STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff/Appellant,

v.

DANIEL S. IVERSON,

Defendant/Respondent.

Case No.: 2014AP515-FT

BRIEF OF RESPONDENT DANIEL S. IVERSON

ON APPEAL FROM AN ORDER GRANTING DANIEL S. IVERSON'S MOTION TO SUPPRESS AND FOR DISMISSAL ENTERED IN THE CIRCUIT COURT FOR LA CROSSE COUNTY, THE HONORABLE RAMONA A. GONZALEZ PRESIDING

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ISSUES PRESENTED

Did the circuit court correctly conclude that a cigarette butt thrown by a passenger in Daniel Iverson's vehicle did not provide reasonable suspicion or probable cause under the Wisconsin and U.S. Constitutions so as to justify stopping his vehicle?

Pursuant to its independent authority under Article I, section 11 of the Wisconsin Constitution, should Wisconsin adopt the rule articulated in *State v. Ladson*, 138 Wash. 2d 343, 979 P.2d 833 (Wash. 1999), and forbid the use of a pretext as a justification for a warrantless search or seizure even if there is a cause for a forfeiture or ordinance articulated?

STATEMENT OF FACTS

Daniel S. Iverson does not take issue generally with the Statement of Facts set forth in the State's brief-in-chief. However, certain additional facts should be provided to the court.

First, at the motion hearing, Trooper Larsen testified as follows with regard to his basis for the stop:

> Q Okay, (Pause.) With the exception of the tossing of the cigarette by the passenger you hadn't any intention of pulling over the vehicle at that time, right?
>
> A Ah, prior to the cigarette butt being thrown out of the vehicle, um, I didn't feel at that point before that I had the reasonable suspicion to initiate a traffic stop on it. I was gonna continue to follow the vehicle to observe more information.

(12:4; A-Ap. 114).

Prior to the tossing of the cigarette by the passenger, Trooper Larsen had not witnessed any unlawful activity by the vehicle or its driver and passengers. He had merely observed the vehicle drift within its own lane, "No, he did not go over the center lane (sic). He just drifted." (12:4; A-Ap. 112). Furthermore, Trooper Larsen did not observe the Iverson vehicle enter a fog line area or curb and gutter area on the right-hand side of the roadway. (12:4; A-Ap. 112). He observed the Iverson vehicle stop at two yellow flashing lights and then after about a block or so, the passenger threw a cigarette butt out of the passenger side of the vehicle. (12:4; A-Ap.

112-13). The Iverson vehicle appropriately signaled and changed lanes post-cigarette toss and did not speed. (12:4; A-Ap. 113).

Finally, there was uncontroverted evidence before the circuit court that citations for tossing cigarette butts are unheard of absent some other danger. (R: 7, 8; A-Ap. 122).

ARGUMENT

I. THE TOSSING OF A SINGLE CIGARETTE BUTT BY A PASSENGER IN A MOTOR VEHICLE DOES NOT JUSTIFY SEIZURE.

A. Standard of Review and Legal Principles.

The Fourth Amendment to the U.S. Constitution and Art. I, §11 of the Wisconsin Constitution forbid the state and its agencies from conducting unreasonable searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.E.D.2d 1081 (1961); *State v. Hess*, 2010 WI 82, ¶41, 327 Wis. 2d 524, 785 N.W.2d 568. A traffic stop is a seizure, which must be reasonable and thus based upon either probable cause or reasonable suspicion of a traffic violation stated by articulable facts. *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634; *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 756 N.W.2d 569. It is the State's burden to prove that a stop was reasonable. *Post*, 2007 WI 60, ¶ 12. A decision to stop a vehicle is reasonable under the Fourth Amendment where the police have probable cause to believe that a traffic violation has occurred. *Whren v. U.S.*, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Delaware v. Prouse*, 440 U.S. 648, 659, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

The question of whether a traffic stop is reasonable is a question of constitutional fact. *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899. A question of constitutional fact is a mixed question of law and fact to which appellate courts apply a two-step standard of review. *State v. Martwick*, 2000 WI 5, ¶ 16, 231 Wis. 2d 801, 604 N.W.2d 552. A circuit court's findings of fact are reviewed under the clearly erroneous standard, and an appellate court independently reviews the application of those facts to constitutional principles. *Id*.; *State v. Payano-Roman*, 2006 WI 47, ¶ 16, 290 Wis. 2d 380, 714 N.W.2d 548.

B. The Stop Was Not Reasonable Under the Fourth Amendment to United States Constitution or Article I, section 11 of the Wisconsin Constitution.

Stopping a vehicle because someone tossed a single cigarette butt out of it, absent some unusual danger, is not reasonable under the Fourth Amendment or Article I, section 11 of the Wisconsin Constitution.

1. The circuit court's ruling was supported by the undisputed facts submitted in support of the motion.

In finding that the stop was not reasonable in that it was pretextual, the circuit court stated:

> …[H]e wasn't stopping him to cite him for the litter. He was stopping him to see if he was a drunk driver. That's really the reason for the stop. The real reason for the stop is not the litter. The litter is the excuse, and if the cigarette butt comes out of the driver's side, I'm with you, Trooper; I'm there; but not out of the passenger side. Motion to suppress is granted.

(12:4; A.Ap-117-18).

Although the circuit court did not state it explicitly, it can be inferred from the ruling that the court did not find any of the prior driving-related facts persuasive as it pertains to justification for the stop. It was well within the Circuit Court's authority to judge the weight of the testimony and credibility of witnesses with regard to facts. *State v. Young*, 2009 WI App 22, ¶ 17, 316 Wis. 2d 114, 762 N.W.2d 736. Stated differently - it was not evidence of impairment, or other illegal driving, to have one-time minor weaving within the lane over a fairly long stretch of road. Further, the stopping at flashing yield light is not unlawful but rather cautious. *Cf. State v. Fields*, 2000 WI App 218, ¶ 23, 239 Wis. 2d 38, 619 N.W.2d 279 (stop for several seconds at stop sign does not provide reasonable suspicion).

It should be noted that there was no evidence submitted to contradict the evidence submitted by counsel for Mr. Iverson that citations for tossing a cigarette butt are unheard of absent some danger related to a person's having done so. (12:4, 8; A-Ap. 122). Presumably, that was the circuit

court's experience as well in that it determined the asserted basis for the stop was a pretext for a drunk driving investigation. A court is entitled to take into account its own experiences in making a ruling, though to be fair the record is devoid of any comment by the circuit court relating to the rarity of such cigarette-butt-tossing citations. *See* WIS JI-Criminal 195. An appellate court is however duty bound to "search the record for evidence to support findings reached by a circuit court." *Noble v. Noble*, 2005 WI App 227, ¶ 15, 287 Wis. 2d 699, 706 N.W.2d 166.

Trooper Larsen acknowledged that he did not have cause to stop the Iverson vehicle based on those pre-cigarette butt-toss facts, stating: "Ah, prior to the cigarette butt being thrown out of the vehicle, um, I didn't feel at that point before that I had the reasonable suspicion to initiate a traffic stop." (12:4; A-Ap., 114). The stop was not reasonable because the trial court justifiably believed that the earlier facts did not present any illegal or truly suspicious driving so as to justify a stop and further the only evidence submitted was that law enforcement does not usually stop drivers when passengers toss a cigarette butt. This is a perfectly reasonable conclusion which this court should affirm.

2. Mr. Iverson did not violate WIS. STAT. § 287.81(2)(b) so as to justify the stop.

The State argues that Trooper Larsen had probable cause and/or reasonable suspicion to stop the Iverson vehicle because Iverson violated WIS. STAT. § 287.81(2)(b), when his passenger discarded a cigarette butt from the rear passenger side window. (State Brief at pp. 8-9).

Section 287.81(2)(b) of the Wisconsin Statutes subjects a driver to a $500.00 forfeiture if the driver, "Permits any solid waste to be thrown from a vehicle operated by the person." "Permits" is defined in Merriam-Webster's online dictionary as: "to allow (something) to happen; to allow (someone) to do or have something; to make something possible. See, www.merriam-webster.com/dictionary/permit. Trooper Larsen admitted he did not know if Iverson authorized the cigarette butt to be discarded from the vehicle. (12:4; A-Ap. 111).

Regardless of the whether Mr. Iverson permitted it, a cigarette butt is not "solid waste" as statutorily defined:

> Any garbage, refuse, sludge from a waste treatment plant, water

> supply treatment plant or air pollution control facility and other discarded or salvageable materials, including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solids or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under s. 283, or source material, as defined in s. 254.31(10), special nuclear material, as defined in s. 254.31(11), or by-product material, as defined in s. 254.31(1).

WIS. STAT. § 289.01(33). It should be noted that there are no published cases analyzing the statutory definition of solid waste.

Clearly a cigarette butt is not garbage, refuse or sludge from a waste treatment plant, water supply treatment plant or air pollution control facility. The question, therefore, is whether it is "other discarded or salvageable materials including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining and agricultural operations, and from community activities." There is no doubt that a cigarette butt tossed from a car window is not a result of industrial commercial, mining and agricultural operations. The only possible basis for a cigarette butt to be considered "solid waste" therefore would be for it to be "other discarded or salvageable materials including … solid … materials resulting from industrial, commercial, mining and agricultural operations, **and from community activities**." (emphasis added). The statute's inclusion of the conjunction "and" prior to the phrase "from community activities" requires that the material discarded be the result of operations that were both "industrial, commercial, mining and agricultural" in nature as well as the result of "community activities."

Even if one reads the statute to merely require that the discarded solid be the result of "community activities," there was no community activity here. A cigarette butt tossed out a window is an everyday and individualized act and not the result of a "community activity." The statute appears directed toward the prevention of the discarding of waste materials from larger scope operations and activities and not from small individual acts like the tossing of a single cigarette butt.

Mr. Iverson did not "permit" the discarding of the cigarette and furthermore a cigarette butt does not qualify as "solid waste" under the statute. Therefore, the ultimate basis for the stop articulated by Trooper

Larsen was not correct.

3. Mr. Iverson did not violate the City of La Crosse's littering ordinance so as to justify the stop.

As an alternative to Trooper Larsen's justification for the stop under the state statute, the State claims the stop was warranted because the tossing of the cigarette butt amounted to a violation of the City of La Crosse's littering ordinance, 7.04(A). This section of the ordinance provides:

> No person shall throw, deposit, dump or discharge any glass, rubbish, filth or debris upon the streets, alleys, public parks or other property of the City or upon any private property not owned by him or upon the surface of any body of water in the City.

First, it is not fair to say that one cigarette butt constitutes "glass, rubbish, filth or debris." Although a cigarette is no longer useful or wanted, in common parlance debris, filth and rubbish are usually considered more than one individual small discarded item, but rather a bag or larger amount of useless waste material.

Further, the only evidence before the circuit court was that cigarette butts are not prosecuted as littering when tossed. Though not articulated explicitly by the circuit court, it can be reasonably assumed that the court felt a stop for littering under a City Ordinance would be even more unusual because it came from a Wisconsin State Trooper. The court's conclusion is not unreasonable given that one can walk down the street in any city or village of any size and find rampant evidence of cigarette butts having been tossed onto sidewalks and into roadside gutters.

Further, Mr. Iverson was not the person who threw the cigarette butt out of his vehicle. The circuit court articulated that it was convinced that if Mr. Iverson had thrown the cigarette butt, the stop would have been justified, but that was not the case. (12:4; A-Ap. 118.)

Finally, the nature of the conduct does not justify the stop. It is not reasonable for law enforcement to stop and seize every person driving whose passenger tosses a cigarette butt unless there is the some real danger. If not, the millions of drivers would be subject to seizure for what can only be categorized as a very minor non-traffic-related civil forfeiture offense. The axiomatic underlying basis for every Fourth Amendment and Article I,

section 11 search – reasonableness – is simply not met here.

II. Wisconsin Should Adopt the Rule Articulated in *State v. Ladson*, 138 Wash.2d 343, 979 P.2d 833 (Wash. 1999), and Forbid the Use of a Pretext Such as an Ordinance Violation or Forfeiture as a Justification for a Seizure.

Even if one assumes there was a basis for the stop based upon a forfeiture violation, the circuit's finding that it was a pretext is reasonable under the facts presented. Pretextual stops made for the purpose of a criminal investigation based on a claimed ordinance or minor forfeiture violations should not be countenanced under Article I, section 11 of the Wisconsin Constitution.

In *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996)the United State Supreme Court held that the constitutional reasonableness of a traffic stop does not depend on the actual motivations of an individual officer involved in the traffic stop. 517 U.S. at 813. The Court further held that it was irrelevant under the Fourth Amendment whether a "reasonable" officer would have been motivated to stop the automobile to enforce the traffic laws as long as there is probable cause to show a traffic violation. *Id*. at 814-15. The *Whren* decision has been the subject of significant criticism. *See Ladson*, 138 Wash.2d 343, 358, n.10 *citing* Peter Shakow, *Let He Who Never Has Turned Without Signaling Case the First Stone: An Analysis of* Whren v. United States, 24 Am. J. Crim. L. 627, 633 (1997).

The State of Wisconsin should provide greater protections under Article I, section 11 of the Wisconsin Constitution than those provided by the Fourth Amendment to the United States Constitution by adopting a constitutional rule that makes it unlawful for an officer to use a non-criminal, non-traffic forfeiture citation as a pretext for a warrantless seizure to investigate other possible crimes. Although this particular issue was not argued specifically in the trial court due to its ruling finding the stop to be a pretext and unwarranted, in the event this court disagrees with the trial court's conclusion regarding the lack of cause for the stop, Mr. Iverson contends that the Wisconsin Courts should adopt such a rule for the reasons set forth by the Washington Supreme Court in *State v. Ladson*, 138 Wash.2d 343, 979 P.2d 833 (Wash. 1999). This rule was also similarly adopted by the New Mexico Court of Appeals in *State v. Ochoa*, 146 N.M. 32, 42, 206 P.2d 143, 153 (N.M. 2008).

The Washington Supreme Court in *Ladson* held that pretextual stops were unreasonable under Art. 1, sec. 7 of the Washington Constitution because allowing for the use of a traffic violation as a pretext for a stop would be a triumph of form over substance and "expediency at the expense of reason." *Id*. at 351, 979 P.2d at 838. The Ladson Court stated:

> The question, then, becomes, whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless seizure which would not otherwise be permitted absent that "authority of law" represented by a warrant. The State argues it does. The State asks this court to approve the use of pretext to justify warrantless seizure. We decline the invitation. Article 1, section 7, forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires we look beyond the formal justification for the stop to the actual one. In the case of pretext, the actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary.

Id. at 352-53, 979 P.2d at 839. The court ultimately held that to determine whether a traffic stop is pretextual, a trial court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's conduct. 138 Wash.2d at 358-59, 979 P.2d at 843.

Wisconsin should similarly hold that its constitution forbids the use of pretext as justification for a warrantless seizure. This is particularly true when the claimed basis for the stop is a minor forfeiture or ordinance citation. Adopting this rule is also warranted given the increasing number of traffic stops in Wisconsin and Milwaukee and the racial disparities reflected in the statistics. *See e.g.*, http://www.jsonline.com/watchdog/watchdogreports/racial-gap-found-in-traffic-stops-in-milwaukee-ke1hsip-134977408.html.

Given the miasma of possible forfeitures that anyone could be subjected to, it would be reasonable for this court to adopt a rule grounded in Article I, section 11, that a stop utilized not to truly enforce a non-traffic forfeiture, but rather to conduct a further criminal investigation unrelated to the claimed forfeiture, does not lawfully justify the stop. *Ladson*, 130 Wash.2d 343, 979 P.2d 833, 837-38 (1999). Broadening the protections under the Wisconsin Constitution is further warranted because the nature of our traffic and forfeiture code is such that most drivers commit some violation on a regular basis, and allowing pretextual stops gives the police

almost unbridled discretion. *See State v. Ochoa*, 146 N.M. 32, 39, 206 P.3d 143, 150 (N.M. 2008).

Our supreme court has held our constitutional protections to be broader than those provided under the U.S. Constitution on many occasions, and should do so here. *See State v. Eason*, 2001 WI 98, ¶ 63, 245 Wis. 2d 206, 629 N.W.2d 625 (good faith exception limited to circumstances in which significant investigation and examination of warrant application found); *State v. Hansford*, 219 Wis. 2d 226, 242-43, 580 N.W.2d 171 (1998) (right to 12 person jury grounded in Art. I, sec. 7 of Wisconsin Constitution); *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923) (exclusionary rule grounded in Wisconsin Constitution); *Carpenter v. Dane County*, 9 Wis. 249, 274 (1859) (right to counsel at state expense grounded in Wisconsin Constitution). Mr. Iverson respectfully contends that Article I, section 11 should be read to provide him and others with protection from seizure *via* the use of pretextual traffic forfeiture or ordinance stops.

CONCLUSION

For all the reasons set forth above, the circuit court decision should be affirmed.

Dated this 11th day of July, 2014.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,852 words.

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with WIS. STAT. § 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 11th day of July, 2014.

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