RECEIVED
05-19-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2018AP1764-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KIMBERLY DALE CRONE,

Defendant-Appellant-Petitioner

PETITION FOR REVIEW

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-Petitioner

TABLE OF CONTENTS

ISSUE PRESENTED

> Does it violate the Fourth Amendment when after the mission of the traffic stop is completed the officer asks about the pill bottles inside the defendant's purse despite the fact that the pill bottles inside the purse are wholly unrelated to the mission of the traffic stop, wholly unrelated to officer safety, the question is not supported by reasonable suspicion and the defendant had a significant interest in keeping her confidential medical information private?

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. (21:17; App. 140).

The court of appeals held that the deputy's request for Ms. Crone's consent did not unreasonably extend the stop. *State v. Crone*, No. 2018AP1764-CR, recommended for publication (Wis. Ct. App. April 20, 2021)(App. 101). The concurrence noted that the court was bound by Wisconsin Supreme Court precedent in *State v. Wright*, 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157, but expressed concern that that precedent "is inconsistent with the purpose of the Fourth Amendment and fails to properly balance the public and private interests at stake." (App. 101, 115).

CRITERIA FOR REVIEW

This court should accept review to clarify that *State v. Wright*, 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157, did not create a bright-line rule that there is never a Fourth Amendment violation when law enforcement asks a question after the completion of the mission of the traffic stop even when the question is wholly unrelated to the mission of the stop and has no relation to officer safety.

This court should also accept review to approve the balancing test set forth in *Brown v. Texas*, 443 U.S. 47, 50-51, (1979), where the United States Supreme Court held "consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

In this case, Ms. Crone was stopped for speeding. After the deputy completed the mission of this stop, he asked Ms. Crone if he could see the pill bottles he spotted inside her purse. The court of appeals cited *Wright* in holding that asking a single question does not impermissibly extend the stop. (App. 108). But if *Wright* indeed creates such a bright-line rule, the holding in *Wright* runs afoul of purpose of the Fourth Amendment "to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Ct. and Cnty. of San Francisco*, 387 U.S.

523, 528 (1967). As the concurrence in the court of appeals noted, the purpose of the Fourth Amendment:

> is not served by enforcing a blanket rule allowing law enforcement officers to extend traffic stops to conduct unrelated inquiries that are unsupported by reasonable suspicion, as long as those inquiries do not take longer than the amount of time needed to ask a question. A single question may, under certain circumstances, constitute precisely the type of arbitrary invasion into an individual's privacy or security against which the Fourth Amendment is intended to protect.

(App. 118).

The issue raised in this case presents a real and significant question of constitutional law and meets the criteria of Wis. Stat. § (Rule) 809.62(1r)(a).

In addition, the wide-ranging impact of the court of appeals' decision creates a question of law that is likely to recur, meeting the criteria of Wis. Stat. § (Rule) 809.62(1r)(c)3.

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. 127-28, 131). 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. 128).

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. 129). He could not tell if the bottles had labels on them or not. (21:7-8; App. 131-132).

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. 129). Deputy Poplin stated that he completed the reason for the stop – speeding – before he asked to see the pill bottles. (21:8; App. 132). 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. 132-133). He explained that "just based on prior law enforcement training and experience I have found illegal substances in pill bottles." (21:10; App. 134).

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. 129-130, 133).

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. 131).

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. 131).

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 calmer. (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. 125). 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. 141).

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. 144).

An appeal followed, and Ms. Crone argued that the extended seizure violated her Fourth Amendment rights. The court of appeals affirmed the circuit court's denial of the suppression motion, holding that the "the officer's simple request for Crone's consent – even when that request occurred at the end of the traffic stop – did not unreasonably extend the stop under the totality of the circumstances." (App. 102). A lengthy concurrence noted that due to this court's decision in *Wright* "binding precedent" barred a dissent. However, the concurrence stated that "the negligible amount of time needed to ask an unrelated question during a traffic stop cannot be the sole criterion by which the reasonableness of the extension of the stop is judged." (App. 118).

ARGUMENT

This Court should accept review and hold that its decision in *State v. Wright* does not create a bright-line rule that a single question cannot transform a lawful stop into an unlawful stop. Instead, consistent with *Brown v. Texas*, the Fourth Amendment protection against arbitrary government intrusions requires a balancing analysis between the public concerns served by the seizure, the degree to which the seizure advances the public interest and the severity of the interference with individual liberty.

A. Introduction and Standard of Review

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 by asking to see the pill bottles he glimpsed inside Ms. Crone's purse. (21:3-5; App. 127-129). 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.

B. The totality of the circumstances surrounding the extension of the stop determine whether the extension was reasonable under the Fourth Amendment. If *State v. Wright* established a bright-line rule that there is never a Fourth Amendment violation when an officer asks a question after the mission of the stop is completed and without reasonable suspicion or any officer safety issues, that bright-line rule is inconsistent with the purpose of the Fourth Amendment.

In *Wright*, this Court approved an extension of a stop because it determined that an officer asking a question does not improperly extend a stop. *State v. Wright*, 2019 WI 45, ¶47. A blanket rule always allowing an officer to extend a stop is inconsistent with the purpose of the Fourth Amendment because it fails to properly balance the public and private interests at stake. This Court should accept review to clarify or overrule *Wright* and require a balancing test when the issue of an extension of a stop is raised.

In *Wright*, the defendant's car was stopped for a traffic violation. "Officer Sardina asked Wright for his driver's license, asked whether he was a CCW permit holder, and asked whether Wright had any weapons in the car. Officer Sardina testified on cross-examination that although he does not recall how many questions he asked or the order in which he

asked them, all of those questions usually 'come pretty fast' after he makes initial contact with a motorist." *Wright*, 2019 WI 45 ¶16.

This Court concluded that none of the officer's questions or actions violated the Fourth Amendment because "we view the time it took Officer Sardina to ask the CCW question as de minimis and virtually incapable of measurement." *Id.* at ¶47.

The holding in *Wright* is inconsistent with the purpose of the Fourth Amendment. The Fourth Amendment exists to safeguard privacy and security of individuals against arbitrary invasions by the government. *Camera v. Municipal Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 528 (1967). That purpose is not served with a blanket rule allowing the extension of traffic stops to ask questions unrelated to the mission, unsupported by reasonable suspicion and unrelated to officer safety.

For that reason, the time needed to ask the question should not be the sole criteria. Instead, this court should impose a test based on *Brown v. Texas*, 443 U.S. 47, 50 (1970), where the reasonableness is based on "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." Courts should weigh the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest and the severity of the interference with individual liberty,

Applying that balancing test to the facts in Ms. Crone's case it is clear that the extension of the stop was unreasonable and violated the Fourth Amendment. Ms. Crone was stopped for speeding, a minor offense. There was no reasonable suspicion. The deputy did not testify about anything about the driving or Ms. Crone's behavior that made him believe she was impaired. When he saw the pill bottles inside Ms. Crone's purse, he had no reason to believe the bottles contained illegal medications. (21:3-5; App. 127-129). Under these circumstances, there was minimal, if any, public interest in questioning Ms. Crone about the bottles.

At the same time, the question about the pill bottles did interfere with Ms. Crone's privacy interest in her personal medical information. Private medical information is highly confidential. Wis. Stat. § 146.82(1). This significant interest in keeping her confidential medical information private outweighed the minimal or nonexistent public interest served by asking about the pill bottles. As the court of appeals' concurrence noted "The question was, quite simply, an arbitrary invasion of Crone's privacy by the government – the very evil against which the Fourth Amendment was intended to protect." (App. 122).

This Court should accept review to clarify that the asking of the question alone is not definitive to the reasonableness analysis and, after applying the balancing test consistent with *Brown*, the extension of the stop in this case violated the Fourth Amendment.

C. If this Court rules that *State v. Wright* does not establish an improper bright-line rule, the extension of the stop violated Ms. Crone's Fourth Amendment rights because the continued detention took place after the mission of the traffic stop was completed, was not supported by reasonable suspicion of criminal activity and did not involve officer safety concerns.

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. 133).

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. 132-133). 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. 134). 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. 129).

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, the court of appeals 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. 131-132). 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.

State v. Wright 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.

The linchpin of the *Wright* 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. 143). 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. 129). 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

Kimberly Dale Crone respectfully requests that the court grant her petition for review.

Dated this 19th day of May, 2021.

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-Petitioner

A P P E N D I X

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

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,304 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 19th day of May, 2021.

Signed:

SUSAN E. ALESIA
Assistant State Public Defender