STATE OF WISCONSIN

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

DISTRICT III

Case No. 2018AP1764-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KIMBERLY DALE CRONE,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered
in the Circuit Court for Sawyer County,
the Honorable John M. Yackel, Presiding

AMENDED BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

SUSAN E. ALESIA
Assistant State Public Defender
State Bar No. 1000752

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1774
alesias@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Wisconsin Constitution

Wisconsin Statutes

ISSUE PRESENTED

Did the deputy unlawfully prolong the traffic stop for speeding when, after concluding his tasks related to the traffic infraction, with no officer safety concerns and without reasonable suspicion of criminal activity, he asked Ms. Crone to hand over pill bottles he saw in her purse?

The circuit court denied Ms. Crone's motion to suppress, concluding that while it was "very, very, very cautious about this fact that well, you can just simply look at somebody's pill bottles" the continuation of the stop was valid because it was minimally intrusive.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This is a one-judge appeal under Wis. Stat. § 752.31(2)(f) and (3), making publication inappropriate. Wis. Stat. § 809.23(1)(b)4; *see also Waukesha County v. Genevieve M.*, 2009 WI App 173, ¶5, 322 Wis. 2d 131, 776 N.W.2d 640. Oral argument is not requested.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

At about 9:00 a.m. on the morning of April 30, 2017, Kimberly Crone was driving to work. (21:3-4, 7; App. 104-105; 108). Sawyer County Deputy Sheriff Jay Poplin clocked Ms. Crone's speed at 66 miles per hour in a 55 miles per hour zone. The deputy pulled Ms. Crone over. (21:4; App. 105).

Ms. Crone was alone in her car. Deputy Poplin asked for her driver's license and proof of insurance. Ms. Crone provided her license and looked through her purse for her insurance card. While she did this, Deputy Poplin saw two pill bottles inside the purse. (21:5; App. 106). He could not tell if the bottles had labels on them or not. (21:7-8; App. 107-108).

Deputy Poplin returned to his squad car to check the status of Ms. Crone's driver's license. Ms. Crone's license was valid. Deputy Poplin walked back to Ms. Crone's car "returned her driver's license to her, and asked to see the pill bottles." (21:5; App. 106). Deputy Poplin stated that he completed the reason for the stop – speeding – before he asked to see the pill bottles. (21:8; App. 109). He did not tell Ms. Crone she was free to leave because when he saw pill bottles in Ms. Crone's purse he knew he "was going to start a drug investigation." (21:8-9; App. 109-110). He explained that "just based on prior law enforcement training and experience I have found illegal substances in pill bottles." (21:10; App. 111).

Ms. Crone handed the deputy a pill bottle with a valid prescription label with her name on it. The prescription was for Gabapentin. The deputy then asked for the second bottle and Ms. Crone handed it to him. This bottle did not have a label. The deputy looked inside the bottle and saw pills of different shapes and colors. Some of the pills matched the Gabapentin pills, some appeared to be Ibuprofen. The deputy handed the Gabapentin and Ibuprofen pills back to Ms. Crone. (21:5-6, 9; App. 106-107, 110).

Deputy Poplin asked Ms. Crone if she had a prescription for the additional pills. Initially she said

that she did, but then admitted that she did not. (21:7; App. 108).

Because Ms. Crone was on her way to work, Deputy Poplin decided that he "did not want to delay her any further" so he seized the pills and let Ms. Crone leave. (21:7; App. 108).

The pills were later identified as Lorazepam. The bottle contained 10 Lorazepam pills. (2:2). On June 14, 2017, the state filed a complaint charging Ms. Crone with possession of a controlled substance in violation of Wis. Stat. § 961.41(3g)(b). (2). According to the complaint, Ms. Crone admitted that a cousin and a friend gave her the Lorazepam because the pills would help her be more calm. (2:2).

Ms. Crone filed a motion to suppress on December 22, 2017, alleging that the pills must be suppressed because the officer obtained the pills after an illegally prolonged detention. (9). The circuit court denied the motion to suppress after a hearing held on February 2, 2018. (21; App. 102). The circuit court held:

> It seems to me that based upon the deputy's training and experience, and I am very, very, very cautious about this fact that well, you can just simply look at somebody's pill bottles. But what he did and the statements that he made of, can I see your pill bottles, was of very minimal intrusion.

(21:17; App. 118).

Ms. Crone entered a no-contest plea to the charged offense on April 24, 2018, and on that same date the court imposed $443 in costs. (20; 10; App. 101).

ARGUMENT

The Continued Detention of Ms. Crone After Resolution of the Speeding Violation Was Not Supported by Reasonable Suspicion of Criminal Activity or Related to Officer Safety and Therefore Evidence Obtained During the Unlawful Seizure Must Be Suppressed.

On her way to work one morning, Ms. Crone was pulled over for speeding. After the deputy confirmed that Ms. Crone's license was valid, he returned her license and completed the tasks tied to the traffic stop. At that point, the seizure should have ended. It did not. Instead, the deputy extended the seizure solely because he caught a glimpse inside Ms. Crone's purse and saw pill bottles. (21:3-5; App. 104-105). This extension of the traffic stop was without reasonable suspicion and had nothing to do with officer safety. The evidence obtained during this unlawful seizure must be suppressed.

A traffic stop is a seizure triggering the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution. *State v. Gammons*, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623.

Whether a seizure is lawful is a question of constitutional fact. *State v. House*, 2013 WI App 111, ¶4, 350 Wis. 2d 478, 837 N.W.2d 645. The circuit court's findings of historical fact will be upheld unless they are clearly erroneous. *State v. Hogan*, 2015 WI 76, ¶32, 364 Wis. 2d 167, 868 N.W.2d 124. But whether those facts "pass constitutional muster" is a question of law reviewed *de novo*. *House*, 350 Wis. 2d 478, ¶4.

An investigative detention pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), must last no longer than is necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983). When the purpose of the stop is to investigate a traffic violation, as occurred here, the permissible duration of the stop is determined by its "mission." *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). In *Rodriguez v. United States*, 135 S. Ct. 1609, the Supreme Court made clear that the mission of a traffic stop is limited to addressing the traffic violation that warranted the stop; and making inquiries related to vehicular safety, such as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the vehicle's registration and proof of insurance. *Rodriguez*, 135 S. Ct. at 1614-1615.

The stop of Ms. Crone's car to address the speeding was lawful. The mission of the traffic stop ended when the deputy checked and returned Ms. Crone's license. The deputy testified that when he returned the license, and before he asked to see the pill bottles in Ms. Crone's purse, he had

completed the reason for the traffic stop. (21:8; App. 109).

Despite this, according to the deputy Ms. Crone was not free to leave because he seized Ms. Crone to conduct "a drug investigation that started when I saw the bottles." (21:8-9; App. 109-110). The deputy pivoted from the mission of the traffic stop and extended the duration of the seizure by asking Ms. Crone to remove the pill bottles from her purse and hand them over to the deputy for inspection. This was done without reasonable suspicion of criminal activity.

An officer may expand the scope and duration of a traffic stop only if there is reasonable suspicion of criminal activity. *Hogan*, 364 Wis. 2d 167, ¶35. An officer's "'inchoate and unparticularized suspicion or hunch'" will not suffice. *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634, *quoting Terry*, 392 U.S. at 27. The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the continued detention. *Id.*, *quoting Terry*, 392 U.S. at 21.

The entirety of the deputy's "drug investigation" was premised on "just based on prior law enforcement training and experience I have found illegal substances in pill bottles." (21:10; App. 111). In other words, the sole basis for extending the seizure was that on perhaps one occasion the deputy found an illegal substance inside a pill bottle. This experience, and some training, does not create a reasonable suspicion of criminal activity.

The facts known to the deputy before he asked for the pill bottles did not amount to reasonable suspicion that the bottles contained illegal drugs. The deputy pulled over Ms. Crone's car not because of any suspected drug or other criminal activity. He stopped her car because she was driving 11 miles over the speed limit at 9 a.m. on her way to work. This is a minor traffic violation resulting in a fine. Wis. Stat. § 346.60. Nothing in the record suggests that Ms. Crone failed to pull over promptly or that she was not cooperative. Nothing in the record suggests that Ms. Crone made any furtive movements, appeared nervous or tried to hide anything. The deputy had no information that Ms. Crone had a criminal record or any prior history of drug dealing or drug use. Nor was there any indication that the stop occurred in an area known for drug activity. The deputy did not see Ms. Crone make any movement suggesting that she was trying to conceal the pill bottles from him. To the contrary, Ms. Crone pulled out her purse and rummaged through it in order to find her insurance card. (21:5; App. 106).

Certainly, conduct that could have an innocent explanation may give rise to reasonable suspicion. *State v. Waldner*, 206 Wis. 2d 51, 59-60, 556 N.W.2d 681 (1996). And when assessing an officer's actions, the court should give weight to his training and experience, as well as his knowledge acquired on the job. *State v. Betow*, 226 Wis. 2d 90, 98, 593 N.W.2d 499 (Ct. App. 1999). However, this court has recognized that while the officer's training and experience is one factor to consider, "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.'" *Id.* at 98 n.5, *quoting State v. Young*, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997) (emphasis in original).

The deputy's suspicion was entirely unreasonable. He only saw pill bottles in a purse. He did not see unmarked pill bottles. He did not see unmarked pill bottles with multiple types of pills inside. (21:7-8; App. 108-109). It is absurd to believe that every person who carries a pill bottle is subject to seizure, yet this is exactly the theory the deputy relied on to extend the stop. A woman who just picked up her pills from the pharmacy and placed them in her purse on the way home would be subject to seizure. A man who needed to take pills multiple times a day and therefore needed to carry them in his briefcase would be subject to seizure. A person on vacation who carried her prescription in her purse would be subject to seizure. An individual who needed to carry pills for unpredictable conditions like migraines would be subject to seizure. On any given day, a tremendous number of people are carrying pill bottles with them. Most of those pill bottles do not contain illegal substances. Law enforcement cannot detain all of these people and examine their medications simply because some training and experience suggest that occasionally people put illegal substances in pill bottles.

The recent Wisconsin Supreme Court decision in *State v. Wright*, 2019 WI 45, ___ Wis. 2d ___, 926 N.W.2d 157, does not change the analysis of the legality of the stop's extension in Ms. Crone's case. In *Wright*, the court applied the well-established law in *Terry* and *Rodriguez* to an officer's inquiries regarding weapons.

Police stopped Mr. Wright's car because his passenger-side headlight was out. While one officer asked for Mr. Wright's driver's license, another officer asked Mr. Wright if he had any weapons in the car. Mr. Wright told the officer he had just finished the carrying a concealed weapon (CCW) permit class and that he had a gun in his glove compartment. *Id.* at ¶¶16-17.

After running a CCW permit check, officers discovered that Mr. Wright did not have a valid permit. Mr. Wright was arrested and charged with unlawfully carrying a concealed weapon. He filed a motion to suppress and both the circuit court and court of appeals ruled that pursuant to *Rodriquez*, the CCW permit question and question about weapons unlawfully extended the traffic stop in violation of the Fourth Amendment. *Id.* at ¶¶18-19.

The Wisconsin Supreme Court reversed, and the linchpin of the decision was officer safety. The court's analysis hinged on the danger to police officers during traffic stops. The officer's question about weapons was directly linked to officer safety "we conclude that this question constitutes part of the stop's mission because the question is a negligibly burdensome precaution taken *to ensure officer safety*." *Id.* at ¶29(emphasis added).

Unlike *Wright*, in Ms. Crone's case no weapon was involved. Deputy Poplin's question had nothing to do with weapons. The question had nothing to do with officer safety. The stop for speeding at 9:00 a.m. did not raise any particular officer safety concerns. The deputy and Ms. Crone had an amicable

interaction. Because the deputy asking to see the pill bottles inside Ms. Crone's purse had no relation to officer safety, the question about the pill bottle in Ms. Crone's purse was not part of the traffic stop's mission.

The circuit court's conclusion that the detention was lawful because the examination of the pill bottles "didn't require a tremendous amount of additional time" is incompatible with *Rodriguez*. (21:18; App. 119). The Supreme Court made clear that any extension is unlawful, no matter its length, if it exceeds the time during which the tasks tied to the traffic violation are completed or "reasonably should have been" completed. *Id*. A traffic stop prolonged beyond that point is unlawful. *Id*. at 1616. The Supreme Court held that police may not extend the duration of a traffic stop without reasonable suspicion – even for just a "de minimis" amount of time – for reasons unrelated to the "mission" of the traffic stop, which is to address the traffic violation and related vehicular safety concerns. *Id.*

The CCW question in *Wright* was asked "concurrently" with the officer running Mr. Wright's information. 2019 WI 45, ¶49. That is not what happened in Ms. Crone's case. Deputy Poplin had completed checking the status of Ms. Crone's license, walked back to her car, "returned her driver's license to her" and then asked to see the pill bottles inside her purse. (21:5; App. 106). This is not concurrent, thus again *Wright* is distinguishable on its facts.

Citing *Cabelles*, the Supreme Court in *Rodriquez* held that because "addressing the [traffic] infraction is the purpose of the stop, it may 'last no

longer than is necessary to effectuate th[at] purpose.'" *Id*. at 1614. Significantly, the court further held:

> Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.

Id.

Therefore the circuit court's focus on the length of the additional detention was improper. The proper question is: did the deputy engage in tasks unrelated to the mission of the traffic stop that extended the seizure beyond what reasonably should have been needed to issue the speeding citation? The answer to that question is yes. For that reason all evidence obtained from that unlawful seizure should have been suppressed.

CONCLUSION

For the reasons set forth above, Kimberly Crone respectfully asks this court to reverse the judgment of conviction and remand to the circuit court with directions to suppress all evidence obtained during the unlawful seizure.

Dated this 19th day of July, 2019.

Respectfully submitted,

SUSAN E. ALESIA
Assistant State Public Defender
State Bar No. 1000752

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1774
alesias@opd.wi.gov

Attorney for Defendant-Appellant

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 2,564 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 19th day of July, 2019.

Signed:

SUSAN E. ALESIA
Assistant State Public Defender

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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 19th day of July, 2019.

Signed:

SUSAN E. ALESIA
Assistant State Public Defender

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page