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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

Page

CASES CITED

STATUTES CITED

Page

OTHER AUTHORITIES

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The State of Wisconsin, Plaintiff-Respondent-Petitioner, files this brief in reply to Defendant-Appellant Antonio D. Brown's brief-in-chief. *See* Wis. Stat. § 809.19(4).

I. THE COURT OF APPEALS MISINTERPRETED WIS. STAT. § 347.13(1) BY HOLDING THAT A TAIL LAMP WITH TWO OF THREE FUNCTIONING BULBS WAS IN "GOOD WORKING ORDER."

A. A tail lamp is in good working order when it is functioning as intended.

The State agrees with Brown that the dispute in this case turns on the definition of "good working order" in Wis. Stat. § 347.13(1) (Brown's brief at 8). Brown argues that the court of appeals correctly determined that good working order must be defined in reference to the statutory definition of a tail lamp, specifically, the requirements that the lamp emit a red light that designates the rear of the vehicle visible from 500 feet during hours of darkness (Brown's brief at 8-10). *See* Wis. Stat. §§ 340.01(66); 347.13(1). Brown contends that because there is no evidence that the tail lamp on his car did not satisfy these requirements, it does not matter that only two of the lamp's three bulbs were working, and the court of appeals correctly held the stop unconstitutional (Brown's brief at 8-10).

This court should reject this argument. As explained in the State's brief-in-chief, "good working order" is properly interpreted to mean functioning according to its nature and purpose (State's brief-in-chief at 18-19). Put another way, a tail lamp is in good working order when it is operating as its manufacturer intended. The tail lamp on Brown's car had three bulbs, which were

meant to function together to illuminate the vehicle's tail end. When one of the bulbs was not working, the tail lamp was not functioning as it was supposed to, and was not in good working order.

B. The State's interpretation of "good working order" does not require tail lamps to be in mint condition.

Brown argues that the State's interpretation of good working order would require tail lamps to be in perfect or mint condition (Brown's brief at 10-14). The State's standard simply requires that vehicle owners replace burned-out bulbs on their vehicle's lamps. This is hardly an onerous condition to impose in exchange for the privilege of operating a vehicle on the public roads. *See State v. Smet*, 2005 WI App 263, ¶ 8, 288 Wis. 2d 525, 709 N.W.2d 474 (driving an automobile is a privilege, not a right, and is subject to reasonable regulation in the interest of public safety and welfare).

Brown also points to other statutes requiring various pieces of vehicle equipment to be in good working order and claims this supports his position (Brown's brief at 11-12). He argues that, like Wis. Stat. § 347.13(1)'s requirement of visibility of a red light from 500 feet, each of these statutes has specifications for each piece of equipment which, in turn establishes what it means for that equipment to be in good working order (Brown's brief at 12).

The State's interpretation of Wis. Stat. § 347.13(1) does not conflict with these statutes.

Brown notes the requirements for motor vehicle brakes, specifically, that they be capable of stopping the vehicle within fifty feet at twenty miles per hour (Brown's brief at 12). Wis. Stat. § 347.36(1). He also points to the requirement that brakes for bicycles, motor bicycles, and personal assistive mobility devices be "'adequate to control the movement of and to stop'" these vehicles "'whenever necessary'" (Brown's brief at 12). Wis. Stat. § 347.489. There is no reason not to believe that brakes that are capable of doing this are functioning as intended, and thus, in good working order under Wis. Stat. § 347.36(3). In contrast, a vehicle light with non-operational bulbs is not functioning as intended, and is not in good working order.

Brown relies on two cases from Indiana to support his definition of good working order. The first, *Goens v. State*, 943 N.E.2d 829 (Ind. Ct. App. 2011), involved a traffic stop where one of a car's three stop lamps was not working. *Id*. at 831. Because Indiana law requires that vehicles have only one stop lamp, the Indiana Court of Appeals found the stop improper. *Id*. at 832-34. The court also rejected the State's alternate argument that the inoperable stop lamp violated Indiana's "good working order statute," finding that the statute did not apply to stop lamps, and even if it did, there was no basis for the stop because only one lamp was required. *Id*. at 834.

Goens is not persuasive. The court addressed the term "good working order" as an afterthought, and its discussion of it cannot be separated from Indiana's requirement that vehicles need just one stop lamp. In contrast, in Wisconsin, if a car has two tail lamps, or stop

lamps for that matter, both must be maintained in good working order. *See* Wis. Stat. §§ 347.13(1); 347.14(1). While Indiana may look to the overall stop lamp system to determine whether it is in good working order, Wisconsin requires an examination of each individual lamp.

The second case, *Kroft v. State*, 992 N.E.2d 818 (Ind. Ct. App. 2013), is also unhelpful. There, police stopped a vehicle because one of its tail lamps had a small hole in it. *Id*. at 820. This allowed some white light to emit from the lamp, and the State claimed a violation of Indiana's statute requiring that tail lamps emit red light. *Id*. at 821. The Indiana Court of Appeals disagreed, saying the statute did not require that the lamp emit only red light, and that the amount of white light emitted was miniscule. *Id*. at 821-22. The court also rejected the State's argument that the hole in the tail lamp violated a different part of the good working order statute that requires vehicles be in "a safe mechanical condition that does not endanger" the driver, passengers, or other people on the highway, finding no evidence that the hole endangered anyone. *Id*. at 822. *Kroft* does not address the definition of "good working order" and has no applicability to this case.[1]

Brown also asks this court to consider the ramifications of adopting the State's position in the context of modern cars, pointing specifically to an Audi with a tail lamp that has almost thirty

[1] The hole in the tail light would likely be a violation in Wisconsin. *See* Wis. Admin. Code § Trans. 305.16(4) (requiring that "[a]ll tail lamp lens and reflectors shall be installed and maintained in proper condition").

bulbs (Brown's brief at 13-14). He argues that under the State's interpretation of Wis. Stat. § 347.13(1), a traffic stop would be justified if one of those bulbs is out (Brown's brief at 14). The State agrees. No one is forced to purchase a car with an intricate tail lamp, and by doing so, the owner takes on the responsibility of maintaining the car in accordance with the law. As, argued, this requires, among other things, that all bulbs in the tail lamps be operational.

C. The court of appeals' decision does not provide guidance to law enforcement, courts, or the public.

Brown next argues that the State is wrong to say the court of appeals' decision sets forth a confusing standard for enforcing Wis. Stat. § 347.13(1). He first criticizes the State's proposed bright-line rule, saying such standards are disfavored in the Fourth Amendment context (Brown's brief at 14). The primary issue here, though, is statutory construction, which will necessarily require the court to establish a bright-line rule when it decides what "good working order" in Wis. Stat. § 347.13(1) means. Brown admits as much when he argues his proposed interpretation of § 347.13(1) provides a clear standard (Brown's brief at 15).

Further, Brown's standard, based on the court of appeals' interpretation of Wis. Stat. § 347.13(1), is not as clear as he claims. Brown argues that so long as a tail lamp is emitting a red light visible from 500 feet to designate the rear of the car, then it is in good working order (Brown's brief at 15-16). Enforcing this standard would be

difficult. How often are police 500 feet from a vehicle they stop, particularly on a city street like the one involved in this case? Brown suggests that if an officer reasonably believes the light is not visible from this distance, he or she can make the stop (Brown's brief at 15-16). What if the officer turns out to be wrong? Brown does not believe officers should be able to make good-faith mistakes of fact in assessing whether to make a traffic stop, so under his interpretation, the stop would be invalid if the light turns out to be visible from 500 feet (Brown's brief at 16-22). In contrast, the State's standard is clearer, and allows officers to stop a vehicle to inform the driver that a tail lamp bulb is burned out, encouraging vehicle maintenance and safety.

Brown contends that the State is wrong that its interpretation promotes road safety because all that is required for a vehicle to have a safe tail lamp is for it to illuminate the car from 500 feet (Brown's brief at 16). But this would encourage drivers to ensure that their tail lamps just met this minimal requirement. Brown's example of the Audi with almost thirty bulbs in its tail lamp is illustrative. As the bulbs burned out, presumably at some point the tail lamp would no longer be sufficient to designate the car from 500 feet. It would be better to require drivers to maintain all of the bulbs and to allow law enforcement to stop and inform them if any are burned out than to allow the tail light to cross the visibility threshold while the car is in motion and threaten public safety.

D. Probable cause or reasonable suspicion can be based on an officer's good-faith mistake of fact.

Brown next asks this court to reject the State's alternative argument that the stop in this case was valid based on the officers' good-faith belief that the unlit bulb was part of the tail lamp, even if that belief was mistaken because the bulb was actually part of the brake lamp (Brown's brief at 16-22). He contends this court should not extend the good-faith exception to the exclusionary rule to mistakes of fact underlying traffic stops (Browns' brief at 18-22).

The State is not asking this court to do anything more than to apply established Fourth Amendment principles in finding that a good-faith mistake of fact can form the basis for a seizure. The touchstone of the Fourth Amendment is reasonableness. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Just because something is wrong does not make it unreasonable. *See Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990). Law enforcement officers are not required to be all-knowing, and if they reasonably rely on apparent facts in making a seizure that later turn out to be wrong, it should not be grounds for suppression.

Further, the State disagrees with Brown's assertion the record does not support a finding that the officers in this case made a good-faith mistake of fact that the unlit bulb was part of the tail lamp (Brown's brief at 17-18). As the circuit court noted, the age of the car and the officers' lack of familiarity with it would allow them to reasonably believe the bulb was part of the tail

lamp (40:7-8). Even if the officers were wrong that the unlit bulb was part of the tail lamp, they could reasonably believe it was and stop Brown's car.

E. Brown's trial counsel was not ineffective.

Brown also argues that his trial counsel was ineffective for not making his current argument about Wis. Stat. § 347.13(1) at the suppression hearing (Brown's brief at 22-24). The reason for this argument appears to be to provide an alternative basis for relief if this court finds that Brown forfeited his claim by not properly raising it while litigating the suppression motion (Brown's brief at 22). The State does not argue that Brown forfeited his claim.

Further, Brown's counsel was not ineffective. Even had counsel argued that Brown's tail lamp complied with Wis. Stat. § 347.13(1), counsel would have been wrong. As such, Brown was not prejudiced by counsel's failure to make this argument during the suppression proceedings. *See State v. Butler*, 2009 WI App 52, ¶ 8, 317 Wis. 2d 515, 768 N.W.2d 46 (counsel not ineffective for failing to make motion that would have been denied).

II. THE STATE AGREES THAT BROWN IS ENTITLED TO THE ADDITIONAL FOURTEEN DAYS OF SENTENCE CREDIT.

Brown is correct that the State has conceded that he is entitled to 209 days of sentence credit, rather than the 195 days he received (Brown's brief at 28). He also notes the State did not brief the issue in its brief-in-chief and asks, should this court reverse on the suppression issue, for remand to the court of appeals to allow it to address the sentence credit claim (Brown's brief at 28).

The State does not object to Brown's proposal, but also does not object to this court addressing the sentence credit issue itself. The State's position on this issue has not changed since this case was before the court of appeals. Undersigned counsel advises the court that he will be prepared to discuss this issue at oral argument, should the court want to address it.

CONCLUSION

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

Dated this 18th day of December, 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 2,252 words.

Dated this 18th day of December, 2013.

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AARON R. O'NEIL
Assistant Attorney General

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 18th day of December, 2013.

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