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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.

REPLY BRIEF OF THE 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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ARGUMENT

The sole issue is whether the officer had a reasonable suspicion that Houghton violated Wis. Stat. § 346.88(3)(b) after seeing Houghton driving with a pine tree air freshener hanging from the rearview mirror and a GPS unit attached to his windshield. The State concedes that the circuit court erred when it upheld the stop based on a suspected violation of Wis. Stat. § 341.15. (Respondent's Brief at 2). And it does not argue that Houghton violated Wis. Stat. § 346.88(3)(a), presumably because there is no evidence that the suction cups attaching the GPS to the windshield were nontransparent, (24).

I. The officer's observation of Houghton's standard size pine tree air freshener and GPS device did not create a reasonable suspicion that Houghton violated Wis. Stat. § 346.88(3)(b).

Wis. Stat. § 346.88(3)(b), prohibits driving with objects placed or suspended that would obstruct the "driver's clear view through the windshield":

> (b) No person shall drive any motor vehicle upon a highway with any object so placed or suspended in or upon the vehicle so as to obstruct the driver's clear view through the front windshield.

The question here is whether the officer had a reasonable suspicion that the air freshener and GPS device obstructed Houghton's "clear view through the windshield."

The question calls for a two-part analysis. First the court should interpret the phrase "driver's clear view through the windshield." Wisconsin courts have not determined whether the "driver's clear view" includes the view of the highway area or

the possible view through the entire windshield. (Respondent's Brief at 4.) The court should find that the plain meaning of the phrase "driver's clear view" is the view of the highway.

The second part of the analysis is whether the air freshener and GPS device actually obstructed Houghton's view. The facts do not support reasonable suspicion under either interpretation of the statute.

A. The Court should hold that the phrase "driver's clear view" as it appears in Wis. Stat. § 346.88(3)(b) means the driver's view of the highway, including intersecting highways and areas from which hazards could reasonably arise.

Statutory interpretation begins with the language of the statute. *State ex. rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The goal is finding the plain meaning of the statutory language. *Id.* To find plain meaning, courts interpret statutory language in the context in which it is used, in relation to other sections, and in a manner that avoids inconsistency between sections or absurd results. *Id.*, ¶ 46.

The Court should hold that the plain meaning of "driver's clear view" is the highway, including intersecting highways and nearby areas from which hazards could arise. The common and ordinary understanding is that driver's view the highway area. Moreover, holding that the driver's clear view includes the entire glass of the windshield would create absurd results, inconsistency between subsections (a) and (b) of § 346.88(3), and would make portions of subsection (a) surplusage.

1. The common and ordinary expectation is that a driver views the highway area.

Statutory language is given its common, ordinary, and accepted meaning. *Kalal*, 271 Wis. 2d 633, ¶ 45. What does a driver view? If we asked a sampling of fellow citizens that question, wouldn't almost every answer be "the road"? That is what we assume drivers view, and what we expect that they view. It is the common and ordinary meaning of the phrase.

2. Holding that "driver's clear view" includes the entire windshield would lead to the absurd result that the statute prohibits sun visors and rearview mirrors.

The Court should interpret the statute in a manner that avoids absurd results. *See Kalal*, 271 Wis. 2d 633, ¶ 46. If the "driver's clear view" includes the entire glass area of the windshield then it bans sun visors and rearview mirrors. Sun visors exist to create a barrier between the driver's eyes and the sun shining through the windshield. Rearview mirrors also come between the driver and the windshield. Yet both items are critical safety features that are required by federal regulation. 49 C.F.R. § 571.111 and § 571.201.

The proper interpretation of "driver's clear view" avoids this absurd result. Using sun visors and a rearview mirror does not violate Wis. Stat. § 346.88(3)(b) because they do not obstruct the driver's clear view *of the highway*.

3. The State's interpretation of the statutory language makes Wis. Stat. § 346.88(3)(b) inconsistent with subsection (a).

Inconsistency between sections should be avoided if another reasonable interpretation is available. *Wisconsin Valley Improvement Co. v. Public Service Commission*, 9 Wis. 2d 606, 615, 101 N.W.2d 798 (1960). Yet the State urges an interpretation of Section 346.88(3)(b) that would prohibit driving with certain stickers that subsection (3)(a) explicitly permits: Subsection (3)(a) provides, in pertinent part:

> No person shall drive any motor vehicle with any sign, poster, or other nontransparent material upon the front windshield…other than a certificate or other sticker issued by order of a governmental agency. **Such permitted sticker shall not cover more than 15 square inches of glass space and shall be placed in the lower left-hand corner of the windshield.**

Wis. Stat. § 346.88(3)(a) (emphasis added).

Nontransparent stickers obstruct the view through the part of the windshield that they cover. So if subsection (b) prohibits driving with any item placed or suspended that obstructs the driver's view of any area through any portion of the windshield, then it prohibits the governmental stickers that subsection (a) specifically permits.

Subsections (3)(a) and (b) are consistent if the phrase "driver's clear view" in subsection (b) means the driver's view of the highway. Small stickers in the lower corner would not interfere with the driver's view of the highway. The legislature presumably made that judgment when it determined the permissible size and placement of the stickers that subsection (a) allows.

4. The language in § 346.88(3)(a) that prohibits driving with nontransparent materials attached to the windshield is surplusage if "driver's clear view" in subsection (3)(b) includes the entire windshield.

Courts interpret statutory language in a manner that avoids rendering language meaningless. *See Kalal*, 271 Wis. 2d 633, ¶ 46. If subsection (b) prohibits placing any item that obstructs the driver's view through any portion of the windshield then it follows that it also prohibits placing any sign, poster, or nontransparent material on the windshield. However, if the phrase "driver's clear view" in subsection (b) refers to the view of the highway, then this language in subsection (a) prohibits conduct that subsection (b) would not necessarily prohibit.

For all of these reasons the Court should hold that the plain meaning of "driver's clear view" is the view of the highway, including intersecting highways and nearby areas from which hazards could reasonably arise. However, the facts do not give rise to a reasonable suspicion under either interpretation of the statute.

B. There was not a reasonable suspicion that the air freshener and GPS obstructed Houghton's view regardless of whether "driver's clear view" means the view of the highway area or of the entire windshield.

Houghton's air freshener was a "standard pine tree looking sort of air freshener." (24:11). It was about three inches wide, *id.*, presumably only at the lowest branches of the pine tree. The string and air freshener combined measure six inches long. *Id.* The officer did not specify how long the string was, so we do not know the length of the actual air

freshener. *See id.* The GPS was in the lower left-hand corner of the windshield. (24:10), and measured three inches by five inches, (24:13).

The facts do not support a reasonable suspicion that Houghton's air freshener or GPS actually obstructed his view through any part of the windshield. And there is even less factual support for a suspicion that the items actually obstructed his view of the highway.

1. Even if Wis. Stat. § 346.88(3)(b) prohibits any item that obstructs any part of the windshield the Court should still find that the facts presented do not create a reasonable suspicion of a violation.

The State had the burden of proving that the facts support a reasonable suspicion that Houghton's air freshener and GPS obstructed his clear view through the windshield. *See State v. Post*, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W.2d 634. The State did not show that either item is big enough to obstruct a driver's view. We do not even know the actual length of the air freshener because the officer only testified to the total length, including the string from which the air freshener hung. (24:11).

We know the GPS unit is three by five, the same size as the fifteen square inch government issued stickers that drivers can put on windshields pursuant to § 346.88(3)(a). The court can infer that the legislature decided that items of that size do not obstruct a driver's view. This is a logical inference because the legislature chose to approve of the stickers within the same statute that bans items that obstruct a driver's

view, a statute titled "Obstruction of Operator's View or Driving Mechanism," Wis. Stat. § 346.88.

The air freshener is smaller than those stickers. If the total length including the string is six inches, and the air freshener is three inches wide, the maximum possible size is eighteen square inches. But some of that is string. The air freshener measures twelve square inches if the string is just two inches long. Moreover, anyone who has seen a pine tree knows that a tree measuring three inches at the bottom branches narrows in all other parts of the tree. The reasonable inference is that the air freshener is smaller than the fifteen square inches allowed for government-issued stickers.

Maybe the cumulative size of the items would obstruct views if they were adjacent. But they were not. The GPS unit was in the lower-left hand corner, (24:10), whereas the air freshener was to Houghton's right, hanging on the rearview mirror, (24:11).

The State claims that the court of appeals previously upheld a stop where the driver's view was obstructed to a lesser degree, (Respondent's Brief at 5); however, that case actually involved a "very large air freshener", *State v. Currie*, No. 2011AP322-CR (Ct. App. July 19, 2011)[1]. In contrast, Houghton had a standard pine tree air freshener and small GPS unit. (24:11). But in fairness it is futile for either party to attempt comparisons to the ambiguously-described "very large" air freshener.

[1] A copy of the unpublished decision is attached at the back of this brief.

2. The facts do not support a reasonable suspicion that the air freshener and GPS unit obstructed Houghton's clear view of the highway through the windshield.

At the motion hearing the State did not argue or present evidence that the items obstructed Houghton's view of the highway. (24). On appeal the State only argues that Houghton violated the statute because it prohibits obstructions of the driver's view through any part of the glass. (Respondent's Brief at 4-5).

Neither the air freshener nor the GPS came between Houghton's eyes and the highway. The air freshener was on the rearview mirror to his right, while the GPS was in the lower left-hand corner. (24:10-11). Realistically either or both could have been in Houghton's peripheral vision, but neither item occupied a space between Houghton and the highway. For these reasons and those stated in the foregoing section (B)(1), the State did not establish a reasonable suspicion that the items obstructed Houghton's clear view of the highway.

CONCLUSION

For all of these reasons, along with the arguments made in Houghton's initial brief, Houghton respectfully requests that the court reverse the Judgment of Conviction and remand the case to the circuit court with orders to grant Houghton's suppression motion.

Dated this 5th day of February, 2014.

_____
Andrew R. Walter
Attorney for the Defendant-Appellant
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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 1,961 words.

Dated this 5th day of February, 2014.

_____
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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 5th day of February, 2014.

_____

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