IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

JOSHUA LYLE CRELLER,
Respondent.

SC22-524

DCA No. 2D19-3085

APPENDIX TO JURISDICTIONAL BRIEF

Dated: April 25, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal to the following on this **twenty-fifth** day of April 2022:

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DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JOSHUA LYLE CRELLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D19-3085

April 6, 2022

Appeal from the Circuit Court for Hillsborough County; Christopher C. Nash, Judge.

Howard L. Dimmig, II, Public Defender, and Pamela H. Izakowitz, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Linsey Sims-Bohnenstiehl, Assistant Attorney General, Tampa, for Appellee.

ATKINSON, Judge.

Joshua Lyle Creller appeals a judgment and sentence for possession of a controlled substance and resisting an officer without violence following a jury trial. Because the K-9 officer's

command for Creller to exit his vehicle was not necessary for the officers to safely complete the traffic stop, we reverse.

Background

On December 20, 2018, a Tampa Police Department officer assigned to the Tactical Narcotics Unit was working undercover in an unmarked vehicle positioned near the corner of Osborne Avenue and Nebraska Avenue. The plain clothes officer observed Creller's vehicle traveling south on Nebraska Avenue approaching the intersection. The vehicle "made a right turn into a gas station and slowed down, continued through the gas station, and exited on Osborne [Avenue] and proceeded to go westbound." The officer concluded that the vehicle had cut through the parking lot in order to avoid the red light at the intersection, a violation of section 316.074(2), Florida Statutes (2018), which prohibits a person from "driv[ing] any vehicle from a roadway to another roadway to avoid obeying the indicated traffic control indicated by such traffic control device." Because he was in an unmarked vehicle, the plain clothes officer "radioed for a marked unit or a unit with lights and sirens to conduct a traffic stop."

The uniformed officer arrived on the scene one minute after receiving the call for a marked unit and stopped the vehicle approximately two minutes after receiving the call. Both officers approached the vehicle—the plain clothes officer on the driver's side and the other on the passenger's side. After obtaining his license and registration, the plain clothes officer asked Creller if he could search the vehicle. Creller refused to give consent. The plain clothes officer did not ask Creller to step out of the vehicle at that time. Instead, he returned to his vehicle and radioed for a K-9 unit to conduct a sweep of the vehicle. The uniformed officer went around to the driver's side and waited with Creller.

The plain clothes officer instructed the uniformed officer to write the traffic citation. The uniformed officer returned to his vehicle to put the necessary information into his computer. The uniformed officer testified that issuing the citation involved logging into the computer, opening the program, and "running" the subject and his vehicle. Some of the information self-populates; then the officer must check the information for accuracy and enter the location and offense. The officer testified that "on average" it takes "five minutes or so" to issue the citation.

While the uniformed officer was completing the citation, a K-9 unit officer arrived on the scene with his dog, four minutes after receiving the call. When asked to explain the nature of a vehicle sweep, the K-9 unit officer provided the following explanation:

> A vehicle sweep is if a patrol officer calls me out and I arrive on the scene, I need the vehicle unoccupied. I go ahead and get my dog and start at the front passenger headlight area. I walk my dog around the exterior of the vehicle. If my dog alerts, which I've been working for him for a couple years, I know his behavior, I know what his final alerts are, then we have probable cause to get inside of the vehicle. He alerts on narcotic odor emitting from the vehicle.

The K-9 officer identified himself to Creller "as a Tampa police officer who works with a narcotic K-9." He asked Creller "if he had anything illegal inside his vehicle; he said no. [He] asked for permission to search the vehicle; [Creller] said no. . . . [He] asked [Creller] to exit the vehicle so [he] could safely do a vehicle sweep with . . . [his] K-9 partner."

The K-9 officer provided testimony explaining why allowing Creller to remain in the vehicle while the vehicle sweep was being conducted posed a danger to him and his dog:

> [Creller]'s in possession of his vehicle. I don't know what's in the vehicle. . . . If I'm in the front of the vehicle with my dog, he could put it in drive. My main concern

> is to watch my dog, to read my dog. . . . I can't be distracted with what the defendant was doing inside the vehicle. So I always tell everybody to exit the vehicle.

After Creller refused to comply with the K-9 unit officer's repeated, verbal requests to exit for the vehicle sweep, a struggle ensued. When the uniformed officer became aware of the struggle, he dropped the computer and ran over to assist the other officers. The three officers were able to pull Creller from his vehicle.

The K-9 unit officer recounted that after he warned Creller that he would be arrested if he failed to comply, Creller became argumentative, yelling "this is illegal." He had trouble placing the handcuffs on Creller because "[h]e was constantly pulling away, resisting." According to the plain-clothes officer, Creller "was bracing his arms, tensing and not allowing us to handcuff him." He subsequently searched Creller and located a clear baggie containing a crystalized substance, later identified as methamphetamine.

According to the plain clothes officer, from the time that the stop occurred to the time the struggle ensued, approximately five to ten minutes had elapsed. The K-9 unit officer stated that he arrived four minutes after receiving the call and that he "was standing there for probably about two minutes, maybe about two minutes, telling

him if you don't get out, you know, you'll be charged with obstruction." The uniformed officer said that it took about two or three minutes for the K-9 unit to arrive. No traffic citation was issued to Creller.

Before asking for argument from the parties at the hearing on the motion to suppress, the trial court proposed that the pertinent determination was why the officers ordered Creller out of the car. Concluding that the reason was the K-9 officer's safety during the vehicle sweep, the trial court suggested, based on *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), and *Maryland v. Wilson*, 519 U.S. 408 (1997), that removal of the driver required separate justification for the narcotics investigation itself:

> What I heard was we wanted to conduct a narcotics investigation and that's why we ordered him out of the car. It was for officer safety for a narcotics investigation. And [the K-9 officer] said I wanted him out, it's for my safety and for . . . [the dog's] safety. He said, well, just have the dog sniff around. That's not how it works; I want you out of the car. But it was for a narcotics investigation. And . . . at this point in the story, there doesn't seem to be any, any reasonable suspicion for a narcotics investigation.

But ultimately the trial court concluded, relying on *Rodriguez v. United States*, 575 U.S. 348 (2015), as urged by the State, that

because the attempted duration of the vehicle sweep—for which independent indicia of criminal activity is ordinarily not required during issuance of a traffic citation—did not prolong the traffic stop, removal of Creller from the vehicle was justified.

The standard of review of a trial court's denial of a motion to suppress is mixed—competent substantial evidence must support the trial court's factual findings, and the trial court's application of the law to those factual findings is reviewed de novo. *See Duke v. State*, 82 So. 3d 1155, 1157–58 (Fla. 2d DCA 2012).

In *Rodriguez*, the United States Supreme Court held 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." *Rodriguez*, 575 U.S. at 350. Here the officers' testimony, which the trial court credited, established that the attempted vehicle sweep occurred while the uniformed officer was in the process of writing the citation. However, the Supreme Court clarified that "[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*, 575 U.S. at 357.

Here, the officers' testimony supports the trial court's conclusion that the vehicle sweep did not prolong the stop. Only five to ten minutes elapsed between the time the officers stopped Creller and his arrest. The uniformed officer testified that it typically takes around five minutes to complete a traffic citation. Nothing presented by Creller supports the argument that this amount of time is unreasonable. *See, e.g.*, *Stanwood v. Stolts*, 3:17-CV-00529-RCJ-CBC, 2018 WL 5833061, at *4 (D. Nev. Nov. 7, 2018) (concluding that "the dog sniff easily passes" the *Rodriguez* test where "the entire stop had only lasted six minutes and six seconds"). The attempted vehicle sweep conducted here did not cause the traffic stop to become " 'prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket." *Rodriguez*, 575 U.S. at 354–55 (alteration in original) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

Relying on *Jones v. State*, 187 So. 3d 346, 347 (Fla. 4th DCA 2016), Creller suggests that the fact that no citation was issued means that the officers abandoned the purpose of issuing the citation. Courts have considered the fact that the traffic citation was never issued in discussing the reasonableness of a seizure.

See, e.g., *Underhill v. State,* 197 So. 3d 90, 91 (Fla. 4th DCA 2016) (noting that the officers waited until later in the day of the defendant's arrest to write the citation for his failure to wear a seatbelt). However, in determining whether the Fourth Amendment has been violated, courts must consider the totality of the circumstances in determining whether a seizure is reasonable. *See Golphin v. State*, 945 So. 2d 1174, 1183 (Fla. 2006) ("Applying the reasonable person standard to determine whether a seizure has occurred is a fact-intensive analysis in which the reviewing court must consider the totality of the circumstances."). The court credited the officers' testimony regarding what precipitated the stop and their explanation of Creller's ensuing struggle against the officers—which provides an eminently reasonable explanation for why the traffic citation was likely relegated to lesser importance than Creller's resistance and the resulting discovery of an illegal substance on his person. The circumstances of the entire episode—including the length of the detention as well as the fact that the uniformed officer was working on the citation until the point that the officers were attempting to extricate Creller from his vehicle (i.e., that he did not *voluntarily* abandon the task of writing the ticket)—

support the conclusion that the attempted vehicle sweep itself did not constitute an unreasonable seizure.

However, because the drugs were recovered as a result of a search incident to Creller's arrest, the trial court's analysis should not have concluded with an assessment of the duration of the stop based on *Rodriguez*. Creller was arrested for his failure to exit the vehicle for the officers to conduct the vehicle sweep. As such, a necessary inquiry is whether that command to exit the vehicle constituted an unreasonable seizure in violation of the Fourth Amendment. *See State v. Mahoy*, 575 So. 2d 779, 780–81 (Fla. 5th DCA 1991) (analyzing whether the deputies command for Mahoy to exit the vehicle "violat[ed] the Fourth Amendment's proscription against unreasonable searches and seizures").

The United States Supreme Court has held that an officer's command to exit the vehicle after the driver was lawfully detained was "reasonable and thus permissible under the Fourth Amendment" because the threat to the officer's safety outweighed the "incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped." *Mimms*, 434 U.S. at

109.[1] The Court has also extended this doctrine to passengers—"an officer making a traffic stop may order passengers to get out of the car pending completion of the stop." *Wilson*, 519 U.S. at 415.

The rationale underlying the Supreme Court's decisions in *Mimms* and *Wilson* is officer safety, specifically in connection with a traffic stop. *Mimms*, 434 U.S. at 110 (recognizing "the inordinate risk confronting an officer as he approaches a person seated in an automobile"); *Wilson*, 519 U.S. at 413 ("[T]he same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger."). Whether issuing a traffic citation or investigating the presence of contraband, that law enforcement officers are frequently subjected to dangerous situations during roadside stops is unquestionable. However, in this case the testimony indicates unequivocally that officer safety did not necessitate driver removal until the traffic stop evolved into a narcotics investigation.

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[1] Pursuant to article I, section 12, of the Florida Constitution, the right against unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."

The first point in time at which an officer asked Creller to exit the vehicle was when the K-9 unit officer asked him to do so out of concern for the officer's safety and that of his dog so that he could conduct the vehicle sweep. No such request or command was made when the plain clothes officer originally approached the vehicle or when the K-9 unit officer arrived and asked Creller for consent to search.[2] In light of that chronology and the K-9 unit officer's explication of why driver-removal is crucial to safety during a vehicle sweep, it is clear that the safety issue was not related to the issuance of the traffic citation but rather to the vehicle sweep.

The Supreme Court has indicated that "the government's officer safety interest" recognized in *Mimms* "stems from the mission of the [traffic] stop itself" whereas "[o]n-scene investigation into other crimes . . . detours from that mission" and a seizure would not be justified for that purpose even if necessitated by officer safety. *Rodriguez*, 575 U.S. at 356–57 ("Thus, even assuming that

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[2] Creller testified that the first and only thing that the K-9 unit officer asked him was to step out of his vehicle. That officer testified that he asked Creller if he could search the vehicle. The trial court accepted all of the officers' testimony at the suppression hearing.

the imposition here was no more intrusive than the exit order in *Mimms*, the dog sniff could not be justified on the same basis."). According to this reasoning, the officer-safety justification given by the K-9 unit officer would not make his command for Creller to exit his vehicle for the sweep constitutionally permissible.

The State relies upon *State v. Benjamin,* 229 So. 3d 442, 444 (Fla. 5th DCA 2017), in which the Fifth District held that following a lawful detention for a traffic infraction, officers can order the driver to exit the vehicle even without a particularized basis to believe the driver was a threat to the officer's safety. *See also Wilson*, 519 U.S. at 412 (characterizing as a "*per se* rule" the conclusion that "once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures" (quoting *Mimms*, 434 U.S. at 111)). In *Benjamin*, officers approached a vehicle parked in a shopping center after they had observed its owner driving with what they suspected was a vehicle with illegal window tint. 229 So. 3d at 442. The officer asked for permission to search the vehicle, and the driver refused; so "[t]he officer then requested a canine unit to conduct an exterior search of

the vehicle." *Id.* While he was writing the citation, the canine unit arrived and told the responding officer to remove the driver from the vehicle. *Id.* As the driver stepped out of the vehicle at the officer's direction, "the officer saw a firearm under the driver's seat that had previously been hidden by Benjamin's leg." *Id.* The Fifth District concluded, based upon *Mimms* and *Wilson*, that the trial court erred in granting the motion to suppress where the command to exit the vehicle occurred while the driver was lawfully detained. *Id.* at 443–44.

The rationale relied upon by the Fifth District in *Benjamin* and applied by the trial court in this case essentially stacks the holdings in *Rodriguez* and *Mimms*: (1) vehicle sweeps are permissible when they do not prolong a valid traffic investigation; (2) officers may ask drivers to exit their vehicles during a valid traffic investigation; (3) therefore, as long as it does not prolong the traffic investigation, officers may order drivers to exit their vehicles for the vehicle sweep. However, this reasoning appears to be an erroneous extension of the carveouts in *Mimms* and *Rodriguez*: The Supreme Court in *Rodriguez* expressly indicated that a deviation from the mission of the traffic stop such as the K-9 unit officer's attempted vehicle

sweep enjoys no support from *Mimms* because "safety precautions taken in order to facilitate such detours" cannot "be justified on the same basis" as those taken to ensure officer safety for the purpose of conducting the traffic stop itself. *See Rodriguez*, 575 U.S. at 356–57.

More importantly, the stacking conflates two incompatible rationales without examining their underpinnings, leading to an illogical conclusion. Officers may ask drivers to exit their vehicles during traffic stops *when such removal is justified by officer safety concerns*. And a vehicle sweep during the duration of a traffic stop is permissible because the driver is *already stopped based on probable cause to believe he committed a traffic infraction.*

Nothing indicates that removal from the vehicle was necessary to ensure the safety of the officers to complete the traffic stop. Thus, the K-9 unit officer's command for Creller to exit the vehicle would need to have been justified by probable cause to believe that narcotics would be found in the vehicle. But no other justification was argued, much less supported by testimony. Rather, the testimony left no doubt that it was the vehicle sweep alone—not the issuance of the traffic citation—that gave rise to a threat to officer

safety. When a driver has already been "validly stopped for a traffic infraction," the "additional intrusion of asking him to step outside his car [is] '*de minimis*.' " *Wilson*, 519 U.S. at 412 (quoting *Mimms*, 434 U.S. at 111). However, even a minor invasion of an "individual's right to personal security free from arbitrary interference by law officers," *id.* (quoting *Mimms*, 434 U.S. at 109), must be justified by *something*. *Cf. id.* at 410, 412–13 (applying the "*per se*" rule "that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle" but describing circumstances that suggested a threat to officer safety, including a driver who was "trembling and appeared extremely nervous" and a passenger who "was sweating and also appeared extremely nervous").

Here, the record indicates that the vehicle sweep necessitating the removal of Creller from his vehicle was random—it was not motivated by any suspicion of the presence of contraband. In other words, it was the traffic infraction that was supported by probable cause, not the existence of illegal drugs in the car. And the record affirmatively establishes that removal from the vehicle was not necessary to ensure officer safety for the purpose of issuing a traffic

infraction.[3] The officers made it clear that they asked the driver to step out of the vehicle to accommodate an arbitrary investigative sweep admittedly based on no suspicion of criminal activity whatsoever.

The Constitution does not prohibit law enforcement personnel from seizing a driver by ordering him out of his vehicle if doing so is necessary to ensure officer safety during the time it takes to issue a citation after a stop justified by probable cause that a traffic infraction has been committed. And the Constitution does not prohibit law enforcement personnel from utilizing a drug-sniffing dog on a random basis to ascertain whether there might be probable cause to believe that illegal narcotics are contained within an automobile. However, the forced removal of an individual from

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[3] The K-9 officer suggested that Creller could have placed the vehicle in drive or reverse and hit him or his police dog. (There was no testimony that the vehicle was still running, and Creller testified it had been placed in park and turned off.) The only other stated safety consideration was the K-9 officer's general concern that he did not know "anything that's inside that vehicle." Thus, the only safety concerns asserted by the State were those described by the K-9 officer as necessary to perform the random narcotics sweep that was not supported by probable cause. Under these unique facts, the concern for officer safety, while understandable, did not justify seizing the driver by removing him from his vehicle.

his vehicle *before* such probable cause of the existence of such contraband has been established—and without any evidence that such seizure is necessary to ensure officer safety during issuance of a traffic citation—constitutes an unreasonable seizure without any justification under the Fourth Amendment.

To be sure, if there *had* been evidence that forcible removal of an occupant from the vehicle was undertaken out of a reasonable concern for the safety of the officer issuing a citation during a stop justified by probable cause to believe that a traffic violation had occurred, then the removal would be justified. But no such evidence was adduced in this case. And if evidence supported that forcible removal was necessary to ensure officer safety for a vehicle sweep that itself was justified by probable cause of the presence of contraband—as opposed to a random, arbitrary search like the one in this case—then the removal would constitute a reasonable seizure unprohibited by the protections provided by the Fourth Amendment. But no such probable cause was argued, much less supported by evidence. As such, under the circumstances of this case, the forced removal of Creller from his vehicle constituted an unreasonable seizure in violation of the Fourth Amendment, and

the trial court erred by denying the motion to suppress the contraband discovered as a result of that seizure. We must therefore reverse.

We certify conflict with *State v. Benjamin*, 229 So. 3d 442 (Fla. 5th DCA 2017).

Reversed, remanded, and conflict certified.

SLEET and STARGEL, JJ., Concur.

Opinion subject to revision prior to official publication.