STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2006-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOHN PATRICK WRIGHT,

Defendant-Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, AFFIRMING AN ORDER SUPPRESSING EVIDENCE ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE HANNAH C. DUGAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

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ISSUE PRESENTED

Does asking a lawfully stopped motorist as to whether he is carrying any weapons, in the absence of reasonable suspicion, unlawfully extend a traffic stop?

The trial court, relying on *Rodriquez v. United States*, 135 S. Ct. 1609 (2015), answered yes.

The court of appeals, also relying on *Rodriquez*, and ignoring this Court's holding in *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560, answered yes.

This Court, following its own precedent in *Floyd*, should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case significant enough for review by this Court, the State requests both oral argument and publication of the opinion.

INTRODUCTION

On June 15, 2016, at approximately 11:00 p.m., Officer Sardina stopped Wright's vehicle for a defective headlight. Officer Sardina approached the vehicle, advised Wright for the reason for the stop, asked for his driver's license, and inquired as to whether Wright was a carrying concealed weapon (CCW) permit holder and if he had any weapons in the vehicle. Wright told Sardina that he had a loaded gun in his glove compartment and had completed a CCW permit class. Wright gave permission for the gun to be in police possession during the duration of the traffic stop, and a subsequent concealed carry permit check showed that Wright did not have a valid permit. Wright was arrested for the crime of carrying a concealed weapon.

The trial court suppressed the gun evidence, reasoning that questions about weapons and Wright's CCW permit status unreasonably extended the traffic stop. The trial court decision was handed down on June 21, 2017, and therefore did not have the benefit of this Court's holding and analysis in *Floyd* which was filed on July 7, 2017.[1]

The court of appeals, in a one-judge opinion, affirmed the trial court's suppression order, holding that without any reasonable suspicion that Wright posed a safety risk, questions about firearms impermissibly expanded the scope of Wright's traffic stop. Despite *Floyd* being discussed and argued by both parties during briefing, the court of appeals made no mention of *Floyd* and instead relied on *Rodriquez* as support for its holding.

The court of appeals erred. Brief questioning about weapons and Wright's CCW permit status were di minimis intrusions that furthered the important goal of promoting officer safety during a traffic stop. Accordingly, the State asks this Court to reverse both the trial court and the court of appeals and to follow the clear line of reasoning articulated in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), and its progeny, and this Court's own precedent in *Floyd*, emphasizing the importance of officer safety concerns in any traffic stop.

[1] On July 11, 2017, the State filed a motion to reconsider, based on *Floyd*, but the trial court entered its suppression order on September 1, 2017 without comment as to the State's reconsideration motion.

STATEMENT OF THE CASE

On June 15, 2016, at approximately 11:00 p.m., Milwaukee Police Officer Kristopher Sardina stopped Wright's vehicle for a burned-out front headlight. (R. 27:5–6, Pet-App. 105–06.) Sardina made contact with Wright, the vehicle's lone occupant. (R. 27:8, Pet-App. 108.) Sardina introduced himself as a Milwaukee police officer and informed Wright of the reason for the traffic stop. (*Id.*)[2] Sardina asked Wright for his driver's license, and inquired, for officer safety purposes, as to whether Wright was a CCW permit holder and whether he had any weapons in the vehicle. (R. 27:9, Pet-App. 109.) Wright advised that he had just finished his CCW permit class and that he did have a firearm in his glove compartment. (R. 27:10, Pet-App. 110.) With Wright's permission, Sardina's partner retrieved the loaded gun from the glovebox. (R. 27:10–11, Pet-App. 110–11.) Sardina ran a check on Wright's CCW status and discovered that Wright did not have a valid permit. (R. 27:11, Pet-App. 111.) Wright was then arrested for a CCW violation. (R. 27:11–12, Pet-App. 111–12.)

Wright filed a motion to suppress the gun evidence, arguing that the questions about his CCW status and as to whether he was carrying any firearms were beyond the scope of a traffic stop for a defective headlight. (R. 5:1–6, Pet-App. 151–56.) Wright's motion was heard on May 11, 2017.

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[2] At the motion hearing, Wright testified that he was not told about the headlight until after he was arrested for CCW. (R. 27:27, Pet-App. 127.) While the trial court did not make a finding of fact as to this issue, the court of appeals, in its "Background" section, referenced Sardina's testimony as to this point and did not discuss Wright's version of events. *State v. Wright*, No. 2017AP2006-CR, 2018 WL 3005943, ¶ 4 (Wis. Ct. App. June 12, 2018) (unpublished) (Pet-App. 172.) And neither the trial court nor court of appeals opinion hinged on when and where Sardina told Wright about the defective headlights.

(R. 27, Pet-App. 101–50.) On June 21, 2017, the trial court orally granted Wright's motion and suppressed the gun evidence. (R. 29, Pet-App. 158–67.) The trial court, in granting Wright's motion, relied on *Rodriquez v. United States*, 135 S. Ct. 1609 (2015). The trial court reasoned that the *Rodriquez* principles were violated by extending a routine traffic stop to ask about weapons. (R. 29:7–8, Pet-App. 164–65.)

On July 7, 2017, this Court issued its opinion in *State v. Floyd*, holding that *Rodriquez* permits brief questioning about weapons in a traffic stop: "Therefore, because the questions [about weapons] related to officer safety and were negligibly burdensome, they were part of the traffic stop's mission, and so did not cause an extension." *Floyd*, 377 Wis. 2d 394, ¶ 28. On July 11, 2017, the State filed a motion to reconsider in Wright's trial court case, based on this Court's holding in *Floyd*. (R. 13, Pet-App. 168–69.) On September 1, 2017, without hearing or comment on the State's motion to reconsider, the trial court issued its suppression order. The State appealed.

In the court of appeals, both the State and Wright discussed this Court's holding in *Floyd*. The State argued that *Floyd* controls the core issue and permits brief questioning about weapons during routine traffic stops; Wright attempted to distinguish his case to avoid *Floyd*'s orbit. On June 12, 2018, Judge Kessler, in a one-judge opinion, affirmed the trial court's suppression order, relying on *Rodriquez v. United States*. *Wright*, 2018 WL 3005943, ¶¶ 13–16 (Pet-App. 177–78.) The court of appeals made no mention of *Floyd*.

On July 12, 2018, the State petitioned this Court for review and the petition was granted on October 9, 2018.

STANDARD OF REVIEW

The question of suppressing evidence is one of historical fact. The circuit court's findings of historical fact are held to the clearly erroneous standard. But the circuit court's application of the facts to constitutional principles are reviewed de novo. *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560.

ARGUMENT

Officer Sardina's two questions about weapons did not unlawfully extend the traffic stop.

A. Controlling legal principles

The police are entrusted with the responsibility of detecting and apprehending law breakers, and the fulfillment of this role is vital to a democratic society. It is critically important that the police perform this function reasonably and safely. This is not idle philosophy or conjecture, as the need for officer safety when lawfully stopping citizens has been repeatedly articulated in Fourth Amendment jurisprudence since the landmark case of *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). The *Mimms* Court removed all debate as to the importance of officer safety in performing their duties when it wrote, "We think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty." *Mimms*, 434 U.S. at 110. And since *Mimms*, the elevated place of officer safety in the hierarchy of reasonable police needs has been consistently recognized by both the United States Supreme Court and this Court.

In the name of officer safety, *Mimms* permitted the police to ask lawfully stopped motorists to exit the car in any traffic stop. *Mimms*, 434 U.S. at 111. This rule was expanded

to allow officers to order passengers out of the vehicle in *Maryland v. Wilson*, 519 U.S. 408, 411, 414 (1997). Both *Mimms* and *Wilson* justified their holdings on the potential dangers of traffic stops to the police. *Mimms*, 434 U.S. at 110 (30 percent of police shootings occurred when a police officer approached a suspect sitting in an automobile); *Wilson*, 519 U.S. at 413 (referencing statistics that in 1994 there were 5,762 officer assaults and 11 officers killed during traffic stops and pursuits).

In both *Mimms* and *Wilson*, the Court articulated a balancing test to evaluate the propriety of a police safety measure during a traffic stop. The Court balanced the public interest in officer safety against the intrusion into the driver's liberty. *See Mimms*, 434 U.S. at 111; *Wilson*, 519 U.S. at 412. After application of this test, both cases held that the police ordering of occupants out of a vehicle, without suspicion of danger, was an acceptable de minimis intrusion. *Id.*

More recently, the Supreme Court has twice reprised the sentiment that traffic stops are fraught with danger to the police. *See Arizona v. Johnson*, 555 U.S. 323, 330 (2009); *Rodriquez v. United States*, 135 S. Ct. 1609, 1616 (2015). The *Rodriquez* Court opined that because of this danger, the police may take negligibly burdensome precautions in order to complete the traffic mission safely. *Rodriquez*, 135 S. Ct. at 1616.

Mimms, *Wilson*, *Johnson*, and *Rodriquez*, recognizing the dangers of traffic stops to the police, interpreted negligibly burdensome safety measures to be part and parcel of the traffic stop mission.

The Courts have also recognized that quick questions during a traffic stop are not sufficiently intrusive to transform a legal stop into an illegal seizure. The asking of quick questions about guns and drugs, without reasonable

suspicion, does not unreasonably prolong a traffic stop. *State v. Gaulrapp*, 207 Wis. 2d 600, 608–609, 558 N.W.2d 696 (Ct. App. 1996). The length of time required to ask a question is not sufficiently intrusive to transform a lawful stop, into an unreasonable unlawful one. *State v. Griffith*, 2000 WI 72, ¶ 61, 236 Wis. 2d 48, 613 N.W.2d 72. An officer's inquiries into matters unrelated to the justification for the traffic stop, do not convert the encounter into something other than a lawful seizure, so long as these inquiries do not measurably extend the duration of the stop. *Johnson*, 555 U.S. at 333. For questioning that does not measurably extend the duration of the stop, *Rodriquez* makes no difference to the rule of law in *Gaulrapp*, *Griffith*, and *Johnson*. *Rodriquez* changed the legal terrain as to delaying traffic stops to further an investigatory objective, but it did not overrule *Johnson* as it specifically allows the police to take de minimis precautions in order to complete a traffic stop safely. Thus, the *Mimms* balancing test tips decidedly in the State's favor as there is a strong court recognized public interest in public safety, and the asking of quick questions to further that interest is a negligibly burdensome and permissible intrusion.

In *State v. Floyd*, this Court appropriately applied the legal precedent, holding that quick questions about weapons are negligibly burdensome and permissible. *Floyd*, 377 Wis. 2d 394, ¶ 28. Incident to a traffic stop, the police asked Floyd if he had any weapons on him. After Floyd denied having any, the police then asked if they could search him for their safety. *Floyd*, 377 Wis. 2d 394, ¶ 5. This Court found these questions permissible safety precautions. *Floyd*, 377 Wis. 2d 394, ¶ 28.

This Court's holding did not turn on a reasonable suspicion analysis. While there were factors such as tinted windows, and air fresheners, the Court took pains to insulate the question about weapons from a reasonable suspicion analysis: "The reason we didn't address 'reasonable suspicion'

[relating to question about weapons] is because that is necessary only if Deputy Ruffalo extended the stop. As the first half of our opinion [the portion of opinion dealing with the effect of the question about weapons on the traffic stop] demonstrates, he did not." *Floyd*, 377 Wis. 2d 394, ¶ 28 n.6. The *Floyd* holding is clear; quick questions about weapons are part of the traffic stop, it does not extend the stop, and therefore there is no need for reasonable suspicion to justify the query. In this manner, *Floyd* remained true to *Pennsylvania v. Mimms* and the cases that followed, none of which required reasonable suspicion for the negligibly burdensome safety measures employed by the police during a lawful traffic stop.

B. Officer Sardina's two quick questions about weapons were connected to officer safety issues, were negligibly burdensome, and thus were part of the traffic stop mission.

There is no dispute that Officer Sardina lawfully stopped Wright's vehicle, and that upon making the stop, Sardina had no particularized suspicion that Wright was carrying firearms or was dangerous. And there is no factual dispute that Sardina asked Wright, during the initial stages of a defective headlight stop, if he had a CCW permit and if he was carrying weapons in the vehicle. The issue is whether these two questions were routine safety inquiries, part of the traffic stop mission, or an impermissible detour extending the traffic stop beyond constitutional limitations.

1. Under *Floyd*, Officer Sardina's brief questions about weapons were constitutionally reasonable.

Here the police, incident to a traffic stop, asked Wright if he had a CCW permit and if he had any weapons in the vehicle. The lone factual differences between this case and

Floyd are that in *Floyd* the police asked for consent to search, while here the police asked about Wright's CCW permit status, and *Floyd* had a couple of factors such as air fresheners and tinted windows that might arguably suggest drug activity. But the relevant facts were on all fours: In both instances, the questions asked furthered the legitimate and weighty goal of officer safety in a traffic stop, were quickly asked, and were de minimis intrusions.

Like asking for consent to a safety frisk in *Floyd*, Sardina's query about Wright's CCW status is clearly tethered to safety concerns. In 2011, the Wisconsin Legislature enacted 2011 Act 35 that allowed Wisconsin citizens to apply for concealed carry permits. Thus, many Wisconsin citizens were given the opportunity to carry concealed weapons legally. While this legislative initiative has proven popular,[3] a collateral consequence is the increased likelihood that the police will encounter armed people, increasing the safety risks outlined in *Mimms* and its progeny. Therefore, it is not surprising that there was a provision in the new law that specifically permitted the police, if acting in an official capacity and with lawful authority, to inquire about a subject's CCW permit status, and if applicable to request production of the permit. *See* Wis. Stat. § 175.60(2g)(c). There is no dispute that Officer Sardina was acting in his official capacity and with lawful authority when he stopped Wright. Therefore, Sardina was statutorily entitled to ask Wright about his CCW status, as a matter of course, and doing so did not impermissibly extend the traffic stop mission.

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[3] In 2017 alone, 103,528 Wisconsin citizens applied for a CCW permit and 96,561 were issued. Wis. Dep't of Justice, *DOJ: Annual CCW Statistics Report for calendar year 2017* (2017), https://www.doj.state.wi.us/sites/default/files/dles/ccw/2017%20Annual%20CCW%20Statistical%20Report.pdf. (Pet.-App. 179.)

Both the trial court and the court of appeals erred when they held that questions about weapons during a traffic stop must be linked to reasonable suspicion. Requiring the police to have reasonable suspicion about weapons before they can ask about them unnecessarily leaves the police vulnerable to the surprise attack, and defeats the safety purposes explicitly detailed in *Mimms*, *Wilson*, *Johnson*, and *Floyd*, none of which required reasonable suspicion before a weapons query.

Floyd points to one conclusion: Officer Sardina's two safety inspired questions about Wright's CCW permit status and weapons were constitutionally reasonable.

2. *Rodriquez v. United States* is not on point.

Both the trial court and the court of appeals incorrectly relied on *Rodriquez v. United States* as authority for suppression. In *Rodriquez*, the police, without reasonable suspicion, delayed a traffic stop for approximately eight minutes to accommodate a fishing expedition dog sniff. The State fails to understand how *Rodriquez*'s prohibition against such a delay can be interpreted to overrule substantial precedent permitting police safety measures during a traffic stop. Indeed, *Rodriquez* made clear the distinction between safety and investigatory delays when it wrote, "Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular." *Rodriquez*, 135 S. Ct. at 1616. And as this Court aptly noted, *Rodriquez* reinforces the point that officer safety is an integral part of every traffic stop mission. *Floyd*, 377 Wis. 2d 394, ¶¶ 26–27.

The questions asked by Officer Sardina concerning weapons in Wright's vehicle were permissible because they furthered the legitimate and weighty goal of officer safety in a traffic stop, and because they were negligibly burdensome.

They were part of the traffic stop mission and so did not extend the stop. They are lawful under *Mimms* and its progeny, and under this Court's recent holding in *Floyd*. Wright's suppression motion should not have been granted.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court to reverse and remand to the circuit court for proceedings consistent with this opinion.

Dated this 8th day of November, 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 length of this brief is 2,810 words.

Dated this 8th day of November, 2018.

_____
DAVID H. PERLMAN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of November, 2018.

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