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STATE OF WISCONSIN COURT OF APPEALS**DISTRICT IV****Case No. 2020-AP-0731-CR**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JOEL DAVISDefendant-Respondent.

On appeal from a Final Order Granting the
Defendant-Respondent's Motion to Suppress
Entered in the Vernon County Circuit Court,
Case No. 19-CF-112,
Honorable Darcy Jo Rood, Presiding

**RESPONSE BRIEF OF
DEFENDANT-RESPONDENT,
JOEL DAVIS**

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STATE OF WISCONSIN COURT OF APPEALS
DISTRICT IV

Case No. 2020-AP-0731-CR

STATE OF WISCONSIN,

Plaintiff,

v.

JOEL DAVIS,

Defendants.

**RESPONSE BRIEF OF DEFENDANT-RESPONDENT,
JOEL DAVIS**

INTRODUCTION

Viroqua Police Officer, Timler Thompson, violated defendant-respondent's, Joel Davis, 4th Amendment and Wisconsin Constitution art. I, §11 rights when he stopped Joel Davis on July 29, 2019 based on an a *non-existent violation* of Wis. Stats. §347.40,^{1,2} Mirrors because the Davis' car had a

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All references are to the 2017-2018 edition of the Wisconsin Statutes, unless otherwise indicated.

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Wis. Stats. 347.40(1) states: No person shall operate any motor vehicle upon a highway unless such a vehicle is equipped with a mirror so located as to reflect to the operator a view of the roadway for a distance of 200 feet to the rear of such vehicle.

missing passenger side mirror, but the car had a rear view mirror and a driver's side mirror (18:4/App R-19). The State conceded that a passenger side mirror was not required (24:4/App R-4). Despite never mentioning a seatbelt violation during the stop and acknowledging that Davis wore his seatbelt when stopped, Thompson altered his report the next day and testified that he stopped Davis for a seatbelt violation (18:5, 38:9, 39:25, 48-49/App R20, 45, 68-69). Davis never received any traffic citations for any traffic violation.

When testifying, Thompson repeatedly refused to make eye-contact and continually diverted his view from counsel and the trial court (24:4, 39:50, 85/App R4, 70, 82). Thompson's obvious lack of eye contract was so egregious during the hearing that the district attorney had to tell Thompson to look at counsel (24:4-5, 39:50, 85/App R4-5, 70, 82). In the State's post-hearing memorandum, it conceded that Thompson's behavior was "unprofessional and immature" (20:1, 24:5/App R5). Thompson's testimony so lacked in credibility, that the State begged the trial court to avoid finding that Thompson perjured himself as it could be a "career-ender" (20:1, 24:5/App R5).

Even though Thompson did not know if he could hold Davis, Thompson detained Davis for approximately 31 minutes after the traffic stop concluded (39:41/App R61). During the unlawful detention, Thompson never wrote Davis a citation

(39:20, 33/App R40, 53). Instead, Thompson sat in his squad car either doing nothing or cleaning his fingernails, while he waited for the K-9 (24:3, 39:37/App R3, 57).

When the K-9 arrived, Vernon County Deputy Bellacero turned his dog loose to search the perimeter of Davis' car (39:14-15/App R34-35). Bellacero claimed that his dog "alerted" to drugs in the car, but the K-9 did not jump on the car until queued by Bellacero (39:14-16/App R34-36). Ballacero had problems with the dog paying attention to the task, claiming that the dog had to relieve himself (39:7/App R27). Based on Bellacero's hand signals, the dog knew he would get a treat if he "alerted" and he would not get a treat if he did not "indicate" (39:15-16/App R35-36).

Subsequent to the unreasonably long and unconstitutional traffic stop, the State charged Davis with drug charges and felony bail jumping³ (2:1-3). Davis filed a Motion to Suppress all evidence from the unlawful stop (15:1-6, 21:1-3/App R9-16). The trial court properly exercised its discretion when it found that the law enforcement officers violated Davis' constitutional rights because he was unreasonably detained him during a traffic stop (24:1-/App R1-8). This Court should affirm Judge Rood's

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The State issued a Criminal Complaint for Count 1, Possession with Intent to Deliver Methamphetamine and Count 2, Felony Bail Jumping. The Complaint body indicates that Thompson based his stop on a missing right side mirror, which is not a traffic violation under *Wis. Stats. §347.40*.

decision because her Opinion is based on a sound factual basis and proper legal analysis (24:1-8/App R1-8).

ISSUES

- 1) Whether the trial court properly granted Davis' Motion to Suppress when it found that the traffic stop of Davis was unconstitutional under the Fourth Amendment and the Wisconsin Constitution, article I, §11 as it was excessively prolonged and exceeded the scope of a traffic stop "ordinary inquiry".

The trial court properly granted Davis' Motion to Suppress for the reasons set forth in the record.

STATEMENT ON PUBLICATION

Davis requests both oral argument and publication, as this case will clarify the constitutional limits of traffic stops when law enforcement uses bogus rationale for a traffic stop and then unreasonably delays the driver in order to wait for a K-9 after the stop was concluded.

STATEMENT OF FACTS

The State presented this Court with a “statement of facts—lite” in its brief and it omitted facts critical to understanding this case.

Thompson, an inexperienced Viroqua Police Officer, held Davis from 7:40:29, when he initiated a traffic stop for an alleged passenger side missing mirror (39:26-27/App R46-47). Thompson alleged that Davis made a “yawning gesture” i.e., hands to his face; made quick movements with his hands/leaning over; possibly reached for his cell phone; drove 20 in a 25 mph zone/37 in a 45 mph zone, braked, and probably put on his seatbelt as he followed Davis for several minutes (39:24-25/App R44-45). Thompson consistently told Davis and the other law enforcement officers that he stopped Davis for a missing passenger side mirror (39:26-27/App R46-47). Thompson never referred to a seatbelt violation until he altered his report, 23 hours later (18:5, 38:9, 39:27, 38, 48/App R20, 47, 58, 68).

About 8:11 minutes after the stop, Thompson told Davis he should call for a ride from the scene because Davis’ license was suspended (39:28/App R48). After telling Davis to call for a ride, Thompson further extended the stop to obtain bond information about Davis’ LaCrosse County case and wait for the K-9 (7:48:40) (39:27-29/App R47-49). The LaCrosse County

case had nothing to do with the traffic stop. The trial court recognized:

It is interesting to note the three officers appeared unconcerned for their safety in spite of the concealed weapon charge [LaCrosse Co], which would have provided a basis for Davis to be asked to step out of the car and be searched.

(24:3 n1/App R3 n1).

Thompson's traffic stop of Davis occurred on July 29, 2019 as follows:

- 7:39:56 Thompson follows Davis (39:26/App R46) (time when squad camera is activated, not actual time when Thompson follows Davis prior to stop)
- 7:40:29 Thompson makes initial contact with Davis Thompson tells Davis stop was for missing mirror (39:26-27/App R46-47).
- 7:43:44 Thompson learn Davis' license suspended, and goes to Davis' vehicle to talk to him. Watches Davis make phone calls to try to get a ride.
- 7:48:40 Thompson returns to squad after telling Davis that he needed to get a ride because his license was suspended (Thompson claims he returned to his vehicle to "run him and see if he's on bond" and write citation for missing mirror). Thompson does not write a citation and sits in his car doing nothing related to traffic stop.
- 7:50:06 Thompson asks dispatch whether Davis has a bond and any bond conditions
- 7:50:45 Officer Raasch arrives on scene. Thompson tells Raasch that he stopped Davis for mirror violation. Raasch tells Thompson that Davis is "big time" drug dealer. Raasch engages Davis in conversation on passenger side of Davis' vehicle. Raasch claims he saw "bulges" in Davis' socks and thigh area

8:02:10 Thompson advised by dispatch of bond conditions that had nothing related to driving safety.

8:18 Officer Bellacero arrives with K-9. Thompson tells Bellacero that he stopped Davis for mirror violation. K-9 searches outside of Davis' vehicle, allegedly "alerted". Davis ordered out of vehicle, searched, and arrested.

(24:3-4/App R3-4).

Thompson repeatedly told Davis and other officers that he stopped Davis for a "missing mirror", even though his reason for stopping was not based in law⁴ (39:27, 36-37/App R47, 56-58). Twenty-three hours later, Thompson "supplemented" his report with allegations about Davis' seatbelt usage (18:5, 39:49/App R20, 69). When stopped, Davis had his seatbelt on and he had no idea that he was stopped about an alleged seatbelt issue (39:50/App R70).

As he explained to Thompson, Davis drove an unfamiliar car that he was "test driving" it to decide if he would purchase it (18:5, 39:54/App R20, 74). Thompson knew that the car was not owned by Davis. Davis' explanation about any presumed driving discrepancies was entirely plausible and innocent that anyone "test" driving a car might be doing while driving a strange car.

⁴

Supra, p.1, n2.

Thompson claimed that Davis exhibited “nervousness”, but when questioned during cross-examination, Thompson stated:

Q: First of all, what about his voice indicates that he’s very nervous there? Didn’t he kind of answer you just like any other person asking you what’s going on?

A: I guess the way I see it he was trying really hard to act in a way the he probably normally doesn’t act.

THE COURT: To act in what way?

A. That he normally doesn’t act.

Q: How do you know how he normally acts?

A: I don’t. I don’t.

(39:36/App R56).

Thompson admitted that he can write a citation in 10 to 15 minutes (39:46/App R66). Thompson checked Davis’ driving status and found that his driving privileges were suspended (39:27/App R47). Davis remained in his car and made calls to find a ride (39:28, 56/App R48, 76). Thompson claimed he returned to his squad to write a citation for the missing mirror, but he did nothing (39:36-37, 41/App R56-57, 61). Rather than write a citation, Thompson spent his time cleaning his fingernails and doing nothing related to writing a citation while he waited for other officers and the K-9 to arrive (39:41/App R61). The traffic stop concluded when Thompson returned to his squad with no intention of writing a citation, yet

officers held Davis while waiting for the K-9.

Thompson and Viroqua Police Officer Raasch, who arrived during Davis' unlawful detention, intentionally extended the stop and delayed Davis in order to wait for the K-9, which the officers knew was about 22 minutes away (39:18, 59/App R38, 79). When the K-9 searched the outside of the vehicle, Bellacero claimed the dog "alerted" on the car's rear passenger door (39:14-16/App R34-36). The video shows that Bellacero used hand signals and the promise of a "treat" for the dog to jump on the car to indicate that drugs were present (39:14-16, 21/App R34-36, 41). No drugs were found in Davis' car (39:18/App R38).

Davis brought a Motion to Suppress (15:1-6, 21:1-3/App R9-16). The trial court held an evidentiary hearing. The trial court issued a written Opinion where it granted Davis' Motion to Suppress for the reasons stated by Judge Darcy Rood (24:1-8/App R1-8).

ARGUMENT

I. STANDARD OF REVIEW WHEN A TRIAL COURT PROPERLY EXERCISES ITS DISCRETION.

This Court reviews a motion to suppress under a two-prong analysis. Under the first prong, this Court will uphold the trial court's findings unless those findings are clearly erroneous. *See State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499, 501 (1999). The second prong requires this Court to review the statutory and constitutional standards under the *de novo* standard. *See id.*

In this case, Judge Rood's Opinion met both criteria for this Court to uphold the trial court's finding to grant Davis' Motion to Suppress. Judge Rood meticulously outlined the facts, including a detailed time-line regarding the unreasonable length of Davis' detention and unreasonable actions by law enforcement to unlawfully detain Davis until the K-9 arrived (24:2-4/App R2-4). Further, Judge Rood properly considered Thompson's glaring testimony inconsistencies and she expressed her concerns about Thompson's behavior, reports, and demeanor (24:4-5/App R4-5).

The trial court not only presented a correct recitation of the facts, it properly applied statutory and constitutional law. The trial court reached a proper conclusion based on a solid legal basis to grant Davis' Motion to Suppress. Therefore, this

Court should find that the trial court properly exercised its discretion and that it properly applied the statutory and constitutional law to the facts and, therefore, affirm the trial court order granting Davis' motion.

II. LAW ENFORCEMENT EXCEEDED THE PARAMETERS OF A CONSTITUTIONALLY PERMISSIBLE ORDINARY INQUIRY FOR A TRAFFIC STOP WHEN IT DETAINED DAVIS FOR APPROXIMATELY 31 MINUTES.

The State argues that this Court should overturn the trial court's ruling to grant Davis' Motion to Suppress because Davis' unreasonably long detention was justified as a traffic stop "ordinary inquiry" about bond conditions (SB10). Bond conditions are not an "ordinary inquiry" related to a traffic stop.

"Ordinary inquiries" related to traffic stops have been defined. Usual and customary "ordinary inquiries" include the following:

- 1) checking driver's license status;
- 2) checking for outstanding traffic related warrants;
- 3) checking for proper vehicle registration; and,
- 4) checking for proof of insurance.

See Rodriguez v. U.S., 575 U.S. 348, 355, *Delaware v. Prouse*, 440 U.S. 648, 658-60 (1979). Although not an exclusive list, there is no justification for checking an individual's bond status, as it exceeds the scope of the traffic stop and violates the constitutional reasonableness requirement, a bond condition is not related to highway safety. *See Whren v. U.S.*, 517 U.S. 806, 809-10 (1996). In its brief, the State admitted that bond conditions are not imposed to ensure highway safety under *State ex rel. Jacobus v. State*, 208 Wis. 2d 39, 52, 559 N.W.2d 900, 904-05 (1997). (SB 10)

A traffic stop and inquiry must be reasonably related to the scope of the initial stop. *See Betow at 94, 593 Wis. 2d at 502*. A dog sniff is not reasonably related to a traffic stop. The correct analysis is whether there is a reasonable relationship between an individual's detention and the reason for the traffic stop. *See id.*, *U.S. v Brignoni-Ponce*, 422 U.S. 873, 881 (1975). Bond conditions are not reasonably related to a traffic stop. The remedy for a bond violation is a criminal bail jumping charge, not a traffic citation.

The dog sniff did not occur contemporaneously to the traffic stop, but rather Davis was detained approximately 31 minutes while Davis was permitted to make phone calls to secure a ride and officers waited for a K-9 to arrive on scene (24:2-4/App R2-4). A dog sniff is a specific procedure directed

at detecting criminal activity. *See Rodriguez at 355*. In *Rodriguez*, the government admitted that a dog sniff is not considered an “ordinary inquiry” during a traffic stop. *Id.* *Rodriguez* specifically noted that “[l]acking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer’s traffic mission”. *Id.* *Rodriguez* defeats the State’s assertion that a dog sniff is justified as a traffic stop “ordinary inquiry”. It is not.

Here, the K-9 arrived at the scene approximately 37½ minutes after Thompson stopped Davis (39:26-32/App R46-52). Approximately 31 minutes prior to the K-9 arriving, Thompson released Davis to call for a ride to leave the stop scene (39:26-27/App R46-47). In the interim, Thompson sat in his squad and did nothing, and, most importantly, he did not write Davis a citation for any traffic violation (39:20, 33/App R40,53).

Thompson admitted that he can write a citation in 10-15 minutes (39:36/App R66). Thompson intentionally did not write a citation to Davis in order to prolong the traffic stop. Not only did Thompson intentionally prolong the stop past the time necessary to make ordinary inquiries, but Raasch arrived at Davis’ car 10:16 minutes after the stop (39:18, 59/App R38, 79).

Raasch engaged Davis in unrelated chit-chat to unlawfully detain Davis until 8:18, when the K-9 arrived (39:18, 59/App R38, 79). Raasch claimed he saw suspicious “bulges” in Davis’

clothing, but he did nothing to either remove Davis from his vehicle or arrest him until after the K-9 became involved (39:56/App R76). Law enforcement's seizure of Davis exceeded the bounds of "ordinary inquiry" for a traffic stop and, exceeded the constitutional reasonableness standard.

Under *Rodriguez* and *Whren*, Thompson's continued detention of Davis violated the constitutional reasonableness standard. *Rodriguez* at 355, *Whren* at 809-10. Long before Thompson decided to check Davis' bond status, he released Davis from the traffic stop to call someone to pick him up (39:26-27, 56/App R46-47, 76). Not only had the traffic stop concluded, Thompson never wrote Davis a citation. Thompson unreasonably detained Davis and, thus, denied Davis his constitutional protection from unreasonable seizures and searches under the 4th Amendment of the United States Constitution and the Wisconsin Constitution, art. I, §11. Therefore, this Court should uphold the trial court as the trial court's findings of fact and conclusion of law is correct.

III. LAW ENFORCEMENT OFFICERS UNREASONABLY EXTENDED THE DAVIS' TRAFFIC STOP WELL BEYOND THE TIME NECESSARY TO WRITE A CITATION.

A traffic stop will be found unconstitutionally unreasonable when that stop exceeds the time necessary to fulfill the traffic stop purpose. *See Rodriguez at 350-51*. A traffic stop becomes unlawful when an officer extends the time beyond the time necessary to complete the stop's "mission". *Id.* A traffic stop "mission" is limited to:

(1) addressing the traffic violation that warranted the stop; (2) conducting ordinary inquiries incident to the stop; and (3) taking negligibly burdensome precautions to ensure officer safety.

State v. Wright, 2019 WI 45, ¶9, 926 M.W.2d 157, 160.

A lawful seizure ends when the tasks related to the traffic infraction is, or reasonably should have been completed. *See Wright at ¶9, 926 N.W.2d at 160, Rodriguez at 354, U.S. v. Sharpe, 470 U.S. 675, 685 (1985)*. The scope and length of a traffic stop detention must be carefully tailored to the actual traffic violation and related safety concerns. *See Rodriguez at 354, Florida v. Royer, 460 U.S. 491, 500 (1983)*.

Thompson held Davis for approximately 31 minutes before the arrival of the Vernon County K-9 (24:2-4/App R2-4). Thompson admitted that he could write a citation in 10 - 15 minutes (R29:46/App R66). However, Thompson never wrote a citation, doing nothing related to the traffic stop (39:27-

33/App R47-53). Instead, he sat in his squad cleaning his fingernails as he stalled for time waiting for the K-9 (39:41/App R61). When Raasch arrived, well after the stop reasonably concluded, he engaged Davis in chit-chat to unlawfully extend the traffic stop. Under the totality of the circumstances a reasonable person would not have believed they were free to leave while two officers surrounded his vehicle.

Suspicious factors must be “particularized” and “objective”. *Betow* at 94, 593 N.W.2d at 502. Nervousness is a common behavior when a person is stopped by the police. *See id.* at 96, 593 N.W.2d at 503.

Here, officers claimed that Davis’ exhibited nervous behavior and “furtive movements” prior to and during the stop, but Thompson could not particularize what exactly Davis’ nervous behavior gave rise to reasonable suspicion (39:24-25/App R44-45). Thompson claimed that Davis exhibited “nervousness”, but when questioned, Thompson stated:

Q: First of all, what about his voice indicates that he’s very nervous there? Didn’t he kind of answer you just like any other person asking you what’s going on?

A: I guess the way I see it he was trying really hard to act in a way the he probably normally doesn’t act.

THE COURT: To act in what way?

A. That he normally doesn't act.

Q: How do you know how he normally acts?

A: I don't. I don't.

(39:36/App R56). Raasch claimed that Davis acted "odd", but he did not remove Davis from the car nor arrest Davis (39:54/App R74). Davis was able to competently call for a ride and he did not exhibit any unusually "odd behavior" that required Raasch to act, but Raasch continued to unlawfully detain Davis (39:54/App R74). Raasch admitted that nervousness during a traffic stop is common "at times" (39:60/App R80). Nothing in Davis' behavior rose to the level of the necessary particularized and objective activity that created reasonable suspicion, as required.

Davis explained to Thompson that the car he drove was unfamiliar to him as he was "test driving" it to decide if he would purchase it (18:5, 39:54/App R20, 74). That was a completely plausible explanation for Davis' driving, which was not in any way a violation of any law. The driving behavior that Thompson claims he observed was not sufficiently particularized or objective to permit the extended and unconstitutional seizure.

Under *Rodriguez* and *Wright*, a lawful seizure ends when the tasks related to the traffic infraction is, or reasonably should have been finished. *Wright at ¶9, 926 N.W.2d at 160,*

Rodriguez at 354. Thompson unlawfully seized Davis at the point when he reasonably should have finished the traffic stop. Law enforcement officers continued Davis' unlawful seizure through various tactics, including not writing a citation, and engaging Davis in non-investigatory conversation while waiting for the K-9 (39:20, 33, 57/App R40, 53, 77). The traffic stop constructively concluded when Thompson should have reasonably completed and delivered a citation to Davis.

Davis' detention by law enforcement was unreasonably long and an unconstitutional seizure. When Davis' detention went beyond the ordinary inquiry standard, his 4th Amendment and Wisconsin Constitution rights were violated. The trial court correctly granted Davis' Motion to Suppress. Not only did the trial court properly review the facts, in detail, but it also properly applied the law when it granted Davis' Motion. Therefore, this Court should uphold the trial court's decision and order to grant Davis' motion.

CONCLUSION

For the foregoing reasons, this Court should uphold the trial court's findings of fact and conclusions of law granting Davis' Motion to Suppress.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in *Wis. Stats. §809.19(8)(b) and (c)* for a brief and appendix produced with proportional serif font. The length of this brief is 3486 words.

I hereby certify that the text of the electronic copy of the brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

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