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In the
United States Court of Appeals
For the Second Circuit

August Term, 2016
No. 16-181-cr

UNITED STATES OF AMERICA,
Appellee,

v.

BRAYAN GOMEZ,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Connecticut.
No. 14-cr-63 — Janet C. Hall, *Chief Judge.*

ARGUED: MAY 16, 2017
DECIDED: DECEMBER 5, 2017

Before: PARKER, WESLEY, and DRONEY, *Circuit Judges.*

1 This appeal arises out of a traffic stop of Defendant-Appellant
2 Brayan Gomez and his resulting judgment of conviction for heroin-
3 trafficking in the United States District Court for the District of
4 Connecticut (Hall, C.J.). During the five-minute traffic stop
5 prompted by multiple traffic violations, the officers prolonged
6 Gomez’s seizure by asking him narcotics-related questions. Gomez
7 then consented to the search of a bag in the car’s trunk, which
8 contained heroin. The district court denied Gomez’s motion to
9 suppress. We hold that the traffic stop violated the Fourth
10 Amendment because the officers extended the stop for reasons
11 unrelated to Gomez’s traffic violations. Nevertheless, we conclude
12 that the good-faith exception to the exclusionary rule applies
13 because, at the time of the stop, the officers reasonably relied on our
14 binding precedent, which we conclude is abrogated by *Rodriguez v.*
15 *United States*, — U.S. —, 135 S. Ct. 1609 (2015). Accordingly, we
16 **AFFIRM** the judgment of the district court.

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GEOFFREY M. STONE (Marc H. Silverman, *of counsel*), Assistant United States Attorneys, *for* Deirdre M. Daly, United States Attorney for the District of Connecticut, New Haven, CT, *for Appellee*.

MATTHEW W. BRISSENDEN, Garden City, NY, *for Defendant-Appellant*.

1 DRONEY, *Circuit Judge*:

2 This appeal arises out of a traffic stop of Defendant-Appellant
3 Brayan Gomez. During surveillance in connection with a heroin-
4 trafficking investigation in Hartford, Connecticut, officers observed
5 Gomez commit several traffic violations and stopped his car.
6 During the five-minute traffic stop, the officers prolonged the
7 seizure by asking Gomez narcotics-related questions not pertinent to
8 the traffic violations. After the questioning, Gomez consented to the
9 search of a closed bag in the car's trunk, which contained nearly a
10 half-kilogram of heroin and drug-packaging materials.

11 Gomez moved to suppress this evidence, arguing that, *inter*
12 *alia*, his seizure violated the Fourth Amendment because the officers
13 measurably extended the stop for investigatory reasons unrelated to
14 the traffic violations. Applying this Court's holding in *United States*
15 *v. Harrison*, 606 F.3d 42, 45 (2d Cir. 2010) (per curiam)—that
16 questioning unrelated to traffic violations during a five-to-six

1 minute stop did not violate the Fourth Amendment—the United
2 States District Court for the District of Connecticut (Hall, C.J.) denied
3 Gomez’s suppression motion. Shortly before the district court’s
4 suppression ruling, however, the Supreme Court held that “a police
5 stop exceeding the time needed to handle the matter for which the
6 stop was made violates the Constitution’s shield against
7 unreasonable seizures,” indicating that the critical question is
8 whether the unrelated investigation “prolongs—*i.e.*, adds time to—
9 the stop.” *Rodriguez v. United States*, — U.S. —, 135 S. Ct. 1609,
10 1612, 1616 (2015) (internal quotation marks omitted).

11 For the reasons that follow, we conclude that the Supreme
12 Court’s decision in *Rodriguez* abrogates our holding in *Harrison*.¹ We
13 also conclude that Gomez’s seizure, albeit only five minutes in
14 length, contravenes *Rodriguez*’s holding and therefore violates the
15 Fourth Amendment. Nevertheless, we conclude that the good-faith
16 exception to the exclusionary rule applies because, at the time of the

¹ This opinion has been circulated to all the judges of the Court prior to filing.

1 stop, the officers reasonably relied on our precedent in *Harrison*. As
2 to Gomez’s other arguments, we conclude that the district court did
3 not clearly err in concluding that (i) the initial stop was based on
4 valid probable cause or reasonable suspicion to believe he
5 committed a traffic violation, and (ii) he consented to the searches of
6 the car, its trunk, and the closed bag in the trunk. Accordingly, we
7 **AFFIRM** the judgment of the district court.

8 **BACKGROUND**

9 **I. The Heroin-Trafficking Investigation**

10 In March 2014, Hartford police detective James Campbell and
11 Drug Enforcement Administration (“DEA”) special agent Michael
12 Schatz—members of a DEA task force—were investigating a large-
13 scale heroin-trafficking organization operating out of Hartford.²

² Unless otherwise noted, the following background is drawn from the testimony of Campbell and Schatz during the June 2015 suppression hearing, the second suppression hearing that was held due to the retirement of the district judge originally assigned to this case. In denying Gomez’s motion to suppress, the district court credited their testimony as to the issues of (i) a traffic violation, (ii) Gomez’s consent to the searches, (iii) the duration of the stop, and (iv) the nature of the questioning during the stop.

1 Based on information from a wiretap and cooperating sources,
2 Campbell and Schatz suspected that the organization, led by Alex
3 Ortiz-Gomez, was in the process of packaging several kilograms of
4 heroin for street-level sale. In addition to this information,
5 Campbell and Schatz knew that law enforcement officers in New
6 Jersey stopped Ortiz-Gomez and his cousin, Defendant-Appellant
7 Brayan Gomez, in a black Honda Accord the previous year, and
8 during a search of the car the officers discovered nearly \$80,000 in
9 cash, which the DEA seized.³

10 On March 19, Campbell and Schatz began surveillance of two
11 addresses associated with Alex Ortiz-Gomez—one in Hartford and
12 another in East Hartford. The following morning, Campbell
13 observed Brayan Gomez exit the Hartford address and drive away
14 in a white Acura.⁴ Schatz followed Gomez to the East Hartford

³ Although Campbell initially believed that Brayan Gomez was Alex Ortiz-Gomez's brother, they are cousins.

⁴ Campbell recognized Brayan Gomez at this time.

1 address, where Gomez briefly entered and exited the residence,
2 switched cars, and again drove away. Gomez left the East Hartford
3 address in a black Honda Accord—the same car involved in the
4 \$80,000 New Jersey cash seizure a year earlier.

5 With Campbell and Schatz (in separate vehicles) covertly
6 following, Gomez drove to a nearby Ramada Inn hotel in East
7 Hartford and parked the black Honda. Although Campbell and
8 Schatz did not arrive in time to see Gomez enter the hotel, Campbell
9 saw him exit the Ramada Inn a few minutes later carrying a
10 “weighted” black duffel bag. After placing the bag in the Honda’s
11 trunk, Gomez drove away again, this time towards the highway;
12 Campbell and Schatz continued to follow.

13 When Campbell saw Gomez place the duffel bag in the car’s
14 trunk and drive away, he notified Schatz and other nearby officers
15 via radio transmissions that he planned to execute a pretextual stop
16 of the Honda if Gomez committed a traffic violation. Gomez then

1 drove through a red light before entering the highway. After
2 Gomez merged on to the highway, Campbell and Schatz observed
3 him speeding and changing lanes without using a directional signal.

4 Gomez did not travel on the highway for long; he slowed to
5 exit via an off-ramp in East Hartford, allowing Campbell and Schatz
6 to catch up. According to Campbell, Gomez committed a third
7 traffic violation at the end of the off-ramp by making a right turn at
8 a red light without stopping.⁵

9 **II. The Traffic Stop**

10 Shortly after Gomez exited the highway, Campbell used his
11 unmarked car's lights and siren to pull Gomez over. Schatz arrived
12 at the scene shortly thereafter and parked his car in front of the black
13 Honda, which was on the road's shoulder. While Schatz remained
14 in his car, Campbell approached the Honda on the driver's side and

⁵ As we discuss further in addressing the legality of the initial traffic stop, Campbell's testimony concerning this third purported violation may be inconsistent and perhaps contradicted by Schatz's testimony. *See infra* at 54–59.

1 noticed, through the open driver-side window, that Gomez
2 “appeared to be nervous as far as what [is] typical in a normal traffic
3 stop”—keeping his hands on the steering wheel, visibly shaking,
4 and maintaining his gaze forward through the windshield.
5 Campbell asked Gomez to turn off the car’s engine. When Gomez,
6 without complying, asked why he was stopped, Campbell again
7 directed Gomez to turn off the engine for “safety purposes.”

8 Shortly after Gomez turned off the engine, Campbell’s
9 questioning detoured from traffic violations to the subject of heroin:

10 Question: After [Gomez] shut the car off, what
11 interaction did you have with him at [that] point?

12

13 Campbell: Once he complied and shut the vehicle off,
14 he again asked me why he had been stopped. I told
15 him that we were conducting an investigation into bad
16 heroin as well as firearms within the city of Hartford.
17 *Then* I also told him that, you know, I observed him
18 travel[ing] at a high rate of speed as well as travel[ing]
19 through the red lights.

20

1 App'x 248 (emphasis added).⁶

2 At Campbell's request, Gomez provided him with the car's
3 registration, which listed Joan Sanchez as the owner. At that time,
4 Campbell did not also ask for Gomez's license. Campbell then
5 asked Gomez where he was coming from, and Gomez responded,
6 untruthfully, that he had come from home. After Campbell inquired
7 where he was travelling, Gomez replied that he was going to the
8 home of his sister-in-law Joan Sanchez—the owner of the black
9 Honda—but he did not know her exact address. Then, Campbell

⁶ The precise order of Campbell's initial statements to Gomez is not entirely clear, as he testified during the November 2014 suppression hearing that he *first* notified the Gomez about his traffic violations and "[t]hen . . . told [Gomez] that [the officers] were doing an investigation involving heroin and firearms . . ." App'x 47–48. Furthermore, on cross-examination during the suppression hearings, Campbell admitted that he "may" have initially told Gomez, untruthfully, that he was stopped because he fit the description of someone involved in a shooting. App'x 88–89. According to Campbell, this was a "technique" to "calm the person down or to not let them know that we [are] on to the fact of what they are doing initially." See App'x 88–89, 284–85; see also App'x 292.

1 asked for the name of Joan Sanchez's spouse; Gomez responded that
2 she was married to Alex Ortiz-Gomez.⁷

3 After this initial questioning with Gomez in the driver's seat,
4 Campbell asked him to exit the car and walk around to the
5 passenger side.⁸ At that point, Schatz exited his car and joined
6 Gomez and Campbell in a grass area on the side of the road. While
7 they stood in the grass, Campbell again told Gomez that they were
8 investigating "bad heroin that had been laced with Fentanyl and
9 firearms" in Hartford, and Gomez replied that he did not "know
10 anything about that." App'x 250; *see also* App'x 48.

11 According to Campbell, he then asked whether Gomez
12 "mind[ed]" if Campbell searched the car, and Gomez replied "no,
13 you can go ahead . . . [t]here's nothing in there." App'x 250; *see also*

⁷ At this point, there still appears to have been confusion over whether Gomez was the cousin or brother of Alex Ortiz-Gomez.

⁸ According to Campbell, traffic from the nearby intersection was passing on the driver's side, and he therefore asked Gomez to exit the Honda for safety purposes.

1 App'x 50. While Schatz watched Gomez, Campbell conducted a
2 search of the front passenger area and found a receipt from the
3 Ramada Inn. The receipt, which displayed Gomez's name and home
4 address,⁹ indicated a stay from March 17 to March 19 (the day before
5 the stop) that was paid for in cash.¹⁰

6 After Campbell found the receipt, he approached Gomez and
7 asked "if he had anything on his person." App'x 253. Gomez
8 replied that he did not. Campbell then conducted a pat-down and
9 asked him to remove the items from his pockets. Gomez removed
10 his wallet, which contained his license, and two Ramada Inn room
11 keys from his pants pocket. With the receipt and room keys in hand,
12 Campbell asked Gomez if he had stayed at the Ramada Inn. Gomez
13 initially responded that he was not staying at the hotel, but that his

⁹ The listed address was 82 Sisson Avenue in Hartford—the address where Gomez entered the white Acura earlier that morning.

¹⁰ After the stop, Campbell obtained another receipt from the Ramada Inn's staff indicating that Gomez checked out of the Ramada Inn on March 20, the morning of the stop, and paid in cash.

1 friends were. When Campbell pressed Gomez as to why he had the
2 keys if only his friends were staying there, Gomez admitted that he
3 had been staying there as well.¹¹

4 Campbell then asked Gomez whether he had anything in the
5 car's trunk, and whether he "mind[ed]" if Campbell opened it. *See*
6 App'x 256–58; *see also* App'x 58–59. According to both Campbell
7 and Schatz, Gomez replied with words to the effect of "go ahead."
8 App'x 257–58, 312; *see also* App'x 58–59, 176. When Campbell
9 opened the trunk, he saw the black duffel bag that Gomez had
10 carried out of the hotel earlier, a large cardboard box, and several
11 smaller cardboard boxes stamped with the words "City Vibe."¹²

12 With the trunk open, Campbell asked whether Gomez
13 "mind[ed]" if he opened the duffel bag. App'x 256–58; *see also*

¹¹ Campbell and Schatz testified that throughout their interaction with Gomez outside of the car, he appeared nervous—failing to make eye contact, swaying in place, and fidgeting.

¹² According to Campbell, Schatz was familiar with the "brand" of "City Vibe" heroin from executing controlled purchases through an informant. App'x 261–62; *see also* App'x 62.

1 App'x 62–63. According to both Campbell and Schatz, Gomez said
2 something along the lines of “no, but what are you looking for?”
3 App'x 256, 258, 313; *see also* App'x 62–63, 177. Campbell opened the
4 bag to find more than 13,000 baggies of heroin packaged for sale, a
5 larger bag containing raw heroin, and other items used in packaging
6 narcotics; in total, the duffel bag contained 378.6 grams of heroin.
7 An East Hartford police officer who had arrived at the scene a few
8 minutes earlier arrested Gomez. Gomez never received a citation for
9 the traffic violations that he committed before the stop.

10 Campbell and Schatz testified that the entire stop—from the
11 moment Campbell pulled Gomez over to the moment he opened the
12 duffel bag—lasted about five minutes. App'x 271, 318.

13 **III. District Court Proceedings**

14 In March 2014, a federal grand jury in the United States
15 District Court for the District of Connecticut returned an indictment
16 charging Gomez with one count of possession with intent to

1 distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B).
2 In June 2014, Gomez moved to suppress the heroin and drug-
3 packaging materials, arguing that they were fruits of an unlawful
4 search and seizure under the Fourth Amendment. Relying on his
5 own two-page affidavit, Gomez claimed that he did not commit
6 traffic violations and did not consent to the searches of the car, its
7 trunk, or the closed duffel bag. Therefore, Gomez argued that (i) the
8 traffic stop was not supported by probable cause or reasonable
9 suspicion, and (ii) the warrantless searches were executed without
10 his consent.¹³

11 In November 2014, the district court (Burns, *J.*) held a
12 suppression hearing during which Campbell and Schatz testified;
13 Gomez did not testify.¹⁴ With the district court's permission, Gomez

¹³ In his motion, Gomez did not argue that the traffic stop was unreasonably prolonged in violation of the Fourth Amendment.

¹⁴ The East Hartford police officer who arrested Gomez after the searches also testified, essentially for the undisputed fact that Gomez did not receive a traffic citation.

1 supplemented his motion with a post-hearing brief in February 2015,
2 arguing that Campbell's questions concerning the drug investigation
3 were unrelated to the traffic violations and extended the traffic stop
4 in violation of the Fourth Amendment. In March 2015, the presiding
5 district judge retired without rendering a decision on Gomez's
6 motion to suppress.

7 In June 2015, after the case was transferred to a different
8 district judge (Hall, C.J.), the district court held a second suppression
9 hearing. Two months before that resumed hearing, the Supreme
10 Court decided *Rodriguez v. United States*, — U.S. —, 135 S. Ct. 1609
11 (2015), but neither Gomez nor the Government filed a supplemental
12 brief concerning *Rodriguez* before or after the second hearing.
13 During the second hearing, Campbell and Schatz testified again, and
14 the court heard oral argument. The parties and the district court did
15 not discuss *Rodriguez* during the hearing, but they did discuss this

1 Court's decision in *United States v. Harrison*, 606 F.3d 42 (2d Cir.
2 2010) (per curiam).

3 In late June 2015, the district court issued a ruling denying
4 Gomez's motion to suppress. *See United States v. Gomez*, No. 14-cr-
5 63, 2015 WL 3936397, at *1–3 (D. Conn. June 26, 2015). First, as to
6 Gomez's argument that the initial stop was unlawful, the district
7 court credited the testimony of Campbell and Schatz, concluding
8 that there was probable cause or reasonable suspicion to believe that
9 Gomez drove through a red light before entering the highway and
10 was speeding on the highway.¹⁵ *Id.* at *2. Second, the district court
11 rejected Gomez's argument that he did not consent to the searches
12 notwithstanding his affidavit, again finding the testimony of
13 Campbell and Schatz credible and "largely consistent with each

¹⁵ The district court did not base its decision on, or address, the disputed third traffic violation concerning the red light at the end of the exit ramp. *See id.* at *1–3.

1 other, as well as with their prior testimony in the [first suppression]
2 hearing.” *Id.*

3 Third, the district court concluded that Campbell did not
4 unreasonably extend the traffic stop in violation of the Fourth
5 Amendment, even though it acknowledged that he questioned
6 Gomez about matters unrelated to the traffic violations. *See id.* at *2–

7 3. The district court relied on this Court’s holding in *Harrison*:

8 The Second Circuit has previously found a stop of five
9 to six minutes was not unlawfully prolonged, *United*
10 *States v. Harrison*, 606 F.3d 42 (2d Cir. 2010), and other
11 circuits have upheld longer intervals

12
13 There is no evidence on the record to contradict
14 testimony by Detective Campbell and Special Agent
15 Schatz that the stop lasted five minutes at most until
16 Gomez was arrested. Based on the record before it, the
17 court finds that, while Gomez was questioned about
18 matters unrelated to the traffic violation during this
19 time period, such questioning did not unreasonably
20 prolong the stop so as to render it unconstitutional.

21
22 *Id.* at *3. The district court did not address the Government’s
23 alternative argument that independent reasonable suspicion of a

1 drug offense justified extending the traffic stop for the narcotics
2 questioning. *See id.* at *2–3.

3 After the district court denied his motion, in September 2015
4 Gomez conditionally pleaded guilty pursuant to a plea agreement
5 that allowed him to appeal the district court’s suppression ruling. In
6 January 2016, the district court sentenced Gomez to sixty months’
7 imprisonment, the statutory minimum under 21 U.S.C.
8 § 841(b)(1)(B). After the district court entered judgment on January
9 8, 2016, Gomez timely appealed.

10 DISCUSSION

11 “On appeal from a denial of a suppression motion, we review
12 a district court’s findings of fact for clear error, and its resolution of
13 questions of law and mixed questions of law and fact *de novo*.”
14 *United States v. Ulbricht*, 858 F.3d 71, 94–95 (2d Cir. 2017) (internal
15 quotation marks omitted). In reviewing a district court’s findings of
16 fact for clear error, we also “pay special deference to the district

1 court's factual determinations going to witness credibility." *United*
2 *States v. Jiau*, 734 F.3d 147, 151 (2d Cir. 2013).

3 Gomez raises three arguments on appeal. First, he contends
4 that the officers unconstitutionally prolonged his traffic stop, a
5 seizure under the Fourth Amendment. Second, Gomez argues that
6 the district court clearly erred in finding that the initial stop was
7 based on valid probable cause or reasonable suspicion to believe he
8 committed a traffic violation. Third, he challenges the veracity of
9 the officers' testimony and the district court's factual finding that he
10 verbally consented to the searches of the car, its trunk, and the
11 closed duffel bag in the trunk.

12 **I. Duration of the Traffic Stop**

13 **A. Traffic Stops after *Rodriguez v. United States***

14 The Fourth Amendment guarantees "[t]he right of the people
15 to be secure in their persons, houses, papers, and effects, against
16 unreasonable searches and seizures" U.S. Const. amend. IV.

1 “Temporary detention of individuals during the stop of an
2 automobile by the police, even if only for a brief period and for a
3 limited purpose, constitutes a ‘seizure’ of ‘persons’ within the
4 meaning of [the Fourth Amendment].” *Whren v. United States*, 517
5 U.S. 806, 809–10 (1996). Therefore, traffic stops must satisfy the
6 Fourth Amendment’s reasonableness limitation, which “requires
7 that an officer making a traffic stop have probable cause or
8 reasonable suspicion that the person stopped has committed a traffic
9 violation or is otherwise engaged in or about to be engaged in
10 criminal activity.” *United States v. Stewart*, 551 F.3d 187, 191 (2d Cir.
11 2009) (alterations and emphasis omitted).

12 **1. Pre-Rodriguez Supreme Court Decisions**

13 A decade before *Rodriguez v. United States*, — U.S. —, 135 S.
14 Ct. 1609 (2015), the Supreme Court explained in *Illinois v. Caballes*
15 that even when a traffic stop is based on probable cause or
16 reasonable suspicion at the outset, “[i]t is nevertheless clear that a

1 seizure that is lawful at its inception can violate the Fourth
2 Amendment if its manner of execution unreasonably infringes
3 interests protected by the Constitution.” *Illinois v. Caballes*, 543 U.S.
4 405, 407 (2005). More specifically, “[a] seizure that is justified solely
5 by the interest in issuing a warning ticket to the driver can become
6 unlawful if it is prolonged beyond the time reasonably required to
7 complete that mission.” *Id.*

8 In *Caballes*, the Court considered a ten-minute traffic stop for
9 speeding where one officer led a narcotics-detection dog around the
10 driver’s car while a second officer simultaneously “was in the
11 process of writing a warning ticket.” *Id.* at 406. The dog alerted to
12 the presence of marijuana, and the driver was arrested and
13 subsequently convicted of a state narcotics offense. *Id.* at 406–07.
14 The Court affirmed the Illinois Supreme Court’s “conclusion that the
15 duration of the stop . . . was entirely justified by the traffic offense
16 and the ordinary inquiries incident to such a stop,” and held that no

1 Fourth Amendment violation occurred. *See id.* at 408 (noting the
2 state court had “carefully reviewed” the details of the officer’s
3 conversations with the driver and the radio transmissions “to
4 determine whether he had improperly extended the duration of the
5 stop to enable the dog sniff to occur”).¹⁶

6 A few years later, in *Arizona v. Johnson*, the Court further
7 considered “[a]n officer’s inquiries into matters unrelated to the
8 justification for the traffic stop.” *Arizona v. Johnson*, 555 U.S. 323, 333
9 (2009). The Court explained in *Johnson* that a stop remains lawful so
10 long as such inquiries do not “*measurably extend* the duration of the
11 stop.” *Id.* (emphasis added). In *Johnson*, during the time necessary
12 for an officer to complete the processing of a traffic stop for a
13 suspended vehicle registration, a different officer on the scene

¹⁶ Accordingly, the Court proceeded to address a separate issue, holding that a dog sniff—an investigation unrelated to the underlying speeding violation—conducted while a driver is otherwise “lawfully seized for a traffic violation” “generally does not implicate legitimate privacy interests” and thus “does not rise to the level of a constitutionally cognizable infringement” of the Fourth Amendment. *Id.* at 409.

1 acquired reasonable suspicion that a passenger in the back seat was
2 armed and dangerous. *Id.* at 328. The officer frisked the passenger
3 and found an unlawful handgun. *Id.* The passenger moved to
4 suppress the handgun in the resulting criminal prosecution, but the
5 Supreme Court concluded that no Fourth Amendment violation
6 occurred because, in part, the traffic stop was not “measurably
7 extend[ed].” *Id.* at 333.

8 2. **Circuit Courts Applying *Johnson* and *Caballes***

9 After *Johnson* and *Caballes*, several of our sister circuits
10 determined whether unrelated investigations during otherwise
11 lawful traffic stops “measurably extend[ed]” such stops or
12 prolonged them beyond the time “reasonably required” to issue a
13 ticket. *See Johnson*, 555 U.S. at 333; *Caballes*, 543 U.S. at 407. Rather
14 than adopt a *per se* rule that *any* extension of a traffic stop for an
15 unrelated investigation is unlawful, several circuits assessed the

1 overall reasonableness of the stop’s duration and the extension on a
2 case-by-case basis.¹⁷

3 In particular, the Eighth Circuit developed a *de minimis* rule: a
4 brief, minutes-long extension of a traffic stop to conduct an
5 unrelated investigation, such as a dog sniff, is a *de minimis* intrusion
6 on a driver’s personal liberty that does not violate the Fourth
7 Amendment. See *United States v. Alexander*, 448 F.3d 1014, 1017 (8th
8 Cir. 2006) (upholding four-minute delay as *de minimis* intrusion);

¹⁷ See, e.g., *United States v. McBride*, 635 F.3d 879, 883 (7th Cir. 2011) (noting that two-minute extension of traffic stop to ask unrelated questions would not “convert a lawful stop into an unlawful one” even if reasonable suspicion did not exist); *United States v. Turvin*, 517 F.3d 1097, 1101–04 (9th Cir. 2008) (explaining that “[w]e will not accept a bright-line rule that questions are unreasonable if the officer pauses in the ticket-writing process in order to ask them” and concluding that a fourteen-minute traffic stop—with a four-minute extension to investigate narcotics—was reasonable); *United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007) (stating that unrelated questioning that does not “appreciably” extend the duration of a traffic stop is reasonable); see also *United States v. Bell*, 555 F.3d 535, 541–42 (6th Cir. 2009) (rejecting argument that independent “reasonable suspicion is required unless all of the [o]fficers’ actions were focused precisely on the purpose of the stop with no deviation whatsoever”); *United States v. Hernandez*, 418 F.3d 1206, 1212 n.7 (11th Cir. 2005) (“Even if seventeen minutes is some minutes longer than the norm, we question whether the Fourth Amendment’s prohibition of unreasonable seizures is concerned with such trifling amounts of time, when the seizure was caused at the outset by an apparent violation of the law. Of trifles the law does not concern itself: *De minimis non curat lex.*” (emphasis in original)).

1 *United States v. Martin*, 411 F.3d 998, 1000, 1002 (8th Cir. 2005)
2 (upholding two-minute delay). The Fourth Circuit adopted a similar
3 rule. *See United States v. Farrior*, 535 F.3d 210, 220 (4th Cir. 2008)
4 (concluding that “any delay in conducting . . . drug-dog sniff
5 amounted to a *de minimis* intrusion on [driver’s] liberty interest” and
6 was thus “not unreasonable as a violation of his Fourth Amendment
7 rights”).

8 In *United States v. Harrison*, we applied *Johnson* and *Caballes* in
9 the context of a traffic stop (for a defective license plate light) that
10 was extended by officer questioning; a search of the car revealed a
11 gun and, ultimately, crack cocaine. *See United States v. Harrison*, 606
12 F.3d 42, 44–45 (2d Cir. 2010) (per curiam). After the officer
13 recognized the driver from previous traffic stops that had uncovered
14 narcotics, he inquired about the driver’s travels that night, then
15 separately questioned the passengers to “see if they would

1 corroborate” the driver’s story, and then confronted the driver with
2 the conflicting account of one of the passengers. *Id.* at 44.

3 Even though we acknowledged that the officer testified that
4 he “had all of the information needed to issue the traffic ticket before
5 he first approached” the car’s passengers to ask questions unrelated
6 to the defective light, we explained that the stop’s extension was
7 reasonable because “the time elapsed between the stop and the
8 arrest was only five to six minutes, and the questions about the
9 passengers’ comings and goings were subsumed in that brief
10 interval.” *Id.* at 45. Furthermore, while we did not expressly adopt
11 the *de minimis* rule, we cited decisions from other circuits for the
12 proposition that “[l]onger intervals than five to six minutes have
13 been deemed tolerable.” *Id.* (collecting cases).¹⁸ Accordingly, we
14 held that the unrelated questioning during the five-to-six minute

¹⁸ Indeed, we cited the Eleventh Circuit’s decision in *Hernandez*, which doubted whether the Fourth Amendment “is concerned with such trifling amounts of time” as seventeen minutes. *See id.* (quoting *Hernandez*, 418 F.3d at 1212 n.7).

1 stop “did not prolong the stop so as to render it unconstitutional.”

2 *Id.*

3 **3. *Rodriguez***

4 In *Rodriguez v. United States*, the Supreme Court rejected the
5 Eighth Circuit’s *de minimis* rule, holding that “a police stop
6 exceeding the time needed to handle the matter for which the stop
7 was made violates the Constitution’s shield against unreasonable
8 seizures.” *Rodriguez v. United States*, — U.S. —, 135 S. Ct. 1609,
9 1612 (2015). *Rodriguez* involved a seven or eight minute delay
10 between the completion of a traffic stop, which had ended with a
11 written warning, and a dog sniff that ultimately uncovered
12 methamphetamine in the car. *See id.* at 1612–13.

13 Adopting findings made by a magistrate judge, the district
14 court in *Rodriguez* found that the officer lacked independent
15 reasonable suspicion of a drug offense to extend the detention once
16 he issued the written warning, but it nevertheless denied the

1 defendant's motion to suppress, concluding that the seven-to-eight
2 minute extension was "only a *de minimis* intrusion on Rodriguez's
3 Fourth Amendment rights and was therefore permissible." *Id.* at
4 1613–14. The Eighth Circuit affirmed, held that the delay was an
5 acceptable *de minimis* intrusion, and did not review the district
6 court's finding that the officer lacked independent reasonable
7 suspicion to extend the seizure. *See id.* at 1614.

8 The Supreme Court vacated the Eighth Circuit's judgment,
9 beginning by explaining that "[l]ike a *Terry* stop, the tolerable
10 duration of police inquiries in the traffic-stop context is determined
11 by the seizure's mission—to address the traffic violation that
12 warranted the stop and attend to related safety concerns." *Id.*
13 (citation and internal quotation marks omitted). Acknowledging
14 *Caballes* (dog sniff) and *Johnson* (questioning of a passenger by a
15 different officer)—in which the Court "concluded that the Fourth
16 Amendment tolerated certain unrelated investigations that *did not*

1 *lengthen* the roadside detention”—the Court reiterated that
2 “[b]ecause addressing the infraction is the purpose of the stop, it
3 may last no longer than is necessary to effectuate that purpose.” *Id.*
4 (emphasis added) (alterations and internal quotation marks
5 omitted). In other words, “[a]uthority for the seizure . . . ends when
6 tasks tied to the traffic infraction are—or reasonably should have
7 been—completed.” *Id.*

8 To be sure, the Court recognized that an officer “may conduct
9 certain unrelated checks during an otherwise lawful traffic stop.” *Id.*
10 at 1615. But “he may not do so in a way that prolongs the stop,
11 absent the reasonable suspicion ordinarily demanded to justify
12 detaining an individual.” *Id.* Therefore, officers may conduct
13 certain ordinary inquiries related to a traffic stop, such as “checking
14 the driver’s license, determining whether there are outstanding
15 warrants against the driver, and inspecting the automobile’s
16 registration and proof of insurance,” without independent

1 reasonable suspicion of other crimes. *Id.* However, tasks not related
2 to the traffic mission, such as dog sniffs or “[o]n-scene investigation
3 into other crimes,” are unlawful if they prolong the stop absent
4 independent reasonable suspicion. *Id.* at 1616.

5 In so holding, the Court emphasized that the “critical
6 question” is not whether the unrelated investigation “occurs before
7 or after the officer issues a ticket,” but whether conducting the
8 unrelated investigation “prolongs—*i.e.*, adds time to—the stop.” *Id.*
9 (internal quotation marks omitted). Additionally, the Court
10 specifically rejected the Government’s contention that an officer may
11 “incrementally” prolong a stop to conduct an unrelated
12 investigation “so long as the officer is reasonably diligent in
13 pursuing the traffic-related purpose of the stop, and the overall
14 duration of the stop remains reasonable in relation to the duration of
15 other traffic stops involving similar circumstances.” *Id.* (alteration
16 omitted). The Court explained that an officer does not “earn bonus

1 time to pursue an unrelated criminal investigation” by “completing
2 all traffic-related tasks expeditiously” because “[t]he reasonableness
3 of a seizure . . . depends on what the police in fact do.” *Id.*

4 The Court remanded to the Eighth Circuit, leaving open “[t]he
5 question whether reasonable suspicion of criminal activity justified
6 detaining Rodriguez beyond completion of the traffic infraction
7 investigation”¹⁹ *Id.* at 1616–17.

8 On remand, the Eighth Circuit again affirmed, but it did not
9 address reasonable suspicion of a drug offense. *See United States v.*
10 *Rodriguez*, 799 F.3d 1222, 1223–24 (8th Cir. 2015), *cert. denied*, 136 S.
11 Ct. 1514 (2016). Rather, it concluded that the good-faith exception to
12 the exclusionary rule applied because officers conducted the
13 extended traffic stop in objectively reasonable reliance on binding

¹⁹ The Court declined to affirm on the basis of the officer acquiring reasonable suspicion for the drugs. The district court concluded that the officer did not have reasonable suspicion to prolong the traffic stop once he issued the written warning. The Eighth Circuit did not address that issue. *Id.* at 1616–17; *see also id.* at 1615 (criticizing one dissent for making its “own finding of ‘reasonable suspicion’”).

1 circuit precedent at the time of the stop: the *de minimis* rule. *Id.* at
2 1224.

3 **B. Analysis**

4 **1. *Rodriguez* Abrogates *Harrison***

5 We begin by addressing Gomez’s contention that the district
6 court erred by applying *Harrison* rather than *Rodriguez*,²⁰ which the
7 Supreme Court decided two months before the June 2015
8 suppression hearing.²¹

9 Although at least one district court in this Circuit has
10 recognized *Rodriguez*’s abrogation of *Harrison*,²² we have not yet had

²⁰ The district court cited *Rodriguez* but did not indicate that it affected *Harrison*.
See Gomez, 2015 WL 3936397, at *2–3.

²¹ A Supreme Court decision “construing the Fourth Amendment is to be applied
retroactively to all convictions that were not yet final at the time the decision was
rendered.” *United States v. Johnson*, 457 U.S. 537, 562 (1982).

²² *See United States v. Gomez*, 199 F. Supp. 3d 728, 742–43 & n.11 (S.D.N.Y. 2016)
(finding reasonable suspicion to extend the stop under the circumstances but
noting that *Rodriguez* “rejected [*Harrison*’s] reasoning”).

1 the opportunity to consider the issue. We conclude that *Harrison's*
2 holding does not survive *Rodriguez*.²³

3 We held in *Harrison* that unrelated questioning “subsumed” in
4 a five-to-six minute traffic stop does not measurably prolong a stop
5 so as to render it unconstitutional. *See Harrison*, 606 F.3d at 45. We
6 explained that the Constitution demands only that a seizure remain
7 reasonable, and that the five-to-six minute seizure was “brief”—
8 shorter than intervals that “have been deemed tolerable” in other
9 circuits. *Id.*

10 In *Rodriguez*, however, the Court held that a police stop
11 “exceeding the time needed to handle the matter for which the stop
12 was made” violates the Fourth Amendment absent independent
13 reasonable suspicion of another offense. *Rodriguez*, 135 S. Ct. at
14 1612. Moreover, the “reasonableness of a seizure . . . depends on

²³ Notably, the Government does not meaningfully contest that *Rodriguez* overrules *Harrison*. *See* Appellee’s Br. 36 & n.7 (arguing that even if Gomez is correct, we “need not decide here whether *Rodriguez* abrogates *Harrison*”).

1 what the police in fact do,” rather than a comparison to the duration
2 of a hypothetically expeditious seizure or the duration of a seizure in
3 similar circumstances. *See id.* at 1616. Therefore, an officer may not
4 obtain “bonus time to pursue an unrelated criminal investigation,”
5 and if such an investigation does in fact “prolong[]—*i.e.*, add[] time
6 to—the stop,” the seizure is unconstitutional absent reasonable
7 suspicion of the other offense. *Id.* (internal quotation marks
8 omitted). In *Harrison*, even though the officer testified that he “had
9 all of the information needed to issue the traffic ticket” (the stop’s
10 mission), he added time to the seizure by “approach[ing] the
11 [passengers] in the car to corroborate [the driver’s] story”—an
12 inquiry unrelated to the traffic violation. *Harrison*, 606 F.3d at 45.
13 Based on the total length of the stop, we concluded that this
14 extension was reasonable. *See id.* That conclusion, however,
15 conflicts with, and thus must yield to, *Rodriguez’s* holding: unrelated
16 inquiries that prolong or add time to a traffic stop violate the Fourth

1 Amendment absent reasonable suspicion of a separate crime.²⁴ See
2 *Rodriguez*, 135 S. Ct. at 1616.

3 Accordingly, we conclude that *Rodriguez* abrogates *Harrison*,
4 and that the district court therefore erred by applying *Harrison* in
5 denying Gomez’s motion to suppress. See *Gomez*, 2015 WL 3936397,
6 at *3 (noting that this Court “found a stop of five to six minutes was
7 not unlawfully prolonged” in *Harrison*, and that there was no
8 evidence to contradict the testimony of Campbell and Schatz that the
9 stop lasted “five minutes at most”).

²⁴ We conclude that the other potential grounds for distinguishing *Harrison* from *Rodriguez* are unpersuasive. First, although *Harrison* involved questioning while *Rodriguez* involved a dog sniff, the Court treated both as investigations unrelated to the traffic stop’s mission. See *Rodriguez*, 135 S. Ct. at 1614 (noting that *Johnson* (questioning) and *Caballes* (dog sniff) both involved unrelated investigations); see also *id.* at 1616 (“On-scene investigation into other crimes . . . detours from [a traffic stop’s] mission.”). Second, the fact that the questioning in *Harrison* occurred before a ticket was issued (no ticket was ultimately issued, it seems) while the dog sniff in *Rodriguez* followed the issuance of a ticket is of no moment because in both situations, unrelated investigations extended the seizure. As the Court explained in *Rodriguez*, “[t]he critical question . . . is not whether the [unrelated investigation] occurs before or after the officer issues a ticket . . . but whether conducting the sniff prolongs—*i.e.*, adds time to—the stop.” *Id.* (citations and internal quotation marks omitted).

1 **2. Gomez’s Traffic Stop is Unconstitutional**

2 We conclude that Gomez’s traffic stop violates the Fourth
3 Amendment because Campbell’s investigative inquiries unrelated to
4 the traffic violations “prolong[ed]—*i.e.*, add[ed] time to—the stop.”
5 *Rodriguez*, 135 S. Ct. at 1616 (internal quotation marks omitted). In
6 applying *Rodriguez*, we look to what Campbell “in fact d[id],” not
7 whether “the overall duration of the stop remains reasonable in
8 relation to the duration of other traffic stops involving similar
9 circumstances.” *Id.*

10 Although both Campbell and Schatz testified that the stop
11 lasted no longer than five minutes, the district court’s factual
12 findings confirm that “Gomez was questioned about matters
13 *unrelated* to the traffic violation[s] during this time period.” *Gomez*,
14 2015 WL 3936397, at *3 (emphasis added). The district court
15 concluded, by applying *Harrison*, that these unrelated questions did
16 not “unreasonably” prolong a concededly brief stop, but we have no

1 doubt that Campbell's inquiries did in fact add time to the stop in
2 violation of *Rodriguez*.

3 From the moment that Campbell first approached the black
4 Honda, his questioning "detour[ed] from th[e] mission" of the stop
5 (Gomez's traffic violations) to the DEA's heroin-trafficking
6 investigation. *See Rodriguez*, 135 S. Ct. at 1616. As Campbell stated
7 on direct examination:

8 Once [Gomez] complied and shut the vehicle off, he
9 again asked me why he had been stopped. I told him
10 that we were conducting an investigation into bad
11 heroin as well as firearms within the city of Hartford.
12 *Then* I also told him that, you know, I observed him
13 travel[l]ing at a high rate of speed as well as travel[l]ing
14 through the red lights.

15
16 App'x 248 (emphasis added). After Campbell asked for the car's
17 registration (but notably not Gomez's license—necessary to write a
18 ticket), he asked Gomez who Joan Sanchez—the car's owner—was
19 married to, and Gomez responded that she was married to Alex
20 Ortiz-Gomez (the suspected leader of the heroin-trafficking

1 organization).²⁵ When Campbell asked Gomez to exit the car, his
2 inquiries again turned to “bad heroin that had been laced with
3 Fentanyl and firearms” in Hartford. App’x 250. Once Campbell
4 searched the interior of the car and discovered the Ramada Inn
5 receipt, he conducted a pat-down, which produced the hotel room
6 keys. With the receipt and room keys in hand, Campbell inquired
7 whether Gomez was staying at the Ramada Inn, pressing him as to
8 why he possessed the keys if only his friends were staying there.
9 Finally, Campbell searched the car’s trunk and the contents of the
10 trunk.

11 These undisputed facts demonstrate that Campbell spent
12 much of the time of the stop, if not most of it, asking questions and
13 executing searches related to the heroin investigation rather than
14 conducting “ordinary inquiries incident to the traffic stop”—such as
15 checking Gomez’s license, determining whether there were

²⁵ This is an unusual question for a traffic stop that, under *Rodriguez*, must be focused on the traffic violations that justified the stop.

1 outstanding warrants for him, and inspecting the car's proof of
2 insurance. *See Rodriguez*, 135 S. Ct. at 1615 (alteration omitted).
3 Even assuming Gomez's detention lasted only five minutes,
4 Campbell extended the seizure to ask questions pertinent to "an
5 unrelated criminal investigation." *Id.* at 1616. Under *Rodriguez*, this
6 violates the Fourth Amendment. *See id.* (explaining that
7 reasonableness of stop depends on what officer in fact does rather
8 than overall duration of stop in relation to other stops in similar
9 circumstances). Just as an officer may not earn "bonus time" to
10 conduct inquiries for an unrelated criminal investigation by
11 efficiently processing the matters related to the traffic stop, *see id.*, an
12 officer may not consume much of the time justified by the stop with
13 inquiries about offenses unrelated to the reasons for the stop.

14 The Government does not appear to dispute this conclusion,
15 arguing only in passing that Campbell and Schatz "simultaneously
16 pursued the traffic violations and the heroin trafficking

1 investigation.” Appellee’s Br. 14. However, the record belies that
2 argument. While Officer Campbell was initially questioning Gomez
3 in the driver’s seat of the black Honda, Agent Schatz had not even
4 exited his car yet. And when Schatz did join them on the side of the
5 road, he stood by and watched Gomez while Campbell questioned
6 him and searched the car. This is not a situation where one officer
7 expeditiously completed all traffic-related tasks while another
8 officer questioned the driver or conducted a dog sniff without
9 extending the stop. *See Caballes*, 543 U.S. at 406, 408 (declining to
10 disturb state court’s conclusion that stop was not improperly
11 extended where second officer “immediately” responded to the
12 scene of a stop and conducted dog sniff while first officer “was in
13 the process of writing a warning ticket”).

14 The Government’s principal argument, however, is that the
15 extended traffic stop is lawful under *Rodriguez* because the officers
16 possessed independent reasonable suspicion that Gomez was

1 trafficking heroin. See Appellee’s Br. 30–35; see also *Rodriguez*, 135 S.
2 Ct. at 1615 (explaining that stop may not be prolonged to conduct
3 unrelated investigation “absent the reasonable suspicion ordinarily
4 demanded to justify detaining an individual”). In so arguing, the
5 Government contends that we should affirm on the basis of
6 reasonable suspicion of a drug crime—an issue that was litigated
7 below but the district court did not reach. See *Gomez*, 2015 WL
8 3936397, at *2–3.

9 “In general, ‘a federal appellate court does not consider an
10 issue not passed upon below.’” *Booking v. Gen. Star Mgmt. Co.*, 254
11 F.3d 414, 418 (2d Cir. 2001) (quoting *Singleton v. Wulff*, 428 U.S. 106,
12 120 (1976)); accord *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 90
13 (2d Cir. 2004) (“In general, we refrain from analyzing issues not
14 decided below . . .”). This general rule, however, is a prudential
15 one, and we therefore have “broad discretion” to consider issues
16 that “were raised, briefed, and argued in the [d]istrict [c]ourt, but

1 that were not reached there.” *Booking*, 254 F.3d at 418–19. We are
2 “more likely to exercise our discretion (1) where consideration of the
3 issue is necessary to avoid manifest injustice or (2) where the issue is
4 purely legal and there is no need for additional fact-finding.” *Baker*
5 *v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000) (internal quotation marks
6 omitted); *see also Hartford Courant*, 380 F.3d at 91 (noting that
7 exercising discretion is appropriate where issue “is a matter of law
8 suitable for determination by an appellate tribunal in the first
9 instance”); *Booking*, 254 F.3d at 419 (deciding issue not reached
10 below, in part, because it was “purely legal”).

11 The existence of reasonable suspicion is not a purely legal
12 issue; rather, it is a mixed question of law and fact dependent on the
13 totality of the circumstances. *United States v. Freeman*, 735 F.3d 92,
14 95–96 (2d Cir. 2013). Here, in its opinion and order, the district court
15 made only four factual findings, which related exclusively to the
16 traffic violations, Gomez’s consent to the searches, the duration of

1 the stop, and the nature of the questioning during the stop.²⁶ See
2 *Gomez*, 2015 WL 3936397, at *2–3. Accordingly, as to the factual
3 portion of the reasonable suspicion issue, we are left with
4 insufficient factual findings upon which to base a conclusion
5 concerning reasonable suspicion. Moreover, the Government has
6 not brought to our attention any “manifest injustice” that would
7 result from not reaching the reasonable suspicion issue here. See
8 *Baker*, 239 F.3d at 420. Therefore, under these circumstances, we
9 decline to reach an issue not decided below. Cf. *Rodriguez*, 135 S. Ct.
10 at 1615, 1616 (criticizing two dissents’ willingness to “find[]”
11 reasonable suspicion, an issue not decided by the Eighth Circuit).

²⁶ Specifically, the district court made the following findings: (i) “that [the officers] had probable cause or reasonable suspicion that Gomez had committed a traffic violation;” (ii) “that [Gomez] did consent to the search of his vehicle, including the trunk;” (iii) “that the process was reasonable in time, and that the officer’s unrelated inquiries did not measurably extend the duration of the stop;” and (iv) “[that] Gomez was questioned about matters unrelated to the traffic violation during th[e] [stop].” App’x 339–40, 342 (internal quotation marks omitted).

1 Accordingly, Gomez’s traffic stop violated the Fourth
2 Amendment under *Rodriguez* because Campbell prolonged the
3 traffic stop by asking unrelated investigatory questions and the
4 district court made no finding that Campbell had independent
5 reasonable suspicion of a different offense.²⁷

6 **3. The Good-Faith Exception Applies**

7 Although we conclude that Gomez’s traffic stop was
8 unlawfully extended under *Rodriguez*, we nevertheless also conclude

²⁷ If it reached the issue, the district court could have—had it made more detailed findings of fact—found that there was reasonable suspicion to extend the stop. Setting aside what occurred during the traffic stop—which may have been unlawfully extended from its outset—the officers testified that *prior* to the stop they observed: Gomez leave an address associated with Ortiz-Gomez (the suspected leader of a heroin-trafficking organization); drive to a second address associated with Ortiz-Gomez; quickly change cars; drive away in a car that had been previously stopped with Ortiz-Gomez and \$80,000 in cash; drive to a hotel just miles away from the two addresses; exit the hotel minutes later carrying a weighted duffel bag that he was not carrying previously; and, before driving away, place the duffel bag in the car’s trunk (rather than its passenger compartment). *See supra* at 5–8. In other words, a pretextual stop and reasonable suspicion are not mutually exclusive; an officer may conduct a pretextual stop based on a traffic violation and then, in full compliance with *Rodriguez*, extend the stop if the officer develops reasonable suspicion based on the actions of a driver or passenger either (i) before the stop, or (ii) during traffic-related processing of the stop. But again, an officer may not extend an otherwise lawful stop for non-traffic related purposes absent reasonable suspicion of another offense.

1 that suppression is not warranted because the good-faith exception
2 to the exclusionary rule applies to the conduct of Campbell and
3 Schatz.

4 “To safeguard Fourth Amendment rights, the Supreme Court
5 created ‘an exclusionary rule that, when applicable, forbids the use
6 of improperly obtained evidence at trial.’” *United States v.*
7 *Bershchansky*, 788 F.3d 102, 112 (2d Cir. 2015) (quoting *Herring v.*
8 *United States*, 555 U.S. 135, 139 (2009)). “The exclusionary rule’s
9 ‘prime purpose is to deter future unlawful police conduct and
10 thereby effectuate the guarantee of the Fourth Amendment against
11 unreasonable searches and seizures.’” *Id.* (quoting *United States v.*
12 *Calandra*, 414 U.S. 338, 347 (1974)). Accordingly, the rule is intended
13 to prevent “deliberate, reckless, or grossly negligent conduct, or in
14 some circumstances recurring or systemic negligence.” *Herring*, 555
15 U.S. at 144. But “[s]uppression is ‘our last resort, not our first

1 impulse.” *Bershchansky*, 788 F.3d at 112 (quoting *Hudson v.*
2 *Michigan*, 547 U.S. 586, 591 (2006)).

3 The good-faith exception provides, among other things, that
4 “searches conducted in objectively reasonable reliance on binding
5 appellate precedent are not subject to the exclusionary rule” because
6 “suppression would do nothing to deter police misconduct in these
7 circumstances, and because it would come at a high cost to both the
8 truth and the public safety.”²⁸ *Davis v. United States*, 564 U.S. 229,
9 232 (2011); accord *United States v. Aguiar*, 737 F.3d 251, 260 (2d Cir.
10 2013).

11 The Government argues, for the first time on appeal, that the
12 good-faith exception applies because *Harrison*—which upheld a five-
13 to-six minute traffic stop extended by unrelated questioning—was

²⁸ Gomez has not argued that this variation of the good-faith exception does not also apply to *seizures*, as opposed to searches, conducted in objectively reasonable reliance on binding appellate precedent. See *Davis*, 564 U.S. at 231–32 (noting that the Court created the exclusionary rule as a deterrent sanction to bar the introduction of evidence “obtained by way of a *Fourth Amendment violation*” (emphasis added)).

1 binding precedent in this Circuit at the time of Gomez’s traffic stop,
2 and the officers here conducted the five-minute stop in objectively
3 reasonable reliance on *Harrison*.

4 It is notable that the Eighth Circuit applied the good-faith
5 exception on remand after the Supreme Court rejected the *de minimis*
6 rule in *Rodriguez*: “[u]nder *Davis* . . . the exclusionary rule does not
7 apply because the circumstances of Rodriguez’s seizure fell squarely
8 within our case law and the search was conducted in objectively
9 reasonable reliance” on the then-binding *de minimis* rule. *Rodriguez*,
10 799 F.3d at 1224, *cert. denied*, 136 S. Ct. 1514 (2016); *see also United*
11 *States v. Ahumada*, 858 F.3d 1138, 1140 (8th Cir. 2017) (same). The
12 Fourth Circuit also applied the good-faith exception in a similar
13 situation after *Rodriguez*. *See United States v. Hill*, 849 F.3d 195, 200–
14 01 (4th Cir. 2017) (applying good-faith exception to seizure
15 conducted in reliance on Fourth Circuit’s pre-*Rodriguez* rule).

1 In response, Gomez does not dispute that *Harrison* was
2 binding precedent at the time of his March 2014 traffic stop—more
3 than a year before the Supreme Court’s decision in *Rodriguez*. Nor
4 does he contend that the officers failed to conduct the seizure in
5 objectively reasonable reliance on our precedent, or that the five-
6 minute traffic stop here is distinguishable from the five-to-six
7 minute traffic stop that we upheld in *Harrison*. Rather, with respect
8 to the good-faith exception, he asserts forfeiture: the Government
9 forfeited its good-faith argument, according to Gomez, by failing to
10 raise it before the district court.²⁹ See Appellant’s Reply Br. 1–3.

11 “It is well settled that arguments not presented to the district
12 court are considered waived [or forfeited] and generally will not be
13 considered for the first time on appeal.” *Anderson Grp., LLC v. City of*

²⁹ Technically, Gomez asserts “waiver,” but “[t]he terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous.” *Hamer v. Neighborhood Housing Servs. of Chi.*, No. 16-658, — S. Ct. —, 2017 WL 5160782, at *3 n.1 (U.S. Nov. 8, 2017). “Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.” *Id.* (alterations and internal quotation marks omitted).

1 *Saratoga Springs*, 805 F.3d 34, 50 (2d Cir. 2015). Nevertheless, we
2 have “discretion to consider arguments waived [or forfeited] below
3 because our waiver [and forfeiture] doctrine is entirely prudential.”
4 *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008)
5 (per curiam).

6 We generally exercise this discretion to consider an otherwise
7 forfeited argument “where necessary to avoid a manifest injustice or
8 where the argument presents a question of law and there is no need
9 for additional fact-finding.” *Bogle-Assegai v. Connecticut*, 470 F.3d
10 498, 504 (2d Cir. 2006) (alteration omitted). We will generally not,
11 however, exercise our discretion where the forfeited argument was
12 “available to the parties below and they proffer no reason for their
13 failure to raise the arguments below.” *Id.* (alterations and internal
14 quotation marks omitted).³⁰

³⁰ See also *In re Nortel*, 539 F.3d at 133 (declining to exercise discretion to consider forfeited argument where party “offered no reason for its failure to raise [forfeited] argument to the district court” and “refusal to address [forfeited] issue w[ould] not result in any injustice”); *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114

1 Under these circumstances, we will exercise our discretion to
2 consider the Government’s good-faith argument, which presents a
3 question of law that requires no additional fact-finding. *See*
4 *Rodriguez*, 799 F.3d at 1224 n.2 (Eighth Circuit rejecting Rodriguez’s
5 argument that Government forfeited good-faith argument by not
6 raising it prior to remand).³¹ The Government did not, in fact, raise
7 the good-faith argument before the district court. But there is a
8 reason why the Government did not invoke the good-faith
9 exception: Gomez never argued that *Rodriguez* abrogated *Harrison*.

(2d Cir. 2005) (declining to exercise discretion to consider forfeited arguments that were “available to the defendants” and “[d]efendants proffer[ed] no reason for their failure to raise [them]”).

³¹ Our decision not to reach the Government’s fact-dependent reasonable suspicion argument, which it raised before the district court, is not inconsistent with our decision to reach the Government’s purely legal good-faith argument, which it raised for the first time on appeal. Although we have broad discretion to consider issues “raised . . . in the [d]istrict [c]ourt, but that were not reached there,” *Booking*, 254 F.3d at 418–19, we are less inclined to do so where “there is [a] need for additional fact-finding,” *Baker*, 239 F.3d at 420. Reasonable suspicion is a mixed question of law and fact, *Freeman*, 735 F.3d at 95–96, and here we are lacking the benefit of sufficient factual findings from the district court, *cf. Rodriguez*, 135 S. Ct. at 1615 (expressing disapproval of dissent making its “own finding of reasonable suspicion” (internal quotation marks omitted)); *id.* at 1616 (criticizing dissent for “resolving the [reasonable suspicion] issue, nevermind that the Court of Appeals left it unaddressed”).

1 More specifically, Gomez first moved to suppress the
2 evidence against him in June 2014, ten months before the Supreme
3 Court decided *Rodriguez*. In his initial motion, Gomez did not even
4 challenge the duration of the traffic stop generally, much less argue
5 that *Harrison* no longer controlled. The district court held the first
6 suppression hearing in November 2014—a month *after* the Supreme
7 Court granted *certiorari* in *Rodriguez*. See 135 S. Ct. 43 (2014). Gomez
8 did not file a supplemental brief concerning *Rodriguez* or even bring
9 that case to the district court’s attention during the first suppression
10 hearing.

11 After the first hearing, Gomez filed a supplemental brief in
12 February 2015 (a month *after* the Supreme Court heard oral
13 argument in *Rodriguez*) contending, for the first time, that Campbell
14 unreasonably prolonged the stop.³² In his supplemental brief,
15 however, Gomez once again did not mention *Rodriguez* or argue that

³² It appears that the Government did not file a responsive supplemental brief.

1 *Harrison* was wrongly decided; rather, he argued that *Harrison* was
2 factually distinguishable from the stop here.

3 After the case was transferred to a different district judge with
4 Gomez's motion pending, the district court held a second
5 suppression hearing in June 2015, two months after the Supreme
6 Court decided *Rodriguez*. In advance of the hearing, Gomez did not
7 file a supplemental brief, nor did he discuss the Supreme Court's
8 decision during the hearing. When the district court twice
9 questioned his counsel about *Harrison* during the hearing, his
10 counsel did not raise *Rodriguez*.

11 Simply put, the first time Gomez argued that *Harrison* was no
12 longer controlling precedent—or even cited *Rodriguez*—was in his
13 opening brief on appeal. We therefore conclude that the
14 Government's failure to raise the good-faith exception prior to its
15 brief on appeal was understandable. See *In re Nortel*, 539 F.3d at 133

1 (declining to consider argument not previously raised where party
2 offered “no reason” for failure to present argument earlier).

3 Accordingly, under these circumstances, we will exercise our
4 discretion to consider the Government’s good-faith argument, and
5 we conclude that the exception applies because the officers
6 conducted Gomez’s five-minute traffic stop in objectively reasonable
7 reliance on our then-binding precedent in *Harrison*. Therefore,
8 although *Rodriguez* abrogates *Harrison*, and Gomez’s traffic stop was
9 unlawfully extended absent independent reasonable suspicion in
10 violation of *Rodriguez*, the good-faith exception to the exclusionary
11 rule applies.

12 **II. Legality of the Initial Stop**

13 Gomez also contends that the traffic stop was unlawful at its
14 inception because Campbell did not have valid probable cause or
15 reasonable suspicion to believe he committed a traffic violation. *See*
16 *Stewart*, 551 F.3d at 191. Although we “analyze *de novo* the ultimate

1 determination of such legal issues as probable cause,” *United States*
2 *v. Howard*, 489 F.3d 484, 490–91 (2d Cir. 2007), Gomez challenges the
3 district court’s factual finding (and corresponding credibility
4 determination) that the stop was justified by at least one traffic
5 violation. *See Gomez*, 2015 WL 3936397, at *2 (“The court finds that
6 [the officers’] testimony was credible and supports a finding that
7 they had probable cause or reasonable suspicion that Gomez had
8 committed a traffic violation.”). Accordingly, Gomez concedes that
9 we review the district court’s finding for clear error. Appellant’s Br.
10 17, 24; *see Ulbricht*, 858 F.3d at 94–95.

11 Based on our review of the testimony during both suppression
12 hearings and the contemporaneous radio communications, we
13 conclude that the district court committed no error, clear or
14 otherwise, in finding that Campbell had probable cause or
15 reasonable suspicion to initiate the traffic stop. Campbell and Schatz
16 testified consistently with each other across both hearings that

1 Gomez drove through a red light before entering the highway.
2 Moreover, the radio communications corroborate their testimony.
3 Additionally, they both testified repeatedly—again corroborated by
4 the radio communications—that Gomez was speeding while on the
5 highway.

6 Faced with this evidence, Gomez raises two arguments to
7 challenge the district court’s credibility determination. *See Jiau*, 734
8 F.3d at 151 (explaining that we “pay special deference” to a district
9 court’s factual determinations “going to witness credibility”).

10 First, Gomez points to certain radio transmissions Campbell
11 made (before Gomez even ran the red light entering the highway)
12 indicating that the officers “definitely” needed to stop him. *See*
13 App’x 202 at 13:39–14:46. Based on Campbell’s statements, Gomez
14 argues that the officers intended to stop him “*no matter what*—even if
15 they had to manufacture a traffic violation in order to do so.”
16 Appellant’s Br. 30. This argument is unpersuasive. As an initial

1 matter, it is well established that “an officer’s use of a traffic
2 violation as a pretext to stop a car in order to obtain evidence for
3 some more serious crime is of no constitutional significance.” *United*
4 *States v. Dhinsa*, 171 F.3d 721, 724–25 (2d Cir. 1998); *see Whren*, 517
5 U.S. at 813–14. Moreover, when confronted during the suppression
6 hearing with these pre-violation statements, such as needing to
7 “definitely . . . take a shot at [Gomez],” Campbell explained:

8 Everybody was aware of the nature of our investigation.
9 When we saw [Gomez] leave with a bag, I wanted
10 everybody to be available if an opportunity to conduct a
11 traffic stop or anything else presented itself. Meaning *if*
12 *he conducts any violations* that we [a]re going to conduct
13 a motor vehicle traffic stop for everybody to be aware.
14

15 App’x 236 (emphasis added). The district court, which listened to
16 the radio communications, did not clearly err in crediting
17 Campbell’s explanation. *See United States v. Delva*, 858 F.3d 135, 160
18 (2d Cir. 2017) (noting that where “there are two permissible views of
19 the evidence, the factfinder’s choice between them cannot be clearly
20 erroneous”).

1 Second, Gomez urges us to conclude that Campbell “offered
2 false testimony” about Gomez’s purported third traffic violation—
3 turning right at a red light without stopping after exiting the
4 highway—in order to cast doubt on Campbell’s testimony as to the
5 other two violations. Appellant’s Br. 32. Although Campbell’s
6 testimony about the third violation may be inconsistent and
7 contradicted by Schatz’s account, Gomez’s argument is insufficient
8 to disturb the district court’s finding for two reasons. First, we pay
9 special deference to the district court’s credibility determination, *see*
10 *Jiau*, 734 F.3d at 151, and “a factfinder who determines that a witness
11 has been . . . contradictory . . . in some respects may nevertheless
12 find the witness entirely credible in the essentials of his testimony.”
13 *United States v. Delacruz*, 862 F.3d 163, 176 (2d Cir. 2017) (internal
14 quotation marks omitted). Second, the district court expressly based
15 its finding on only the first and second traffic violations—the red
16 light before entering the highway and the speeding while on the

1 highway. *See Gomez*, 2015 WL 3936397, at *2. Again, both officers
2 testified consistently, corroborated by the radio communications,
3 about those two violations. At the very least, the district court's
4 conclusion is supported by a permissible view of the evidence and
5 thus is not clearly erroneous. *See Delva*, 858 F.3d at 160.³³

6 Accordingly, we cannot conclude that the district court erred
7 in finding that Gomez's traffic stop was based on valid probable
8 cause or reasonable suspicion of a traffic violation.

9 **III. Consent to the Searches**

10 Finally, Gomez argues that the district court committed clear
11 error in crediting the officers' testimony and finding that Gomez
12 verbally consented to Campbell's searches of (i) the interior of the

³³ For the first time on appeal, Gomez suggests that Campbell, a Hartford police detective and cross-deputized DEA task force officer, had no authority to conduct a traffic stop in the neighboring jurisdiction of East Hartford. Although Gomez's counsel explored this issue on cross-examination during the first suppression hearing, he did not argue that the stop was invalid on this basis in his initial motion to suppress or his post-hearing supplemental brief, or during oral argument at the end of the second suppression hearing. We therefore consider this argument forfeited.

1 black Honda, (ii) its trunk, and (iii) the closed duffel bag in the
2 trunk. His argument is unavailing.

3 It is “well settled that one of the specifically established
4 exceptions to the requirements of both a warrant and probable cause
5 is a search that is conducted pursuant to consent.” *Schneckloth v.*
6 *Bustamonte*, 412 U.S. 218, 219 (1973). The existence and scope of a
7 defendant’s consent is a question of fact we review for clear error,
8 and the “[G]overnment has the burden of proving, by a
9 preponderance of the evidence, that the consent to search was
10 voluntary.” *United States v. Gandia*, 424 F.3d 255, 265 (2d Cir. 2005);
11 *see also United States v. Guerrero*, 813 F.3d 462, 467 (2d Cir. 2016) (“We
12 do not reverse a finding of voluntary consent except for clear error.”
13 (internal quotation marks omitted)).

14 Here, based on the record of the suppression hearings and the
15 district court’s credibility findings, we encounter no such error. *See*
16 *Gomez*, 2015 WL 3936397, at *2 (“The court finds [the officers’]

1 testimony credible. Thus, notwithstanding Gomez's sworn
2 statement to the contrary, the court finds that he did consent to the
3 search of his vehicle, including the trunk" (footnote omitted)).
4 Both Campbell and Schatz testified consistently during two hearings
5 that Gomez verbally consented three separate times: first, to the
6 search of the car's passenger area; second, to the search of the trunk;
7 and third, to the search of the closed duffel bag in the trunk. We
8 conclude that the district court committed no error in finding that
9 Gomez consented to the three searches.³⁴

10 CONCLUSION

11 We conclude that the Supreme Court's decision in *Rodriguez*
12 abrogates our holding in *Harrison*, and that the extension of Gomez's

³⁴ Gomez argues that even if he *did* verbally consent to the searches, Campbell's purportedly illegal pat-down prior to the trunk search tainted the voluntariness of Gomez's consent. The record is clear that Gomez waived this argument during the second suppression hearing, during which his counsel responded affirmatively when the court asked directly: "I think in one of your briefs earlier . . . you cite some cases that actually go to voluntariness of consent. I want to be clear my understanding is your client's position is that he gave no consent so the voluntariness is not an issue." App'x 327 (emphasis added).

1 traffic stop violated the Fourth Amendment. Nevertheless, the
2 good-faith exception to the exclusionary rule applies because the
3 officers reasonably relied on our then-binding precedent. As to
4 Gomez's remaining arguments, the district court did not clearly err
5 in concluding that the initial traffic stop was valid and that Gomez
6 consented to the searches. We therefore **AFFIRM** the judgment of
7 the district court.