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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Court of Appeals Case No. 2013AP1581 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD E. HOUGHTON, JR.,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

On Appeal from the Circuit Court for Walworth County, the Honorable John R. Race, Presiding
Circuit Court Case No. 2012CF187

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUE

I. Under the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution, is it unreasonable for an officer to initiate a traffic stop based on an incorrect belief that Wis. Stat. § 341.15(1) requires a front license plate for all vehicles and to continue to pull the vehicle over when the officer saw a properly displayed Michigan license plate on the vehicle's rear after turning on his lights but before the vehicles actually stopped?

Circuit Court Answered: No.

STATEMENT ON ORAL ARGUMENT

Pursuant to Wis. Stat. § 809.22, oral argument is unnecessary because the briefs will fully develop and explain the issues and relevant legal authorities.

STATEMENT ON PUBLICATION

Pursuant to the criteria of Wis. Stat. § 809.23, Houghton does not request publication of the opinion in this case.

STATEMENT OF THE CASE

Houghton appeals from the circuit court ruling that denied his motion to suppress evidence that an officer found after stopping Houghton's car based on a mistaken belief that Wis. Stat. § 341.15(1)

requires all vehicles, including Houghton's Michigan vehicle, to display a front license plate.

Officer Jeff Price was parked on the shoulder of Highway 20 in East Troy when Houghton's vehicle approached. Price made three observations that he believed constituted traffic violations:

1. The vehicle had no front license plate
2. There was a standard size pine tree shaped air freshener hanging from the rearview mirror
3. There was a GPS unit attached to the windshield.

(24:5-6; App. 5-6).

Price made a U-turn to stop the vehicle. (24:6-7; App. 6-7). The circuit court would ultimately decline to rule on whether the air freshener and GPS unit constituted violations, but upheld the stop based on Price's observation of no front license plate. (24:25-26; App. 25-26). Price stated that he also based the stop on his observation of a broken passenger side mirror. (24:6, 8-9; App. 8-9). However, the court found that did not support the stop because Wis. Stat. § 347.40(1) does not prohibit driving with one broken mirror; it only requires one mirror allowing the driver to see 200

feet to the rear. (24:26; App. 26). Houghton's rearview mirror satisfied this requirement. *Id.*

As to the lack of a front license plate, Price testified that Wis. Stat. § 341.15(1) requires that all vehicles operating in Wisconsin must have both front and rear license plates:

> Q. How many license plates does a car need in the State of Wisconsin?
>
> A. Two
>
> Q. And how many did you observe on this vehicle?
>
> A. Only one.
>
> Q. Are there any exceptions in the State of Wisconsin as to how many mirrors--how many license plates must be on a vehicle?
>
> A. Not to my knowledge.

(24:10; App. 10).

However, § 341.15(1) provides:

> (1) Whenever 2 registration plates are issued for a vehicle, one plate shall be attached to the front and one to the rear of the vehicle. Whenever only one registration plate is issued for a vehicle, the plate shall be attached as follows:
>
> (a) If the vehicle is a truck tractor or road tractor or a motor truck issued the plate under s. 341.405(2), to the front.
>
> (b) For any other vehicle for which only one plate is issued, to the rear, except that a plate issued to or for a municipality under s. 341.26(2m) may be attached to the front of the vehicle if the design or use of the vehicle is such as to make a plate attached to the rear difficult to see and read.

Houghton is a Michigan resident and is only issued one license plate. Mich. Comp. Laws § 257.225.

Price pulled behind Houghton and flipped on his lights to make a stop. He saw Houghton's Michigan license plate "as we pulled off to the shoulder," sometime after putting on his lights but before the vehicles stopped. (24:7; App. 7). Price continued with the stop.

When the vehicles eventually stopped, Price approached and spoke with Houghton, the driver. *Id.* He discovered marijuana in Houghton's vehicle during the stop. (2).

Circuit Court Ruling Regarding License Plate

In upholding the stop, the court reasoned that officers can always stop a car that lacks a front license plate. (24:24; App. 24). In the circuit court's view, officers are not required to know if the law requires a driver to display one or two license plates:

> I don't believe a traffic officer is required to have at his finger types [sic], memorized or on his computer in his squad car the requirements of each of the forty-eight states with respect to front license plates and the Canadian provinces. If he sees a car without a front license plate it's a violation of Wisconsin law.
>
> *Id.*

Circuit Court Discussion of Other Justifications for Stop

The circuit court upheld the stop solely because of the suspected license plate violation and made no ruling regarding the pine tree air freshener or the GPS unit:

> [T]here must be a zillion cars driving around with air fresheners and not very many of them would get stopped…if he stopped maybe he could issue a citation. Maybe it would be found valid. But the principle reason for the stop that creates reasonable and articulable suspicion is the front license plate missing…I don't know about the GPS.

(24:25-26; App. 25-26).

Houghton pled guilty to Possession with Intent to Deliver Tetrahydrocannabinol, contrary to Wis. Stat. § 961.41(1m)(h)2. (17; App. 29). He appeals pursuant to Wis. Stat. § 971.31(10).

STANDARD OF REVIEW

Whether there is reasonable suspicion or probable cause to conduct a traffic stop is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶ 10, 317 Wis. 2d 118, 765 N.W.2d 569. Appellate courts apply a two-step standard of review to questions of constitutional fact. *State v. Williams,* 2001 WI 21, ¶ 18, 241 Wis.2d 631, 623 N.W.2d 106. First, the court will review the circuit court's findings of historical fact and uphold them unless they are clearly erroneous. *Popke*, 317 Wis. 2d 118, ¶ 10. Second, the

circuit court's determination of reasonable suspicion or probable cause to make a traffic stop will be reviewed de novo. *Id.*

ARGUMENT

I. The court should hold that the traffic stop was unreasonable because it was based on Price's mistake of law that Wis. Stat. § 341.15(1) requires that all vehicles have front license plates.

The issue before this court is whether it is unreasonable for an officer to seize a motorist who has no front license plate based on the officer's mistaken belief that the law requires that all vehicles have front license plates. The Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution permit a traffic stop when an officer has an objectively reasonable suspicion, based on articulable facts, to believe that the motorist is committing or has committed a violation. *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634; Wis. Stat. § 968.24 (codifying the reasonable suspicion standard). However, in this case Price acted not because of what he reasonably suspected the facts to be, he acted based on what he suspected that the law requires. (24:24-25; App. 24-25).

The reasonable suspicion standard applies to an officer's suspicions about what the facts are; it does not encompass an officer's suspicion about

what the law requires. *State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999). A stop is invalid when an officer bases a decision to stop on a mistaken interpretation of what the law requires. *Id.* at 8-9.

Price admitted to a mistaken interpretation of the law when he testified that Wis. Stat. § 341.15(1) requires all vehicles to display a front license plate without exception. (24:10; App. 10). Sec. 341.15(1) actually requires that vehicles display the number of plates they have been issued; a vehicle issued only one plate need only display a rear plate. He did not testify to any assumption that Houghton registered his car in Wisconsin, (24:5-15; App. 5-15), and he obviously saw no need to look for that evidence because he thought all vehicles needed a front license plate. Price first acted on the mistake of law when he activated his lights to pull Houghton over.

He compounded that mistake when, while the vehicles were still moving, he continued to pull Houghton over after seeing the Michigan license plate properly displayed. At that there could be no doubt that Houghton was committing no violation. Any arguable reasonable suspicion evaporated, and no officer may stop or detain a motorist in the absence of reasonable suspicion, *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct.

1391, 59 L. Ed. 2d 660 (1979). While this court has found an exception to *Prouse* that allows police to request identification *after* a lawful stop, *State v. Williams*, 2002 WI App 306, 258 Wis. 2d 395, 655 N.W.2d 462, it should not expand that exception to this circumstance because reasonable suspicion evaporated before the vehicles stopped, before Price and Houghton had any actual contact.

A. No valid traffic stop can result from a mistake of law.

A lawful stop cannot be predicated on a mistake of law. *Longcore*, 226 Wis. 2d at 9 (applying Art. I, Sec. 11 of the Wisconsin Constitution), *aff'd by an equally divided court,* 2000 WI 23, 233 Wis.2d 278, 607 N.W.2d 620; *United States v. Tyler*, 512 F.3d 405 (7th Circ. 2008) (applying the Fourth Amendment). *Longcore* explained it is a mistake of law when an officer stops a car with plastic window covering because he mistakenly believes that the traffic code requires safety glass.[1] *Id.* A mistake of law, even when reasonable, cannot form the basis of a valid stop. *Id.* at 9 ("when an officer relates the facts to a specific offense, it must indeed be an offense.").

[1] The court left unresolved whether the officer correctly interpreted the law. *Id.* at 9-10. On remand, the circuit court determined the officer correctly interpreted the statute and thus there was no mistake of law; the court of appeals affirmed. *State v. Longcore*, 2001 WI App 15, 240 Wis. 2d 429, 623 N.W.2d 201.

In contrast, a reasonable mistake of fact can form the basis for a valid stop. For example, several courts have upheld stops for failure to obey traffic signs when the officer reasonably but mistakenly believed than an unofficial road sign was official. *E.g. County of Sheboygan v. Bubolz*, Nos. 2010AP2995, 2010AP2996, 2010AP2997 (Wis. Ct. App. Dist. II Apr. 6, 2011) (App. 32) (finding a reasonable mistake of fact when an officer relied on an unofficial "Road Closed" sign that was indistinguishable from official signs).

B. A mistake of law occurs when an officer accurately perceives the facts and incorrectly believes that those facts are all the facts that are required for there to be a violation

Bubolz provides a test for distinguishing a mistake of law from a mistake of fact. When there is a mistake of law the officer's error is in answering: "what facts [are] required under the statute in order to be in violation of the statute." *Bubolz*, slip. op. ¶*12 (citing Longcore*, 226 Wis. 2d at 8-9). When there is a mistake of fact the officer's error is in what he perceived the facts to be. *Id.*

C. Even before seeing Houghton's license plate, Price made a mistake of law when he turned on his squad lights to stop Houghton based on his mistaken belief Wis. Stat. § 341.15(1) requires a front license plate on every vehicle, without exception.

Price's error was in answering the question: what facts are required to be in violation of Wis. Stat. § 341.15(1). Believing that the statute requires all vehicles to have front and rear plates, he believed the facts needed to establish a violation of the statute are:

1. Operation of a vehicle
2. No front (or rear) license plate.

He actually saw both of those facts. But the statute actually requires another element: the vehicle must have been issued two plates. *See* Wis. Stat. § 341.15(1).

This is a mistake of law. Price accurately perceived the facts but the facts equate to a violation only under a misinterpretation of the law. *See Longcore*, 226 Wis. 2d at 9 ("if the facts would support a violation only under a legal misinterpretation, no violation has occurred, and thus by definition there can be no probable cause that a violation has occurred.").

That Price testified to a mistaken view of the law distinguishes this case from *State v. O'Connor*, No. 2012AP1638 (Wis. Ct. App. Jan. 23, 2013) (App. 40). There a deputy stopped O'Connor's vehicle after seeing

no front license plate. But whereas Price testified to a misinterpretation of the law, O'Connor merely speculated that the deputy misunderstood the law.

Unlike Price the deputy never denied that some vehicles require only one plate. *O'Connor*, slip. op. ¶¶ 5, 9. He just failed to spontaneously point out that a vehicle issue only one plate need not have a front license plate. *Id.* The circuit court rejected any inference that the deputy misunderstood the law. *Id.* slip. op. ¶ 5.

The court of appeals held that the deputy's significant law enforcement experience and training in Wisconsin traffic law supported the circuit court's inference that the deputy properly understood the law and made the stop based on his belief that O'Connor's car was registered in Wisconsin. *Id.* slip. op. ¶ 9. Thus he stopped O'Connor because of what he reasonably perceived the facts to be, i.e., he believed the car was registered in Wisconsin. *See id.* He did not misinterpret the law. *Id.*

In contrast, Price specifically testified to a misinterpretation of the law. (24:10; App. 10). The circuit court acknowledged the error, but upheld the stop because it found it unreasonable to expect Price to know whether a Michigan vehicle requires two license plates when driving through

Wisconsin. (24:24-25; App. 24-25). In other words, the court found that Price made a reasonable mistake of law. *See id.* A lawful stop cannot be predicated on a mistake of law. *Longcore*, 226 Wis. 2d at 9.

D. If Price had a reasonable suspicion when he first turned on his lights, it evaporated when he saw Houghton's Michigan license plate before the vehicles stopped.

The well-established rule is that an officer may not stop or detain a motorist without reasonable suspicion of a violation. *See Prouse*, 440 U.S. at 663. There is a limited exception to that general rule; when an officer's reasonable suspicion evaporates after making a lawful traffic stop, it is reasonable for the officer to ask the driver for identification in order to make a report of a citizen contact. *Williams*, 2002 WI App 306.

However, that exception applies here only if the court decides to greatly expand it; it currently applies only when an officer has already made a lawful stop and has citizen contact. In *Williams*, an officer made a lawful traffic stop, approached the driver because he appeared to match the description of a domestic abuse suspect, and asked for his identification. *Id.*, ¶¶ 14-16. According to the defendant, the officer saw that he was not the suspect before asking for identification and should have ended the stop immediately. *Id.*, ¶ 18. Instead the court held that even if the officer already

knew Williams was not the suspect it was reasonable to ask for identification to make a report of the contact. *Id.*, ¶ 22.

In carving out that exception to *Prouse* the court considered the familiar balance that weighs the public interest against the significance of the intrusion. *See id.*, ¶¶ 19-22. The court decided that the public's interest in having police reports of citizen contacts outweighs the "very minimal intrusion" of asking an already lawfully stopped motorist for identification. *Id.* That determination rests on two pillars that do not exist in this case.

First, the driver must already be lawfully stopped. *Id.*, ¶ 20. When a person has already been lawfully stopped it is a "very minimal" additional intrusion to take the additional time to check identification. *Id.* In contrast, Houghton had not yet suffered the major interference that a traffic stop entails, *see Coolidge v. New Hampshire*, 403 U.S. 443, 479, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971). He had not had his freedom of movement curtailed or his time consumed. *See Prouse*, 440 U.S. at 657 (explaining that the intrusion in a traffic stop includes curtailed freedom of movement, consumption of time, inconvenience, and substantial anxiety).

Second, there must be a need for the officer to make a report of the citizen contact. *Williams*, 258 Wis. 2d 395, ¶ 19. The court explained that

officers may be required to make reports when they have contact with a citizen and also may need a report to help the officer in the event that the contact leads to a complaint by the citizen. *Id.*

In contrast, there is no substantial need for a report when the officer has not actually stopped the vehicle or made contact with the driver. There was no real danger that Houghton would file a citizen complaint when he had no contact with the officer. He could not have even given Price's name or description. The interaction was no more significant than the common situation where an officer puts on his lights to instruct an illegally stopped motorist to move along.

The court should not expand the *Williams* exception to these circumstances because the balance is much different when an officer has not already lawfully stopped a vehicle or made contact with the occupants. When Price saw the Michigan plate before the stop the proper action would have been to turn off his lights and drive away. At that point, Houghton would have been free to go. Wis. Stat. § 346.19(1) (providing that a driver who has been approached by emergency vehicle with audible siren shall pull over until the emergency vehicle passes).

CONCLUSION

For all of these reasons, and pursuant to Wis. Stat. § 971.31(10), Houghton respectfully requests that the court reverse the Judgment of Conviction and denial of his motion to suppress the fruits of the traffic stop.

Dated this 24th day of October, 2013.

_____
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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) and 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 a minimum of 2 points and maximum of 60 characters per line of body text. The length of this brief is 2,873 words.

Dated this 24th day of October, 2013.

_____
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of Rule 809.19(12). I further certify that the 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 24th day of October, 2013.

_____

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of the brief, is an appendix that complies with Rule 809.19(2)(a), and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written

rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 24th day of October, 2013.

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