

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 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. 2016AP618-CR

Cir. Ct. No. 2015CM329

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KATHERINE J. DOWNER JOSSI,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
MICHAEL J. APRAHAMIAN, Judge. *Affirmed.*

¶1 REILLY, P.J.¹ Katherine J. Downer Jossi appeals her conviction for possession of drug paraphernalia arguing that the circuit court should not have applied the good faith exception to the exclusionary rule. We affirm.

¶2 The facts are not disputed. On January 23, 2015, Officer Adam Olson was on patrol when he stopped a vehicle with an expired license plate. Downer Jossi was a passenger in the vehicle. When Olson approached the vehicle, all the occupants lit cigarettes. Olson noted that based on his training and experience, he knew that cigarette smoke can be used to mask the smell of drugs. Olson proceeded to ask the driver routine questions and requested the driver's identification. The driver admitted that the registration sticker was not on his license plate, but asserted that his registration was current. The driver explained that they were coming from Racine and heading to Menomonee Falls, Wisconsin. Olson testified that this "spiked my interest" because Racine is a drug distribution city. Olson's continued questioning of the occupants revealed that the other female passenger was on probation for retail theft and Downer Jossi was previously addicted to marijuana.

¶3 Olson called for a canine unit during his walk back to his vehicle. Olson confirmed that the driver's registration was current and began writing a written warning for failure to attach the rear registration decal. The canine unit arrived while Olson was completing the warning. Olson stopped writing the warning and explained the situation to the canine officer. After completing the warning, Olson ordered all the occupants out of the vehicle, informed them that a

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

dog sniff would be conducted, and explained the warning to the driver. During Olson's conversation with the driver, the canine unit conducted the dog sniff.

¶4 The dog alerted on the vehicle, and Olson conducted a search. Olson found heroin-related drug paraphernalia in a purse underneath a seat. Downer Jossi confessed that the items belonged to her and that as a recovering heroin addict she had used within the last week. Downer Jossi was arrested for possession of drug paraphernalia. Olson testified that the traffic stop lasted approximately fifteen to twenty minutes, whereas a traffic stop where he would only issue a citation or warning (no canine unit) would typically take approximately eight to twelve minutes.

¶5 Downer Jossi moved to suppress the evidence of the search. The circuit court concluded that there was no reasonable suspicion to conduct the dog sniff and that the dog sniff of the vehicle prolonged the traffic stop. Applying the United States Supreme Court's decision in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), the court found the seizure unconstitutional. The court, however, applied the good faith exception, reasoning that as the traffic stop and subsequent dog sniff was conducted before the *Rodriguez* decision was issued, Olson was justified in relying on controlling Wisconsin precedent in *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748. Downer Jossi entered a no contest plea to possession of drug paraphernalia and was sentenced to a year of probation. Downer Jossi now appeals.

¶6 “When we review a circuit court's ruling on a motion to suppress evidence, we apply the clearly erroneous standard to the circuit court's findings of fact. However, we review the circuit court's application of constitutional

principles to the findings of fact de novo.” *State v. Smiter*, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (citation omitted).

¶7 The parties do not dispute that the initial seizure of the vehicle or questioning of its occupants for the registration violation was lawful. Downer Jossi also does not dispute the circuit court’s conclusion that the traffic stop was prolonged without reasonable suspicion. We concur, and will not upset the circuit court’s well-reasoned conclusion that the evidence known to Olson at the time he requested the canine unit did not amount to reasonable suspicion under the totality of the circumstances. Downer Jossi only takes issue with the court’s pronouncement that the good faith exception to the exclusionary rule applies, arguing that Olson’s reliance on *Arias* was not objectively reasonable and *Rodriguez* did not change Wisconsin law. We disagree.

¶8 When evidence is obtained in violation of the constitution, we apply the judicially-developed exclusionary rule to preclude its use in a criminal proceeding. *Mapp v. Ohio*, 367 U.S. 643 (1961). Exclusion is not a constitutional right. As such, “the exclusionary rule should not apply where the officers relied in good faith on clear and settled law that was only subsequently changed.” *State v. Dearborn*, 2010 WI 84, ¶34, 327 Wis. 2d 252, 786 N.W.2d 97.

¶9 We agree with the circuit court that Olson was acting in objectively reasonable reliance on established Wisconsin precedent. Downer Jossi’s arguments to this court rely heavily on the Court’s decision in *Rodriguez*. *Rodriguez*, however, was decided on April 21, 2015, and the traffic stop in this case was conducted on January 23, 2015. *Rodriguez* clearly changed the state of the law in Wisconsin. *Arias* allowed for a reasonable delay based on the totality of the circumstances, *Arias*, 311 Wis. 2d 358, ¶38, while the Supreme Court in

Rodriguez made clear that “a traffic stop ‘prolonged beyond’” the “time reasonably required to complete [the stop’s] mission” without reasonable suspicion is unlawful, *Rodriguez*, 135 S. Ct. at 1615-16 (citations omitted). “The critical question ... is not whether the dog sniff occurs before or after the officer issues a ticket ... but whether conducting the sniff ‘prolongs’—i.e., adds time to—‘the stop.’” *Id.* at 1616. Thus, *Rodriguez* changed the analysis: instead of questioning whether the delay was reasonable we now only consider what is a reasonable amount of time to complete the purpose of the original seizure.

¶10 The pivotal fact is that Olson acknowledged that the traffic stop was prolonged because of the dog sniff. *Rodriguez* changed Wisconsin law as *Arias*’s allowance for a reasonable delay is no longer good law. *State v. Kiper*, 193 Wis. 2d 69, 80-81, 532 N.W.2d 698 (1995) (explaining that Wisconsin courts “consistently follow[] the United States Supreme Court’s interpretation of the search and seizure provision of the fourth amendment in construing the same provision of the state constitution” (citation omitted)). Olson, however, properly acted under *Arias*, and, therefore, the exclusionary rule does not apply. *See Dearborn*, 327 Wis. 2d 252, ¶¶36, 44.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

