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STATE OF WISCONSIN

10-31-2016

IN SUPREME COURT

**CLERK OF SUPREME COURT
OF WISCONSIN**

No. 2015AP756-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

FREDERICK S. SMITH,

Defendant-Appellant.

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

1. When a police officer performs a lawful traffic stop, is it reasonable for the officer to make contact with the driver to ask for the driver's name and identification and to explain the basis for the stop, even if the reasonable suspicion supporting the stop has dispelled by the time the officer does so?

- The circuit court answered "yes."
- The court of appeals "assumed without deciding" that the officer in this case was permitted to take such action.
- This Court should answer "yes."

2. When an officer is unable to request a driver's name and identification and explain the basis for a traffic stop because, as in this case, the driver indicates that the driver's side window and door are both broken, is the officer then permitted to open the passenger's side door to achieve that goal?

- The circuit court answered "yes."
- The court of appeals answered "no."
- This Court should answer "yes."

STATEMENT OF CRITERIA SUPPORTING REVIEW

As more fully explained below, this petition meets the following criteria for review by this Court:

1. A real and significant question of federal or state constitutional law is presented. Wis. Stat. § (Rule) 809.62(1r)(a).

2. A decision by this Court will help develop, clarify or harmonize the law concerning novel legal questions, the resolution of which will have statewide impact. Wis. Stat. § (Rule) 809.62(1r)(c)2.

3. Important questions presented are not factual in nature; they are questions of law of the type that are likely to recur unless resolved by this Court. Wis. Stat. § (Rule) 809.62(1r)(c)3.

4. The court of appeals' decision is in conflict with controlling opinions of the U.S. Supreme Court, the Wisconsin Supreme Court or other court of appeals' decisions. Wis. Stat. § (Rule) 809.62(1r)(d).

STATEMENT OF THE CASE

Following a traffic stop on April 6, 2014, Frederick Smith was charged with his seventh drunk driving offense and operating a motor vehicle while revoked. (4; 8.) The arresting officer discovered Smith was intoxicated when he stopped the car Smith was driving after running the car's plates and discovering that the registered owner's operating privileges were suspended. (4:2.) Smith filed a motion to suppress evidence, including the arresting officer's observations of him during the traffic stop, arguing that the officer improperly failed to terminate the stop immediately when he saw that the driver was Smith (a man) and not the registered owner (a female). (12:2-3.)

Both Sergeant Bernie Gonzalez, the arresting officer, and Smith testified at the evidentiary hearing on Smith's motion. (36, Pet-App. 118-157.) On the night in question, Sergeant Gonzalez saw a car stop in the middle of the road to drop off a passenger in a neighborhood where there had been some gang-related gunfire the night before. (36:6, Pet-

App. 123.) Sergeant Gonzalez followed the car as it drove away, and he checked the car's license plate. (36:6, Pet-App. 123.) Sergeant Gonzalez learned that the car was registered to a woman named Amber Smith and that her driving privileges were suspended. (36:7, Pet-App. 124.) Sergeant Gonzalez turned on his emergency lights to initiate a traffic stop. (36:8, Pet-App. 125.) At that time, he could not see who was driving the car. (36:8, Pet-App. 125.)

The car turned into a parking lot and parked in a stall. (36:8, Pet-App. 125.) Sergeant Gonzalez walked up to the car and saw that the driver was a man (Smith). (36:9, 11, 17-18, Pet-App. 126, 128, 134-135.) Sergeant Gonzalez asked Smith to open his door, but Smith said he couldn't because it was broken. (36:9, Pet-App. 126.) Smith made clear that he could neither roll down the window nor open the car door. (36:9, Pet-App. 126.) Sergeant Gonzalez could hear Smith from inside the car, and Smith said "It's broken." (36:9, Pet-App. 126.)

Sergeant Gonzalez assumed that Smith must have gotten in the car through the passenger door. (36:21, Pet-App. 138.) As a result, he walked around to the passenger side of the car and opened the door so that he could speak with Smith. (36:9, 21, Pet-App. 126, 138.) Sergeant Gonzalez testified that Smith leaned over to help open the passenger door, and that he and Smith opened the door simultaneously. (36:9-10, Pet-App. 126-127.) Smith testified that he did not help open the door; he was simply maneuvering to the passenger seat and put his hand on a different handle to pull himself over to the passenger seat. (36:31-33, 35, Pet-App. 148-150, 152.)

During its oral ruling on the motion, the circuit court indicated that it was accepting Smith's version of events.

(18:2-3; 37:2-3, Pet-App. 159-160.) When Smith's attorney asked for a more specific finding that Sergeant Gonzalez opened the door, the court explained that it did not find either Sergeant Gonzalez's or Smith's testimony on that point to be more persuasive. (37:9, Pet-App. 166.) Ultimately, the court "found" that if Sergeant Gonzalez was the one who opened the door, it was lawful and reasonable. (37:9, Pet-App. 166.)

For the same reason that he asks other drivers to roll down their windows during traffic stops, Sergeant Gonzalez went to door that could be opened so that he could speak to Smith more effectively and clearly. (36:23, Pet-App. 140.) When the door opened, Sergeant Gonzalez talked with Smith about the reason for the stop, and he noticed that the car was filled with cigarette smoke. (36:10, Pet-App. 127.) Sergeant Gonzalez also smelled a strong odor of intoxicants and saw that Smith's eyes were red and bloodshot. (36:10, Pet-App. 127.) Based on additional information, Sergeant Gonzalez ultimately arrested Smith for drunk driving.

On October 6, 2014, the circuit court issued an oral ruling on Smith's motion. (37, Pet-App. 158-167.) First, the court found that there was reasonable suspicion to stop the car Smith was driving. (37:3-6, Pet-App. 160-163.) The court also concluded that given the circumstances of the stop, Sergeant Gonzalez was permitted to open the passenger door to speak with Smith and request Smith's identification. (37:6-9, Pet-App. 163-166.)

After pleading guilty to operating while intoxicated, 7th or subsequent offense, Smith appealed the circuit court's decision on his motion to suppress. Wis. Stat. § 971.31(10).

The court of appeals concluded that “[f]or purposes of this order, we assume, without deciding, that the officer was permitted to continue the stop, that is, continue the seizure, for the purpose of asking for the driver’s identification and explaining why the officer initiated the stop.” *State v. Smith*, No. 2015AP756-CR, 2016 WL 5415968, ¶ 5 (Wis. Ct. App. Sept. 29, 2016) (unpublished). (Pet-App. 102-103.) The court also found, however, that the officer was not permitted to open the passenger door of Smith’s car after Smith indicated that his driver’s side window and door were broken because the officer’s investigative methods were not “the least intrusive means” reasonably available. *Smith*, 2016 WL 5415968, ¶¶ 6, 12.

The State petitions for review.

ARGUMENT

- I. **This Court should find that when a police officer performs a lawful traffic stop, the officer is allowed to make contact with the driver to ask for the driver’s name and identification and to explain the basis for the stop, even if the reasonable suspicion supporting the stop has dispelled by the time the officer does so.**

The United States Constitution and the Wisconsin Constitution prohibit unreasonable searches and seizures, U.S. Const. amend. IV; Wis. Const. art. 1, § 11, and a traffic stop is a seizure within the meaning of the Fourth Amendment. *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. An officer may perform an investigative stop when the officer has grounds reasonable to suspect, based on the totality of the circumstances that a traffic violation has been or will be committed. *State v. Colstad*, 2003 WI App 25, ¶¶ 8-9, 260 Wis. 2d 406, 659 N.W.2d 394. The essential inquiry is whether the officer’s actions were

reasonable under all the facts and circumstances present. *State v. Williams*, 2002 WI App 306, ¶ 12, 258 Wis. 2d 395, 655 N.W.2d 462 (citation omitted).

Smith did not argue that there was no reasonable suspicion of the initial traffic stop.¹ He claimed that Sergeant Gonzalez improperly extended the stop by walking around the car and opening the passenger door to speak with him because the reasonable suspicion for the stop dissipated when Sergeant Gonzalez observed that it was Smith behind the wheel instead of the unlicensed registered owner. Our court of appeals has rejected similar claims in several cases.

In *Williams*, the court of appeals held that when an officer has reasonable suspicion to make a traffic stop, the officer is permitted to ask for the driver's name and identification even if the officer realizes that the driver is not the party that the officer is looking for:

Having concluded that Officer Garcia had reasonable suspicion to stop Williams's vehicle to investigate whether the driver was [the suspect in a domestic violence complaint], we next consider whether the conduct of the officers subsequent to the initial stop made the stop unlawful, as Williams contends. Williams asserts that, as soon as Officer Garcia saw the driver, she had to terminate the stop because she had seen a photograph of [the suspect] and would have known the driver was not [the suspect]. . . . [W]e conclude that, even if Officer Garcia realized that the driver was not [the suspect] before she asked his name and requested identification, it was reasonable for her to do this.

¹ The stop was lawful under *State v. Newer*, 2007 WI App 236, ¶¶ 5, 7, 306 Wis. 2d 193, 742 N.W.2d 923.

Williams, 258 Wis. 2d 395, ¶ 18.² The officer's request for identification did not transform the lawful stop into an unlawful seizure. *Id.* ¶¶ 21-22.

The court of appeals reached the same conclusion on highly similar facts in *State v. Winberg*, No. 2013AP2661-CR, 2014 WL 2197944 (Wis. Ct. App. May, 28, 2014).³ In *Winberg*, the police stopped a vehicle because it was registered to a female owner with a revoked driver's license. After the officer stopped the car, but before he made contact with the driver, the officer realized that the driver was a man and therefore not the registered owner. The defendant argued that as soon as the officer realized that he was not the registered owner, any further contact with him was unlawful. This Court disagreed:

Here, unlike *House*,⁴ [the officer's] action in making contact with Winberg after he realized that Winberg was not the registered driver was still related in scope to the circumstances justifying the initial stop. As established in *Williams*, if a driver is lawfully stopped, it is reasonable for the officer to ask the driver for his or her name and identification, even if at the time the officer makes this request, the suspicion supporting the stop has dispelled. Nothing

² As the *Williams* Court also noted, Wisconsin law requires its drivers to carry their driver's licenses at all times when they are driving and to show them on demand from traffic officers. Wis. Stat. § 343.18(1).

³ *Winberg*, an unpublished, one-judge opinion issued after July 1, 2009, is cited as persuasive authority, and the State has included a copy of the decision in its appendix. (Pet-App. 107-117.) Wis. Stat. § (Rule) 809.23(3)(b) and (c).

⁴ *State v. House*, 2013 WI App 111, 350 Wis. 2d 478, 837 N.W.2d 645.

in *House* establishes that an officer must abandon the traffic stop before making contact with the driver. Rather, *House* prohibits officers from prolonging traffic stops to conduct separate investigations without reasonable suspicion. [The officer's] action of asking for Winberg's name and identification was not a separate investigation and therefore did not constitute an unlawful seizure.

Winberg, 2014 WL 2197944, ¶ 19. (Pet-App. 114-115 (citation omitted, footnote added).) Based on the officer's observations when he made contact with Winberg, the court also upheld the officer's related investigation for operating while intoxicated. *Winberg*, 2014 WL 2197944, ¶¶ 20-22.⁵

Despite this precedent, the court of appeals chose to "assume, without deciding," that Sergeant Gonzalez was permitted to continue the traffic stop to request Smith's identification and explain the reason for the stop. Police officers often face situations like the one presented in this case, and they require clear guidance from our courts on how to proceed.

This Court should grant review of the court of appeals' decision and clarify that under Wisconsin law, an officer who performs a lawful traffic stop is allowed to make contact with the driver to ask for the driver's name and identification and to explain the basis for the stop, even if the reasonable suspicion supporting the stop has dispelled by the time the officer does so.

⁵ Again, Smith has not challenged the validity of the stop in that regard.

II. This Court also should find that when an officer is unable to request a driver's name and identification and explain the basis for a traffic stop because the driver indicates that the driver's side window and door are both broken, the officer is permitted to open the passenger's side door to achieve that goal.

While the court of appeals accepted the premise that Sergeant Gonzalez was allowed to continue the traffic stop to ask for Smith's identification and explain the reason for the stop, the court characterized the opening of Smith's car door as a separate and impermissible intrusion under the Fourth Amendment. As the State argued, however, Sergeant Gonzalez's actions did not alter the constitutional analysis. Because Sergeant Gonzalez was authorized to request Smith's identification and speak with him about the basis for the stop, he was also authorized to open Smith's passenger door to accomplish just that.

As the U.S. Supreme Court has explained, every Fourth Amendment analysis hinges on "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)). And reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Id.* (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)).

Weighing a driver's liberty interest against the risk officers undertake when they approach a car during a routine traffic stop, the Supreme Court held that ordering the driver to get out of the car was not an impermissible intrusion under the Fourth Amendment:

[W]e are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as *de minimus*. The driver is being asked to expose to view little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "petty indignity." What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Mimms, 434 U.S. at 111 (internal quoted source omitted).

The U.S. Supreme Court's opinion in *Mimms*, as well as our court of appeals' decisions in *Williams* and *Winberg*, recognize that a police officer is constitutionally permitted do a number of things during a routine traffic stop. As long as the stop is lawful, the officer may ask for identification, explain the reason for the stop, and even order the driver to get out of the car. Opening the car door for the driver in such a situation does not transform the encounter into a Fourth Amendment violation.

Contrary to the court of appeals' decision in this case, opening Smith's passenger door after he indicated that his

driver's side window and door were broken was not an impermissible search; it was a reasonable, *de minimus* intrusion that did not violate the Fourth Amendment.

Other jurisdictions have reached the same conclusion. In *State v. James*, 13 P.3d 576 (Utah 2000), an officer discovered a vehicle that may have been involved in a reckless driving incident. When the officer found the car parked and idling, he walked up, opened the door and instructed the driver to get out. The Utah court concluded that the officer had not performed an illegal search:

Causing the door to be opened in some manner was a reasonable and practical means for obtaining compliance with [the officer's] authority to lawfully require [the driver] to step from the vehicle. As such, the opening of the door was an incidental factor in the investigation . . . and not an independent search of the vehicle. To draw distinctions as to who actually opened the door and the nature of any conversation or notification occurring beforehand would elevate form over substance.

James, 13 P.3d at 580.

In *State v. Irwin*, 137 P.3d 1024 (Idaho 2006), an officer witnessed a traffic incident, approached the car involved, and opened the passenger door to direct the driver to come out. The defendant argued that opening the door was improper because it was not the "least intrusive investigative method reasonably available to verify or dispel their suspicion." *Id.* at 1028. The court rejected that argument "because an officer's action of opening a car door before directing the occupant to exit is no more intrusive than a verbal command followed by the occupant's opening the door. Either way, the door will be opened and the officer

will see inside.” *Id.* Noting that the “least intrusive method” argument was “utterly at odds with the rule that police officers may order the occupants out of lawfully stopped vehicles,” the court concluded:

Given that officers have clear authority to order people out of vehicles during a roadside stop, it is *constitutionally irrelevant* whether the officer or the occupant opens the car door to enable the occupant to exit.

Irwin, 137 P.3d at 1028 (emphasis added).

The same is true in this case. As Smith acknowledges, the traffic stop in this case was lawful. *State v. Newer*, 2007 WI App 236, ¶¶ 5, 7, 306 Wis. 2d 193, 742 N.W.2d 923. Accordingly, Sergeant Gonzalez was authorized to make contact with Smith to ask for his name and identification and to explain the basis for the stop, even though the reasonable suspicion for the stop had dispelled at that point. *Williams*, 258 Wis. 2d 395, ¶ 18; *Winberg*, 2014 WL 2197944, ¶ 19. (Pet-App. 114-115.) To accomplish that goal, Sergeant Gonzalez walked around and opened the passenger side door because Smith indicated that the driver’s side window and door were broken and would not open. In doing so, Sergeant Gonzalez did not violate the Fourth Amendment.

This Court should grant review and reverse the court of appeals’ decision in this case. The Court should hold that when an officer is unable to request a driver’s name and identification and explain the basis for a traffic stop because, as in this case, the driver indicates that the driver’s side window and door are both broken, the officer is permitted to open the passenger’s side door to achieve that goal.

CONCLUSION

For all of the above reasons, the State of Wisconsin asks this Court to grant review in this case: (1) to reverse the court of appeals' decision, (2) to clarify that under Wisconsin law, an officer who performs a lawful traffic stop is allowed to make contact with the driver to ask for the driver's name and identification and to explain the basis for the stop, even if the reasonable suspicion supporting the stop has dispelled by the time the officer does so, and (3) to hold that when an officer is unable to request a driver's name and identification and explain the basis for a traffic stop because, as in this case, the driver indicates that the driver's side window and door are both broken, the officer is then permitted to open the passenger's side door to achieve that goal.

Dated: October 31, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 3,370 words.

Dated: October 31, 2016.

NANCY A. NOET
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated: October 31, 2016.

NANCY A. NOET
Assistant Attorney General

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APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: October 31, 2016.

NANCY A. NOET
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)**

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated: October 31, 2016.

NANCY A. NOET
Assistant Attorney General