STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2011AP002907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction and an Order Denying Post-Conviction Relief Entered in the Circuit Court for Milwaukee County, the Honorable Rebecca F. Dallet, Presiding

---

BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT

HANNAH B. SCHIEBER
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-2201
E-mail: schieberh@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Did police have a lawful basis to conduct a traffic stop when they observed a tail lamp with two lit bulbs and one unlit bulb, where Wisconsin Statutes define a tail lamp as a "device to designate the rear of a vehicle by a warning light" and require the tail lamp to be in "good working order"?

The circuit court denied Mr. Brown's motion to suppress the evidence obtained as a result of the stop. (39:28-36;State's Appx.185-192). The circuit court further denied Mr. Brown's post-conviction motion challenging the circuit court's ruling on the motion to suppress and presenting an alternative argument that counsel was ineffective for failing to argue specifically that the car was not in violation of Wisconsin Statute Section 347.13(1) (which addresses the requirements for tail lamps). (29;State's Appx.113-117).

The Court of Appeals reversed, holding that "[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." (Ct. App. Op., ¶ 21)(State's Appx.110). The Court of Appeals explained that 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.'" ***Id.*** The Court explained that "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,'" ***id.*** (citing Wis. Stat. § 340.01(66)), and concluded that the officers therefore lacked probable cause to conduct the stop. ***Id.***

2. Did the search of Mr. Brown's car following the stop implicate ***Arizona v. Gant***?

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[.]" (Wis. Sup. Ct. Order., Oct. 15, 2013). Mr. Brown did argue to the circuit court that the search violated ***Gant***. (9;39:26-27;State's Appx.182-183). The circuit court held that ***Gant*** did not apply to the search. (39:33-35;State's Appx.189-191). Mr. Brown did not challenge the search under ***Gant*** in his post-conviction motion or to the Court of Appeals. *See* (28;Brown Ct. App. Initial and Reply Briefs).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to accept review indicates oral argument and publication are likely warranted.

RELEVANT STATUTE

This case involves the interpretation and application of Wisconsin Statute § 347.13(1)[1], which states:

> 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 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.

STATEMENT OF THE CASE AND FACTS

The State's statement of the case and facts sufficiently frames the issues in this case. Mr. Brown will include additional relevant facts as needed in the argument section of his brief.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise indicated.

ARGUMENT

This case involves one central question: whether the State established that the tail lamp on the driver's side of Mr. Brown's car, which police saw had two lit bulbs and one unlit bulb, violated the traffic statutes to justify the traffic stop. The answer to this question can be found in the plain language of the statutes. As the Court of Appeals held in this case, the statutes define a tail lamp as a "device to designate the rear of a vehicle by a warning light," and simply require the tail lamp to be in "good working order." (Ct. App. Op., ¶ 18,21)(State's Appx. 109-110)(citing Wis. Stat. § 340.01(66);Wis. Stat. § 347.13(1)). Wisconsin Statute Section 347.13(1) also explains when a tail lamp is in "good working order": requiring that the lamp, "when lighted during hours of darkness, emits a red light plainly visible from a distance of 500 feet to the rear." Wis. Stat. § 347.13(1).

Thus, as the Court of Appeals held, "[a] tail lamp with one of three bulbs unlit does not violate Wis. Stat. § 347.13(1) when it otherwise meets the statutory definition of a tail lamp." (Ct. App. Op., ¶ 21)(State's Appx.110). The Court of Appeals applied the plain language of the statute and held that the tail lamp on Mr. Brown's car satisfied the statutory requirements and that therefore the officers lacked a lawful basis to stop the car. ***Id.***

The State now asks this Court to effectively amend the statutes to impose stricter requirements than what the statutes actually require. In so doing, the State confuses a tail lamp that is in "good working order" with a tail lamp that is in perfect condition. Requiring every component of a tail lamp to be in perfect condition would allow police to conduct traffic stops even when the tail lamp satisfies its role under

the plain language of the statute. This Court should uphold the Court of Appeals' decision.

The State also asks this Court to expand the scope of the good faith exception to apply to mistakes of fact in cases involving warrantless searches and seizures. This record, however, does not support that there was any mistake of fact. Further, such an extension would ignore the core purposes of the exclusionary rule. This Court should therefore decline the State's request to extend the scope of the good faith exception to mistakes of fact.

Lastly, this Court asked the parties to address whether ***Arizona v. Gant*** applies to the facts of this case. Mr. Brown agrees with the State that ***Gant*** does not apply to the facts of this case. Insofar as this Court accepted review of this case to address the application of ***Gant***, this Court should dismiss review of the case as improvidently granted.

I. Police Had No Lawful Basis to Stop the Car as the State Failed to Demonstrate that the Tail Lamp Violated the Statutes.

When reviewing a motion to suppress, an appellate court applies a two-step standard of review. ***State v. Pallone***, 2000 WI 77, ¶ 27, 236 Wis. 2d 162, 613 N.W.2d 568, *cert. denied*, 531 U.S. 1175 (2001) (citations omitted). First, an appellate court will uphold a circuit court's findings of historical facts unless those facts are clearly erroneous. ***Id.*** Second, an appellate court reviews *de novo* the application of constitutional principles to those facts. ***Id.***

"Statutory interpretation is a question of law reviewed de novo." ***Village of Cross Plains v. Haanstad***, 2006 WI 16, ¶ 9, 288 Wis. 2d 573, 709 N.W.2d 447. Statutory interpretation begins with the plain language of the statute.

State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specifically-defined words or phrases are given their technical or special definitional meaning." ***Id.*** Because "[c]ontext is important to meaning," "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd results." ***Id.***

The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution protect citizens against unreasonable searches and seizures. U.S. CONST., Amend. IV and WIS. CONST., Art 1, § 11. The "temporary detention of individuals" during a traffic stop constitutes a "seizure" within the meaning of the Fourth Amendment. ***State v. Popke***, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569 (citation 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.*** (quoting ***State v. Gaulrapp***, 207 Wis. 2d 600, 605, 558 N.W.2d 696 (Ct. App. 1996)).

"Reasonable suspicion is based upon specific and articulable facts that together with reasonable inferences therefrom reasonably warrant a *suspicion* that an offense has occurred or will occur." ***State v. Longcore***, 226 Wis. 2d 1, 9, 594 N.W.2d 412(Ct. App. 1999), *aff'd* 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620 (citing ***Terry v. Ohio***, 392 U.S. 1 (1968))(emphasis in original). "It is insufficient to support an arrest or search, but permits further investigation." ***Id.*** Probable cause, on the other hand, "looks to the totality of the circumstances facing the officer at the time of arrest to

determine whether the officer could have reasonably believed the defendant had committed, or was committing, an offense." ***Id.***

When an officer conducts a traffic stop based on a specific offense, the purported offense "must indeed *be* an offense; a lawful stop cannot be predicated upon a mistake of law." ***Longcore***, 226 Wis. 2d at 9 (emphasis in original).

As the Court of Appeals explained, the issue in this case requires consideration of whether the officers had probable cause to conduct the stop:

> Here, the officers observed that the middle, red light bulb on the rear driver's side of the vehicle was unlit, and stopped the vehicle because they believed that the unlit light bulb constituted an equipment violation. They 'did not act upon a suspicion that warranted further investigation, but on [their] observation of a violation being committed in [their] presence.' As such, the issue before us is whether the officers had probable cause that a law had been broken supporting the stop, not whether there was reasonable suspicion to support the stop.

(Ct. App. Op., ¶ 15)(State's Appx.108)(internal citations omitted).

A. A tail lamp is in "good working order" under Wis. Stat. § 347.13(1) when it designates the rear of the car by a red light plainly visible from 500 feet to the rear.

Here, the officers had no lawful basis to stop the car. The officers testified that they stopped the car because of a "defective tail light"—specifically, because one of three red lights on the driver's side tail lamp was unlit. (38:5-6,10;

State's Appx.122-23,127).[2] Officer Feely testified that the "driver['s] side middle" red light was out. (38:26;State's Appx.143). The circuit court found the officers credible that they saw that the one of the three red lights was unlit. (39:32;State's Appx.188). Nevertheless, as the Court of Appeals held, the statutes do not require each individual component of one tail lamp to be in perfect condition. (Ct. App. Op., ¶ 21)(State's Appx.110).

Wis. Stat. § 347.13(1) provides, in relevant part, that: "[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)(emphasis added). Whether or not police had a lawful basis to stop the car therefore turns on what is required for a tail lamp to be in "good working order."

A "tail lamp" "means a device to designate the rear of a vehicle by a warning light." Wis. Stat. § 340.01(66)(*see also* Wis. Stat. §§340.01, explaining that the definitions in that statute apply to statutory chapters including Chapter 347). So, when is a tail lamp in "good working order"? The plain language of the statute provides the answer:

> 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*

---

[2] Included in Mr. Brown's appendix are pictures of the rear of Mr. Brown's car that were admitted at the suppression hearing. (44:1)(Exh.D:3-4)(App.101). These pictures were not taken at the time of the stop, but instead a week before the suppression hearing. (39:31;State's App.187).

> *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 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.

Wis. Stat. § 347.13(1)(emphasis added). Thus, the statute establishes that a tail lamp is in "good working order" when it gives off a red light which can be plainly seen from up to 500 feet behind the car, and further requires that if a car comes with two tail lamps, both tail lamps must be in "good working order."

The State in this case presented no evidence at the suppression hearing to suggest that the driver's side tail lamp was insufficient to designate the rear of the car to the officers. Instead, the officers testified that they conducted the traffic stop because they believed the driver's side tail lamp to be defective because one of three bulbs comprising the lamp was unlit. (38:5-6,10,26;State's Appx.122-23,127,143). But, as the Court of Appeals held, one unlit bulb does not mean that the tail lamp was not *working* as required by the statute:

> 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." 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."

(Ct. App. Op., ¶ 21)(State's Appx.110)(internal citations omitted).

B. The State's proposed interpretation confuses a "working" tail lamp with a tail lamp in mint condition.

The State's proposed interpretation confuses "good working order" with perfect condition, and in so doing ignores the statutorily-provided requirements for what it means for a tail lamp to be *working*. If the Legislature wishes to amend the statute to create more stringent requirements for drivers in Wisconsin, that is the prerogative of the Legislature—not this Court. *See., e.g.,* ***It's in the Cards v. Fuschetto***, 193 Wis. 2d 429, 437, 535 N.W.2d 11 (Ct. App. 1995)(noting that the court "will not indulge" in "judicial legislation" in order "to change or amend the statutes").

Is a car not "working" if the radio in the car is broken? The answer to that question depends on what it means for a car to be "working." If "working" simply requires that the car get the driver from point A to point B, then a car that can do so is still "working" regardless of whether the radio is functioning. Similarly, a tail *lamp* may be functioning as required under the statute (to designate the rear of the car) even if a specific individual bulb or component that is part of the lamp is not in perfect condition. Thus, the question is not—as the State attempts to argue—one of percentages (i.e. if 66% of bulbs are lit, is that enough? 50%?)—the question is whether the tail lamp was serving its function as required by the statute: to designate the rear of the car to cars behind it. This is what the Court of Appeals held, (*see* Ct. App. Op., ¶ 21)(State's Appx.110), and it is the proper interpretation of the statute.

The State attempts to point to other portions of Chapter 347 and the Administrative Code to support its proposed standard. *See* State's Brief at 19 (discussing Wis. Stat. § 347.06(3)'s requirement that all lamps must be "reasonably clean and in proper *working* condition" and Administrative Code § 305.16(2) requirement that lamps be "maintained in proper *working* condition")(emphasis added). But here too the State ignores the statutory explanation that *working* condition means a tail lamp that is designating the rear of a car by a red light viewable up to the 500 feet required by the statute. *See* Wis. Stat. § 347.13(1).[3]

Contrary to the State's assertions, the text of other statutes within Chapter 347 (Equipment of Vehicles) instead support the Court of Appeals' interpretation of what is required for a tail lamp to be in "good working order." Wisconsin Statute Section 347.13 is not the only time the phrase "good working order" appears in the Chapter. Stop lamps (brake lamps), brakes themselves, car horns, and windshield wipers must also be in "good working order." *See* Wis. Stats. §§ 347.14(1)(explaining that stop lamps must be in "good working order");340.01(63)(defining stop lamp as "a device giving steady warning light to the rear of a vehicle to indicate the intention of the operator of the vehicle to diminish speed or stop"); 347.36 (explaining that brakes must be in "good working order"); 347.38 (explaining that car horns must be in "good working order"); and 347.42 (explaining that windshield wipers must be in "good working order"). Chapter 347 also requires that all bicycles, motor bicycles, and electric personal assistive mobility devices have

[3] Furthermore, insofar as any portions of the Administrative Code, Chapter 305 (Department of Transportation, Standards for Vehicle Equipment) appear to conflict with the requirements of Chapter 347, Chapter 305 states directly that "[n]othing in this chapter is intended to modify the provisions of ch. 347, Stats." Wis. Stat. § 305.02(7).

a brake that is in "good working condition." Wis. Stat. § 347.489.

Each of these statutes explains what is required for that equipment to be "working." (*See* Wis. Stats. §§ 347.14(1), 347.36, 347.38, 347.42, 347.489). Brakes on a car, for example, "shall be capable of bringing the vehicle or combination of vehicles to a stop, under normal conditions, within 50 feet when traveling at a speed of 20 miles per hour." Wis. Stat. § 347.36. A brake on a bicycle, motor bicycle, or electric personal assistive mobility device must be "adequate to control the movement of and to stop the bicycle, motor bicycle, or electric personal assistive mobility device whenever necessary." Wis. Stat. § 347.489. A brake is thus in "good working" order or condition when it is capable of bringing the vehicle, bicycle, etc., to a stop as set forth in the statute. These statutes do not mandate that the brakes be in mint condition to be in "good working" condition—the statutes require that the brakes be sufficient ("adequate") to perform their required function. Wis. Stat. § 347.489. Wisconsin Statute § 347.13(1) sets forth the same standard for tail lamps.

The Indiana Court of Appeals has reached similar conclusions when interpreting its traffic statutes. In ***Goens v. State***, 943 N.E.2d 829 (Ind. Ct .App. 2011), the Indiana Court of Appeals held that a car's stop lamps (brake lights) were in "good working order" where two of three stop lamps were working. ***Id.*** at 834;(Appx.102-105). The Court noted that as the statute only required one operating stop lamp, the defendant's equipment was in "good working order" where the other two stop lamps were functioning. ***Id.*** Additionally, in ***Kroft v. State***, 992 N.E.2d 818 (Ind. Ct. App. 2013), the Indiana Court of Appeals held that a tail lamp was in "good working order" despite a small hole in the lamp that caused

white light, instead of red, to be illuminated from that hole. ***Id.*** at 822; (Appx.106-108). Indiana, like Wisconsin, requires tail lamps to emit "a red light plainly visible from a distance of five hundred (500) feet to the rear." ***Id.*** at 821; (App.107). Indiana law also requires that a person may not operate a motor vehicle on a highway unless the equipment is in "good working order."[4] ***Id.*** at 822; (App.107). The State in that case argued that police had reasonable suspicion because the tail lamp was not functioning properly as the tail lamp had the small hole which emitted white, not red, light. ***Id.*** at 821; (App.107). The Indiana Court of Appeals disagreed, noting that the officer testified that he pulled the defendant over "simply because there was white light coming out of the tiny hole; he did not testify that he had trouble spotting [the defendant's] Jeep from behind." ***Id.*** at 822; (App.108). The Court concluded that the tail lamp was in compliance with the statute and that therefore police lacked a lawful basis to conduct a traffic stop. ***Id.*** (App.108).

Mr. Brown's case involved a 1977 Buick Electra. (39:28;State's Appx.184). Consider, however, the ramifications of adopting the State's interpretation with the tail lamp designs of modern cars, like the Audi pictured here:

[4] Indiana law also requires that a vehicle "is in a safe mechanical condition that does not endanger the person who drives the vehicle, another occupant of the vehicle, or a person on the highway." ***Id.***

Audi: Light and Design, Car Body Design, http://www.carbodydesign.com/archive/2008/12/02-audi-light-design/ (last visited December 4, 2013). Under the State's theory, if any one of the almost *thirty* tiny lights that comprise one "tail lamp" is not lit, then—even if the lamp is still capable of designating the rear of the car—this tail lamp would not be in "good working order." Police would have probable cause to conduct a traffic stop—a "seizure" under the Fourth Amendment—based on that alone. But this is not what the statute requires, and this Court should uphold the Court of Appeals' plain-language interpretation of Wis. Stat. § 347.13(1).

C. The Court of Appeals' interpretation and the plain language of the statute provide sufficient guidance to police.

The State argues that the Court of Appeals' standard creates an unworkable standard for police, noting that a bright-line standard requiring every component of a tail lamp to be in perfect condition would be much easier for police. (*See* State's Brief at 22-23). But, as this Court has repeatedly recognized, whether an officer has reasonable suspicion or probable cause often cannot—and should not—be answered with a bright line. "The Fourth Amendment's touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances, *eschewing bright-line rules and emphasizing instead the fact-specific nature of the reasonableness inquiry*." ***State v. Sumner***, 2008 WI 94, ¶ 20, 312 Wis. 2d 292, 752 N.W.2d 783 (emphasis added); *see also, e.g.,* ***State v. Post***, 2007 WI 60, ¶ 18, 301 Wis. 2d 1, 733 N.W.2d 634 (rejecting the State's request to adopt a bright-line rule that a car weaving within one lane provided reasonable suspicion to perform a stop, explaining: "[t]he State asks for a bright-line rule, where this court has

consistently maintained that the determination of reasonable suspicion is based on the totality of circumstances.")

Indeed, it would be less "difficult" for police to discern whether they have lawful authority to conduct a stop if they could pull any driver over at any point for driving a car that is not in perfect, mint condition. (*See* State's Brief at 22, arguing that the Court of Appeals' interpretation will be "difficult" to apply). But that is not what the statutes require, and both the Courts and people of Wisconsin expect police to make decisions that balance the need to protect the public against the constitutional rights of individuals every day.

But even further, the Court of Appeals' interpretation, which reflects the plain language of the statute, *does* provide a clear standard: a tail lamp must "emit[] a red light plainly visible from distance of 500 feet to the rear." Wis. Stat. § 347.13(1); *see also* (Ct. App. Op., ¶ 21)(State's Appx.110)("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.' 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").[5] If a police officer thus sees a car with a

[5] The Court of Appeals' decision did not specifically state that the plain language of the Wis. Stat. § 347.13(1) requires that the light emitted from the tail lamp be visible from 500 feet to the rear of the car. *See* (Ct. App. Op.). This, however, is implicit in the Court of Appeals' analysis: The Court held that 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." (Ct. App. Op., ¶ 21). The Court also explained that the statutes only require "good working order," and found that the tail lamp at issue satisfied the definition of a tail lamp as a "device to designate the rear of a vehicle by a warning light." ***Id.*** (citing Wis. Stat. § 340.01(66)).

tail lamp that the officer reasonably believes is not emitting a red light viewable from that distance, that police officer would have probable cause to stop the car for a violation of the statute.

The State maintains that this standard—set forth by the plain language of the statute—would be problematic because "it is not obvious that motorists would be willing to ensure their tail lamps met this requirement," and again asserts that this standard would be "more difficult than simply examining whether all tail lamp bulbs are working." (State's Brief at 23). The State further maintains that its proposed standard—which would require "all bulbs to be lit"—would better promote road safety. ***Id.*** But if a tail lamp sufficiently designates the rear of the car to cars traveling behind it from up to 500 feet, and thus satisfies the statutory requirements set forth by the Legislature, then how does that tail lamp jeopardize road safety? And again, the State seeks to impose stricter requirements than what the statutes actually require. Amending the statutes is the prerogative of the Legislature, not this Court.

D. The good faith exception does not apply to the officers' actions.

The State now argues that even if the officers were mistaken—even if there was no malfunction because that bulb was not supposed to be lit—that the good faith exception should apply to the officers' "good-faith mistake of fact." (State's Brief at 24-26). Nevertheless, if this Court agrees with the Court of Appeals' holding that the tail lamp was in "good working order" with two of three bulbs lit, then the officers' belief that they had grounds to conduct a traffic stop based on one of three bulbs being unlit would be a mistake of law (i.e. that the law required all components of the tail lamp

to be in perfect condition), not fact. The State agrees that a traffic stop may not be based on a mistake of law. (*See* State's Brief at 25). Thus, whether the good-faith exception to the exclusionary rule applies in this case would arise *only* if this Court reverses the holding of the Court of Appeals.

Even then, the record in this case does not establish that there was any mistake of fact. As the State acknowledges, there were no specific findings made that the unlit bulb was *not* part of the tail lamp. (*See* State's Brief at 24). The circuit court found credible the officers' testimony that the light was "defective." (39:39;State's Appx.188). Mr. Lipsey—the driver of the car who testified for the defense—testified that the middle light was not part of the tail lamp (but instead a brake light), and that on the day of the stop he observed that all of the lights on the back of the car were operating on the day of the stop. (39:8-9;State's Appx.164-165). The circuit court found incredible his testimony that he noticed that all of the bulbs in the tail lamps were lit on that day, but did not, as the Court of Appeals noted, specifically explain that it found incredible Mr. Lipsey's testimony "as it related to the location and function of each of the lights." (Ct. App. Op., ¶ 19, n.5)(State's Appx.109)(39:28-36;State's Appx. 184-192).

After denying the motion to suppress, the circuit court at Mr. Brown's plea hearing offered supplemental explanation for its rationale, noting: "I know that the officers testified that one of the three lights was out and I found them to be credible and I still do, and I'm not changing anything I said, but there was an issue raised as to the other light and whether or not that light would or wouldn't have been on or off." (40:7;State's Appx.197). The court explained that "if 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." ***Id.***

The circuit court noted that it did not "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 say that as far as analysis goes in my mind because I did think about that later." (40:8;State's Appx.198).

Thus, the record does not establish that there was any actual mistake of fact. The circuit court, in offering its supplemental rationale, noted that it was *not* stating that the officers were mistaken in believing that the unlit bulb was a component of the tail lamp. ***Id.*** And though Mr. Lipsey testified that the unlit bulb was not a part of a tail lamp, the circuit court did not make this specific finding. The State asks this Court to conclude that insofar as the police were incorrect that the unlit bulb was part of the tail lamp, their error was a mistake of fact. But that would require that this Court apply the good faith exception based on a mistake of fact, without a record establishing a mistake of fact. As the State had the burden of demonstrating that the stop was lawful, any failure to demonstrate a mistake of fact was a failure of the State to meet its burden to prove that the stop was lawful. *See* ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973)("Where a violation of the Fourth Amendment right against unreasonable search and seizures is asserted, the burden of proof upon the motion to suppress is upon the state.").

Furthermore, as the State recognizes, it does not appear that either this Court or the Court of Appeals has before held in a published decision that the good faith exception to the exclusionary rule should apply to officers' mistake of fact. (*See* State's Brief at 25). Nevertheless, the State points to two unpublished Court of Appeals' decisions to ask this Court to now extend the good faith exception to officers' mistake of fact. This Court should reject the State's invitation to expand the scope of the good faith exception in

Wisconsin, particularly in a case where the record does not establish that there even was a factual mistake.

Wisconsin first adopted the exclusionary rule in 1923. ***Hoyer v. State***, 180 Wis. 407, 193 N.W. 89 (1923). Our appellate courts have recognized two purposes to the exclusionary rule: "one, to deter police misconduct; and two, to ensure judicial integrity insofar as the judiciary would refuse to give its imprimatur to police misconduct by relying upon evidence obtained through that misconduct." ***State v. Eason***, 2001 WI 98, ¶ 44, 245 Wis. 2d 206, 629 N.W.2d 625 (citing ***Conrad v. State***, 63 Wis. 2d 616, 636, 218 N.W.2d 252 (1974)). As this Court explained in ***State v. Gums***, 69 Wis. 2d 513, 517, 230 N.W.2d 813 (1975), the "deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful or, at the very least, negligent conduct which has deprived a defendant of a constitutional right." ***Id.***

This Court has held that the good faith exception to the exclusionary rule applies in limited circumstances in which police have relied in good faith on either (1) a warrant issued by an "independent and neutral magistrate," or (2) on well-settled law which is subsequently overruled. *See* ***Eason***, 2001 WI 98, ¶ 29 (adopting for Wisconsin the good faith exception for objectively reasonable reliance upon a facially valid search warrant following the U.S. Supreme Court's articulation of that exception in ***United States v. Leon***, 468 U.S. 897 (1984); ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517; ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97 (applying the good faith exception to an officer's reliance on well-settled case law). Central to these holdings was the conclusion that excluding the evidence in these limited situations would not deter police misconduct.

Eason, 2001 WI 98, ¶ 2; ***Ward***, 2000 WI 3, ¶¶ 49-50; ***Dearborn***, 2010 WI 84, ¶ 44.

This Court has also previously held that the Wisconsin Constitution provides greater protections than the U.S. Constitution against the application of the good faith exception. In ***Eason***, 2001 WI 98, this Court adopted the U.S. Supreme Court's holding in ***Leon***, 486 U.S. 897, that evidence need not be suppressed where a police officer relied in good faith on "a search warrant issued by an independent and neutral magistrate." This Court nevertheless went beyond the U.S. Supreme Court and held that, in order for the good faith exception to apply in such cases, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." ***Eason***, 2001 WI 98, ¶ 63. This Court explained: "While this process was followed in ***Leon***, the United States Supreme Court did not specifically hold that the Fourth Amendment required a significant investigation and review of the warrant application for the good faith exception to apply. However, we hold that Article I, Section 11 of the Wisconsin Constitution requires this process and thus affords additional protection than that which is afforded by the Fourth Amendment." ***Id.***

To extend these limited applications of the good faith exception to an officer's mistake of fact would be to dramatically broaden the scope of the exception in Wisconsin and ignore the purposes of the exclusionary rule: in both of the circumstances where the exception is currently applied, exclusion would not deter police misconduct because the police acted based on legal conclusions made by the independent judiciary (whether relying on a warrant signed

by a judge in the specific case or in reliance on well-settled law). But an officer who mistakes facts is not acting on reliance on an independent judicial determination; the officer is relying on incorrect information, likely due to his or her *own* mistake.

As this Court has recognized, the exclusionary rule serves to deter not only willful misconduct by the police, but also *negligent* conduct. *See* ***Gums***, 69 Wis. 2d at 517. Application of the exclusionary rule in situations where an officer deprives someone of a constitutional right based on a factual mistake deters police negligence and encourages police to be accurate. Indeed, to allow at trial the introduction of evidence obtained through an officer's mistake of fact would be "legitimizing the conduct which produced the evidence." *See* ***Terry***, 392 U.S. at 88.

As Professor LaFave has explained, to extend the good faith exception creates the real risk that "police officers may feel that they have been unleashed and consequently may govern their future conduct by what passed the good faith test in court on a particular occasion rather than on the traditional Fourth Amendment standards of probable cause, exigent circumstances, and the like." 1 Wayne R. LaFave, *Search and Seizure* §1.3(g), at 131 (5th ed. 2012). Even further, as Professor LaFave explains when discussing the dangers of applying the good faith exception to circumstances beyond warrant cases, continuing to expand the good faith exception "would also impose upon suppression judges the heavy burden—indeed, the intolerable burden—of frequently making exceedingly difficult decisions about what constitutes (as it was put in ***Leon***) 'an objectively reasonable belief in the existence of probable cause.'" ***Id.*** at 130.

The State argues that federal courts, including the Seventh Circuit, have upheld searches and seizures based on an officer's "reasonable" mistake of fact. *See* State's Brief at 25. But this Court has in the past recognized that Wisconsin's Constitution provides greater protections than the U.S. Constitution such that the requirements for the good faith exception to apply would be more stringent. *See* ***Eason***, 2001 WI 98, ¶ 63. Ultimately, this Court should reject the State's request to open the door to the good faith exception when police conduct a warrantless traffic stop based on the officer's mistake of fact.

E. Alternatively, Mr. Brown was denied the effective assistance of counsel as counsel failed to argue that police lacked a lawful basis to conduct the stop based on the tail lamp.

Insofar as this Court concludes that trial counsel failed to sufficiently argue that the car did not violate the requirements of Wis. Stat. § 347.13(1), then trial counsel's failure to do so violated Mr. Brown's constitutional right to the effective assistance of counsel. Mr. Brown made this alternative argument to the Court of Appeals; however, the Court of Appeals did not address his ineffective assistance of counsel argument as it reversed on the merits. (*See* Ct. App. Op., ¶ 21)(State's Appx.110). In his response to the State's Petition for Review, Mr. Brown reserved his right to raise the arguments he raised in the Court of Appeals before this Court, including his alternative argument concerning ineffective assistance of counsel. (Brown Response to State's PFR).

Both the United States and Wisconsin constitutions guarantee a criminal defendant the right to the effective assistance of counsel. U.S. Const. amends. VI, XIV, WI

Const. art I, § 7; ***State v. Thiel***, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. To establish the denial of the effective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiencies prejudiced the defense. ***Id.*** (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). The U.S. Supreme Court has explained that when "defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness," "the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986); *see also* ***State v. Cleveland***, 118 Wis. 2d 615, 618, 338 N.W.2d 500.

Here, trial counsel performed deficiently by failing to argue that the officer lacked a basis to stop the car because Wisconsin law does not require that *all* individual components of a tail light be in perfect condition in order for the tail lamp to be in good working order. For the reasons argued above, the State failed to demonstrate that the tail lamp, with two lit bulbs, was not in "good working order." Counsel's failure to make this argument prejudiced Mr. Brown: the officers stopped the car based on a mistake of law. And because a traffic stop cannot lawfully be based on a mistake of law, *see* ***Longcore***, 226 Wis. 2d at 9, the evidence from the search would have to be suppressed. And without the firearm as evidence, the State would not have been able to move forward with the prosecution for felon in possession of a firearm. The case would have been dismissed, and Mr. Brown would not have pled guilty to a dismissed charge. As there is a reasonable probability that the outcome of the case would have been different absent the excludable evidence,

Mr. Brown was prejudiced by his attorney's failure to make this argument. *See* ***Kimmelman***, 477 U.S. 365 at 375.

II. *Arizona v. Gant* Does Not Apply to the Facts of This Case.

This Court further 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 Mr. Brown agrees with the State that ***Gant*** does not apply to this case as the facts do not appear to involve a search incident to arrest. Trial counsel did argue that the search violated ***Gant***—an argument the circuit court rejected. (39:26-34;State's Appx.182-190). Mr. Brown did not make an argument to the Court of Appeals about the validity of the search under ***Gant*** and does not make such an argument to this Court. Insofar as this Court granted review to address the application of ***Gant*** to the facts of this case, then this Court should dismiss review of this case as improvidently granted. *See e.g.,* ***State v. Kasmarek***, 2006 WI 123, 297 Wis. 2d 589, 723 N.W.2d 428 (dismissing the petition for review as improvidently granted where the case did not adequately present the issue for which the Court granted review).

In ***Gant***, the U.S. Supreme Court limited previous holdings concerning searches incident to a lawful arrest, holding that police may search a car incident to arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." ***Id.*** at 351. The U.S. Supreme Court declined to extend this decision to apply to other warrantless searches of a car beyond a search incident to arrest:

> Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary c oncerns demand. For instance, ***Michigan v. Long***, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." ***Id.*** at 1049, 103 S. Ct. 3469 (citing ***Terry v. Ohio***, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). If there is probable cause to believe a vehicle contains evidence of criminal activity, ***United States v. Ross***, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), authorizes a search of any area of the vehicle in which evidence might be found.

Id. at 346-347.

Since ***Gant***, the Wisconsin Court of Appeals has affirmed that ***Gant*** does not apply to protective searches based on officer safety. *See* ***State v. Williams***, 2010 WI App 39, ¶24, 323 Wis. 2d 460, 781 N.W.2d 495 ("The holding in ***Gant*** is limited to the search incident to arrest exception. The Court in ***Gant*** expressly left intact the other exceptions to the Fourth Amendment warrant requirement, such as ***Terry***. In ***Gant***, the Court specifically preserved the vehicle passenger compartment search when justified by reasonable suspicion under ***Terry*** and ***Long***"); ***State v. Bailey***, 2009 WI App 140, ¶¶ 44-45, 321 Wis. 2d 350 ("There is no dispute that Bailey's case is not a 'search incident to arrest' case. The search in this case was done out of officers' concern for their safety. No arrest had occurred before the search and as noted above, Bailey was very close to his car and would have been released after the tinting citation had been issued. Thus, ***Gant*** does not govern Bailey's case").

Ultimately, as ***Gant*** is limited to searches incident to arrest, the only way in which ***Gant*** would be an issue here is if the officer's search under the seat was pursuant to a lawful arrest. Police in no way had a basis to arrest for the "wooden object" prior to the search; thus, the only way that a lawful arrest could have occurred was if police had arrested Mr. Brown for violating the tail lamp statute. Though the police have lawful authority to arrest someone without a warrant for a traffic violation, *see* Wis. Stat. § 345.22, here the facts do not appear to support the conclusion that Mr. Brown was under arrest for the traffic violation.

According to the officers' testimony, which the circuit court found to be credible, after stopping the car because of the tail lamp in the evening in an area which had numerous armed robbery and drug dealing complaints, they illuminated the spot light on their car and saw Mr. Brown—one of three people in the car, alone in the backseat—bending forward and to his right. (38:6-8,27,39:28-31;State's Appx.123-125,144,184-186). Mr. Brown did not respond to their request to show his hands, and one officer drew his weapon "to a low ready position." (38:8,29,39:29;State's Appx.125,146,185). As they approached the car, Officer Feely saw Mr. Brown raise his body off the seat, lean forward toward the passenger side of the floor board, and then make a kicking motion underneath the passenger seat. (38:9,28-29,39:29-30;State's Appx.126,145-146,185-186). He saw Brown kick a "small wooden object" under the seat, and did not know what this object was. (38:29,39:30;State's Appx.146,186). Mr. Brown pushed his foot under the front seat such that Officer Feely could no longer see the object and put his hands up in the air. (38:30,39:30;State's Appx.147,186).

At this point, the officers[6] removed all three people from the car. (38:9,31,39:30-31;State's Appx.126,148,186-187). Officer Feely looked under the seat where he saw Mr. Brown kicking and found a revolver. (38:31;State's Appx.148). Officer Wawrzonek testified that the occupants were removed from the car and sat down on the curb during the search, and that Mr. Brown was handcuffed because he had not complied with their orders. (38:13-15;State's Appx.130-132). Officer Feely testified that the three occupants of the car were sitting along the curb approximately five feet away from the Buick, and that Mr. Brown may have been handcuffed. (38:34-35;State's Appx.152). The driver of the car, defense witness Mr. Lipsey, testified that all three of the car's occupants were handcuffed during the search. (39:11;State's Appx.167).[7]

The facts are thus indicative of a protective search following the officers' observations, not a search incident to a lawful arrest. ***Gant*** therefore does not apply to the facts of this case. Insofar as this Court took review of this case to address the application of ***Gant***, then this Court should dismiss review of this case as improvidently granted.

The issue in this case is that the *stop*, not the subsequent search, violated Mr. Brown's constitutional rights.

---

[6] Officer Feely testified that a third officer had arrived in a separate car by the time they approached Mr. Brown's car. (38:30;State's Appx.147).

[7] The circuit court did not make specific fact-findings concerning where the occupants were located during the search of the car and whether the occupants were handcuffed during the search. (*See* 39:28-36;State's Appx.184-192). Nevertheless, the circuit court found the officers' testimony to be credible. (39:31;State's Appx.187).

The Court of Appeals' decision reflects the plain-language requirements of the statute and should be upheld.[8]

---

[8] Mr. Brown also argued post-conviction that he was entitled to a total of 209 days sentence credit, from the date of his arrest to the date of sentencing in this case. (28:6-7). Mr. Brown noted that because his sentence in this case was ordered concurrent, he was entitled to sentence credit up until he started serving a sentence. (28:7). And though his extended supervision was revoked in another case, he argued that he did not actually begin serving that revocation sentence until he arrived at the institution, which occurred after his sentence in this case. (28:7). The circuit court awarded Mr. Brown only 195 days credit, from his arrest until the date his extended supervision was revoked (which occurred before his sentencing in this case). (29:3-5;State's Appx.115-117). Mr. Brown sought the additional 14 days of credit on appeal. (Brown Initial Ct. App. Brief at 8-11). The State conceded to the Court of Appeals that Mr. Brown was entitled to this additional credit. (State's Ct. App. Brief at 3-7). The Court of Appeals noted that the State conceded that Mr. Brown was entitled to this additional credit; however, because the Court of Appeals reversed the judgment of conviction, it did not address whether Mr. Brown was entitled to this additional credit. (Ct. App. Op., ¶22).

Though the State did not specifically ask this Court to address sentence credit in its Petition for Review, the State did note that if the Court granted its petition, it "anticipate[d] fully briefing this issue, for which a decision by this court will provided much-needed clarity to circuit courts." (State's PFR at 15). Brown, in his response to the State's Petition, reserved his right to raise this argument. (Brown Response to PFR). This Court's order directs the parties to address the "issue stated in the petition for review" and whether ***Gant*** applies to the facts of the case. (Wis. SC. Order, 10/15/13). The State in its brief to this Court did not brief the sentence credit issue, but did note that should Mr. Brown "continue to request the additional fourteen days of sentence credit in this court, the State will again concede that he should receive it." (State's Brief at 9-10). Mr. Brown continues to assert that he is entitled to the additional 14 days credit—for a total of 209 days. As this issue does not appear to be before this Court, however, Mr. Brown respectfully requests that, should this Court reverse the Court of Appeals' decision, this Court remand this matter to the Court of Appeals for a decision on Mr. Brown's sentence credit argument.

CONCLUSION

For these reasons, Mr. Brown therefore respectfully requests that this Court affirm the decision of the Court of Appeals. Insofar as this Court granted review for the purpose of addressing the application of ***Gant***, Mr. Brown respectfully requests that this Court dismiss review as improvidently granted.

Dated this 4th day of December, 2013.

Respectfully submitted,

HANNAH B. SCHIEBER
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-2201
E-mail: schieberh@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,811 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 4th day of December, 2013.

Signed:

HANNAH B. SCHIEBER
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-2201
E-mail: schieberh@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the supplemental appendix fall into one of the categories specified in sub. (2)(a).

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 this 4th day of December, 2013.

Signed:

HANNAH B. SCHIEBER
Assistant State Public Defender
State Bar No. 1081221

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-2201
E-mail: schieberh@opd.wi.gov

Attorney for Defendant-Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X