STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2011AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Milwaukee County, the Honorable Rebecca F. Dallet Presiding

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The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief to address the law concerning the effect of a police officer's mistakes, whether of law or of fact, on the constitutionality of a traffic stop. It takes no position regarding the interpretation of Wisconsin Statutes §347.13(1).

ARGUMENT

LAWFUL POLICE STOPS OF VEHICLES FOR TRAFFIC OFFENSES MAY BE BASED ON A POLICE OFFICER'S OWN MISTAKE ONLY IF THE MISTAKE IS ONE OF FACT AND IS OBJECTIVELY REASONABLE

When the police stop a driver because they believe a traffic violation has been committed, they must have probable cause to do so. *State v. Longcore*, 226 Wis.2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 233 Wis.2d 278, 607 N.W.2d 620 (2000). Probable cause exists "when the officer has 'reasonable grounds to believe that the person is committing or has committed a crime.'" *State v.*

Popke, 2009 WI 37, ¶14, 317 Wis.2d 118, 765 N.W.2d 569 (quoting *Johnson v. State*, 75 Wis.2d 344, 348, 249 N.W.2d 593 (1977)).

Although police also may make traffic stops in the absence of probable cause when, under the totality of the circumstances, they have grounds "to reasonably suspect that a...traffic violation has been or will be committed," *id*., ¶23, Wisconsin courts analyze stops under this reasonable suspicion standard[1] only when an officer "act[s] upon a suspicion that warrant[s] further investigation," and not when the stop is based upon "his observation of a violation being committed in his presence," *Longcore*, 226 Wis.2d at 8-9.

In other words, the reasonable suspicion standard only applies if objective facts justify further investigation. *See, e.g., State v. Griffin*, 183 Wis. 2d 327, 333-334, 515 N.W.2d 535 (Ct. App.. 1994) (proper to apply reasonable suspicion standard to stop investigating whether vehicle was registered because "license applied for" sign may not have been properly displayed and did not resolve the issue); *State v. Krier*, 165 Wis.2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991) (reasonable suspicion standard applied to stop investigating whether lack of license constituted a civil or criminal offense).

The police, like everyone else, make mistakes, which can figure into a decision to make a traffic stop. The mistakes can be either mistakes of law or of fact and the first step is to distinguish between the two as they are treated differently under the law.

A police officer's *own* mistake of law, not made in reasonable reliance upon the judicial branch, *see, e.g., United States v. Leon*, 468 U.S. 879, 920-923 (1984) (reliance on a search warrant issued by a judicial officer); *State v. Dearborn*, 2010 WI 84, 327 Wis.2d 252, 786 N.W.2d 97 (reliance on this Court's precedent later

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[1] Reasonable suspicion exists when "'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*, 2009 WI 37, ¶23 (quoting *State v. Post*, 2007 WI 60, ¶10, 301 Wis.2d 1, 733 N.W.2d 634).

abrogated by the United States Supreme Court), or on the legislative branch, *see, e.g., Illinois v. Krull*, 480 U.S. 340, 349-350 (1987) (reliance on a statute later held to be unconstitutional), is not a reasonable mistake justifying a stop, even if the mistake is made in good faith. *United States v. McDonald*, 453 F.3d 958 (7th Cir. 2006). Despite good faith, "a police officer's mistake of law cannot support probable cause to conduct a stop." *Id*.

By contrast, if the officer's mistake was one of fact, then courts must decide whether the mistake of fact was reasonable. *See United States v. Dowthard*, 500 F.3d 567, 569 (7th Cir. 2007). When a stop is based upon such a mistake, the only question is whether the mistake was reasonable. *McDonald*, 453 F.3d at 962.

A. A Mistake About What Facts Must be Present for a Violation of Traffic Law to Exist is a Mistake of Law, But a Mistake Solely as to Whether an Unilluminated Bulb is Part of a Tail Light is a Mistake of Fact.

The first step in analyzing a case involving a traffic stop premised upon a police error is to determine whether the mistake is one of law or of fact. Courts long have needed to distinguish between determinations of facts and determinations of law. Appellate courts, for example, typically give deference to a circuit court's determination of fact, but not to a circuit court's determination of law. *See, e.g., State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). The usual distinction made is that the question of what happened is a matter of fact while the question whether what happened fulfills a particular standard is a matter of law. *Id*.

A similar distinction exists between errors of law and errors of fact. As the Court of Appeals explained in *County of Sheboygan v. Bubolz*, 2010AP2995, ¶12 (Ct. App. 2011) (unpub) (App. 1-3), a mistake concerning the answer to the question "[w]hat facts were required under the statute in order to be in violation of the statute" is a mistake of law while a mistake concerning the answer to the

question "[w]hat did the officer reasonably perceive the facts to be" is a mistake of fact.

Assuming, for purposes of argument only, that the interpretation of Wisconsin Statutes §347.13(1) of both the Court of Appeals, *see* State's Appendix at 110, ¶21, and the defendant, *see* Brief of Defendant-Appellant at 7-16, are correct, a stop can occur only based upon a mistaken belief as to what the law requires because the status of a particular unilluminated bulb in an otherwise properly visible light is irrelevant. Under this scenario, the stop would be based upon a mistake of law in that the officer did not know what facts were required under the statute to be in violation of the statute. *See Bubolz*, 2010AP2995, ¶12 (App. 2). It would involve applying law to facts, which is a matter of law. *See Weborg v. Jenny*, 2012 WI 67, ¶41, 341 Wis.2d 668, 816 N.W.2d 191.

But, assuming, for purposes of argument only, that the state's interpretation of Wisconsin Statutes §347.13(1) is correct, *see* Brief of Plaintiff-Respondent-Petitioner at 17-21, then there are two possible scenarios. The first is that the police officers were correct that a tail light was malfunctioning in which case there is no mistake at all. The second is that the police officers were mistaken that the unilluminated bulb was part of a tail light. This mistake would be one concerning what the officers perceived the facts to be and would be a mistake of fact. *See Bubolz*, 2010AP2995, ¶12 (App. 2).

B. A Police Officer's Independent Mistake of Law Cannot Provide Reasonable Suspicion or Probable Cause Justifying a Traffic Stop.

If the Court of Appeals and the defendant are correct as to the requirements of §347.13(1), then the officers stopped the defendant based upon a mistake of law. Under current Wisconsin law, and as the state acknowledges here, *see* Brief of Plaintiff-Respondent-Petitioner at 25, a police officer's mistake of law cannot support a constitutional traffic stop. *State v. Longcore*, 226 Wis.2d, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 223 Wis.2d 278,

607 N.W.2d 620. When an officer bases a traffic stop on a specific offense, "it must indeed be an offense; a lawful stop cannot be predicated upon a mistake of law." *Id*. at 9. In such circumstances, although good faith may make a traffic stop *subjectively* reasonable, it fails to meet the requirement that the stop be *objectively* reasonable. *See Dowthard*, 500 F.3d at 569.

The Seventh Circuit, *United States v. McDonald*, 453 F.3d 958 (7th Cir. 2006), as well as the majority of federal circuit courts, *United States v. Miller*, 145 F.3d 274, 278-279 (5th Cir. 1998); *United States v. Urrieta*, 520 F.3d 569, 574-575 (6th Cir. 2008); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005); *United States v. Chanathasouxat*, 342 F.3d 1271, 1279 (11th Cir. 2003); *but see United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005), and a majority of states, *see, e.g., People v. Ramirez*, 44 Cal. Rpt. 3d 813, 816 (Ct. App. 2006); *Hilton v. State*, 961 So.2d 284, 298-299 (Fla. 2007); *Martin v. Kan. Dept. of Revenue*, 176 P.3d 938, 948 (Kan. 2008); *State v. Kilmer*, 741 N.W.2d 607, 611-612 (Minn. Ct. App. 2007); *Byer v. Jackson*, 661 N.Y.S.2d 336, 338 (App. Div. 1997); *but see, e.g., Andrews v. State*, 658 S.E.2d 126, 128 (Ga. Ct. App. 2008); *Moore v. State*, 986 So. 2d 928, 935 (Miss. 2008); *State v. Greer*, 683 N.E.2d 82, 83 (Ohio. Ct. App. 1996), also hold that even a reasonable mistake of law cannot support either probable cause or reasonable suspicion because such a mistake cannot be objectively reasonable.

From a public policy perspective, requiring police to know the law is essential. Allowing a traffic stop to be based upon any mistake of law, even a good-faith one, "remove[s] the incentive for police to make certain that they understand the law that they are entrusted to enforce and obey." *Lopez-Soto*, 205 F.3d at 1106. Police are officials "charged with strengthening the rule of law in society," Jerome H. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society 233 (Macmillan Coll. Publ'g Co. 3d ed. 1994). Excusing law enforcement mistakes of law, even reasonable ones,

> would provide a strong incentive to police officers to remain ignorant of the language of the laws that they enforce and of the teachings of judicial opinions whose principal function frequently is to construe such laws and to chart the proper limits of police conduct.

People v. Teresinski, 640 P.2d 753, 758 (Cal. 1982).

Fundamental fairness also supports requiring police to actually know the law. *See Chanthasouxat*, 342 F.3d at 1280. Ordinary citizens are required to know the law, even if complex, and ignorance of the law or negligence as to the existence of the law is not a defense, *State v. Collova*, 79 Wis.2d 473, 488, 255 N.W.2d 581, 588 (1977). The training and experience of police officers concerning the law is far superior to that of most ordinary citizens. Thus, "[d]ecency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J dissenting).

More practical reasons for upholding this fundamental fairness include the importance of public perception of justice. Research has shown that the public is far more willing to comply with the law and assist police when citizens believe that police behavior is fair and just. *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities,* 6 Ohio St. J. Crim. L. 231, 253-265 (2008) ("Respondents viewed the police as more legitimate if they made decisions fairly and if they treated people justly.") If a lawless search is held to be reasonable, it undermines confidence in police fairness and justice and reduces the chances of public cooperation. Excluding the fruits of a lawless search therefore will reinforce faith in the police, thereby enhancing public safety rather than reducing it.

In addition, allowing police mistakes of law to form the basis for constitutional traffic stops improperly places the interpretation of law into the hands of the police, rather than the hands of the

judiciary, and encourages vague laws.[2] When mistakes of law need only be reasonable, courts need not, and likely will not, determine whether the police interpretation of the law is actually correct, see, e.g., *United States v. Rodriguez-Lopez,* 444 F.3d 1020, 1022-1023 (8th Cir. 2006) (declining to decide a statutory interpretation issue because the case turned on whether the "belief that the statute was violated was objectively reasonable"). The result will be increased legal confusion as different police departments, and even different officers, interpret the traffic laws differently.

Moreover, unlike the judiciary, police are not neutral and detached decision-makers. Given the pressure to increase their control of crime, they are likely to interpret laws broadly rather than narrowly. One casualty of this tendency toward broader interpretation of laws will be "the familiar Wisconsin rule that 'penal statutes are generally construed strictly to safeguard a defendant's rights.'" *See State v. Rabe,* 96 Wis.2d 48, 69-70, 291 N.W.2d 809 (1980) (citing *Austin v. State*, 86 Wis.2d 213, 223, 271 N.W.2d 672 (1978)).

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[2] This problem of interpretation does not exist when the police rely on a judicially-issued search warrant, *see Leon*, 468 U.S. at 920-923, on this Court's interpretation of law, *Dearborn*, 2010 WI 84 (reliance on case later abrogated by United States Supreme Court), or on the legislative branch, *see, e.g., Illinois v. Krull*, 480 U.S. at 349-350 (reliance on a statute later held to be unconstitutional), so creating a good-faith exception in those circumstances does not implicate the same interests. Similarly, such a limited good-faith exception, because of the role of the opinions of other people than just the police, is less likely to appear unfair or risk having the police broaden the scope of the law.

C. A Police Officer's Mistake of Fact Can Only Provide Reasonable Suspicion or Probable Cause if Objectively Reasonable.

If the state is correct as to the requirements of §347.13(1), then the officers stopped the defendant based upon a mistake of fact. In that situation, the correct analysis requires determining whether the mistake was reasonable. *See United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000). Because the legal test involves objective, not subjective, reasonableness, *see, e.g., State v. Waldner*, 206 Wis.2d 51, 55, 556 N.W.2d 681 (1996), the good faith of a particular officer in making the mistake is irrelevant.

The situation hereis not one in which a police officer could better evaluate the situation after additional investigation. This case is not one in which an officer spotted a windshield crack between seven and ten inches long as a Chevy Blazer was driving on the interstate and could reasonably assume that the crack met the administrative code requirement that it be eight inches long to be considered excessive. *See id*. Such a determination reasonably could be made that precisely only with "[c]areful measurement." *Id*.

Nor is this situation one in which the officer's mistake as to the status of a sign occurred because the status was not readily apparent. In *Bubolz*, 2010AP2995, ¶5 (App. 1) , the officer observed a sign that turned out to be unofficial because it had not been properly authorized. Because the information concerning whether the sign was authorized was contained in a construction contract held by the Department of Transportation, *id*. at ¶4, the officer could not reasonably be expected to know the sign's unofficial status.

Similarly, this case does not involve an obscured license plate number. In *State v. Reierson*, 2010AP596-CR, ¶11 (Ct. App. 2011) (unpub) (App. 4-5), the officer testified that he misread an "8" for a "6" because of the location of a screw or bolt. Because the information was not readily visible, the officer could reasonably have misread the plate.

Here, unlike in those cases, the symmetry of tail lights on cars provides a readily available method for determining whether the unilluminated bulb was likely to be part of a malfunctioning tail light without gathering any additional information. Making such a determination did not require familiarity with an old car or any particular car. It simply required the officers to compare one side of the car to the other. If the same configuration of bulbs was illuminated on one side as on the other, it was not reasonable to assume that the light that was not lit was a tail light. This comparison works regardless whether the vehicle has one bulb on either side, three bulbs on either side, 20 or more LED bulbs on either side, or several red panels on its rear light design of which only some are tail lights.

Because the light configurations on vehicles, regardless of model, are symmetrical, a police officer who sees a light illuminated in a particular position on one side which is not illuminated on the other would have probable cause to believe that a bulb in one tail light is not working. Given the extremely low probability that exactly the same bulb would be out on both sides, a police officer seeing unilluminated lights in the same position on either side could reasonably believe that those lights were not tail lights. The burden of establishing the comparison would, of course, be on the state because the burden of proving that the factual mistake is objectively reasonable is on the state, not on the defendant. *See State v. Post*, 2007 WI 60, ¶12, 301 Wis.2d 1, 733 N.W.2d 634.

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CONCLUSION

For these reasons, WACDL asks that the Court hold that courts presented with arguments that a stop should be found constitutional despite an error by a law enforcement officer must first determine whether the error is one of law or of fact. This Court should further hold that an error in determining what law applies is an error of law. The Court then should re-affirm that, under Wisconsin law, regardless of the good faith of the officer, a mistake of law is not objectively reasonable and stops based upon a mistake of law are unconstitutional. Finally, with regard to traffic stops based upon a mistake of fact, this Court should reaffirm that such stops are constitutional only if the mistake of fact is reasonable and that such a mistake is not reasonable if everything necessary to make the determination of fact was readily available and there was a readily available method of determining the fact.

Dated at Milwaukee, Wisconsin, December 19, 2013.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,999 words.

_____
Ellen Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Ellen Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 19th day of December, 2013, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
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