STATE OF WISCONSIN

IN SUPREME COURT

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 CIRCUIT COURT FOR WALWORTH COUNTY, JOHN R. RACE, JUDGE.

REPLY BRIEF OF THE PLAINTIFF-RESPONDENT-PETITIONER

BRAD D. SCHIMEL
Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

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ARGUMENT

While Houghton has restated and renumbered the issues presented for review (Houghton's Br. at 1-2), the State will address the issues as presented in the petition for review that was accepted by this Court.

I. Wisconsin Stat. § 346.88(3)(b) prohibits any obstruction to the driver's clear view through the front windshield.

Houghton argues that a person violates Wis. Stat. § 346.88(3)(b) "by placing an item that makes it more difficult for the driver to see things through the windshield." (Houghton's Br. at 18-19). The State agrees. Placing an opaque item, such as a GPS device or air freshener within the area of the windshield, by the definition of opaque, obstructs the driver's clear view through the front windshield because it makes it impossible for the driver to see through that portion of the windshield. The area of view that an object cannot obstruct is the clear view through the windshield, not just the driver's immediate or normal field of vision. However, in this case, the GPS device was in the driver's field of vision (24:25; Pet-Ap. 130). Therefore, under the plain language of the statute, it was reasonable for the officer to stop Houghton's vehicle.

By way of example, a Virginia court reasoned that it was illogical to read Virginia's statute as prohibiting "a dangling object from obstructing a driver's view of the pavement directly in front him but not a vehicle, bicyclist, or pedestrian . . . ." *Mason v. Commonwealth*, 767 S.E.2d 726, 733 (Va. App. 2015). Virginia's statute differs slightly from Wisconsin's and is narrowed by the addition of "of the highway" after the words "clear view." VA Code Ann. § 46.2–1054. However, the same principle applies. Like the parking placard at issue in *Mason*, the GPS and the air freshener in this case would amount to an obstruction. Contrary to Houghton's assertion, it does not matter if the obstruction was at eye level or within the driver's immediate field of vision (Houghton's Br. at 21). As the Virginia court explained:

> Several scenarios illustrate why. . . . The parking pass could be at an angle that might partially block a driver's clear view of a vehicle ahead and to the right of him. If that vehicle put on its left-turn signal, for example, the driver with the parking pass might not see it at all—particularly when the vehicle is merging into highway traffic from an on-ramp. If a driver simply wanted to make a right turn at an intersection, the parking pass could partially obscure his field of vision. . . . Consider, too, highway signs

> that are often placed overhead and on the right shoulder of the highway. A person of any height could have his clear view of highway signs partially obstructed by the parking pass, especially during nighttime driving.

Mason, 767 S.E.2d at 733.

Further, unlike some states, Wisconsin does not require that the driver's clear view be materially obstructed. *See, e.g.*, *Commonwealth v. Holmes*, 14 A.3d 89, 98-99 (Pa. 2011) (It is not illegal in Pennsylvania to place items within the space of the front windshield because it would not materially obstruct the driver's view. However, if the statute prohibited any obstruction, the officer's testimony that he observed an object hanging from a rearview mirror may be enough to support a traffic stop.). Therefore, small items placed within the space of the front windshield would violate Wis. Stat. § 346.88(3)(b). This is supported by the fact that the Legislature specifically exempted "a certificate or other sticker issued by order of a governmental agency" from Wis. Stat. § 346.88(3)(a). If small items did not violate the statute, as Houghton contends (Houghton's Br. at 21-22), then the language establishing that exemption would be completely superfluous. Such an interpretation is contrary to the plain language of the statute and contrary to cannons of statutory construction. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.") (citation omitted).

The State acknowledges the plain language of the Wis. Stat. § 346.88(3)(b) may subject "zillions" of vehicles to valid traffic stops, but that does not mean that an officer cannot stop a vehicle for an observed violation of Wis. Stat. § 346.88(3)(b). *Whren v. United States*, 517 U.S. 806, 818-19 (1996) (the fact that the vast majority of people could be subjected to a valid traffic stop is not a basis upon which a court could conclude that a particular stop was unreasonable). In this case, the court of appeals went beyond the plain language of the statute to invalidate the stop. The officer had probable cause to believe that Houghton was violating Wis. Stat. § 346.88(3)(b) because the officer plainly observed an air freshener and GPS unit obstructing Houghton's clear view through the front windshield

(24:6; Pet-Ap. 111). As such, the court of appeals' decision should be reversed and this court should affirm the judgment of conviction and order denying suppression.[1]

II. The reasonable suspicion standard is the appropriate standard to apply when evaluating the reasonableness of a traffic stop.

Houghton argues, relying on *Terry v. Ohio*, 392 U.S. 1 (1968), that the reasonable suspicion standard should not apply to all traffic stops because the reasonable suspicion standard is aimed at confirming or dispelling suspicions (Houghton's Br. at 6). While we all think of *Terry* as authorizing investigatory stops on less than probable cause, *Terry* states a proposition of law that goes beyond the limited facts of that case. The court in *Terry* concluded that when the Warrant Clause of the Fourth Amendment is not implicated, the conduct in question "must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Terry*, 392 U.S. at 20. That inquiry, the reasonableness inquiry, focuses on weighing "the governmental interest which allegedly justifies official intrusion against the invasion of the constitutionally protected interests of the private citizen." *Terry*, 392 U.S. at 21-22 (internal quotation marks omitted). *Terry* clearly authorizes investigatory stops conducted on reasonable suspicion not because reasonable suspicion is only applicable to investigatory stops; rather, because the facts of *Terry* included investigation of a crime as the government's interest to be weighed against the invasion at issue. *Id.* at 22-23.

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[1] Houghton contend that the "State hasn't argued that the facts meet" the probable cause standard (Houghton's Br. at 20). The first issue addressed in the State's opening brief is exactly that. The State asked this Court to reverse the court of appeals' decision because the court of appeals went beyond the plain language of the statute to invalidate the stop (Pet'r's Br. at 8). In other words – reverse the court of appeals' decision because the court of appeals went beyond the plain language of the statute to find that probable cause did not exist.

Probable cause is typically the standard that we associate with arrest, or seizures similar to arrest. Arrests have been continuously distinguished from other seizures, including traffic stops resulting in citations. *See, e.g., Knowles v. Iowa*, 525 U.S. 113, 116-18 (1998). Because a traffic stop is not an arrest or equivalent to arrest, determining whether a traffic stop is reasonable when supported by less than probable cause must focus on the balancing of the government's interest against the intrusion.

Houghton submits that the only government interest involved in conducting a traffic stop when the officer suspects, but does not have probable cause to believe that a traffic violation has occurred, is that the stop may allow the officer to investigate other crimes (Houghton's Br. at 8). That is untrue. Houghton does not address the State's argument that traffic laws are designed and implemented to ensure safety. "Public safety and the protection of human life is a state interest of the highest order." *State v. Miller*, 196 Wis. 2d 238, 249, 538 N.W.2d 573 (Ct. App. 1995). Further, a traffic stop is generally thought of as only a modest intrusion on the detainee's Fourth Amendment rights. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975). "The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect." *Florida v. Royer*, 460 U.S. 491, 500 (1983). That predicate is satisfied in the context of traffic stops. While the "investigatory" function underlying *Terry* may be absent in some cases, a traffic stop – like a *Terry* stop – is a relatively brief and minimal intrusion. That brief and minimal intrusion is outweighed by the government's interest in ensuring the safety of our roadways and of the public generally.

Houghton also argues that there is no need for one standard by which to judge traffic stops because the reasonable suspicion / probable cause dichotomy applies in other contexts, such as an officer stopping an individual on the sidewalk (Houghton's Br. at 7). That assertion is without any legal authority, likely because there is none. Regardless, traffic stops are inherently different from encounters on a sidewalk. Unlike initiating a traffic stop, an officer is able to approach an individual on a sidewalk whenever the officer pleases so long as the encounter is consensual. *See generally, United*

States v. Drayton, 536 U.S. 194 (2002); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *United States v. Mendenhall*, 446 U.S. 544 (1980); *State v. Goyer*, 157 Wis. 2d 532, 460 N.W.2d 424 (Ct. App. 1990). When a moving vehicle is involved, it is near impossible for an officer to initiate a consensual encounter from the first contact with the citizen. Beyond consensual encounters, there are two other types of encounters between officers and citizens on the sidewalk: arrests and seizures not amounting to arrest. *State v. Young*, 2006 WI 98, ¶¶ 20-22, 294 Wis. 2d 1, 717 N.W.2d 729. The State can think of no situation in which an officer would need probable cause to approach an individual on the sidewalk unless the officer was going to arrest that individual.

Clarifying that reasonable suspicion applies to all traffic stops will eliminate confusion, because it will not always be clear what an "investigatable" traffic violation is. This case is the perfect example of that. Houghton argues that the "State failed to establish that either item was of the size or placement that could reasonably cause an obstruction" (Houghton's Br. at 21). If, for the sake of argument, Houghton's interpretation of Wis. Stat. § 346.88(3)(b) is accepted, when an officer observes a vehicle with items within the space of the windshield, it would be necessary for the officer to stop the vehicle to investigate whether the items actually obstructed that particular driver's view. *See, e.g., United States v. Callarman*, 273 F.3d 1284, 1286-87 (10th Cir. 2001). An officer would not be able to make that determination without stopping the vehicle and investigating. *See State v. Moreno*, 340 P.3d 426 (Ariz. Ct. App. 2014) (when a violation cannot be confirmed until the vehicle is stopped, the officer does not need to observe an excessive infraction or leave leeway for the possibility that a violation may not have actually occurred).

This is further supported by Houghton's contention that Wis. Stat. § 346.89(6) permitted him to directly observe a GPS device while driving (Houghton's Br. at 21). Wisconsin Stat. § 346.89 is the inattentive driving statute. Sections 346.89(5) and (6) allow a driver to directly observe, meaning to directly view a GPS device. The statute does not, however, permit placing a GPS device within the space of the windshield because there is no exception to Wis. Stat. § 346.88 found in Wis. Stat. § 346.89. Moreover, when an officer

observes what appears to be an electronic device that a driver can directly observe, it would be necessary for the officer to stop the vehicle to investigate whether the device was a GPS device and not a cell phone or other electronic device being used for a purpose unrelated to the "operation, navigation, condition, radio, or safety of the vehicle . . ." Wis. Stat. § 346.89(6)(b). It would be impossible to determine as much without investigating.

The fact that attorneys and courts do not agree as to what traffic offenses are investigatory speaks to the need for one standard. As Fourth Amendment jurisprudence has developed, it is becoming increasingly apparent that traffic stops are more akin to *Terry* stops, and therefore, the reasonableness of a traffic stop should rest on whether the officer had a reasonable and articulable suspicion that a traffic or criminal violation has been or will be committed.

III. This Court should adopt the Supreme Court's interpretation of the Fourth Amendment found in *Heien v. North Carolina* and conclude that the officer's belief that Wis. Stat. § 346.88(3)(b) prohibits any obstruction to the driver's clear view was objectively reasonable.

Houghton urges this Court to reject the Supreme Court's interpretation of the Fourth Amendment in *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (Houghton's Br. at 10-16). He asserts that if Wisconsin adopts the Supreme Court's interpretation, citizens will be subjected to unfettered police contact (Houghton's Br. at 13-14). Contrary to Houghton's assertion, *Heien* does not make it "almost impossible for citizens to shield themselves from stops even when their conduct is wholly innocent." (Houghton's Br. at 14). Rather *Heien* recognizes that when, due to ambiguity in the law, it is reasonable for an officer to mistake innocent conduct for illegal conduct, then that mistake is not fatal to the inquiry of whether the officer's actions were reasonable under the Fourth Amendment.

If reasonableness is the hallmark of the Fourth Amendment, then there is no basis to demand that an officer always interpret the law flawlessly. *Heien*, 135 S. Ct. at 539. That, however, does not mean that "an officer can gain . . . advantage through a sloppy study of the

laws he is duty-bound to enforce." *Id*. at 539-40. Officers will still be duly trained on the law. Under *Heien* there is no incentive to not know the law. *Id*. And while Houghton is correct that "society justifiably demands that officers understand the laws they enforce" (Houghton's Br. at 13); when there is more than one reasonable interpretation of the law, it is not justifiable for society to demand that officers foresee what interpretation will be adopted by the courts. Law enforcement officers are not psychics and they are not legal technicians that can reasonably predict how a court will subsequently interpret a statute. *State v. Brown*, 2014 WI 69, ¶¶ 101-03, 355 Wis. 2d 668, 850 N.W.2d 66. If a court later interprets the law in question to mean something else, so long as the officer's interpretation was reasonable, suppression of evidence obtained from the stop is not warranted. *See, e.g., State v. Heien*, 737 S.E.2d 351, 357 (S.C. 2012) ("A *post hoc* judicial interpretation of a substantive traffic law does not determine the reasonableness of a previous traffic stop within the meaning of the state and federal constitutions.").

Houghton argues that "*Heien* presents a standard by which to judge officer mistakes rather than a standard to guide their conduct." (Houghton's Br. at 10, 15-16). The State is unclear what Houghton means by that, but it appears that Houghton is arguing that if this Court adopts the Supreme Court's interpretation of the Fourth Amendment as allowing reasonable mistakes of law, the State will train officers on how to reasonably misinterpret the law (Houghton's Br. at 15). That is an incredibly bold and misguided assertion. "A court tasked with deciding whether an officer's mistake of law can support a seizure [ ] faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake." *Heien*, 135 S. Ct. at 541 (Kagan, J. concurring). The officer's subjective understanding is not at issue. *Heien*, 135 S. Ct. at 539 (citing *Whren*, 517 U.S. at 813). The State would never train or promote misinterpretations of the law, nor would adopting the Supreme Court's conclusion in *Heien* promote such a practice.

In the case at hand, if this Court concludes that Wis. Stat. § 346.88(3)(b) requires a particular degree of obstruction, or that obstruction must be in the driver's immediate field of vision,[2] then the Court must conclude that the statute is ambiguous because its plain language contains neither requirement. Wisconsin Stat. § 346.88(3)(b) reads "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 statute does not require that the obstruction be material or substantial, nor does the statute require that the obstruction must be to a particular area of the windshield. Rather the language requires no obstruction to the driver's clear view. Therefore, when the officer encountered Houghton's vehicle with multiple items visible within the space of the front windshield, it was objectively reasonable for the officer to reasonably suspect that Wis. Stat. § 346.88(3)(b) had been violated.

When an officer's interpretation of a traffic law, especially one concerned with safety, is reasonable and that reasonable interpretation leads the officer to believe that a violation has occurred, then it is reasonable to stop the vehicle. *Heien*, 135 S. Ct. at 539-40. As such, even if this Court concludes that the officer stopped Houghton's vehicle based on a mistaken interpretation of Wis. Stat. § 346.88(3)(b), the circuit court's order denying Houghton's suppression motion and Houghton's judgment of conviction should be affirmed.

[2] Again, in this case, the GPS device was in the driver's field of vision (24:25; Pet-Ap. 130).

CONCLUSION

For the reasons stated above, and the reasons presented in the State's brief-in-chief, the State respectfully requests that this Court reverse the court of appeals decision and affirm the judgment of conviction and order denying suppression.

Dated this 17th day of March, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

TIFFANY M. WINTER
Assistant Attorney General
State Bar #1065853

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
(608) 266-9594 (Fax)
wintertm@doj.state.wi.us

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 2,999 words.

Dated this 17th day of March, 2015.

_____

Tiffany M. Winter
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 17th day of March, 2015.

_____

Tiffany M. Winter
Assistant Attorney General