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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal Case No. 2010AP001837 CR
Circuit Court Case No. 2009CT000105

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE C. GREENWOOD,

Defendant-Appellant.

APPEAL FROM THE CONVICTION AND ORDER
DENYING SUPPRESSION OF EVIDENCE
ENTERED IN IOWA COUNTY CIRCUIT COURT,
THE HONORABLE WILLIAM D. DYKE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent (hereinafter referred to as the State) does not request oral argument. The issues are clearly set forth, explained, cited and analyzed.

Publication is also not requested. The case does not present any novel issue of law and will not assist in the development of the law.

STATEMENT OF FACTS

An evidentiary hearing was held on December 1, 2009. R.11 Ap. pp.101-137. Defendant-Appellant (hereinafter referred to as Defendant) sought suppression of all evidence obtained after the stop of his motorcycle by Officer Jeremy Kass on June 27, 2009. Kass stopped Defendant for having a loud exhaust and a registration lamp violation, contrary to § 347.13(3), Wis. Stats. R.11 pp.4,7, Ap. pp.104, 107. Defendant testified that his registration lamp was in fact working. R. 11 p.16, Ap. p.116. Defendant also provided a mechanics work order dated October 26, 2009 which purports to indicate that Defendant's registration lamp was working at the time of the stop. R.11 p.16, Ap. p.116. A videotape of the stop was inconclusive as to whether the registration lamp was in fact operating. R.11 p.9, Ap. p.109.

STANDARD OF REVIEW

When reviewing an order on a motion to suppress, the Court of Appeals will uphold the Circuit Court's factual finding unless clearly erroneous. *State v. Drew*, 305 Wis.2nd 641, 740 N.W. 2d 404, review denied, 306 Wis.2nd 48 (Ct. App. 2007).

ARGUMENT

I. THE CIRCUIT COURT'S FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS

The Circuit Court specific finding of fact in its written decision was stated as follows:

> ... the officer could see an operating taillight but could not see the registration. One tiny bulb was asked to provide both the red taillight and the white illumination of the plates, and it apparently was unequal to the task. Thus, the failure to provide illumination at 50 feet gave rise to reasonable suspicion. R.7 p.2, Ap. p _.

Thus, the Defendant did violate § 347.13(2), which in turn justified the stop of Defendant's vehicle.

The Circuit Court's finding of fact was clearly supported in the record. The officer testified he confirmed the inadequate illumination of the registration lamp three times. First, after it passed by his location. R.11 p.29, Ap. p.129. Second, while following the vehicle for a distance of a mile and a half. R.11 p.13, Ap. p.113. Finally, a third time, after the officer had the vehicle stopped. R.11 p.29, Ap. p.129. In each instance the officer could not see

a white registration lamp. R.11 pps. 29, 30, Ap. pp.129, 130.

II. AN OFFICER'S MISTAKE OF FACT CANNOT SERVE AS A BASIS FOR SUPPRESSION OF EVIDENCE.

The law is well settled in this regard. Once the State establishes that the police acted lawfully in stopping a vehicle, suppression is not warranted. Critical to the Court's analysis in this particular circumstance is the distinction between an officer's mistake of law as opposed to an officer's mistake of fact.

The State does not believe the officer was mistaken in either law or fact. However for purposes of argument and analysis, the State will assume the officer was mistaken in some respect.

Certainly the officer did not make a mistake of law. An officer may stop a vehicle for a registration lamp violation because it is contrary to § 342.13(3), Wis. Stats., in that all motor vehicles must have a functional registration lamp that illuminates a registration plate. Hypothetically, if there were no such statute regulating motor vehicles and this officer stopped this Defendant under the mistaken belief that such a statute existed, that would be a mistake of law. Since the officer under this hypothetical would have no lawful authority to stop this

vehicle, all derivative evidence as a result of this unlawful stop would be properly suppressed because the law does not excuse an officer's mistake of law.

The law however does excuse an officer's mistake of fact. The Fourth Amendment does not require that the decisions of law enforcement officers always be correct; in some cases a search and/or seizure can be reasonable under the Fourth Amendment even if mistakes were made by the officers involved. In order to satisfy the reasonableness requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable. State v. St. Germaine, 2007 WI App 214, ¶ 17, 305 Wis.2d 511, 519, 740 N.W.2d 148; State v. Johnson, 75 Wis.2d 344, 349 n.1, 249 N.W.2d 593 (1977); Illinois v. Rodriguez, 497 U.S. 177, 183-184, 110 S.Ct. 2793, 2799-2800 (1990); United States v. Rosario, 962 F.2d 733, 738 (7th Cir. 1992).

"The 'exclusionary rule' is that, where constitutional guaranties have been invaded, derivative evidence cannot be introduced against an accused at trial. It is a sanction to deter future *unlawful* police conduct. Its purpose is to prevent, not to repair. However, the rule does not mean that whenever the constable errs the criminal goes free.

The law does not require that policemen in the performance of their official duties make no errors whatsoever. Such an expectation would be unrealistic." State v. Gums, 69 Wis.2d 513, 515-516, 230 N.W.2d 813 (1975). (*Emphasis added*)

In Illinois v. Rodriguez, 110 S.Ct. 2793, 2799 (1990), the Supreme Court emphasized that reasonableness under the Fourth Amendment does not demand that law enforcement officers be factually correct in their assessment of a situation. The judgment of the police officers at the time of the challenged conduct must be responsible, but it need not be correct. Rodriguez, 110 S.Ct. at 2799.

Therefore, if the State concedes that Officer Kass was factually incorrect (which the State does not so concede) and he was indeed mistaken as to the fact of whether the registration lamp was illuminated, the exclusionary rule is not applicable. It is not applicable because the policy considerations of deterring unlawful police conduct are not served and the applicable case law recognizes that officers, like any other human beings, make mistakes. Indeed, absolutely nothing is served by letting alleged criminals go free because of an officer's good faith mistake of fact.

III. CONCLUSION

The Circuit Court's findings of fact were not clearly erroneous.

Assuming arguendo that the officer was mistaken in fact that cannot serve as a basis for suppression of evidence.

Wherefore, the State respectfully requests that this Court affirm the decision of the Iowa County Circuit Court.

Dated this _____ day of October 2010.

_____

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BRIEF CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 11 pages not including the Certification.

Dated this _____ day of October 2010.

_____

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. § 809.19(2)(a) and that contains:

(1) A table of contents;
(2) Relevant circuit court record entries;
(3) The findings or opinion of the circuit court; and
(4) Portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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 portion of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of October 2010.

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CERTIFICATE OF MAILING

STATE OF WISCONSIN)
IOWA COUNTY)

I, Larry E. Nelson, a licensed Wisconsin attorney, hereby certify that copies of Plaintiff-F Respondent's Brief and Appendix in Appeal No. 2010AP1837 were placed in the U.S. Mail, with proper postage affixed this 6th day of October 2010, addressed to the following as indicated below:

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