, were that Brown was driving a rental car, was first observed driving in a cul-de-sac of closed businesses and not on the highway, and had a prior history of drug arrests and drug convictions. Certainly the known fact that Brown had previously been involved in drugs is more probative than speculating from a picture of a mushroom, and the fact that Brown was in a

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[2] The *Betow* case does not actually state the time of the stop other than to refer to it as late in the evening. While it is unlikely that it was as late as 2:44 a.m. it is fair to conjecture that this fact is similar to what is present in this case.

[3] In *State v. Betow*, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999), the State portrayed Madison as a place where drugs can be readily obtained without any reference in the record supporting this contention. *Id.* at 97. Here, Officer Deering testified that Milwaukee is known as a source city for drugs. (R. 64:19.)

rental car off the beaten track is more telling than Betow's nervousness about being stopped by a police officer.

In *Gammons*, a vehicle was stopped for not having a rear license plate. *Gammons*, 241 Wis. 2d 296, ¶¶ 1–3. The vehicle had three occupants, including passenger Gammons. *Id.* The police developed what they felt was reasonable suspicion of drug activity because (1) the vehicle was stopped in a drug related area, (2) it was 10:00 p.m. and the vehicle was from Illinois, (3) Gammons appeared to be nervous, and (4) the occupants had a prior history of drug activity. *Id.* ¶¶ 21–23. As in *Betow*, this Court found that these factors did not establish the requisite reasonable suspicion. In comparing *Betow* to *Gammons*, this Court noted that in *Betow* the driver gave some implausible story of his whereabouts which was not present in *Gammons*, and conversely in *Gammons* there was evidence of the prior drug history of the occupants, which was not present in *Betow*. *Id.* ¶¶ 21–25. Hence, both cases fell short of reasonable suspicion as each was missing a fact present in the other.

Our case threads the needle between *Betow* and *Gammons*, as it contains each of the facts missing in those two cases: namely it has both the implausible explanation of whereabouts and the prior history of drug activity. In addition, our case involves a rental car and a vehicle not being first observed on the highway but rather in a cul-de-sac of closed businesses at 2:44 a.m. In our case there are more suspicious inferences that can be reasonably drawn based on the totality of the circumstances and thus this Court finding reasonable suspicion would not conflict with its findings in *Betow* and *Gammons*.

This Court's recent decision in *State v. Floyd*, 2016 WI App 64, 371 Wis. 2d 404, 885 N.W.2d 156, where this Court found reasonable suspicion on facts no more compelling than

those present here is also instructive.[4] In *Floyd*, the officer's formulation of reasonable suspicion of drug activity was based on (1) air fresheners in every vent of the vehicle as well as the rear view mirror, (2) the stop was in a high crime area, and (3) Floyd's car had tinted windows. *Id.* ¶¶ 13–16. While our case had none of these facts, it has many compelling circumstances not present in *Floyd*. The stop occurred at 2:44 a.m. in a rented vehicle first observed coming from a cul-de-sac of closed businesses, the driver gave an untrue explanation of his route and implausible explanations of where he had been, and the driver had a prior record of drug arrests and drug convictions. It would be inconsistent to find reasonable suspicion in *Floyd*, but not here, where the combination of a prior drug history, the odd location at a very late hour when the vehicle was first observed, the curious explanation of Brown's whereabouts, and the fact he was driving a rental car from Milwaukee, points at least as conclusively to reasonable suspicion of drug activity as would air fresheners in a tinted car in a high crime area.

Brown attacks the reasonable suspicion by offering innocent explanations for his behavior, and by addressing each of the relevant facts individually and finding each insufficient. And Brown suggests that finding reasonable suspicion here would mean that any convicted drug offender would have little rights on the streets. (Brown's Br. 8–9.) The problem with this line of argument is that all the relevant factors have to be evaluated in the composite and not as a collection of individual items. And the presence of potential innocent explanations for perceived suspicious behavior is not determinate. *See Waldner*, 206 Wis. 2d at 58–59.

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[4] This case was appealed to the Wisconsin Supreme Court, and the high court affirmed on different grounds without comment as to this Courts reasonable suspicion determination. *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560.

Brown says his facts are like those in *Betow* and *Gammons* but, as discussed above, the totality of the circumstances in this case is stronger than in those two cases and at least as strong as the circumstances in *Floyd*. Based on his experience and training, Officer Deering had a reasonable suspicion that Brown might be engaged in illegal drug activity. This reasonable suspicion justified Deering asking Brown a question about what he might be carrying and asking Brown for consent to search.

II. Asking Brown if he had something on him Deering should know about and for consent to search Brown's person did not impermissibly extend the traffic stop.

As argued above, Officer Deering had sufficient reasonable suspicion to extend the traffic stop to make an inquiry about drugs and to ask for consent to search Brown. But, even in the absence of reasonable suspicion, asking one quick question about whether Brown was carrying something Deering should know about, followed by asking for permission to search, does not unlawfully extend a traffic stop. This was not argued to the circuit court, but "a respondent may advance for the first time on appeal any argument that will sustain the trial court's ruling." *State v. Darcy N.K.*, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998). As the court explained in *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987), if a circuit court's legal conclusion is correct, "it should be sustained, and this court may do so on a theory or on reasoning not presented to the trial court."

A. Controlling legal principles.

Asking a lawfully stopped driver to exit the vehicle does not unlawfully extend a traffic stop. *State v. Floyd*, 2017 WI 78, ¶ 23, 377 Wis. 2d 394, 898 N.W.2d 560. Once a motor vehicle has been lawfully detained for a traffic violation, the

police may order the driver to exit the vehicle without violating the Fourth Amendment. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977).

A police officer can lawfully ask a driver if he has weapons during a routine traffic stop and ask for consent to frisk, as part of the original traffic stop mission. *Floyd*, 377 Wis. 2d 394, ¶ 28.

A police officer can lawfully ask a driver if he has drugs and ask for consent to search during a routine traffic stop. *Ohio v. Robinette*, 519 U.S. 33, 35–36, 39–40 (1996). Asking a lawfully stopped motorist for consent to search does not unreasonably prolong the original traffic stop. *State v. Gaulrapp*, 207 Wis. 2d 600, 609, 558 N.W.2d 696 (Ct. App. 1996). The length of time required to ask a question does not transform a reasonable, lawful stop into an unreasonable unlawful one. *State v. Griffith*, 2000 WI 72, ¶¶ 56–61, 236 Wis. 2d 48, 613 N.W.2d 72 (citing *Robinette*, 519 U.S. at 39–40, and *Gaulrapp*, 207 Wis. 2d at 609).

The police may pursue inquiries unrelated to the traffic stop, provided that they do not measurably extend the duration of the stop. *Rodriquez v. United States*, ___ U.S. ___, 135 S. Ct. 1609, 1615 (2015). It is the extension of the stop beyond the point that is reasonably justified by the initial stop, and not the subject of the questions asked by the police that determines whether the Fourth Amendment has been violated. *State v. Luebeck*, 2006 WI App 87, ¶ 12, 292 Wis. 2d 748, 715 N.W.2d 639 (citing *Gaulrapp*, 207 Wis. 2d at 609.)

B. Officer Deering asking Brown a quick question about what he might be carrying and requesting consent to search does not transform the legal traffic stop into an illegal detention.

There is no dispute that Brown was lawfully stopped. And the law is clear that pursuant to any valid traffic stop,

the police can lawfully order the motorist out of the vehicle. *See Floyd*, 377 Wis. 2d 394, ¶ 24 (citing *Mimms*, 434 U.S. at 111 n.6). Accordingly, at the point Brown was asked whether he had illegal weapons or drugs, and whether he would consent to a search, Brown was lawfully seized. The remaining issue, therefore, is if in the absence of reasonable suspicion, Deering's quick question and a request for consent impermissibly extended the traffic stop. It did not.

First, the Wisconsin Supreme Court recently made clear in *Floyd*, that asking a stopped driver if he has weapons, and then asking for permission to frisk is part of the original traffic stop mission. *Floyd*, 377 Wis. 2d 394, ¶ 28. Here, Deering asked Brown if he had something on him Deering should be aware of, and thus it can be argued that *Floyd* ends the inquiry in the State's favor. But, Officer Deering did not mention weapons to Brown and testified that his primary motivation was to seek permission to search for drugs, whereas in Floyd the officer's desire was to do a safety search. (R. 64:40.) *Floyd*, 377 Wis. 2d 394, ¶ 28.

In *Gaulrapp*, 207 Wis. 2d at 609, a case very similar to ours, this Court held that asking a question about drugs during a routine traffic stop did not unreasonably extend the detention. In *Gaulrapp* the police stopped a vehicle for a loud muffler. *Id.* at 603. The police asked Gaulrapp where he was coming from and where he was headed. *Id.* Then the police officer, without any reasonable suspicion, asked Gaulrapp if he had any drugs, and when Gaulrapp denied having any the police asked for permission to search his truck and his person. *Id.* Gaulrapp consented and the searches produced incriminating evidence. This Court upheld the propriety of the drug questions, opining that the reasonableness focus should be placed on the duration of the seizure and not the nature of the questions. *Id.* at 609. This Court concluded that Gaulrapp's detention was not unreasonably prolonged by asking one question about drugs and that the detention was

only measurably prolonged because Gaulrapp consented to the search. *Id.*

In deciding *Gaulrapp*, this Court principally relied on *Ohio v. Robinette*, 519 U.S. 33 (1996), where the United States Supreme Court held that the police are not obligated to tell a suspect he is free to go before asking for consent to search during a traffic stop. *Id.* at 39–40. In *Robinette*, the driver was stopped for speeding and, without reasonable suspicion of drug activity, the driver was asked if he had any drugs. After a denial, the police asked for consent to search, which was granted. *Id.* at 35–36. The *Robinette* court did not expressly decide if asking questions about drugs, without reasonable suspicion, during a traffic stop violates the Fourth Amendment. But, this Court properly inferred that the *Robinette* court could not have had reservations about the drugs questions asked, since the *Robinette* court held that the consent the questions generated was voluntary and valid. *Gaulrapp*, 207 Wis. 2d at 608.

Our case is similar to both *Robinette*, and *Gaulrapp*, in that during a traffic stop the driver was asked if he had something on him, the driver denied having anything, and then the driver consented to the search. Therefore, under *Robinette* and *Gaulrapp*, Officer Deering's question and request for consent to search did not violate the Fourth Amendment, even if Deering did not have reasonable suspicion of drug activity.

Many Wisconsin cases have looked at the issue of consent searches during a traffic stop. None have overruled *Robinette* or *Gaulrapp*. In *Betow*, 226 Wis. 2d 90, this Court, after finding no reasonable suspicion of drug activity, suppressed evidence, but not because asking quick questions about drugs impermissibly extended the stop. The problem in *Betow*, was that Betow denied consent to search his car, but the police continued the detention to accommodate a dog sniff. *Betow*'s holding is that if a driver is asked about drugs and

then denies consent to search, any further delay in pursuing a drug investigation, without reasonable suspicion, is unlawful. In our case Brown, like Robinette and Gaulrapp, consented to the search.

In *Gammons*, 241 Wis. 2d 296, this Court, after finding no reasonable suspicion, invalidated Gammon's continued detention where he refused to give consent to a search of his vehicle after being asked about drugs. *Id.* ¶ 24. The *Gammons* court reasoned that while the initial questions about drugs may have been permissible under *Gaulrapp*, there was no continued basis to detain Gammons after he denied having drugs and refused consent to search. *Id. Gammons* is similar to *Betow*, in that both cases address detention after the denial of consent.

In *State v. Williams*, 2002 WI 94, ¶¶ 11–12, 255 Wis. 2d 1, 646 N.W.2d 834, the officer asked questions about drugs and requested consent after the original traffic stop had been terminated. *Williams* was therefore not concerned with whether the drug questions were a permissible extension of the traffic stop, but rather focused on whether asking about drugs after the stop had been concluded constituted a new seizure or a consensual encounter. So, *Williams* did not overrule either *Robinette*, or *Gaulrapp*, since it did not deal with the issue of drug questions being posed during an ongoing traffic stop.

In *Luebeck*, 292 Wis. 2d 748, this Court did find a consensual search for drugs during an ongoing traffic stop unlawful. But the facts in *Luebeck*, were very different than those in *Robinette*, *Gaulrapp*, and here. Luebeck was stopped for a lane deviation, and the police initiated a drunk driving investigation. *Id.* ¶ 2. After a thorough investigation, including the administration of field sobriety tests, the police determined that there was not enough evidence to arrest Luebeck for operating while intoxicated (OWI). *Id.* ¶ 3. The police then advised Luebeck that they intended to issue him

a warning for the lane deviation and to release him. *Id.* Then, the officer decided that he wanted Luebeck's passenger to take a preliminary breath test because she had indicated that she had less to drink than Luebeck, and Luebeck advised that he had no problem with this. *Id.* ¶ 4. Before approaching the passenger about taking the preliminary test, the officer asked Luebeck if he had anything illegal on his person or in his vehicle and after Luebeck denied this, he consented to a search. *Id.* By the time the officer inquired about the passenger's sobriety, Luebeck had been detained for over 20 minutes, and the officer had determined that there was insufficient evidence to think Luebeck was impaired. *Id.* ¶ 15.

In holding that Luebeck had been impermissibly detained when questioned about illegal items he might have on his person or in his car, this Court reprised *Gaulrapp*'s focus on the duration of the detention past the point reasonably justified by the stop, not the nature of the questions posed, in determining if there was a Fourth Amendment violation. *Id.* ¶ 12. *Luebeck*, did not overrule *Gaulrapp*, but rather distinguished it: in *Gaulrapp* the drug questions were posed during a relatively brief traffic encounter, whereas in *Luebeck* it occurred after a twenty minute OWI investigation, and after a discussion about Luebeck's passenger's sobriety. *Luebeck* stands for the principle that the longer the initial detention takes, the less forgiving the court will be in accommodating an added extension to explore an unrelated inquiry. Our case is akin to *Gaulrapp*, and not to *Luebeck*, as the drug question was posed during a relatively quick traffic stop, and not after a lengthy and thorough detention for an OWI investigation.

In *Rodriquez*, 135 S. Ct. 1609, the Supreme Court dealt with an extension of an ongoing traffic stop to accommodate a dog sniff. Rodriquez was stopped for driving on the shoulder of the road. *Id.* at 1612. After asking Rodriquez where he was coming from and where he was going, and making the routine

checks pursuant to a traffic stop, the officer asked Rodriquez for permission for a dog to walk around his vehicle and Rodriquez refused to consent to this activity. *Id.* at 1613. After being denied consent, and without reasonable suspicion, a dog was called for and approximately eight minutes after the officer had issued a warning citation, the dog alerted to Rodriquez's vehicle. *Id. Rodriquez* does not control our case for two main reasons: (1) here, Brown consented to the search of his person where Rodriquez refused consent to have a dog sniff his vehicle. Extending a stop after refusal to give consent is what made the searches in *Betow* and *Gammons* problematic; and (2) asking a question about drugs and asking for consent to search is appreciably different than asking for consent to interject a dog into the traffic stop environment. Nothing in *Rodriquez* suggested an intent to overrule *Robinette*, which looked approvingly at an officer asking for consent to search, absent reasonable suspicion, during a traffic stop. And the *Rodriquez* Court confirmed that a seizure remains lawful, so long as the "unrelated inquiries do not measurably extend the duration of the stop." *Id.* at 1615 (citation omitted).

Robinette and *Gaulrapp* remain good law. Indeed, in *Griffith*, 236 Wis. 2d 48, ¶ 56, the Wisconsin Supreme Court looked approvingly at both cases as authority for the issue of whether quick questions unreasonably extend a traffic stop.[5] Both *Robinette* and *Gaulrapp* allow for a police officer in a routine traffic stop, without reasonable suspicion, to ask the vehicle occupants if they have drugs and to ask for permission to search. Neither case nor its progeny allow for the police to continue such an unrelated inquiry if the subject refuses consent. Here, Brown was asked during a relatively short traffic contact if he had something Officer Deering should be

[5] *Griffith* involved the police asking for identification during the stop, and not a question about drugs or consent to search.

aware of and for permission to search his person. Brown granted permission and thus the subsequent search was permissible.

Officer Deering's consent search of Brown's vehicle was permissible since Deering had reasonable suspicion that Brown was engaged in illegal drug activity, and also, even in the absence of reasonable suspicion, the request for consent to search did not impermissibly extend the traffic stop.

CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm the trial court's judgment of conviction.

Dated this 7th day of November, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,107 words.

Dated this 7th day of November, 2017.

_____
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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 7th day of November, 2017.

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