

FILED
09-14-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
CASE NO. 2021AP001067-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRADLEY C. BURGESS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN THE LAFAYETTE COUNTY CIRCUIT COURT
THE HONORABLE KARL HANSON PRESIDING.

BRIEF OF DEFENDANT – APPELLANT

Attorney John Mueller
State Bar #1091117
The Law Offices of John P. Mueller, LLC
209 Eighth Street
Racine, WI 53403
Ph: (262) 843-5646
JMueller@JohnMuellerLaw.com
Attorney for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
STATEMENT OF THE ISSUE.....	4
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	4
SUMMARY OF THE ARGUMENT	5
STATEMENT OF FACTS	5
STANDARD OF REVIEW	11
ARGUMENT	11
CONCLUSION.....	15
CERTIFICATION AS TO FORM/LENGTH	16

TABLE OF AUTHORITIES

CASES

<i>Rodriguez v. United States</i> , 135 S. Ct. 1609, 191 L. Ed. 2d 492, 575 U.S. 348 (2015).....	5, 9, 10, 11, 12, 13, 14
<i>State v. Davis</i> , Appeal No. 2020AP731-CR, District IV, filed August 19, 2021, Recommended for Publication.....	5, 11, 14
<i>State v. Smith</i> , 2018 WI 2, 379 Wis. 2d 86, 905 N.W. 2d 353	12
<i>State v. Tullberg</i> , 2014 WI 134, 359 Wis. 2d 421, 857 N.W. 2d 120	12
<i>State v. Wright</i> , 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157	5, 11, 12, 13, 14

CONSTITUTIONAL PROVISIONS

Article 1, Section 11 of the Wisconsin Constitution.....	12
Fourth Amendment to the US Constitution	12

STATEMENT OF THE ISSUE

Did an unlawful seizure occur when Officer Mantsch extended a traffic stop to ask passengers for their identification, to ask the driver questions unrelated to the traffic stop, and to run a record check on the information provided by the passengers?

The circuit court found that while the additional inquiries and actions of Officer Mantsch did extend the traffic stop, because they were “ordinary inquiries related to a traffic stop” the extension was not unlawful.

This decision of the circuit court should be reversed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant Bradley C. Burgess believes the briefs filed by the parties will be sufficient to fully address the issue presented but welcomes oral argument if this Court feels it will assist in making its decision.

Mr. Burgess believes that publication is warranted as this issue clarifies an existing rule of law and contributes to the legal literature by collecting case law. See Wis. Stat. § (Rule) 809.23(1)(a)(1) and (4).

SUMMARY OF THE ARGUMENT

Officer Mantsch initiated a traffic stop of a vehicle for a defective muffler in which Mr. Burgess was a passenger. After Officer Mantsch completed his investigation of the defective muffler and determined he would give the driver a verbal warning, instead of doing so, he extended the stop to ask for the identity of the passengers, to inquire where the driver had been prior to the stop, and to run a record check on the information received by the passengers.

The circuit court found that while the additional inquiries and actions of Officer Mantsch did in fact extend the duration of the traffic stop, the additional inquiries and actions were part of the “ordinary inquiries related to a traffic stop” and therefore, an unlawful seizure did not occur.

As the decision of the circuit court runs afoul to the legal principles set forth by the United States Supreme Court in *Rodriguez v. United States*, 575 U.S. 348 (2015), our Wisconsin Supreme Court in *State v. Wright*, 2019 WI 45, 386 Wis. 2d 495, 926 N.W. 2d 157, and this Court’s recent decision in *State v. Davis*, Appeal No. 2020AP731-CR, ¶3 (August 19, 2021), the order to suppress and the judgment of conviction must be reversed.

STATEMENT OF FACTS¹

On January 24, 2019, at approximately 2 am, City of Darlington Police Officer Nicholas Mantsch was on patrol when he observed a parked vehicle he did not recognize near the residence of a known drug user. (R1:4; R112:22-23). While the vehicle was unoccupied and legally parked, and Officer Mantsch was unable to link the vehicle to any specific residence, observed nothing suspicious pertaining to the vehicle, and could not point to any evidence of criminal activity, Officer Mantsch decided to run the license plate of the vehicle. (R112:23-25).

¹ The Statement of Facts are derived primarily from the uncontradicted testimony of Officer Mantsch at the suppression hearing. (R112:1)

Upon running the plate, Officer Mantsch learned the vehicle was owned by and properly registered to Brandon Loken. (R112:24). Officer Mantsch did not know Loken personally, had no knowledge of any relationship between Loken and anybody at the residence of the known drug dealer, and did not know if Loken was in fact the one who had driven the vehicle to its present location. (R112:24-25). Even so, Officer Mantsch ran a record check of Loken and learned that while Loken had a valid driver's license and no active warrants, he was on parole for a drug related offense. (R76:2; R112:24-25).

Officer Mantsch kept the legally parked vehicle in when when approximately 10 minutes later, he observed four persons enter the vehicle. (R112:28). Officer Mantsch could not determine from where they came (e.g., the residence of the known drug user or another nearby residence), did not recognize any of the persons, did not observe any criminal activity, and did not observe any of the persons carrying any objects, such as a backpack. (R112:26-28). Once the vehicle began moving, Officer Mantsch quickly determined the vehicle had a defective muffler. (R112:29).

Before initiating a traffic stop and approaching the vehicle, Officer Mantsch radioed dispatch to request a K-9 Officer to respond to the traffic stop, even though again, at this time, Officer Mantsch had not observed anything unusual or suspicious and could not see the activities of the persons inside the vehicle as the windows of the vehicle were "quite foggy." (R1:4; R112:29). Officer Mantsch did initiate a traffic stop for the sole purpose of addressing the vehicle's defective muffler. (R76:4; R112:30).

When Officer Mantsch approached the driver's side of the vehicle, the driver's side window was open and the driver handed his driver's license to Officer Mantsch. (R112:30). Officer Mantsch looked at the license and confirmed the driver of the vehicle was Loken while the following colloquy took place:

Officer Mantsch: Hi there, I'm [Officer Mantsch] from the Darlington Police Department. The reason I stopped you is your exhaust is kinda loud.
Loken: Yeah, it is.
Officer Mantsch: You were obviously aware of that?
Loken: Yeah, we just bought this car.

Officer Mantsch: How long ago did you buy it?
Loken: Like, two months ago.
Officer Mantsch: Two months ago? You plan on getting that taken care of?
Loken: Yeah.
Officer Mantsch: Yeah, ok.
Loken: Slowly but surely. (R112:30-35; R45:1).

Officer Mantsch testified that when Loken stated “slowly but surely” the investigation into the defective muffler was completed. (R112:36). He further testified that at this point, he had determined he would give Loken a verbal warning for the defective muffler. (R112:36). Officer Mantsch also acknowledged that at this time, he had no reasonable suspicion to believe a crime was being committed or had been committed. (R76:2; R112:36, 38).

However, instead of giving Loken a verbal warning, returning his license, and telling Loken and the passengers they are free to go, Officer Mantsch extended the traffic stop with additional inquiries and actions. (R112:38). Officer Mantsch acknowledged he did not suspect any of the passengers had committed or were committing any crimes when the additional inquiry and actions ensued because the passengers had “[n]othing to do with the muffler investigation *** because they weren’t driving.” (R112:38-39).

The passengers apparently communicated they did not have IDs, so Officer Mantsch asked each passenger for his or her name, date of birth, and phone number. (R112:39). Two of the three passengers responded by providing information to Officer Mantsch. (R45:1-2). When asked why he requested this information from the passengers, Officer Mantsch testified that based on his training and experience a traffic stop cannot be entirely completed until he runs all the passenger information². (R112:6-7).

After obtaining the information from some of the passengers, Officer Mantsch extended the stop even further when he asked the driver of the vehicle several questions unrelated to a defective muffler. (R112:38-39). These questions included “where are you guys coming from tonight?” and

² Officer Mantsch was asked why he needed a passenger’s date of birth and he responded, “it’s pertinent information when running record checks.” (R112:39). When asked why he needed phone numbers he responded, “in case I need to get a hold of them.” (R112:39).

“what’s over by the fair?” and “who’s your buddy?” and “do you know the street over there?” and “are you still living in Platteville?” and “can I get your phone number?” and “where were you before you dropped [] off [your buddy?” and “Madison? What’s in Madison?” and “[Did you go to Madison] to pick him up, give him a ride home?” (R45:2-3). Officer Mantsch acknowledged some of these questions had nothing to do with his investigation into a defective muffler but that he asked these questions as part of a “common practice,” as part of his “normal practice,” as part of the “policies and procedures for his department,” and that he does this with “every single traffic stop.” (R112:6, R44-48).

Officer Mantsch then returned to his car to run a record check on the information provided by the passengers. (R112:42). Officer Mantsch testified that when he headed back to his vehicle, he was not investigating any new crimes “beyond the defective muffler.” (R112:42).

Officer Mantsch continued to extend the stop when he ran a record check of the information provided by the passengers. He testified this check would reveal whether the passenger had a warrant, whether a passenger had prior criminal convictions, whether a passenger had a valid driver’s license, and whether a passenger was on probation or parole. (R112:50-51).

The information provided by one passenger came back as valid with no arrest warrants. (R112:51). However, the information provided by the other passenger received no data return. (R112:51). Even though Officer Mantsch acknowledged the passenger had no duty to provide him with any information and acknowledged he would not have received a return of data if the passenger was under the age of 16, did not have a license, or lived in another state, Officer Mantsch believed the passenger had provided false information regarding his identity. (R112:51-53). This passenger was Mr. Burgess, and it was at this point that Officer Mantsch first believed Mr. Burgess was committing or had committed a crime. According to Officer Mantsch, it was the crime of “obstructing my investigation” of the “overall traffic stop” by “providing a false name.” (R112:52-53).

Officer Mantsch then returned to the vehicle and asked Mr. Burgess to exit the vehicle for further questioning. (R112:52). Officer Mantsch

eventually asked the driver to exit as well. (R112:53). Eventually, a search of the vehicle was conducted and a backpack, linked to Mr. Burgess, was discovered containing contraband. (R1:4; R112:53). Mr. Burgess was charged with several crimes and each crime was based solely on evidence that was the fruit of the extended seizure. (R1:1-4).

At the suppression hearing, the State acknowledged Officer Mantsch believed his investigation into the defective muffler was complete after his initial interaction with Loken. (R112:67). The State argued, however, that there is “nothing that says he’s not allowed to ask people what their names are and to run record checks on them. Again, all part of the stop.” (R112:71). The State further argued it is “common practice to ask for passenger information” and that while a passenger is not required to give that information, if they do give it, “certainly the officer is not required to ignore that information and not check for warrants[.]” (R112:66).

The State asked the circuit court to apply an objective test to the “reasonableness of the stop and the totality of the circumstances” and find that once Mr. Burgess admitted he gave a false name, in light of the totality of the circumstances, a new obstruction investigation began and because this new investigation began before the traffic stop was completed, no unlawful extension of the traffic stop occurred. (R112:66, 68-71).

Defense Counsel responded by pointing out that even if a traffic stop is unlawfully measurably extended by one second, a fourth amendment violation occurs. (R112:77). Defense counsel cited the United States Supreme Court decision of *Rodriguez v. United States*, 575 U.S. 348 (2015), noting this decision eliminated the de minimis rule pertaining to traffic stops and that the law is clear that when police ask questions unrelated to the mission of a traffic stop that even negligibly prolong the duration of the traffic stop, an unlawful seizure occurs. (R112:75).

Defense counsel stipulated that when Mr. Burgess admitted he gave a false name, it was at this point Officer Mantsch had reasonable suspicion of a crime. (R112:78). However, because no reasonable suspicion developed prior to this admission and because Officer Mantsch did not develop any reasonable suspicion until he extended the traffic stop past the point the

mission of the stop should reasonably have concluded, an unlawful seizure occurred and the evidence discovered as a result must be suppressed. (R112:78, 80).

The circuit court denied the motion to suppress. (R112:96). In its oral decision provided at the conclusion of the suppression hearing, the circuit court ruled that because Officer Mantsch is permitted to attempt to identify the occupants of the vehicle during the initial traffic stop, it doesn't matter whether this questioning occurred before or after Officer Mantsch believed the investigation into the defective muffler was complete. (R112:93). The circuit court continued that because Officer Mantsch did not give the driver a warning and say he was free to go, "it was obvious that he was still trying to identify the individuals in the vehicle," and even though Officer Mantsch subjectively believed the investigation regarding the initial stop for the defective muffler had concluded, it had not. (R112:93). The circuit court ruled the additional inquiries and actions were reasonable and did not constitute an unlawful seizure warranting suppression of the evidence that was obtained as a result of that seizure. (R112:93).

The circuit court later denied a motion to reconsider filed by Mr. Burgess. (R76:1). In a written order, the circuit court clarified that the additional inquiries and actions by Officer Mantsch were part of the "ordinary inquiry related to the traffic stop." (R76:3). The circuit court held that it was "immaterial, in light of *Rodriguez*, when [Officer] Mantsch made his inquiries about the identity of the passengers" as these inquiries are permitted and as they are permitted, they do not extend the traffic stop. (R76:3-4) (Emphasis in original). The circuit court found that "most critically" it was the false identity provided by Mr. Burgess that allowed Officer Mantsch to develop reasonable suspicion that a new crime had occurred. (R76:4).

STANDARD OF REVIEW

A motion to suppress evidence raises a question of constitutional fact. *State v. Wright*, 2019 WI 45, ¶22, 386 Wis.2d 495, 926 N.W.2d 157 (Wis. 2019).

This Court reviews a question of constitutional fact under a two-step inquiry. First, this Court reviews the circuit court's findings of historical facts under the clearly erroneous standard. *Id.* Second, this Court independently applies constitutional principles to these historical facts. *Id.*

ARGUMENT

Officer Mantsch unlawfully seized Mr. Burgess when he extended the traffic stop beyond the time reasonably necessary to complete the mission and the circuit court erred in denying the motion to suppress.

Officer Mantsch conducted a lawful traffic stop of a vehicle for a defective muffler. (R112:29). After he completed his investigation of the defective muffler and determined he would give the driver of the vehicle a verbal warning, he prolonged the stop to ask the passengers of the vehicle for information pertaining to their identity, to ask the driver several questions unrelated to the defective muffler, and to run a record check on the information provided by the passengers. (R112:38-39).

There is no dispute that these additional inquiries and actions extended the length of the traffic stop. Because the extension constitutes an unlawful seizure under the Fourth Amendment of the United States Constitution and the Wisconsin Constitution as recognized by the United States Supreme Court in *Rodriguez v. United States*, 575 U.S. 348 (2015), the Wisconsin Supreme Court in *State v. Wright*, 2019 WI 45, 386 Wis. 2d 495, 926 N.W.2d 157, and this Court in *State v. Davis*, Appeal No. 2020AP731-CR (August 19, 2021 – Recommended for Publication), the circuit court erred when it denied Mr. Burgess' motion to suppress.

The Fourth Amendment to the US Constitution along with Article 1, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. *State v. Tullberg*, 2014 WI 134, ¶29, 359 Wis. 2d 421, 857 N.W.2d 120. For constitutional purposes, traffic stops are considered seizures. *State v. Wright*, 2019 WI 45, ¶23, 386 Wis.2d 495, 926 N.W.2d 157 (Wis. 2019).

Whether a traffic stop constitutes an unreasonable seizure involves a two-part inquiry. *State v. Smith*, 2018 WI 2, ¶10, 379 Wis. 2d 86, 905 N.W.2d 353. The first is whether the initial seizure was justified³. *Id.* The second is whether subsequent police conduct was reasonably related in scope to the circumstances that justified the initial interference. *Id.*

In 2015, the United States Supreme Court in *Rodriguez v. United States*, 135 S.Ct. 1609, 1612, 191 L. Ed. 2d 492, 575 U.S. 348, 350 (2015) addressed the issue of whether a dog sniff conducted after the completion of a traffic stop violated the protections provided by the Fourth Amendment. The US Supreme Court held in *Rodriguez* that it did because based on the facts in that case, the dog sniff constituted a police stop that exceeded the time needed to handle the matter for which the stop was made and hence, extending the stop to perform this action violated the Constitution's shield against unreasonable seizures. *Id.*

In *Rodriguez*, the US Supreme Court held a seizure that is only justified by a police-observed traffic violation becomes unlawful when it is prolonged beyond the time reasonably required to complete the "mission" of issuing a ticket for the violation, provided no reasonable suspicion of another crime arises during the mission. *Id.* The US Supreme Court held the "mission" of a traffic stop includes addressing the traffic violation that warranted the stop, conducting *ordinary inquiries* incident to the stop, and taking negligibly burdensome precautions to ensure officer safety. *Rodriguez*, at 1614-15. Emphasis Added.

The US Supreme Court gave several examples of "ordinary inquiries" that are "typical" to a traffic stop. *Id.* at 1615. These include checking the license of the driver, determining whether the driver has any outstanding

³ Mr. Burgess does not challenge the finding that the initial seizure was justified.

warrants, and inspecting the vehicle's registration and proof of insurance. *Id.* The US Supreme Court pointed out these "ordinary inquiries" serve the same objective as enforcement of the traffic code, which is to ensure that vehicles on the road are operated safely and responsibly. *Rodriguez* at 1615.

The US Supreme Court further held that while an officer may conduct certain unrelated checks (inquiries), an officer may not do so "in a way that prolongs the stop absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* The US Supreme Court further held the focus of the reasonableness of the seizure depends on what the police in fact do and whether what they do adds time to the stop. *Id.* at 1616. If police expeditiously complete all traffic related stops, they do not earn bonus time to pursue unrelated criminal investigations. *Id.* at 1616.

In *State v. Wright*, 2019 WI 45, ¶35, 386 Wis. 2d 495, 926 N.W. 2d 157, our Wisconsin Supreme Court recently addressed whether a police officer unlawfully extended a traffic stop when questions were asked pertaining to a concealed carry weapon permit and a subsequent permit check was conducted. Our Wisconsin Supreme Court held that these are not "ordinary inquiries" incident to a traffic stop and so if engaging in this actions extend the traffic stop, that extension is unlawful. *Id.* at ¶36.

In reaching this decision, our Supreme Court cited *Rodriguez* and noted these "ordinary inquiries" serve the same objectives as enforcement of the traffic code which is to ensure vehicles on the road are operated safely and responsibility. *Wright*, at ¶36, FN 36 and *Rodriguez*, at 1615. Our supreme court observes whether somebody has a permit does not address the traffic violation that warranted the stop⁴. *Wright*, at ¶36, FN 36.

⁴ Our supreme court ultimately held there was no constitutional violation when the officer asked the permit related question and ran a permit check because the record in the case, which was "not richly detailed," did not demonstrate the permit question and check measurably extended the duration of the traffic stop. *Wright*, at ¶45. Our supreme court concluded the record was sufficient to conclude these tasks were done concurrent to the mission-related activities and therefore did not result in any measurable extension of the traffic stop. *Wright*, at ¶44, ¶49.

In *State v. Davis*, Appeal No. 2020AP731-CR, ¶36, Court of Appeals District IV, (Filed August 19, 2021 – recommended for publication), this Court recently examined whether an inquiry into bond conditions are an “ordinary inquiry incidental to the mission of a traffic stop.” This Court correctly concluded an inquiry into bond conditions are not part of an “ordinary inquiry” incidental to the mission of a traffic stop and are instead “objectively understood as the first step of an impermissible inquiry, unsupported by reasonable suspicion or probable cause, into whether the motorist is committing an additional crime of bail jumping at the time of the stop.” *Id.* at ¶35. This Court correctly held such inquiries “run afoul of the prohibition against prolonging a stop to conduct unrelated investigations that detour from the stop’s mission.” *Id.* In reaching this decision, this Court observed that our supreme court (See *State v. Wright*, ¶36) has “balked at the suggestion” that the list of “ordinary inquiries” set forth in *Rodriguez* should be expanded to include all tasks that could, in some indirect sense, be said to promote officer safety or ensure that vehicles on the road are operated safely and responsibly. *Davis*, ¶27.

In light of the above stated authority, the circuit court denied the motion to suppress when it concluded the “additional inquiries” such as a request for passenger identification, questions pertaining to where the driver was earlier in the evening, and a record check on information received from the passengers, were “ordinary inquiries” related to the mission of the traffic stop⁵. (R76:4). These additional inquiries were not related to the mission of the traffic stop, measurably extended the duration of the traffic stop beyond the time the stop reasonably should have been completed and therefore constituted an unlawful seizure.

In this case, the facts are clear. The purpose of the traffic stop was to investigate a defective muffler. (R112:30). Officer Mantsch testified that before he engaged in the additional inquiries and actions that extended the stop, the investigation into the defective muffler was completed and he had

⁵ The circuit court did not find the “additional inquiries” had anything to do with officer safety and there was no evidence presented that these questions asked after the stop reasonably should have been completed impacted officer safety at that point. In addition, the circuit court did not find the additional inquiries were supported by “reasonable suspicion” of a crime and a finding otherwise is also unsupported in the record.

already decided he would give Loken a verbal warning for the defective muffler. (R112:36). Officer Mantsch testified he had no reasonable suspicion another crime had been committed or was being committed during the additional inquiries and actions and acknowledged the additional inquiries and actions had nothing to do with a defective muffler. (R112:38-39).

Both Officer Mantsch and the circuit court concluded reasonable suspicion did not develop until after Officer Mantsch learned one of the passengers did not provide accurate information. (R76:4; R112:52-53). Nothing in the record supports the when the additional inquiries and actions occurred, they had anything to do with ensuring officer safety. Even if that assertion was made, because the stop should reasonably have ended before Officer Mantsch received the first answer to his first additional inquiry, such a finding would be erroneous.

It is objectively reasonable to conclude based on the facts in this case, the mission of the traffic stop reasonably should have ended within seconds of Officer Mantsch completing the defective muffler investigation. However, he Officer Mantsch unlawfully prolonged the seizure by asking additional questions and engaging in actions that were unrelated to the mission of the traffic stop. By failing to complete the mission in a reasonable amount of time and instead, extend the stop beyond the mission, an unlawful seizure occurred, and the circuit court should have granted the motion to dismiss filed by Mr. Burgess.

CONCLUSION

The circuit court erred in denying the motion to suppress filed by Mr. Burgess. This Court should reverse the circuit court's order denying Mr. Burgess' suppression motion and vacate the judgment of conviction.

Dated this 14th day of September 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'J. P. Mueller', written over a horizontal line.

Attorney John P. Mueller

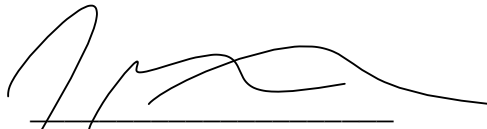
State Bar. No. 1091117
209 Eighth Street
Racine, WI 53403
Ph: (262) 843-5646
Em: JMueller@JohnMuellerLaw.com
Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,794 words.

Dated this 14th day of September, 2021.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John P. Mueller', written over a horizontal line.

Attorney John P. Mueller
State Bar. No. 1091117
209 Eighth Street
Racine, WI 53403
Ph: (262) 843-5646
Em: JMueller@JohnMuellerLaw.com
Attorney for Defendant-Appellant