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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 and
the Honorable Richard J. Nuss, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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I. Officer Deering's Investigatory Actions Prolonged the Traffic Stop

The key question presented in this case is whether Officer Deering's 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 safety precautions taken as part of the mission of the stop or actions taken to facilitate investigation into other criminal wrongdoing. If the actions were safety precautions taken as part of the mission of the stop, they did not prolong it. See *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (mission of traffic stop encompasses "address[ing] the traffic violation that warranted the stop, and attending[ing] to related safety concerns" (internal citation omitted)). If, on the other hand, the actions were taken to facilitate investigation into unrelated criminal activity, they were not part of the mission of the stop and prolonged it. See *Indianapolis v. Edmond*, 531 U.S. 32, 40–41 (2000) (measures taken to "detect evidence of ordinary criminal wrongdoing" are not part of the stop's mission); see also *Rodriguez*, 135 S. Ct. at 1615 (same).

The Supreme Court has provided some guidance to assist in this inquiry. In *Rodriguez*, the Court explained that "[o]n-scene investigation into other crimes . . . detours from [the stop's] mission. So

too do safety precautions taken in order to facilitate such detours." 135 S. Ct. at 1616 (internal citation omitted).

The state asserts that Officer Deering's actions are justified by the government's interest in officer safety. (State Br. at 9–13). The state argues that removing Brown from the vehicle, asking Brown whether he had anything illegal, and asking for Brown's consent to search are all actions that have been deemed permissible as negligibly burdensome safety precautions that are part of the mission of the stop. See *Pennsylvania v. Mimms*, 434 U.S. 106 (1996) (removing driver from vehicle); *State v. Johnson*, 2007 WI 32, 299 Wis. 2d 675, 729 N.W.2d 182 (same); *State v. Wright*, 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 729 (asking whether driver had weapon and for consent to search); *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560 (same).

While it may be true that in certain circumstances Officer Deering's actions could be considered safety precautions that are part of the mission of the stop, they were not here. "The reasonableness of a seizure . . . depends on what the police in fact do." *Rodriguez*, 135 S. Ct. at 1616. That is, in each case a court must examine "what the officer actually did and how he did it[.]" *Id.* An examination of Officer Deering's actions and his testimony demonstrates that by the time he took these actions, he no longer was diligently pursuing the mission of the traffic stop. Instead, Officer Deering had detoured from the mission of the traffic

stop to investigate unrelated criminal wrongdoing and his actions were taken to facilitate that investigation.

By the time Officer Deering returned to Brown's vehicle to issue the warning and return Brown's license, he had completed substantially all of the mission-related activities. Officer Deering already had asked Brown about where he had been earlier that evening and where he was going, called back up officers to the scene, conducted a record check, and drafted a written warning. (64:14, 16–17, 27, 35–38; App. 114, 116–117, 127, 135–138). (Officer Deering had not issued the written warning or returned Brown's license before removing him from the car. That is not dispositive here. See pp. 7–9, *infra*.) Officer Deering was able to complete each of these actions without removing Brown from the vehicle or asking about the presence of illegal items. And no mission-related activities were simultaneously occurring when Officer Deering reapproached Brown's vehicle.

Moreover, Officer Deering's testimony at the suppression hearing confirms that he had detoured from the mission of the stop to investigate whether Brown was engaged in illegal drug activity. Officer Deering expressed no intention to explain the warning to Brown. In fact, when questioned at the suppression hearing about whether he had issued the citation or returned Brown's license when he reapproached Brown's vehicle, Officer Deering could not remember. (64:43; App. 143). This testimony supports the proposition that by the time Officer Deering returned to Brown's vehicle, he already had

moved on from the mission of the stop and was engaged in investigation of other criminal activity.

In addition, Officer Deering earlier had sought a drug-sniffing dog and, after discovering that no dog was available, decided instead to search Brown for drugs himself. Officer Deering admitted that removing Brown from the vehicle and asking him whether he had anything illegal was based solely on purported reasonable suspicion that Brown was engaged in illegal drug activity and, therefore, was unrelated to traffic stop's mission:

> Q: Did you check to see if there was a canine on duty that night?
>
> A: I did, and there was not.
>
> Q: And why would you ask if there was a canine on duty?
>
> A: A combination of the suspicion of where he was coming from, his story. Also when I ran his name, he had priors for possession with intent to distribute cocaine, armed robbery, other charges, enough suspicion to check if this [sic] was a canine on duty.
>
> Q: And there was not a canine on duty that evening?
>
> A: Correct.
>
> Q: So you wrote the warning for not wearing a seat belt, and did you proceed to initiate contact with Courtney again?
>
> A: Yes.

Q: And what -- did you ask him to step out of the vehicle?

A: Yes.

Q: What did you do next?

A: I had him walk back to my squad car.

Q: Okay. And did you ask him anything then?

A: I asked him if there was anything on him I needed to know about. He said no.

Q: And why would you ask him that question?

A: To ask if he had any illegal weapons or drugs on him.

Q: Okay. And you decided to ask him that question because of what had occurred in the lead up to this point?

A: Correct. The suspicion from the driving and the information on his record under totality.

. . .

Q: Why did you have Mr. Brown exit the vehicle?

A: Again, that would be an awkward encounter to ask for someone's consent when they're sitting in a vehicle and then reach through the window to search them. That's not police practice.

> Q: So you already knew you were going to search him before you even re-approached him?
>
> A: Correct.

(64:17–18, 40; App. 117–118, 140).

Further, Officer Deering did not testify and the facts do not support a conclusion that Officer Deering's actions were aimed at promoting officer safety. Officer Deering testified that the stop was not high risk and that he had no specific concern that Brown was armed. (64:28–29, 40; App. 128–129, 140). Indeed, Officer Deering did not ask Brown any questions about whether he was armed at the time initial contact was made. Moreover, at the time Officer Deering reapproached Brown's vehicle, two other officers had arrived on scene to ensure Officer Deering's safety. (64:33–34; App. 133–134). And neither "safety officer" removed Brown from the vehicle or otherwise questioned him about weapons while Officer Deering was in his squad car writing the warning.

The state argues that Officer Deering's testimony supports a conclusion that he was concerned about officer safety related to the mission of the stop. The state points to Officer Deering's testimony that when he asked Brown whether he had anything illegal, he did so to determine whether Brown "had any illegal weapons or drugs." (State Br. 18–21). But, by the time Officer Deering had asked Brown this question, he had moved on to an investigation of criminal wrongdoing unrelated to the

mission of the stop. And Officer Deering's own testimony reflects that he had no concern that Brown was armed.

In asserting that Officer Deering's actions were safety precautions taken as part of the mission of the traffic stop, the state also relies heavily on the fact that Officer Deering had not yet issued the warning or returned Brown's driver's license at the time he ordered Brown to exit the vehicle. (State Br. 13–18).

Brown does not dispute that issuing the warning and returning a driver's license are part of the mission of the stop. And Brown does not dispute that Officer Deering had not issued the warning nor returned Brown's driver's license at the time he removed Brown from the vehicle. But whether Officer Deering had issued the warning and returned Brown's license does not dictate whether the stop was prolonged.

Under *Rodriguez*, a traffic stop is prolonged if an officer engages in an investigation of ordinary criminal wrongdoing in a way that adds time to the stop. It is irrelevant whether the officer's actions occur before or after he issues the warning and returns a driver's documents.

In *Rodriguez*, a K-9 officer witnessed a vehicle briefly veer onto the shoulder of a highway. 135 S. Ct. at 1612. The officer pulled over the vehicle and asked the driver for his license, registration, and proof of insurance. *Id.* at 1613. After running a record check on the driver and the passenger, the officer called for a backup officer and wrote a warning for driving on the shoulder of the road. *Id.* The officer returned to

the vehicle, issued the warning to the driver, and returned the driver's and passenger's documents. *Id.* The officer then asked the driver whether he could perform a dog sniff of the vehicle. *Id.* After the driver refused, the officer instructed the driver to wait for the second officer to arrive on scene. *Id.* When the second officer arrived, the K-9 officer retrieved his dog and conducted a dog sniff of the car. *Id.*

In explaining that the traffic stop was prolonged, the Supreme Court noted that "[i]f an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time 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.* "The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs'—*i.e.* adds time to—'the stop.'" *Id.* (internal citations omitted).

True, the K-9 officer in *Rodriguez* issued the warning ticket and returned the occupants' documents before he ordered them to wait for the second officer. But if the officer instead had held onto the written warning and the occupants' documents at the time he ordered them to wait, the stop still would have been prolonged.

Similarly, here, the time reasonably required to complete the stop is not controlled by Officer Deering's issuance of the warning and return of Brown's license. When Officer Deering returned to Brown's vehicle, he had moved on from addressing

the underlying traffic infraction and had begun investigating ordinary criminal wrongdoing. In doing so, Officer Deering added time to the stop. To be sure, Officer Deering could have, as part of the mission of the stop, returned to Brown's car and presented and explained the warning. He did not. Instead, Officer Deering detoured from that portion of the traffic stop and began a new investigation into ordinary criminal wrongdoing. This detour from the stop's mission prolonged the stop beyond the time reasonably required to complete it.

II. Officer Deering Lacked Reasonable Suspicion to Prolong the Traffic Stop in Order to Engage in a Drug Investigation

The state argues that the following facts support reasonable suspicion: Brown was driving a rental car late at night in a city in which he did not live and Officer Deering witnessed Brown turn off of a dead-end road that had closed businesses on it. Moreover, Brown allegedly was vague and untruthful about where he had been earlier that evening and where he was going. And Brown had previous arrests for possession with intent to distribute cocaine and possession of marijuana and was from Milwaukee,

which Officer Deering testified is a source city for drugs.[1] (State Br. at 22–34).

But if the objective facts in this case support reasonable suspicion to investigate drug activity, large portions of the population will be subjected to nearly unchecked searches. An officer must articulate more than a hunch or inchoate suspicion to support a finding of reasonable suspicion. *State v. Young*, 2006 WI 98, ¶ 21–22, 294 Wis. 2d 1, 717 N.W.2d 729. Moreover,

> while an officer's training and experience is 'one factor in the totality of the circumstances that courts take into account in deciding whether there is reasonable suspicion to make the stop,' that fact 'does not require a court to accept all of [the officer's] suspicions as reasonable, nor does mere experience mean that an [officer's] perceptions are justified by the *objective* facts.'

State v. Betow, 226 Wis. 2d 90, 98 n.5, 593 N.W.2d 499 (Ct. App. 1999) (quoting *State v. Young*, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997)). Here, the alleged reasonable suspicion was supported by unreasonable inferences from innocuous conduct and a mere hunch that criminal activity was afoot.

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[1] The state correctly explains in its brief that Officer Deering was aware only of Brown's arrest record. (State Br. at 19 n.2). Officer Deering testified that he discovered that Brown had prior arrests for "possession with intent to distribute cocaine, armed robbery, other charges." (64:17; App. 117). Officer Deering's incident report clarifies that the record check revealed three prior arrests: possession with intent to distribute cocaine, armed robbery, and possession of marijuana. (64 Ex. 1 at 3–4; App. 177–178).

Officer Deering witnessed Brown turn off of a dead-end road with closed businesses late at night in a rental car and inferred that Brown's presence in that location was suspicious because it was a secluded spot where a drug deal could take place. But that suspicion was unreasonable and unsupported by the objective facts. A drug deal requires more than one party and Officer Deering did not witness another car or another person in the vicinity. And Officer Deering's inference that a street with closed businesses is particularly secluded is unreasonable: Most locations in Fond du Lac could be considered "secluded" at 2:44 a.m. And it is more likely that businesses would have security cameras than a residential area where most people would be sleeping at that time of night. Moreover, that Brown was driving a rental is "not particularized information concerning" Brown's "conduct and it describes large numbers of innocent persons." *Young*, 212 Wis. 2d at 433.

Similarly, that Brown is from Milwaukee and that Officer Deering testified that Milwaukee is a source city for drugs are facts that are not particularized to Brown's conduct. It may be that there are instances where a person's presence in or movement from a "source city" adds to the mosaic of reasonable suspicion when combined with other particularized facts suggesting that the person is engaged in drug trafficking. See, e.g., *United States v. Sokolow*, 490 U.S. 1, 4–9 (1989). But nothing particularized about Brown's conduct suggested that he was engaged in the sale of drugs.

Brown addressed the remainder of the facts related to reasonable suspicion in his opening brief. It is worth noting as a general matter, however, that whether Officer Deering had reasonable suspicion to prolong the stop to investigate drug activity must be viewed from the perspective of a reasonable officer *at the time of the encounter*. See *Terry v. Ohio*, 392 U.S. 1, 20–22 (1968). With the benefit of hindsight, we know that Officer Deering's hunch that criminal activity was afoot was correct. But the facts known to Officer Deering at the time he prolonged the traffic stop should not be afforded a more suspicious character simply because we know now that Brown possessed drugs. See *State v. Morgan*, 197 Wis. 2d 200, 223, 539 N.W.2d 887 (1995) (Abrahamson, J., dissenting).

III. If This Court Concludes That the Traffic Stop Was Not Unlawfully Extended, It Should Remand the Case for the Trial Court to Make a Factual Finding on Consent

The trial court issued a final order denying Brown's motion to suppress. (64:73; App. 173). Because a final ruling was made on Brown's motion to suppress, the exception to the guilty-plea-waiver rule for orders denying motions to suppress evidence applies. See Wis. Stat. § 971.31(10) & Comments; *State v. Reikkoff*, 112 Wis. 2d 119, 124–125, 332 N.W.2d 744 (1983).

The parties agree that the trial court denied Brown's motion to suppress without making a factual finding on whether Brown consented to the search

and that, as a result, there is no factual finding on consent for this Court to review. (State Br. 34–37). Brown is not asking this Court to resolve the contested issue of consent.

Rather, if this Court concludes that the traffic stop was not unlawfully extended, Brown believes the most expedient course of action is for this Court to remand the case to the trial court to make a factual finding on consent. This will permit the trial court to make the required finding and prevent further, multi-layered litigation on ineffective assistance of counsel, see *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992); *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996), or a new plea withdrawal motion on different grounds, as the state appears to suggest. (State Br. at 37).

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 8th day of January, 2020.

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 2,991 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 8th day of January, 2020.

Signed:

ELIZABETH NASH
Assistant State Public Defender