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DISTRICT III

09-19-2019

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2018AP1764-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

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

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Was Deputy Poplin's request to search Ms. Crone's pill bottles, absent any reasonable suspicion of drug activity, a permissible extension of the original traffic stop?

The trial court answered this question yes, stating the deputy's question was "very, very straightforward and did not, didn't require a tremendous amount of additional time."

STATEMENT ON ORAL ARGUMENT AND PUBLICATON

The State does not request oral argument or publication. This case can be resolved by applying well established law to the facts.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Sawyer County Deputy Sheriff Jay Poplin was working moving patrol monitoring traffic at approximately 9:00 a.m. on April 30, 2017. (21:3-4). Deputy Poplin observed a vehicle coming towards him and he estimated it was traveling over the 55 mile an hour speed limit. Deputy Poplin activated his radar and confirmed the vehicle's speed at 66 miles an hour and then conducts a traffic stop. (21:4).

Poplin made contact with the driver and identified her as Kimberly Crone from her Wisconsin Driver's license.

(21:4-5). While Ms. Crone was looking for her proof of insurance in her purse, Deputy Poplin observes two pill bottles. (21:5).

Deputy Poplin returned to his patrol vehicle and found Ms. Crone to have a valid driver's license. Poplin then re-approached Ms. Crone's vehicle, returned her driver's license to her and asked to see the pill bottles. (21:5).

Upon request, Ms. Crone handed the pill bottles to the deputy. The first pill bottle had a prescription label on it with Ms. Crone's name. (21:5). The second pill bottle given to the deputy did not have any label upon it and contained multiple pills of different kinds. (21:5-6). Poplin asked if Ms. Crone had a prescription for all of the pills in the bottle without a label. Some of the pills did appear to match those found in the first pill bottle that had a label and Deputy Poplin returned those items to Crone. (21:6). As to the other pills in the unlabeled bottle, Deputy Poplin asked if Crone had a prescription for those pills. At first she stated she did, but later Crone admitted she did not have a valid prescription for the pills later identified as Lorazepam, a substance that required a prescription. (21:7).

Ms. Crone stated she was speeding because she was late to work. Poplin, not wanting to delay her any further, seized the pills that were not consistent with Ms. Crone's prescription and released her from the traffic stop. (21:7).

The State filed a complaint on June 14, 2017 charging Ms. Crone with possession of a controlled substance contrary to Wis. Stat. § 961.41(3g)(b). (2).

On December 22, 2017, Ms. Crone filed a motion to suppress the pills alleging they were obtained by the deputy after an illegally prolonged traffic stop. (9). The circuit court denied the motion to suppress on February 2, 2018. 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 he made of, can I see your pill bottles, was of very minimal intrusion...

His statement to her was of a nature that was very, very straightforward and did not, didn't require a tremendous amount of additional time...

So the Court is going to deny the motion and find that it was a valid expansion under these very limited circumstances. (21:17-18).

STANDARD OF REVIEW

Whether or not evidence should be suppressed is a question of constitutional fact. The circuit court's factual findings are evaluated under the clearly erroneous standard, but the circuit court's application of the historical facts to constitutional principles is reviewed de novo. *State v. Floyd*, 2017 WI 78 ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560.

ARGUMENT

The circuit court correctly denied Crone's motion to suppress, finding that Deputy Poplin's request to search did not measurably extend the duration of the traffic stop.

Deputy Poplin pulled Ms. Crone over because her vehicle was exceeding the speed limit. There was no argument that the initial traffic stop itself was somehow unlawful. During the traffic stop, Deputy Poplin approached the vehicle, gathered the driver's information, noticed pill bottles and returned to his vehicle. Once learning Crone's license was valid, he returns to the vehicle, hands the license back and at that same moment asks for consent to see the pill bottles. Although there was no reasonable suspicion to form the basis for seeking consent to search, the request added no measurable time to

the duration of the stop. The stop was not impermissibly extended.

A traffic stop constitutes a seizure for constitutional purposes, and triggers Fourth Amendment protections from unreasonable search and seizures. *State v. Gammons*, 2001 WI App 36, ¶ 6, 214 Wis. 2d 296, 625 N.W. 2d 623. "A seizure for a traffic violation justifies a police investigation of that violation." *Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609, 1614 (2015). Citing *Knowles*, the *Rodriguez* Court states a traffic stop is more like a *Terry* stop than a formal arrest. *Id.* (citing, *Knowles v. Iowa*, 525 U.S. 113, 117, 119 S. Ct. 484 (1998) (citations omitted). "Like a *Terry* stop the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop." *Rodriguez* at 1614. (citing, *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S. Ct. 834, 837 (2005), *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968)).

The traffic stop "mission" normally includes addressing the traffic violation that warranted the stop, conducting ordinary inquiries incident to the stop, and taking negligibly burdensome precautions to ensure officer

safety. *State v. Wright*, 2019 WI 45 ¶ 24, 386 Wis. 2d 495, 926 N.W.2d 157, (citing *Rodriquez* at 1614.) "Authority for the seizure ends when these tasks are, or reasonably should have been, completed." *Rodriquez* at 1614. "[T]he Fourth Amendment tolerates certain unrelated investigations that do not lengthen the roadside detention. *Wright* ¶ 27, (citing, *Rodriquez* at 1614). A seizure will remain lawful, "so long as those inquires do not measurably extend the duration of the stop." *Wright* ¶ 27 (citing, *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S. Ct. 781 (2009)).

In *State v. Wright*, the Wisconsin Supreme Court found the Fourth Amendment was not violated by the continued detention during a routine traffic stop where a driver was questioned about possessing a firearm, questioned about having a carry concealed weapon (CCW) permit and a records check conducted to confirm the CCW permit. *Wright* ¶ 45. Wright was stopped by officers because the vehicle he was driving had a headlight out. *Id.* ¶ 15. Upon first contact with Wright, police asked for his driver's license, whether he was a CCW permit holder and if he had any weapons in the car. *Id.* ¶ 16. Wright responded that he just finished the CCW permit class and he did have a firearm in the vehicle. *Id.* Wright then gave consent to the officers to remove the

firearm during the traffic stop. *Id.* The officer took Wright's information back to his squad to "run" and simultaneously checked for a valid CCW permit. *Wright* ¶ 18. After learning Wright did not have a valid permit he was arrested for carrying a concealed weapon in violation of Wis. Stat. § 941.23(2). *Id.*

The *Wright* Court analyzed three Fourth Amendment issues. First, the Court explained it was not a violation of the Fourth Amendment for an officer to ask a lawfully stopped driver about the presence of a firearm. *Id.* ¶ 6. Relying on *State v. Floyd*, 2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560, the Court found the question about having a firearm was negligibly burdensome and was part of the "mission" of the traffic stop. *Wright* ¶ 34.

The remaining issues of asking about the CCW permit and checking the status of the CCW permit are more factually consistent with Crone being asked for consent to search her pill bottles. The *Wright* Court found these questions had nothing to do with officer safety but were an unrelated investigation without any reasonable suspicion of criminal activity. *Wright* ¶ 37. "Inquiries unrelated to the original justification for the stop are permissible under the Fourth Amendment 'so long as those inquiries do

not measurably extend the duration of the stop.'" *Id.* at ¶ 38 (citing, *Johnson* at 333).

The *Wright* Court distinguished the facts of *Caballes* from those contained in *Rodriguez*. *Wright* ¶¶ 39-43. The Supreme Court found the dog sniff in *Caballes* did not violate the Fourth Amendment because it occurred while the traffic stop's mission was still being completed. *Caballes* at 407. In *Rodriguez*, the dog sniff occurred many minutes after the completion of the mission and was therefore a violation of the Fourth Amendment. *Rodriguez* at 1613. The key difference in the cases was the timing of the unrelated investigation, the dog sniff. In *Caballes*, the dog sniff was conducted simultaneously with the mission-ending activities and the unrelated investigation in *Rodriguez* was over five minutes after the mission was complete. *Wright* ¶ 43.

In *Wright*, there was no evidence to support that questioning the driver about having a CCW permit extended the duration of the stop. *Wright* ¶45. The CCW permit check occurred during ongoing mission activities. *Id.* The officer's question about having a CCW permit took some amount of time, but the actual time of the question was looked at as de minimis and virtually incapable of

measurement. *Wright* ¶ 47. For those reasons, the Court found the question and the check did not measurably extend the duration of the stop in violation of the Fourth Amendment. *Id.* ¶ 50.

In our case, the question to search comes at the moment Deputy Poplin hands Ms. Crone's license back to her. Like *Wright*, the time between handing the license back and asking for consent would be incapable of measurement. Deputy Poplin's request to search in absence of reasonable suspicion did not impermissibly extend the traffic stop.

CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm the circuit court's judgment of conviction.

Dated this 16th day of September, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

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**CERTIFICATE OF COMPLIANCE
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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 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 16th day of September, 2019.

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