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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2022AP000634

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

WARNER E. SOLOMON,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

On Notice of Appeal from a Judgment of Conviction
Entered in the Racine County Circuit Court,
the Honorable Wynne P. Laufenberg Presiding

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ISSUE PRESENTED FOR REVIEW

Whether the circuit court erred when it denied Solomon's Fourth Amendment Motion to Suppress Evidence, which challenged (1) the search of the vehicle, (2) the extension of the stop, and (3) the canine's immediate entry into the vehicle to conduct a dog sniff.

The circuit court denied the motion after an evidentiary hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The briefs should address the issue presented on this appeal adequately, and oral argument would be of "marginal value." Wis. Stat. (Rule) 809.22(2)(b).

Solomon's claim rests on established authority and publication will probably not be justified. Wis. Stat. (Rule) 809.23(1)(b)(1).

STATEMENT OF THE CASE

Solomon was charged by Criminal Complaint filed February 22, 2019 with two counts of Possession of a Firearm by a Felon under Wis. Stat. § 941.29(1m)(a); one count of Possession with Intent to Deliver Cocaine (> 40 grams), Second or Subsequent Offense under Wis. Stat. §§ 961.41(1m)(cm)4 and 961.48(1)(a); and one count of Possession of Drug Paraphernalia under Wis. Stat. § 961.573(1). (R.1:1-2; App 3-4.)

After waiving his preliminary hearing on March 27, 2019, Solomon was bound over for trial. (R.92:3.) Defense counsel filed a Notice of Motion and Motion to Suppress Evidence on September 5, 2019, and another motion, expanding on arguments made in the first, on October 1, 2019. (R.32; 33.) An evidentiary hearing on the motions was held on December 2, 2019. (R.89; App 9-65.) After further briefing, the circuit court orally denied the motion at a decision hearing held on February 14, 2020. (R.91; App 66-77.)

Pursuant to plea negotiations, Solomon pled no contest to count 1, Possession of a Firearm, and count 3, Possession with Intent to Deliver Cocaine (> 40 grams), without the enhancer, and the remaining counts were dismissed but read in. (R.83:2, 10.) He was sentenced to four years on count 1 (two years initial confinement followed by two years of extended supervision), and ten years on count 2 (five years of initial confinement and five years of extended supervision). (R.72:24; 70:1.)

STATEMENT OF FACTS

The probable cause section of the Criminal Complaint alleges that on February 21, 2019, Solomon was stopped while driving a vehicle by Deputy [Anthony] Valenti. (R.1:3; App 5.) Deputy Valenti searched the vehicle and found “a large amount of cash in a Ziploc bag in the center console.” (Id.) “K9 Officer Titan” also searched the vehicle and “located” a backpack behind the driver’s seat, which contained two handguns, digital scales, and five baggies of a substance that field-tested positive for cocaine and weighed 92.5 grams. (Id.) According to the Complaint, Solomon took responsibility for everything in the

vehicle. (Id.)

Solomon's Motion to Suppress Evidence raised three grounds for granting the relief sought: (1) the vehicle was unlawfully searched; (2) the stop was impermissibly extended for a K9 drug-sniffing dog to arrive; and (3) the K9's immediate entry into the vehicle upon arriving at the scene of the stop was unlawful. (R.33:1-9.)

Hearing on Motion to Suppress

The arresting officer, Deputy Valenti of the Racine County Sheriff's Office, was the sole witness at the hearing on Solomon's motion to suppress. He testified on direct examination that at 12:00 p.m. on February 21, 2019, he stopped a black GMC Yukon for speeding, approached the driver side of the vehicle, and made contact with the driver, Solomon, and a passenger, Solomon's brother. (R.89:4-5, 8; App 12-13, 16.) Deputy Valenti testified that he "could immediately smell the strong odor of burnt marijuana emitting from the vehicle." (R.89:5-6; App 13-14.) Based on the odor of marijuana he "called for a cover squad so that [he] could pull both occupants out of the vehicle and then conduct a hand search of the vehicle." (R.89:6; App 14.)

While waiting for the cover squad to arrive, Deputy Valenti performed background checks of the criminal histories of Solomon and his brother and began typing a speeding citation. (R:89:7; App 15.) When the cover officer, Officer Aguillar of the Racine Police Department, arrived on scene, they handcuffed Solomon and put him in Deputy Valenti's squad car; the passenger was also handcuffed and placed in Officer Aguillar's squad. (R:89:8; App 16.)

Deputy Valenti began searching the driver's side compartment, while Officer Aguillar requested a canine officer to respond to the scene. (Id.) Deputy Valenti found a large amount of cash in a ziplock bag in the center console and then stopped searching the vehicle. (R.89:9-10; App 17-18.) He expressed concerns about "hidden compartments" based on the premise that "a lot of drug trafficking and movement operations" use them, and that a dog might be able to locate such compartments. (R.89:10; App 18.)

The canine officer, Officer Arvai, arrived and, after being briefed by Deputy Valenti, had his dog search the vehicle. (R.89:12; App 20.) Deputy Valenti stood in front of his squad car while Officer Arvai's canine searched the vehicle. (Id.) The canine apparently alerted to a backpack which, when searched by Deputy Valenti, contained 92.5 grams of cocaine, two firearms, and a digital scale. (R.89:13; App 21.) Deputy Valenti did not recall how long it took from the start of the traffic stop until Solomon was arrested but that a vehicle search generally takes 35 to 50 minutes to perform. (R.89:15; App 23.)

On cross-examination, Deputy Valenti confirmed that he stopped Solomon at 12:00 p.m. During his initial conversation with Solomon and the passenger, he ascertained that Solomon was lawfully driving the vehicle and had a valid driver's license. (R.89:15-16; App 23-24.) He denied observing any furtive movements at all by Mr. Solomon or the passenger as he approached the vehicle. (R.89:17; App 25.) He obtained Solomon and the passenger's identification cards and requested backup. (Id.) After reviewing the call detail report, which was entered at the hearing as Exhibit 1, he confirmed that he requested a cover officer at 12:05 p.m.¹ (R.89:18; 38:2; App 26; 78.)

Deputy Valenti performed background checks on Solomon and his brother and found that they both had prior drug-related convictions. (R.89:19; App 27.) When asked if the prior convictions heightened his suspicions about whether there were drugs in the car, he responded: "Yeah. I mean, if they do have a drug history, absolutely. Yes." (R.89:20; App 28.)

Deputy Valenti acknowledged that he was "trained to distinguish between the odor of burnt marijuana and fresh marijuana," and that he only smelled burnt marijuana. (R.89:20-21; App 28-29.) When asked if the smell of burnt marijuana was coming from one person in particular, he testified that it was coming from Solomon's brother. (R.89:21;

¹ Exhibit 1, which can be found at page 78 of Defendant-Appellant's Appendix, indicates that Deputy Valenti requested a cover officer at 12:05:25.

App 29.)

Deputy Valenti did not believe that either Solomon or his brother were impaired or under the influence of marijuana. (R.89:21; App 29.) When he detained Solomon's brother, he asked him why he smelled like marijuana to which the brother replied that he had smoked marijuana an hour before Solomon "picked him up while he was at work." (R.89:22; App 30.) Deputy Valenti testified that the vehicle "still smelled like marijuana when I went to search" it (Id.)

Officer Aguillar called for the canine officer "[r]ight after [Deputy Valenti] started searching the driver's compartment." (Id.) Referring to the call detail report, he confirmed that the canine officer, Officer Arvai, was dispatched at 12:21 p.m. (12:21:29) (R.89:23; App 31; 78.) Deputy Valenti indicated that he told both officers that Solomon and his brother had lengthy criminal histories. (R.89:23; App 31.) The following exchange then took place:

Question: And based upon that conversation, that heightened your awareness that there might be some hidden compartment within the vehicle?

Answer: Absolutely.

Question: Was there any other indication that you had that there was a hidden compartment inside that vehicle?

Answer: No. It's just common practice with drug trafficking. My initial response because I found a large sum of money in the vehicle when I started my initial hand search is the reason that I assumed that this would be drug trafficking which entails hidden compartments. So in order to not take 45 minutes to hand search or rip apart a car, I requested a canine so the canine could detail the car better than I am able to. (R.89:23-24; App 31-32.)

Deputy Valenti acknowledged that he had been trained to detect hidden compartments and taught to look for various indicia (e.g., retooled screws, aftermarket parts) of hidden

compartments, and had observed none. (R.89:24-25; App 32-33.)

Deputy Valenti did not observe any evidence of marijuana (shake, roaches) when he initially approached the vehicle or when he searched the vehicle, nor was any contraband found on Solomon or his brother when they were searched upon being detained. (R.89:25-26; App 33-34.)

Deputy Valenti testified that he stopped searching after he found the money in the center console because there was a canine available. (R.89:28-29; App 36-37.) Referring to the call detail report, he testified that it was 27 minutes from the beginning of the stop until the canine officer arrived, which was six minutes after the canine officer was requested. (R.89:29; App 37.) He conceded that he had not found anything illegal in the car or any indicia that the vehicle had hidden compartments when he terminated his search. (Id.) He explained his basis for believing there were hidden compartments:

I have the odor of marijuana, I have people in the vehicle with prior criminal history for possession with intent to deliver, we have a car that's not theirs which is common practice for drug trafficking, large sums of money which is common practice for selling narcotics, and then having large amounts of cash on your person. Those were all separate reasons of why I would call for a canine without the probable cause to search a vehicle based off of the odor of marijuana. (R.89:30-31; App 38-38.)

Later in the hearing, Deputy Valenti also testified that the time of day and the fact that "they advised that they were going to a store together" heightened his suspicions of drug-trafficking. (R.89:41; App 49.)

He acknowledged, however, that he did not find a large sum of money on Solomon's person, and that Solomon provided him with the name of the registered owner of the vehicle he was driving and an explanation for his use of it. (R.89:31; App 38.) Using footage from Deputy Valenti's body worn camera (entered as Exhibit 2), to refresh his recollection, defense counsel established that there was a title to a vehicle in the ziplock bag containing the money that was found in the center console. (R.89:34-36; R.111 at 18.47-18:54; App 42-

44.)

Deputy Valenti described what occurred between the start of the traffic stop, at 12:00 p.m., and the request for the canine officer at 12:21 p.m.:

Attempting to write a citation, waiting for back up. There was the initial conversation, there was pulling the driver and passenger out, doing a physical search of their persons, then they were detained, placed in the back of my squad and one was place in the back of Officer Aguilar's squad and the conversations between us and then I conducted – I began to conduct a hand search of the vehicle. (R.89:37-38.)

Between 12:18 p.m. and 12:19 p.m., the money and vehicle title were found in the ziplock bag in the center console. (R.89:38; App 46.) Then Deputy Valenti spoke with Officer Aguillar, during which time Deputy Valenti muted his body worn camera. (R.89:39; App 47.) Officer Aguillar called for the canine officer at 12:21 p.m. (Id.)

Officer Arvai arrived on scene at 12:27 p.m. (R.89:39.) Deputy Valenti testified that he did not watch Officer Arvai or his canine conduct the search, and did not know whether the dog went directly into the vehicle. (R.89:40; App 48.) His body worn camera video, however, which was entered into evidence as Exhibit 2 during the hearing, shows the dog leap into the vehicle at 26:07, immediately after Officer Arvai was briefed and opened the front driver's side door. (R.111 at 26:07.)

Decision Hearing

After additional briefing, and reviewing the exhibits, the circuit court issued its decision denying Solomon's motion on February 14, 2020. The court found that Solomon was stopped for speeding on February 21, 2019 in the middle of the day, and that there was a front seat passenger. (R.91:2-3; App 67-68.) Solomon provided his license but not insurance because the vehicle, a GMC Yukon, was his cousin's. (R.91:3; App 68.) The passenger was also provided his driver's license "because of a suspected seatbelt violation." (Id.)The court indicated that Deputy Valenti "is then seen going back to his squad car and requesting backup because during the stop of the Yukon, he

smells THC.” (Id.)

The court further found that Deputy Valenti ran background checks and started typing a citation, based on the video and his testimony. (Id.) While he is in his squad, a backup squad arrives and Deputy Valenti tells the responding officer of the reason for the stop, that he smelled THC, and that “one of the individuals has a lengthy criminal record that includes drug convictions.” (R.91:3-4; App 68-69.) The officers then detained Solomon and the passenger in separate squads. (R.91:4; App 69.)

According to the circuit court, the passenger says that he smoked in the vehicle an hour ago when “asked if THC is in the vehicle.” (Id.) Officer Valenti begins his search of the front area of the vehicle and has an “audible reaction” when he finds the “bag of cash in the console.” (Id.) The court indicated that the “[o]fficer goes on to say I’m not going to touch the car any more then,” in response to the other officer saying they’re sending something, which the court could not make out. (Id.)

The court found that the screen went black and there is no further audio.² (Id.) When the video resumes, “a canine unit is on scene. The dog is let inside the car. There is no video of any circling of the automobile by the dog at that point. Within a minute or two the dog and the canine officer being in and around the vehicle, the canine officer removes the backpack from the vehicle,” which is subsequently searched on the hood of the squad car. (R.91:4-5; App 69-70.)

The court noted that there is a reference by the officer of the presence of cologne smell, which the court surmises is a “cover spray,” though the officer “doesn’t really explain that to his fellow officer.” (R.91:6; App 71.) The court indicates that Deputy Valenti has this information, as well as the smell of marijuana and information on Solomon’s criminal record, to support his search of the vehicle, and cites *State v. Secrist* for the proposition “that the unmistakable odor of THC from an

² It should be noted that the video is continuous in the copy of Exhibit 2 of Deputy Valenti’s body camera video that appellate counsel obtained from the clerk of circuit court after filing a motion and obtaining an order for it in the circuit court. (R. 96; 100.) The audio portion of the exhibit appellate counsel received does stop at 20:44.

automobile provides probable cause for an officer to believe the automobile contains evidence of a crime.” (R.91:6-7; App 71-72.)

The court stated that the warrantless search of a car is permissible when two prongs are met: (1) there is probable cause to search the car; and (2) “the fact that the car was readily mobile.” (R.91:7; App 72.) The court concluded that the initial search of the car was permissible because Deputy Valenti smelled THC, he had the information about Solomon’s criminal history, “and the passenger admitted to the police officer that he used THC in the vehicle.” (Id.) The court also appears to consider the “bag of cash” to increase the quantum of probable cause supporting the search. (R.91:8; App 73.)

The court further found that “[i]t’s no surprise that the canine goes into the vehicle immediately because there’s already been an admission by the passenger that there was THC; that he smoked THC within that vehicle.” (Id.) Finally, the court held that the wait for the canine unit “did not extend the purpose of the mission of the stop.” (R.91:9; App 74.)

After the court denied Solomon’s motion, defense counsel raised an issue with its findings of fact. Specifically, in the defense’s pleadings based on police reports and the officer’s testimony, the passenger said that he smoked marijuana before entering the vehicle. (R.91:9-10; App 74-75.) The court indicated that it had taken specific notes while watching the video but whether the passenger smoked before or after entering the vehicle would not change its ruling. (R.91:10; App 75.)

ARGUMENT

The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution guarantee the right to be free from unreasonable searches. “[W]arrantless searches are per se unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions.” *State v. Sanders*, 2008 WI 85, ¶ 27, 311 Wis. 2d 257, 752 N.W.2d 713. The state bears the burden of proving that an exception to the warrant requirement exists. *State v. Pallone*, 2000 WI 77, ¶ 29, 236 Wis. 2d 162, 613

N.W.2d 568. The remedy for an unlawful search or seizure is the suppression of the evidence obtained thereby. *State v. Carroll*, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1; *Wong Sun v. United States*, 371 U.S. 471, 487 (1963).

A trial court's findings of fact are upheld on appellate review unless they are clearly erroneous. *State v. Patton*, 2006 WI App 235, ¶ 7, 297 Wis. 2d 415, 724 N.W.2d 347. Whether a search or seizure is constitutional, however, is reviewed independently of the circuit court's conclusions. *State v. Secrist*, 224 Wis. 2d 201, ¶ 11, 589 N.W.2d 387 (1999) (citations omitted). The application of constitutional principles by appellate courts to the trial court's findings is de novo. *State v. Grady*, 2009 WI 47, ¶ 13, 317 Wis. 2d 344, 766 N.W.2d 729.

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S ORDER DENYING SUPPRESSION BECAUSE THE VEHICLE SOLOMON WAS DRIVING WAS UNLAWFULLY SEARCHED.

Vehicles may be searched without a warrant pursuant to the automobile exception to the warrant requirement if probable cause exists to believe that it contains evidence of a crime. *Secrist*, 224 Wis. 2d at ¶ 16. Wisconsin courts have held that the "unmistakable odor of marijuana" emanating from an automobile provides such evidence. *Id.*

In *Secrist*, the issue was "whether the odor of a controlled substance may provide probable cause to arrest." *Id.* at ¶ 2. The defendant, Timothy Secrist, the sole occupant of a tan 1977 Chevrolet Impala, drove up to an officer directing traffic during a Fourth of July parade and asked for directions through his open driver's side window. *Id.* at ¶ 3. "The officer immediately smelled a strong odor of marijuana coming from the automobile," told Secrist to pull over, and placed him under arrest. *Id.* at ¶¶ 3-4. Another officer subsequently searched the Impala and found "a marijuana cigarette with an attached 'roach clip' in the ashtray next to the driver's seat." *Id.* at ¶ 5.

In reaching its conclusion that the odor of marijuana coming from an automobile provides probable cause to search it, the *Secrist* court cited numerous cases from other

jurisdictions. *Id.* at ¶ 17. In *State v. Judge*, for example, the Superior Court of New Jersey concluded that the odor of marijuana provided probable cause to search, stating that “it creates an inference that marijuana is not only physically present in the vehicle, but that some of it has been smoked recently.” *Id.*, quoting *State v. Judge*, 275 N.J. Super. 194, 645 A.2d 1224, 1228 (1994).

In *Judge*, New Jersey State Troopers, using radar, observed a vehicle at 12:36 a.m. travelling 12 miles an hour over the speed limit. *Judge*, 645 A.2d at 1225. The officers stopped the vehicle, which contained two passengers, and when one of the officers approached the driver’s side window and informed the driver of the reason for the stop, he “detected the odor of burnt marijuana.” *Id.* at 1226. The driver was ordered out of the car and searched but no contraband was found on his person. *Id.* The two passengers were also searched and metal smoking pipes “containing burnt marijuana residue” were found on both. *Id.* When the car was searched, a plastic bag “containing greenish-brown vegetation” and “two partially smoked marijuana cigarettes” were found in plain view on the center console. *Id.* A gym bag containing two bags of suspected marijuana was also recovered. *Id.*

The facts of this case are distinguishable from those in *Secrist* and *Judge*. Here, Deputy Valenti testified that the smell of marijuana came from one person in particular: Solomon’s brother. Solomon himself did not appear to be impaired or under the influence of marijuana. Unlike the passengers in *Judge*, the search of Solomon and his brother did not yield any contraband or paraphernalia. Furthermore, no marijuana pipes, cigarettes, stems, seeds, shake or any other evidence of marijuana was observed by Deputy Valenti in the vehicle at any time, as opposed to the marijuana found in plain view in *Secrist* and *Judge*.

The *Secrist* court noted that the “strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug. The probability diminishes if the odor is not strong or recent, if the source of the odor is not near the person, if there are several people in the vehicle, or if a person offers a reasonable explanation for the odor.” *Secrist* at ¶ 34.

Though the *Secrist* court was addressing the quantum of evidence to arrest an individual based on the odor of marijuana, as opposed to that needed to search a vehicle, this Court should consider the factors enumerated above in its analysis of the totality of the circumstances.

The odor was linked to a specific person. Solomon's brother told Deputy Valenti he smoked marijuana an hour before Solomon picked him up. He provided a reasonable explanation for the odor. When he was searched, however, no marijuana or paraphernalia was found on his person. There is little indication in the record that the odor was particularly strong or recent. The circuit court's vague reference to a "cover spray" does not appear to be borne out by Deputy Valenti's body cam.

To give law enforcement the authority to search every inch of a vehicle based on an odor of marijuana that was not described as strong or recent but, rather, came from an occupant who admitted using marijuana prior to entering the vehicle, and with no other indicia of marijuana being in the vehicle, is unreasonable. "The basic purpose of this prohibition [against unreasonable searches and seizures] is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *State v. Boggess*, 115 Wis. 2d 443, 448-49, 340 N.W.2d 516 (1983) (citation omitted). It is submitted that the balance between an individual's right to privacy and legitimate government interests was not held true in this case. After Deputy Valenti made the link between the marijuana and the passenger, and a search of both Solomon and his brother yielded nothing, he should have terminated the search.

Instead, Deputy Valenti was operating on a hunch. He testified that the fact that Solomon and his brother had prior drug convictions "absolutely" heightened his suspicions about whether there were drugs in the car. (R.89:20.) However, the fact that an individual has a prior criminal record does not supply reasonable suspicion, much less probable cause. *State v. Betow*, 226 Wis. 2d 90, 92 n.2, 595 N.W.2d 499 (1999) ("There is a widespread recognition that police awareness of an individual's prior criminal record, or their observation of

gang insignia on his or her person, in and of themselves, are insufficient to provide a basis for a reasonable suspicion that would justify stopping and detaining the individual.”) (citations omitted).

The other reasons Deputy Valenti offered at the suppression hearing to justify his suspicions are equally unavailing. He noted the time of day – noon – as being a time when drug dealing occurs. Of course, many other legitimate activities occur at that time, and it begs the question: if the stop had occurred late at night would it have been less suspicious? Similarly, he opined that Solomon and his brother’s purpose of going to a store was suspicious though there could hardly be an activity more innocuous. He further stated that Solomon’s driving a vehicle he did not own was suspicious, though it was adequately explained that Solomon was borrowing his cousin’s car and Deputy Valenti conceded that Solomon was driving it legally. Deputy Valenti expressed concerns that there might be “hidden compartments,” but could not articulate any particular, objective reason – like retooled screws or after-market components – to justify those concerns. *See Betow*, 226 Wis. 2d at 91 (“Once a justifiable stop is made . . . the scope of the officer’s inquiry, or line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer’s attention – keeping in mind that these factors . . . must be ‘particularized’ and ‘objective.’”)

During Deputy Valenti’s hand search of the interior compartment of the vehicle, he found money in a ziplock bag in the center console. Inside the ziplock bag, however, on top of the money, was a title to a vehicle, belying the notion that it was related to narcotics or drug-trafficking. At this point he stopped his search without finding anything illegal in the vehicle or when Solomon or his brother were searched.

II. THIS COURT SHOULD REVERSE THE CIRCUIT COURT’S ORDER DENYING SUPPRESSION BECAUSE THE STOP WAS UNLAWFULLY EXTENDED.

When Deputy Valenti stopped searching the vehicle he had no additional information to supply the requisite

reasonable suspicion to lawfully extend the stop to wait for a canine officer to arrive. As noted above, his suspicions about hidden compartments were not particularized but, rather, were based on a hunch (which turned out to be unfounded). He testified: “It’s just common practice with drug trafficking.” (R.89:23; App 31.)

Any detention of individuals during a traffic stop, no matter how brief or limited, is a “seizure” of “persons” for Fourth Amendment purposes. *Whren v. United States*, 517 U.S. 806, 809 (1996); *State v. Harris*, 206 Wis. 2d 243, 258, 557 N.W.2d 245 (1996). An automobile stop, therefore, must be reasonable under the circumstances; if it is not, the remedy is suppression of the evidence produced. *Whren*, 517 U.S. at 809; *Harris*, 206 Wis. 2d at 258, 254.

A traffic stop is more like a *Terry* stop than a formal arrest, *Knowles v. Iowa*, 525 U.S. 113, 117 (1998). “An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500 (1983).

In *Illinois v. Caballes*, the United States Supreme Court held that “[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.” 543 U.S. 405, 410 (2005). The Court cautioned, however, that a seizure can become unlawful if extended beyond the time reasonably necessary to complete the mission of the stop. *Id.* at 407.

In *Rodriguez v. United States*, the Court held that “a police stop exceeding the time to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.” 575 U.S. 348, 350 (2015) (extending the stop seven to eight minutes after issuing a warning to conduct a non-consensual dog sniff unlawful). The Court disagreed with the Eighth Circuit’s finding that the delay was *de minimis*; rather, a dog sniff goes beyond the ordinary inquiries of a traffic stop (such as checking driver’s licenses, registration, checking whether the vehicle’s occupants have outstanding warrants), and cannot be “fairly characterized as part of the officer’s traffic mission.” *Id.* at 356.

The Wisconsin Supreme Court, in *State v. Wright* – a case *not* involving a dog sniff – addressed the holdings in *Caballes* and *Rodriguez*. Wright was lawfully stopped for a violation of the traffic code and was charged with carrying a concealed weapon when a search revealed the weapon in the glove compartment of his vehicle. *State v. Wright*, 2019 WI 45, ¶ 2-3, 386 Wis. 2d 495, 926 N.W.2d 157. Wright argued that his Fourth Amendment rights were violated when the police took the following three actions: (1) asked whether he had a weapon in the car; (2) asked whether he had a permit for the concealed weapon, and (3) checked to see if he was a valid permit holder. *Id.* at ¶¶, 4-17. The circuit court granted Wright’s suppression motion, holding that the officer unlawfully extended the stop with her questions, and the Court of Appeals affirmed, adopting the circuit court’s reasoning. Reversing the Court of Appeals, the Wisconsin Supreme Court noted: “The key fact driving the different conclusions in *Caballes* and *Rodriguez* is that in *Caballes*, the dog sniff added no time at all to the traffic stop because it was conducted simultaneously with mission-related activities. In *Rodriguez*, all mission-related activities had been completed, and thus, the dog sniff unlawfully extended the duration of the stop.” *Id.* at ¶ 43.

It is important to note, however, that the Court in *Rodriguez* emphasized that “[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.” *Rodriguez*, 575 U.S. at 354. Absent reasonable suspicion that a crime has been committed, a traffic stop becomes unreasonable and unlawful “if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a traffic ticket.” *Id.*, citing *Caballes*, 543 U.S. at 407.

Here, Solomon concedes that the initial stop was lawful. If Deputy Valenti was justified in changing the mission of the stop from issuing a citation for speeding to searching the vehicle based on the odor of burnt marijuana, he completed the new mission when he stopped searching the vehicle without finding any evidence of crime. Any reasonable suspicion based on the odor of marijuana was dispelled when he found neither marijuana nor related paraphernalia during his search. His

remaining suspicions, based on the time of day, Solomon and his brother's criminal records, the fact that they were going to a store, and his imaginative concerns about "hidden compartments," were not reasonable and did not support prolonging the stop. Therefore, the six minute and twenty-two second interval between the time when the canine unit was dispatched and its arrival on scene³ was an unlawful extension of the stop.

That Deputy Valenti had not issued the speeding citation to Solomon is immaterial. He certainly *could* have completed that task. He testified that he began typing the citation when he returned to his squad car and before the arrival of the cover squad he had requested. At the very least he had over six minutes while waiting for the canine unit to arrive to complete typing the citation and hand it to Solomon. As the Court in *Rodriguez* emphasized: "The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs' – i.e., adds time to – 'the stop.'" 575 U.S. at 356. Here, conducting the dog sniff indisputably added at least six minutes and twenty-two seconds to the stop, which is unreasonable given Deputy Valenti's failure to find any evidence during his search of the vehicle and lack of reasonable suspicion to support prolonging the stop.

III. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S ORDER DENYING SUPPRESSION BECAUSE THE CANINE'S IMMEDIATE ENTRY INTO THE VEHICLE WAS UNREASONABLE AND UNLAWFUL.

Exposing a container, be it a piece of luggage or an automobile, to a trained canine in a public place is not considered a "search" under the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 706 (1983); *United States v. Sharp*, 689 F.3d 616, 618 (6th Cir. 2012).

In *Sharp*, the defendant moved to suppress controlled

³ See Exhibit 1 (R. 38:2; App. 78.). The canine unit was dispatched at 12:21:29 and arrived on scene at 12:27:51. The amount of time the stop was prolonged would be greater, of course, if calculated from the time of dispatch to the completion of the dog sniff.

substances discovered when police searched a shaving kit on the passenger side of his car “after a trained narcotics detection canine jumped into the car through the driver’s window and alerted” to the kit. *Sharp*, 689 F.3d at 618. Acknowledging that this issue was a matter of first impression, the Sixth Circuit cited its previous holding that “absent police misconduct, the instinctive act of trained canines . . . do not violate the Fourth Amendment.” *Id.* at 619, *citing United States v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998) (internal quotation marks omitted). Reviewing precedent from other jurisdictions, however, that had addressed this fact pattern, the court noted that “a dog sniff from the inside of a vehicle becomes a search that violates the Fourth Amendment when ‘the officers themselves opened the door’ and ‘facilitate[d] a dog sniff’ of the vehicle’s interior. *Id.*, quoting *United States v. Winningham*, 140 F.3d 1328, 1331 (10th Cir. 1998).

In this case, Deputy Valenti testified that he did not observe what Officer Arvai and the canine did to search the GMC Yukon. Nonetheless, Deputy Valenti’s body cam captured the sequence of events as follows:

Officer Arvai, with his canine, arrives on scene and appears to be briefed by Deputy Valenti (who had muted the audio on his body cam by this time). (R.111 at 25:17.)

Immediately after his short conversation with Deputy Valenti, Officer Arvai, with his dog on a short leash, opens the front driver’s side door of the GMC Yukon. (R.111 at 25:53.)

Fourteen seconds later, Officer Arvai’s canine leaps through the open driver’s side door and into the vehicle at his direction. Officer Arvai then closes the door and can be seen monitoring the canine through the windows of the truck. (R.111 at 26:07.)

About a minute after the canine entered the vehicle, Officer Arvai climbs into the truck through the front driver’s side door and exits with a backpack. (R.111 at 27:04.)

Officer Arvai opened the door and facilitated a search when there was not probable cause to do so. There is no indication that the canine was instructed to sniff the outside of

the vehicle, much less alerted to anything outside of it. Deputy Valenti did not find anything illegal during his search inside the vehicle either, so there was no reasonable basis for the canine to immediately enter the vehicle. Had the canine jumped into the truck on its own volition, the result might be different, but under these circumstances, where the officer opened the door to the vehicle to allow his canine access to the interior, the officer's facilitation renders it an unreasonable search and constitutionally impermissible.

CONCLUSION

The search of the vehicle and the extension of the traffic stop were unreasonable and unconstitutional. Solomon therefore respectfully requests that this court reverse the decision and judgment of the circuit court, order that he be permitted to withdraw his guilty pleas, order the evidence obtained as a result of law enforcement's unlawful actions be suppressed, and remand the case to the circuit court for further proceedings.

Dated this 1st day of August, 2022.

Gabriel Houghton,
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Electronically signed by:
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RULE 809.19(8g)(a) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of the brief is 5,833 words.

Dated this 1st day of August, 2022.

Gabriel Houghton,
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RULE 809.19(8g)(b) CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § (Rule) 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the finding of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 1st day of August, 2022.

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