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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2017AP002006-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

JOHN PATRICK WRIGHT,

Defendant-Respondent.

ON NOTICE OF APPEAL FROM AN ORDER
GRANTING A MOTION TO SUPPRESS EVIDENCE
ENTERED ON SEPTEMBER 1, 2017, IN THE
CIRCUIT COURT OF MILWAUKEE COUNTY,
THE HONORABLE HANNAH DUGAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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STATE OF WISCONSIN

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

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STATEMENT OF THE ISSUE

1. Did an officer's questions regarding the presence of a weapon during the normal course of a traffic stop improperly extend the scope of that traffic stop?

   Trial court answered: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on those issues. *See* Wis. Stat. (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not meet the criteria for publication. *See* Wis. Stat. (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On July 29, 2016, the State of Wisconsin charged John Wright with one count of Carrying a Concealed Weapon. (R1:2; App. 102) The charge stemmed from events that occurred on June 15, 2016, at 2350 North 23rd Street after Milwaukee Police stopped Wright for having a defective headlight. (R1:2; App. 102) Subsequent to stopping Wright, officers asked Wright if he had a permit to carry a concealed weapon and if he had any weapons in the vehicle. (R1:2; App. 102) Wright answered that he did not have a permit and additionally answered that he had a gun locked in his glovebox. (R1:2; App. 102)

On February 1, 2017, Wright filed a motion to suppress evidence in the trial court arguing that officers' questioning as to whether he was a permit holder and whether he had any weapons was outside the scope of the initial stop. (R5:5; App. 107)[1] Wright argued that the officers transformed the legitimate seizure into a constitutionally improper one when they asked these questions of Wright without any reasonable suspicion to believe he had a weapon. (R5:5-6; App. 107-108)

An evidentiary hearing regarding Wright's motion was held on May 11, 2017. (R27; App. 116-65) At that hearing, Milwaukee Police Officer Kristopher Sardina testified to the following facts: On June 15, 2016, he and his partner stopped a vehicle that had only one headlight working. (R27:6; App. 121) Upon stopping the vehicle, Officer Sardina learned that John Wright was the driver and lone occupant. (R27:8; App. App.

[1] Wright acknowledged in his brief that the initial stop for a defective headlight was a lawful stop. (R5:5; App. 107)

123) Officer Sardina stopped the vehicle only for the headlight and had no other basis for which to stop Wright's vehicle when he did so at approximately 11:00 p.m. (R27:7; App. App. 122)

Officer Sardina then approached Wright and asked him questions. (R27:9; App. 124). Two of those questions were whether Wright was a Carrying Concealed Weapon (CCW) permit holder and if he had any weapons in his vehicle. Officer Sardina asked these questions in conjunction with asking for Wright's driver's license. (R27:9; App. 124) In response, Wright stated that he had just completed taking a CCW permit course but had not yet obtained his permit. (R27:10; App. 125) Wright also told Officer Sardina that he did have a firearm in his vehicle. (R27:10; App. 125) Wright then told Officer Sardina and his partner that they could take possession of his firearm during the traffic stop. (R27:10; App. 125) Officer Sardina's partner then retrieved the firearm from Wright's closed glovebox. (R27:11; App. 126) It was only after recovering the firearm from Wright's glovebox that Officer Sardina took Wright's driver's license back to his car with him to run a check on it. (R27:11; App.126)

Officer Sardina explained that he and fellow Milwaukee police officers are trained to ask these questions during traffic stops for officer safety and that the questions are even printed on a card given to officers regarding questions to ask during traffic stops. (R27:9, 17; App. 124, 132) Officer Sardina testified that, at the time he asked Wright those questions, Wright was still seated inside his vehicle and was not asked to exit his vehicle at that point. (R27:12; App. 127) Officer Sardina added that he had not seen a firearm, a holster, bullets, or other evidence that Wright may have a firearm when he asked Wright those questions regarding a CCW permit and the presence of a firearm. (R27:17; App. 132)

At the conclusion of the testimony,[2] the State argued

[2] Wright did testify at the motion hearing. However, he agreed with a substantial portion of Officer Sardina's testimony. Wright only disagreed that officers never told him the reason for which he was initially detained prior to him being taken to the station. The remainder of Wright's brief testimony established that the gun recovered from the glove box was his and that he had completed a course as a prerequisite to applying for a CCW permit. (R27:22-28; App. 137-143)

that officers did not extend the traffic stop by asking Wright whether he was a CCW permit holder and whether he possessed a gun because these questions were concerned with officer safety. (R27:32; App. 147) The State highlighted the dangerous nature traffic stops pose to officers. (R27:32; App. 147) This argument was identical to one the State made in a response brief citing *State v. Mohr*, 2000 WI App 111, ¶ 14, 235 Wis. 2d 220, 613 N.W.2d 186. (R6:3; App. 112) The State further argued these questions were related to the officer safety component of the traffic stop, which is part of the traffic stop, not an extension of the same. (R27:32; App. 147)

Wright argued, however, that when Officer Sardina asked these questions related to a firearm, he extended the traffic stop into a criminal investigation with no reasonable suspicion to do so. (R27:35; App. 150) Wright compared this to a "fishing expedition" for weapons in cars. (R27:34; App. 149) Wright then argued that, because officers were changing the nature of the seizure, the Fourth Amendment would require them to have independent reasonable suspicion when the officers asked these questions related to a firearm, and thus they improperly extended the traffic stop. (R27:35; App. 150)

The State then reiterated its argument that these two questions did not amount to a criminal investigation but were wholly concerned with the officers' safety during the traffic stop that they were legitimately investigating. (R27:40; App. 155) The trial court then adjourned the case for a decision to be given regarding the motion. (R27:48; App. 163)

On June 21, 2017 the trial court found that the officers' initial stop of Wright was "fine" based on the testimony that Officer Sardina observed Wright to have only one operational headlight. (R29:5) The trial court then found that Officer Sardina could not recall the exact order of questions he asked of Wright regarding Wright's driver's license, the CCW permit, and the presence of a firearm. (R29:5-6) The trial court placed great weight on the order in which Officer Sardina asked these questions citing the "constitutional principles . . . of asking questions in a correct order in terms of seizing[3]." (R29:6). The

[3] The trial court never elaborated to what constitutional principles it was referring.

court later found that Officer Sardina did not ask the questions in a sequential order "in terms of establishing the correct way to stop and search." (R29:6) The trial court also found neither Officer Sardina nor his partner observed Wright make any furtive movements. (R29:6) The court then found that, though the initial traffic stop was justified under the Fourth Amendment, Officer Sardina's questions regarding a firearm extended the traffic stop into a different kind of investigation, which "was against the standard of reasonableness" in terms of whether the officers could have believed that Wright was committing or was about to commit a crime. (R29:7) In response to a question by the State, the trial court clarified its ruling stating that officers lacked reasonable suspicion to ask Wright whether he was a CCW permit holder and whether he possessed a firearm during the traffic stop. (R29:8) On those findings, the trial court then granted Wright's motion to suppress the firearm as evidence. (R29:7-8) The State then requested a status date to consider an appeal of that decision[4] and the case was set for August 18, 2017. (R29:9)

On July 11, 2017, the State filed a motion to reconsider the decision on Wright's motion. (R13; App. 113-114) The crux of the State's argument in its motion to reconsider revolved around a Wisconsin Supreme Court case that had been published very shortly after the trial court's decision in this case. (R13:2; App. 114) The State filed that motion five weeks in advance of the status date with both the trial court and Wright's attorney. (R13; App. 113-114) The State did not request any date preceding the upcoming August 18, 2017, status date. (R13; App. 113-114) On August 18, 2017, the trial court refused to consider the State's motion to reconsider stating that it was the first the court had seen of the State's motion. (R30:6; App. 171) The trial court further based its decision to not consider the State's motion on the facts that the State did not file a notice of motion along with its actual motion on July 11, 2017, and the State did not include the standard of review for a motion to reconsider, and thus, the trial court refused to consider the State's motion to reconsider. (R30:6; App. 171) The State now brings this appeal.

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[4] Though the court made its decision on June 21, 2017, it did not issue a formal written decision from which to appeal until September 1, 2017. (R15; App. 115)

The State argues that Judge Dugan erred when she ruled Officer Sardina's questions improperly extended the traffic stop. Wisconsin and federal law allow an officer to ask questions related to officer safety as part of the mission of a traffic stop. Officer Sardina was lawfully allowed to ask Wright questions related to the presence of weapons without improperly extending the traffic stop. The State respectfully requests this court reverse Judge Dugan's decision and remand the case to the trial court.

STANDARD OF REVIEW

Whether evidence should be suppressed is a question of constitutional fact. *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899. A reviewing court will uphold the trial court's finding of facts unless they are clearly erroneous. *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W. 2d 827 (1987). However, the trial court's application of those findings of fact to constitutional principles is a question of law for a reviewing court to review independently. *Id.*

ARGUMENT

THE TRIAL COURT ERRED WHEN IT RULED THAT OFFICER SARDINA'S QUESTIONS EXTENDED THE TRAFFIC STOP INTO A CRIMINAL INVESTIGATION

In his argument to the trial court following the motion hearing on May 11, 2017, Wright analogized his facts to those in *Rodriguez v. United States,* 135 S. Ct. 1609 (2015). (R27:35; App. 150) In *Rodriguez*, officers had concluded their mission of a traffic stop but caused Rodriguez to wait on scene for approximately five additional minutes for officers to procure a drug sniffing canine to search for the odor of drugs around Rodriguez's car. *Rodriguez*, 135 S. Ct. at 1613. The Court in *Rodriguez* held that the tolerable length of a traffic stop is determined by the nature of the seizure's mission, which is to address the traffic violation that warranted the stop, *and to attend to related safety concerns*. *Id.* at 1614 (emphasis added). Authority for the seizure ends when the tasks tied to the original mission are, or should have been, concluded. *Id.*

Contrary to Wright's argument, the facts of *Rodriguez* are not analogous to the facts in the present case. Here, the officers had not concluded their original mission of handling the traffic violation or the related safety concerns related to that mission. Unlike the officer in *Rodriguez*, who approached Rodriguez's vehicle three times, issued a formal written warning to Rodriguez and handed back Rodriguez's license and paperwork prior to ordering him to remain on scene for a drug sniffing dog, Officer Sardina, when asking about the presence of any weapons, had just begun speaking with Wright and had not yet returned to his squad car even once with Wright's license to run a check or to conclude his mission surrounding the faulty headlight. (R27:11; App. 126) The State argues that Judge Dugan erred in finding that Officer Sardina's actions were comparable to those of the officer in *Rodriguez*. (R29:7-8) Officer Sardina asked about the presence of weapons; he did not ask to search for drugs or delay the traffic stop for any other law enforcement to arrive. He asked Wright almost immediately whether he was in possession of any weapons and Officer Sardina did not extend this traffic stop. The trial court's comparison of these facts to *Rodriguez* was in error.

Wisconsin case law has consistently held that officer's questioning regarding the presence of weapons at a traffic stop are related to the legitimate interest of officer safety related to that traffic stop and do not extend traffic stops. The State will discuss two of these cases in the following paragraphs.

Wright's case is more analogous to *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560. In *Floyd*, officers stopped Floyd for suspended registration. *Floyd*, 2017 WI 78, ¶ 2. The officer approached Floyd and spoke with him for approximately two to three minutes before obtaining Floyd's state identification card. *Id.,* ¶ 4. The officer then returned to his squad car and asked for canine officers to report to the scene but none were in the immediate area. *Id.* The officer then completed writing Floyd citations and re-approached Floyd's vehicle approximately five minutes later. *Id.,* ¶ 5. Prior to handing Floyd his identification card or citations, the officer asked Floyd to step out of the vehicle at which time the officer asked Floyd if he had any weapons on his person that could harm the officer. *Id.* The officer then asked Floyd if he would consent to a search of his person. *Id.* Floyd then appealed on

the grounds that the officer's questioning of him when he re-approached Floyd's vehicle improperly extended the traffic stop. *Id.,* ¶ 1.

In its decision, the *Floyd* Court cited the same language from *Rodriguez* mentioned above in describing the constitutional limitations on the tolerable time of a traffic stop. *Floyd*, 2017 WI 78, ¶ 21. In discussing what tasks are included in the mission of a traffic stop, the *Floyd* Court noted that officer safety is "… an integral part of every traffic stop's mission." *Id.*, ¶ 26 (citing *Rodriguez v. United States*, 135 S. Ct. at 1616). The *Floyd* Court stated that the danger inherent to an officer during the course of a traffic stop authorizes an officer to take certain negligibly burdensome precautions in order to complete the officer's mission safely. *Floyd,* 2017 WI 78, ¶ 27. The Court then specifically stated that the officer's question regarding whether Floyd had any weapons on his person that could harm the officer was related to officer safety and was negligibly burdensome to ensure the officer could fulfill his duties safely. *Id.,* ¶ 28. The Court further ruled that, because the questions were related to officer safety and were negligibly burdensome, they were related to the original traffic mission and did not extend the original seizure. *Id.*

In another similar case, the Wisconsin Court of Appeals also held that an officer asking a motorist stopped for an equipment violation about the presence of weapons did not improperly extend the scope of the traffic stop. *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996). In *Gaulrapp*, officers stopped Gaulrapp for having an excessively loud muffler. *Gaulrapp*, 207 Wis. 2d 600 at 603. Upon approaching Gaulrapp's vehicle and making contact with him, officers asked Gaulrapp if he had any weapons or drugs in his vehicle. *Id.* Gaulrapp moved to suppress drugs that officers found on his person arguing that the officers had improperly extended the traffic stop when they asked about the presence of weapons and drugs. *Id.* at 604. The *Gaulrapp* Court held, however, that mere questioning by officers does not constitute a seizure. *Gaulrapp*, 207 Wis. 2d 600 at 609 (citing *Florida v. Bostick*, 501 U.S. 429 (1991)). It is, therefore, not the nature of any questions being asked of a motorist that extends a traffic stop, but an officer's actions if he or she unreasonably delays or makes the motorist remain after the purpose of the traffic stop

has concluded. *Gaulrapp*, 207 Wis. 2d 600 at 609. In the present case, Officer Sardina did nothing to delay the traffic stop, nor did he cause Wright to remain on scene longer than necessary. Officer Sardina merely asked questions of Wright in the normal course of investigating the traffic stop – behavior permitted under *Gaulrapp*.

In this case, as in *Gaulrapp* and *Floyd*, Officer Sardina asked negligibly burdensome questions related to his safety while completing the mission of his traffic stop. Remarkably, Officer Sardina's actions towards Wright were less intrusive than the officer's actions in *Floyd*, who asked Floyd to step out of the vehicle and ultimately asked for permission to search Floyd's person after writing citations in his squad car and then re-approaching Floyd's vehicle. Here, Officer Sardina had just begun his mission of this particular traffic stop. He had just obtained Wright's driver's license and had not yet gone back to his squad car. In order to ensure his safety during the course of this traffic stop, Officer Sardina asked negligibly burdensome questions as to whether Wright had any weapons in the vehicle. Wright stated he did and gave Officer Sardina consent to take possession of it during the course of the traffic stop. Only then did Officer Sardina return to his squad car to fulfill his duties during the traffic stop. Officer Sardina's questions were related to his safety, which even the *Rodriguez* Court, to which Wright attempted to compare his case, stated is an integral part of every traffic stop. Judge Dugan erred in finding that such questions were an improper extension of the scope of the traffic stop.

CONCLUSION

Wisconsin and federal law have consistently held that officer safety is an integral part of every traffic stop due to the inherent risk of danger that traffic stops present. Officers are therefore authorized to ask negligibly burdensome questions to ensure their safety during traffic stops. The trial court erred in ruling that Officer Sardina was required to ask questions in a particular order. There is no such test that requires officers to ask questions in a particular order; rather, the test is only that officers' questions be negligibly burdensome and related to officer safety and asked in the normal course of completing the

mission of the traffic stop. That mission includes ensuring the officer's safety.

Wisconsin cases have consistently held that an officer's questions regarding the presence of a weapon at a traffic stop are related to the legitimate purpose of officer safety and are negligibly burdensome and do not extend the stop. Judge Dugan erred in deciding otherwise. The State respectfully requests this court reverse Judge Dugan's decision.

Dated this _____ day of January, 2018.

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 word count of this brief is 3,178.

_____ _____

Date

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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 s. 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.

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