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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP774-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COURTNEY C. BROWN,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction Entered in the Fond du Lac County Circuit Court, the Honorable Dale English, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED

Fond du Lac Police Officer Christopher Deering stopped Courtney Brown's vehicle after witnessing Brown fail to come to a complete stop at a stop sign. After investigating the traffic infraction and writing a warning for failing to wear a seatbelt, Officer Deering removed Brown from the vehicle to conduct a drug investigation.

1. Was the traffic stop prolonged when, after the stop reasonably should have been completed, Officer Deering conducted an investigation into illegal drug activity by ordering Brown out of his vehicle, walking Brown to the squad car, asking Brown if he had anything illegal, and asking Brown for consent to search?

In the circuit court, the parties agreed that the traffic stop was prolonged and the circuit court held that it was "clear . . . that the scope of the stop and the length of the stop were extended" by Officer Deering's investigation into illegal drug activity.

The court of appeals concluded that Officer Deering's actions did not prolong the traffic stop because they were part of the mission of the stop.

2. Did Officer Deering have reasonable suspicion to prolong the traffic stop to investigate illegal drug activity?

The circuit court concluded that Officer Deering had reasonable suspicion to prolong the stop and investigate whether Brown possessed illegal drugs.

The court of appeals did not reach this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is scheduled for January 21, 2020. Publication is customary for this court.

STATEMENT OF THE CASE

1. *Factual Background*[1]

While on patrol on August 23, 2013, at 2:44 a.m., City of Fond du Lac Police Officer Christopher Deering observed a vehicle turn off of a dead-end street. (64:10; App. 110). At that time of night, all of the businesses on the street were closed. (64:10; App. 110). Officer Deering was suspicious "as to why is a vehicle coming from a dead end of all-closed businesses." (64:10; App. 110). Officer Deering ran a record check on the vehicle, which revealed that it was a rental car. (64:10–11; App. 110–111).

Officer Deering followed the vehicle and initiated a traffic stop after observing that the vehicle failed to come to a complete stop at a stop sign. (64:11; App. 111). Officer Deering approached the vehicle and made contact with the driver, Courtney Brown. (64:11; App. 111). Officer Deering noticed that Brown was not wearing a seat belt. (64:12; App. 112). Officer Deering asked Brown where he was coming from and Brown responded that he was coming from a Speedway gas station. (64:12; App. 112). Officer Deering believed Brown was lying

[1] The facts presented in this section are taken from the hearing on Brown's motion to suppress drug evidence that took place on July 5, 2016.

because there was no Speedway gas station on the dead end road where Officer Deering had seen Brown pull out. (64:12, 32; App. 112, 132).

In response to further questioning, Brown told Officer Deering that he was not headed anywhere in particular at the time of the stop and that earlier in the evening he had been visiting the house of a friend who he had met online. (64:50–51, Ex. 1; App. 150–151, 177). Brown told Officer Deering that his friend's name was Brandy but that he did not know her last name. (64:14; App. 114). Brown further told Officer Deering that he did not know Brandy's address but that she lived near the intersection of 3rd Street and Ellis Street. (64:14, 16; App. 114, 116). Brown told Officer Deering that he was from Milwaukee. (64:19; App. 119).

While Officer Deering was talking to Brown, two other officers, Officer Weid and Officer Brooks, arrived on the scene. (64:16, 32–34; App. 116, 132–134). Those officers exited their squad cars and stood by as safety officers during the stop. (64:33–34, 46–47; App. 133–134, 146–147).

After initially questioning Brown, Officer Deering returned to his squad car and completed a number of tasks. Officer Deering called the City of Fond du Lac and requested that a drug-sniffing dog be dispatched. (64:35–37; App. 135–137). After learning that the City of Fond du Lac did not have a dog available, Officer Deering requested a dog from Fond du Lac County. (64:35; App. 135). The county similarly did not have a dog available. (64:35; App. 135). Officer Deering also ran a record check on

Brown. (64:17; App. 117). That check revealed that Brown had three prior arrests, two involving drugs. (64:17, 30–31, Ex. 1; App. 117, 130–131, 177–178). Finally, Officer Deering wrote a warning for Brown's failure to wear his seatbelt. (64:17, 35, Ex. 2; App. 117, 135, 181). Officer Deering could not remember the order in which he completed these tasks but stated that "[t]here was no lull time or me just sitting there doing nothing. It was, you know, a constant working on the warning or calling for the canine." (64:42; App. 142).

Before reapproaching Brown's vehicle, Officer Deering already had decided reasonable suspicion existed to further investigate whether Brown had drugs. (64:40; App. 140) (At the time Officer Deering conducted the traffic stop, he had been a police officer for approximately one year. (64:9; App. 109)). Officer Deering explained that he believed that Brown had lied about where he had been coming from and "coming from the dead end could be a spot for a drug deal. It's a secluded spot. Those businesses are all closed." (64:30; App. 130). Officer Deering also said that the fact that Brown was driving a rental car was suspicious because "[r]ental cars are commonly used by drug dealers." (64:18–19, 30; App. 118–119, 130). Moreover, Officer Deering noted that Brown's presence in Fond du Lac in the middle of the night was suspicious, particularly because Brown was from Milwaukee, which Officer Deering identified as a "source city" for drugs. (64:19, 30; App. 119, 130). Finally, Brown's previous arrest history including arrests involving drugs, suggested to Officer Deering that further investigation was warranted. (64:30–31; App. 130–131). Accordingly, by the time Officer

Deering completed drafting the seatbelt warning, he already had decided to remove Brown from the vehicle to facilitate a search for illegal drugs. (64:43; App. 143).

Officer Deering returned to Brown's vehicle and told him to exit the vehicle. (64:17, 38, 48; App. 117, 138, 148). At the time Officer Deering ordered Brown out of his vehicle, Officer Deering had not yet returned Brown's license and had not handed Brown the seatbelt warning. (64:38–39; App. 138–139). Officer Deering affirmed that he ordered Brown to exit the vehicle solely to facilitate a search for drugs. (64:40; App. 140). Officer Deering stated that it "would be an awkward encounter to ask for someone's consent when they're sitting in a vehicle and then reaching through the window to search them. That's not police practice." (64:40; App. 140).

As Officers Weid and Brooks stood by, Officer Deering restrained Brown's hands behind his back and walked Brown toward the front of the squad car. (64:17, 38, 40, 48; App. 117, 138, 140, 148). When Officer Deering and Brown reached the squad car, Officer Deering asked Brown if he had anything illegal on him. (64:18, 39; App. 118, 139). Brown responded that he did not. (64:18, 49; App. 118, 149).

Officer Deering then asked if he could search Brown. (64:18, 49; App. 118, 149). Officer Deering stated that Brown consented to the search. (64:18; App. 118). Brown disagreed, explaining that he had not consented to the search. (64:49; App. 149).

Officer Deering explained that at no point did he consider the stop to be a high-risk stop and that Brown had not made any furtive movements suggesting any danger to the three officers on the scene. (64:28–29, 40; App. 128–129, 140). Moreover, Officer Deering said that there were "no specific factors" leading him to believe that Brown had any weapons. (64:28–29; App. 128–129).

Officer Deering proceeded to search Brown and found crack cocaine and $500 cash. (64:18, 49; App. 118, 149). Officer Deering placed Brown under arrest.

2. Procedural History

On August 26, 2013, the state charged Brown with one count of possession with intent to deliver cocaine, as a repeater, and as a second or subsequent offense. (1:1–2).

Brown moved to suppress the drug evidence found by Officer Deering. (33). At the suppression hearing, Brown argued that Officer Deering prolonged the initial traffic stop to conduct an investigation into whether Brown possessed illegal drugs. (64:57–59; App. 157–159). Brown further argued that Officer Deering lacked reasonable suspicion to prolong the traffic stop to conduct this investigation. (64:60–61; App. 160–161). Brown stated that Officer Deering's decision to conduct an investigation for drugs was based on nothing more than a "hunch." (64:61; App. 161). Brown concluded that, without reasonable suspicion to conduct the

investigation, the drugs obtained as a result of it, had to be suppressed.[2]

The state conceded that the stop was prolonged beyond the scope of the initial stop. (64:63; App. 163). The state argued, however, that under the totality of the circumstances Officer Deering had reasonable suspicion to extend the stop to conduct further investigation into whether Brown possessed illegal drugs. (64:63–64; App. 163–164).

The court began its analysis by explaining that "[i]t's clear, from the testimony today, that the scope of the stop and the length of the stop were extended due to the officer's suspicions of drug possession or drug activity." (64:65; App. 165). The court proceeded to address Brown's consent to the search concluding that it would not resolve the fact dispute between Brown and Officer Deering:

> There's an issue of fact which is not to be addressed this afternoon, as to whether Mr. Brown consented to the search. The court is going to assume, solely for the purpose of this analysis,that Mr. Brown consented to the search. If Mr. Brown didn't consent to the search, then we have a whole different issue as far as whether there was a constitutional -- or an exception to the requirement of probable cause in a search warrant to search, but that is for a different day.

(64:66; App. 166).

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[2] In the circuit court, Brown also challenged whether Officer Deering had reasonable suspicion for the stop itself. (10). Brown did not renew this challenge on appeal.

The court then denied Brown's suppression motion finding that Officer Deering had reasonable suspicion to prolong the stop to investigate whether Brown possessed drugs. (64:66–73; App. 166–173). The court explained that "there was barely enough for the officer to have a reasonable suspicion of possible drug activity to extend the stop" and that it was "maybe the closest case that I've had either in the 20 years I've been doing this or in a long time." (64:69, 71; App. 169, 171). The court noted that while many of the facts testified to by Officer Deering could have innocent explanations, taken as a whole, the facts were sufficient for an officer to have reasonable suspicion of possible drug activity. (64:71–72; App. 171–172). The court relied on the fact that Brown had a history of prior drug arrests, that Brown was driving a rental car, that Officer Deering saw Brown drive away from a dead-end street with closed businesses, that Brown was from Milwaukee, which Officer Deering identified as a source city for drugs, that it was late at night, and that Officer Deering believed that Brown lied about where he was coming from. (64:69, 72; App. 169, 172).

The court finished its analysis by returning to the issue of consent to the search. The court restated that, in denying the motion to suppress, it was "assuming for the purpose of the analysis that Mr. Brown consented" to the search. (64:72; App. 172). The court reiterated that Brown testified that he had not consented to the search and that "[t]here's a separate issue as to whether Mr. Brown actually consented to the search, and if he did not, whether the search of him was constitutionally valid. But that's an issue for a different day, with potentially

additional witnesses." (64:72; App. 172). Leaving the issue of consent unresolved, the court concluded that "based on the issues before the court today, the court is denying the motion to suppress." (64:72; App. 172).

After the court denied the suppression motion, Brown pleaded no contest to one count of possession with intent to deliver cocaine. (42). Following sentencing, Brown appealed.

In the court of appeals Brown argued that Officer Deering lacked reasonable suspicion to prolong the traffic stop to investigate whether Brown possessed drugs. See Brief of Defendant-Appellant at 7–10, *State v. Brown*, 2019 WI App 34, 388 Wis. 2d 161, 931 N.W.2d 890 (No. 17AP774-CR). And even if he consented to the subsequent search, Brown continued, that consent was invalid because Officer Deering improperly extended the stop. See Brief of Defendant-Appellant at 7, *Brown*, 2019 WI App 34 (No. 17AP774-CR).

The state responded that Officer Deering had reasonable suspicion to extend the traffic stop. See Brief of Plaintiff-Respondent at 6–13, *Brown*, 2019 WI App 34 (No. 17AP774-CR). Even if he lacked reasonable suspicion, however, the state argued for the first time on appeal that Officer Deering had not extended the stop when he ordered Brown to exit his vehicle, asked Brown whether he had anything illegal, and asked Brown for consent to search. See Brief of Plaintiff-Respondent at 13–20, *Brown*, 2019 WI App 34 (No. 17AP774-CR). Finally, the state argued that Brown had consented to the search and that by failing to raise the issue of consent on appeal,

Brown had waived the issue. See Brief of Plaintiff-Respondent at 2 n.1, *Brown*, 2019 WI App 34 (No. 17AP774-CR).

The court of appeals affirmed the denial of the motion to suppress. Relying on *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560 and *State v. Wright*, 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157, the court of appeals concluded that Officer Deering's order to exit the car and subsequent questioning "were part of the mission of the traffic stop, and thus were not an extension of the stop." *Brown*, 388 Wis. 2d 161, ¶ 17. (App. 187). Because the traffic stop was not extended, the court of appeals declined to address whether Officer Deering had reasonable suspicion to prolong the stop to investigate drug activity. *Id.* at ¶ 17. (App. 187). Moreover, the court of appeals noted that Brown had not challenged the voluntariness of his consent to the search on appeal and so the court declined further to address consent. *Id.* at ¶ 16. (App. 186–187).

ARGUMENT

I. Officer Deering Prolonged the Traffic Stop When, After the Stop Should Have Been Completed, He Ordered Brown to Exit the Vehicle, Asked Brown Whether He Had Anything Illegal, and Sought Brown's Consent to Search

The United States Supreme Court has held that a traffic stop may only last as long as necessary to complete the mission of the stop. *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). A stop is unlawfully prolonged when an officer adds time to the stop by diverting from the stop's mission to investigate other crimes without reasonable suspicion. An officer's actions are unrelated to the stop's mission when they are taken after the stop reasonably should have been completed. This is true even where those actions ordinarily would have been justified on the basis of officer safety had they had been performed while the stop was ongoing.

Officer Deering's investigative actions—removing Brown from the vehicle, restraining Brown's hands behind his back, walking Brown to the squad car, asking whether Brown had anything illegal, and seeking Brown's consent to search—were unrelated to the mission of the stop because they occurred after the stop reasonably should have been completed. Moreover, Officer Deering's questions were not incidental to the stop's mission because they were not tied to officer safety. And Officer Deering's actions added time to the stop. Accordingly, the stop was prolonged.

A. Officer actions during a traffic stop must be limited to the stop's mission

A routine traffic stop is a seizure under the Fourth Amendment. *Rodriguez*, 135 S. Ct. at 1614; *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Unlike a formal arrest, however, a traffic stop is "[a] relatively brief encounter" akin to a *Terry* stop. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998); see *Rodriguez*, 135 S. Ct. at 1614; *Terry v. Ohio*, 392 U.S. 1 (1968).

A traffic stop may last only as long as necessary to complete the mission of the stop. *Rodriguez*, 135 S. Ct. at 1614. A traffic stop's mission is "to address the traffic violation that warranted the stop . . . and attend to related safety concerns." *Id.* at 1614 (internal citations omitted). "Beyond determining whether to issue a traffic ticket" an officer may "check[] the driver's license, determin[e] whether there are outstanding warrants against the driver, and inspect[] the automobile's registration and proof of insurance." *Id.* at 1615. These "ordinary inquiries" are part of the traffic stop's mission because they "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." *Id.* When actions are taken to protect officer safety, they too are part of the stop's mission. *Id.* at 1616.

Inquiries and investigations "aimed at 'detect[ing] evidence of [other] criminal wrongdoing,'" on the other hand, are unrelated to the purpose of the stop and, therefore, fall outside of the stop's mission. *Id.* at 1615–1616 (quoting *Indianapolis v. Edmond*,

531 U.S. 32, 40–41 (2000)). Indeed, "[o]n-scene investigation into other crimes . . . detours from" the stop's mission, as "do safety precautions taken in order to facilitate such detours." *Id.* at 1616.

A stop becomes unlawful when it "last[s] . . . longer than is necessary" to complete its mission because "[a]uthority for the seizure . . . ends when tasks tied to the [mission] are—or reasonably should have been—completed." *Id.*; see *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

Thus, in the absence of reasonable suspicion, actions taken by an officer after a stop should have been completed are impermissible because they fall outside of the stop's mission. This principle applies even to actions that ordinarily would be permitted to promote officer safety had they occurred while the stop was ongoing.

For example, ordering a person lawfully seized to exit his vehicle during the course of a traffic stop is permissible to promote officer safety. In *Pennsylvania v. Mimms*, the Supreme Court held that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." 434 U.S. 106, 111 n.6 (1977). The Court "reasoned that the government's 'legitimate and weighty' interest in officer safety outweighs the 'de minimis' additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle." *Rodriguez*, 135 S. Ct. at 1615. This court has interpreted *Mimms* to establish "a per se rule that an

officer may order a person out of his or her vehicle incident to an otherwise valid stop for a traffic violation." *State v. Floyd*, 2017 WI 78, ¶ 24, 377 Wis. 2d 394, 898 N.W.2d 560 (quoting *State v. Johnson*, 2007 WI 32, ¶ 23, 299 Wis. 2d 675, 729 N.W.2d 182).

An officer similarly may ask a lawfully seized motorist questions related to officer safety during the course of a lawful traffic stop. See *State v. Wright*, 2019 WI 45, ¶¶ 29–34, 386 Wis. 2d 495, 926 N.W.2d 157. This Court has held that an officer may ask, for example, whether the motorist is carrying any weapons and—if the motorist has been removed from the vehicle—whether the officer can perform a search of the person to verify that the person is not carrying any weapons. *Id.* at ¶ 34; *Floyd*, 377 Wis. 2d 394, ¶ 28.

These actions may only be taken, however, while the stop is ongoing. See *Rodriguez*, 135 S. Ct. at 1616 (stating that the state's interest in officer safety "stems from the mission of the stop itself"). To conclude otherwise would have the illogical result of permitting officers to prolong a stop, thereby exposing them to greater danger, in order to promote officer safety. See *State v. Smith*, 2018 WI 2, ¶ 82, 379 Wis. 2d 86, 905 N.W.2d 353 (Kelly, J., dissenting) ("Is it really necessary to point out that concerns over the officer's safety would vanish if he ended the seizure?"); *United States v. Landeros*, 913 F.3d 862 (9th Cir. 2019) ("Extending the stop, and thereby prolonging the officers' exposure to Landeros, was, if anything, inversely related to officer safety." (internal quotation marks omitted)).

Accordingly, an officer is not acting to protect his safety when he removes a person from a vehicle and asks the person safety-related questions after the stop reasonably should have been completed. Once the mission of the stop reasonably should have been completed, an officer's decision to remove a person from a car and question him becomes akin to a dog sniff: an act not tied to the stop's mission, but aimed solely at facilitating ordinary criminal investigation. This is not permitted under the Fourth Amendment. See *Rodriguez*, 135 S. Ct. at 1616.

B. Officer Deering's removal of Brown from the car and his subsequent questioning of Brown were not tied to the stop's mission

Here, Officer Deering engaged in an investigation, which included removing Brown from the vehicle and asking Brown if he had anything illegal and whether Brown would consent to a search. This investigation was unrelated to the mission of the stop because it occurred after the stop reasonably should have been completed. Officer Brown's inquiries were unrelated to the stop's mission for the additional reason that they were not justified by officer safety.

1. Officer Deering's actions were unrelated to the mission of the stop because they occurred after the stop reasonably should have been completed

Whether the mission of the stop should have been completed is an inquiry based on the totality of the circumstances. *Floyd*, 377 Wis. 2d 394, ¶ 22. A court must assess whether the officer was reasonably diligent in pursuing the traffic-related purpose of the stop. See *id.*; *Rodriguez*, 135 S. Ct. at 1616. An officer does not act with reasonable diligence when he unnecessarily delays performance of any portion of the traffic stop. *Floyd*, 377 Wis. 2d 394, ¶ 22.

The tasks tied to the traffic stop reasonably should have been completed when Officer Deering reapproached Brown's car. By the time Officer Deering returned to Brown's car, Officer Deering already had assessed the underlying infraction and determined that he would issue Brown a warning for failing to wear a seatbelt. (64:16–17, 35; App. 116–117, 135). And Officer Deering had drafted the written warning. (64:16–17, 35–37; App. 116–117, 135–137). Officer Deering also had asked Brown about his destination and plans, checked Brown's driver's license, and run a record check on Brown. (64:14, 16, 27, 37–38; App. 114, 116, 127, 137–138). During this time, Officer Deering also called both the City and County of Fond du Lac to check if a drug-sniffing canine was available. (64:35–37; App. 135–137). Moreover, there were no further safety concerns to attend: the stop was not high-risk (64:28; App.

128), three officers were on the scene (64:33–34; App. 133–134), Brown had made no furtive movements nor taken any other action suggesting that he posed a risk to the officers (64:28–29, 40; App. 128–129, 140). Thus, Officer Deering had performed all of the tasks associated with assessing the underlying traffic violation and attending to related concerns. At that point, the stop reasonably should have been completed.

It is true that Officer Deering had not returned Brown's license nor handed Brown the seatbelt warning when he ordered Brown out of the car. (64:38–39; App. 138–139). But Deering withholding the documents was not related to the stop's mission. The act of returning a driver's documents and issuing a traffic warning is not dispositive of whether the mission of the stop has been or should have been completed. See *State v. Gammons*, 2001 WI App 36, ¶¶ 2–4, 24, 241 Wis. 2d 296, 625 N.W.2d 623 (holding that mission of stop was complete after reason for initial seizure was satisfied, driver and passengers had provided identification, and officer had run record checks on the driver and passengers). If it was, an officer could withhold a driver's license and warning to prolong the stop and "earn bonus time to pursue unrelated criminal investigation." *Rodriguez*, 135 S. Ct. at 1616. At the time Officer Deering reapproached Brown's vehicle, there were no outstanding tasks tied to the traffic stop warranting further inquiry. Thus, Officer Deering no longer had a lawful basis to detain Brown and was required to terminate the stop.

The court of appeals, relying in part on *Floyd*, stated that although Officer Deering's actions were taken "near the end," the stop had not yet been completed. *Brown*, 388 Wis. 2d 161, ¶ 24. (App. 189–190). But *Floyd* does not support a conclusion that the stop in this case was ongoing when Officer Deering ordered Brown out of the car and questioned him.

In *Floyd*, this Court explained that whether a traffic stop should have ended requires inquiry into the proper scope of the stop, which is determined by looking to the underlying purpose of the stop. 377 Wis. 2d 394, ¶ 18. There, an officer pulled over Floyd who was driving a car with a suspended registration. *Id.* at ¶ 2. When the officer made contact with Floyd, he discovered that Floyd did not have a driver's license or proof of insurance. *Id.* at ¶ 4. After drafting the citations in his squad car, the officer returned to Floyd's vehicle and ordered him to exit the vehicle so that the officer "could explain the citations." *Id.* at ¶ 5.

It was reasonable to conclude that the stop in *Floyd* was not over at the time the officer ordered Floyd out of the vehicle "because [Floyd] did not have a valid driver's license and therefore could not drive away when the traffic stop ended." *Id.* at ¶ 7. Indeed, the nature of the underlying infraction in *Floyd* dictated that the stop had not ended when the officer reapproached Floyd's vehicle. The officer could not permit Floyd to drive away without a valid driver's license, so ordering Floyd out of the car comprised part of the mission of the stop.

The scope of the stop in this case did not involve removing Brown from his vehicle, let alone restraining his hands behind his back or walking him to the squad car. Officer Deering had pulled Brown over for failing to come to a complete stop at a stop sign and had written Brown a warning for failing to wear his seatbelt. Neither of those infractions created a need to remove Brown from his vehicle or to restrain him physically. Had Officer Deering discharged his duty by simply handing Brown the warning and driver's license, Brown could have driven away from the scene.

Moreover, the officer in *Floyd* testified that he removed Floyd from the vehicle, at least in part, to "explain the citations." *Id.* at ¶ 5. In contrast, Officer Deering testified that he removed Brown from the vehicle to facilitate a search for drugs. (64:40; App. 140). Officer Deering stated that he had made that decision long before he reapproached Brown's vehicle. (64:40; App. 140). Officer Deering did not articulate, and the record does not reflect, any purpose for removing Brown from the vehicle that falls within the scope of the stop. Indeed, the mission of the stop had been completed; Officer Deering had moved on from the purpose of the stop to engaging in ordinary criminal investigation.

In its final opinion, the court of appeals did not address whether this Court's holding in *State v. Smith* impacts the outcome of this case. In *Smith*, an officer pulled over a vehicle after learning that the car's registered owner, Amber Smith, had a suspended driver's license. 379 Wis. 2d 86, ¶ 4. As the officer approached the vehicle, he realized that the

driver was a man and, thus, could not be Amber Smith. *Id.* At that point, the reasonable suspicion underlying the stop had dissipated. *Id.* at ¶ 14. But the officer did not end the stop. Instead, the officer ordered the driver, Frederick Smith, to open the door or roll down the window and asked Smith for his driver's license. *Id.* at ¶ 4. Smith told the officer that his license had been revoked and the officer noticed that Smith appeared intoxicated. *Id.* at ¶ 6. The officer conducted field sobriety tests and arrested Smith. *Id.*

This Court concluded that the officer's actions were permissible because "when an officer conducts a valid traffic stop, part of that stop includes checking identification, even if the reasonable suspicion that formed the basis for the stop in the first place dissipated." *Id.* at ¶ 2. This Court reasoned that in addition to "considering whether to issue a ticket," the mission of the traffic stop includes "the ordinary inquiries of checking [the driver's] license, registration and insurance." *Id.* at ¶¶ 20–21.

The holding in *Smith*, does not change the result here. This case does not involve the rapid dissipation of reasonable suspicion before the ordinary inquiries incident to the stop could have been completed. Indeed, the ordinary inquiries related to the stop already had been completed by the time Officer Deering began conducting his investigation into whether Brown had illegal drugs. When Officer Deering removed Brown from the vehicle he already had assessed the traffic violation, reviewed Brown's license, and run a record check. Officer Deering admitted that his purpose in further

detaining Brown was nothing more than an attempt "to fish for wrongdoing." *Id.* at ¶ 22. *Smith* permits an officer to check the identification of a driver after the reasonable suspicion that formed the basis of the stop has dissipated, nothing more. *Id.* at ¶ 2. Officer Deering had completed the ordinary inquiries when he ordered Brown to exit the vehicle. The mission of the stop had been completed and Officer Deering was required to end the traffic stop.

Moreover, to the extent that *Smith* can be read broadly to suggest that an officer can take actions ordinarily justified to protect officer safety after reasonable suspicion for the stop has dissipated, it is incorrect. See *id.* at ¶ 63 (Kelly, J., dissenting); 4 Wayne R. LaFave, *Search and Seizure* § 9.3(f-1) (5th ed. 2019) (noting near complete agreement among appellate court's with dissent in *Smith* and collecting cases.). "[T]he government's officer safety interest stems from the mission of the stop itself." *Rodriguez*, 135 S. Ct. at 1616; *Smith*, 379 Wis. 2d 86, ¶ 61, (Kelly, J., dissenting) ("Everything *Rodriguez* said about the traffic mission—everything—describes it in terms of the singular mission we have always ascribed to a valid traffic stop, to wit, the investigation of an officer's reasonable suspicion of wrongdoing. . . . '[O]fficer safety' and 'the usual inquiries' have always been incidents to the purpose of the traffic stop, and *Rodriguez* said not a single word to the contrary."). Accordingly, there exists no independent, constitutional basis for an officer to take "safety precautions" once the stop's mission has

been completed and reasonable suspicion has dissipated. See *Smith*, 379 Wis. 2d 86, ¶¶ 61–77.[3]

[3] In the court of appeals, Judge Reilly wrote separately to express his disagreement with this Court's recent jurisprudence in cases involving extensions of traffic stops. See *Brown*, 388 Wis. 2d 161, ¶¶ 26–35 (Reilly, P.J., concurring). (App. 191–196). Judge Reilly explained that the import of this Court's recent jurisprudence "is that the removal and consent to frisk is left to officer discretion without any foundational requirement of reasonable suspicion to do so." *Id.* at ¶ 32. (App. 194). Judge Reilly noted that "[i]f reasonable suspicion is not required, then we are authorizing and condoning the profiling of persons on something other than 'additional suspicious factors which are sufficient to give rise to an articulable suspicion' that the person has or is committing a crime separate and distinct from the minor traffic violation." *Id.* (App. 194).

Permitting this discretionary profiling will disproportionately impact people of color. Brown is Black. Data compiled by the Bureau of Justice Statistics shows that police officers are more likely to exercise their discretion to ticket, search, and arrest Black and Hispanic drivers. See Elizabeth Davis, et al., Bureau of Justice Statistics, *Contacts Between Police and the Public, 2015* 12 (Oct. 2018), *available at* https://www.bjs.gov/content/pub/pdf/cpp15.pdf; Lynn Langton & Matthew Durose, Bureau of Justice Statistics, *Police Behavior During Traffic and Street Stops, 2011* 9 (Sept. 2013), *available at* https://www.bjs.gov/content/pub/pdf/pbtss11.pdf; Christine Eithe & Matthew R. Durose, Bureau of Justice Statistics, *Contacts Between Police and the Public, 2008* 1, 9–10 (Oct. 2011), *available at* https://www.bjs.gov/content/pub/pdf/cpp08.pdf.

2. Officer Deering's inquiries were not tied to the mission of the stop because they were unrelated to officer safety

This court has held that certain inquiries, including those needed to protect officer safety, are part of a stop's original mission. *Wright*, 386 Wis. 2d 495, ¶ 9; *Smith*, 379 Wis. 2d 86, ¶ 2. The questions asked by Officer Deering—whether Brown had anything illegal on him and whether he would consent to a search—were not justified by officer safety, but instead, were general investigative steps. In *Floyd*, after the officer removed Floyd from the vehicle, he asked the driver "if he had any weapons or anything that could harm [the officer]" and sought the driver's consent to "perform a search for his safety." *Floyd*, 377 Wis. 2d 394, ¶ 28. This Court concluded that those inquiries were permissible because they "specifically related to the officer's safety." *Id.* Asking a motorist whether he has anything illegal, however, is not the same as an officer asking if a person is carrying a weapon. Moreover, Officer Deering did not state, nor do the objective facts support, that the request to search was made to protect officer safety. Officer Deering testified that the stop was not high risk and that he had no reason to believe that Brown was armed. (64:28–29, 40; App. 128–129, 140). Officer Deering asked these questions as part of a new criminal investigation into whether Brown possessed illegal drugs. Thus, these inquiries were not part of the stop's original mission.

C. Officer Deering's investigatory actions added time to the stop

Unrelated investigations may be permissible if they are undertaken within "the time reasonably required to complete" the stop's mission. *Rodriguez* 135 S. Ct. at 1615. Unrelated investigations are impermissible, however, if they "lengthen the roadside detention." *Id.* at 1614. Accordingly, an officer may not engage in an unrelated investigation that prolongs a stop unless he has formed independent reasonable suspicion supporting it. See *State v. Hogan*, 2015 WI 76, ¶ 35, 364 Wis. 2d 167, 868 N.W.2d 124; *State v. Betow*, 226 Wis. 2d 90, 94, 593 N.W.2d 499 (Ct. App. 1999); see also *Rodriguez*, 135 S. Ct. at 1612).

1. There is no de minimis exception to the rule that a stop lengthened by unrelated investigation is impermissible

The length of the delay attributable to an inquiry or investigation that is unrelated to the mission of the stop is immaterial to whether it is permissible.

Prior to the Supreme Court's decision in *Rodriguez*, the Wisconsin Supreme Court tolerated minor extensions of traffic seizures even if the extension was caused by inquiries unrelated to the mission of the stop. See *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748. In *Arias*, a traffic stop was delayed by 78 seconds to allow an officer to perform a dog sniff of a vehicle. *Id.* at ¶ 28. This Court concluded that under the totality of the

circumstances, the stop was not unlawfully prolonged. *Id.* at ¶¶ 39–40. This Court reasoned that the 78-second delay was a reasonable extension because it amounted to only an "incremental intrusion upon [the driver's] liberty interest" that was "outweighed by the public's interest served thereby." *Id.* at ¶ 40.

Rodriguez flatly rejected the reasoning of *Arias*. Like *Arias*, the Eighth Circuit in *Rodriguez* had concluded that the dog sniff at issue was permissible because it amounted to only a de minimis or reasonable—seven or eight minute—extension of the stop. *Rodriguez*, 135 S. Ct. at 1614–1615. The Supreme Court disagreed, holding that the length of the delay caused by unrelated criminal investigation is irrelevant to whether it is permitted under the Fourth Amendment. *Id.* at 1615–1616. Instead, the Supreme Court explained, a stop may last only as long as is "reasonably required to complete [the stop's] mission." *Id.* at 1616 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). "[A] traffic stop 'prolonged beyond' that point is 'unlawful.'" *Id.*

A majority of federal circuit courts have agreed that *Rodriguez* does not permit an extension of a traffic stop for even a de minimis period of time while officers engage in ordinary criminal investigation. *Landeros*, 913 F.3d at 866 ("*Rodriguez* squarely rejected . . . a reasonableness standard for determining whether prolonging a traffic stop for reasons not justified by the initial purpose of the stop is lawful."); *United States v. Campbell*, 912 F.3d 1340, 1352–1353 (11th Cir. 2019) (any extension of time, even if de minimis, impermissible); *United*

States v. Stewart, 902 F.3d 664, 674 (7th Cir. 2018) (75 seconds to call for backup could unlawfully prolong stop); *United States v. Clark*, 902 F.3d 404, 410–411 (3d Cir. 2018) (20 seconds of questioning after stop should have ended was impermissible); *United States v. Bowman*, 884 F.3d 200, 210 (4th Cir. 2018) (stop is unlawfully prolonged where it is extended beyond the time needed to complete mission "even if it is only for a *de minimis* period of time"); *United States v. Gomez*, 877 F.3d 76, 88–93 (2d Cir. 2017) (rejecting *de-minimis*-extension rule); *United States v. Macias*, 658 F.3d 509, 518–519 (5th Cir. 2011) (questions unrelated to stop only permissible where they do not extend stop's duration).

2. Removing Brown from his car, walking him to the squad car, asking Brown whether he had anything illegal, and seeking Brown's consent to search added time to the stop

As explained above, see pp. 11–23, *supra*, the actions taken by Officer Deering when he reapproached Brown's vehicle were unrelated to the mission of the stop. And Officer Deering's actions added time to the stop beyond what was necessary to complete the stop's mission. Because the state conceded in the trial court that the stop had been prolonged (64:63; App. 163), the record does not reflect the precise amount of time that each of Officer Deering's actions took. It is reasonable to conclude, however, that it took some measurable amount of time for Officer Deering to order Brown out of the car, for Brown to exit his car, for Officer Deering to

restrain Brown's hands behind his back, for Officer Deering to walk Brown to the squad car, for Officer Deering to ask Brown whether he had anything illegal, and, finally, for Officer Deering to ask for Brown's consent to a search. *Rodriguez* dictates that the measurable amount of time it took Officer Deering to engage in this ordinary criminal investigation was impermissible because it added time to the stop beyond the time reasonably required to complete the stop's mission. See *Rodriguez*, 135 S. Ct. at 1616. The overall length of the delay is immaterial. To conclude otherwise would improperly revive the standard in *Arias* that was rejected by the Supreme Court.

The court of appeals suggested, citing *Wright*, 386 Wis. 2d 495, that Officer Deering's actions were permissible because they did not add an unreasonable amount of time to the stop. See *Brown*, 388 Wis. 2d 161, ¶¶ 21–22, 24 n.4. (App. 188–190). But the court of appeals is incorrect for two reasons: first, even a short delay is impermissible and second, *Wright* is factually distinguishable from this case.

In *Wright*, two officers stopped a motorist for driving with a broken headlight. 386 Wis. 2d 495, ¶ 15. Within moments of approaching Wright's car, one of the officers made a series of inquiries, which included requesting to see Wright's driver's license, asking whether Wright was carrying any weapons, and asking whether Wright had a concealed-carry permit. *Id.* at ¶¶ 45–46. In response to the officer's questions, the driver told the officer that he had a

handgun in the glove box. *Id.* at ¶¶ 16–17. The officer then asked whether the driver had a valid permit to carry a concealed weapon. *Id.* at ¶ 16.

This Court stated that the officer's question about the concealed-carry permit was not part of the mission of the stop. *Id.* at ¶ 36. This Court concluded, however, that the question was permissible because it did not measurably extend the duration of the stop. *Id.* at ¶¶ 44–47. This Court reasoned that although the officer's question "took some amount of time to ask . . . the time it took" was "de minimis and virtually incapable of measurement." *Id.* at ¶ 47.

To the extent that this Court's holding in *Wright* conflicts with the plain language of *Rodriguez*—that even a de minimis extension is impermissible—it is incorrect. Extending a traffic stop for even a short time to engage in ordinary criminal investigation is impermissible. See *Rodriguez*, 135 S. Ct. at 1614–1615.

More importantly, however, Officer Deering's actions in this case took far longer than the single question posed in *Wright*. In *Wright*, the officer quickly asked a single question surrounded by inquiries related to the mission of the stop. See 386 Wis. 2d 495, ¶¶ 16, 46. The officer's question was so brief that this Court deemed it "virtually incapable of measurement." *Id.* at ¶ 47. Here, Officer Deering's actions took a measurable amount of time. Officer Deering removed Brown from the vehicle, restrained Brown's hands behind his back, walked Brown to the squad car, and asked whether Brown

had anything illegal and would consent to a search. There is no question that Officer Deering's investigative actions added time to the stop and were not "virtually incapable of measurement" like the single question in *Wright*.

* * *

By the time Officer Deering returned to Brown's vehicle, ordered him to exit, and questioned him, the mission of the traffic stop reasonably should have been completed. Officer Deering's actions were unrelated to the mission of the stop and undertaken solely to facilitate ordinary criminal investigation. Moreover, these investigative actions added time to the stop. Therefore, Officer Deering prolonged the traffic stop.

II. Officer Deering Lacked Reasonable Suspicion of Drug Activity and, Therefore, Could Not Prolong the Traffic Stop in Order to Engage in a Drug Investigation

Officer Deering lacked reasonable suspicion to prolong the traffic stop to engage in an investigation of illegal drug activity. The factors that Officer Deering identified as "suspicious," viewed objectively, reflect a consistent story of an out-of-town driver in an unfamiliar location.

A. Reasonable suspicion requires a particularized and objective basis to suspect wrongdoing

An officer may only expand the scope of a traffic stop to engage in further investigation if he develops a reasonable, articulable suspicion of separate and distinct criminal activity. See *Betow*, 226 Wis. 2d at 94–95. An officer must have "a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002); see also *Betow*, 226 Wis. 2d at 94. "An inchoate and unparticularized suspicion or hunch will not suffice" to establish reasonable suspicion. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996) (internal quotation marks and ellipsis omitted); see also *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Indeed, where the facts relied on "describe a very large category of presumably innocent [people]," courts have found reasonable suspicion lacking. *Reid v. Georgia*, 448 U.S. 438, 441 (1980); see also *State v. Young*, 212 Wis. 2d 417, 432–433, 569 N.W.2d 84 (Ct. App. 1997); *United States v. Williams*, 808 F.3d 238, 246 (4th Cir. 2015); *United States v. Neff*, 681 F.3d 1134, 1142 (10th Cir. 2012); *United States v. Boyce*, 351 F.3d 1102, 1109–1110 (11th Cir. 2003).

A court must consider the totality of the circumstances in determining whether reasonable suspicion exists. See *Arvizu*, 534 U.S. at 273; *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634. "The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect

that the individual has committed, was committing, or is about to commit a crime." *Post*, 301 Wis. 2d 1, ¶ 13.

B. Under the totality of the circumstances, the objective facts did not amount to reasonable suspicion to prolong the stop to investigate drug activity

Here, the record does not support a finding of reasonable suspicion. Officer Deering, who had one year of experience as a police officer, saw a rental car pulling out of a dead-end street late at night. (64:9–11; App. 109–111). All of the businesses on the street were closed. (64:10; App. 110). Moreover, in Officer Deering's experience, "people that traffic drugs often use rental cars." (64:19; App. 119).

After conducting a traffic stop, Officer Deering learned that the driver, Brown, was not from the Fond-du-Lac area, having traveled there from Milwaukee. (64:19; App. 119). Officer Deering stated that Milwaukee was a source city for drugs. (64:19, 30; App. 119, 130).

Officer Deering believed that Brown gave evasive answers to two questions about where he had been that evening. First, Brown said he had been at a friend's house earlier in the evening but could not remember her last name. (64:14, 16, 50–51; App. 114, 116, 150–151). And, although Brown identified the intersection where the house was located, he could not remember the exact address. (64:14, 16; App. 114, 116). Second, when Officer Deering asked where Brown had been coming from, Brown told Officer

Deering that he had been at a Speedway gas station. (64:12, 32; App. 112, 132). Because Officer Deering had seen Brown pull out from a street that did not have a Speedway gas station, Officer Deering interpreted Brown's response as a lie. (64:12, 32; App. 112, 132).

Finally, after running a record check on Brown, Officer Deering learned that Brown had three prior arrests, two involving drugs. (64:17, 30, Ex. 1; App. 117, 130, 177–178).

Based on these facts, Officer Deering concluded that he had reasonable suspicion to prolong the stop to investigate whether Brown was engaged in illegal drug activity.

Viewing the facts objectively, from the perspective of a reasonable officer, this record fails to establish reasonable suspicion. Brown, who was from Milwaukee, was driving a rental car late at night in a city in which he did not live. Brown's use of a rental car in a city in which he did not live is an activity consistent with typical rental-car drivers throughout the country. And while some drug traffickers may use rental cars, as Officer Deering believed, "the overwhelming majority of rental car drivers on our nation's highways are innocent travelers with entirely legitimate purposes." *Williams*, 808 F.3d at 247; see also *Boyce*, 351 F.3d at 1109–1110 (concluding that driving rental car, even on interstate that is known drug corridor, did not create reasonable suspicion). Officer Deering did not

identify any particular facts about the rental car or Brown's use of it that were more suspicious than the average rental-car driver.

The fact that Brown was from Milwaukee, which Officer Deering identified as a source city for drugs, adds little. See *Betow*, 226 Wis. 2d at 97 & n.4. Like driving a rental car, being from Milwaukee is an innocent activity common to many. Indeed, over 10 percent of Wisconsinites live in Milwaukee. Moreover, the court of appeals has warned against assigning too much significance to the fact that a person either is present in or comes from a high crime area. See *State v. Gordon*, 2014 WI App 44, ¶ 15, 353 Wis. 2d 468, 846 N.W.2d 483 ("[T]he routine mantra of 'high crime area' has the tendency to condemn a whole population to police intrusion that, with the same additional facts, would not happen in other parts of our community.").

That it was late at night when Officer Deering encountered Brown does not increase suspicion of drug activity. Officer Deering did not explain why the time of day was relevant to whether Brown was engaged in illegal drug activity. In the past, the court of appeals specifically has noted that it is unaware of "any case that stands for the proposition that drugs are more likely to be present in a car at night than at any other time of day." *Betow*, 226 Wis. 2d at 96; see also *Gammons*, 241 Wis. 2d 296, ¶¶ 21–23.

Brown was visiting Fond du Lac from Milwaukee. He did so in a rental car. It was late at night. To conclude that these actions fit the profile of a drug trafficker is to ignore the reality that,

objectively, those actions fit the profile of "a very large category of presumably innocent travelers." *Reid*, 448 U.S. at 441. The Supreme Court cautioned against assigning weight to activities like traveling from a location known as an origin for drugs at a specific time of day, which sweep too broadly. *Id.* at 440–441. To do so, the Supreme Court noted, would improperly subject countless innocent people "to virtually random seizures." *Id.* at 441.

Moreover, Officer Deering's conclusion that Brown gave evasive answers to questions about where he had been that evening was objectively unreasonable. Viewed in context, Brown's response that he could not remember the exact address of the house was consistent with a person visiting an area with which he was unfamiliar. Brown identified the intersection where the house was located, but the street address escaped him. There is nothing nefarious about failing to memorize the street address of a home in which you do not live. And that Brown did not remember the last name of the friend who he had recently met online and had been visiting, similarly, does not raise suspicion absent more facts. The record is devoid of information suggesting that Brown had a close relationship with the friend and nothing in the record suggests that Brown was nervous or otherwise answering evasively.

Nor is there anything suspicious about Brown's answer that he had been coming from a Speedway gas station. Officer Deering concluded that Brown must have been lying because Officer Deering had seen Brown pull out of a street with only closed

businesses and no Speedway gas station. But interpreting Brown's statement as a lie was not objectively reasonable. Perhaps Officer Deering would only have been satisfied if Brown, in response to the question, had said, "I came from a dead-end street where there were closed businesses." But a reasonable officer, without more information, would not automatically conclude that a driver was lying when he failed to mention the dead-end street. Indeed, Brown testified that he merely had pulled onto the dead-end street to turn around. (64:44–45; App. 144–145). Because Officer Deering failed to ask Brown any further questions about this alleged inconsistency, it can hardly amount to an inadequate explanation of Brown's whereabouts that adds to Officer Deering's reasonable suspicion.

These facts do not, in their totality, amount to reasonable suspicion that Brown was engaged in illegal drug activity. Instead, the facts depict a consistent narrative of a person driving in an unfamiliar area at night. That Officer Deering divined reasonable suspicion from these non-particularized, non-individualized facts is unreasonable. Reasonable suspicion requires more than a hunch to conclude that criminal activity is afoot.

The fact that Officer Deering discovered that Brown had been arrested twice for drug-related crimes does not change this result. It is true that a person's arrest record may be considered by an officer as part of the totality of the circumstances taken into account in deciding whether reasonable suspicion exists. See *State v. Anderson*, 2019 WI 97, ¶ 51, 2019

WL 6108606 (Nov. 15, 2019). But "police awareness of an individual's prior criminal record . . . in and of [itself], [is] insufficient to provide a basis for" reasonable suspicion. *Betow*, 226 Wis. 2d at 95 n.2; see *Anderson*, 2019 WI 97, ¶ 51. To attach a suspicious character to Brown's innocent actions merely because he had been arrested for two drug crimes in the past improperly weights his prior criminal history.

For example, in *Gammons*, the court of appeals considered whether reasonable suspicion of drug activity existed where officers stopped "an out-of-town vehicle in an area purportedly known for drug activity," at night, and the suspect was nervous. 241 Wis. 2d 296, ¶ 23. The court concluded that these facts were insufficient to establish reasonable suspicion, and proceeded to consider whether the officer's "personal knowledge of [the suspect's] prior drug activity" made a difference. *Id.* The court concluded that it did not, particularly where the officer had not witnessed the suspect "say or do anything that specifically indicated drug use or possession on the night of the stop." *Id.*

Like *Gammons*, the facts in this case do not support a conclusion that Officer Deering had reasonable suspicion to investigate drug activity. That Brown had been arrested in the past for drug activity does not change the outcome.

Accordingly, Officer Deering lacked reasonable suspicion to prolong the traffic stop to engage in an investigation of illegal drug activity.

III. Because the Traffic Stop Was Unlawfully Prolonged, Rendering Brown Illegally Seized, Any Consent Given by Brown to Conduct a Search Is Invalid

Brown illegally was seized when Officer Deering prolonged the traffic stop, without reasonable suspicion, to engage in ordinary criminal investigation. See pp. 11–36, *supra*. It was during this illegal seizure that Officer Deering requested Brown's consent to conduct a search. But consent given by an individual who is unlawfully seized is invalid. See *State v. Williams*, 2002 WI 94, ¶¶ 19–20, 255 Wis. 2d 1, 646 N.W.2d 834; *State v. Jones*, 2005 WI App 26, ¶ 9, 278 Wis. 2d 774, 693 N.W.2d 104. Accordingly, any consent given by Brown during the unlawfully prolonged traffic stop was invalid.

IV. If Officer Deering Did Not Prolong the Stop or If He Had Reasonable Suspicion to Investigate Whether Brown Had Illegal Drugs, This Court Must Remand the Case for the Trial Court to Determine Whether Brown Validly Consented to the Search

Even if this Court concludes that Officer Deering did not prolong the traffic stop or that he had reasonable suspicion to pursue an investigation for illegal drugs, a factual finding must still be made on the issue of Brown's consent to the search. The trial court failed to make a factual finding on consent, holding the issue in abeyance. The appropriate remedy is to remand the case to the trial court for a factual finding on whether Brown consented to the search.

Ordering a driver out of a car "does not by itself justify the often considerably greater intrusion attending a full field-type search." *Knowles*, 525 U.S. at 117. An officer may search a person detained during a traffic stop pursuant to a custodial arrest, *New York v. Belton*, 453 U.S. 454, 460 (1981), or if the officer obtains a search warrant. An officer also may search an individual detained during a traffic stop if the officer has reasonable, articulable suspicion that the person is armed and dangerous. See *Terry*, 392 U.S. at 27. Absent those circumstances, an officer may only search an individual if the officer has obtained the person's voluntary consent. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 242–243 (1973); *Floyd*, 377 Wis. 2d 394, ¶ 29. "The state bears the burden of establishing by clear and convincing evidence that a person's consent to a search was voluntary." *Floyd*, 377 Wis. 2d 394, ¶ 30 (citing *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998)).[4]

Here, it is undisputed that Officer Deering did not have a search warrant, nor had he placed Brown under arrest at the time the search was performed. Moreover, there are no facts in the record that would permit a finding that officer Deering had reasonable suspicion that Brown was armed and dangerous. In fact, Officer Deering testified to the contrary that there were "no specific factors" leading him to

[4] Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment "is generally impermissible in court proceedings." *State v. Scull*, 2015 WI 22, ¶¶ 20–23, 361 Wis. 2d 288, 862 N.W.2d 562.

believe that Brown had any weapons. (64:28–29; App. 128–129). Accordingly, Officer Deering's search only can be justified if Brown validly consented to it.

In the trial court, the parties disputed whether Brown consented to the search. Officer Deering testified that Brown had consented to the search; Brown testified that he had not. (64:18, 49; App. 118, 149). The trial court never resolved this dispute choosing instead to hold the issue of consent in abeyance. See *Brown*, 388 Wis. 2d 161, ¶ 16. (App. 186–187). At the suppression hearing, the trial court explained that the issue of consent would not "be addressed this afternoon" and noted that if Brown had not consented to the search there would be "a whole different issue" of whether that consent and the search were constitutionally valid. (64:66, 72; App. 166, 172). The court concluded that the issue of consent was "for a different day, with potentially different witnesses." (64:72; App. 172).[5]

But the parties never revisited the issue of consent. Although the state bore the burden of proving by clear and convincing evidence that Brown's consent to the search was voluntary, it did not request an additional hearing or otherwise

[5] Although the trial court did not specify what additional witnesses it expected would testify on the issue of consent, it is reasonable to assume the court was referring to the two other officers—Officer Weid and Officer Brooks—who were at the scene of the stop. The record reflects that, in addition to Brown and Officer Deering, Officers Weid and Brooks were the only other people present at the time of the stop.

provide the accounts of the fact witnesses (Officers Weid and Brooks) the trial court determined were needed to resolve the issue of consent.

The trial court is the appropriate place to resolve this factual dispute. On remand, the trial court will have the opportunity to revisit the testimony of Brown and Officer Deering and make a factual finding on consent. Accordingly, if this Court concludes that the traffic stop was not prolonged or that reasonable suspicion justified Officer Deering's actions, Brown requests that the Court remand the case for the trial court to make a finding on the issue of consent.

CONCLUSION

For the reasons stated, Courtney C. Brown respectfully requests that the court vacate his conviction and remand to the circuit court with instructions to permit him to withdraw his no-contest plea and to grant the motion to suppress.

Dated this 29th day of November, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,708 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 29th day of November, 2019.

Signed:

ELIZABETH NASH
Assistant State Public Defender

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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 s. 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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Dated this 29th day of November, 2019.

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