STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP1764-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KIMBERLY DALE CRONE,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

ISSUE PRESENTED

Defendant-Appellant-Petitioner Kimberly Dale Crone pleaded no contest to one count of possession of a controlled substance following a consent search during a lawful traffic stop. Crone consented to the search after an officer asked if he could examine prescription pill bottles visible in her purse. Did this request unlawfully extend the traffic stop?

The circuit court denied Crone's motion to suppress, ruling that the request was a very minimal intrusion that did not require much extra time.

The court of appeals affirmed, holding that the request was lawful because, under the totality of the circumstances, it did not unreasonably extend the stop beyond the time necessary to complete the mission of the stop.

INTRODUCTION

Crone has petitioned this Court for review of the Wisconsin Court of Appeals' decision below, *State v. Crone*, 2021 WI App 29, ___ Wis. 2d ___, 961 N.W.2d 97, and this Court has ordered the State to respond. The issue presented by Crone's case does not meet this Court's criteria for review. The facts of this case are quite similar to those in a case this Court heard a little over two years ago, *State v. Wright*, 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157. The court of appeals correctly held that *Wright* and similar cases governed the outcome here,[1] which was the affirmance of the circuit court's

[1] The State acknowledges that the majority and the concurrence in the court of appeals disagreed over the import of *Wright* to this case. The concurrence opined that *Wright* "directly controls the issue of whether Poplin's question to Crone impermissibly extended the duration of the traffic stop." *State v. Crone*, 2021 WI App 29, ¶ 33 n.1, ___ Wis. 2d ___, 961 N.W.2d 97 (Stark, P.J., concurring). The majority concluded that *Wright* was

decision that the brief question posed to Crone during the traffic stop did not unlawfully extend the stop in violation of her Fourth Amendment rights. This Court should deny the petition.

DISCUSSION

Crone's case does not meet this Court's criteria for review.

In arriving at its decision affirming the circuit court's denial of Crone's motion to suppress, the court of appeals relied on established and recent precedent. The main cases that the court cited—*Wright* and *Floyd*[2]—lead to the same conclusion: there is no bright-line rule that any question that may fall outside of the initial purpose of the traffic stop constitutes an unlawful extension of the stop. Instead, courts review whether a traffic stop was unlawfully extended under the totality of the circumstances, and where—as here—a brief question takes an amount of time that is virtually incapable of measurement, the totality of the circumstances points to there being no unlawful extension of the stop.

Wright is notable both because of its recency and because of how similar it is. Decided in 2019, *Wright* concerned a traffic stop where a police officer (Sardina) asked the defendant (Wright) whether he had a concealed carry

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"materially distinguishable and, therefore, not dispositive of the issue on appeal." *Id.* ¶ 21 n.4. This conclusion is puzzling, however, given the court's statement earlier in the opinion that "the scenario here appears to fit squarely within our supreme court's language in *Floyd* and *Wright*." *Id.* ¶ 16. If there is any flaw in the court of appeals' opinion, it is on this point. Nevertheless, it is notable that despite their apparently conflicting views of the impact *Wright* had on this case, all three judges arrived at the same conclusion: there was no unlawful extension of the stop here.

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

(CCW) permit and whether he had any weapons in the car. *Wright*, 386 Wis. 2d 495, ¶ 16. Wright told Officer Sardina that he had a firearm in the glovebox and that he had just completed a class to obtain his CCW permit. *Id.* ¶ 17. Officer Sardina ran Wright's information and learned that Wright did not have a CCW permit; Wright was then arrested for unlawfully carrying a concealed weapon. *Id.* ¶ 18.

This Court agreed with both Wright and the State that Officer Sardina's question about a CCW permit, and the related check, were not part of the ordinary inquiries related to a traffic stop. *Id.* ¶ 36. However, this Court noted that "[i]nquiries 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.* ¶ 38 (quoting *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)). This Court "conclude[d] that Officer Sardina's question about whether Wright held a CCW permit did not 'measurably extend the duration of the stop.'" *Wright*, 386 Wis. 2d 495, ¶ 47 (citation omitted). This Court continued, "[o]bviously, Officer Sardina's CCW permit question took some amount of time to ask. However, we view the time it took Officer Sardina to ask the CCW question as de minimis and virtually incapable of measurement. Thus, the CCW question did not violate the Fourth Amendment in the instant case." *Id.*

This case has a lot in common with *Wright*. In each case, settled legal principles established that the traffic stop was not unlawfully extended by a short question virtually incapable of timing. Contrary to Crone's assertion, however, the court of appeals did not hold in this case that *Wright* created 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." (Crone's Pet. 5.)

Indeed, the court specifically noted that "the Supreme Court has consistently eschewed bright-line rules when determining whether law enforcement violated an individual's Fourth Amendment rights." *Crone*, 2021 WI App 29, ¶ 14. And it expressly rejected Crone's approach, which it saw as itself advocating for a bright-line rule:

> [A] court assesses the reasonableness of an officer's manner of conducting unrelated mission activities. And, similar to other Fourth Amendment inquiries, reasonableness is determined based on the totality of the circumstances. A holistic reading of *Rodriguez*[3] therefore illustrates that it did not create the bright-line rule Crone seemingly relies upon in her appellate arguments.

Id. ¶ 27 (citations omitted). This Court's clarification is not necessary.

Moreover, given the recency of the *Wright* decision, there is no need for this Court to revisit this area of the law, and Crone's petition thus falls outside of the criteria for review set forth in Wis. Stat. § (Rule) 809.62(1r). Crone suggests that her case meets the criteria for review because it concerns a constitutional question. (Crone's Pet. 6.) This is not enough. Under such a standard, one could argue that *any* Fourth Amendment case is worthy of this Court's review. That is clearly not the case; something more is needed.

But in reality, Crone's petition offers little more than a suggested alternative to the decades of caselaw, which this Court revisited and reaffirmed as recently as two years ago in *Wright*. Crone takes an idea set out in the concurrence below—that a better test for determining whether a traffic stop was unlawfully extended exists in *Brown*,[4] a 42-year-old

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[3] *Rodriguez v. United States*, 575 U.S. 348 (2015).

[4] *Brown v. Texas*, 443 U.S. 47 (1979).

Supreme Court case—and runs with it. This position is flawed.

Brown was not a traffic case, nor did it concern the lawfulness of the extension of a *Terry*[5] stop. Rather, *Brown* dealt with a Texas statute that made it a crime for a person to refuse to identify himself to police. *Brown v. Texas*, 443 U.S. 47, 48 (1979). There, police seized the defendant "for the purpose of requiring him to identify himself." *Id.* at 50. The Court noted that "[t]he reasonableness of seizures that are less intrusive than a traditional arrest depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Id.* (citations omitted). But it did so while weighing the constitutionality of the initial seizure of the defendant, not during any kind of discussion about any extension of a lawful stop. *See id.* at 50–51.

To supplant *Wright* and other traffic stop extension cases with *Brown* makes little sense. Doing so would only create confusion by calling into question 42 years of precedent; it would not "clarify or harmonize the law." *See* Wis. Stat. § (Rule) 809.62(1r)(c). And it is not necessary. The principles espoused by cases like *Wright*, *Robinette*,[6] and *Gaulrapp*,[7] reflect careful analysis related to facts relevant to the extension of traffic stops. Nothing more is necessary.

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[5] *Terry v. Ohio*, 392 U.S. 1 (1968).

[6] *Ohio v. Robinette*, 519 U.S. 33 (1996).

[7] *State v. Gaulrapp*, 207 Wis. 2d 600, 558 N.W.2d 696 (Ct. App. 1996).

CONCLUSION

For the reasons set forth above, the State requests that this Court deny Crone's petition for review.

Dated this 30th day of August 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JOHN A. BLIMLING
Assistant Attorney General
State Bar #1088372

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-3519
(608) 294-2907 (Fax)
blimlingja@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this petition is 1,497 words.

Respectfully submitted,

JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b) (2019–20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

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

Respectfully submitted,

JOHN A. BLIMLING
Assistant Attorney General