

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2017

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. 2017AP3-CR

Cir. Ct. No. 2015CF60

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES R. STIB,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Ozaukee County:
SANDY A. WILLIAMS, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 REILLY, P.J. This appeal concerns whether the good faith exception to the exclusionary rule applies to evidence obtained when binding appellate precedent permitted a reasonable delay of a traffic stop to conduct a dog sniff. See *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748. James

R. Stib argues that his Fourth Amendment rights were violated when his traffic stop was prolonged for the sole purpose of conducting a dog sniff in contravention of the United States Supreme Court's holding in *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). We affirm as the dog sniff was conducted in objectively reasonable reliance on then-existing precedent, and, therefore, the good faith exception applies and renders exclusion of the evidence an inappropriate remedy.

BACKGROUND

¶2 On February 8, 2015, Trooper Brendan Braun of the Wisconsin State Patrol was monitoring traffic on I-43 when he observed a vehicle traveling 81 miles per hour (mph) in a 65 mph zone. Braun initiated a traffic stop on the vehicle, which exited the highway and entered a gas station parking lot. As the vehicle was exiting the highway, Braun witnessed the vehicle appear to lose control briefly. Braun testified that he saw the vehicle's "reverse lights briefly [come] on and then shut off" and he "thought the driver might lose control." He believed that the driver of the vehicle was "trying to hide something, taking [her] attention off controlling the vehicle and moving about the vehicle." Braun made contact with the driver and two other passengers in the vehicle; Stib was the passenger in the front seat.

¶3 Braun returned to his vehicle to write a citation for speeding and a warning for a cracked windshield¹ and contacted the Mequon Police Department and the Cedarburg Police Department to have a canine unit dispatched to his

¹ At the hearing on April 14, 2015, Braun indicated that he issued the warning for obstructing an officer. At the hearing on January 15, 2016, Braun explained that the warning was for having a cracked windshield.

location, which took approximately two minutes. Braun continued to write the citation. Five minutes later, the Cedarburg canine officer arrived, at which time Braun stopped working on the traffic stop and briefed the officer on the situation. Braun asked all the occupants to exit the vehicle, he patted the occupants down for weapons, and the canine unit was deployed.

¶4 After the dog alerted, Braun searched the vehicle. *See State v. Miller*, 2002 WI App 150, ¶¶12-14, 256 Wis. 2d 80, 647 N.W.2d 348. He found marijuana and drug paraphernalia in the area around the front passenger seat, where Stib had been seated. When Braun put his hand on Stib's arm to arrest him, Stib pulled away and took off running across a field. Stib was eventually located and arrested about thirty minutes later. After Stib was apprehended, Braun continued his search of the vehicle, which revealed a handgun that had been reported stolen in the pocket of Stib's jacket. According to the squad car video and Braun's testimony, the entire encounter, from first contact with the driver to the point where Stib fled the scene, took approximately ten to fifteen minutes, which Braun testified is typical for a traffic stop.

¶5 Stib filed a motion to suppress all evidence obtained, arguing that Braun acted without reasonable suspicion to detain Stib or probable cause to search the vehicle where he was a passenger. An evidentiary hearing was held in which Braun and the canine officer testified. Counsel argued that under the United States Supreme Court's decision in *Rodriguez*, the dog sniff violated Stib's rights as the evidence demonstrated that the police had prolonged the stop for the purpose of conducting the dog sniff without reasonable suspicion. The circuit court denied Stib's motion, finding that *Rodriguez* was inapplicable as Braun was still in the process of writing the citation when the canine unit arrived. Stib filed a motion for reconsideration, arguing that the squad car video demonstrated that

Braun had finished writing the citation for speeding and had printed it when the officer arrived. The circuit court held another hearing, where Braun testified that although he had finished the citation, he was still in the process of writing the warning for the windshield. Based on this testimony, the circuit court denied Stib's motion.

¶6 Stib pled guilty to concealing a stolen firearm and resisting an officer, and the State agreed to dismiss all other counts. The court withheld sentence and placed Stib on probation for three years on the stolen firearm count and sentenced Stib to six months in jail on the resisting an officer count. This appeal follows.

DISCUSSION

¶7 We review a decision denying a motion to suppress evidence in two steps. *State v. Vorburger*, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829. First, we review the circuit court's finding of fact under the clearly erroneous standard. *Id.* Second, we review the application of constitutional principles to those facts de novo. *Id.* We are not constrained, however, by the circuit court's reasoning, and we may affirm the circuit court's order on separate grounds. *State v. Smiter*, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920.

¶8 Stib acknowledges that the initial traffic stop was legal, but he asserts that Braun violated his Fourth Amendment rights by unlawfully prolonging the stop for the sole purpose of conducting a dog sniff without reasonable suspicion in violation of *Rodriguez*. We disagree with the circuit court's

conclusion that *Rodriguez* was inapplicable.² As the Supreme Court explained in *Rodriguez*, “[t]he 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.’” *Rodriguez*, 135 S. Ct. at 1616.³ “A seizure justified only by a police-observed traffic violation ... ‘become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation.” *Id.* at 1612 (citation omitted). Under *Rodriguez*, the court’s focus should have been on whether the dog sniff delayed completion of the traffic stop, not whether the sniff occurred before Braun issued the citation and warning.

¶9 The State concedes that “Braun did not have reasonable suspicion to suspect some other criminal activity that would justify prolonging the traffic stop” and also that “the record here suggests that the canine sniff took Braun’s attention from completing the traffic stop, potentially adding time to the stop.” Accordingly, we assume that the evidence in this case was obtained in violation of the constitution, without reaching the issue of whether the seizure of Stib was unreasonably prolonged or whether his rights against unreasonable seizures were violated.

² The State agrees that the circuit court erred in finding *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), inapplicable.

³ A dog sniff of the exterior of an automobile while in a public place is not a search. *See State v. Salonen*, 2011 WI App 157, ¶9, 338 Wis. 2d 104, 808 N.W.2d 162. Further, the police “may conduct certain unrelated checks during an otherwise lawful traffic stop,” such as a dog sniff, so long as it is not done “in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” *Rodriguez*, 135 S. Ct. at 1615.

¶10 We apply the judicially-developed exclusionary rule to preclude evidence obtained in violation of the constitution from use in criminal proceedings. *Mapp v. Ohio*, 367 U.S. 643 (1961). Exclusion of evidence is not a constitutional right, however, and “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. The good faith exception to the exclusionary rule is applicable in this case as Braun was acting in objectively reasonable reliance on *Arias*, 311 Wis. 2d 358, the controlling Wisconsin precedent.

¶11 *Arias* allowed for a reasonable delay of a traffic stop for a dog sniff based on the totality of the circumstances. *Id.*, ¶38. *Rodriguez* altered the state of the law in Wisconsin as it provided 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). *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 to investigate whether the stop was prolonged. We conclude, however, that as Stib was seized on February 8, 2015, and *Rodriguez* was decided more than two months later on April 21, 2015, Braun acted properly under the then-existing precedent in *Arias*, and, therefore, the exclusionary rule does not apply. See *Dearborn*, 327 Wis. 2d 252, ¶¶36, 44.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.

