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 SAWYER COUNTY CIRCUIT COURT, THE HONORABLE JOHN M. YACKEL, PRESIDING

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

The circuit court properly denied Crone's motion to suppress. 1

A. The Fourth Amendment allows inquiries unrelated to the purpose of a traffic stop if the inquiries do not measurably extend the duration of the stop. 1

B. Deputy Poplin's question did not measurably extend the traffic stop. 4

CONCLUSION.....6

TABLE OF AUTHORITIES

Cases

Arizona v. Johnson,
555 U.S. 323 (2009) 5

Illinois v. Caballes,
543 U.S. 405 (2005) 2, 5

Ohio v. Robinette,
519 U.S. 33 (1996) 2, 3

Rodriguez v. United States,
575 U.S. 348 (2015) 2, 5

State v. Betow,
226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999)..... 2

State v. Brown,
2020 WI 63, 392 Wis. 2d 454, 945 N.W.2d 584..... 1, 4

State v. Floyd,
2017 WI 78, 377 Wis. 2d 394, 898 N.W.2d 560..... 1, 2

Page

State v. Gaulrapp,
207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996)..... 2, 3, 4

State v. Griffith,
2000 WI 72, 236 Wis. 2d 48, 613 N.W.2d 72..... 2

State v. Gruen,
218 Wis. 2d 581, 582 N.W.2d 728 (Ct. App. 1998)..... 2

State v. Smith,
2018 WI 2, 379 Wis. 2d 86, 905 N.W.2d 353..... 2

State v. Wright,
2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157..... 1, 4, 5

Terry v. Ohio,
392 U.S. 1 (1968) 2

Statutes

Wis. Stat. § (Rule) 809.41(3)..... 1

Wis. Stat. § 752.31(3)..... 1

INTRODUCTION

This case is a misdemeanor appeal originally assigned to one judge pursuant to Wis. Stat. § 752.31(3). From July to October of 2019, this case underwent full briefing to this Court with the Sawyer County District Attorney filing a brief on behalf of the State.

On July 15, 2020, this Court ordered that the case would be decided by a three-judge panel pursuant to Wis. Stat. § (Rule) 809.41(3). This Court further ordered that the State, through the Attorney General, "file a supplemental respondent's brief addressing the issues in this appeal." This brief is in response to that order.

This Court should affirm the circuit court's order denying Crone's motion to suppress. As the State has argued, Deputy Poplin's question to Crone about the pill bottles did not measurably extend the stop within the meaning of *State v. Wright*, 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157. The Wisconsin Supreme Court's recent decision in *State v. Brown*, 2020 WI 63, 392 Wis. 2d 454, 945 N.W.2d 584, does not change the analysis.

ARGUMENT

The circuit court properly denied Crone's motion to suppress.

A. The Fourth Amendment allows inquiries unrelated to the purpose of a traffic stop if the inquiries do not measurably extend the duration of the stop.

"[A] traffic stop is a seizure within the meaning of our Constitutions." *State v. Floyd*, 2017 WI 78, ¶ 20, 377 Wis. 2d 394, 898 N.W.2d 560. "The reasonableness of a traffic stop involves a two-part inquiry: first, whether the initial seizure was justified and, second, whether subsequent police conduct

'was reasonably related in scope to the circumstances that justified' the initial interference." *State v. Smith*, 2018 WI 2, ¶ 10, 379 Wis. 2d 86, 905 N.W.2d 353 (quoting *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968)). A traffic stop is justified when an officer "reasonably believes the driver is violating a traffic law." *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999).

The reasonableness of an officer's conduct during a traffic stop is measured by the mission of the seizure, the mission being "to address the traffic violation that warranted the stop" and to attend to the "ordinary inquiries" incident to the stop. *Rodriguez v. United States*, 575 U.S. 348, 354–55 (2015). However, "a traffic stop 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a . . . ticket." *Id.* (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). Courts considering the reasonableness of the duration of a stop have rejected setting "[a] hard and fast time limit" on stops. *State v. Gruen*, 218 Wis. 2d 581, 590–91, 582 N.W.2d 728 (Ct. App. 1998). *See also Floyd*, 377 Wis. 2d 394, ¶ 22 ("[W]hile the temporal duration of the stop may inform those considerations, it is not in itself dispositive."). Rather, courts consider, under the totality of the circumstances, whether police are diligent in completing their tasks related to the traffic infraction. *See id.*

Moreover, a police officer can lawfully ask a driver if he has drugs and ask for consent to search during a routine traffic stop. *Ohio v. Robinette*, 519 U.S. 33, 35–36, 39–40 (1996). Asking a lawfully stopped motorist for consent to search does not unreasonably prolong the original traffic stop. *State v. Gaulrapp*, 207 Wis. 2d 600, 609, 558 N.W.2d 696 (Ct. App. 1996). The length of time required to ask a question does not transform a reasonable, lawful stop into an unreasonable unlawful one. *State v. Griffith*, 2000 WI 72, ¶¶ 56–61, 236 Wis. 2d 48, 613 N.W.2d 72 (citing *Robinette*, 519 U.S. at 39–40, and *Gaulrapp*, 207 Wis. 2d at 609).

In *Gaulrapp*, 207 Wis. 2d at 609, this Court held that asking a question about drugs during a routine traffic stop did not unreasonably extend the detention. In *Gaulrapp* the police stopped a vehicle for a loud muffler. *Id.* at 603. The police asked Gaulrapp where he was coming from and where he was headed. *Id.* Then the police officer, without any reasonable suspicion, asked Gaulrapp if he had any drugs, and when Gaulrapp denied having any the police asked for permission to search his truck and his person. *Id.* Gaulrapp consented and the searches produced incriminating evidence. *Id.* 603–04. This Court upheld the propriety of the drug questions, opining that the reasonableness focus should be placed on the duration of the seizure and not the nature of the questions. *Id.* at 609. This Court concluded that Gaulrapp's detention was not unreasonably prolonged by asking one question about drugs and that the detention was only measurably prolonged because Gaulrapp consented to the search. *Id.*

In deciding *Gaulrapp*, this Court principally relied on *Robinette*, 519 U.S. 33, where the United States Supreme Court held that the police are not obligated to tell a suspect he is free to go before asking for consent to search during a traffic stop. *Id.* at 39–40. In *Robinette*, the driver was stopped for speeding and, without reasonable suspicion of drug activity, the driver was asked if he had any drugs. After a denial, the police asked for consent to search, which was granted. *Id.* at 35–36. The *Robinette* court did not expressly decide if asking questions about drugs during a traffic stop—without reasonable suspicion—violates the Fourth Amendment. But this Court inferred that the *Robinette* court could not have had reservations about the drugs questions asked, since the *Robinette* court held that the consent the questions generated was voluntary and valid. *Gaulrapp*, 207 Wis. 2d at 608.

B. Deputy Poplin's question did not measurably extend the traffic stop.

The circuit court found that Deputy Poplin asked Crone, "Can I see the pill bottles?" (R. 21:16.) The State acknowledged in its response brief that the request was not supported by reasonable suspicion. (State's Response Br. 4.) And unlike the situation recently addressed by the Wisconsin Supreme Court in *Brown*, the State acknowledges that Deputy Poplin's question in this case was specifically related to drugs, not weapons, and therefore cannot be interpreted as relating to officer safety. *Cf. Brown*, 392 Wis. 2d 454, ¶ 26.

The inquiry does not end there, however. Deputy Poplin's question needed not relate to officer safety nor to the original reason for the traffic stop "so long as [it did] not measurably extend the duration of the stop." *Id.* ¶ 17 (quoting *State v. Wright*, 2019 WI 45, ¶ 38, 386 Wis. 2d 495, 926 N.W.2d 157). As in *Wright*, the time it took Deputy Poplin to ask Crone if he could see the pill bottles was "virtually incapable of measurement." *See Wright*, 386 Wis. 2d 495, ¶ 47. And as in *Gaulrapp*, Crone's valid consent to Deputy Poplin looking at the pill bottles is what prolonged the stop, not an unlawful continuation of the seizure. *See Gaulrapp*, 207 Wis. 2d at 609.

In her opening brief to this Court, Crone argues that "the linchpin of the [*Wright*] decision was officer safety." (Crone's Br. 9.) That is not entirely accurate. While the court in *Wright* did say that officer safety permitted a question about whether Wright had any weapons, officer safety did *not* justify a question about whether Wright had a Concealed Carry Weapon (CCW) permit. *Wright*, 386 Wis. 2d 495, ¶ 37. "Knowing whether or not an individual has a valid CCW permit does not make the officer any safer than the officer otherwise would have been in the absence of that knowledge." *Id.* Nevertheless, the CCW question was permissible—even though it was not related to the purpose of the stop or to

officer safety—because it "did not 'measurably extend the duration of the stop.'" *Id.* ¶ 47 (quoting *Arizona v. Johnson*, 555 U.S. 323, 333 (2009). The same is true here.

In her reply brief to this Court, Crone argues that the timing scenario in *Wright* was critically different from the timing scenario here. (Crone's Reply Br. 1–3.) Under Crone's reasoning, it matters that the officer in *Wright* asked about a CCW permit before returning to his squad car while Deputy Poplin asked if he could see the pill bottles after returning from his squad car. But there is no reason why a question asked before an officer returns to his squad car would not extend a stop while the same question asked after he returns from his squad car would.

Finally, Crone argues that the Supreme Court's holding in *Rodriguez* controls here. (Crone's Br. 10; Crone's Reply Br. 4.) In *Rodriguez*, the Court overturned the Eighth Circuit's holding that a delay of seven to eight minutes for a dog sniff without reasonable suspicion was a *de minimis* intrusion allowed under the Fourth Amendment. *Rodriguez*, 575 U.S. at 356–57. Here, the delay was nowhere near seven or eight minutes; it was "virtually incapable of measurement." *See Wright*, 386 Wis. 2d 495, ¶ 47. Put another way, the time it took Deputy Poplin to ask Crone to see her pill bottles here was likely no longer than the interruption "on an unrelated matter" the officer encountered in *Caballes*. *See Caballes*, 543 U.S. at 418 (Ginsburg, J., dissenting). Yet the Court in *Caballes* concluded that any extension caused by that interruption did not render the dog sniff in that case illegal. *See Caballes*, 543 U.S. at 408–09. *See also Rodriguez*, 575 U.S. at 357 ("As we said in *Caballes* and reiterate today, a traffic stop 'prolonged beyond' [the time reasonably required to complete the stop's mission] is 'unlawful.'").

This case is far more like *Robinette*, *Caballes*, and *Wright* than *Rodriguez*. Deputy Poplin did not unlawfully

extend the stop by asking Crone to see the pill bottles. This Court should affirm.

CONCLUSION

For the reasons discussed, this Court should affirm the circuit court's denial of Crone's motion to suppress.

Dated this 10th day of August 2020.

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 1,646 words.

Dated this 10th day of August 2020.

JOHN A. BLIMLING
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 10th day of August 2020.

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