STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2006-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

JOHN PATRICK WRIGHT,

Defendant-Respondent.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

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ARGUMENT

I. *State v. Floyd* held that officer safety is an integral part of every traffic stop mission and controls the outcome of this case.

Neither the court of appeals nor Wright properly accounted for this Court's holding in *Floyd*, as it related to the issue of asking about weapons during a routine traffic stop. The court of appeals completely ignored *Floyd* and the first 12 pages of Wright's argument fail to discuss it. (Wright's Br. 6–18.) This avoidance is puzzling as *Floyd* dealt extensively with the lone issue in this case: whether questions about weapons during a traffic stop are part and parcel of the stop or an impermissible detour. And *Floyd* gives clear direction to resolving this issue, holding that questions about weapons and consent to search are negligibly burdensome precautions to ensure officer safety, and therefore properly part of the traffic stop mission and not an unconstitutional extension of it. *State v. Floyd*, 2017 WI 78, ¶¶ 27–28, 377 Wis. 2d 394, 898 N.W.2d 560.

Wright argues at length that police questions about weapons and his CCW permit status should be interpreted as an improper attempt to investigate, without reasonable suspicion, criminal wrongdoing. This argument only holds if questions about weapons to a lawfully stopped motorist are viewed as an investigation into the criminal offense of carrying a concealed weapon. But this type of analysis was rejected by this Court when Floyd similarly argued that questions about weapons were an impermissible investigatory detour: "Although Mr. Floyd's argument incorporates the principle that the "mission" of the traffic stop defines its acceptable duration, he *does not account for how the officer's safety fits within that mission*." *Floyd*, 377 Wis. 2d 394, ¶ 26 (emphasis added). This Court concluded that the questions about weapons and the request to search for

weapons were related to officer safety and thus part of the original traffic stop mission. *Id.* ¶ 28.

When Wright finally gets around to discussing *Floyd*, he tries to avoid its orbit. He does this in three ways: (1) attempts to dismiss *Floyd* as a consent-to-search case. (Wright's Br. 18), (2) argues that while Floyd involved a suspended registration, this case involved the unlikely to be ticketed matter of a defective headlight (Wright's Br. 20), and (3) notes that *Floyd* had factors pointing to reasonable suspicion of drug dealing whereas here there was no suspicion of wrongdoing. (*Id.*) All three attempts to distinguish *Floyd* fail.

Wright's portrayal of *Floyd* as a consent-to-search case misses the mark. To be sure, the validity of Floyd's consent to search his person was at issue, but the core of the opinion, and the first issue discussed, was the constitutionality of the traffic stop: was the stop improperly extended prior to Floyd's granting consent to search. Indeed, the *Floyd* majority hammered this point home when it noted that its holding that the police did not extend the stop was based on police interactions with Floyd before he consented to the search, that almost half of the opinion's analysis discussed whether asking about weapons and asking for consent to search were part and parcel of the traffic stop mission, or an impermissible investigative detour. *Floyd*, 377 Wis. 2d 394, ¶ 28 n.6. *Floyd*, dealt primarily with the propriety of asking questions about weapons during a traffic stop and is thus on point.

Wright argues that *Floyd* is distinguishable as it was spawned from a suspended registration violation, whereas in this case the basis for the stop was a defective headlight, a violation not likely to result in the issuance of a citation. He argues that since the officer was not going to issue a ticket, any police action not connected to a broken headlight was an impermissible detour. The State fails to see any relevant

difference between whether a lawful traffic stop is likely to result in the issuance of a citation or not, in relation to queries about weapons. In either case the police have a traffic stop mission, to cite or to warn, and are entitled to perform all functions incident to the mission. *Floyd* makes clear that one of these functions is to ask the motorists questions related to officer safety, such as questions about weapons.

Wright notes that there were suspicious factors present in *Floyd* that are not present in his case. He points out that the tinted windows and air-fresheners present in *Floyd* have long been linked to drug activity and weaponry. (Wright's Br. 18–20.) He suggests that *Floyd*'s holding turned on suspicious factors because they made the stop more dangerous. But *Floyd*'s holding did not depend on the existence of suspicious facts. Indeed, this Court explained the independence of its holding from a reasonable suspicion analysis: "The reason we didn't address 'reasonable suspicion' [relating to questions about weapons] is because that is necessary only if Deputy Ruffalo extended the stop. As the first half of our opinion [the portion of the opinion dealing with the effect of questions about weapons on the traffic stop] demonstrates, he did not." *Floyd*, 377 Wis. 2d 394, ¶ 28 n.6. The suspicious factors present in *Floyd* had no bearing on the holding of *Floyd* that the State relies on here: questions about weapons are negligibly burdensome and are permissible incident to any traffic stop.[1]

[1] Wright seeks support for his reasonable suspicion requirement argument in *Pinner v. State*, 74 N.E.3d 226 (Ind. 2017) (Wright's Br. 15 n.6.) But *Pinner* is way off base—it involved whether there was sufficient reasonable suspicion of unlawful gun possession to trigger a seizure. Here, there is no dispute about the propriety of the initial seizure; the issue is whether a lawful stop is impermissibly extended by questions about weapons. This issue was not addressed by *Pinner*.

Wright's attempt to avoid *Floyd*'s glare, result in his flawed central theme. He argues that the fundamental principles of the landmark case of *Terry v. Ohio*, 392 U.S. 1 (1968) control this case in his favor. Wright frequently refers to the "Terry test": "[I]n determining whether the seizure and search were unreasonable, our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." (Wright's Br. 9 (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. at 19–20); Wright's Br. 10–12, 22–23, 26.) He concludes that the test invalidated questions about weapons because they were not related to a traffic stop for a defective headlight. But traffic stop questions about weapons fit neatly into the *Terry* test, rather than violate it as Wright asserts.

Floyd made the same argument Wright makes here when he argued that questions about weapons were not within the scope of a stop for suspended registration, and this Court rejected it: "Although Mr. Floyd's argument [that the traffic stop should have ended with the issuance of a citation and before any questions about weapons] incorporates the principle that the "mission" of the traffic stop defines its acceptable duration, he does not account for how the *officer's safety fits within that mission*." *Floyd*, 377 Wis. 2d 394, ¶¶ 25–26 (emphasis added). This Court then made clear that officer safety concerns are within the scope of every traffic stop: "That [the inherent dangerous nature of traffic stops] makes officer safety an integral part of every traffic stop's mission." *Floyd*, 377 Wis. 2d 394, ¶ 26.

The court of appeals completely ignored *Floyd*. Its opinion and Wright's argument are in direct conflict with this Court's holding that officer safety concerns are an integral part of every traffic stop mission, regardless of the presence

of suspicious factors, and permitting negligibly burdensome precautions to ensure officer safety during the stop.

II. Questions about weapons and Wright's CCW permit status were safety related.

Wright argues that the questions about weapons and his CCW permit status were not motivated by safety concerns but rather were an unlawful attempt, without reasonable suspicion, to investigate a possible CCW violation. It beggars belief to argue that asking a motorist about whether he is armed is not tethered to officer safety concerns. Wright likely understands this as he almost exclusively limits his objection to the CCW permit inquiry and almost never mentions the propriety of the question about his being armed. But these two questions cannot be parceled out, one being permissible and the other not. To do so would lead to an illogical holding of permitting one question about weapons, and if it is answered in the affirmative, to forbid the police to check if the weapon is being lawfully carried.

The propriety of asking about weapons and Wright's CCW status in tandem is underscored by our state statute permitting the police to ask about a person's CCW status if the officer is acting in an official capacity and with lawful authority. In a footnote, Wright attempts to dodge this statute by arguing that the officer was not acting with his lawful authority. (Wright's Br. 12 n.4.) There is no dispute that at the time Officer Sardina asked Wright about weapons and his CCW permit status, Wright was lawfully stopped. So, Wright's argument boils down to this flawed reasoning: the police are not protected by a statute permitting an inquiry into a lawfully stopped person's CCW permit status because inquiring about that status transforms a lawful stop into an unlawful one. Without any development, Wright also suggests that the statute might be unconstitutional. *Id.* This Court

should not consider such an argument but, even if it was properly presented, it should be rejected as a statute allowing an inquiry to a lawfully seized person carrying a concealed weapon does not violate Fourth Amendment protections.

Wright claims there was no indication that Officer Sardina's questions about his CCW permit and weapons were related to officer safety. (Wright's Br. 20–21.) Wright misreads the record. When asked why he inquired about weapons and Wright's CCW permit status, Officer Sardina explained that he did so for officer safety purposes. (R. 27:9.) Sardina's questions about weapons were safety related, constitutionally and statutorily permitted, and incident to the traffic stop mission.

III. *Rodriquez v. United States* does not advance Wright's argument that Officer Sardina's questions about weapons were an impermissible investigatory detour from the traffic stop.

Wright argued that the State failed to appreciate that *Rodriquez v. United States*, 135 S. Ct. 1609 (2015) prohibited Sardina's questions even if the questions are viewed as safety related. (Wright's Br. 16.) Wright's premise is that *Rodriquez* interpreted safety measures as an improper extension of a stop if they were employed to facilitate improper police detours from the traffic stop mission. While this might be true, *Rodriquez*'s holding is not applicable here, as questions about weapons during a traffic stop, unlike possible safety accommodations for dog sniffs, are not facilitating an impermissible detour but rather are negligibly burdensome safety precautions incident to the stop itself. This is how this Court interpreted *Rodriquez* when it cited it for support for the proposition that officer safety is an integral part of every traffic stop mission. *Floyd*, 377 Wis. 2d 394, ¶ 26. Thus, *Rodriquez*'s ban on measures to accommodate an impermissible investigatory detour are not impactful here.

Rodriquez is not on point and to the extent it is, it supports the State's position and this Court's holding in *Floyd*.

CONCLUSION

The State asks this Court to reverse the court of appeals affirmance of the trial court's granting Wright's motion to suppress.

Dated this 13th day of December, 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 1,921 words.

Dated this 13th day of December, 2018.

_____
DAVID H. PERLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 13th day of December, 2018.

_____
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