STATE OF WISCONSIN
IN SUPREME COURT
No. 2011AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

Page

Page

CASES CITED

Page

Page

STATUTES CITED

OTHER AUTHORITIES

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ISSUES PRESENTED

1) Did police officers have probable cause or reasonable suspicion to stop Defendant-Appellant Antonio D. Brown's car based on their observation that one of three bulbs in the car's driver's side tail lamp was not functioning?

The circuit court held the stop was proper. The court of appeals reversed, concluding that a tail lamp with two of three bulbs functioning was "'in good working order'" under Wis. Stat. § 347.13(1). *State v. Brown*, No. 2011AP2907-CR, decision (Ct. App., Dist. I, Jan. 15, 2013) (Pet-Ap. 101-11); s*ee State v. Brown*, 2013 WI App 17, ¶¶ 19-20, 346 Wis. 2d 98, 827 N.W.2d 903.

2) Did police officers have reasonable suspicion to perform the protective search of Brown's car in which they found a gun?

The circuit court determined the search was proper. Brown did not challenge the search in the court of appeals. In its order granting review in this case, this court asked the parties to address "whether *Arizona v. Gant*, 556 U.S. 332 (2009) applies to the fact situation in this case and, if so, how[.]" *State v. Brown*, No. 2011AP2907-CR, order (Wis. Sup. Ct., Oct. 15, 2013).

Arizona v. Gant, 556 U.S. 332 (2009), does not apply to this case because the search of Brown's car was not incident to arrest. Instead, the validity of the search is governed by the principles of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Michigan v. Long*, 463 U.S. 1032 (1983), governing protective searches of vehicles for weapons.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted for review by the Wisconsin Supreme Court, both oral argument and publication appear warranted.

STATEMENT OF THE CASE AND FACTS

Brown was convicted on his guilty plea to one count of possession of a firearm by a felon (30; Pet-Ap. 112). The conviction arose from City of Milwaukee Police Officers Michael Wawrzonek and William Feely stopping and searching Brown's car in July 2010, and discovering a gun under the front passenger seat (2:1; 40:13-14 (using complaint as factual basis for Brown's plea)). Brown was in the back seat when the car was stopped (2:1). Willie Lipsey was driving the car, and a female acquaintance of Brown's was in the front passenger seat (39:6; Pet-Ap. 162).

A. Testimony at the hearing on Brown's suppression motion.

Brown moved to suppress the gun on the grounds that police did not have reasonable suspicion or probable cause to stop the car, and that the search violated *Gant* (9).

At the hearing on Brown's motion, Wawrzonek testified that on July 3, 2010, he and Feely were on routine patrol in an area where he had been involved with drug and firearm investigations in the past, describing it as a "hot bed" of violent crime, including shootings and a "high density of armed robberies" (38:4, 6-7; Pet-Ap. 121, 123-24). He said around 9:30 p.m., they observed a 1977 Buick Electra with a "defective tail light," specifically, that one of the three red panels on the car's driver's side tail lamp was out (38:5-6, 10; Pet-Ap. 122-23, 127). He and Feely stopped the vehicle based on the defective lamp, though the car was pulling to the side of the street

and parking as they did so (38:5, 10-11; Pet-Ap. 122, 127-28).

Wawrzonek said there were three people in the car, and Brown was seated alone in the back seat (38:7; Pet-Ap. 124). As they approached, Wawrzonek saw "a lot of movement" from Brown, in particular, that he was bending forward and to his right (38:8; Pet-Ap. 125). He and Feely yelled for the occupants to show their hands, and while the persons in the front seat complied, Brown did not (38:8; Pet-Ap. 125). Instead, Wawrzonek testified, Brown continued to lean forward (38:8; Pet-Ap. 125). As he and Feely approached the car, Feely was able to illuminate the car's interior with a flashlight, and told Wawrzonek that Brown was kicking something underneath the seat (38:9; Pet-Ap. 126). They removed the occupants from the car and Feely searched it, finding the gun (38:9, 20; Pet-Ap. 126, 137).

Feely testified that he and Wawrzonek were on patrol on the night of July 3, 2010, in an area where there had been numerous armed robberies and complaints of drug dealing, when they stopped a 1977 Buick Electra for a "[d]efective tail lamp" (38:25-26; Pet-Ap. 142-43). Feely said the "driver['s] side middle" red tail lamp was out (38:26; Pet-Ap. 143). After the stop, Feely said he illuminated the passenger compartment of the vehicle and saw Brown moving around in the back seat (38:27-28; Pet-Ap. 144-45). Feely testified that as he approached the vehicle, Brown "raised his body off the seat and was making movements and then leaned forward toward the passenger side of the floor board. Then as I moved closer he was making a kicking motion underneath the passenger seat" (38:28; Pet-Ap. 145).

Feely said that he then ordered the occupants to show their hands; the two in the front seat complied, while Brown did not (38:29; Pet-Ap. 146). Feely testified he could see in the car using the light from his flashlight, the spotlight on the squad car, and a street light (38:29-30; Pet-Ap. 146-47). He advised Wawrzonek and another officer who had arrived at the scene that Brown was kicking something underneath the seat (38:29-30; Pet-Ap. 146-47). Feely said he observed Brown kicking a "small wooden object" under the seat, but did not know what it was (38:29; Pet-Ap. 146). Feely testified that Brown eventually raised his hands, and also placed his foot under the front seat so the wooden object was not visible (38:30; Pet-Ap. 147). After the occupants were out of the car, Feely looked under the seat where Brown had kicked the object and discovered a .38 Taurus revolver (38:31; Pet-Ap. 148).

Lipsey testified at the hearing that he was driving Brown's car the night of the stop because Brown was drunk (39:6-7; Pet-Ap. 162-63). He said that before the stop, they had gone to a gas station to get gas (39:7; Pet-Ap. 163). Lipsey said that while there, he saw the tail lamp structure and it was operational (39:7; Pet-Ap. 163). He testified he knew this "because both lights, you have to pull down the license plate to get to the gas. It's in between both of the lights, so you have to pull it down to get to the gas pump" (39:7; Pet-Ap. 163). Lipsey testified he left the car running while he filled it with gas (39:17; Pet-Ap. 173).

Lipsey also identified two photographs of the car's rear lighting (39:8-9; 45, Exs. 3-4; Pet-Ap. 164-65). One shows the entire back end of the

car (45, Ex. 3). Looking at the photo, Lipsey explained that the car "has red lights on both sides, and a white light is the reverse light, and the middle light is a brake light. And it has two lights on the sides, which would be the park lights" (39:8; *see also* 39:15-16; Pet-Ap. 164, 171-72). The other photo shows the driver's side lighting with the plastic lens removed and the light bulbs exposed (45, Ex. 4). The three bulbs closest to the left side of the car are lit, while the one closest to the license plate is not (45, Ex. 4). Lipsey said the first and third lights to the left are "park lights" that are lit when the car is in park, and the middle bulb was a brake light that lights when the brakes are engaged (39:9, *see also* 39:15-16; Pet-Ap. 165, 171-72). Lipsey testified that he knew all of the lights were operational on the night of the stop because he saw them at the gas station (39:7, 9-10; Pet-Ap. 163, 165-66).

Lipsey said that he drove home after leaving the gas station (39:10; Pet-Ap. 166). He testified that as soon as he parked at his residence, there were "police everywhere" and they removed him and the others from the car (39:10-11; Pet-Ap. 166-67).

B. The circuit court's decision.

The court denied Brown's suppression motion (38:28-34; Pet-Ap. 145-51). It first summarized Wawrzonek's, Feely's, and Lipsey's testimony (39:28-31; Pet-Ap. 184-87). It then said it found both officers credible, stating,

> [b]oth officers testified about the defective tail lamp. And I think it's important that

> Officer Wawrzonek specifically said it was one of three lights on the driver's side. In looking at the picture, there are three lights that we're talking about here, that fourth one is the reverse light, as I was told in looking at the pictures. So he specifically is saying that one of those three lights was out.

(39:31-32; Pet-Ap. 187-88).

The court further found that Lipsey's testimony that the lighting was fully operational was not credible:

> I don't think it's credible that Mr. Lipsey remembers whether his lights were working or not at the time. No officer had stopped them to know what day you looked at your lights, and whether or not one of them was out or not makes no sense. . . . I just think people do not pay attention to that type of thing on a regular basis, particularly to a day, and I just don't find that credible.

(39:32; Pet-Ap. 188).

Brown's attorney pointed out to the court that based on Lipsey's testimony, the middle bulb on the tail lamp was a brake light and would not necessarily be illuminated when the tail lamp was on (39:35; Pet-Ap. 191). Thus, he argued, the officers were incorrect in their belief that the tail lamp was defective based on their observation of the unlit bulb (39:35; Pet-Ap. 191). The court reiterated that it did not find credible Lipsey's testimony about which lights were functioning (39:35-36; Pet-Ap. 191-92).

At the plea hearing, the court clarified its findings and addressed the issue raised by

counsel. It said that even if the unlit bulb was a brake light, the officers could still have reasonably believed it should have been lit and stopped Brown's car. Specifically, the court said:

> [I]f the officers even reasonably believed that a light was out even if it's later shown to be not out, it forms the basis of a stop. I thought of that afterwards, that, you know, sometimes an officer could be mistaken given the age of a car as to which lights are supposed to be on and which ones aren't. Just stopping a car based on that, that could give them a basis if they believed that the taillight was out even if it's later to be shown that somehow that that light is supposed to not be on at that time. I don't think it's a fatal flaw in the stop itself if the officers were in fact mistaken. I'm not saying that they were, but I wanted to add that as far as [the] analysis goes in my mind because I did think about that later.

(40:7-8; Pet-Ap. 197-98).

The court also held that Brown's actions after the stop justified searching the car:

> Now, once they get out of the car and they see him moving around and making a specific bending motion forward and to the right, his failure to put his hands in the air when ordered to do so, and specifically seen trying to kick something underneath the seat that Officer Feely described as a wooden object that then they could no longer see I think gives those officers every reason after this stop . . . they have every right at this point to get those people out of the car and to make sure that that's not a weapon.

(39:33; Pet-Ap. 189).

The court also determined that *Gant* did not apply, saying that case did not require the officers to put their safety at risk by not allowing them to check whether there was a weapon in the car

> when a defendant or a person in the back, at the time not a defendant yet, fails to put up his hands, is seem specifically making a motion where that object is, the object is a wooden – like a wooden handle of a gun, and it's kicked under the seat as the officers approach, and the area is known for armed robberies.

(39:33-34; Pet-Ap. 189-90).

The court also said the officers had "every right to believe that there was a weapon or something that could harm them under that seat at that time" (39:34; Pet-Ap. 190). It further noted the limited scope of the search, saying Feely had looked only in the area where he had seen Brown kicking the object (39:34-35; Pet-Ap. 190-91).

C. Brown's postconviction proceedings.

After he pled guilty, Brown filed a motion for postconviction relief in which he argued that the stop was invalid because, even if the officers were correct that one of the tail lamps was defective, it did not amount to a violation of Wis. Stat. § 347.13(1) (28:4-5).[1] That statute provides

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[1] Brown also sought 209 days of sentence credit in his postconviction motion (28:6-7). The circuit court granted him 195 days (29:3-5). In the court of appeals, Brown claimed he was entitled to the full 209 days he had (footnote continued)

"[n]o vehicle originally equipped at the time of manufacture and sale with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in good working order." Wis. Stat. § 347.13(1).

In particular, Brown argued that the statute did not require that all tail lamps on a vehicle be in good working order, only that two of them meet this requirement (28:4). He claimed that the car had four tail lamps, two on each side of the car (28:4). Brown maintained that even if the middle light was out on the driver's side, the car still had two tail lamps that were lit and in good working order, which is all Wis. Stat. § 347.13(1) requires (28:4-5).

Brown also asserted that his trial counsel was ineffective for not making this argument (28:5-6).

The circuit court denied Brown's motion (29; Pet-Ap. 113-17). It held that even had Brown or his attorney argued there was no violation of Wis. Stat. § 347.13(1), its decision on the suppression motion would have been the same. It stated:

> The court based its decision on the officers' reasonable belief that one of the lights on the vehicle was inoperable or defective. The court referenced the fact that the age of the

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requested, and the State conceded that he was (Brown's court of appeals' brief-in-chief at 8-11; State's court of appeal's brief-in-chief at 3-7). Should Brown continue to request the additional fourteen days of sentence credit in this court, the State will again concede that he should receive it.

> car might have a bearing on an officer's reasonable belief, and even if it is shown later on that a particular light wouldn't necessarily have been operational, it doesn't affect their reasonable belief at the time of the stop. The court's decision was based on the officers' objective viewing of the vehicle, and therefore, reference by counsel to sec. 347.13(1), Stats., would not have altered the outcome of the court's findings and conclusions.

(29:2-3; Pet-Ap. 114-15).

D. The court of appeals' decision.

Brown appealed his conviction and the circuit court's order denying his postconviction motion to the court of appeals (31). On appeal, he argued the officers lacked reasonable suspicion or probable cause to stop the car because its tail lamps were not in violation of Wis. Stat. § 347.13(1), and his trial counsel was ineffective for failing to make this argument about the stop (Brown's court of appeals brief-in-chief at 12-16).

The court of appeals reversed. *See Brown*, 346 Wis. 2d 98, ¶ 1. The court determined that the issue in the case was whether the officers had probable cause to stop the car, rather than reasonable suspicion, because they believed the burned-out tail lamp bulb was an equipment violation. *Id.* ¶ 15. It also noted that Brown was alleging that the officers made a mistake of law in performing the stop because he claimed Wis. Stat. § 347.13(1) does not require all tail lamps be lit. *Id.* ¶ 17. The court held:

¶ 19 The parties agree with the circuit court's finding that the police officers stopped the vehicle because "the middle" rear tail light on the driver's side of the vehicle was unlit. It is undisputed that both the first and the third rear light bulbs on both the driver's side and the passenger's side (totaling four lights) were lit. The driver testified, and his testimony is undisputed, that those four lights were lit whenever the vehicle was in motion, and therefore, they were the lights which designated the rear of the vehicle, to wit, all four of the lights which made up the vehicle's two tail lamps were in working order. [footnote omitted].

¶ 20 Brown argues that even if the second light was unlit and was part of the vehicle's tail lamp, when a vehicle's tail lamp is made up of three lights, and two of those lights are lit, the tail lamp is "in good working order" as required by WIS. STAT. § 347.13(1). As such, Brown contends that the police officers had no basis to stop the vehicle and the stop was unconstitutional. We agree.

¶ 21 A tail lamp with one of three light bulbs unlit does not violate WIS. STAT. § 347.13(1) when it otherwise meets the statutory definition of a tail lamp. The statute does not require that a vehicle's tail lamps be fully functional or in perfect working order. It only requires "good working order." *See id.* Here, the two lit light bulbs making up the driver's side tail lamp satisfied the definition of a tail lamp as "a device to designate the rear of a vehicle by a warning light." *See* WIS. STAT. § 340.01(66). Because the two lit light bulbs on the rear driver's side of the vehicle were sufficient to designate the rear of the vehicle to a vehicle travelling behind it, the officers did not have probable cause of a traffic

> violation and the stop was unconstitutional. The officers mistakenly believed that the law required all of the tail lamps light bulbs to be lit; and "a lawful stop cannot be predicated upon a mistake of law." *See Longcore*, 226 Wis. 2d at 9. As such, we reverse.

Id. ¶¶ 19-21.

SUMMARY OF ARGUMENT

This court should reverse the court of appeals' decision that the stop of Brown's car was unconstitutional. The court's conclusion that under Wis. Stat. § 347.13(1), a tail lamp made up of three lights is in good working order when only two of the lights are lit is wrong. "Good working order" is properly interpreted to mean that the tail lamp is functioning as it is supposed to, that is, with all of its component lights lit. The court of appeals' standard is unworkable and gives little guidance to law enforcement, the public, and courts in determining whether a tail lamp is in good working order. The State's interpretation of § 347.13(1) is clear, consistent with other statutes, the administrative code, a past decision of the court of appeals and decisions of other courts.

Further, this court should conclude that the officers acted properly when they stopped Brown's car. If the officers were correct that the unlit light was part of the tail lamp, then, applying the State's interpretation of Wis. Stat. § 347.13(1), they had probable cause to stop the car because they observed that its tail lamps did not comply with the law. Further, even if the officers were wrong that the unlit light was a tail lamp, they acted reasonably in believing that it was, and had

probable cause or reasonable suspicion to believe the tail lamp was in violation of § 347.13(1).

This court should also conclude that the officers had reasonable suspicion to perform a protective search of the car for weapons pursuant to *Long*, 463 U.S. 1032. That case, and not *Gant*, controls whether the search was constitutional. Under all the circumstances of the stop, the officers could reasonably suspect there was a weapon in Brown's car and undertake a search to ensure their safety.

ARGUMENT

I. THE OFFICERS PROPERLY STOPPED BROWN'S CAR BECAUSE WIS. STAT. § 347.13(1) REQUIRES THAT ALL THE BULBS IN A CAR'S TAIL LAMP BE LIT TO BE IN GOOD WORKING ORDER.

A. Applicable law and standard of review.

1. Traffic stops.

"'The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of the Fourth Amendment.'" *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569 (quoting *State v. Gaulrapp*, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App.

1996) and citing *Whren v. United States*, 517 U.S. 806, 809-10 (1996)).

"An automobile stop must not be unreasonable under the circumstances." *Popke*, 317 Wis. 2d 118, ¶ 11 (citations omitted). "A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed." *Id.* (internal quotation marks and citations omitted).

"Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that a traffic violation has occurred." *Id*. ¶ 14 (internal quotation marks and citations omitted). The information must lead a reasonable officer to think that guilt is more than a possibility. *Id*. (citation omitted). It does not have to be evidence to establish proof beyond a reasonable doubt or even that guilt is more probable than not. *Id*. (citation omitted).

If probable cause does not exist, law enforcement may still conduct a traffic stop if the totality of the circumstances provides grounds to reasonably suspect that a crime or traffic violation has been or will be committed. *Id*. ¶ 23 (citation omitted). There must be "specific and articulable facts which, taken together with rational inferences from those facts" that reasonably warrant the stop. *Id*. (citing *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634). "The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was

committing, or is about to commit a crime." *Popke*, 317 Wis. 2d 111, ¶ 23 (citation and internal quotation marks omitted). "An officer's inchoate and unparticularized suspicion or hunch, however, will not give rise to reasonable suspicion." *Id.* (internal quotations omitted).

"Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact." *Id.* ¶ 10 (citing *State v. Mitchell*, 167 Wis. 2d 672, 684, 482 N.W.2d 364 (1992) and *State v. Williams*, 2001 WI 21, ¶ 18, 241 Wis. 2d 631, 623 N.W.2d 106). A finding of constitutional fact consists of the circuit court's findings of historical fact, which this court reviews under the clearly erroneous standard, and the application of these facts to constitutional principles, which this court reviews de novo. *Popke*, 317 Wis. 2d 111, ¶ 10 (citation omitted).

2. Statutory interpretation.

"The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238 (citations and internal quotation marks omitted). "[S]tatutory interpretation begins with the language of the statute." *Id.* (citation omitted). "With the exception of technical or specially-defined words, statutory language is given its common and ordinary meaning." *Id.* (citation omitted). If the language is plain, this court's inquiry ends. *Id.* (citation omitted).

Determining a statute's plain meaning requires more than focusing on a single sentence

or a portion of one. *Id.* ¶ 43 (citation omitted). Statutes should be interpreted in the context they are used, "'not in isolation but as part of a whole.'" *Id.* (quoted source omitted). Statutes should also be construed reasonably to avoid absurd results or an interpretation that contravenes the statute's purpose. *Id.* (citation omitted).

Statutory interpretation is a question of law this court reviews de novo. *Id.* ¶ 37 (citation omitted).

B. The court of appeals improperly concluded that a tail lamp with two of three bulbs lit is in good working order under Wis. Stat. § 347.13(1).

1. The court's interpretation is incorrect.

This court should first conclude that the court of appeals improperly interpreted Wis. Stat. § 347.13(1) in holding that the sixty-six percent functional tail lamp in Brown's car was in good working order. Section 347.13(1) provides:

> No person shall operate a motor vehicle, mobile home or trailer or semitrailer upon a highway during hours of darkness unless such motor vehicle, mobile home or trailer or semitrailer is equipped with at least one tail lamp mounted on the rear which, when lighted during hours of darkness, emits a red light plainly visible from a distance of 500 feet to the rear. No tail lamp shall have any type of decorative covering that restricts the amount of light emitted when the tail

> lamp is in use. No vehicle originally equipped at the time of manufacture and sale with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in good working order. This subsection does not apply to any type of decorative covering originally equipped on the vehicle at the time of manufacture and sale.

The court of appeals interpreted "good working order" in reference to the statutory definition of "tail lamp," which Wis. Stat. § 340.01(66) states is a "device to designate the rear of a vehicle by a warning light." *Brown*, 346 Wis. 2d 98, ¶¶ 18, 21. It concluded that even assuming the unlit bulb was part of the tail lamp, the lamp was in good working order because it designated the rear of Brown's car. *Id*. ¶¶ 20, 21. It also determined that good working order did not mean "fully functional or in perfect working order." *Id*. ¶ 21. Thus, because there was nothing legally wrong with the tail lamp, the court held the officers impermissibly stopped Brown's car based on a mistake of law. *Id*. ¶ 21 (citing *State v. Longcore*, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999).

The court of appeals' interpretation of Wis. Stat. § 347.13(1) is contrary to the plain meaning of the statute's language. "Working order" means "a condition of a machine in which it functions according to its nature and purpose." *Webster's Third New Int'l Dictionary* 2635 (1986). *See State v. Sample*, 215 Wis. 2d 487, 499, 573 N.W.2d 187 (1998) (court may refer to dictionary definitions to establish the common and approved usage of a word in statute, even if it is not ambiguous). The nature of the tail lamp on

Brown's car is that it consists of three individual bulbs. The purpose of the tail lamp is to illuminate the tail end of the car using those three bulbs. When one of those bulbs is not lit, the lamp is not functioning according to its nature or purpose.[2]

The court's interpretation also conflicts with related statutes and administrative code sections. Wisconsin Stat. § 347.06(3) requires that a vehicle's operator keep all required lamps "reasonably clean and in proper working condition." Similarly, the code requires that tail lamps "shall be maintained in proper working condition and in conformity with this section and s. 347.13(1) and (2), Stats." Wis. Admin. Code § Trans. 305.16(2) (2013). A tail lamp with an unlit bulb has not been kept or maintained in proper working condition.

Further, Wis. Stat. § 347.13(4) requires that tail lamps be wired to be lighted whenever headlamps or auxiliary lighting lamps are lighted. And, Wis. Admin. Code § Trans. 305.16(3) requires that in tail lamps "all wiring and connections shall be maintained in good condition." If a defect in the tail lamp's electrical system was the cause of the lamp having an unlit bulb, either or both of these sections would be violated. Yet, under the court of appeals' decision, an officer could not stop

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[2] The MacMillan Dictionary provides a clearer definition, explaining that "working order" means "working correctly, without any problems." *See* http://www.macmillandictionary.com/us/dictionary/american/working-order (last visited Nov. 11, 2013). A tail lamp with an unlit bulb would not satisfy this definition.

a car to investigate whether this is the case if two of the three lights in the tail lamp are operational.

Additionally, the court of appeals' opinion conflicts its earlier decision in *State v. Olson*, No. 2010AP149-CR (Wis. Ct. App., Dist. IV, Aug. 5, 2010) (Pet-Ap. 199-202).[3] In *Olson*, the defendant was stopped driving a car with a total of four lamp light bulbs, two on each side. *Id.* ¶¶ 2, 12. One of bulbs on the right side was burned out. *Id.* The court of appeals held the stop was proper because the officer had probable cause to believe the burnt-out bulb violated Wis. Stat. § 347.13(1). *Id.* ¶¶ 9-12. It noted that the statute did not state that each bulb constituted a tail lamp. *Id.* ¶ 11. The court explained that on Olson's vehicle, the tail lamps consisted of two bulbs located on the right and left sides of the rear end, and that "[t]hese clusters of bulbs function together as a single device," within the meaning of Wis. Stat. § 340.01(66). *Id.* ¶ 11. The court held that because it was undisputed that one of the bulbs on the right lamp was burnt out, that lamp was not in good working order. *Id.* ¶ 12.

Olson conflicts with the court of appeals decision in this case.[4] It holds that a tail lamp

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[3] *Olson* is an unpublished decision issued by a single judge after July 1, 2009, and may be cited for its persuasive authority. Wis. Stat. § 809.23(3)(b). The State has included a copy of the decision in its appendix. Wis. Stat. § 809.23(3)(c).

[4] Two other unpublished court of appeals' decisions reach the same conclusion as *Olson*. Though issued by a (footnote continued)

with a nonfunctional bulb is not in good working order under Wis. Stat. § 347.13(1). Here, the court said that an unlit bulb does not violate § 347.13(1) if the tail lamp is still capable of designating the car's rear end. *Brown*, 346 Wis. 2d 98, ¶ 21. The only apparent way to reconcile the cases is to say a sixty-six percent functional lamp, as in this case, is in good working order, while a fifty percent functional lamp, as in *Olson*, is not. As discussed in the next section, this is a confusing and unworkable standard that offers little guidance to the public, law enforcement, and courts.

Finally, other state courts have interpreted the phrase "good working order" similar to *Olson* in cases involving vehicle lamps. *See People v. Blue*, No. A119530, 2008 WL 3890038, *3 (Cal. Ct. App. Aug. 22, 2008) (Pet-Ap. 203-06) (tail light with bulb that it not functioning is not in good working order even though light may otherwise comply with other requirements of vehicle code); *People v. Bradford*, No. D051227, 2008 WL 2316490, *3-4 (Cal. Ct. App. June 6, 2008) (Pet-Ap. 207-12) ("when a stoplamp is designed to function using two light bulbs, both of those bulbs must be working for the stoplamp to be said to be in good working order"); *State v. Stephan*, 2009 WL 815994 (N.J. Super. A.D. Mar. 31, 2009) (Pet-Ap. 213-15) (tail lights were not in good working order where one light was brighter than the other). This court should follow *Olson* and these cases, and conclude the court of appeals misinterpreted Wis. Stat. § 347.13(1).

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single judge, both decisions were issued before 2009 and are not citable as persuasive authority.

2. The court of appeals' interpretation of Wis. Stat. § 347.13(1) creates a confusing standard.

The court of appeals' interpretation of Wis. Stat. § 347.13(1) also creates a confusing and unreasonable definition of "good working order." The public, law enforcement, and courts will have a difficult time applying the decision to the varieties of tail and other vehicle lamps that are required to be in good working order. *See* Wis. Stat. § 347.14(1) (where vehicle equipped with two stop lamps, they must be maintained in good working order). Requiring that all bulbs in a lamp be functioning provides a simple and clear standard.

Under the court of appeals interpretation of Wis. Stat. § 347.13(1), a tail lamp with sixty-six percent of its bulbs functioning is in good working order as long as it is capable of designating the rear of the vehicle by a warning light. *Brown*, 346 Wis. 2d 98, ¶ 21. Presumably, the lamp would also have to satisfy the requirements listed in § 347.13(1), which mandate that the lamp be mounted on the rear of the vehicle and emit a red light visible from 500 feet during hours of darkness.

The court's interpretation is confusing. It does not explain whether the percentage of functional bulbs is controlling or whether the tail lamp meeting the statutory requirements is what is relevant. If it is the former, the decision does not explain the minimum percentage of bulbs that must be for a lit lamp to be in good working order.

Olson holds that fifty percent is not enough, but it is not precedential, and in any event, the court's decision in this case does not explain what to do about lamps that are between fifty and sixty-six percent functional.

If all that matters is whether the lamp meets the statutory definitions, this too is problematic. Law enforcement would be unable to stop motorists to inform them that a bulb on their tail lamp was not functioning unless the officer made sure that the lamp was not capable of designating the car's rear end from 500 feet away in the dark. Further, it is not obvious that motorists would be willing to ensure their tail lamps met this requirement, which would be more difficult than simply examining whether all tail lamp bulbs were working. Requiring all bulbs to be lit would promote maintenance of vehicle safety equipment in furtherance of the vehicle code's primary purpose of promoting safety on the highways, *see State v. Hart*, 89 Wis. 2d 58, 66, 277 N.W.2d 843 (1979); *see also Ziegler*, 342 Wis. 2d 256, ¶ 43 (statute should be construed to avoid interpretation that contravenes its purpose). The court of appeals' decision is unclear and establishes a confusing standard. This court should reverse it.

3. The officers had probable cause to stop Brown's car.

The court of appeals misinterpreted Wis. Stat. § 347.13(1). All bulbs in a tail lamp must be lit for it to be in "good working order." Thus, if the unlit bulb on Brown's car was part of the tail lamp, Wawrzonek and Feely had probable cause to

stop the car because they observed a violation of § 347.13(1). *Popke*, 317 Wis. 2d 118, ¶ 14. This court should conclude the stop was proper.

C. Even if the officers were mistaken that the bulb was part of the tail lamp, they still could properly stop Brown's car.

This court should also conclude that even if Wawrzonek and Feely were wrong that the unlit bulb was part of the tail lamp, they could still stop Brown's car because they reasonably believed the bulb was part of the tail lamp, and thus, still had probable cause, or at least reasonable suspicion, for the stop under the correct interpretation of Wis. Stat. § 347.13(1).

The circuit court and the court of appeals considered whether the officers were mistaken about the unlit bulb being part of the tail lamp, but did not make a specific finding whether the bulb was part of the tail or brake lamp. The circuit court found credible the officers' testimony that Brown's car had a defective tail lamp (38:5, 26; 39:31-32; Pet-Ap. 122, 143, 187-88). It also found Lipsey's testimony that he observed the tail lights at the gas station not credible, but did not make the same finding about his testimony that the unlit bulb was a brake light (38:35-36; Pet-Ap. 152-53). The court later said that that even if the officers were wrong that the bulb was part of the tail lamp, they still could suspect it was and validly stop the car (40:7-8; Pet-Ap. 197-98). The court of appeals assumed the bulb was part of the tail lamp in construing Wis. Stat. § 347.13(1). *Brown*, 346 Wis. 2d 98, ¶¶ 19 n.5, 20-21.

However, it also noted that the circuit court had not specifically found incredible Lipsey's testimony the bulb was a brake light, only his testimony that about his observations at the gas station. *Brown*, 346 Wis. 2d 98, ¶ 19 n.5.

This court should conclude that, regardless of whether the officers were correct that the bulb was part of the tail lamp, they still could stop Brown's car.

While a vehicle stop may not be based on an officer's mistake of law, *see Longcore*, 226 Wis. 2d at 9, as a general rule, courts decline to apply the exclusionary rule to an officer's good-faith mistake of fact. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990) (to satisfy Fourth Amendment's reasonableness requirement, factual determinations of officer executing a search or seizure under exception to warrant requirement must not always be correct, but rather, must be reasonable); *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000) (upholding stop based on officer's mistake of fact about whether length of crack in windshield was long enough to violate statute).

Although no published Wisconsin decision appears to have addressed the effect of an officer's good-faith mistake of fact on a traffic stop, two recent unpublished decisions from the court of appeals have held that such an error does not invalidate a stop. In *State v. Reierson*, No. 2010AP596-CR (Wis. Ct. App., Dist. IV, Apr. 28, 2011) (Pet-Ap. 216-19), the officer stopped a vehicle for an expired registration based on his misreading of the vehicle's license plate. *Id.* ¶ 3. The court held the officer's good-faith mistake did not invalidate the stop. *Id.* ¶ 11.

Similarly, in *County of Sheboygan v. Bubolz*, Nos. 2010AP2995, 2010AP2996, 2009AP2997 (Wis. Ct. App., Dist. II, Apr. 6, 2011) (Pet-Ap. 220-23), an officer saw a vehicle drive though an area marked with "'Road Closed—Local Traffic Only,'" signs and stopped the driver for failing to obey an official traffic sign. *Id.* ¶ 2. The driver claimed the sign was not official. *Id.* ¶¶ 5, 10. The court of appeals held that even if this was the case, the officer could reasonably believe the sign was official, and had reasonable suspicion to stop the car. *Id.* ¶ 13. This court should follow *Reierson and Bubolz*, and conclude that, an officer may still have probable cause or reasonable suspicion to stop a vehicle even if the officer makes a good-faith mistake about a relevant fact.[5]

Here, Wawrzonek and Feely could reasonably believe the light was part of the tail lamp. Feely testified he was not familiar with Brown's car before the stop (38:26-27; Pet-Ap. 143-44). He said he saw that the middle, driver's side red light was out (38:26; Pet-Ap. 143). Wawrzonek testified one of the three panels on the driver's side was out (38:5; Pet-Ap. 122). They both testified that the stop was for a defective tail lamp (38:5, 26; Pet-Ap. 122, 143). At the time of the stop, Brown's car was more than thirty years' old. In light of the officers' unfamiliarity with the car and its age, it would be reasonable for them to

[5] Both *Reierson* and *Bubolz* are unpublished decisions issued by a single judge after July 1, 2009, and may be cited for their persuasive authority. Wis. Stat. § 809.23(3)(b). The State has included copies of the decisions in its appendix. Wis. Stat. § 809.23(3)(c).

suspect that all three of the lights constituted the tail lamp. Because Wis. Stat. § 347.13(1) requires that all bulbs in a tail lamp be lit for it to be in good working order, the officers reasonably suspected Brown's car was in violation of this statute and could properly stop it.[6]

[6] Although not relevant to whether Wawrzonek and Feely reasonably thought the unlit bulb was part of the tail lamp, Lipsey's testimony at the suppression hearing did not clearly establish that the bulb was part of the brake light. Lipsey testified that he saw all of the driver's side lights operational at the gas station (39:9). He said this while viewing Exhibit 4, which shows the three leftmost bulbs on the driver's side lit, including the one Lipsey claimed was the brake light (39:9; 45, Ex. 4). Thus, for Lipsey's testimony to establish that the unlit bulb was a brake light, not only would the car have had to been running while he put gas in it, but someone would have had to have been pressing the brake pedal while he did so (39:19). Additionally, there was no testimony that someone was pressing the brake pedal when Exhibit 4 was created the week before the hearing (39:8).

Additionally, both Wawrzonek and Lipsey testified that the car was parking when the officers stopped it (38:11; 39:10). It would be likely that a functioning brake light would have come on while this was happening, although there was no testimony at the suppression hearing on the matter.

II. THE OFFICERS HAD REASONABLE SUSPICION TO SEARCH BROWN'S CAR FOR A WEAPON.

A. *Gant* does not apply to this case.

As noted, this court asked the parties to brief whether *Gant* applies to this case and, if so, how. *Gant* does not apply to this case because the search of Brown's car was not incident to an arrest. *See State v. Smiter*, 2011 WI App 15, ¶ 16 n.4, 331 Wis. 2d 431, 793 N.W.2d 920. Instead, the search was a protective search for weapons pursuant to *Long*, 463 U.S. 1032, and one that was justified under the circumstances. *See State v. Williams*, 2010 WI App 39, ¶¶ 22-25, 323 Wis. 2d 460, 781 N.W.2d 495 (*Gant* does not govern protective searches of vehicles for weapons; *Long* is still good law after *Gant*); *State v. Bailey*, 2009 WI App 140, ¶¶ 44-45, 321 Wis. 2d 350, 773 N.W.2d 488 (same).

B. Applicable law and standard of review.

During a traffic stop, an officer may conduct a protective search of the passenger compartment of the vehicle if the officer reasonably suspects the person is dangerous and may gain immediate access to a dangerous weapon. *Long*, 463 U.S. 1049-50. Reasonable suspicion requires that the officer be "'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *State v. Johnson* 2007 WI 32,

¶ 21, 299 Wis. 2d 675, 729 N.W.2d 182 (quoting *Terry*, 392 U.S. at 21).

> The test is an objective one: "[W]hether a reasonably prudent [officer] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger" because the person may be armed with a weapon and dangerous. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he [or she] is entitled to draw from the facts in light of his [or her] experience."

Johnson, 299 Wis .2d 675, ¶ 21 (citation omitted).

Courts resolve the propriety of protective searches on a case-by-case basis, examining the totality of the circumstances. *Id*. ¶ 22. The reasonable suspicion requirement seeks to balance the safety of law enforcement officers with the right of persons to be free from unreasonable government intrusions. *Id*. (citation omitted).

Whether a protective search is valid is a matter of constitutional fact. *Bailey*, 321 Wis. 2d 350, ¶ 26. This court will uphold the trial court's factual findings unless they are clearly erroneous, but independently reviews whether those facts satisfy the constitutional standard. *Id*.

C. Discussion.

The officers had reasonable suspicion to allow Feely to search Brown's car for a weapon. Both officers described the area of the stop as

known for violent crime (38:6-7, 31-32; Pet-Ap. 123-24, 148-49). As the officers approached the car, they observed Brown bending forward and to the right side of the floorboard (38:8, 28; Pet-Ap. 125, 145). Feely yelled for the occupants to show their hands, but Brown did not comply, and Wawrzonek said he continued to lean forward (38:8, 29; Pet-Ap. 125, 146). Feely was able to see in the car, and saw Brown kicking a small wooden object under the front seat (38:29-30; Pet-Ap. 146-47). Brown eventually raised his hands, but kept his foot under the seat so the object was not visible (38:30; Pet-Ap. 147). The officers removed Brown from the car, placed him in handcuffs, and detained him for not complying with the order to show his hands (38:14; Pet-Ap. 131). Feely looked where Brown had kicked the object and found a gun (38:31; Pet-Ap. 148). The circuit court found the officers credible (39:31; Pet-Ap. 187).

The totality of the circumstances justified Feely's protective search of the car. The stop took place at night in what the officers perceived as a high-crime area. The time of day and the area's high-crime status are relevant factors in justifying a protective search. *State v. Kyles*, 2004 WI 15, ¶ 62, 269 Wis. 2d 1, 675 N.W.2d 449; *State v. Morgan*, 197 Wis. 2d 200, 211, 539 N.W.2d 887 (1995). Brown engaged in repeated furtive movements by leaning forward, suggesting that he was attempting to hide something. Surreptitious movement by a person in a vehicle immediately after a traffic stop may be a substantial factor in establishing reasonable suspicion to believe the occupants have access to weapons. *Johnson*, 299 Wis. 2d 675, ¶ 37.

Once the officers saw Johnson's movements, they ordered him to show his hands. He did not and continued to lean forward. A suspect's refusal to show his hands to police "is an important factor for a court to consider under the totality of the circumstances" in assessing the validity of a frisk. *Kyles*, 269 Wis. 2d 1, ¶ 50. When Feely got close enough to the car, he saw Brown kicking a wooden object under the front seat. Many guns have wooden handles, and it was reasonable for Feely to suspect that the object was a weapon based on this and Brown's attempts to conceal it. Brown continued to try to hide the object after he showed his hands, and this also contributed to the suspicion necessary to support the search.

Further, that Brown was only detained and not under arrest at the time of the search also gave the officers an "immediate safety interest in verifying that [Brown] did not have a gun or other weapon." *Williams*, 323 Wis. 2d 460, ¶ 23. "'In the no-arrest case, the possibility of access to weapons in the vehicle always exists, since the driver or passenger will be allowed to return to the vehicle'" when the encounter is over. *Id*. (quoting *Gant*, 556 U.S. at 352 (Scalia, J., concurring)). Because the car was stopped for a traffic offense, Brown likely would have been returned to the car, and the officers could make sure he would not have access to a gun when he did so. *See also Long*, 463 U.S. at 1050-52 (search may take place even though suspect detained outside of car; officer remains at risk because full custodial arrest has not yet occurred).

Finally, Feely's search was limited to the area he saw Brown kick the gun. This too shows the search was reasonable. *See Long*, 463 U.S. at

1049 (weapon search must be limited to areas in which weapon may be placed or hidden). The protective search of Brown's car for weapons was supported by reasonable suspicion.

CONCLUSION

Upon the foregoing, the State respectfully requests that this court reverse the decision of the court of appeals.

Dated this 14th day of November, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,029 words.

Dated this 14th day of November, 2013.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

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

Dated this 14th day of November, 2013.

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