

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERICK S. SMITH,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Wisconsin

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF WISCONSIN

CASE No.: 2015AP756-CR

COMPLETE TITLE: State of Wisconsin,
 Plaintiff-Respondent-Petitioner,
 v.
 Frederick S. Smith,
 Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS
 Reported at 372 Wis. 2d 184, 888 N.W.2d 22
 (2016 - Unpublished)

OPINION FILED: January 9, 2018
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SOURCE OF APPEAL:
 COURT: Circuit
 COUNTY: Dane
 JUDGE: Stephen E. Ehlke

JUSTICES:
 CONCURRED:
 DISSENTED: A.W. BRADLEY, J. dissents joined by ABRAHAMSON
 J. (opinion filed).
 KELLY, J. dissents joined by ABRAHAMSON, J. and
 A.W. BRADLEY, J. (opinion filed).

NOT PARTICIPATING:

ATTORNEYS:

For the plaintiff-respondent-petitioner there were briefs by *Tiffany M. Winter*, assistant attorney general, with whom on the briefs were *Brad D. Schimel*, attorney general, and *Lisa E.F. Kumfer*, assistant attorney general. There was an oral argument by *Tiffany M. Winter*.

For the defendant-appellant there was a brief and oral argument by *Christopher D. Sobic*, assistant state public defender.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2015AP756-CR
(L.C. No. 2014CF667)

STATE OF WISCONSIN

:

IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent-Petitioner,

v.

Frederick S. Smith,

Defendant-Appellant.

FILED

JAN 9, 2018

Diane M. Fremgen
Clerk of Supreme Court

REVIEW of a decision of the Court of Appeals. *Reversed.*

¶1 REBECCA GRASSL BRADLEY, J. We are asked to decide whether the police violated Frederick S. Smith's Fourth Amendment rights when a police officer asked for his driver's license during a traffic stop even though reasonable suspicion for the stop dissipated as the officer approached the car, or when the police officer opened the passenger door after being told the driver's door and window were broken. The Fourth Amendment protects "against unreasonable searches and seizures,"¹

¹ The Fourth Amendment to the United States Constitution provides:

(continued)

and our analysis focuses on what is reasonable in light of the particular circumstances. See Terry v. Ohio, 392 U.S. 1, 21 (1968); see also Elkins v. United States, 364 U.S. 206, 222 (1960) ("What the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.").

¶2 We hold that when an officer conducts a valid traffic stop, part of that stop includes checking identification, even if the reasonable suspicion that formed the basis for the stop in the first place has dissipated. See Rodriguez v. United States, 135 S. Ct. 1609, 1615 (2015) ("Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.'" (citing Illinois v. Caballes, 543 U.S. 405, 408 (2005))); State v. Williams, 2002 WI App 306, ¶1, 258 Wis. 2d 395, 655 N.W.2d 462 ("We conclude the officer had the requisite reasonable suspicion

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 11 of the Wisconsin Constitution likewise provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

to stop Williams's vehicle to determine if he was the suspect in a domestic abuse incident. We also conclude that, because the initial detention was lawful, the officer could properly ask Williams his name and for identification even if she had already decided he was not the suspect."). Asking for a driver's license does not impermissibly extend a stop because it is part of the original mission of the traffic stop. However, the "ordinary inquiries," which are related in scope to the purpose of a traffic stop, must be executed within the time it should have reasonably taken to complete them. Rodriguez, 135 S. Ct. at 1614.

¶3 We further hold the police officer's act of opening the passenger door in order to effectively communicate with a driver otherwise inaccessible due to the malfunctioning driver's door and window did not constitute an unreasonable search because the officer's actions, viewed objectively, would warrant a person of reasonable caution to believe the action taken was appropriate. See Terry, 392 U.S. at 21-22. Because Smith's stop was reasonably executed, we hold that no Fourth Amendment violation occurred. The circuit court² correctly denied Smith's suppression motion. Accordingly, the decision of the court of appeals³ is reversed and Smith's judgment of conviction stands.

² The Honorable Stephen E. Ehlke, Dane County Circuit Court, presiding.

³ State v. Smith, No. 2015AP756-CR, unpublished slip op., ¶1, (Wis. Ct. App. Sept. 29, 2016) (per curiam).

I. BACKGROUND

¶4 On April 6, 2014, Madison Police Sergeant Bernard Gonzalez's duties included monitoring a Madison neighborhood for gang retaliation following what police believed to be gang-related shots fired the previous night. At about 10:45 p.m., Gonzalez, while parked in the watch area, observed a car with dark tinted windows drive by and stop in the middle of the street for 10 to 15 seconds.⁴ This drew Gonzalez's attention "because [the car] did not pull to the curb. It stopped in the middle of the street."⁵ Then, a passenger got out of the car and walked to apartment buildings, after which the car drove away. Gonzalez followed the car, checked the license plate, and learned the registered owner, Amber Smith, had a suspended driver's license. Gonzalez activated the squad's lights to get the car to pull over. The car did not pull over right away, but proceeded to turn off the main street and turn again into a parking lot before finally pulling into a parking space and stopping. When Gonzalez was five-to-ten feet from the driver's door, he "was pretty sure" the driver was not Amber Smith because the driver appeared to be a man. When the sergeant

⁴ The record indicates that at the preliminary hearing, held ten days after the stop, the sergeant testified Smith's car stopped in the middle of the road "[f]or about three minutes." At the suppression hearing, four months later, the testimony described the time as 10 to 15 seconds. This discrepancy does not affect our analysis.

⁵ The facts are presented in chronological order; all quoted testimony comes from the suppression hearing.

asked⁶ the driver, later identified as Frederick Smith, to open the door or roll down the window, Smith shrugged his shoulders and responded that both the door and window were broken. As is his typical practice in a traffic stop with an inoperable driver's side door and window, Gonzalez walked to the passenger side of the car to speak "more effectively" with Smith. Smith appeared to be cooperating and moving toward the passenger seat, either activating the lock or reaching for the passenger door handle. Gonzalez did not ask Smith to open the passenger side door or window; rather, the sergeant put his hand on the door handle, and testified that "together we opened the door." "[Smith] reached over and worked the door handle." Gonzalez, believing Smith was cooperating by moving toward the passenger seat and trying to open the passenger door, testified that they "simultaneously . . . opened the door."⁷

¶5 Smith admitted that he "was maneuvering to the passenger seat" after telling Gonzalez the driver's door and

⁶ The record is unclear as to whether Gonzalez simply motioned for Smith to roll down the window and open the door or verbally asked Smith to do so. This uncertainty does not impact our analysis.

⁷ The circuit court initially noted: "So whether Sergeant Gonzalez first started to open the door or whether they opened it simultaneously, either way I conclude that under the Fourth Amendment reasonableness standards that it was a reasonable thing to do." When Smith's lawyer asked the circuit court to find "Gonzalez was the one that opened the door," the circuit court found that "the sergeant went to open the door and began to open the door." In doing so, the circuit court did not impugn the credibility of Gonzalez's testimony.

window were broken. Smith explained that "every day I use the car, I pull on the handle to get out because the driver's side don't open." Smith also said he stopped in that parking lot because he lived in a building next to it.

¶6 With the door open, Gonzalez observed that Smith had red, bloodshot eyes, and smelled of alcohol. When Gonzalez asked Smith for his driver's license, Smith responded that his license had been revoked. After conducting field sobriety tests, Gonzalez arrested Smith and took him to the police station where Smith refused to voluntarily give a blood sample. Gonzalez obtained a warrant and transported Smith to the hospital for the evidentiary blood test. Afterwards, Gonzalez drove Smith to the Dane County Jail where he agreed to provide a breath sample pursuant to the jail admitting procedures. The breath test showed Smith's blood alcohol to be .38. The State charged Smith with operating a motor vehicle under the influence of an intoxicant, seventh offense.

¶7 Smith moved to suppress all evidence acquired from the traffic stop, arguing that when Gonzalez saw a man (rather than a woman) driving the car, reasonable suspicion dissolved, and the stop should have immediately ceased. He also argued Gonzalez violated the Fourth Amendment when he opened the passenger door without any lawful basis to do so. The circuit court denied Smith's motion and he pled guilty to operating a

motor vehicle under the influence, seventh offense, contrary to Wis. Stat. §§ 346.63(1)(a) and 939.62(1)(b) (2015-16).⁸

¶8 Smith did not file a postconviction motion but appealed to the court of appeals, arguing that all evidence should be suppressed and his judgment should be vacated because: (1) once Gonzalez saw a man (instead of a woman) behind the wheel, reasonable suspicion for the initially lawful stop evaporated, and the sergeant's failure to immediately release Smith improperly extended the duration of the seizure; and (2) the sergeant conducted an unlawful search in violation of the Fourth Amendment by opening the passenger door without consent or probable cause. The court of appeals declined to decide the case on the merits; instead, it determined the State's response to Smith's arguments on appeal were too cursory to warrant a review on the merits. The court of appeals vacated Smith's conviction and remanded the case to the circuit court ordering it to grant Smith's suppression motion; it sua sponte ordered that Smith be allowed to withdraw his plea. State v. Smith, No. 2015AP756-CR, unpublished slip op., ¶1 (Wis. Ct. App. Sept. 29, 2016) (per curiam). We granted the State's petition for review.

II. STANDARD OF REVIEW & APPLICABLE LAW

¶9 A suppression issue presents a question of constitutional fact. See State v. Floyd, 2017 WI 78, ¶11, 377 Wis. 2d 394, 898 N.W.2d 560. "We review the circuit court's

⁸ All subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

findings of historical fact under the clearly erroneous standard. But the circuit court's application of the historical facts to constitutional principles is a question of law we review independently." Id. (internal citations omitted).

¶10 The reasonableness of a traffic stop involves a two-part inquiry: first, whether the initial seizure was justified and, second, whether subsequent police conduct "was reasonably related in scope to the circumstances that justified" the initial interference. See Terry, 392 U.S. at 19-20; see United States v. Sharpe, 470 U.S. 675, 682 (1985). The mission of a traffic stop includes "determining whether to issue a traffic ticket" and the ordinary inquiries incident to the stop. Rodriguez, 135 S. Ct. at 1615. As long as the initial stop was lawful, requesting identification is a permissible part of the dual mission of every traffic stop. Id. The ordinary inquiries portion of the traffic stop's mission includes "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance."⁹ Id.

⁹ The United States Supreme Court in Rodriguez v. United States, 135 S. Ct. 1609 (2015), distinguished between inquiries that are related to a traffic stop and those that are unrelated. It concluded that asking for identification is an ordinary inquiry that is related to the purpose of a lawful stop as part of its dual mission and the stop "may last no longer than is necessary to effectuate that purpose." Id. at 1614-15. Unrelated inquiries, such as a dog sniff, occurring after the dual mission has been completed, violate the Fourth Amendment unless supported by additional reasonable suspicion or probable cause. Id. at 1612-14.

III. DISCUSSION

A. Initial Stop and Ordinary Inquiries

¶11 Smith insists the circuit court should have suppressed the evidence that led to his seventh drunk-driving conviction because the officer unlawfully extended the duration of the seizure by continuing to question Smith after reasonable suspicion dematerialized. The State contends that because a traffic stop's mission includes the ordinary inquiries, such as checking a driver's license, an officer who lawfully stops a vehicle should be able to complete that mission even if the reason for the traffic stop ended during the officer's walk to the stopped vehicle.¹⁰ The State is correct.

¶12 The United States Supreme Court recently reaffirmed that a police officer's "ordinary inquiries," reasonably executed during a lawful traffic stop—including "checking the driver's license"—do not violate the Fourth Amendment because these "routine measures" are "fairly characterized as part of the officer's traffic mission." See Rodriguez, 135 S. Ct. at 1615. "Because the Fourth Amendment and Article I, § 11 provide

¹⁰ We note, however, that other facts of record in this case support ongoing reasonable suspicion that did not dissipate during this traffic stop and therefore provide further basis for upholding Smith's conviction. For example, Gonzalez could have issued a ticket to Smith under Wis. Stat. § 346.51 for stopping his car "upon the roadway." Nonetheless, because this case comes to us for a decision on whether an officer may continue with the ordinary inquiries when reasonable suspicion dissipates, our analysis focuses on that question. For the purposes of our analysis, we assume without deciding that reasonable suspicion had dissipated.

substantively identical protections, we have historically interpreted this section of the Wisconsin Constitution in accordance with United States Supreme Court interpretations of the Fourth Amendment." State v. Asboth, 2017 WI 76, ¶11, 376 Wis. 2d 644, 898 N.W.2d 541. Thus, we apply Rodriguez's interpretation of the Fourth Amendment.

¶13 There is no dispute that the initial seizure of Smith (the traffic stop) was justified.¹¹ Gonzalez had a legal basis to stop the car Smith was driving. Specifically, Gonzalez observed the driver of the car engage in suspicious activity in an area being watched for gang retaliation; these concerns prompted Gonzalez to run the license plate, which in turn came back registered to an owner who could not be legally driving. These facts provide reasonable suspicion sufficient to conduct a traffic stop. See State v. Newer, 2007 WI App 236, ¶¶5, 7, 306 Wis. 2d 193, 742 N.W.2d 923 (reasonable suspicion exists to stop a vehicle if an officer has knowledge the owner of the vehicle has an invalid license); see also Floyd, 377 Wis. 2d 394, ¶20 ("Reasonable suspicion that a driver is violating a traffic law is sufficient to initiate a traffic stop."). Thus, part one of the two-part test we apply to determine whether a traffic stop was reasonable is satisfied. See Terry, 391 U.S. at 19-20.

¹¹ As this court acknowledged recently, "It is an unremarkable truism that a traffic stop is a seizure within the meaning of our Constitutions." State v. Floyd, 2017 WI 78, ¶20, 377 Wis. 2d 394, 898 N.W.2d 560.

¶14 We turn our attention to part two of the reasonableness test—whether subsequent police conduct "was reasonably related in scope to the circumstances that justified" the initial interference. After Sergeant Gonzalez stopped Smith, he approached the driver's door. Moments before reaching the door, Gonzalez was "pretty sure" the driver was a man and not Amber Smith, the woman identified as the registered owner, who could not legally drive her car because her license had been suspended. The State conceded that the reasonable suspicion underpinning the traffic stop dissipated at that moment.

¶15 But in these particular circumstances, does the Fourth Amendment require a police officer to freeze, do an about-face, and walk away? Such a reaction is neither practical nor required.¹² According to the Supreme Court, the Fourth Amendment does not compel such an about-face because the mission of any lawful traffic stop includes routine measures like checking a driver's license. See Rodriguez, 135 S. Ct. at 1615 (the

¹² Justice Daniel Kelly asserts an officer can speak with the driver under these circumstances, but only to "inform him he was free to leave." Justice Daniel Kelly's dissent, ¶85. But, under Justice Kelly's analysis, any further contact with the driver is not permitted under the Fourth Amendment because the officer cannot continue the seizure past the moment reasonable suspicion dissipates. Justice Kelly can't have it both ways. The idiocracy of having to waive a driver off who has been legally seized without any explanation is another reason why the ordinary inquiries do not violate the Fourth Amendment. The officer must be able to complete the traffic stop by speaking with the driver, documenting a name for the officer's reporting requirements, and providing the stopped driver with the courtesy of an explanation for the seizure.

mission of a lawful traffic stop includes both "determining whether to issue a traffic ticket" and conducting the ordinary inquiries).

¶16 Before applying Rodriguez to the particular circumstances in Smith's case, we first examine the conditions surrounding the Supreme Court's holding in Rodriguez. In its 2014-15 term, the Supreme Court had before it petitions for certiorari in two related cases: (1) Rodriguez v. United States, 135 S. Ct. 1609 (2015), where the Eighth Circuit Court of Appeals upheld Dennys Rodriguez's drug conviction arising from drugs discovered by a narcotics dog after all the business related to a traffic stop had been completed; and (2) People v. Cummings, 2014 IL 115769, ¶¶1-2, 6 N.E.3d 725 (hereinafter Cummings I), where the Illinois Supreme Court granted the defendant's motion to suppress evidence police discovered during a traffic stop. In Cummings I, an outstanding warrant for the registered owner of the vehicle, who was a woman, generated reasonable suspicion for the traffic stop. Cummings I, 6 N.E.3d 725, ¶5. As the officer approached the stopped vehicle, however, the officer saw the driver was a man, not a woman. Id., ¶7. All three levels of Illinois courts held that suppression was appropriate because reasonable suspicion for the lawful stop disappeared when the officer saw a man (not a woman) behind the wheel. Id., ¶¶8-9. The Illinois Supreme Court held that by asking the driver for identification, the officer "impermissibly extended the stop." Id., ¶26.

¶17 Rodriguez and Cummings are both Fourth Amendment cases involving traffic stops where defendants sought suppression of evidence based on arguments that police unlawfully extended the stop. Six days after the Supreme Court decided Rodriguez, it vacated the judgment in Cummings I, and "remanded to the Supreme Court of Illinois for further consideration in light of" Rodriguez. See Illinois v. Cummings, 135 S. Ct. 1892 (Mem) (Apr. 27, 2015).

¶18 On remand, the Illinois Supreme Court set forth the Supreme Court's conclusions in Rodriguez:

- A dog sniff that prolongs a stop in an attempt to detect evidence of wrongdoing is "not part of the officer's 'mission' for the stop."
- "The Court defined the mission of the stop as 'to address the traffic violation that warranted the stop' and to 'attend to related safety concerns.'"
- The mission's safety concerns permit officers to make "ordinary inquiries incident to [the traffic stop]."
- "Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance."
- Actions outside the mission of the stop that "measurably extend the duration of the stop" "cause the stop to become unlawful" unless reasonable suspicion supports the extension.

- The Court drew a bright line against extending a stop "with inquiries outside the mission of a traffic stop" absent reasonable suspicion for the outside inquiries.
- The Court precisely defined what inquiries are part of the traffic stop and what inquiries fall outside the mission of a traffic stop.

See Cummings, 2016 IL 115769, ¶7, 46 N.E.3d 248 (hereinafter Cummings II) (citations omitted). Based on the directives of Rodriguez, the Illinois Supreme Court reversed its earlier determination that the stop in Cummings I violated the Fourth Amendment. Id., ¶13. Instead, it ruled a police officer may lawfully check a driver's license even though reasonable suspicion for the stop ended when the officer saw a man (not a woman) behind the wheel. Id. The Illinois Supreme Court held this did not render the seizure unreasonable because Rodriguez recognized the purpose of a traffic stop includes the "ordinary inquiries" of checking a driver's license. Id. In other words, when a traffic stop is lawful at its inception, a police officer may complete the ordinary inquiries even if reasonable suspicion "vanished upon seeing the defendant" because the purpose of the stop is not concluded until the ordinary inquiries are completed. Id., ¶18. "Such ordinary inquiries are part of the stop's mission and do not prolong the stop, for fourth amendment purposes." Id.

¶19 When the Supreme Court vacated the judgment in Cummings I and remanded the case to the Illinois Supreme Court for further consideration in light of Rodriguez it signaled that

"ordinary inquiries" remain reasonable for the duration of an otherwise lawful stop. The Illinois Supreme Court's interpretation of Rodriguez in Cummings II is correct. Rodriguez concludes that an officer's mission in conducting a traffic stop includes "whether to issue a traffic ticket" and the "ordinary inquiries incident to [the traffic stop]." Rodriguez, 135 S. Ct. at 1615. These include: "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." Id. The justification for the ordinary inquiries is two-fold: (1) these checks serve to enforce the traffic code by "ensuring that vehicles on the road are operated safely and responsibly"; and (2) for officer safety.¹³ Id. at 1615-16. The Supreme Court protected Fourth Amendment rights by emphasizing that a traffic stop's mission

¹³ This court just last term acknowledged the "legitimate and weighty" concern for officer safety attendant to every traffic stop:

Traffic stops are "especially fraught with danger to police officers...." Rodriguez, 135 S. Ct. at 1616 (quoting [Arizona v.] Johnson, 555 U.S. [323, 330 (2009)]); see also [Pennsylvania v.] Mimms, 434 U.S. [106, 110 (1977)] ("We think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty."). That makes officer safety an integral part of every traffic stop's mission. Rodriguez, 135 S. Ct. at 1616 ("Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself.").

Floyd, 377 Wis. 2d 394, ¶26.

should not extend beyond the amount of time reasonably required to complete it, and an officer must proceed diligently, id. at 1616, thereby eliminating the potential for police to delay the ordinary inquiries to delve into unrelated and undiscovered criminal wrongdoing.

¶20 We return to the particular facts in Smith's case in light of Rodriguez's conclusion that the lawfully initiated traffic stop includes both considering whether to issue a ticket and conducting the ordinary inquiries. When Gonzalez saw the driver of the stopped car was a man, the first part of the mission ended. Gonzalez would not be issuing a ticket to Amber Smith for driving with a suspended license. The second mission of the traffic stop, however, had not been performed—checking the driver's license, registration, and insurance. To accomplish this, Gonzalez followed his normal practice where a driver's door does not work and walked around to the passenger side of the car. Smith concedes he was moving over to the passenger side and reaching for a handle on the passenger door. He even explained this is a movement he makes every time he has to get in and out of the car. In fact, unless Smith planned to sleep in the car, it is logical that Smith would get out of the car because he had pulled into a parking spot in the lot where his residence was located. Gonzalez thought Smith was struggling to open the passenger door so he put his hand on the outside door handle and pulled the door open. Upon opening the door, Gonzalez learned Smith did not have a valid driver's

license either. It is at this point Gonzalez suspected Smith had been driving drunk.

¶21 Thus, applying the directives from Rodriguez, we hold the stop in Smith's case did not violate the Fourth Amendment. The mission of the lawful traffic stop did not end when reasonable suspicion dissipated because at that moment, the sergeant had not completed the ordinary inquiries of checking Smith's license, registration, and insurance. Before Gonzalez could complete the ordinary inquiries incident to the stop, he discovered Smith did not have a valid driver's license and saw signs Smith had been driving drunk. At this point, the sergeant had probable cause to extend the stop to investigate and eventually arrest Smith for drunk driving.

¶22 In addition, the record shows Gonzalez acted promptly in his attempt to accomplish the mission of this traffic stop; there is nothing to suggest Gonzalez slothd through the mission to fish for wrongdoing. We emphasize, as did the Rodriguez Court, that "[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." Rodriguez, 135 S. Ct. at 1614. Police actions in all traffic stops will be scrutinized to ensure a temporary detention "last[s] no longer than is necessary to effectuate the purpose of the stop." Sharpe, 470 U.S. at 684; Rodriguez, 135 S. Ct. at 1614. Neither the Fourth Amendment nor the cases interpreting it require this traffic stop seizure to end at the moment Gonzalez saw a man instead of a woman in the driver's seat. The Fourth Amendment presented no bar to

Gonzalez taking the minimally intrusive, routine measure of checking the identification of the driver. Because Gonzalez did so in a reasonable manner and within a reasonable amount of time, Smith's stop was not unlawfully prolonged. See Rodriguez, 135 S. Ct. at 1615; see also, State v. House, 2013 WI App 111, ¶¶6, 9, 350 Wis. 2d 478, 837 N.W.2d 645 (concluding the purpose of traffic stop ended when "everything related to the initial stop" had been completed including running a check on defendant's license and returning license to the defendant); State v. Gammons, 2001 WI App 36, 241 Wis. 2d 296, 625 N.W.2d 623 (holding the purpose of the traffic stop had concluded after the reason for the initial seizure had been satisfied, the driver and the two passengers had provided identification, and the officer had run computer checks on all three).

¶23 Our conclusion that this traffic stop comports with the Fourth Amendment is further supported by existing Wisconsin case law. Before the United States Supreme Court decided Rodriguez, our court of appeals already decided that when "the initial detention was lawful" an officer can properly ask for a driver's name and identification card even when the officer "had already decided" the driver "was not the suspect." See State v. Williams, 2002 WI App 306, ¶1, 258 Wis. 2d 395, 655 N.W.2d 462. In Williams, a police officer stopped a vehicle thinking the driver was a wanted domestic abuse suspect named Demetrius Phillips. Id., ¶¶2-3. The driver told the officer his name was Vernell Williams, but he did not have any identification to

prove his identity. Id. The officer called another officer who knew a lot of people in the neighborhood to see if Williams' identity could be verified. Id., ¶4. The second officer confirmed that Williams was who he said he was. Id. At this point, the police knew the driver was not the domestic abuse suspect, but they had the dispatcher run his name and birthdate anyway and found Williams did not have a valid driver's license. Id. Further investigation led to the discovery of cocaine in the car and Williams filed a motion to suppress the evidence. Id., ¶¶4-5, 8. The court of appeals concluded the officer's actions were lawful because the request for the driver's name and identification was reasonable, even if the request came after the officer realized the driver was not the suspect the officer sought.¹⁴ Id., ¶18. The court of appeals further held that when "Williams stated that he had no identification, there was a reasonable ground for further detention," id., ¶22, based on Wis. Stat. § 343.18(1)'s requirement that persons operating

¹⁴ The court of appeals also relied on a community caretaker vehicle case, State v. Ellenbecker, 159 Wis. 2d 91, 464 N.W.2d 427 (Ct. App. 1990), in reaching its conclusion. See State v. Williams, 2002 WI App 306, ¶¶18-21, 258 Wis. 2d 395, 655 N.W.2d 462. We question whether Ellenbecker was properly decided but decline to address that specific issue as it is not dispositive here.

motor vehicles must have their driver's licenses with them.¹⁵ These routine measures are reasonable because they ensure the driver has a valid license and they document the driver's identity in case there is a complaint after the stop.

¶24 Smith distinguishes his case from Rodriguez because reasonable suspicion for the traffic stop in that case continued for the duration of the stop, whereas here, the State conceded that reasonable suspicion dissipated as Sergeant Gonzalez approached Smith's car. We need not guess whether the Supreme Court would rule differently if faced with a case where reasonable suspicion dissipated after a lawful stop but before the ordinary inquiries could take place. The Supreme Court in fact had that very case before it—Cummings I—concomitantly with Rodriguez and although the Court never issued an opinion, its procedural actions signal that the Fourth Amendment does not compel an officer to prematurely terminate a lawful stop by dispensing with the ordinary inquiries.

¶25 First, Rodriguez does not specifically limit its holding to a lawful stop where reasonable suspicion does not dissipate. Given that the Supreme Court had before it both Rodriguez—a case where reasonable suspicion remained until the

¹⁵ Wisconsin Stat. § 343.18(1)'s requirement that all drivers possess a driver's license while driving and display it "upon demand from any judge, justice, or traffic officer" further supports our opinion. It is reasonable to expect to show a driver's license when a police officer conducts a traffic stop.

ordinary inquiries had been completed, and Cummings—a case where reasonable suspicion vanished before the ordinary inquiries could be made, the Supreme Court most certainly would have pointed out this distinction if the Court determined it commands opposite Fourth Amendment outcomes.

¶26 Second, six days after deciding Rodriguez, the Supreme Court vacated the judgment in Cummings I and told the Illinois Supreme Court to reconsider its ruling. See Illinois v. Cummings, 135 S. Ct. 1892 (Mem) (2015). Again, the Illinois Supreme Court initially ruled in favor of the defendant in Cummings I, holding that the police officer could not ask to see his driver's license after reasonable suspicion vanished. See Cummings I, 6 N.E.3d 725, ¶20. It is not logical or reasonable for the Supreme Court to have vacated Cummings I if it believed the Illinois Supreme Court reached the correct result. There would be no reason to make the Illinois Supreme Court redo its decision if the Supreme Court believed the law prohibits a license check when reasonable suspicion dissipates before the officer speaks with the driver. That is what the Illinois Supreme Court had already ruled. If the Supreme Court wanted to limit the ordinary inquiries only to cases where reasonable suspicion remained until those routine procedures were completed, presumably the Court would have simply let the Illinois Supreme Court ruling in Cummings I stand. If the disappearance of reasonable suspicion extinguished an officer's ability to proceed with ordinary inquiries, logically the

Supreme Court would have said so either in Rodriguez itself or by writing an opinion in Cummings I.

¶27 Third, the Illinois Supreme Court's analysis in Cummings II upon remand from the Supreme Court is sound. That court certainly could have distinguished Cummings from Rodriguez based on the vanishing reasonable suspicion factor, but did not. A unanimous court interpreted Rodriguez and the Supreme Court's granting, vacating, and remanding in Cummings I to mean a police officer who lawfully stops a vehicle may engage in the ordinary inquiries even if the reasonable suspicion initiating the stop dissipates.

¶28 Fourth, our court of appeals recently interpreted Rodriguez in the same way the Illinois Supreme Court did. In State v. Cotter, No. 2015AP1916-CR, unpublished slip op. (Wis. Ct. App. Aug. 25, 2016) (per curiam) a police officer stopped a car based on information that the registered owner (a woman) had a non-valid license.¹⁶ Id., ¶¶7, 9. The driver of the car, however, turned out to be a man, not a woman. Id., ¶9. One of the car's passengers, Charles Cotter, challenged his narcotic drug conviction resulting from the discovery of heroin on his person during a pat-down search. Id., ¶¶10-14. Cotter argued

¹⁶ We note that State v. Cotter, No. 2015AP1916-CR, unpublished slip op. (Wis. Ct. App. Aug. 25, 2016) (per curiam) is an unpublished per curiam, which according to Wis. Stat. § 809.23(3) may not be cited by the parties. This court, of course, is not a party. Moreover, Cotter is cited for the fact that the decision exists rather than for reliance on its legal analysis and holding.

this evidence should have been suppressed because once the officer saw the driver was a man, and not the woman with the invalid license, the officer no longer had any valid reason to extend the stop. Id., ¶14. That case also involved a broken driver's-side window, resulting in the officer having to open the passenger door to speak with the occupants. Id., ¶10. Our court of appeals held that Rodriguez controlled and this stop did not violate the Fourth Amendment because (1) the police lawfully stopped the car based on the registered owner's invalid license; and (2) even though the officer "could not issue a ticket on the basis for which the stop was initiated" the officer could "continue the stop for purposes of completing routine matters such as gathering [the driver's] license information, making attendant observations in the process." Id., ¶18. The court of appeals concluded that the reasonable suspicion that developed while the ordinary inquiries occurred "provided a basis for the officers to extend the stop" and as a result, the discovery of heroin during Cotter's pat-down did not violate the Fourth Amendment. Id., ¶19. Cotter correctly points out that conducting the ordinary inquiries is not an extension of the stop; it is part of the mission of the stop itself. Discovering additional reasonable suspicion during the ordinary inquiries can lead to a legal basis upon which to extend the stop beyond the ordinary inquiries.

¶29 The three cases on which Smith heavily relies in advancing his contrary position, Delaware v. Prouse, 440 U.S. 648 (1979), Florida v. Royer, 460 U.S. 491 (1983), and State v.

Coleman, 890 N.W.2d 284 (Iowa 2017), are either distinguishable or not controlling.

¶30 First, Smith argues Delaware v. Prouse shows Gonzalez's conduct violated his Fourth Amendment rights. Prouse held that random traffic stops simply to check a driver's license and registration absent any basis to stop the vehicle violated the Fourth Amendment. 440 U.S. at 650. But this is not what happened to Smith. Here, it is undisputed there was a lawful basis to stop the car Smith drove.

¶31 Second, Smith turns to Florida v. Royer for its holding that police may not detain a person for "longer than is necessary to effectuate the purpose of the stop," and the "methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." 460 U.S. at 500. Royer involved an airport traveler suspected of transporting narcotics in his suitcase. Id. at 493-94. After approaching the traveler and questioning him, undercover officers took him into a large closet with a desk and two chairs, where he was in essence under arrest. Id. at 494-97. Smith's situation, unlike Royer, involved a traffic stop based on reasonable suspicion. As already explained, Rodriguez tells us the purpose and scope of any lawful traffic stop includes both the officer's decision on whether to issue a ticket (which Gonzalez could not do because reasonable suspicion on that aspect dissipated), as well as the officer's completion of ordinary inquiries (which Gonzalez was attempting to do when he saw signs that Smith was driving drunk). We are also not

persuaded by Smith's assertion that Gonzalez violated Royer's requirement that an officer should use the "least intrusive means" in an investigative detention. Smith argues the least intrusive means here required Gonzalez to speak to Smith through the closed and inoperable window. Even if we could agree that requiring Gonzalez to shout through a closed window late at night constitutes the least intrusive means, it is unreasonable to expect Gonzalez to accomplish the ordinary inquiries through a closed window. Under Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977), an officer may ask a driver to step out of the car during a traffic stop because "[e]stablishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements" which could threaten the officer's safety. A face-to-face confrontation is also necessary to accomplish the ordinary inquiries, as it would be difficult if not impossible to check a driver's license, registration, and insurance without having those documents in hand. Requiring Gonzalez to accomplish the ordinary inquiries in the dark through a closed window is illogical and unreasonable.

¶32 The third case Smith proffers to support his position is State v. Coleman, 890 N.W.2d 284 (Iowa 2017). Coleman is a post-Rodriguez case in which a sharply divided Iowa Supreme Court held, based on the Iowa Constitution, that an officer cannot conduct the ordinary inquiries if reasonable suspicion dispels after the initially lawful stop. Id. at 285. The majority in Coleman rejected Rodriguez's recitation of the long-

established rule that ordinary inquiries are part of a lawful traffic stop as "dicta." Id. at 300. Three Iowa Supreme Court Justices dissented in Coleman, criticizing the majority for disregarding Rodriguez, for ignoring Iowa's statute that requires drivers to carry a driver's license and "display it upon an officer's request," for overruling prior Iowa case law consistent with Rodriguez, and for concluding for the first time that the search and seizure provision in Iowa's Constitution provides greater protection than the Fourth Amendment to the United States Constitution. Id. at 301-05. We are not persuaded by Coleman for several reasons. First, we are not bound by Iowa law, particularly judicial interpretations of its own constitution. Second, it applies an untenably cramped interpretation of the holding in Rodriguez. Third, it ignores the clear message the Supreme Court conveyed in its handling of Cummings I, resulting in the Illinois Supreme Court's reversal. Notably, Coleman is the only post-Rodriguez case in the country to conclude that checking a driver's license during an initially lawful traffic stop constitutes an unreasonable seizure when reasonable suspicion for the stop evaporates as the officer approaches the stopped car.¹⁷ We agree with the dissenters in

¹⁷ Smith also cites numerous other state and federal cases he contends prohibit police from asking for identification if reasonable suspicion triggering the traffic stop dissipated as the officer approached the vehicle. All of these cases, however, pre-date the Supreme Court's decision in Rodriguez v. United States, 135 S. Ct. 1609 (2015).

Coleman in regarding an officer's request to see a driver's license during a traffic stop as "completely unobjectionable and, indeed, mundane" and therefore unquestionably constitutional. Id. at 302.¹⁸

¹⁸ Justice Daniel Kelly's dissent conjures a law enforcement boogeyman but if speculation and storytelling determine the reasonableness of a police officer's actions, consider this reworked storyline:

Female driver (name unknown as the officer will not be permitted to ask): What are you stopping me for officer?

Officer Doe: I'm sorry. I stopped this minivan because it is registered to Mr. Jones whose license is suspended. But, you are not Mr. Jones. I apologize for any inconvenience. You are free to go.

Female driver drives away.

Officer Doe returns to his squad car and 30 minutes later hears a radioed alert to be on the lookout for a female suspect wanted for sex trafficking. There are warrants out for her arrest. The female is thought to be driving a minivan with six kidnapped girls. The suspect matches the description of the driver Officer Doe just let go. The female driver is never caught and five of the six girls are never heard from again. When the police locate the minivan, they find the sixth missing girl who has been badly beaten and drugged. She reports the girls were forcibly drugged and physically and sexually abused and further reveals the trafficker's plan to transport the girls overseas to be sold as sex slaves. The sixth girl later dies at the hospital during surgery to stop her internal bleeding.

(continued)

Justice Kelly's strawman overlooks a significant restraint on law enforcement: constitutional reasonableness. The parade of horrors Justice Kelly proffers is as probable as the proverbial boogeyman's existence. They are designed to frighten despite materializing only in imagination and myth. The principles declared today are not new. Nearly 40 years ago, the United States Supreme Court recognized that checking a driver's license during an otherwise lawful traffic stop constitutes a permissible inquiry. See Rodriguez, 135 S. Ct. at 1615 (citing Delaware v. Prouse, 440 U.S. 648, 658-660 (1979)). No court has expanded the ordinary inquiries incident to a traffic stop to include headlight, horn, or exhaust performance because the Fourth Amendment commands reasonableness. We think the typical scenario in Officer Doe's stop of Mrs. Brown's minivan would be:

Officer Doe: License and registration please.

Mrs. Brown: Yes Officer. Here it is. Did I do something wrong?

Officer Doe: The car you are driving is registered to a Mr. Jones whose license is suspended.

Mrs. Brown: Oh no. I borrowed this minivan to get these kids to soccer practice. The Jones' are my neighbors.

Officer Doe: Got it. Give me a couple minutes to clear this up.

Officer Doe goes back to the squad car and runs Mrs. Brown's license. He comes back moments later, returns Mrs. Brown's license, and says: "I'm sorry for the inconvenience. Everything checks out. You may be on your way."

It is often easy for a court, which has the luxury to study the cold transcripts and ponder the nuances of case law, to criticize an officer's split-second decisions in high crime areas late at night. But reasonableness cannot be measured with 20/20 hindsight; instead, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving" Graham v. Connor, 490 U.S. 386, 396-97 (1989). Sergeant Gonzalez's actions here were reasonable.

(continued)

B. Opening of the Passenger Door

¶33 Smith also argues that opening the passenger door constituted a separate Fourth Amendment event requiring additional reasonable suspicion. We do not agree. Whether a search or seizure is reasonable depends upon the particular facts of each case, and what Gonzalez did under these facts was reasonable. See South Dakota v. Opperman, 428 U.S. 364, 375 (1976) (citation omitted).¹⁹ Gonzalez approached the driver's door and asked Smith to open the door or the window. Smith responded that both were broken. As Gonzalez walked around to the passenger door, Smith appeared to be cooperating and moving toward the passenger seat, and seemed to be trying to open the passenger door. The officer testified that Smith and he simultaneously opened the door and that they opened it

¹⁹ Courts have recognized a variety of circumstances where a search of a car does not infringe upon the Fourth Amendment: (1) when the driver consents, see Florida v. Jimeno, 500 U.S. 248 (1991); (2) when an officer sees contraband in plain view, see State v. Buchanan, 2011 WI 49, ¶¶26-27, 334 Wis. 2d 379, 799 N.W.2d 775; (3) incident to an arrest, see Arizona v. Gant, 556 U.S. 332 (2009); (4) when an officer has probable cause to suspect a crime, see United States v. Ross, 456 U.S. 798 (1982); and (5) when a car has been impounded, see South Dakota v. Opperman, 428 U.S. 364 (1976). Police may also order the driver out of a vehicle for officer safety. See Pennsylvania v. Mimms, 434 U.S. 106 (1977); see also United States v. Stanfield, 109 F.3d 976, 981 (4th Cir. 1997) (recognizing certain circumstances in which opening at least one of the vehicle's doors is consistent with concerns of officer safety).

together.²⁰ An officer may make reasonable inferences based on the facts drawn from his experience. Terry, 392 U.S. at 21-22. It was reasonable for Gonzalez to infer that Smith's movements indicated he was willingly opening (or attempting to open) the passenger door. The sergeant needed to communicate with and identify the driver whom he had stopped and there was no avenue to do that on the driver's side of the car due to the inoperable driver's window and door.

¶34 Smith offers New Jersey v. Woodson, 566 A.2d 550 (N.J. Super. Ct. App. Div. 1989), in support of his argument that Gonzalez unreasonably opened the door. Smith's reliance on Woodson is misplaced. We are neither bound by New Jersey authority nor persuaded that it presents similar facts. In Woodson, police conducted a traffic stop and immediately opened the car door without making any attempt to speak with the driver. Id. at 551. The New Jersey court held this police conduct violated the Fourth Amendment. Id. at 552. Woodson's facts are clearly distinguishable from Smith's.

¶35 Finally, Gonzalez's act of opening the passenger door did not violate the Fourth Amendment because under all the facts and circumstances, the action was reasonable and this intrusion on Smith's personal liberty was an incremental, de minimus one. See Mimms, 434 U.S. at 109-11. Under Mimms, a police officer

²⁰ Again, we acknowledge the circuit court found it was the officer who opened the door. Nonetheless, the circuit court did not find the officer's testimony in this regard not credible.

has the right to a face-to-face encounter with a driver during a lawful traffic stop. "[T]his additional intrusion can only be described as de minimus." Id. at 111.²¹

IV. CONCLUSION

¶36 We acknowledge that the police are not infallible, and a police officer may intentionally or unintentionally infringe upon the constitutional rights of Wisconsin citizens. If that happens, it is the duty of this court to impose consequences for such violations. Terry, 392 U.S. at 12 ("[E]xcluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct."). Likewise, when the police abide by the rules and act reasonably, the Fourth Amendment is not violated and we must uphold convictions.

¶37 The Supreme Court's most recent pronouncement on the scope of constitutionally reasonable traffic stop seizures, Rodriguez v. United States, 135 S. Ct. 1609 (2015), requires upholding Smith's conviction. Rodriguez acknowledges that "ordinary inquiries" are part of the mission of every lawful and reasonably executed traffic stop. The mission of such stops is not completed until the police officer checks a driver's identification, even if reasonable suspicion for stopping the

²¹ Justice Ann Walsh Bradley's dissent assumes that Smith had permission to drive his sister's car. See Justice Ann Walsh Bradley's dissent, ¶47. There is nothing in the record establishing that Smith had permission to drive his sister's car.

vehicle dissipates as the officer approaches the vehicle. Further, the officer's act of opening the passenger door to facilitate safe, face-to-face contact with the otherwise inaccessible driver did not constitute an unreasonable search.

By the Court.—The decision of the court of appeals is reversed.

¶38 ANN WALSH BRADLEY, J. (*dissenting*). I join Justice Kelly's dissent. However, I write separately because I determine that the majority compounds its error when it departs from the clear directive of Pennsylvania v. Mimms, 434 U.S. 106 (1977) (*per curiam*), extending the holding past its breaking point and further eroding the protections of the Fourth Amendment.

¶39 Contrary to the majority, I apply the clear precedent and conclude that Smith's Fourth Amendment rights were violated when Sergeant Gonzalez opened Smith's passenger side door without a warrant or consent. Accordingly, I respectfully dissent.

I

¶40 In Mimms, law enforcement officers pulled the defendant over for driving a vehicle with an expired license plate. Id. at 107. One of the officers approached the car and asked the defendant to step out. Id. When the defendant did so, the officer noticed a bulge in his jacket, which turned out to be a gun. Id. After the State indicted the defendant on two weapons related offenses, the defendant moved to suppress the gun as evidence. Id.

¶41 The United States Supreme Court concluded that the police officers acted properly because law enforcement officers are allowed to order occupants to exit a lawfully stopped vehicle even if there is nothing unusual or suspicious about their behavior. Id. at 111. This court has recognized Mimms as

establishing a clear directive, "a per se rule that an officer may order a person out of his or her vehicle incident to an otherwise valid stop for a traffic violation." State v. Johnson, 2007 WI 32, ¶23, 299 Wis. 2d 675, 729 N.W.2d 182 (emphasis added); State v. Floyd, 2017 WI 78, ¶24, 377 Wis. 2d 394, 898 N.W.2d 560.

¶42 Therein lies the rub. As set forth in Justice Kelly's dissent, the facts here do not support the conclusion that this was "an otherwise valid stop." Indeed, the State conceded that reasonable suspicion had dissipated when the officer realized the male driver was not the female registered owner. Majority op., ¶14.

II

¶43 Not only does the majority violate Mimms' clear directive, it extends the holding beyond what is constitutionally permissible. Mimms explains that law enforcement officers may order occupants out of a vehicle during a traffic stop. It does not suggest that police may open a vehicle door and invade the space inside absent a warrant. See State v. Woodson, 566 A.2d 550, 552 (N.J. Super. Ct. App. Div. 1989) ("There is a significant difference between ordering one out of a car and opening a car door without warning. In the former case, the occupant has an opportunity, before opening the door and leaving the car, to safeguard from public view matters as to which he has a privacy interest").

¶44 The majority fails to acknowledge the limitations of Mimms and extends its holding past its breaking point, reading

language into that opinion that is not present. Mimms does not permit the officer's conduct in this case. Contrary to the majority's assertion, Mimms does not imply that a police officer has "the right to a face-to-face encounter." See Majority op., ¶35. And, it certainly does not extend such a right once the validity of the stop has been undermined because reasonable suspicion has dissipated.

¶45 Rather, Mimms is limited to an officer verbally ordering an occupant out of a vehicle. In determining that Mimms allows an officer to not only order an occupant out of a vehicle but to also invade the interior space of a vehicle by opening the door, the majority departs from what is constitutionally permissible and disregards the facts of this case.

¶46 The Fourth Amendment protects against unreasonable searches and seizures and focuses on the reasonable expectation of privacy. U.S. Const., amend. IV; Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); State v. Bruski, 2007 WI 25, ¶22, 299 Wis. 2d 177, 727 N.W.2d 503; see also Wis. Const. art I, § 11. Yet, the majority's conclusion ignores that a defendant in Smith's position has a reasonable expectation of privacy in the interior of a vehicle. See State v. Dixon, 177 Wis. 2d 461, 470, 501 N.W.2d 442 (1993) ("This relationship [between the vehicle owner and the driver] and prior use of the vehicle point to the defendant having an expectation of privacy in the interior of the truck that society is willing to recognize as reasonable").

¶47 The record reflects that the vehicle Smith was driving belonged to his sister. A person who borrows a car and drives it with the owner's permission has an expectation of privacy in the interior of the vehicle which society is willing to recognize as reasonable, especially where the owner of the car is a family member.¹ See id. at 470-72 (citing United States v. Griffin, 729 F.2d 475, 483 n.11 (7th Cir. 1984), cert. denied, 469 U.S. 830 (1984) (accused who borrowed a car from his brother had a protectable privacy interest in the vehicle)). Opening the door of a vehicle is clearly contrary to this reasonable expectation of privacy.²

¶48 With no reasonable suspicion remaining to support the stop, the objective of the stop at the point Gonzalez opened the door was simply to communicate with Smith. But this easily could have been accomplished without invading the interior of the car. The record reflects that Sergeant Gonzalez successfully communicated with Smith through the closed door and

¹ The record indicates that the prosecutor never contended that Smith used the vehicle without permission. During cross examination, Smith reiterated that the car was his sister's. The prosecutor did not elicit any testimony about consent and there is nothing in the record indicating that Smith's use of the vehicle was without his sister's permission.

² I further observe that Officer Gonzalez violated the United States Supreme Court's decree that law enforcement must employ "investigative methods" that are the "least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Florida v. Royer, 460 U.S. 491, 500 (1983). The record does not support the assertion that opening Smith's passenger side door was the least intrusive means of completing the objective of the stop.

window on the driver's side of the car and understood Smith's responses without having to repeat himself. Why then was it necessary to open the door?

¶49 Applying the clear precedent under the facts presented, I conclude that Smith's Fourth Amendment rights were violated when Sergeant Gonzalez opened Smith's passenger side door without a warrant or consent.

¶50 Finally, I observe that once again a majority of this court continues the trend of diminishing Fourth Amendment protections we have seen in recent years. See Floyd, 377 Wis. 2d 394, ¶¶83-89 (Ann Walsh Bradley, J., dissenting). To give meaning to the Fourth Amendment, we must use it as a check on governmental power. This court's decision fails to provide this check, instead giving law enforcement carte blanche to detain individuals when there is no reasonable suspicion that they have done anything wrong. The majority further gives officers free reign to invade a space in which a person has a reasonable expectation of privacy without a warrant or consent when less intrusive means of communication demonstrably suffice.

¶51 Accordingly, I respectfully dissent.

¶52 I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

¶53 DANIEL KELLY, J. (*dissenting*).

I

¶54 Frederick Smith is not a sympathetic character. This case is here only because he was driving an automobile while drunk—really drunk: his blood alcohol level was .38 when he was arrested.¹ This is not his first time, or even his second. In fact, this is the seventh time he has been arrested and convicted of driving while intoxicated. And because we can be pretty confident that drunk drivers are not caught every time they go abroad with too much alcohol in their system, it's reasonable to believe that seven-time offenders make a habit of putting at risk the lives of everyone around them. It is not without reason that drunk drivers have been described as a scourge. See, e.g., State v. Nordness, 381 N.W.2d 300, 307, 128 Wis. 2d 15 (1986) (describing drunk driving as "transform[ing] an innocent user of a highway into a victim at any time . . . " and as "a scourge on society"). To live in society peacefully, we must have at least a minimal level of trust that our neighbors won't habitually place us in mortal danger. We can count ourselves fortunate that Officer Gonzalez apprehended Mr.

¹ To put this in context, a person with a blood alcohol concentration of .31 (that is, less than Mr. Smith), is at risk of death by alcohol poisoning. See, e.g., National Institute on Alcohol Abuse and Alcoholism, Alcohol Overdose: The Dangers of Drinking Too Much, <https://pubs.niaaa.nih.gov/publications/alcoholoverdosefactsheet/overdosefact.htm> (last visited Dec. 1, 2017).

Smith before he could maim or kill someone with the car he was driving. The people of Wisconsin want drunk drivers to be stopped. They need drunk drivers to be stopped.

¶55 None of that, however, has anything to do with the proper understanding of the Fourth Amendment's proscription against unreasonable searches and seizures. Whatever rule of police conduct we derive from that provision must be just as applicable to a soccer mom taking the neighborhood children to practice as it is to habitual drunk drivers like Mr. Smith. Indeed, the rule we announce today would probably benefit from considering how it would apply in a legally identical but less emotionally-fraught situation.

¶56 So let's consider the soccer mom, Mrs. Brown. Her automobile is in the shop for maintenance, so Mrs. Jones (Mrs. Brown's neighbor and best friend) lent her the family's minivan. While Mrs. Brown is en route to soccer practice with a vehicle full of children, Officer Doe runs the plates and discovers the registered owner, Mr. Jones, has a suspended driver's license. Believing Mr. Jones is driving the minivan, he pulls it over. Upon approaching the driver's window, he realizes his mistake. But instead of apologizing for his interference with Mrs. Brown's liberty, the following conversation takes place:

"Good afternoon, ma'am," said Officer Doe. "I pulled you over because I thought you were Mr. Jones. Obviously, I couldn't be more wrong. You needn't be alarmed—I don't believe you have broken any laws, nor does it appear you are contemplating doing so."

"Oh," replied Mrs. Brown, somewhat disconcerted. "Just so I understand, you presently have no

reasonable suspicion to believe I have done anything wrong?"

"That is correct, ma'am."

"Then I may leave?" Mrs. Brown inquired.

"Actually, no," said Officer Doe. "You see, I'm curious about a few things. I want to know whether you have your driver's license with you. I'm also curious about whether it is valid, and whether there are any warrants for your arrest, or if there are any other reasons law enforcement might be interested in you."

"Please understand that I have no reason to believe you don't have a valid driver's license with you, or that law enforcement has any reason to be interested in you," Officer Doe continued. "And, of course, this has absolutely nothing to do with the reason I mistakenly pulled you over in the first place. However, a new Wisconsin Supreme Court decision, State v. Smith, says I can compel you to remain here until I finish satisfying my curiosity on these subjects."

¶57 That's enough of a vignette for the analysis. But it's important to note that this is not the full extent of the intrusion Officer Doe could command under these entirely innocent circumstances. If our decision today is correct, he could also have his narcotics-detection dog sniff the perimeter of the automobile to see if it would alert for the presence of illegal substances while awaiting the report on Mrs. Brown.² And he could order Mrs. Brown out of the minivan.³ He could even order all of the children to stand along the roadside while he

² Illinois v. Caballes, 543 U.S. 405, 409 (2005).

³ Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (per curiam).

completed his "incidental" questioning.⁴ His authority to do all of this comes not from anything Mrs. Brown did, but from a mistake of Officer Doe's own making.⁵

II

¶58 This case requires us to identify the point at which the Fourth Amendment says a traffic stop must end. Is it when the purpose for initiating the stop is satisfied, or may a police officer continue the seizure to pursue other objectives? That is, must Officer Doe end Mrs. Brown's seizure when he discovers she is not Mr. Jones, or may he maintain the seizure to ask questions that have no connection to a reasonable suspicion of wrongdoing?

¶59 In giving our imprimatur to the latter, we erred, and significantly so. In adopting the constitutionally-unique concept of a "dual mission" traffic stop, we created a mission

⁴ See Rodriguez v. United States, 575 U.S. ___, 135 S. Ct. 1609, 1615 (2015) (citing Mimms, 434 U.S. at 110-11 (no Fourth Amendment violation occurs where an officer orders "a driver, already lawfully stopped, to exit the vehicle") and Maryland v. Wilson, 519 U.S. 408, 413-15 (1997) (an officer may require passengers to exit a vehicle lawfully stopped for a traffic violation)).

⁵ The court says my hypothetical is a strawman. Majority op., ¶32 n.18. A strawman is a debate technique in which one participant pursues a rhetorical advantage by positing and refuting an argument the other participant didn't make. All I have done with this vignette is remove the elements that make Mr. Smith an unsympathetic character and replace them with elements that make the subject of the seizure neutral or sympathetic—elements, that is, that should not affect our analysis. Because the court has identified no constitutionally-significant difference between Mrs. Brown and Mr. Smith, I disagree with its conclusion that this is a strawman.

that allows a police officer to seize an individual without any reasonable suspicion of wrongdoing. And we took this groundbreaking step based largely on a "signal" we discerned from the vacation of the Cummings I⁶ judgment by the United States Supreme Court.

A

¶60 Let's start with this—we should never countenance a traffic stop "mission" that is not tied to the Constitution. Power bristles at restraint, which is why we chain it firmly to constitutional anchor points. That is true whether the exercise of power involves the taking of personal property for public use, or inhibiting speech or publications, or the possession of arms, or conducting a traffic stop. We may disagree about the length of the chain, but we have always agreed that the Constitution must hold its anchor. Until today. Today we have dual mission traffic stops in which one mission is tethered to the Fourth Amendment and the other is not.

¶61 The first mission we describe in our opinion is the conventional one, the one which we have always understood to be inexorably linked to the purpose for the traffic stop, and thus to the Constitution. Notwithstanding our suggestion to the contrary, Rodriguez didn't say a single word from which we may infer the existence of any other mission. It started with the

⁶ Like the majority, I will refer to People v. Cummings, 6 N.E.3d 725 (Ill. 2014), vacated, 135 S. Ct. 1892 (2015), as "Cummings I." I will likewise refer to People v. Cummings, 46 N.E.3d 248 (Ill. 2016) as "Cummings II."

broad observation that "[l]ike a Terry⁷ stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, . . . and attend to related safety concerns[.]" Rodriguez v. United States, 575 U.S. ___, 135 S. Ct. 1609, 1614 (2015) (citations omitted). And it recognized that "'[t]he scope of the detention must be carefully tailored to its underlying justification.'" See id. (quoting Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion)). The underlying justification that defines the scope of the detention is the event that caused the officer to initiate the stop: "Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose." Rodriguez, 135 S. Ct. at 1614 (internal marks and citation omitted). From this the Rodriguez Court concluded that the authority for a traffic stop cannot outlast its purpose: "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." Id. Most importantly to our decision today, Rodriguez confirmed that even if a seizure was constitutional when it began, it can lose this status if it continues after the purpose for the stop has been satisfied. "[A] traffic stop 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket." Id. at 1614-15 (quoting Illinois v. Caballes, 543

⁷ Terry v. Ohio, 392 U.S. 1 (1968).

U.S. 405, 407 (2005)). Everything Rodriguez said about the traffic mission—everything—describes it in terms of the singular mission we have always ascribed to a valid traffic stop, to wit, the investigation of an officer's reasonable suspicion of wrongdoing. As discussed at length, infra, "officer safety" and "the usual inquiries" have always been incidents to the purpose of the traffic stop, and Rodriguez said not a single word to the contrary.

¶62 And everything Rodriguez said about the constraining chain refers back to the constitutional anchor: Reasonable suspicion of wrongdoing. That, and that alone, is what defines the purpose of the stop. That purpose, in turn, defines "the tolerable duration of police inquiries." And the tolerable duration of police inquiries defines, in its own turn, the uttermost extent of the authority to seize a person. If the seizure goes beyond that, the police are on forbidden ground. Link by link by link, courts test the soundness of the connection between the constitutional anchor and the exercise of power. This has been the state of the law for long enough to consider it settled. Inasmuch as Rodriguez did nothing but recite these principles, we can safely conclude it hasn't disturbed the chain's continued integrity. And nothing in that recitation of well-established principles hints at the existence of a companion mission.

¶63 The second mission, the one we created today, breaks the link to the constitutional anchor point. This mission is triggered by a constitutional traffic stop, but after its

genesis it lives separately and apart from the purpose of the stop and, hence, its constitutional limits. We called this second mission into existence by promoting the "usual inquiries,"⁸ which used to occupy the lowly office of incidents to a traffic stop, all the way up to a rank of equal dignity with the purpose of the traffic stop itself.

¶64 Rodriguez referred to these usual inquiries as "incident to the traffic stop." 135 S. Ct. at 1615 (citation, brackets, and internal quotation marks omitted). So did Caballes, in which the court observed that "the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop." 543 U.S. at 408; see also Berkemer v. McCarty, 468 U.S. 420, 439 (1984) ("Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.").

¶65 As "incidents" to a traffic stop, the usual inquiries are logically and constitutionally subordinate to the purpose of the stop. An incident does not exist on the same plane as its premise. That is true as a matter of definition. An incident is "something dependent upon, appertaining or subordinate to, or accompanying something else of greater or principal importance." Incident, Webster's Third New International Dictionary (1986).

⁸ The usual inquiries, of course, refer to a police officer's request to see a person's driver's license and proof of registration and insurance.

Because the usual inquiries, according to Rodriguez and Caballes, are incidents to a traffic stop, they can have no independent existence. In the world of logic, that's what it means to be dependent on something. That's why a seizure that begins with a constitutional basis can become unconstitutional: "[A] traffic stop 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket." Rodriguez, 135 S. Ct. at 1614-15 (quoting Caballes, 543 U.S. at 407).

¶66 Therefore, by main force of precedent and logic, the usual inquiries cannot be made after the purpose for the traffic stop—investigation of a reasonable suspicion of wrongdoing—no longer exists. The usual inquiries are thereby subjected to constitutional restraint, but only because they are subordinate to the purpose of the traffic stop, which is textually bound to the Fourth Amendment.

¶67 That is why we had to give the usual inquiries a promotion. As mere incidents they can have no existence beyond the purpose of the traffic stop. If Officer Doe is to authoritatively maintain Mrs. Brown's seizure after the dissipation of reasonable suspicion (the constitutional anchor point), the usual inquiries must be more than incidents. We accomplished the promotion with some clever melding of our voice with Rodriguez. We said that Rodriguez "concluded that asking for identification is an ordinary inquiry that is related to the purpose of a lawful stop as part of its dual mission and the stop 'may last no longer than is necessary to effectuate that

purpose.'" Majority op., ¶10 n.9 (quoting Rodriguez, 135 S. Ct. at 1614-15). Placing "dual mission" in the sentence where we did suggests that Rodriguez says the "purpose" of the stop includes both the traffic infraction and the desire to make the ordinary inquiries. Notwithstanding our voice-melding, however, Rodriguez still says the purpose of the stop is to address the traffic infraction.

¶68 With this promotion from "incident" to parity with the "purpose of the traffic stop," we freed the usual inquiries from their constitutional anchor point. We observed that "[w]hen Gonzalez saw the driver of the stopped car was a man, the first part of the mission ended." Majority op., ¶20. That is to say, the mission anchored in the Fourth Amendment ended. But because of the promotion, Officer Gonzalez didn't need to end the traffic stop: "The second mission of the traffic stop, however, had not been performed—checking the driver's license, registration, and insurance." Id. So we concluded that "[t]he mission of the lawful traffic stop did not end when reasonable suspicion dissipated because at that moment, the sergeant had not completed the ordinary inquiries of checking Smith's license, registration, and insurance." Majority op., ¶21. Et voilà: The advent of a traffic mission that allows a police officer to seize a person with no reasonable suspicion of wrongdoing whatsoever.

¶69 This should shock us. The "reasonable suspicion" requirement is not an archaic formula to which we give rote obeisance. It is, instead, the only textual link to the Fourth

Amendment's promise that we shall be free of "unreasonable" seizures. This is the stuff of our deepest bedrock principles: "[A person] may not be detained even momentarily without reasonable, objective grounds for doing so" Royer, 460 U.S. at 498. Courts have spent decades fine-tuning what this principle means in the context of traffic stops. They have scrupled over, for just a few examples, whether the officer may require drivers to exit their vehicles,⁹ or make passengers exit a vehicle,¹⁰ or request permission to perform a pat-down search,¹¹ or ask questions unrelated to the traffic stop,¹² or conduct a canine sniff,¹³ or extend the stop based on discoveries made while reasonable suspicion exists.¹⁴ We went through this very exercise just last term, when we said:

[W]e draw the line between traffic stops of proper duration and those that extend into unconstitutional territory according to functional considerations. . . . Generally speaking, an officer is on the proper side of the line so long as the incidents necessary to carry out the purpose of the traffic stop have not been completed, and the officer has not unnecessarily delayed the performance of those incidents. . . . He steps across that line (again speaking generally) when he maintains the seizure

⁹ Mimms, 434 U.S. 106.

¹⁰ Wilson, 519 U.S. 408 (1997).

¹¹ Arizona v. Johnson, 555 U.S. 323 (2009).

¹² Id.

¹³ Rodriguez, 135 S. Ct. 1609; Caballes, 543 U.S. 405.

¹⁴ State v. Betow, 226 Wis. 2d 90, 593 N.W.2d 499 (Ct. App. 1999).

after he has completed all the necessary functions attendant on the traffic stop.

State v. Floyd, 2017 WI 78, ¶22, 377 Wis. 2d 394, 898 N.W.2d 560 (internal citations omitted; emphasis added). In all of this, the courts microscopically examined the purpose of the stop so that they could identify the point at which it must end.

¶70 Identifying the end point of the second mission requires no such fastidiousness. This mission is not based on "reasonable, objective grounds" to believe legal mischief is afoot. Until today, those grounds had always been the constitutional anchor to which we tethered the exercise of an officer's power during a traffic stop. And it is the anchor we now discard. This mission has no textual link to the Fourth Amendment, so our new "usual inquiries" jurisprudence sets us at odds with Royer (and the rest of the Fourth Amendment "seizure" canon): The police may detain a person without "reasonable, objective grounds" for doing so.

¶71 This frees traffic stops from constitutionally-defined limitations on at least two dimensions—length and content. In the pre-Smith world, the duration of the stop was subject to an externally imposed limitation—it could last no longer than necessary to investigate the officer's reasonable suspicion of wrongdoing. The second mission has no such limitation. So how long may it last? Well, we said "the 'ordinary inquiries,' which are related in scope to the purpose of a traffic stop, must be executed within the time it should have reasonably taken to complete them." Majority op., ¶2. In other words, the inquiries must be executed in the time it takes to execute them.

We also said that Rodriguez "signaled that 'ordinary inquiries' remain reasonable for the duration of an otherwise lawful stop." Majority op., ¶19.¹⁵ Which is a different way of saying the same thing. One of the problems with defining an activity's lawful boundary in terms of how long the activity lasts is that it is not possible to cross the boundary. Ever. That's the "limit" we set today on the second part of our brand new dual mission.

¶72. The reason we have traditionally required a constitutional anchor point is so that we may have a boundary that is not self-referential. That is, we tie the duration of the traffic stop to its purpose, and then we tie the purpose to the reasonable suspicion that inspired the stop, and then we tie the reasonable suspicion to the Fourth Amendment's text by observing that it prevents unreasonable seizures. Thus, the temporal aspect of the seizure had a constitutional anchor and limit that was not self-referential. That's part of what we lose today. Because the usual inquiries no longer require the existence of any reasonable suspicion of wrongdoing, there is no

¹⁵ The meaning of this statement is not entirely clear. On its face, its reference to an "otherwise lawful stop" seems to undermine (in the space of three words) the entire rationale of the opinion. The only "otherwise" about the lawful duration of the traffic stop was the existence of reasonable suspicion, which everyone acknowledges ran out before the officer engaged in the usual inquiries. That would mean the inquiries in this case were extra-constitutional. The other potential reading of the statement makes it appear we are defining the lawful duration of the stop in terms of how long it takes to conduct the inquiries. That doesn't help at all. One can't measure something by reference to itself. If someone asks after the height of our Capitol and we say it is one Capitol high, we have been perfectly accurate while conveying exactly no information.

link between them and the Fourth Amendment. So they may last as long as they last. We may eventually encounter a case in which the amount of time the officer took to make the ordinary inquiries will make us uncomfortable. But when we try to explain why the seizure lasted too long, we'll find that we have put our constitutional measuring stick beyond our reach. It is not immediately apparent what will take its place.

¶73 The same is true with respect to the contents of the "usual inquiries." These aren't spelled out in the Constitution, and we've not given much attention to their content because an officer may question drivers even on unrelated subjects so long as they do not extend the traffic stop. See Rodriguez, 135 S. Ct. at 1614-15. The Supreme Court explained that the usual inquiries are justifiable "incidents" of a traffic stop because they "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." Id. at 1615. As incidents, there was an external limitation on how far the police could go in "enforc[ing] the traffic code" during a traffic stop, to wit, the amount of time within which there was reasonable suspicion of wrongdoing.

¶74 Because we have elevated the usual inquiries beyond the status of incidents, however, there is no longer any external limitation on how far they can go. If demanding presentation of a driver's license during a traffic stop is constitutionally permissible because it "serves the same objective as enforcement of the traffic code," then it must

certainly be true that ascertaining compliance with the actual traffic code can be no less constitutional.

¶75 Our opinion teaches that the traffic stop does not end until inquiries related to the safe and responsible operation of the vehicle have been conducted. Enterprising officers may teach us, in turn, that there is a whole lot more to the safe and responsible operation of a vehicle than a driver's license and proof of registration and insurance. See, e.g., Wis. Stat. § 347.10(2) (describing the required performance of headlights); Wis. Stat. § 347.13 (describing the required performance of taillights); Wis. Stat. § 347.39(2) (describing required exhaust system performance and safety requirements); Wis. Stat. § 347.36(1) (describing required brake system performance); Wis. Stat. § 347.38(1) (describing the horn's required performance); Wis. Stat. § 347.40 (describing the required performance of rear-view mirrors). Each of these traffic-code provisions is at least as closely related to the safe and responsible operation of a vehicle as possession of a driver's license.

¶76 Perhaps the court will say that inquiring into these aspects of the safe and responsible operation of a vehicle is not part of what we call "usual." Which would be both true and irrelevant. The "usual inquiries" are usual not because the Constitution says they are, but because the judiciary says they are. The only limitation any court has ever placed on them is that they must be related to the safe and responsible operation of vehicles, and that they be incidents to the traffic stop. We've removed the latter limitation, so we are free to give the

"usual" label to as many inquiries as we wish, so long as they comply with the "safe and responsible operation" boundary.

¶77 The court says this should present no worries because the usual inquiries are subject to the constraint of "constitutional reasonableness." Majority op., ¶32 n.18. I had thought this type of reasonableness consisted of "reasonable" suspicion of wrongdoing. Our opinion today says that's wrong (or at least incomplete), so it would have been helpful if we had described the parameters of this constraint and identified its reference point in the Constitution. The police and our courts will need this guidance.

B

¶78 Authorizing a police officer to seize an individual when there is no reasonable suspicion of wrongdoing is enough to send a tremor through the foundation of the Fourth Amendment. If the United States Supreme Court had explicitly commanded such a result, we would be justified in questioning whether the Fourth Amendment's terms really are congruent with Article I section 11 of the Wisconsin Constitution.¹⁶ But we aren't responding to an explicit command here—we're reading a "signal."

¹⁶ "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Wis. Const. art. I, § 11.

¶79 Our opinion carefully avoids an independent analysis of whether Rodriguez is truly responsible for this seismic event. Instead, we focus on environmental factors at the time of the Court's decision: "Before applying Rodriguez to the particular circumstances in Smith's case, we first examine the conditions surrounding the Supreme Court's holding in Rodriguez." Majority op., ¶16. One of the conditions was the Supreme Court's treatment of an Illinois Supreme Court case involving the same issue we are addressing. See majority op., ¶¶16-19; see also People v. Cummings, 6 N.E.3d 725 (Ill. 2014), vacated, 135 S. Ct. 1892 (2015). We concluded that "[w]hen the Supreme Court vacated the judgment in Cummings I and remanded the case to the Illinois Supreme Court for further consideration in light of Rodriguez it signaled that 'ordinary inquiries' remain reasonable for the duration of an otherwise lawful stop." Majority op., ¶19.¹⁷ And then we adopted the Cummings II analysis of Rodriguez as our own. Id. ("The Illinois Supreme Court's interpretation of Rodriguez in Cummings II is correct.").

¶80 Armed with the Rodriguez "signal" and Cummings II, we decided the merits of this case. That puts a premium on the incisiveness of the Cummings II opinion. But it appears the Illinois Supreme Court also relied on signaling. In relevant part, the court said:

¹⁷ This statement is substantively problematic apart from the importance it attaches to a Supreme Court "signal." See supra note 15.

The seizure's mission consists of the purpose of the stop—in Rodriguez, traffic enforcement—and "related safety concerns." Those related safety concerns include "'ordinary inquiries incident to [the traffic] stop,'" and typically "involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance."

People v. Cummings, 46 N.E.3d 248, 251 (Ill. 2016) (citations omitted). The court concluded that the traffic stop may continue even without the existence of reasonable suspicion of wrongdoing because "[t]he interest in officer safety permits a driver's license request of a driver lawfully stopped." Id. at 253.

¶81 The Cummings II analysis is an unabashed bootstrap. Between Officer Doe and Mrs. Brown, it would sound something like this:

"Why are you continuing my seizure?" Mrs. Brown asked.

"To engage in the usual inquiries," replied Officer Doe.

"But why do you need to engage in the usual inquiries?" persisted Mrs. Brown.

"To ensure my safety," Officer Doe patiently explained.

"Why is your safety an issue?"

"Because I'm continuing your seizure, of course," concluded Officer Doe.

¶82 Is it really necessary to point out that concerns over the officer's safety would vanish if he ended the seizure? Or that ending the seizure would make the usual inquiries moot?

¶83 So, based on nothing more than a Supreme Court signal and the Illinois Supreme Court's interpretation of that signal,

we decided that the Fourth Amendment permits the seizure of an individual without reasonable suspicion of wrongdoing. That's an awfully momentous decision to base on a signal.

III

¶84 We ask, semi-rhetorically: "But in these particular circumstances, does the Fourth Amendment require a police officer to freeze, do an about-face, and walk away?" Majority op., ¶15. The answer is definitively "no." But not for the reasons we gave, and certainly not with the same consequences.

¶85 The real reason the answer is "no" is because the officer deprived Mr. Smith of his liberty and had no continuing justification for withholding that liberty from him. Once seized by a police officer during a traffic stop, a driver may not leave until the traffic stop is finished. See Wis. Stat. § 346.04(2t) ("No operator of a vehicle, after having received a visible or audible signal to stop his or her vehicle from a traffic officer or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety reasonably permits."); see also, Arizona v. Johnson, 555 U.S. 323, 333 (2009) ("Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave."). So, in these circumstances, the officer's clear, unequivocal, mandatory duty was to approach Mr. Smith and inform him he was free to

leave.¹⁸ Of course, if the officer develops a reasonable suspicion of wrongdoing during this brief interaction, he may proceed with the seizure just as if the reasonable suspicion had never lapsed.

¶86 If our focus is on whether it was a good thing to catch Mr. Smith, then this is a galling result, given what we know about his state of inebriation when Officer Gonzalez seized him. But the Constitution is not a Dorian Gray-like bargain in which we accept the beauty of apprehending Mr. Smith in exchange for the ugliness of Mrs. Brown's unreasonable seizure. The Constitution's instruction on this question is categorical: A person may not be "detained even momentarily without reasonable, objective grounds for doing so." And because it is categorical,

¹⁸ The court says my analysis would not allow the officer to excuse Mr. Smith because I eschew "any further contact with the driver . . . past the moment reasonable suspicion dissipates." Majority op., ¶15 n.12. I don't think that is so. Every traffic stop must eventually end, and it ends when the officer tells the motorist he is free to go. Johnson, 555 U.S. at 333. The duty to release the motorist stems from the constitutional mandate that a person "may not be detained even momentarily without reasonable, objective grounds for doing so" Florida v. Royer, 460 U.S. 491, 498 (1983). Actualizing that mandate requires the officer to approach the motorist to tell him the seizure is over. Requiring production of a driver's license, and proof of registration and insurance, however, does nothing to further that task.

it applies even when it means we don't catch Mr. Smith and his like.¹⁹

¶87 It is important, essential even, to consider how our decision impacts Mrs. Brown. Neither she nor anyone like her will ever come before this court, for she has done nothing wrong and, consequently, will never be party to a case we can review. But we have, nonetheless, decided how she may be treated. So Mrs. Brown may spend an evening fielding calls from irate parents asking why their children were lined up along the roadside while a narcotics-detection dog searched the minivan. After the last call, perhaps she will pull out her pocket Constitution and puzzle over why the promise of freedom from unreasonable seizures means she can be seized for no reason at all. Because I can't explain that to her, I respectfully dissent.

¶88 I am authorized to state that Justices SHIRLEY S. ABRAHAMSON and ANN WALSH BRADLEY join this dissent.

¹⁹ To illustrate why my analysis is untenable, the court proposes an alternate scenario in which the apparently innocent minivan driver is actually a sex trafficker. Majority op., ¶32 n.18. Conducting the usual inquiries in those circumstances, it says, would have revealed there was criminal behavior afoot. True enough. But doesn't that just prove my point? The court's scenario could be read as favoring suspicion-free police investigations because of the results they might produce. But we don't measure the constitutionality of a search in terms of its effectiveness in revealing hidden malefaction. According to Royer, we measure it in terms of reasonable suspicion of wrongdoing. If the investigation is not necessary to address the purpose of the stop, it may last only as long as there is reasonable suspicion. Johnson, 555 U.S. at 333. Suspicion-free investigations like the one the court described might be very productive, but that doesn't make them constitutional.

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP756-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2014CF667

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FREDERICK S. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STEPHEN E. EHLKE, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Fredrick Smith appeals a judgment of conviction. We conclude that the State has failed to provide a meaningful legal response to Smith's argument that his suppression motion should have been granted.

Therefore, we vacate the judgment of conviction and order the circuit court to allow Smith to withdraw his plea and to grant the suppression motion.

¶2 Smith pled guilty to and was convicted of one count of operating while intoxicated. He appeals the denial of his suppression motion under WIS. STAT. § 971.31(10) (2013-14).¹

¶3 After an evidentiary hearing, the circuit court found that the officer pulled over the car Smith was driving because a check showed that the driver's license of the vehicle owner was suspended. However, on approaching the vehicle, the officer noted that Smith did not appear to be the same gender as the owner. The officer continued to approach the car. The officer asked the driver to open the window, and then the door, but the driver said they were broken. The officer then went around to the passenger side and, according to the circuit court finding, opened that door. The officer then observed signs of intoxication.

¶4 Both parties agree that reasonable suspicion dissipated when the officer was first able to see Smith from five or ten feet away and conclude that he was not the owner. The disputed questions revolve around what the officer was permitted to do after that.

¶5 Smith first argues that the officer improperly extended the duration of the seizure after reasonable suspicion dissipated. For purposes of this order, we assume, without deciding, that the officer was permitted to continue the stop, that

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

is, continue the seizure, for the purpose of asking for the driver's identification and explaining why the officer initiated the stop.

¶6 Smith's second argument is that the officer was not permitted to open the passenger door without consent and without probable cause. Smith argues that the investigative methods used during a seizure must be, quoting case law, "the least intrusive means reasonably available to verify or dispel the officer's suspicion." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Here, Smith argues that opening the door did not comply with that requirement.

¶7 Smith separately argues that by opening the door the officer was conducting a search, again without consent or probable cause or any other exception to the warrant requirement. He argues that the officer's perceptions after the opening of the door should be suppressed as fruit of an illegal search.

¶8 The State's response to these arguments is cursory. The State does not address the two theories separately. The State does not place its argument in any specific legal framework, and does not cite any legal authority. The State does not dispute that opening the door was a warrantless search and does not argue that any specific exception to the warrant requirement justified a search. The State's argument is only that if the *driver's side* window and door were operational, Smith would have opened those, and the signs of intoxication would have been detected by the officer that way, leading to the same result as when it was the officer who opened the passenger door. Moreover, the logical extension of the State's theory seems to be that, if Smith had declined to open an operational driver's side window or door, the officer would have been authorized to open the door from the outside without consent.

¶9 Regardless, in this case the driver's door and window were *not* operational, as far as the officer knew. The State does not explain why we should analyze the case by considering what might have happened if the facts were different. The State's response appears to imply that the rule is, or should be, as follows:

When:

- (1) an officer initiates a seizure based on reasonable suspicion,
- (2) that suspicion dissipates, and
- (3) the officer properly extends the seizure,

then the officer is permitted, without consent, to take an intrusive action, including an action amounting to a search, if the officer's action produces a result that the officer was permitted to ask the driver to create. However, the State does not cite any direct legal authority or authority-based analysis supporting such a rule.

¶10 Furthermore, if reasonableness is the legal test, it is not obvious that such a rule would be reasonable in all cases. It is normally more reasonable to ask before taking intrusive action. For example, even though an officer conducting a traffic stop may require a driver to exit the vehicle, *Maryland v. Wilson*, 519 U.S. 408, 412 (1997), we question whether it would be held reasonable for an officer, without first asking the driver to exit, to open the car door and physically pull the driver out. While that example contains an element of physical force not present in our current case, the example is sufficient to show that the State's focus on the ultimate physical outcome appears flawed. So far as we are aware, the manner of achieving a result is part of the general reasonableness test.

¶11 Put simply, with respect to the passenger side door, the officer here acted without even asking for cooperation first. We are not presented here with the scenario in which an officer—properly approaching a driver, after reasonable suspicion had dissipated, to explain or request identification—asks a driver to open an operational driver’s side window and the driver actively or passively declines to cooperate. Whether, in that scenario, the officer would be authorized to open the driver’s side door without consent is, so far as we know, an open question. And, notably, we are one step removed from that scenario. Here, the officer did not even ask the driver to open the passenger side window or door, he just opened it. To repeat, if there is authority for this intrusive action, the State does not provide it.

¶12 We stress that we have not reached an opinion on the topic. We are not suggesting that, merely because it is often *more* reasonable for an officer to start by asking, this means it is always constitutionally *unreasonable* for an officer to act without asking first. Rather, the situation here is that Smith has presented a cogent legal argument with authority explaining that the officer’s action violates the “least intrusive means” rule of *Royer* and that the action, revealing as it did the odor in the vehicle, amounts to a non-consensual search. In the face of this, the State has not even attempted to offer a legally developed explanation as to why the officer’s intrusive action was permitted. Therefore, we conclude that Smith’s argument has gone without a meaningful rebuttal, and we reverse on that basis. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (appellant’s argument not refuted is conceded).

¶13 The State does not argue that the error was harmless because Smith would still have pled guilty even if the evidence had been suppressed. *See State v. Semrau*, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376. Therefore, we

do not address that issue. After remittitur, the circuit court shall vacate the judgment of conviction, allow Smith to withdraw his plea, and grant the suppression motion.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

State of Wisconsin vs. Frederick S Smith

Judgment of ConvictionSentence to Wisconsin State
Prisons and Extended
Supervision

Date of Birth: 12-27-1983

Case No. 2014CF000667

FILED

12-09-2014

CIRCUIT COURT

DANE COUNTY, WI

List Aliases: AKA Fredrick Smith

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	[939.62(1)(b) Repeater] OWI (7th)	346.63(1)(a)	Guilty	Felony G	04-06-2014		12-08-2014

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	12-08-2014	State Prison w/ Ext. Supervision 6 YR		Department of Corrections	Commencing forthwith. Defendant is eligible for the Challenge Incarceration Program. Defendant is eligible for the Substance Abuse Program.

Total Bifurcated Sentence Time

Confinement Period					Extended Supervision			Total Length of Sentence		
Ct.	Years	Months	Days	Comments	Years	Months	Days	Years	Months	Days
1	3	0	0		3	0	0	6	0	0

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	12-08-2014	DOT License Revoked	36 MO		Commencing forthwith.
1	12-08-2014	Ignition interlock	36 MO		IID restriction effective upon licensure for 36 mo.
1	12-08-2014	Alcohol assessment			

State of Wisconsin vs. Frederick S Smith

Judgment of ConvictionSentence to Wisconsin State
Prisons and Extended
Supervision
Case No. 2014CF000667FILED
12-09-2014
CIRCUIT COURT
DANE COUNTY, WI

Date of Birth: 12-27-1983

Conditions of Extended Supervision:**Obligations:** (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
451.00	631.00			63.00	92.00		250.00

Ct.	Condition	Agency/Program	Comments
1	Fine		\$250 DNA surcharge remitted. \$1204 to be collected by the Dept of Corrections. Court financial obligations shall be paid at the rate of 25% of the prison wages and work release funds. Restitution shall be paid pursuant to separate court order. The balance remaining at release from prison be paid as a condition of extended supervision or parole at a rate determined by the supervising agent.
1	Alcohol treatment		AODA and treatment as recommended.
1	Drug Treatment		AODA and treatment as recommended.
1	Prohibitions		Do not drive a motor vehicle without valid DL and approval of agent.
1	Other		Random UA & BA testing at discretion of agent. Defendant shall complete a risk and needs assessment and comply with care plan goals related to prioritized need areas identified. Defendant advised of requirement to provide DNA sample. Any other conditions DOC, Probation/Parole Department may impose.
1	Costs		\$33 blood draw cost to be collected by the Dept of Corrections.

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:The Defendant is ☒ is not ☐ eligible for the Challenge Incarceration Program.The Defendant is ☒ is not ☐ eligible for the Substance Abuse Program.**IT IS ADJUDGED** that 246 days sentence credit are due pursuant to §973.155, Wisconsin Statutes**IT IS ORDERED** that the Sheriff shall deliver the defendant into the custody of the Department.**BY THE COURT:****Distribution:**Stephen E Ehlke, Judge
Jordan Lippert, District Attorney
John E Tradewell, Defense AttorneyElectronically signed by Dawn Willison
Circuit Court Judge/Clerk/Deputy ClerkDecember 9, 2014
Date

DANE COUNTY

Defendant.

ANN M. ALBERT, RMR, CRR
Court Reporter

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P R O C E E D I N G S

THE COURT: All right. We'll go on the record in the case of State of Wisconsin versus Frederick S. Smith, 14 CF 667. May I have the appearances, please.

MS. WETJEN: State appears by Chelsea Wetjen.

MR. TRADEWELL: Frederick Smith with John Tradewell.

THE COURT: And we're here for an oral ruling on the defendant's motion to suppress evidence. We previously had an evidentiary hearing at which Madison Police Sergeant Bernard Gonzalez testified, and Mr. Smith also presented some testimony.

The facts in this case are essentially undisputed. Both the State's version of the facts in its brief and the defendant's statement of facts in its brief are basically identical. The only difference is, and it's not that the parties construe them differently, but there was some difference in the version of the Madison police officer and Mr. Smith in terms of who reached to open the door or who put their hand on the door first or whether they opened the door, you know, at the same time. But basically, the facts are undisputed. So for the record, I will adopt as the finding of the facts here the defendant's version of the statement of facts. It really is not

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1 much different at all, if at all, for the State's
2 version. So for the record, I adopt the defendant's
3 version of the facts set forth in its brief at pages
4 1, 2, and half of page 3. I won't read them into the
5 record, but I think they're very clear.

6 The first question is the original stop of the
7 vehicle. And everyone agrees basically that there was
8 a sufficient reason to at the beginning stop the
9 vehicle once Sergeant Gonzalez ran the license plate
10 and determined the registered owner's license was
11 suspended. At that point, Sergeant Gonzalez did not
12 know who was driving the vehicle. He could not see
13 into the vehicle. He had made some observations which
14 raised his suspicion for the reasons he testified on
15 the record, and then he ran the plates and it came
16 back that the person who owned the vehicle, the
17 registered owner, that person's license was suspended.
18 So he then began to follow the vehicle and stopped the
19 vehicle.

20 Under the Newer case, N-e-w-e-r, at 306 Wis.2d
21 193 and some of the other cases cited, it's clear that
22 they stand for the proposition that if the officer
23 learns of facts prior to stopping the vehicle that it
24 is in fact not the owner of the car, for example,
25 because the gender is wrong or the age is decades

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1 apart, then reasonable suspicion of criminal activity
2 dissipates and the officer would not be justified in
3 stopping the vehicle.

4 But as I noted here, everyone agrees that in
5 terms of the original stop, the officer hadn't come
6 across facts prior to stopping the vehicle. So
7 Sergeant Gonzalez was justified in stopping the
8 vehicle.

9 Once Sergeant Gonzalez stopped the vehicle, he
10 got out of the vehicle and began to walk over to the
11 vehicle. While walking over to the vehicle, he
12 observed that Mr. Smith was driving the vehicle and it
13 was not a woman who was driving. And so at that point
14 he would have known that it wasn't the registered
15 owner.

16 It is the defense position at that point that
17 the stop had to end and it was unreasonable to go
18 further. There's more later on to the defense
19 position, but that's essentially the defense position.

20 Relying on language from the Newer case, the
21 defendant claims it was unreasonable to continue with
22 the investigation at the point that Sergeant Gonzalez
23 saw that it was not the registered owner. I've read
24 the Newer case several times, and in my view the
25 language in Newer involves the question of whether

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1 there was reasonable suspicion to stop the vehicle.

2 In other words, the information learned from the
3 officer was did anything dissipate that original
4 belief that the registered owner was driving. And in
5 that case, if there was something that would raise a
6 concern about that, then the officer wouldn't be
7 justified in stopping the vehicle.

8 So, for example, in this case, if Mr. Smith's
9 car had been turning left at an intersection and
10 Sergeant Gonzalez had seen right then that it was not
11 a woman driving, then under Newer, Sergeant Gonzalez,
12 absent anything else, would not have been justified in
13 stopping the vehicle.

14 But Newer does not involve the question of what
15 the officer may do after they stop the vehicle. That
16 is discussed more thoroughly in the Williams case,
17 State versus Williams, 258 Wis.2d 395. The defendant
18 also relies extensively on the United States Supreme
19 Court case of Delaware versus Prouse, P-r-o-u-s-e, at
20 440 U.S. 648.

21 I find -- wait. I conclude that that case does
22 not apply here because it involved a different legal
23 question. Justice White succinctly stated the legal
24 question in the very first paragraph of the decision
25 when he wrote, "The question is whether it is an

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1 unreasonable seizure under the Fourth and Fourteenth
2 Amendments to stop an automobile being driven on a
3 public highway for the purpose of checking the
4 driver's license of the operator and the registration
5 of the car where there is neither probable cause to
6 believe nor reasonable suspicion that the car is being
7 driven contrary to the laws governing the operation of
8 motor vehicles or that either the car or any of the
9 its occupants is subject to seizure or detention in
10 connection with the violation of any other applicable
11 law." So that case involves a situation where there's
12 neither probable cause nor reasonable suspicion.

13 But as discussed just a few moments ago, in this
14 case there was reasonable suspicion to stop the
15 vehicle. So I find that that Prouse case does not
16 apply.

17 In Williams, our Court of Appeals held that once
18 there is reasonable suspicion to stop the vehicle,
19 then the officer can go further and ask for
20 identification and the name of the person who they had
21 stopped. The court says at page 407, in part, "In any
22 event, we conclude that even if Officer Garcia
23 realized that the driver was not Phillips, before she
24 asked his name and requested identification, it was
25 reasonable for her to do this."

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~~10000~~

1 And the court goes on the next page at page 408
2 discussing the Wisconsin Statutes which give law
3 enforcement officers the authority to require a driver
4 of a motor vehicle to display his or her license on
5 demand. The court discusses that and eventually
6 indicates that the public interest in requesting the
7 license and running the check does not outweigh the
8 very minimal intrusion it imposes on the driving.

9 So in Williams, the court, I think, answered the
10 question that's presented here, and that is what the
11 officer can do after they've stopped the car based on
12 reasonable suspicion.

13 Now, the defense argues that it was unreasonable
14 for Sergeant Gonzalez to go around the vehicle to the
15 passenger side of the vehicle and to open the door to
16 begin discussions with Mr. Smith and that that
17 extension of the stop was unreasonable. I disagree
18 based on the facts of this case. Sergeant Gonzalez
19 testified that was difficult to speak to Mr. Smith.
20 The door was not functioning -- the window was not
21 functioning properly. Sergeant Gonzalez is a very
22 experienced officer. I forget the number of years
23 he's been working offhand, but it was quite a few
24 years, so he's not a rookie cop or anything. And he
25 testified that it was easier to communicate and

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~~End~~

1 discuss things with Mr. Smith.

2 So whether Sergeant Gonzalez first started to
3 open the door or whether they opened it
4 simultaneously, either way I conclude that under the
5 Fourth Amendment reasonableness standards that it was
6 a reasonable thing to do, Sergeant Gonzalez was within
7 his rights to seek an identification of Mr. Smith and
8 to look at his license, and that what he did in
9 reaction to the situation with the door and the window
10 was reasonable.

11 So for those reasons, the stop was reasonable
12 and the request for the license was reasonable. The
13 motion to suppress is denied for those reasons.

14 Mr. Tradewell, if you need an order to that
15 effect, of course, for any appeal rights or what have
16 you, I'd certainly sign that, just if you would please
17 simply indicate for the reasons indicated on the
18 record, the motion to suppress is denied.

19 MR. TRADEWELL: Okay. Will do, Judge.

20 Just to clarify the one finding, the -- I
21 appreciate that you adopted the statement of facts as
22 stated in the defense brief. However, I guess I'd ask
23 you to make a finding that Sergeant Gonzalez was the
24 one that opened the door. And I think that in light
25 of your ruling that if that is the case, it's still a

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1 reasonable exercise under the Fourth Amendment, and
2 that would just clarify the --

3 THE COURT: There was a difference of
4 recollection on that point. And Sergeant Gonzalez
5 certainly was persuasive on that. Mr. Smith testified
6 about that. You know, I didn't find one of them or
7 the other to be particularly more persuasive on that
8 point. On the one hand, Mr. Smith was drinking and
9 has an interest in this. On the other hand, the
10 sergeant has many, many traffic stops he has, and it's
11 hard to remember all of them exactly.

12 So for purposes of that, even if -- and I will
13 find that -- the sergeant went to open the door and
14 began to open the door, it was reasonable because
15 Mr. Smith is on the driver's side and, you know, at
16 best he would have to have reached across to try to
17 help to open that door.

18 So what I'm saying is that even if Sergeant
19 Gonzalez was the first to, you know, touch that door
20 and start to open it, that was a reasonable thing for
21 him to do because he was trying to simply better
22 communicate with Mr. Smith and see his license or have
23 that license presented to him.

24 MR. TRADEWELL: Thank you.

25 THE COURT: Okay. Then with that, we'll be

~~10020~~ A-134

1 adjourned. Thank you all.

2 MS. WETJEN: Thank you.

3

4 STATE OF WISCONSIN)
5) ss:
6 COUNTY OF DANE)

7

8 I, ANN M. ALBERT, Court Reporter, do hereby
9 certify that I reported in stenographic machine
10 shorthand the hearing held in the above-entitled
11 matter before the Honorable STEPHEN E. EHLKE, on the
12 6th day of October, 2014, and that the foregoing is an
13 accurate and complete transcript of my shorthand notes
14 and the whole thereof.

15 Dated this 26th day of January, 2015.

16

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Ann M Albert
Ann M. Albert
Court Reporter

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
 Branch 15

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 2014CF000667

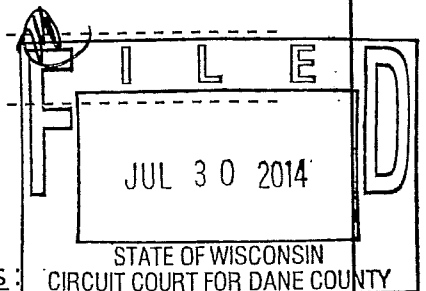
FREDERICK S. SMITH,

Defendant.

ORIGINAL

MOTION HEARING

HONORABLE STEPHEN EHLKE
Judge Presiding



Appearances: STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY

Mr. Jordan Lippert, Special
Prosecutor for Dane County,
appearing for the
State of Wisconsin,
Plaintiff;

Mr. John Tradewell, Attorney
at Law, appearing for the
Defendant;

Mr. Frederick Smith,
Defendant, appearing in
person.

DATE OF PROCEEDINGS:
July 25, 2014

Karen L. Howell
Court Reporter

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I N D E X

<u>Witness</u>	<u>Page</u>
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E X H I B I T S

	<u>Offered</u>	<u>Received</u>
Exhibit No.		
No. 1 - Patrol DVD Of Stop.....	13	14

1 TRANSCRIPT OF PROCEEDINGS

2 THE COURT: State of Wisconsin versus
3 Frederick S. Smith, 14CF000667. May I have the
4 appearances, please.

5 MR. LIPPERT: The state appears by Special
6 Prosecutor Jordan Lippert.

7 MR. TRADEWELL: Frederick Smith is here with
8 John Tradewell.

9 THE COURT: And we're here on the defendant's
10 motion to suppress evidence, the motion previously having
11 been filed.

12 Mr. Tradewell supplemented his motion with a
13 letter dated July 25th of this year indicating he's
14 adding an argument about seizure of Mr. Smith in addition
15 to the stop, the basis for the stop and the extension of
16 the stop that had previously been put in his motion.

17 Have you received that, Mr. Lippert?

18 MR. LIPPERT: I have.

19 THE COURT: So my understanding is that we'll
20 be taking evidence from the officer here this afternoon.
21 Mr. Tradewell had requested an opportunity to brief this
22 matter. Is that still your wish, Mr. Tradewell?

23 MR. TRADEWELL: I believe so, unless the
24 evidence comes in in a way that I don't anticipate, and
25 one never knows, but yes, at this point that is what I

1 anticipate.

2 THE COURT: All right. So what I'll probably
3 do then is hear the evidence, take the evidence, receive
4 the evidence and then give each side a chance to brief
5 it, and then I'll review all that and I'll either issue a
6 written decision or an oral decision, most likely an oral
7 decision because it's just much more efficient for me to
8 do it that way.

9 MR. TRADEWELL: That's fine.

10 THE COURT: So with that said, Mr. Lippert, is
11 the state prepared to proceed?

12 MR. LIPPERT: Yes.

13 THE COURT: Then you may call your first
14 witness.

15 MR. LIPPERT: The state calls Bernard
16 Gonzalez.

17 THE COURT: Officer Gonzalez, if you will come
18 forward, you'll be sworn in, please.

19 (Witness is sworn.)

20 THE COURT: You may know this already,
21 Officer, but the chair doesn't move and the microphone
22 does.

23 BERNARD GONZALEZ,
24 being first duly sworn on oath to tell the
25 truth, the whole truth, and nothing but the

truth, testified as follows:

DIRECT EXAMINATION

BY MR. LIPPERT:

Q. Could we please just begin by you stating your name and then spelling your last name for the court reporter?

A. My name is Sergeant Bernie Gonzalez, or Bernard Gonzalez, rather. The last name is spelled G-O-N-Z-A-L-E-Z.

Q. What is your occupation?

A. I'm a sergeant with the City of Madison Police Department.

Q. How long have you been a police officer?

A. I have been a police officer for approximately 22 years; seven-and-a-half with the Milwaukee Police Department, and the remainder 15 years with the Madison Police Department.

Q. Okay. What is your general assignment or duties?

A. My general assignment is sergeant of patrol. I'm in uniform out on the street in a supervisory role.

Q. Okay. Were you on duty on April 6th of this year, 2014?

A. Yes.

Q. Were you on duty at approximately 10:45 p.m.?

A. Yes.

Q. What was the nature of your assignment at that time?

A. I was not on a particular assignment. I was on routine patrol at that time.

1 Q. Okay. Where were you located?

2 A. I was in the 2900-block of Worthington Avenue.

3 Q. Were you moving? Were you stationary?

4 A. I was parked.

5 Q. Okay. At approximately that time, 10:45 p.m., did
6 anything draw your attention?

7 A. As I was parked there, I noticed a red Oldsmobile drive
8 past me in the 2900-block and then stop in the middle of
9 the street in the 3000-block of Worthington Avenue, so
10 approximately a block ahead of me.

11 Q. Why did that draw your attention?

12 A. Well, I was parked in the neighborhood as a result of
13 some shots that were fired the previous evening at
14 Rosemary and Darbo. It was gang related. The
15 investigation had thus far shown that it was gang
16 related, and just due to the possibility of retaliation,
17 I was monitoring the neighborhood.

18 Q. Okay. So I believe that you testified that that vehicle
19 stopped how far in front of you?

20 A. I was in the 2900-block. It stopped in the 3000-block,
21 so it was a good block ahead of me.

22 Q. Okay. What happened when that vehicle stopped?

23 A. It sat there for several moments, and then I saw someone
24 get out of the passenger side of the vehicle and walk to
25 the apartment buildings. I was -- it was -- it drew my

1 attention because it did not pull to the curb. It
2 stopped in the middle of the street, so I wasn't sure
3 what the occupants may have been up to.

4 Q. Okay. And when you say "someone got out," could you --
5 how far away could you provide -- let me strike that.
6 Were you able to make a good -- could you describe that
7 person? How good was your observation?

8 A. Well, it was a block away. It was dark. The only thing
9 I could probably say is that I believed it was an adult,
10 but anything beyond that, no.

11 Q. Okay. So after that person got out, what happened?

12 A. The car then continued on Worthington Avenue towards
13 Marquette and toward East Washington Avenue. I then
14 drove and attempted to overtake the car and did so near
15 East Washington Avenue.

16 Q. And when you overtook the car, what happened?

17 A. I noted the license plate number. I checked that on my
18 computer, and the DOT computer database revealed that
19 vehicle was registered to a female by the name of Amber
20 Smith, and I then checked her name, and her operating
21 privileges were suspended at the time.

22 Q. And you were checking this in the computer in the car?

23 A. My squad computer, yes, sir.

24 Q. So this Amber Smith had a -- with a suspended license --
25 what did you do?

1 A. I followed the car. As I was retrieving data, computers
2 being what they are, sometimes they are quick, sometimes
3 they are not, but when I got that information, the
4 vehicle was already outbound on East Washington Avenue
5 turning left onto Melvin Court, and so right past Highway
6 30, and that's when I activated my emergency lights. The
7 vehicle then turned right into the parking lot of an
8 apartment building in the 3100-block of Ridgeway, I
9 believe.

10 Q. Prior to activating your emergency lights, could you see
11 the driver at all?

12 A. No.

13 Q. Could you tell -- when it first passed you, did you take
14 note of the driver or notice the driver?

15 A. Back on Worthington?

16 Q. Yes.

17 A. No. Like I said, when I saw the car, it had already
18 passed me, so I didn't see who was driving.

19 Q. Okay. And so what happened when you activated your
20 emergency lights? I think you testified that the vehicle
21 pulled into the -- right into a parking lot; is that
22 correct?

23 A. It turned right into a parking lot and then turned left
24 into a parking stall.

25 Q. So what are you doing throughout this time?

1 A. Well, I assumed that's where it was ultimately stopped,
2 and so I was following it until it came to a complete
3 stop, and that's when I got out and contacted the driver.

4 Q. Now, was it easy to contact the driver? Strike that. I
5 can see you are kind of confused. Could you tell me how
6 you contacted the driver?

7 A. I walked up to the driver's door as I would with any
8 traffic stop, and I could see that it was a male driver,
9 and he was shrugging his shoulders, and I asked him to
10 open the door and he said he couldn't, the -- it was
11 broke and the window would not roll down and the door
12 would not open, so he made it clear that he could not do
13 either.

14 Q. When you said "made it clear," how did he make it clear?

15 A. I could hear him talking.

16 Q. Okay.

17 A. I remember him saying, "It's broken."

18 Q. Okay. So then what happened?

19 A. So then I went around to the passenger side of the
20 vehicle and put my hand on the door. He leaned over, and
21 pretty much simultaneously we opened the door, and that's
22 when I was able to speak to him.

23 Q. Did you discuss that at all? Did he direct you there, or
24 how did you end up over on that side?

25 A. No. I went over to the passenger side on my own

1 volition.

2 Q. Okay. And so am I correct, were -- let me see if I got
3 this correct -- he leaned over from the driver's side to
4 the passenger's side of the vehicle?

5 A. Right.

6 Q. And on the latch on the inside of the door --

7 A. Right.

8 Q. -- operated the latch?

9 A. Yeah. He was helping me open the door. I put my hand on
10 the door. He reached over, did the latch mechanism, but
11 since he was leaning over, he could not physically push
12 the door open, so that's when I pushed it, so I said
13 simultaneously together we opened the door.

14 Q. Okay. So what happened once you opened that door?

15 A. I asked him if he knew why I stopped him, and he said,
16 "Yes, because of the light." I told him, "No, it wasn't
17 because of the light. It was because the vehicle was
18 registered to a suspended driver," and that's why I was
19 contacting him.

20 Q. And when you were talking to him, could you make any
21 physical observations about him?

22 A. Yeah. He was smoking a cigarette. The interior of the
23 car was filled with smoke. I also smelled a strong odor
24 of intoxicants. His eyes were red and bloodshot.

25 Q. At what point did you notice all those things?

1 A. As soon as I started talking to him. I noticed both
2 odors were pretty overpowering and his eyes were really
3 noticeable. I asked him if he had been drinking and he
4 said no, he hadn't had anything to drink, and I mentioned
5 his -- I could see his eyes were bloodshot, and he said
6 he had an eye condition in his left eye, but both eyes
7 were the same.

8 Q. Now, that person, is that person in the courtroom today?

9 A. Yes. He's seated at the defense table there in the all
10 blue.

11 MR. TRADEWELL: I will stipulate to I.D.
12 today.

13 THE COURT: So noted.

14 BY MR. LIPPERT:

15 Q. So then what kind of happens next in your interaction?

16 A. Well, I asked him if he -- again, I asked him if he had
17 been drinking. He said he hadn't. I asked him if he
18 could recite the alphabet without singing it, just
19 straight from A to Z. He tried three times, was unable
20 to do so, and that's when I subsequently asked him to
21 step out of the vehicle and then administered field
22 sobriety tests to him.

23 Q. And just as you asked him to do the alphabet, how was he
24 unable to do that?

25 MR. TRADEWELL: Just for the record, we are

1 not challenging probable cause from the field sobriety
2 test. This is a question of up to the point where the
3 officer, you know, opened the door or the door was
4 opened -- I mean, I think just to clarify things, if that
5 helps things.

6 THE COURT: It does. So I mean, I think what
7 Mr. Tradewell is saying is that once the door is opened
8 and then the initial observations are made by the
9 officer, it's the defense's position that there was a
10 seizure there that required something more, but beyond
11 that, if I understand what Mr. Tradewell is saying
12 correctly, there is no dispute that the field tests were
13 then performed and that those would provide a basis for
14 probable cause. Subsequently, it's just up to that point
15 is where the legal challenge is.

16 MR. TRADEWELL: Yes. That's right.

17 MR. LIPPERT: I certainly was not planning on
18 going through all of the field sobriety tests.

19 BY MR. LIPPERT:

20 Q. Were you able to identify this person by means other than
21 just visually?

22 A. He had a photo I.D., Frederick Smith.

23 MR. LIPPERT: I guess I don't have any further
24 questions at this point.

25 THE COURT: Cross exam?

1 MR. TRADEWELL: Are you going to play the --

2 MR. LIPPERT: Oh, yes.

3 MR. TRADEWELL: I don't have any objection
4 to --

5 THE COURT: So Exhibit 1 was previously marked
6 off the record as a CD. I assume it is of the squad
7 video; is that right?

8 MR. LIPPERT: Yes.

9 BY MR. LIPPERT:

10 Q. Was your squad video equipped with video recording
11 equipment?

12 A. Yes, it was.

13 Q. And do you know if your equipment picked up this traffic
14 stop?

15 A. It did video, not audio.

16 Q. Okay. If I can direct your attention to the screen, we
17 have a DVD that has been previously marked as Exhibit 1,
18 and we are going to just briefly show you the first
19 couple frames. Is this the video of that incident?

20 A. Yes.

21 MR. LIPPERT: I would move Exhibit 1 into
22 evidence.

23 THE COURT: I think there is no objection for
24 this hearing at least.

25 MR. TRADEWELL: I have no objection.

1 THE COURT: Yes. Okay. It's received.

2 MR. LIPPERT: I'm playing it just from the
3 very beginning of the counter. Actually, the counter on
4 the DVD player is 003. I'm unable to read the counter in
5 the upper right-hand corner.

6 THE COURT: Can you see that, Officer? You
7 can get up if you would like.

8 THE WITNESS: All right.

9 THE COURT: That's fine. I'll leave that up
10 to you.

11 THE WITNESS: I can kind of see it.

12 MR. LIPPERT: Pressing play.

13 (Video is played.)

14 MR. TRADEWELL: That is clearer.

15 MR. LIPPERT: So I'm pressing pause at
16 32 seconds on the DVD's counter.

17 BY MR. LIPPERT:

18 Q. Officer Gonzalez, is it correct that the emergency lights
19 appear to have been turned on in your vehicle at this
20 point?

21 A. Yes.

22 Q. And this vehicle that's on the screen, is that the
23 vehicle we are talking about?

24 A. Yes.

25 MR. LIPPERT: Pressing play again at

1 32 seconds.

2 (Video is played.)

3 MR. LIPPERT: Now, pressing stop here at two
4 minutes and 20 seconds.

5 BY MR. LIPPERT:

6 Q. Sergeant Gonzalez, was that a true and accurate depiction
7 of the incident as you recall it?

8 A. Yes.

9 Q. Were you able to -- well, I guess no further questions.

10 THE COURT: Cross-exam?

11 CROSS-EXAMINATION

12 MR. TRADEWELL: I would like to push play from
13 the point this is stopped, and I would like to give it
14 just a few more seconds.

15 Pushing play, and according to what was on the
16 screen, that should resume at the point it stopped.

17 (Video is played.)

18 BY MR. TRADEWELL:

19 Q. Sergeant, at that point -- was the door opened at the
20 point I just stopped it? You can't see, can you? Let me
21 turn that on again. 10:26:45, are you in there yet?

22 A. From memory, I would say yes.

23 Q. Okay.

24 A. I can't see accurately, but from memory, there was not a
25 prolonged standing outside the closed door.

1 Q. Okay.

2 A. It was pretty contemporaneous in my memory.

3 Q. Okay. Now, when you first saw this red Oldsmobile, you
4 said he was stopped for a few moments or several moments.
5 Can you quantify that in seconds? And let me actually
6 clarify that. The period of time after you noticed that
7 the red Oldsmobile was stopped until the person got out
8 of the car.

9 A. That would probably be about -- I'd say probably 10 to
10 15 seconds it just sat in the road.

11 Q. And a person got out. It appeared to you to be an adult
12 got out?

13 A. Yes.

14 Q. Did they leave the vicinity of the car, or did they stand
15 there?

16 A. They left. They got out of the passenger side, and I
17 remember at that moment being very curious as to whether
18 -- my question in my mind was, Is this person going to
19 run or walk? I'm thinking, you know, in light of recent
20 events, that was going to be a telltale sign. The person
21 got out of the car and casually walked into the complex
22 there in the 3000-block of Worthington.

23 Q. And at some point the red Oldsmobile -- after the person
24 got out of the car, at some point that began to drive?

25 A. Correct, and it wasn't delayed. It left.

1 Q. So basically it appeared that they were -- that the red
2 Oldsmobile had stopped to discharge his passenger?
3 A. Yes.
4 Q. And the driver of the red Oldsmobile never got out?
5 A. Correct.
6 Q. The passenger got out of the passenger side?
7 A. Correct.
8 Q. There were tinted windows to the rear, correct?
9 A. Yes.
10 Q. Not to the front?
11 A. I don't remember tinted windows to the front.
12 Q. Okay. Meaning not the side front windows, nor the
13 windshield?
14 A. Correct.
15 Q. But yes, tinted on the side back windows and the rear
16 window?
17 A. Yes.
18 Q. So when you stopped this car, how far were you away from
19 the car when you realized it wasn't a woman driving?
20 A. Probably when I got out of my squad and began walking up
21 to the vehicle with my flashlight.
22 Q. Okay. And that would have been about how far?
23 A. Probably when I knew for sure it was a male?
24 Q. Yes.
25 A. Probably I'd say maybe five to ten feet.

1 Q. From the side of the car?

2 A. From the driver's door.

3 Q. Okay. And you didn't have any independent basis to
4 believe that the person who was actually driving the car
5 wasn't licensed at that point, correct?

6 A. Aside from the license plate, the registration?

7 Q. Right, right. I mean -- I'm sorry, at the point it
8 became clear to you that the gender of the driver was
9 male and not female. Well, first of all, that excluded
10 that person as the suspended registered owner of the car,
11 correct?

12 A. Yeah. I was pretty sure it wasn't Amber Smith.

13 Q. Right. And at that point you didn't have any reason to
14 believe that the gentleman behind the wheel was revoked
15 or suspended?

16 A. I did not know that, correct.

17 Q. And I think I may have almost pinned this down, but let
18 me just ask one more question to make sure. After you
19 activated the emergency lights and approached and were
20 about five or ten feet from the driver's door and
21 realized it was not a woman named Amber Smith or a woman
22 driving, that was the first time you really got a look at
23 the driver?

24 A. Yes.

25 Q. Okay. Now, did -- Mr. Smith responded to questions

1 through the closed door?

2 A. Yes. He told me the door was broken.

3 Q. Okay. Did you ask him any other questions that he didn't

4 respond to?

5 A. I don't recall if I did.

6 Q. Okay. So you were able to communicate with him?

7 A. Yes.

8 Q. You walked around to the other side of the door -- I'm

9 sorry, the other side of the car, correct?

10 A. Correct.

11 Q. You said at some point that he was helping you open the

12 door, and another time you said he couldn't really push

13 on the door. Is it the case that you reached for the

14 door and pulled it, but it was locked?

15 A. I put my hand on the door.

16 Q. Ah-ha.

17 A. He activated the latch and, like I testified,

18 simultaneously we opened the door.

19 Q. Okay. And so your hand would have been on the door

20 before he leaned over?

21 A. It could have been. I don't recall.

22 Q. Can you describe how he unlatched the latch? Did he

23 reach over and pull something up? Did he just work the

24 door handle?

25 A. He reached over and worked the door handle. I don't

1 recall exactly what kind of door handle it was.

2 Q. Do you know whether it was the sort of lock that -- it
3 looks like an older model Oldsmobile from the tape; is
4 that fair to say?

5 A. Yes.

6 Q. Is it the sort of one where you can flick up the
7 electronic locks from the driver's side?

8 A. I don't recall.

9 Q. Okay. Do you remember whether it was one of the types of
10 door locks where there was a knob on top of the sill
11 where you have to pull it up?

12 A. I don't recall.

13 Q. Okay. And you don't remember him actually doing
14 something like that?

15 A. No, I don't.

16 Q. Okay. And the -- all right. Now, you had -- Mr. Lippert
17 asked you at one point -- or right after you -- when you
18 were talking about having opened the door, and you said
19 that you immediately noticed smoke in the car, a strong
20 odor of intoxicants and that Mr. Smith's eyes were
21 bloodshot or glassy or something like that?

22 A. Yes.

23 Q. And Mr. Lippert asked you when you noticed that and you
24 said -- when you had contact or when you spoke to
25 Mr. Smith, that -- just to clarify that that was at the

1 time the door was opened; is that correct?

2 A. Yes, sir.

3 Q. Now, at the time you put your hand on the door, you
4 intended to go into the car, is that -- you intended to
5 open that door; is that fair?

6 A. I intended -- I assumed that -- up to this point
7 Mr. Smith was cooperative. He was explaining that the
8 door was broken, so I was assuming that he would be
9 opening the door. I did not reach the point where I had
10 to decide whether I was going to open it or not. I just
11 assumed he was -- since the driver's door did not open,
12 the passenger door would be opened. I assumed that's the
13 way he would get in and out of the car anyway, so when I
14 had my hand on the door, I hadn't really decided what I
15 was going to do had he not opened the door.

16 Q. Why did you need to have a door open in that car?

17 A. So I could speak to him more effectively.

18 Q. Did it appear that he couldn't hear what you were saying
19 to him through the closed driver's door?

20 A. Well, I could hear him, but, you know, it was not -- it
21 would be just like talking through glass, you know. If
22 you speak loud enough, yes, you could probably hear.
23 There would probably be -- I would probably have to
24 repeat everything just to, you know, make sure we
25 understood each other, so just for ease of communication.

1 Q. Up to that point, had you had to repeat yourself?

2 A. Pardon me?

3 Q. Up to the point where you walked around to the car, had
4 you had to repeat yourself?

5 A. I don't believe I did.

6 Q. Okay. And did he -- did you have trouble hearing what he
7 was saying?

8 A. I couldn't hear him as clearly as if he would have rolled
9 down the window or opened the door, but since the door --
10 both the window -- I was led to believe both the window
11 and the door was broken.

12 Q. But -- yeah, I do understand it would be easier to do
13 without a window in the way, but could you hear him?
14 Could you understand what he was saying to you?

15 A. From the driver's side?

16 Q. Yeah.

17 A. I understood when he told me the door was broken. I
18 understood that.

19 Q. Did it appear that there was anything that he was saying
20 that you couldn't understand?

21 A. Like I said, I didn't ask him too many other questions at
22 that point so -- with the broken door -- with the door
23 broken, I then proceeded just to the passenger side of
24 the car, so I didn't ask him any more questions through
25 the door, the closed driver's door.

1 Q. Why did you go around to the passenger side?

2 A. So I could speak to him more effectively, more clearly.

3 It's just the same reason why I would go initially, ask a
4 driver to roll down his window or her window. If they
5 can't, then, well, then can you open the door to talk to
6 them.

7 Q. You didn't ask him to crack his window -- his passenger
8 side window -- did you?

9 A. No, I did not.

10 Q. And you just reached for the door handle?

11 A. I just put my hand on the door handle, yeah.

12 Q. Now, at the moment that you put your hand on the door
13 handle, what would have happened if he would have backed
14 up and driven off? You would have stopped him, wouldn't
15 you?

16 A. I probably would have pursued him.

17 Q. Sergeant, have you had a chance to look at your report?

18 A. Yes, sir.

19 Q. Do you recall -- strike that. I was looking at the wrong
20 part.

21 MR. TRADEWELL: That's all. Thank you very
22 much.

23 THE COURT: Any redirect?

24 REDIRECT EXAMINATION

25 BY MR. LIPPERT:

1 Q. If the driver would have pulled out as you were on the
2 passenger side of the vehicle and driven away, why would
3 you have pursued him?

4 A. I would have pursued him. My suspicions, which may have
5 been at a certain level prior to that, would have now
6 been a lot higher. Had I pursued him at that point, per
7 our policy, we have to give the reason for the pursuit.
8 Based on those reasons, we determine whether or not to
9 proceed or terminate the pursuit based on the seriousness
10 of the offense.

11 At that point, had I pursued him, I would have
12 had to give a reason for the pursuit. The reason I would
13 have been giving would not have probably risen to the
14 level of, you know, a bank robber or anything like that
15 at that point, but I would have pursued him just because
16 of my suspicions being raised for obvious reasons, you
17 know.

18 You are stopped already, you know, in a
19 parking lot. For him to leave at this point would have
20 required not just simply driving off. It would have
21 required a backing maneuver, a serious attempt to get
22 away from the police, in my opinion.

23 BY MR. LIPPERT:

24 Q. Have you ever stopped a vehicle that initially stopped
25 and then once you tried to make contact, driven away?

1 A. Yes.

2 Q. And what do you do in circumstances like that?

3 A. We pursue the vehicle.

4 Q. You were asked some questions on cross-examination about
5 going into the vehicle. Could you describe what you mean
6 by going into the vehicle?

7 A. Opening the door or the door opening. I never physically
8 went into the vehicle.

9 Q. Have you ever made a passenger side approach on a stopped
10 vehicle?

11 A. Several times.

12 Q. And was this a typical passenger side approach?

13 A. It was not.

14 Q. What made it nontypical?

15 A. What do you mean?

16 Q. In what way wasn't it typical?

17 A. In what way was it not typical?

18 Q. Yes.

19 A. Most of the time on traffic stops the driver will roll
20 the window down. If the window can't roll down, then
21 they'll open the door.

22 Q. Let me ask you this. Did you ever ask Mr. Smith to open
23 the door, the passenger side door?

24 A. No, I did not.

25 Q. Did you ask him to open the driver's side door?

1 A. Yes. The window didn't roll down. I said, "Open the
2 door," and he said, "It's broken."

3 Q. So let me just see if we can just make this -- when you
4 first approached, did you ask him to roll down the
5 window? So you pulled into the parking spot. You have
6 gotten out of your vehicle. You can see him. What do
7 you say to him?

8 A. I walk up to the car, and I either motion to roll the
9 window down or motion to open the door, and at that point
10 he appeared to understand what my desires were right away
11 and told me the door was broken.

12 Q. And then did you exchange any other words when you walked
13 around the vehicle? When you got to the passenger side
14 of the vehicle, did you say anything before the door was
15 opened?

16 A. No. I put my hand on the door handle. He reached over,
17 and together we opened the door. That's when I started
18 talking to him.

19 MR. LIPPERT: Nothing further.

20 RECROSS-EXAMINATION

21 BY MR. TRADEWELL:

22 Q. Sir, if I'm understanding what you just testified to on
23 cross, tell me if I'm wrong in concluding that at the
24 point you stopped him, he was not free to leave, correct?

25 A. Correct.

1 Q. And, in fact, the reason your suspicions would have been
2 higher if he had driven away is because you think that
3 anyone in Mr. Smith's position at that point would know
4 that he wasn't free to leave, fair?

5 A. Correct.

6 Q. And also -- and the reason he -- anyone in his position
7 would not have felt he was free to leave was because of
8 the authority you were employing as a duly constituted
9 police officer making a traffic stop?

10 MR. LIPPERT: I guess at this point, Your
11 Honor, I'm going to object. These are more arguments
12 that we can make in briefs rather than an item we want
13 the officer to speculate about what a reasonably -- a
14 reasonable person would think.

15 MR. TRADEWELL: Well, I mean, I think it --

16 THE COURT: Well, I think it is a legal issue,
17 so for the record, you can answer, Officer. I think it
18 is more of a legal issue, but if you can answer --
19 obviously, it's correct that you should not speculate,
20 obviously, as to what another person is thinking, but
21 your squad lights were on at that point?

22 THE WITNESS: Yes, sir.

23 THE COURT: You were in uniform?

24 THE WITNESS: Yes, sir.

25 THE COURT: All right. Any further questions?

1 BY MR. TRADEWELL:

2 Q. So you would have expected him -- based on -- you have
3 been an officer for 22 years, correct?

4 A. Yes, sir.

5 Q. How much of that time have you engaged in patrol, routine
6 patrol?

7 A. All of it.

8 Q. And so you have made probably thousands of stops?

9 A. Yes, sir.

10 Q. And is it in your experience the case that people in a
11 situation for a traffic stop -- generally, the reason
12 that they don't drive away from you is they are yielding
13 to the authority that you have exhibited by putting on
14 your emergency lights in a marked car in uniform,
15 presumably armed; is that correct?

16 A. Yes, sir. Yes to your question. Yes, sir.

17 MR. TRADEWELL: Thank you. Nothing further.

18 THE COURT: You are done, Officer.

19 THE WITNESS: Thank you.

20 THE COURT: Does the state have any other
21 witnesses?

22 MR. LIPPERT: No.

23 THE COURT: Did the defense intend to call any
24 witnesses?

25 MR. TRADEWELL: May I have just one moment

1 with my client, Judge?

2 THE COURT: Sure.

3 MR. TRADEWELL: Judge, thank you. Mr. Smith.
4 I am going to call Mr. Smith as a witness for a limited
5 purpose.

6 THE COURT: All right.

7 MR. TRADEWELL: So we call Frederick Smith.

8 THE COURT: He has to go with the bailiffs
9 then.

10 MR. TRADEWELL: I'm sorry. It's been a long
11 time since I had an in-custody client.

12 (Witness is sworn.)

13 FREDERICK SMITH,

14 being first duly sworn on oath to tell the
15 truth, the whole truth, and nothing but the
16 truth, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. TRADEWELL:

19 Q. Would you state your name, please?

20 A. Frederick Smith.

21 Q. And you are the defendant in this case; is that correct?

22 A. Yes.

23 Q. Now, you were present when the videotape of the stop was
24 played?

25 A. Yes.

1 Q. Did you see it?

2 A. Yes.

3 Q. And does that comport with your recollection of what
4 happened that night?

5 A. Yes.

6 Q. You were here when Sergeant Gonzalez just testified?

7 A. Yes.

8 Q. I want to direct your attention to when he followed you
9 into the parking lot -- strike that. When the lights
10 went on, his emergency lights went on, you pulled into
11 the parking lot and parked, correct?

12 A. I pulled off East Wash and pulled into the parking lot.

13 Q. Why did you pull into that parking lot?

14 A. Because I was being pulled over and that is where I live.

15 Q. So the parking lot was attached to your residence?

16 A. Yes.

17 Q. You heard when Officer -- you heard Officer Gonzalez say
18 that he came up to your driver's side door, correct?

19 A. Correct.

20 Q. First of all, who owns the car you were driving that
21 night?

22 A. Amber Smith, my sister.

23 Q. Okay. And when Sergeant Gonzalez spoke to you, could you
24 hear what he was saying?

25 A. Yes.

1 Q. Were you able to respond?

2 A. Yes.

3 Q. Did he appear to understand what you were saying?

4 A. Yes.

5 Q. Now, at some point he walked around the car and came to
6 the passenger side. Do you remember that?

7 A. Yes.

8 Q. And we saw that in the video. Is that a correct
9 representation of him walking around the car to get to
10 the passenger side?

11 A. Yes.

12 Q. Was there anybody else in the car with you?

13 A. No.

14 Q. How did Officer Gonzalez happen to open the door?

15 A. There's a handle with a button on it. You have to press
16 the button and pull the door.

17 Q. The outside door handle you are talking about?

18 A. Yes.

19 Q. You heard his testimony that you -- first of all, did he
20 ask you to open the door, the passenger door?

21 A. I don't believe so.

22 Q. Did you see him reach for the door in any way?

23 A. Yes.

24 Q. What did you do when you saw him do that?

25 A. I was maneuvering to the passenger seat. I put my arm on

1 the handle to pull myself to the passenger seat.
2 Q. I'm sorry, I didn't understand. Which handle are you
3 talking about?
4 A. It has a handle on the inside of my door to pull on.
5 Every day -- every day I use that car, I pull on the
6 handle to get out because the driver's side don't open.
7 Q. I see. So you heard him say that he believed that you
8 had unlocked the door and helped push it open; is that
9 what happened?
10 A. Unlock the door?
11 Q. Yes.
12 A. Would you repeat that?
13 Q. Yes. Did you assist him by unlocking the door?
14 A. No.
15 Q. Did you push on the door to help him to open it?
16 A. No. The door was never locked.
17 Q. Did you -- is -- what year car is this, if you know?
18 A. It is a 1991.
19 Q. It doesn't have electronic locks?
20 A. Yes.
21 Q. Does it?
22 A. Yes.
23 Q. Does it have the kind of locks that operate automatically
24 when you reach a certain speed?
25 A. No.

1 Q. At the time you were stopped, was the door locked?

2 A. No.

3 Q. Did you -- did you at any time work the -- during the
4 time you were stopped, did you at any time work the
5 inside door handle on the passenger side door?

6 A. The door handle -- there are two handles on the door.

7 Q. The one to open the door.

8 A. No.

9 Q. What is the other handle? Is that just a handle, sort of
10 a bracing handle, a pull handle?

11 A. Correct.

12 Q. And that doesn't have anything to do with opening or
13 closing the -- or opening the door?

14 A. No.

15 Q. So is Officer -- I'm sorry, Sergeant Gonzalez's testimony
16 mistaken when he said that it appeared that you worked
17 simultaneously with him to open the door?

18 A. Yes, it was a mistake.

19 Q. Did you believe you were free to leave after the lights
20 went on, after the emergency lights went on?

21 A. No.

22 MR. TRADEWELL: Thank you. That's all.

23 THE COURT: Any cross?

24 CROSS-EXAMINATION

25 BY MR. LIPPERT:

1 Q. Mr. Smith, how good is your memory of this incident?
2 A. It's fairly good.
3 Q. You were drunk at the time?
4 A. Yes.
5 Q. Very drunk?
6 A. Correct.
7 Q. Later on when police took your blood, you joked that it
8 was 80 proof blood?
9 A. That part I do not recall.
10 Q. But you would agree that you were very intoxicated?
11 A. I was intoxicated, yeah.
12 Q. And you now know you have been charged with a 7th offense
13 drunk driving?
14 A. Yes, I do.
15 Q. So if I have this correct, you are in the driver's side
16 of your vehicle when Officer Gonzalez starts walking
17 around to the passenger side, correct?
18 A. In my sister's car, yes.
19 Q. Sorry, your sister's car, the Oldsmobile, correct?
20 A. Correct.
21 Q. And then Officer Gonzalez never told you to open the
22 door, but as he approached the passenger side, you were
23 kind of leaning over to the passenger side of the
24 vehicle, correct?
25 A. Can you repeat the question?

1 Q. I'll break it down. So when Officer Gonzalez was walking
2 to the passenger side of the vehicle, you were still in
3 the driver's seat?

4 A. Yes.

5 Q. And then as he got to the other side about where the door
6 is, you leaned over and grabbed onto the door?

7 A. Correct.

8 Q. And your intention was to pull yourself over to the
9 passenger door?

10 A. Yes. I wasn't trying to leave.

11 Q. So when the door opened, did he pull you -- did that pull
12 you into the passenger side of the vehicle?

13 A. The door slipped out of my hand by him pulling it.

14 Q. Okay. And the doors -- the car had electric locks?

15 A. Yes.

16 Q. And you didn't lock the doors?

17 A. No because the driver's side door doesn't open, so I
18 never use the electrical part.

19 MR. LIPPERT: I guess I don't have any further
20 questions.

21 MR. TRADEWELL: Nothing further. Thank you.

22 THE COURT: And he's done, and thank you very
23 much to the bailiffs.

24 I assume there is no further testimony,
25 Mr. Tradewell.

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MR. TRADEWELL: Right.

THE COURT: All right. Then the evidentiary portion of the record is completed. I assume you still want a chance to brief this, Mr. Tradewell.

MR. TRADEWELL: Yes, sir.

THE COURT: All right. Then I know it's the state's burden to establish that there was a reasonable basis for the stop and so forth, but sometimes the defense would rather file their brief and then get a reply, so it doesn't make any difference to me, I guess, so --

MR. TRADEWELL: I think I have to establish that the facts meet the theory that I'm presenting, and the state's burden is to disprove that or prove another, but yeah, I think it falls on me to write the first brief.

THE COURT: So I'll give you -- would 30 days be enough?

MR. TRADEWELL: Yes.

THE COURT: So 30 days from now with the -- let me just pick a -- August 24th is a Saturday, so why don't we say August 29th. That is the very end of August.

MR. TRADEWELL: August 29th.

THE COURT: That is going into Labor Day, so

1 you'll have great incentive to get it done before then.

2 MR. TRADEWELL: I will.

3 THE COURT: And then how about two weeks for
4 the response from the state?

5 MR. LIPPERT: I believe that should be
6 sufficient.

7 THE COURT: September 12th, and one week
8 turnaround for the 19th?

9 MR. TRADEWELL: That's absolutely fair.

10 THE COURT: I won't preclude anyone from
11 writing whatever they would like, but what I'm mainly
12 interested in is the time period from the door not being
13 able to be open and then going around to the other side
14 and then opening the door. I think State versus Newer,
15 306 Wis. 2d 193 mentioned, I think -- and the motion is
16 fairly clear that if an officer doesn't know who is in
17 the driver's side and -- but knows that the registered --
18 the vehicle is registered to someone whose license is
19 suspended, the officer can stop the vehicle, but I don't
20 think there is a case that meets these precise facts
21 exactly, but you might want to take a look at an
22 unpublished Court of Appeals decision recently issued.
23 Again, it's not on all force with the facts of this case,
24 but I'll give it to you because I have done my own little
25 research and looked it up. It's State of Wisconsin

1 versus Joshua Winberg, W-I-N-B-E-R-G. I don't think
2 either of you cited that one to me. It is an unpublished
3 Court of Appeals decision issued May 28, 2014. It is
4 Appeal No. 13AP2661-CR.

5 MR. TRADEWELL: 2661 --

6 THE COURT: -CR.

7 MR. TRADEWELL: Thank you.

8 THE COURT: And that case, it was a second
9 offense operating under the influence issue, and it is
10 similar in the sense that a car was stopped because the
11 registered owner didn't have a license or their license
12 was revoked, and that became obvious to the officer at
13 some point in that case that it wasn't the registered
14 driver. You'll see when you read the decision. It
15 tracks this case somewhat but not exactly, so to the
16 extent that is helpful, it's at least what I was looking
17 at before.

18 MR. TRADEWELL: I appreciate it.

19 THE COURT: But there may be other cases out
20 there, so all right, then. Either counsel, anything
21 further to put on the record here today?

22 MR. LIPPERT: I have nothing further. I'll
23 bring the DVD up to the clerk.

24 THE COURT: Anything further, Mr. Tradewell?

25 MR. TRADEWELL: No, sir. Thank you. And I'm

1 sorry for the phone alarm that went off. It's a
2 medical -- I've got to take some meds.

3 THE COURT: That's okay. Thank you for saying
4 something. Thank you all.

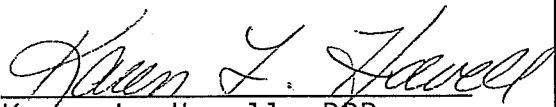
5 (Proceedings were adjourned.)
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STATE OF WISCONSIN).
COUNTY OF DANE) ss.
)

I, Karen L. Howell, Circuit Court
Reporter for Dane County, State of Wisconsin, hereby
certify that the foregoing is a true, correct and
complete transcript of the motion hearing in the
foregoing matter, held on the 25th day of July, 2014, as
contained in my Stenograph shorthand notes and all
matters pertaining thereto.

Dated this 31st day of July, 2014.


Karen L. Howell, RPR
Circuit Court Reporter
Dane County Circuit Court