State of Wisconsin
Court of Appeals
District IV

Appeal No. 2018 AP 1963 - CR
Columbia County Case No. 2012 CM 660

State of Wisconsin,
Plaintiff-Respondent,

v.

Rosalee M. Tremaine,
Defendant-Appellant.

Brief of Defendant-Appellant

On appeal from a judgment of the Columbia County Circuit Court,
The Honorable W. Andrew Voigt, presiding.

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Issues Presented for Review

I. Whether defense counsel's failure to challenge the extension of the stop beyond the time at which the written warnings were delivered constituted ineffective assistance of counsel.

II. Whether, even though the post-conviction motion raised the issue of the improper extension of the stop beyond when the written warnings were delivered, the State failed to present evidence sufficient to meet its burden of showing that the extension was justified.

III. Whether the circuit court improperly denied the post-conviction motion.

IV. Whether, regardless of whether *Arias* or *Rodriguez* applies they have the same result in this case.

Statement of the Case

This case began with a traffic stop on 9 October 2012, during which police found what they suspected to be paraphernalia and marijuana in Ms. Tremaine's purse. (R.1; App. 1-2.) Testing confirmed both suspicions, and the State charged her with Possession of THC and drug paraphernalia under Wis. Stat. §§ 961.41(3g)(e) and 961.573(1), respectively. (R.1; App. 1-2.)

Defense counsel filed a Motion to Suppress Based upon Illegal Detention & Arrest as well as a Motion for Further Discovery on 6 January 2014. (R.13:1-4; 4-6.) On 8 January 2014, the court scheduled the suppression motion for hearing and denied the discovery motion as untimely. (R.67; App. 7-48.)

The Motion for Further Discovery primarily sought video of the traffic stop counsel believed likely to have been captured by a squad car camera. (R.13:4.) The subsequent, undisputed testimony of Deputy David Clark at the suppression hearing revealed that no squad video existed, as the car in question was equipped with a camera system. (R.67:19; App. 25.) This assertion confirmed Assistant District Attorney Crystal Long's assertion at the January 8 hearing that no videos existed.

The 14 April 2014 hearing on the Motion to Suppress Based upon Illegal Detention & Arrest included police testimony detailing the 9 October 2012 traffic stop. (R.67; App. 7-48.) Deputy David Clark, then an officer with the City of Portage

police department, testified that he stopped the vehicle due to the presence of a visual obstruction hanging from the rear-view mirror and subsequently noticed a malfunctioning center brake light. (R.67:6-7; App. 12-13.) The operator of the car was Lonnie Barron, and his passenger was the defendant-appellant, Rosalee Tremaine. (R.67:8; App. 14.) Deputy Clark testified that he had decided to issue a written warning, but his mobile data computer malfunctioned, requiring him to wait for support from other police. (R.67:11-12; App. 17-18.)

In addition to calling for assistance with the written warning, Deputy Clark called for help investigating the possible presence of illegal drug activity. (R.67:11-12; App. 17-18.) Presumably, he did this based on what both he and Deputy Haverly testified were "numerous tips" that the driver of the car was involved in drug trafficking. (R.67:6, 10, 21, 28, 29, 31; App. 12, 16, 27, 34, 35, 37.)

As a result, Deputy Stroik and Detective Haverly arrived to perform a drug investigation in which Detective Stroik performed a dog sniff test of the vehicle.

Deputy Clark testified, however, that he was able to provide written warnings to the driver prior to a dog sniff test being performed:

> "Q: Had you indicated to Mr. Barron once you issued those citations to him that he was free to leave?
>
> A: I did not.

> Q: So he was still sitting there after you issued those citations to him from your initial seizure of him, is that correct?
>
> A: Yes.
>
> Q: And he had tickets in hand prior to the drug dog that Deputy Stroik had as a partner running any type of search, is that correct?
>
> A: Yes." (R.67:25, App. 31)

Neither the State nor the defense, however, ever asked how long the stop had been prolonged after the issuance of the written warnings. (R.67; App. 7-48.) This may be due to defense counsel never successfully having distinguished between two separate extensions of the stop: (1) the deputy's decision to prolong the stop to issue written warnings and (2) the subsequent decision to prolong the stop after delivery of those warnings to allow for the dog sniff.

Therefore, it was undisputed that Deputy Clark prolonged the stop solely to investigate possible drug offenses, and no evidence suggested Deputy Clark had personally observed facts that might justify enlarging the scope of the stop.

Further, defense counsel implied that he had sought dispatch records that could have provided a clearer understanding of when various events occurred but was told that no such records were available, and Deputy Clark acknowledged surprise: "Yes. There should be records." (R.67:19-20; App. 25-26.)

What is undisputed is that Deputy Stroik performed the dog sniff test after delivery of the written warnings and that, due to a

positive result, police requested that both occupants exit the vehicle. (R.67:29-30; App. 35-36.) After exiting the vehicle, Ms. Tremaine admitted to having a "chillum" in her purse, which police recognized as a term for a marijuana pipe. (R.1.) A search of the purse revealed the pipe as well as suspected marijuana, both of which police confirmed with subsequent testing. (R.1.)

On the suppression motion, the court ruled orally that the extension of the stop was primarily to exercise police discretion to issue a written warning and that claims of the malfunctioning mobile printer did not appear to be manipulative or dishonest. (R. 68.) Due to this, he found it reasonable under the circumstances to extend the stop by fewer than ten minutes to provide written warnings. (R.68:4; App. 59.)

It is important to note that nothing in the record supports the court's finding that the stop was extended by fewer than ten minutes. The closest thing to such support might be Deputy Clark's testimony that he thought Deputy Oetzman arrived with the necessary forms to provide written warnings in that amount of time. (R.67:12; App. 18)

Additionally, the circuit court never reached the issue of whether the dog sniff test impermissibly lengthened the traffic stop beyond the constitutionally-mandated scope of the initial seizure. This may have resulted from the lack of a clear record made by defense counsel and the State as to when events really occurred.

For instance, no one elicited testimony as to how long the dog sniff test continued after the delivery of the written warnings.

After the court denied the suppression motion, Ms. Tremaine entered a plea agreement in which she and the State jointly agreed to recommend a combined fine and costs of $694. (R.70.)

Subsequently, Ms. Tremaine sought review of the court's decision to deny the suppression motion. Tremaine filed a post-conviction motion alleging ineffective assistance of counsel and that the circuit court record was insufficient for the State to have met its burden of proof. (R.47.) The basis of this motion was that the failure of the defense to raise the issue of the extent to which the dog sniff actually extended the scope of the stop. (R.47.) The circuit court denied the motion on the basis (1) that trial counsel had attempted to track down dispatch logs and then tried to elicit testimony specifying when the dog sniff occurred and (2) that no one had sufficient knowledge of when the events occurred to say with confidence. (R.77.) The court made clear that an absence of evidence as to the length of time critically undermined the suppression motion:

> "I just - - if the information didn't exist - - which it appears to be the, that it didn't exist, his failure to ask that question is, at worst, harmless error, assuming that it was an error in the first place." (R. 77:22; App. 90.)

Statement of the Law

Ineffective Assistance of Counsel

The test for ineffective assistance of counsel is two-tiered:

> "To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he or she was prejudiced by the deficient performance." *State v. Kimbrough*, 2001 WI App. 138, ¶ 26, 246 Wis. 2d 648, 630 N.W.2d 752.

However, defense counsel is entitled to deference on strategic decisions:

> "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Strickland v. Washington*, 466 US 668, 681 (1984).

Burden of Proof

Upon an adequate showing, the burden to prove the constitutionality of the extension of the stop was the State's:

> "Where a violation of the fourth amendment right against an unreasonable search and seizure is asserted, the burden of proof upon the motion to suppress is upon the state." *State v. Taylor*, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973).

Informant as a Basis for a Stop

Police may make an investigatory stop based on an anonymous tip when the tip is independently-corroborated by subsequent police investigation. *Alabama v. White*, 496 US 325 (1990).

Extension of a Stop

Wisconsin precedent at the time of the stop in this case was that an "incremental extension of time" of the stop of 78 seconds for a dog sniff was too short to be deemed unreasonable under the Fourth Amendment. *State v. Arias*, 2008 WI 84, ¶ 3, 752 N.W.2d 748.

Arias never specified how long a stop could be lengthened while remaining reasonable under the Fourth Amendment.

Further, it is unclear that *Arias* comported with existing US Supreme Court precedent, as SCOTUS later explained in *Rodriguez v. United States*:

> "In *Illinois v. Caballes*, 543 U. S. 405 (2005), this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police observed traffic violation, there fore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation. *Id*., at 407. **The Court so recognized in *Caballes*, and we adhere to the line drawn in that**

> **decision.**" (Emphasis added) *Rodriguez v. US*, 135 S.Ct. 1609, 1612 (2015).

The *Rodriguez* and *Caballes* courts merely reiterated the longstanding rule that "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

Retroactive Application of SCOTUS Precedent

Further, the above quote from *Rodriguez* strongly supports the notion that it must be applied retroactively. In *Griffith v. Kentucky*, the US Supreme Court summarized the policies and standards for when its decisions must be retroactively applied, holding that its Fourth Amendment decisions were generally to be applied retroactively:

> "As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is 'the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a new rule. 457 U. S., at 556, n. 16 (emphasis in original). Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: 'The time for toleration has come to an end.' Ibid.
>
> In *United States v. Johnson*, our acceptance of Justice Harlan's views led to the holding that 'subject to [certain exceptions], a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.' *Id*., at 562. The exceptions to which we referred related to three categories in which we concluded that existing precedent established threshold tests for the retroactivity

> analysis. In two of these categories, the new rule already was retroactively applied: (1) when a decision of this Court did nothing more than apply settled precedent to different factual situations, see id., at 549, and (2) when the new ruling was that a trial court lacked authority to convict a criminal defendant in the first place. See *id*., at 550.
>
> The third category — where a new rule is a 'clear break' with past precedent." 479 U.S. 314, 323-324 (1987).

Thus, on direct appeal, only an opinion establishing a "new rule" that is a "clear break" from past precedent is non-retroactive.

This rule also applies to state courts: "Indeed, about the only point on which our retroactivity jurisprudence has been consistent is that the retroactivity of new federal rules is a question of federal law binding on States." *Danforth v. Minnesota*, 128 S.Ct. 1029, 1048 (2008).

Standard of Review

Our Supreme Court set forth the appropriate standard of review regarding motions to suppress evidence:

> "In reviewing a motion to suppress, we apply a two-step standard of review. First, we review the circuit court's findings of historical fact, and will uphold them unless they are clearly erroneous. Second, we review the application of constitutional principles to those facts de novo." *State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W. 2d 625.

Argument

I. Ineffective Assistance of Counsel

To prove ineffective assistance of counsel, we need to show (1) that counsel's performance was deficient and (2) that this deficiency prejudiced Ms. Tremaine.

With regard to deficient performance, it is undisputed that defense counsel failed to argue or elicit testimony regarding the police decision to continue restraining Ms. Tremaine's liberty after the original purpose of the investigatory seizure had been terminated by the delivery of the written warnings. When later asked, trial counsel could not explain this failure in rational, strategic terms, suggesting it was an oversight and not a strategic decision. (R.77:5-6; App. 73-74.)

Prejudice is proved by the fact that, as discussed below, the State could not have met its burden to explain the enlargement of the scope of the stop. As such, the evidence subsequently obtained by police would have been inadmissible as "fruit of the poisonous tree." *Nardone v. United States*, 308 US 338, 341 (1939). The State has never shown that the evidence could have been developed through any other source.

II. The State Failed to Meet Its Burden.

Even in its response to the post-conviction motion, the State never presented evidence that adequately could have explained the basis for the extension of the stop beyond the delivery of the

written warnings. Even if the court was correct that Deputy Clark had discretion to enlarge the scope of the stop to issue a written warning rather than an oral one, nothing in the record justifies the subsequent enlargement of the stop's scope beyond the issuance of the written warnings, nor did there exist any evidence as to how long the stop was prolonged.

III. The Circuit Court Improperly Denied the Post-Conviction Motion.

At the end of the post-conviction motion hearing, the circuit court found, in effect, that if police did not know how long the dog sniff prolonged the stop, the suppression motion must be denied. For example:

> "If nobody knew at the time, some two years after the traffic stop, whether it was a minute and five seconds or three minutes later, that the sniff got done, or whatever it might have been, I don't know that that's Mr. Holtz's fault, for not asking a question to which it should have been pretty clear that the answer was that nobody knew at that time. Nobody knew what the answer was; that seems pretty clear from the testimony." (R.77:21; App. 89.)

The court's position seems to be that, if police simply fail to preserve a record of their conduct, criminal defendants lack any means of challenging that conduct. This contradicts the controlling authority placing the burden of proof on the State in suppression hearings, as previously discussed. More dangerous is the fact that such a decision incentivizes surreptitious conduct and a lack of candor from police by allowing them to thwart suppression merely by failing to recall relevant facts.

IV. The Result Remains the Same Regardless of the Authority Cited.

Regardless of which authority controls, the State failed to meet its burden to show the reasonableness of the seizure.

If *Arias* is the controlling authority in this case, the State cannot have satisfied its burden to show the reasonableness of the delay without being able to show how much of a delay actually occurred.

However, it may be that *Arias* was not the appropriate controlling authority at the time. Seeing as *Rodriguez* simply reiterated existing law to more specific facts, the case did not announce a "new rule" and was, thus, retroactive.

Therefore, if *Rodriguez, Caballes,* or even *Terry* is the controlling authority in this case, the State cannot meet its burden because none of these cases allows an enlargement of a stop without reasonable suspicion supporting a renewed basis for the seizure.

No reasonable suspicion existed because the drug trafficking allegations vaguely referenced in the deputies' testimonies were never independently corroborated by police as required by *Alabama v. White*, 496 US 325 (1990). Unless police can corroborate anonymous[1] tips, they do not amount to a reasonable suspicion. *Id*.

[1] These tips must be treated as anonymous, as the State never sought to introduce any evidence that they were reliable.

Thus, there never existed any means for the State to have met its burden.

Conclusion

Ultimately, had trial counsel properly raised the issue of the impropriety of the enlarged scope of the stop under *Arias*, the State would have been unable to meet its burden under *Taylor* to show that the enlargement of the stop was either reasonable under *Arias* or based on the reasonable suspicion required in *Rodriguez* and earlier cases. The evidence would have needed to be suppressed, and no alternative basis for conviction would have remained.

Further, the circuit court's analysis shows the risks of being too deferential to police. If accepted at face value, the idea that the law enforcement can simply claim not to remember the circumstances of a seizure would fatally undermine suppression as a remedy, and police would be able to violate the Fourth Amendment absent accountability.

For the reasons stated above, we ask that the court vacate Ms. Tremaine's conviction and require that she be reimbursed for the fine and costs she paid as a result of her conviction.

Dated this 28th day of February 2019.

Respectfully submitted,

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Rule 809.19(8)(d) Certificate

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 3,028 words.

Dated this 28th day of February 2019.

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Rule 809.19(12)(f) Certificate

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 28th day of February 2019.

Brandon Kuhl

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Certificate of Mailing

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that I caused ten copies of the Brief and Appendix of Defendant-Appellant to be mailed by Priority Mail to the Wisconsin Court of Appeals, PO Box 1688, Madison WI 53701-1688, three copies to the State by Attorney Crystal Nobbe-Long at the Columbia County District Attorney's Office, 400 De Witt Street, PO Box 638, Portage WI 53901-0638.

Dated this 28th day of February 2019.

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Statement on Oral Argument and Publication

Neither oral argument nor publication is warranted in this case.

The brief fully presents and develops the issues on appeal, making oral argument unnecessary. Wis. Stat. (Rule) 809.22.(2)(b).