RECEIVED
03-04-2015
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN

SUPREME COURT

Case No. 2013AP1581 CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD E. HOUGHTON, JR.,

Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, REVERSING AN ORDER OF THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE JOHN R. RACE, PRESIDING

BRIEF OF DEFENDANT-APPELLANT

Andrew R. Walter
Attorney for Defendant-Appellant
State Bar No. 1054162

WALTER LAW OFFICES LLC
108 West Court Street
Elkhorn, WI 53121
(262) 743-1290
(262) 723-7715 (Fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

ISSUES PRESENTED FOR REVIEW

1. Does the exception to the probable cause standard that permits citizens to be seized on reasonable suspicion for the purpose of investigation apply to non-investigative stops?

   The court of appeals held, in accordance with *State v. Longcore*, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), *aff'd by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620 (per curiam), that when an officer acts upon an observation of a violation in his presence rather than a suspicion warranting further investigation, the required standard is probable cause.

2. Should the Court adhere to *State v. Brown*, 2014 WI 69, 355 Wis. 2d 668, and hold that under Article I, Section 11 of the Wisconsin Constitution, it is unreasonable for police to seize innocent citizens based on officers' errant interpretations of the laws that they enforce?

   This issue was not raised in the court of appeals.

3. Under Wis. Stat. § 346.88(3)(b), and its prohibition on items that "obstruct the driver's clear view," is the word "obstruct" ambiguous so that an officer could hold an objectively reasonable mistaken belief that it includes all items that come within the space of the windshield, regardless of whether they interfere with the driver's view?

   The court of appeals held, without elaboration, that the facts of this case didn't establish probable cause that Houghton was violating that statute.

4. If the Court applies the reasonable suspicion standard to this stop, should it adopt the State's request for a bright-line rule that officers always have reasonable suspicion that a driver is violating § 346.88(3)(b) when the officer observes more than one item visible within the space of the windshield?

   The court of appeals held that probable cause was required; thus, it didn't address arguments relating to the reasonable suspicion standard.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are appropriate regarding these constitutional issues.

ARGUMENT

In this case, the State asks the Court to overrule its precedents on two separate issues that both involve the seizure of citizens without warrants and without probable cause. The Court should adhere to its prior holdings. First, it should continue to hold that the reasonable suspicion standard, as an exception to the traditional probable cause standard that allows brief detention for the purpose of investigation, is limited to investigative stops. If the Court agrees, it doesn't need to address the remaining issues because the State hasn't argued that the stop at issue in this case was supported by probable cause.

Second, the Court should continue to hold that, under Article I, Section 11 of the Wisconsin Constitution, a lawful seizure cannot be predicated on an officer's mistake of law, because failure to understand the law by those who enforce it is not objectively reasonable. Third, even if the Court overrules itself on both of those issues, the mistake of law in this case wouldn't justify the stop because the mistake was not objectively reasonable. Finally, if the Court adopts the State's proposed expansion of the reasonable suspicion standard, it should still uphold the court of appeals decision because the facts are insufficient to establish reasonable suspicion that Houghton's GPS device and standard-size pine-tree air freshener obstructed his clear view through the windshield.

I. The Court should continue to distinguish between investigative stops, which require reasonable suspicion, and non-investigative stops, which require probable cause.

With limited exceptions, the traditional standard for warrantless seizures has been probable cause. *Dunaway v. New York*, 442 U.S. 200, 208 (1979). However, as an exception to the general requirement of probable cause, police can, though they have only a reasonable suspicion of criminal activity, stop a person in order to freeze the situation to allow for further investigation. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). This Court has distinguished these investigative stops, which require reasonable suspicion, from stops that are non-investigative, to which the normal probable cause standard applies. *State v. Popke*, 2009 WI 37, ¶¶ 10-11, 317 Wis. 2d 118, 765 N.W.2d 569; *State v. Longcore*, 226 Wis. 2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999).

The Court should continue that approach. First, because the lower reasonable suspicion standard finds its justification in the frequent need for police to freeze a situation while conducting further investigation, to use that standard when the stop is not investigatory would untether the exception from its justification. Second, on balance the rights of citizens to be free from these intrusions outweighs the government's interest in conducting non-investigatory stops on anything less than probable cause, in fact, the government has no legitimate interest in making that type of stop. Third, given the Court's preference for adhering to stare decisis, *see Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257, there is no reason to overrule *Popke* since there have been no major shifts in the law and the distinction between investigative and non-investigative stops is coherent and easy to grasp.

A. As a limited exception to the traditional probable cause standard, the reasonable suspicion standard must continue to be narrowly confined to its permissible purpose and the circumstances which justified it.

The reasonable suspicion standard for stops pursuant to *Terry* is just a narrow exception to the long-established probable cause standard. *Dunaway*, 442 U.S. at 208. The permissible purpose of such a stop, widely known as an investigative detention, is to investigate. *Terry*, 392 U.S. at 22. Thus, the reasonable suspicion standard applies to investigative stops, whereas non-investigative stops require probable cause. *See Popke*, 317 Wis. 2d 118, ¶¶ 10-13, 22-23 (applying probable cause standard to observed traffic violation and reasonable suspicion standard to legal but suspicious driving).

The traditional rule is that all seizures require probable cause. *Dunaway*, 442 U.S. at 208; *Florida v. Royer,* 460 U.S. 491, 499 (1983) ("*Terry* and its progeny nevertheless created only limited exceptions to the general rule that seizures of the person require probable cause to arrest."). That standard has deep roots in our history. *Henry v. United States*, 361 U.S. 98, 100 (1959). The Fourth Amendment is a product, in large part, of the colonist's hostility to seizures based on mere suspicion. *Id.* The probable cause standard "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule." *Dunaway*, 442 U.S. at 213.

The exception that permits brief investigative seizures on reasonable suspicion is narrowly confined to the circumstances that justified the exception in the first place. Those

circumstances, and the justification for the exception, were the frequent need for police, though lacking probable cause, to temporarily freeze a situation for further investigation aimed at confirming or dispelling their suspicions. *Terry,* 392 U.S. at 22 (stating that police may approach a person "for purposes of investigating possibly criminal behavior"); *State v. Guzy*, 139 Wis. 2d 663, 676, 407 N.W.2d 548 (1987) (justifying what the Court calls "investigative stops" by the need to temporarily freeze the situation to conduct that investigation). It follows then, that investigative detentions must in fact be investigative, i.e., there must be something to investigate. *Longcore*, 226 Wis. 2d at 8-9. To expand the exception beyond investigative stops would untether the exception from the circumstances that justified its adoption.

When an officer stops someone to write a ticket or to arrest based on a violation that the officer observes, there is no need for further investigation; thus, the normal probable cause standard applies. *Id. Longcore* applied the probable cause standard when an officer stopped a vehicle upon observing a plastic window covering, which the officer believed to be an equipment violation. *Id.* The court noted that this wasn't an investigative stop; the officer acted upon an observed violation rather than a suspicion that warranted further investigation. *Id.*

This Court makes the distinction between investigative and non-investigative stops. In *Popke*, an officer conducted a traffic stop after seeing a car cross the center line and repeatedly weave within its own lane. 317 Wis. 2d 118, ¶¶ 3-5. The Court judged the officer's suspicion of OWI under the reasonable suspicion standard, but it judged his observation of a left-of-center violation under the probable cause standard. *Id.*, ¶ 12, 22. Similarly, in *State v. Anagnos*, 2012 WI 64, 341 Wis. 2d 576, 815 N.W.2d 675,

the Court applied the probable cause standard to an officer's observation of a traffic violation, *id.*, ¶ 46, but upheld the stop based on the officer's reasonable suspicion of OWI, *id.*, ¶ 56. The Court made a similar distinction in *State v. Brown*, 2014 WI 69, ¶¶ 20-21, 355 Wis. 2d 668, 850 N.W.2d 66.

This distinction between investigative and non-investigative stops is easy for police to follow. If they have a suspicion that warrants further investigation, the reasonable suspicion standard applies. *Longcore*, 226 Wis. 2d at 8-9. If they're stopping just to ticket or arrest, probable cause is required. *Id.* This principle applies equally to stops on the sidewalk as to traffic stops; there is no reason to distinguish between traffic stops and stops in other circumstances. To treat traffic stops different from other stops would only create another set of rules for police officers and courts to interpret.

In addition, limiting the exception to investigative stops meshes with the requirement that investigative detentions last no longer than necessary to confirm or dispel the officer's suspicion. *See Royer*, 460 U.S. at 500. This requirement could never be fulfilled by an officer who will not conduct any further investigation. In sum, the reasonable suspicion standard only applies to investigative stops.

B. The right of citizens to be free from intrusion outweighs the State's non-existent interest in conducting non-investigative stops in the absence of probable cause.

The State asks the Court to abandon the distinction between investigative and non-investigative stops and establish a bright-line rule that reasonable suspicion justifies all traffic

stops. State's Brief at 12-13. Determining whether to expand an exception to the probable cause standard requires application of a balancing test. The balancing test weights the importance of the government interest involved against the nature and extent of the intrusion upon the individual's Fourth Amendment rights. *United States v. Place*, 462 U.S. 696, 704 (1983). On this issue, that balance supports the continued use of the probable cause standard for non-investigative stops.

When the facts don't add up to probable cause, and the police will make no further investigation, the State has no legitimate interest in making a stop. If the facts aren't sufficient to establish probable cause, they're also insufficient to establish guilt. If there is no further investigation, the person will not be convicted. The State has no legitimate interest in stopping people just to write citations that can't result in convictions.

Of course, those kinds of stops occasionally turn up evidence of other violations. But that is a byproduct rather than a legitimate goal to pursue. To say that the State has a legitimate interest in these stops is to condone seizures for offenses for which guilt can't be proven as a ruse to fish for evidence of other offenses.

Given the lack of legitimate State interest, even a minimal invasion of privacy and liberty is unjustifiable. Traffic stops are a "major interference in the lives of the [vehicle's] occupants." *Coolidge v. New Hampshire*, 403 U.S. 443, 479 (1971). They involve often unsettling shows of authority, restrict free movement, are inconvenient, consume time, and may create substantial anxiety, *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). Because the State has no legitimate interest in conducting non-investigative stops with less than probable cause, these intrusions aren't justified.

C. The doctrine of stare decisis further supports adherence to the *Popke* line of cases.

The most important reason to adhere to *Popke* is that the Court was right to distinguish between investigative and non-investigative stops. However, the importance of stare decisis reinforces the need to adhere to that precedent. The Court follows the doctrine of stare decisis scrupulously. *Johnson Controls,* 264 Wis. 2d 60, ¶ 94.

Departure from precedent demands special justification. *Id.* In *Johnson Controls,* the Court explained the demanding standards which may justify departing from precedent. *Id.*, ¶¶ 98-99. The State relies on two of those criteria. State's Brief at 6. It argues that the decisions have become detrimental to coherence and consistency in the law, and that the decisions are unworkable in practice. *Id.*

As to the first of those criteria, it is hard to see how the Court's 2009 decision in *Popke* has created incoherence or inconsistency. *Popke* is entirely consistent with the Supreme Court's statement that probable cause is the normal standard for traffic stops, *Whren v. United States*, 517 U.S. 806, 810 (1996). It's also consistent with the probable cause standard that is generally the minimum requirement for warrantless seizures and searches in other contexts. *Dunaway*, 442 U.S. at 208.

Moreover, the *Popke* approach is eminently workable. The simple distinction is between investigative and non-investigative stops. And it has the benefit of being equally applicable in all contexts. By contrast, the State's approach creates more confusion by carving out a different set of rules for traffic stops. Therefore, the Court should decline to overrule *Popke* and its

progeny, and should hold that probable cause is required for non-investigative stops regardless of whether the person seized is in traffic.

II. The Court should adhere to its recent holding that Article I, Section 11 of the Wisconsin Constitution prohibits stops based on an officer's errant interpretation of a statute.

Less than one year ago this Court joined the overwhelming majority of courts that have held that a lawful stop cannot be predicated on a mistake of law. *State v. Brown*, 2014 WI 69, ¶¶ 22-25, 355 Wis. 2d 668, 850 N.W.2d 66. Shortly thereafter, the United States Supreme Court departed from this consensus by holding that, under the Fourth Amendment, an officer's "objectively reasonable" mistake of law can give rise to the reasonable suspicion necessary to conduct a traffic stop. *Heien v. North Carolina*, 135 S.Ct. 530 (2014). This Court's holding in *Brown* is correct, and it should adhere to its interpretation of Article I, Section 11 of the Wisconsin Constitution.

First, *Brown* is in line with over a century of intolerance to police mistakes about the laws they enforce. Second, it is reasonable to expect that officers, in combination with their employers and other law enforcement entities, will ensure that the officers understand the law. Third, authorizing these stops would give police unfettered discretion to seize innocent citizens. Fourth, there is a reduced need to adhere to Fourth Amendment jurisprudence on this unique issue because, unlike most other Fourth Amendment rulings, *Heien* presents a standard by which to judge officer mistakes rather than a standard to guide their conduct.

A. *Brown* is backed by a long tradition of prohibiting stops based on an officer's misinterpretation of the law.

Brown accords not only with most modern courts, but also with over a century of intolerance to police mistakes of law. Under the common law, no right was "more carefully guarded…than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, *unless by clear and unquestionable authority of law*." *Terry v. Ohio*, 392 U.S. at 9 (emphasis added) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891). Thus, although the common law excused seizures based on an officer's reasonable mistake of fact, it held officers liable for seizures based on mistakes of law.

The first Restatement of Torts summarized the rule: "an officer is not privileged to arrest another whom he reasonably suspects of having committed an act which the officer, through a mistake of law reasonable in one of his position, believes to be a common law felony." Restatement of Torts § 121 cmt. i (1934). The common law rejected any exception for cases involving an ambiguous statute even when courts interpreted the law contrary to the officer's view only after the seizure. *Id.* In an example of the common law's intolerance for such seizures, the Michigan Supreme Court said "an officer of justice is bound to know what the law is, and if the facts on which he proceeds, if true, would not justify action under the law, he is a wrong-doer." *Malcolmson v. Scott*, 23 N.W. 166 (Mich. 1885). English common law also forbade officers from making arrests based on mistakes of law. *See, e.g., Carratt v. Morley*, (1841), 113 Eng. Rep. 1036 (holding an officer liable for arrest based on a mistake regarding jurisdiction).

That remains the consensus among modern courts. As this Court noted in *Brown*, that a stop can't be predicated on an officer's mistake of law is the view of an overwhelming majority of courts. *Brown*, 355 Wis. 2d 668, ¶¶ 23-25 (listing the federal and state courts in this majority). *But see id.*, ¶ 23 n. 10 and ¶ 25 n. 11 (listing the three federal circuit courts and five state courts in the minority). In sum, *Brown* is supported by both historical and modern consensus regarding whether citizens can lawfully be subjected to seizures based on an officer's mistake of law.

B. It is reasonable to expect that officers and the law enforcement system will ensure that officers understand the laws that they enforce.

The Court's reasoning in *Brown* is equally valid today. The standard for investigative stops is objectively reasonable suspicion. *Brown*, 355 Wis. 2d 668, ¶ 24. Failure to understand the law by those who enforce it is not objectively reasonable. *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005). Police departments, and the entire law enforcement system, have a duty to ensure that officers understand the laws they enforce. *See Brown*, 355 Wis. 2d 669, ¶ 24. Overruling *Brown* would remove their incentive to do so.

It's reasonable to expect that officers know the laws they enforce. *Tibbetts*, 396 F.3d at 1138 ("[F]ailure to understand the law by the very person charged with enforcing it is not objectively reasonable."); *see also Brown*, 355 Wis. 2d 668, ¶ 24 ("An officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable cause are not prohibited by law.") (quoting *United States v. McDonald*, 453 F.3d 958, 961 (7th Cir. 2006)). Those that excuse these stops argue that the law is too complex for officers to master, *see, e.g., United States v. Sanders*, 196 F.3d 910, 913 (8th

Cir. 1999), but this "rests on the unacceptable premise that those entrusted to enforce the law need not know and follow its actual proscriptions." Wayne A. Logan, *Police Mistakes of Law*, 61 Emory L.J. 69, 106 (2011). Additionally, officers don't act as individual entities; they are employed by police departments and are part of the law enforcement system that includes their departments, the Department of Justice, the State Patrol, district attorneys, and other law enforcement entities. So they aren't expected to interpret the law by themselves.

It's reasonable to expect that those agencies will ensure that their officers thoroughly understand the laws they enforce. This Court's holding in *Brown* gives them an incentive to provide the necessary training. *See Brown*, 355 Wis. 2d 668, ¶ 24 (citing Logan, *supra* at 106 ("there has been no mistaking that the specter of [the exclusionary rule's] application has prompted police departments to significantly fortify and improve their training efforts relative to Fourth Amendment expectations."). In sum, an officer's mistake of law is unreasonable because society justifiably demands that officers understand the laws they enforce.

C. Permitting stops based on officers' mistakes of law leaves citizens vulnerable to unfettered police discretion.

Article I, Section 11 serves as a constraint on law enforcement's discretion in order to protect people from arbitrary invasions. *State v. Post*, 2007 WI 60, ¶ 21, 301 Wis. 2d 1, 733 N.W.2d 634. Thus, the reasonableness of a stop is not dependent on the officer's subjective beliefs; instead, it depends on whether the objective facts support a suspicion under the correct legal interpretation of the statute at issue. *State v. Baudhuin*, 141 Wis. 2d 642, 651, 416 N.W.2d 60 (1987). In contrast, relying on an officer's subjective belief about the law leads to arbitrary stops.

Heien makes it almost impossible for citizens to shield themselves from stops even when their conduct is wholly innocent. Under that holding, citizens who want to avoid stops would have to obey not just their legal obligations, they also would have to predict and avoid a sphere of wholly innocent conduct that an officer could reasonably believe is prohibited. Compared to what the law actually prohibits, the scope of conduct prohibited under "reasonable" misinterpretations would be broader.

In some cases, officers could stop a person no matter what the person does. For example, in *McDonald*, a driver was stopped after activating a turn signal at a ninety-degree curve in the road where the road changed names. 453 F.3d 958. The traffic law didn't clearly specify whether using a signal was necessary or even permitted. *Id.* at 960-61. A lower court found that the officer's belief that the law prohibited signaling in that situation was reasonable. *Id.* at 960. Yet, if the defendant hadn't signaled, an officer might have reasonably believed that a ninety-degree curve onto a road with a different name required a signal.

And, if reasonable mistakes can establish probable cause, the situation for innocent citizens is even more perilous. When probable cause exists, a suspect can lawfully face much more significant intrusions. Innocent citizens who engage in conduct that falls within the scope of a reasonable misinterpretation of the law could legally be subjected to invasive searches and arrests.

In addition, these intrusions would be recurring, because allowing such stops would delay clarification of our laws. *Heien*, 135 S.Ct. at 544 (Sotomayor, J. dissenting). As long as the officer's interpretation was reasonable, courts wouldn't need to interpret the statutory language. *Id.* Under *Heien*, that officer, having not been disabused of the "reasonable" misinterpretation, could continue using that misinterpretation to stop more citizens.

D. This issue presents a unique circumstance in which there is little need for uniformity between Art. I., Sec. 11 and the Fourth Amendment.

The Court shouldn't reverse its interpretation of Article I, Section 11 less than a year after *Brown* just because the United States Supreme Court, interpreting the Fourth Amendment, reached a different conclusion. Although this Court generally interprets the Wisconsin provision consistent with the Supreme Court's Fourth Amendment holdings, *State v. Eason*, 2001 WI 98, ¶ 17 n. 6, 245 Wis. 2d 206, 629 N.W.2d 625, it doesn't do so automatically, *see id.*, ¶ 60 (adopting higher standards for application of the exclusionary rule than the Fourth Amendment requires). The Court's general preference for interpreting the provisions coextensively rests on two grounds; first, they contain nearly identical language, and second, the need for uniform standards to guide police. *Id.*, ¶ 47. Obviously, the language of Article I, Section 11 hasn't changed since *Brown.* In addition, this is a unique issue wherein the normal need for uniformity is inapplicable.

There is no need to give police uniform standards regarding their mistakes of law. Officers can't plan to make mistakes of law. They don't need advanced guidance or training on how to misinterpret the law without running afoul of the constitution. They don't need to participate in national conferences or share information on how to do that. If the Court adheres to *Brown*, nothing would change for Wisconsin officers. And nothing would change for Wisconsin courts. Because the need for uniformity is absent, the Court should feel free to interpret the Wisconsin Constitution to provide more protection than the Fourth Amendment.

The Court has done that on several occasions. In *Hoyer v. State*, 180 Wis. 2d 407, 193 N.W. 89 (1923), it adopted the exclusionary rule nearly forty years before the Supreme Court applied that rule to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). And in *Eason*, the Court added two requirements for invoking the good faith exception to the exclusionary rule beyond those required by the Fourth Amendment. 245 Wis. 2d 206, ¶ 63. The Court has also interpreted other constitutional provisions to provide greater protections than their federal counterparts. *See, e.g., State v. Klessig*, 211 Wis. 2d 194, ¶ 23, 564 N.W.2d 716 (1997) (adopting a higher standard for finding a valid waiver of the right to counsel under Article I, Sec. 7, than applies under the Sixth Amendment).

In sum, the Court's reasoning in *Brown* is sound, it remains aligned with the overwhelming majority of courts, and there is an unusually minimal need for uniformity. In these circumstances, the Court has demonstrated that it will not be "bound by the minimums which are imposed by the Supreme Court of the United States if it is the judgment of this court that the Constitution of Wisconsin and the laws of this state require that greater protection be afforded." *State v. Doe*, 78 Wis. 2d 161, 172, 254 N.W.2d 210 (1977). Therefore, the Court should hold that, under Article I, Section 11, a stop is not objectively reasonable if it is based on an officer's mistake of law.

III. Any mistake of law regarding Wis. Stat. § 346.88(3)(b) was not objectively reasonable.

This isn't one of the "exceedingly rare" cases in which an officer's mistake of law was reasonable. *See Heien,* 135 S.Ct. at 541 (Kagan, J., concurring). The statute clearly and unambiguously prohibits items that "obstruct" a driver's clear view. *See* Wis. Stat. § 346.88(3)(b). Obstruct means more than just in the driver's field of view or within the space of the windshield, it means the item prevents or makes it more difficult for the driver to see. If the officer thought a violation required anything less than that, the mistake was not objectively reasonable.

A. Under Wis. Stat. § 346.88(3)(b), the term "obstruct" as used in the phrase "obstruct the driver's clear view" means to prevent or make it more difficult for the driver to see things through the windshield.

The issue is whether all items that can come within the glass space of the windshield obstruct that vision or just those that actually make it more difficult for a driver to utilize the function of the windshield. The State assumes that all items within a driver's field of vision obstruct that vision, State's Brief at 7-8 and 14-15[1], but "obstruct" means something more. In §

[1] The State misinterprets the court of appeals' ruling when it says that the court found that the GPS and air freshener "did not obstruct the view *enough* to establish a violation." State's Brief at 14-15. The court made no statement that a certain level of obstruction is required. *State v. Houghton*, No. 2013AP1581-CR, slip op. ¶ 10. It merely said there was not probable cause to conclude a violation had occurred. *Id.* The most reasonable reading is that the court found the State didn't prove the facts necessary to establish probable cause that the items obstructed Houghton's view *at all*. *See id.*

346.88(3)(b), "obstruct" means to prevent or make it more difficult for a driver to see things through the windshield.

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. Statutory language "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* Further, the language is interpreted in the context in which it is used, "in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*, ¶ 46. "Obstruct" is not defined in the traffic code, so the Court should give the term its common, ordinary, and accepted meaning. *Id.*, ¶ 45. The Court can consult a dictionary to determine the ordinary meaning of undefined words. *Brown*, 355 Wis. 2d 668, ¶ 28.

The ordinary meaning of obstruct is to prevent or make more difficult. One common dictionary defines obstruct as to "impede, retard, or interfere with; hinder. AMERICAN HERITAGE COLLEGE DICTIONARY 942 (3d ed. 1993). When "obstruct" has appeared in other statutes, courts have reached nearly identical definitions. For example, obstructing an officer under Wis. Stat. § 946.41(1) means to make more difficult the performance of the officer's duties. *State v. Caldwell*, 154 Wis. 2d 683, 690-91, 454 N.W.2d 13 (Ct. App. 1990); WIS JI-CRIMINAL 1766 (2010) (stating that obstruct means to "hinder, delay, impede, frustrate, or prevent"). Similarly, in prosecutions for obstructing a game warden under Wis. Stat. § 29.951, obstruct means to impede, retard, interfere with, or hinder. *State v. Dearborn*, 2008 WI App 131, ¶¶ 27-28, 313 Wis. 2d 767, 758 N.W.2d 463. In accord with these definitions, a person violates §

346.88(3)(b) by placing an item that makes it more difficult for the driver to see things through the windshield.

B. If the officer believed that § 346.88(3)(b) prohibits all items that come within the driver's field of vision, that mistake was not objectively reasonable.

Section 346.88(3)(b) clearly prohibits placing items that make it more difficult for a driver to see things outside through the windshield. The officer never said what he believed "obstruct" means, (24:5-15). But there is no objectively reasonable mistake to be made regarding this statute. It unambiguously prohibits items that make it more difficult for a driver to see the things a driver looks at through the windshield. If the officer believed that any item within the driver's field of vision when looking out the windshield is an obstruction, that belief was not objectively reasonable.

Mistakes of law that are objectively reasonable are "exceedingly rare." *Heien*, 135 S.Ct. at 541 (Kagan, J., concurring). "Objectively reasonable," according to the State's proposed standard, State's Brief at 22, means a mistake regarding a statute whose meaning is "genuinely ambiguous." *Id.* (quoting *Heien*, 135 S.Ct. at 541 (Kagan, J., concurring). This Court provided a test for ambiguity in *Kalal*:

> [A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses. Mere disagreement is not enough, the test for ambiguity examines the language of the statute to determine whether well-informed persons *should have* become confused, that is, whether the statutory ... language *reasonably* gives rise to different meanings. Statutory

> interpretation involves the ascertainment of meaning, not a search for ambiguity.

Kalal, 271 Wis. 2d 633, ¶ 47 (internal citations and quotation marks omitted).

The statute is not ambiguous. "Obstruct" is defined by its ordinary meaning, that being to prevent or make more difficult. If the officer defined obstruction as any item within the driver's field of vision, or any item within the glass space, his belief was not reasonable.

IV. There was neither reasonable suspicion nor probable cause to believe that either item made it more difficult for Houghton to see things through his windshield.

In the circuit court, the burden of proving that the stop met the constitutional reasonableness standard fell on the State. *Brown*, 355 Wis. 2d 668, ¶ 20. Probable cause exists when an officer has reasonable grounds to believe that a person is committing or has committed a violation. *Id.* The State hasn't argued that the facts meet this standard. Under the reasonable suspicion standard, the question is "whether 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." *State v. Post*, 2007 WI 60, ¶ 13, 301 Wis. 2d 1, 733 N.W.2d 634.

The State's argument relies on its request for a bright-line rule that an officer's observation of multiple items visible within the space of the front windshield automatically establishes reasonable suspicion. State's Brief at 23-24. The Court should reject that request and continue to evaluate reasonable suspicion

based on the totality of the circumstances present in each case. *See Post*, ¶¶ 18-21 (rejecting the State's request for a rule that repeated weaving within a single lane establishes reasonable suspicion of OWI). Again the State errantly equates items within the space of the windshield with obstructions. In addition, it's easy to imagine items that probably wouldn't obstruct a driver's view: a small rosary, a sun visor, the rearview mirror itself, the small mirror that parents use to see infants in the back seats, a compass on the dashboard, and an officer's radar gun mounted to the dashboard.

In this case, the officer observed Houghton's vehicle from the front as it approached. (24:6). He saw a three-inch tall, five-inch wide GPS device in the lower-left corner of the windshield, and a standard-size pine-tree air freshener hanging by a string from the rearview mirror. (24:6, 10-13). The air freshener was three inches wide, and its bottom was about six or seven inches below the rearview mirror. (24:6). The State didn't clarify the height of the air freshener itself, just the total length including the string. (24:11).

The State failed to establish that either item was of the size or placement that could reasonably cause an obstruction. It didn't even establish that the items were at or near Houghton's eye level. The GPS in the lower corner of the windshield and air freshener about six inches below the rearview mirror were likely below Houghton's eyes.

Moreover, Wis. Stat. § 346.89(6) specifically permits a driver to directly observe a GPS device while driving a vehicle. In addition, the officer saw that both items were small. The GPS device was about fifteen square inches, the same size that the legislature allows for state issued stickers, Wis. Stat. §

346.88(3)(a). Obviously items of that size aren't necessarily an obstruction; to think otherwise is to assume the legislature would tolerate some danger to those on the road just to make it convenient to display state park stickers. That small item, along with an air freshener at least as small, were on opposite sides of Houghton, so there wouldn't be a cumulative effect.

In addition, the Court can use common sense and its own experiences to determine whether a small GPS or standard pine-tree air freshener would obstruct a driver's view. As the circuit court said "there must be a zillion cars driving around with air fresheners and not many of them would get stopped." (24:25). Pine-tree air fresheners are sold at most gas stations, so presumably everyone has been in a car with one. And GPS devices are equally common. If items like this were obstructing driver's views, and thereby endangering everyone's safety, it's unfathomable that most police would ignore the hazard. In sum, the facts don't establish that a reasonable police officer would suspect that either item made it more difficult for Houghton to see things through the windshield.

CONCLUSION

For these reasons, Houghton requests that the Court affirm the court of appeals decision that reversed the circuit court judgment of conviction.

Dated this 2nd day of March, 2015.

_____

Andrew R. Walter
Attorney for the Defendant-Appellant
State Bar No. 1054162

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 5,543 words.

Dated this 2nd day of March, 2015.

_____

Andrew R. Walter
Attorney for the Defendant-Appellant
State Bar No. 1054162

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 2nd day of March, 2015.

_____

Andrew R. Walter
Attorney for the Defendant-Appellant
State Bar No. 1054162