20180356
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 28, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Appellee, vs. Dylan Benjamin Vetter, Appellant.	**SUPREME COURT NO. 20180356** Criminal No. 09-2018-CR-00869

ON APPEAL FROM THE DISTRICT COURT
STATE OF NORTH DAKOTA
COUNTY OF CASS
THE HONORABLE JOHN C. IRBY

APPELLANT'S

REPLY BRIEF

Luke T. Heck (#08133)
lheck@vogellaw.com
Matthew S. Dearth (#08394)
mdearth@vogellaw.com
VOGEL LAW FIRM
Attorneys for Appellant
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Paragraph(s)**

Constitutions

LAW AND ARGUMENT

I. The purpose for the extension of a traffic stop, not the length of time, determines a Fourth Amendment violation.

[¶1] The State of North Dakota argues Deputy Thompson was permitted to investigate into matters unrelated to the stop, provided he did not measurably extend its duration. Appellee's Br. at ¶ 12. With that, the State's reliance on Arizona v. Johnson, 555 U.S. 323, 333 (2009) as authoritative on the issue is misplaced. The United States Supreme Court's holding in Rodriguez clearly explained its prior analysis in Johnson, as well as in Illinois v. Caballes, as setting a benchmark of what makes otherwise lawful traffic stops unreasonable:

> A seizure for a traffic violation justifies a police investigation of that violation. "[A] relatively brief encounter," ***a routine traffic stop is "more analogous to a so-called 'Terry stop' ... than to a formal arrest.***" [Citations omitted] Like a Terry stop, the ***tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"***—to address the traffic violation that warranted the stop... and attend to related safety concerns. [Citations omitted].... ***Because addressing the infraction is the purpose of the stop, it may "last no longer than is necessary to effectuate th[at] purpose."*** ... Authority for the seizure thus ends when tasks tied to the traffic infraction are—***or reasonably should have been***—completed.

Rodriguez, 135 S. Ct. at 1614 (emphasis added). This Court has since recognized the distinction is not in the *length* of the delay, but in the *purpose* behind the delay. See State v. Asbach, 2015 ND 280, ¶ 12, 871 N.W.2d 820 ("On-scene investigation into other crimes detours from the purpose of the stop.") (citing Rodriguez, 135 S.Ct. at 1609). "[A] police stop exceeding *the time needed to handle the matter for which the stop was made* violates the Constitution's shield against unreasonable seizures." Rodriguez, 135 S.Ct. at 1612 (emphasis added). In essence, when the stop is extended for any amount of time beyond what is required, due to a deviation of purpose, there is a violation.

[¶2] In this case, as noted in Mr. Vetter's initial brief to the Court, the district court did ***not*** find Deputy Thompson had reasonable and articulable suspicion to extend the stop. The district court's error occurred later in the analysis by determining that because the citation technically had not yet been issued,"the purposes of the traffic stop were not yet completed" when the canine sniff occurred. Such analysis is over-simplified and impermissibly avoids two crucial Fourth Amendment questions – (1) was the delay for an improper purpose; and (2) did the delay extend the stop beyond when the tasks tied to the traffic infraction should have been completed? See Rodriguez, 135 S. Ct. at 1614. Here, the delay was for an improper purpose – investigation into criminal conduct absent reasonable articulable suspicion – and the delay plainly extended the stop.

[¶3] The State further defends the canine sniff by arguing, pursuant to Caballes, a canine sniff itself is not a search under the Fourth Amendment. Appellee's Br. at ¶ 15. Taken in a vacuum, the State correctly states the law as it pertains a canine sniff. However, this statement of law does not dispose of the issue in Mr. Vetter's case – in fact, it is not relevant to the case at all. As confirmed by Rodriguez, the Court's holding in Caballes made the extension of a stop to conduct a canine to sniff impermissible:

> In Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop. ***We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "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 407, 125 S.Ct. 834. ***The Court so recognized in Caballes***, and we adhere to the line drawn in that decision.

Rodriguez, 135 S. Ct. at 1612. The State's narrow view of Caballes was rejected in Rodriguez – in fact, the Supreme Court clarified the holding of Caballes stood for a far more expansive rule than simply that a dog sniff was not a search. Rodriguez considered a stop extended absent reasonable and articulable suspicion, and whether a canine sniff was permissible under those circumstances. See id. In doing so, the Court held the extension of the stop itself under those circumstances unjustified, as would any canine sniff under those circumstances. "The critical question, then, 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.

[¶4] As previously noted, Deputy Thompson's interrogation of Mr. Vetter, couple with his conference with Cpl. Hedin about assisting with the issuance of a written warning so he could perform the canine sniff, indisputably added time to the duration of the stop. Absent reasonable and articulable suspicion to extend the stop, law enforcement effectuates an unreasonable seizure in violation of a motorist's Fourth Amendment rights. Id. at 1617. In Mr. Vetter's case, there was no reasonable and articulable suspicion, and based on the same, the seizure was unconstitutional. See Rodriguez at 1617 (remanding case where no finding of reasonable and articulable suspicion was made).

CONCLUSION

[¶5] For the reasons stated above, and the reasons stated in his initial appellate brief, Mr. Vetter respectfully requests this Court **REVERSE** the District Court's June 8, 2018 Order Denying Mr. Vetter's Motion to Suppress.

Respectfully submitted January 28th, 2019.

VOGEL LAW FIRM

By: _____

Luke T. Heck (#08133)
Matthew S. Dearth (#08394)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983
lheck@vogellaw.com
mdearth@vogellaw.com
ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Appellee, vs. Dylan Benjamin Vetter, Appellant.	**SUPREME COURT NO. 20180356** Crim. No. 09-2018-CR-00869

ON APPEAL FROM THE DISTRICT COURT
STATE OF NORTH DAKOTA
COUNTY OF CASS
THE HONORABLE JOHN C. IRBY

CERTIFICATE OF ELECTRONIC SERVICE

[¶1] I hereby certify that on January 28, 2019, the following documents:

APPELLANT'S REPLY BRIEF

were e-mailed to the address below and are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail:

KARA SCHMITZ OLSON
SA-DEFENSE-NOTICES@CASSCOUNTYND.GOV

Dated this 28th day of January, 2019.

VOGEL LAW FIRM

By: */s/ Luke T. Heck*
Luke T. Heck (#08133)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701-237-6983
Email: lheck@vogellaw.com
ATTORNEYS FOR APPELLANT