

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 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. 2015AP1916-CR

Cir. Ct. No. 2014CF283

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES J. COTTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
JOHN W. MARKSON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Charles Cotter appeals a judgment convicting him of possession of narcotic drugs in violation of WIS. STAT. § 961.41(3g)(am) (2013-

14).¹ He argues that the circuit court erroneously denied his motion to suppress evidence.² We disagree, and affirm.

Standard of Review

¶2 Motions to suppress raise questions of constitutional fact that present a mixed question of fact and law. *State v. Knapp*, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. When reviewing the circuit court’s denial of Cotter’s motion to suppress, we accept the court’s findings of historical facts so long as its findings are not clearly erroneous. See *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. The application to the historical facts of constitutional principles of law is a question of law which we review *de novo*. *State v. Johnson*, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182.

Background

¶3 This case concerns a traffic stop undertaken incident to a drug investigation that was extended briefly based on suspicious circumstances. Cotter was a passenger in a car operated by Craig Tomlinson at the time of the stop.

¶4 At the suppression hearing, Madison Police Department Sergeant Thomas Finnegan, who testified that he has participated in “probably five hundred or more” drug investigations, explained that members of the North District Community Policing Team received information concerning suspected drug

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

² Following the circuit court’s denial of Cotter’s motion to suppress evidence, Cotter entered a guilty plea to a single count of possession of narcotic drugs.

activity at a residence on Commercial Avenue from two anonymous sources. Finnegan also testified that he was aware that police had recently responded to the residence on a domestic disturbance call. Officer Steven Chvala, a member of Finnegan's team, testified that his research, undertaken prior to the stop in question, revealed that the domestic incident involved the homeowner's daughter and a man currently on parole for a conviction for drug sales who had an extensive drug history.

¶5 With this background information, Finnegan commenced surveillance of the suspect residence and relayed ongoing information to other members of his team. Finnegan first observed a male on a bicycle leave the driveway and ride away, and a purple Concord car in the driveway. Shortly thereafter, Finnegan observed a red Jeep pull into the driveway, back out, and park on the curb in front of the house. It appeared that there was only one person in the Jeep, a male, who then knocked at the door, which was answered by a woman whom Finnegan recognized from photographs as the homeowner's daughter. The man left shortly after entering the house, accompanied by a tall, slender man who was wearing a "fur trooper hat" with the flaps turned down. The two men left the area in the Jeep. Finnegan briefly followed, but lost sight of the Jeep and returned to the Commercial Avenue residence.

¶6 When Finnegan returned, he noticed a Mercury Sable back out of an adjacent driveway and pull into the suspect driveway. Finnegan heard the Sable horn honking, and after about two minutes, the Sable left. Finnegan followed the Sable for some distance, then decided to return back to the Commercial Avenue house.

¶7 Upon Finnegan's arrival back at the house, he noticed that the Jeep was back, parked in the same curbside position where it had been previously. Finnegan estimated that the Jeep had been gone less than five to seven minutes. Shortly thereafter, Finnegan saw the Concord leave the driveway and proceed in the same direction as the other cars had gone, eastbound on Commercial Avenue. Finnegan followed the Concord and read the license plate number to his team members, who were able to run the plate from their cars and determine who the registered owner was. He learned that the Concord was registered to Danielle Tomlinson, who was listed as having a non-valid operator's license.

¶8 Finnegan traveled past the Concord on the passenger's side and noticed that the passenger in the front seat appeared to be the same man in the fur trooper hat that he had seen earlier in the Jeep and coming out of the Commercial Avenue residence. He also noted that the Concord was taking a longer route than necessary to reach East Washington Avenue. Finnegan was unable to see the Concord's driver and could not determine the driver's gender.

¶9 Officer Scott Templeton, a member of Finnegan's team, testified that he initiated a traffic stop on the basis that the Concord's registered owner did not have a valid operator's license. Templeton made contact with the driver, and identified the driver as Craig Tomlinson via Tomlinson's driver's license. There were two passengers in the car. Templeton testified that Tomlinson, whom Templeton could not see upon initial contact due to the fact that Tomlinson had his seat deeply reclined, presented as "extremely nervous." When Templeton asked Tomlinson to exit the car, Tomlinson was fidgeting and appeared not to know what to do with his hands. Templeton inquired where Tomlinson was going, and Tomlinson replied that he had picked up friends out of town, brought them to Madison, and was taking them to the Burger King. This made no sense to

Templeton because Templeton was aware that the Concord had left the Commercial Avenue address and its direction of travel was not consistent with a visit to the particular Burger King referenced by Tomlinson. Templeton pointed out the discrepancy, and then asked for consent to search Tomlinson, which he gave. Templeton found nothing.

¶10 In the meantime, Officer Steven Chvala, who participated in the initial stop of Tomlinson's car, made contact with the front seat passenger, identified as Sterling Jiran, the man with the fur trooper hat. Because the car window was apparently broken, Chvala spoke to Jiran through the open car door and observed a pocket knife clipped to Jiran's pants pocket. Chvala then spoke with both Jiran and the rear seat passenger, the appellant, Charles Cotter. Chvala asked each questions such as where they were coming from and where they were going, and received conflicting answers. After several minutes, Chvala separated Jiran and Cotter, so that Chvala could speak privately with Jiran.

¶11 Because Jiran did not respond when Chvala asked him whether he was carrying any weapons other than the knife, Chvala conducted a weapons pat-down, during which Chvala uncovered a bag containing what Jiran acknowledged was marijuana. Chvala placed Jiran in custody in the squad car.

¶12 Returning to the Tomlinson car, Chvala spoke with Craig Tomlinson and learned that the registered owner of the car was his mother. Chvala explained to Tomlinson that based upon the marijuana he had located on Jiran, he was going to search the car. Chvala inquired whether Tomlinson was aware of anything illegal in the car, and Tomlinson replied that anything illegal in the car would be associated with either Jiran or Cotter. When pressed, Tomlinson indicated that

Chvala may find “weed” on Jiran and “dope” on Cotter. As Chvala began his search, he saw Templeton take Cotter into custody.

¶13 Returning to Templeton’s testimony, after Templeton completed his initial contact with Tomlinson, he went to the rear passenger area, made contact with Cotter, and asked him to step out of the car. Templeton testified that Finnegan, who had come to assist with the traffic stop, came over and told Templeton that it was likely that Cotter had heroin (the “dope” referred to by Tomlinson) in his possession. Templeton asked Cotter to step out of the car, and asked for consent to search him. Cotter consented to a pat down frisk for weapons, which revealed nothing. Templeton then asked Cotter to empty his pockets. Cotter displayed the contents and permitted Templeton to stick his hands in the pockets. Cotter indicated that he had one more inside pocket, and hesitating, reached in it. When Cotter removed his hand from the pocket, he kept it cupped and it was apparent to Templeton that Cotter was attempting to hide something. Cotter then displayed to Templeton that nothing was still in the pocket and permitted Templeton to check it. Templeton then asked Cotter to show him what was in his hand. After some hesitation, Cotter threw a tied off corner of a plastic bag containing a light brownish chunky substance onto the hood of the car. Based on his training, Templeton believed this to be heroin. Cotter admitted that the substance was heroin, and testing confirmed it.

¶14 Cotter now raises the issue of whether the officers conducting the stop on the basis of a suspected violation of traffic laws, namely that the car’s female registered owner whose license was invalid may be driving the car, were permitted to prolong the stop for further investigation after the officers realized

that the car's driver was male.³ We conclude that controlling case law under the undisputed facts of this case permitted police to undertake basic questioning of the driver Craig Tomlinson, which, in turn, developed into the requisite reasonable suspicion to expand the duration of the stop, and ultimately, Cotter's production of the heroin packet. We break the issue into two parts. The first part involves justification to continue the stop for any length of time after learning that the vehicle operator was male. The second part involves justification to prolong the stop to the point at which Cotter produced the heroin.

Extension of Stop After Seeing Male Operator

¶15 Cotter does not dispute that the officers were permitted to conduct a traffic stop of the car in which he was traveling as a passenger when they discovered that the registered owner did not have a valid license. However, Cotter argues that the officers extended the duration of the stop beyond the time reasonably necessary to complete its mission, and that here the mission was completed when Officer Templeton saw that a man, rather than the female registered owner, had been operating the car. Cotter's argument is grounded in his assertion that our decision in *State v. Williams*, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462, conflicts with the more recent United States Supreme Court decision in *Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609 (2015). We disagree. Further, to the extent that Cotter asks us to modify *Williams*, we are

³ Cotter also challenges a separate basis that the circuit court concluded justified the stop, namely, that reasonable suspicion supported the officers' decision to stop the Concord based solely on the anonymous tips, unusual vehicular traffic suggesting drug activity, and related pre-traffic stop information. However, because we affirm for other reasons, we need not address this separate ground to affirm. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

bound by our own precedent, *Skrupky v. Elbert*, 189 Wis. 2d 31, 56, 526 N.W.2d 264 (Ct. App. 1994), and are not permitted to overrule, modify, or withdraw language from one of our previously published opinions. *Cook v. Cook*, 208 Wis. 2d 166, ¶55, 560 N.W.2d 246 (1997).

¶16 The question in *Rodriguez* is “whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff.” *Rodriguez*, 135 S. Ct. at 1614. The Court answered the question in the negative, concluding: “An officer ... may conduct certain unrelated checks during an otherwise lawful traffic stop ... [but] may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” *Id.* at 1615. The *Rodriguez* Court explained that, under established law, police may not prolong a lawful stop “beyond the time reasonably required to complete th[e] mission.” *Id.* at 1611 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). *Rodriguez* essentially reiterates established law that prohibits the expansion of a traffic stop to conduct a dog sniff without reasonable suspicion and provides guidance with regard to acceptable routine inquiries an officer may make attendant to a lawful traffic stop. *Rodriguez*, 135 S. Ct. at 1614-15. *Rodriguez* holds that “[b]eyond determining whether to issue a traffic ticket,” “completing the 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.” *Id.*, 135 S. Ct. at 1615. The Court contrasted a dog sniff with such routine functions as checking the driver’s license, noting that “a dog sniff ... is not an ordinary incident of a traffic stop.” *Id.* The Court continued: “Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer’s traffic mission.” *Id.*

¶17 Not inconsistent with the later *Rodriguez*, in *Williams*, 258 Wis. 2d 395, ¶22, we held that it is reasonable for an officer to request a driver’s license from a motorist even after the officer has determined that, as here, the motorist could not be the person whom the officer suspected he or she might be at the time of the stop, and, thus, the justification for the stop has dissipated. We also held that the officer may gather identification so that he or she is able to generate a report of the contact for future use. *Id.*, ¶¶19, 22. *Williams* does not conflict with *Rodriguez*, because *Rodriguez* recognizes that for an officer making a traffic stop, the *first* step is to determine whether to issue a ticket. That determination alone, however, does not necessarily “complete the mission,” because *Rodriguez* instructs that the officer is necessarily permitted to check the driver’s license, among other things. *Rodriguez*, 135 S. Ct. at 1615. And, of course, if reasonable suspicion of other violations arises in the course of completing the mission, the officer may prolong the detention. *Id.* at 1614; *see also State v. Hogan*, 2015 WI 76, ¶35, 364 Wis. 2d 167, 868 N.W.2d 124.

¶18 In this case, police lawfully stopped the Tomlinson car after discovering that the registered owner’s operator’s license was invalid. Consistent with *Rodriguez*, as well as with Wisconsin precedent stated in *Hogan* and *Williams*, Templeton, after determining that he could not issue a ticket on the basis for which the stop was initiated, was permitted to continue the stop for purposes of completing routine matters such as gathering Craig Tomlinson’s license information, making attendant observations in the process.

Extension of the Traffic Stop Beyond Initial Encounter

¶19 Reviewing the totality of the circumstances, we conclude that reasonable suspicion provided a basis for the officers to extend the stop beyond

the steps to complete the mission justifying the traffic stop and continuing until Cotter produced the heroin. *See Hogan*, 364 Wis. 2d 167, ¶¶36-37. Prior to the traffic stop, Finnegan watched the residence and discovered what he considered to be unusual short-term vehicular traffic, in which one individual—the man with the fur trooper hat—took one short trip with the occupants of the Jeep, returned to the residence within some seven minutes, and left again in the Concord, which was eventually stopped. One other vehicle, the Sable, was also briefly at the residence. Finnegan was also aware that a man with a known drug history was involved in a domestic incident at the residence just days before the surveillance.

¶20 Templeton, who initiated the stop of Tomlinson’s vehicle, noted immediately upon interacting with Tomlinson that Tomlinson appeared very nervous and offered a confusing explanation for his origin and destination. *See State v. Buchanan*, 2011 WI 49, ¶12, 334 Wis. 2d 379, 799 N.W.2d 775; *State v. Betow*, 226 Wis. 2d 90, 93, 593 N.W.2d 499 (Ct. App. 1999). Chvala, who had initial contact with passenger Jiran, spotted a pocket knife. Considering the totality of the circumstances and the reasonable inferences we draw from the cumulative effect of those circumstances, *see State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996), we conclude that reasonable suspicion was established at this time and supported the continued detention of Tomlinson, and his passengers, Cotter and Jiran, for at least brief further investigation. *See State v. Malone*, 2004 WI 108, ¶¶32, 40, 274 Wis. 2d 540, 683 N.W.2d 1.

¶21 Based upon the circumstances we have noted, it was reasonable for the experienced officers to suspect from early moments of the stop that some kind of criminal activity had taken or was taking place. *See State v. Young*, 212 Wis. 2d 417, 423, 569 N.W.2d 84 (Ct. App. 1997) (valid stop requires officer, relying on own experience and information collectively gathered, to reasonably

suspect that criminal activity has occurred). Quickly thereafter, Chvala's conversation with Jiran and Cotter and frisk of Jiran, along with Tomlinson's admission that both Jiran and Cotter may be carrying controlled substances, added to this initial suspicion. All of this supported the officers' authority to conduct further investigation, which led to discovery of Cotter's heroin. We conclude that reasonable suspicion supported the extension of the traffic stop. Accordingly, the circuit court properly denied Cotter's motion to suppress evidence.

By the Court.—Judgment affirmed.

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

