STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2011AP2907-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO D. BROWN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The parties' briefs adequately set forth the relevant facts and applicable law. Publication, however, may be helpful to clarify and provide guidance on the issues presented in this case.

INTRODUCTION

On July 3, 2010, Milwaukee police officers arrested defendant-appellant Antonio Brown for possession of a firearm by a felon after they stopped the car in which he was riding for operating with a defective tail lamp. A subsequent search of the car produced the weapon. Brown challenged the stop in a motion to suppress, but the circuit court denied the motion. Subsequently, Brown entered a guilty plea on the new charge.

At the time of his arrest, Brown was on supervision for a previous felony. Based on the new crime and other violations of conditions of supervision, Brown's supervision was revoked on January 14, 2011, and he was ordered to serve the remainder of his sentence on his felony conviction. Two weeks later, on January 28, he was sentenced on the new crime to a term to run concurrently with his revocation sentence. He was transferred to prison a few days later to begin serving both of those sentences. The circuit court awarded Brown 195 days of sentence credit from the date of his arrest to the date of his revocation.

On appeal, Brown raises two issues. First, he seeks an additional fourteen days of sentence credit for his custody between January 14 and January 28, the date he was sentenced for his new crimes. Second, he challenges the legality of the stop, arguing that the officers made a mistake of law in concluding that the non-operation of a single bulb within the car's tail lamp was a violation of Wis. Stat. § 347.13(1). As an alternative argument, he asserts that counsel was ineffective for failing to raise that argument in the motion hearing.

For the foregoing reasons, the State agrees that Brown is entitled to the additional fourteen days of sentence credit that he seeks. However, Brown is not entitled to relief on his second claim. Under the circumstances, the circuit court properly concluded that

the officers had probable cause or reasonable suspicion to initiate the stop based on a single inoperable tail lamp bulb and counsel did not perform deficiently for not raising that argument.

SUPPLEMENTAL STATEMENT OF THE CASE

Brown's statement of the case is sufficient to frame the issues for review. The State will include additional relevant facts in the argument section of its brief.

ARGUMENT

I. BROWN IS ENTITLED TO SENTENCE CREDIT THROUGH THE DATE OF HIS SENTENCING FOR THE NEW CRIME.

Brown first argues that the circuit court erred in denying his postconviction motion regarding sentence credit (Brown's brief at 8-11). For the foregoing reasons, the State agrees that Brown is entitled to the fourteen days of sentence credit between his revocation on January 14 and his sentencing for the new crime on January 28. Accordingly, this court should reverse the decision and order of the circuit court denying Brown's postconviction motion and remand with instructions to amend the amended judgment of conviction to reflect those additional fourteen days of sentence credit.

A. Relevant facts.

Brown was arrested for possession of a firearm by a felon on July 3, 2010, while he was on extended supervision (19; A-Ap. 126). His supervision was revoked 195 days later on January 14, 2011 (28:9; A-Ap. 125). Brown was sentenced for the felon-in-possession charge on January 28, 2011, to a term of five years' incarceration to be served concurrently with his revocation sentence (19; A-Ap. 126). He was transferred to prison a

few days later to serve those sentences (19; 28:9; A-Ap. 125-26).

Brown filed a postconviction motion seeking credit for the 209 days that he was in custody between his arrest and his sentencing in the new case (28:6-7; A-Ap. 122-23). The circuit court granted Brown credit on the 195 days between the date of his arrest and his revocation, but denied that he was entitled to credit for the fourteen days between his revocation and sentencing (29:3-5; A-Ap. 114-16). Brown appeals.

B. Brown is entitled to sentence credit for the fourteen days he spent in custody between his revocation and his sentencing in the new case.

The relevant law is expressed in *State v. Beets,* 124 Wis. 2d 372, 369 N.W.2d 352 (1985). When an offender commits a crime while on supervision and the court ultimately imposes concurrent sentences, the offender is credited with custody up until the time that the offender is sentenced on either the new crime or the revocation sentence. Either act of sentencing—whichever occurs first—severs the connection with the custody on the other crime. *Id.* at 379. *Beets* involved probation with a withheld sentence. In that case, the supreme court held that the sentencing determination after probation, not the revocation itself, severed the connection with the custody on the new crime. *Id.*

In *State v. Presley,* 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713, this court addressed the issue in the context of extended supervision. This court, relying on *Beets*, held that it was the "act of sentencing, not the revocation determination" that was the "lynchpin to the uncoupling of the connection between the new and old charges." *Id.*, ¶9. Specifically, this court reiterated the holding in *Beets* that the reconfinement hearing, not the

revocation hearing, severs the connection between the charges in the context of extended supervision. *Id.*, ¶10.

Thus, in both *Beets* and *Presley,* it was the sentencing after revocation that severed the connection between the old and new offenses, not the revocation itself. As Brown notes, after *Presley* was decided, the legislature eliminated reconfinement hearings (Brown's brief at 11 n.3). *See* 2009 Wisconsin Act 28. Accordingly, that change raises the following question: Given the elimination of reconfinement hearings, is the revocation decision itself the "act of sentencing" that severs the connection between the old and new crimes?

The circuit court in the present case answered that question with a "yes." It reasoned that Brown was reconfined administratively when his supervision was revoked and before he was sentenced for the new crime (29:5; A-Ap. 116). Thus, it concluded, he was only entitled to credit up until the date of revocation (*id.*).

The State agrees with Brown's position and respectfully submits that the circuit court's conclusion was incorrect. Rather, the following rule reflects the proper approach: In situations where an offender is revoked from supervision for committing a new crime, where there is no reconfinement hearing on the revocation, and where the offender is sentenced to concurrent terms on both the revocation sentence and the sentence for the new crime, he or she is entitled to sentence credit for custody served from the date of arrest to either the date of the sentencing on the new crime or of the transfer to prison, whichever occurs first.[1]

The State finds support for that rule in *Presley* and Wis. Stat. § 304.072(4). As noted above, this court in *Presley* held that the reconfinement hearing, not the

[1] As Brown notes, this question is likewise at issue in *State v. John Oliver Huff, Jr.*, Dist. I, No. 2011AP2268-CR, which is currently submitted to this court and in which the State advances the same argument.

revocation date, severs the connection between the old and new charges. *Presley*, 292 Wis. 2d 734, ¶10. The State in that case advanced a position essentially identical to the one that the circuit court in Brown's case adopted, i.e., that Presley was only entitled to credit up to the date of his revocation because he began serving his revocation sentence on that date.

Significantly, the *Presley* court rejected that position, in part based on Wis. Stat. § 304.072(4). As that court explained, Wis. Stat. § 304.072(4) provided that "[t]he sentence of a revoked parolee or person on extended supervision resumes running on the day he or she is received at a correctional institution . . . ." Given that language, the *Presley* court observed, "If the State's position were to be adopted—that Presley was serving a sentence once the extended supervision was revoked—it would appear to conflict with § 304.072(4), which unambiguously states that the sentence begins once the offender is transported and received at a correctional institution, not when the revocation occurs." 292 Wis. 2d 734, ¶14. So too, here: To hold that the revocation date functions as an act of sentencing severing the connection between the old and new crimes would appear to conflict with Wis. Stat. § 304.072(4).

Likewise, the Special Materials of the Wisconsin Jury Instructions devoted to sentence credit (SM-34A) support that conclusion. *See State v. Gilbert*, 115 Wis. 2d 371, 379, 340 N.W.2d 511 (1983) (stating that SM-34A is persuasive authority for the correct interpretation of Wis. Stat. § 973.155). The comments to SM-34A provide that revocation sentences commence when the offender arrives at prison and the "revocation date is irrelevant" for determining sentence credit. *Compare* Wis. JI-Criminal SM-34A cmt. 23b (June 1995) (stating that a sentence after revocation of probation where there is an imposed and stayed sentence, "the sentence commences when the offender arrives at the prison. The revocation date is irrelevant"), *and id.* at cmt. 23c ("Sentences of revoked parolees resume running on the date the person is received

at the correctional institution."); *with id.* at cmt. 23a (explaining that where a sentence is originally withheld and probation imposed, the sentence begins on the date of imposition).

Here, the circuit court discounted § 304.072(4) as inapplicable because it is a sentence computation, not sentence credit, statute (29:3; A-Ap. 114). But statutes indicating a clear legislative intent for when sentences commence provide guidance for courts determining sentence credit under Wis. Stat. § 973.155. The fact that § 304.072(4) is not directed to a court or does not discuss credit directly does not make it inapplicable. Rather, § 304.072(4) is germane to the analysis: Its plain text demonstrates legislative intent that revocation sentences begin with an offender's transfer to prison, in the same way that an offender's sentence for any other crime begins on the day on which the court imposes sentence. As noted above and as this court in *Presley* explained, the circuit court's approach here would appear to conflict with the legislative intent provided in § 304.072(4).

Finally, in addition to maintaining consistency with controlling law in *Beets*, *Presley*, and Wis. Stat. § 304.072(4), the rule advanced here by the State reflects the underlying purposes of Wis. Stat. § 973.155: affording fairness, applying credit consistently, and ensuring individual offenders do not serve more time than what he or she is sentenced to serve. *See Presley*, 292 Wis. 2d 734, ¶12. Thus, the State concedes that Brown should receive credit on his revocation sentence for the days he spent in custody until he was either received at the institution or for the "act of sentencing" of the new crime, whichever occurred first. Because the sentencing for his new crime occurred before his reception at the institution, he is entitled to a total of 209 days of credit—an additional fourteen days—for time in custody between his arrest and sentencing in the present case.

II. THE CIRCUIT COURT PROPERLY CONCLUDED THAT THE OFFICERS HAD PROBABLE CAUSE OR REASONABLE SUSPICION TO STOP THE CAR.

A. Relevant law and standard of review.

A traffic stop by police is 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. "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 requires that the quantum of evidence lead a reasonable police officer to believe that there is more than a possibility that a person is guilty of violating a traffic law. *Id.*, ¶14. To demonstrate reasonable suspicion to initiate a stop, "'the officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop.'" *Id.*, ¶23 (quoting *State v. Post*, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634) (internal quotation marks omitted).

On review of a circuit court's denial of a motion to suppress, this court will uphold the circuit court's findings of fact unless they are clearly erroneous. *State v. Jackson*, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989). Whether the undisputed facts and the facts found by the circuit court satisfy the constitutional requirement of reasonableness presents a question of law that this court reviews de novo. *Id.*

B. Background.

On the night of his arrest, Brown was riding in the back seat of his 1977 Buick Elektra while an acquaintance, Willie Lipsey, drove (38:5, 19, 28; 39:4-7). The Elektra's tail lamps consisted of two wide horizontal red panels each next to a smaller white panel, all situated above the bumper (39:8-9; 45:D-Exhs. 3-4; R-Ap. 101).[2] Each lamp contained four bulbs (*id.*). Three of the four bulbs starting from the outside of the car illuminated the red panel, and the fourth bulb, near the center of the car, illuminated the white panel (*id.*).

Milwaukee police officers Michael Wawrzonek and his partner William Feely each testified that they stopped the Elektra for having a defective tail lamp after observing that one of the three bulbs under the red panel on the driver's side was unlit (38:5, 9, 27).

Lipsey, the driver, disputed the officers' testimony. He stated that he had stopped at a gas station before the encounter with the officers and filled the car's tank, which was accessible from under the license plate on the back of the car (39:7-8). He stated that he habitually left the car running while filling the gas tank, and that, from his vantage point while he was filling the tank that night, he noticed that all of the tail bulbs on the Elektra were operational (39:9-10, 19). Lipsey also explained that not all of the bulbs on the car would necessarily be illuminated at the same time: The first and third bulbs under the red panel comprised parking lights, the middle bulb was the brake light, and the fourth bulb under the white panel illuminated only when the driver shifted into reverse (39:8-9).

The circuit court made factual findings relevant to the stop based on the defective tail lamp at the conclusion of the hearing (39:28-36; A-Ap. 101-09). It found that

[2] To aid the court, the State included in its appendix copies of defense exhibits 3 and 4, which are photographs of the back of the Elektra taken before the motion hearing (R-Ap. 101).

both Officer Feely and Officer Wawrzonek saw that the Elektra had a defective tail lamp (39:28; A-Ap. 101). It noted that Wawrzonek specifically observed that the defect was in "the driver's side tail lamp and it was one of three lights that was out" (*id.*).

The court further summarized Lipsey's testimony that he knew that the tail lamp bulbs were operational on July 3, 2010, based on his filling the gas tank earlier that evening (39:31; A-Ap. 104). It noted that the photographs of the car showed that all three of the red-panel tail bulbs were operational, *see* 45:D-Exhs. 3-4 (R-Ap. 101), but that the photo was taken a week before the hearing in January 2011, not in July 2010 (39:31; A-Ap. 104).

The court found that both officers were credible as to their observations that the tail lamp was defective:

> Both 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; A-Ap. 104-05).

It further found that Lipsey was not credible as to his claim that the tail lamps were fully operational:

> 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; A-Ap. 105).

Brown's counsel 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; A-Ap. 108). Thus, he argued, the officers were incorrect in their belief that the tail lamp was defective based on their observation of an unlit bulb (*id.*).

The court clarified its findings and addressed the issue raised by counsel:

> [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 the 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; A-Ap. 110-11).

In his postconviction motion to the circuit court, Brown argued that the stop violated the Fourth Amendment because, even if one of the tail lamp bulbs was defective, it was not a violation of Wis. Stat. § 347.13(1) (28:4-5; A-Ap. 120-21). He argued that the statute merely requires that cars equipped with two tail lamps must have those lamps "in good working order," not that all of the bulbs within a multi-bulb tail lamp must be operational (*id.*). Alternatively, he argued, his counsel was ineffective for failing to raise that argument to the court during the hearing on the motion to suppress (28:5-6; A-Ap. 121-22).

The circuit court denied the postconviction motion in a written order (29; A-Ap. 112-16). It explained that

even if Brown had brought Wis. Stat. § 347.13(1) to the court's attention, "the result would have been the same":

> 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 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; A-Ap. 113-14).

C. The circuit court properly concluded that the officers' observation of a seemingly defective tail lamp bulb provided probable cause or reasonable suspicion to stop the car based on a violation of Wis. Stat. § 347.13(1).

As an initial matter, the circuit court's findings that both officers observed a defective tail lamp and stopped the car on that basis were not clearly erroneous. Both officers testified that the one of the three bulbs in the driver's side tail lamp was defective.

Likewise, the circuit court's findings that the officers were credible were not clearly erroneous. Both officers stated that they were not otherwise familiar with the car or its occupants (38:12-13, 26-27). Further, as the court explained, it believed the officers' testimony over that of Lipsey, reasoning that most people would not independently notice—let alone be able to recall noticing on a given day—that a car's tail lamps were fully operational. *See* Wis. Stat. § 805.17(2); *State v. Byrge*, 2000 WI 101, ¶33, 237 Wis. 2d 197, 614 N.W.2d 477

(appellate courts "give due regard" to a circuit court's opportunity to assess witnesses' credibility).

Given those findings, the circuit court's conclusions were not erroneous. As the circuit court noted, the officers had a reasonable belief that a violation was occurring, particularly given the age of the Elektra, and the reasonableness of that belief is not made unreasonable by a later showing that a particular bulb would not have necessarily been lit when the officers saw the car. Accordingly, even if the officers mistakenly believed that an unlit bulb should have been lit, that mistake does not affect the fact that they had reasonable suspicion, if not probable cause, to stop the car.

D. The officers did not make a "mistake of law" because a single defective bulb within a multi-bulb tail lamp could constitute a violation of Wis. Stat. § 347.13(1).

Brown urges on appeal that the stop of the vehicle was predicated on a mistake of law, invoking *State v. Longcore*, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999). He argues that the officers here lacked reasonable suspicion or probable cause that Lipsey was committing a violation of Wis. Stat. § 347.13(1) because all that the statute requires is that "two tail lamps be in good working order," not all tail lamps when there are more than two (Brown's brief at 13). Accordingly, by his reasoning, having one defective bulb among multiple bulbs comprising his tail lamp did not violate the statute, because the statute requires only two total bulbs to be in good working order (Brown's brief at 13-14).

The fundamental flaw in Brown's argument is that the statute references tail lamps; it does not say anything about bulbs. To avoid that problem, Brown presupposes the term "tail lamp" as used in § 347.13(1) to mean each *bulb* positioned in the back of the car. That approach

disregards the definition of "tail lamp" as provided in Wis. Stat. § 340.01(66): "'Tail lamp' means a device to designate the rear of a vehicle by a warning light." The statute does not designate each individual bulb to be a tail lamp. Rather, the tail lamp is a device that may consist of one bulb multiple bulbs, or some other light source that allows the device to provide sufficient visibility.

Here, given the findings of the circuit court, one of the bulbs included within the tail lamp appeared to be inoperable. A tail lamp with a defective bulb, regardless of how many other bulbs are operating, is not "in good working order" as required by Wis. Stat. § 347.13(1). Thus, where the officers either (1) in fact observed one of the tail lamp bulbs to be defective or (2) observed the unlit brake light bulb and simply made a mistake of fact that that bulb should have been illuminated, either of those observations provided at least reasonable suspicion, if not probable cause, to stop the vehicle and investigate a potential violation of Wis. Stat. § 347.13(1).

This court has so held under similar facts in *State v. Laurence Evan Olson*, Dist. IV, No. 2010AP149-CR, slip op. at ¶¶11-12 (Wis. Ct. App. Aug. 5, 2010) (R-Ap. 106-07).[3] In that case, Olson was driving a car "equipped with four tail lamp bulbs, one of which was burnt out" and stopped by a trooper. Slip op. at ¶2; (R-Ap. 103). The court employed the reasoning set forth above based on the language of Wis. Stat. §§ 340.01(66) and 347.13(1) and concluded that the stop was valid because the trooper's observation of the defective bulb provided probable cause to perform the traffic stop. Slip op. at ¶13 (R-Ap. 107).

Accordingly, Officers Wawrzonek and Feely had probable cause or reasonable suspicion to believe that a violation of Wis. Stat. § 347.13(1) was occurring and,

[3] "[A]n unpublished opinion issued on or after July 1, 2009, that is authored by . . . a single judge under s. 752.31(2) may be cited for its persuasive value." Wis. Stat. § 809.23(3)(b). In accordance with Wis. Stat. § 809.23(3)(c), the State has included a copy of the slip opinion in its appendix to the brief (R-Ap. 102-07).

hence, the stop did not violate the Fourth Amendment. The circuit court did not err in so concluding.

III. BROWN WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S FAILURE TO RAISE A MERITLESS ARGUMENT TO THE CIRCUIT COURT.

Brown finally argues, in the alternative, that his trial counsel was ineffective for failing to argue that a single defective bulb under these circumstances could not violate Wis. Stat. § 347.13(1) (Brown's brief at 14-16). This court should summarily reject this argument.

To establish ineffective assistance of counsel, a defendant must prove that the representation was (1) deficient and (2) prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Courts need not address both prongs of the *Strickland* test if the defendant fails to make a sufficient showing on one. *See id.*

For the reasons stated above in Part II.C and D, an officer viewing a car with a single defective tail lamp bulb has probable cause or reasonable suspicion to believe that a violation of Wis. Stat. § 347.13(1) was occurring. Accordingly, Brown cannot demonstrate that his counsel was deficient for failing to raise that argument. *See State v. Wheat*, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel is not deficient for failing to pursue meritless argument). Brown is not entitled to relief on his ineffective assistance of counsel claim.

CONCLUSION

For those reasons, the State respectfully asks that this court affirm the judgment of conviction and circuit court's postconviction decision and order based on Brown's challenge to the stop. It also respectfully asks that this court reverse the portion of the circuit court's

order denying Brown sentence credit from January 14 to January 28, 2011, and remand to the circuit court with directions to amend the amended judgment of conviction to reflect a total of 209 days of sentence credit.

Dated this 26th day of June, 2012.

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 4390 words.

_____
Sarah L. Burgundy
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 26th day of June, 2012.

_____
Sarah L. Burgundy
Assistant Attorney General