STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP000515-FT

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

DANIEL S. IVERSON,

DEFENDANT-RESPONDENT.

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

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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ARGUMENT

The State maintains that Trooper Larsen's stop of Iverson's vehicle was supported by both probable cause and reasonable suspicion to believe Iverson and a passenger within his vehicle violated state statutes and a city ordinance, both prohibiting littering.

A. Trooper Larsen's stop of Iverson's vehicle was supported by probable cause and reasonable suspicion to believe violations of Wis. Stat. §§ 287.81(2)(a) and 287.81(2)(b) occurred.

Twisting statutory language to illogical ends, Iverson appears to argue that probable cause or reasonable suspicion to detain his vehicle for a violation of Wis. Stat. § 287.81(2)(b) did not exist because: (1) Trooper Larsen did not investigate subsequent to the traffic stop whether Iverson authorized his passenger to litter. Iverson's Brief at 5; and (2) a cigarette butt does not fall within the statutory definition of "solid waste" pursuant to Wis. Stat. § 289.01(33). Iverson's Brief at 6. For the reasons set forth below, the State maintains neither argument is persuasive.

Referencing the dictionary definition of "permits" in conjunction with Wis. Stat. 287.81(2)(b), Iverson appears to argue the legality of his traffic stop is affected by Trooper Larsen's failure to determine *after* the traffic stop whether a passenger was expressly authorized to discard a cigarette butt from the vehicle. Iverson's Brief at 5.

In effect, Iverson attempts to impose upon Trooper Larsen a burden to conduct additional investigation in order to legitimize a prior traffic stop. As articulated in the State's brief, evidence constituting probable cause "need not establish proof beyond a reasonable doubt or even that guilt is more probable than not, but rather, probable cause requires that the information 'lead a

reasonable officer to believe that guilt is more than a possibility.'" *State v. Popke*, 2009 WI 37, ¶ 14, 317 Wis.2d 1, 733 N.W.2d 634; State's Brief at 5.

While Trooper Larsen's choice not to question Iverson about his passenger's actions would undoubtedly affect the ability to prove a violation of Wis. Stat. § 287.81(2)(b) at trial, it is irrelevant in determining the constitutionality of a traffic stop. At the time of the traffic stop, Trooper Larsen was not acting unreasonable in assuming that Iverson had permitted a passenger to dispose of litter on the city street before stopping the vehicle, accordingly.

Further, Iverson fails to demonstrate why Trooper Larsen's observations would not support probable cause or reasonable suspicion to believe a passenger acted contrary to Wis. Stat. § 287.81(2)(a), by disposing of the cigarette butt on the street even absent authorization by Iverson.

Iverson then attempts to distinguish a cigarette butt from the statutory definition of "solid waste" set forth in Wis. Stat. § 289.01(33). Iverson's Brief at 5-6. As previously noted, the statutory definition of solid waste encompasses a wide variety of items, including garbage, refuse, and other discarded or salvageable materials from community activities. *See* WIS. STAT. § 289.01(33); State's Brief at 8-9. To find that a cigarette butt does not fall squarely within all three of the above-referenced categories is to ignore the clear and unambiguous language of the statute.

B. Trooper Larsen's stop of Iverson's vehicle was also supported by probable cause and reasonable suspicion that a passenger violated a city ordinance prohibiting littering.

Iverson proceeds to argue that probable cause or reasonable suspicion to stop his vehicle for a violation of city ordinance did not exist. Iverson's Brief at 7. In support, Iverson argues: (1) a cigarette butt does not fall within the definition of "glass, rubbish, filth or debris" as set forth in La Crosse City Ordinance 7.04(A), (2) law enforcement rarely cites individuals for littering violations, (3) a passenger, not Iverson, was the individual responsible for littering, and (4) the nature of the offense does not justify a traffic stop. Iverson's Brief at 7. Again, Iverson's arguments are unpersuasive, and at times, contrary to law.

In efforts to distinguish a cigarette butt from the delineated categories of "glass, rubbish, filth or debris" set forth in La Crosse City Ordinance 7.04(A), Iverson notably concedes a cigarette butt is an object "no longer useful or wanted." Iverson's Brief at 7. Undermining his own argument, Iverson's cited source defines rubbish using nearly identical terms: "things that are no longer useful or wanted and that have been thrown out." Merriam-Webster, http://www.merriam-webster.com/dictionary/rubbish (last visited July 28, 2014).

Iverson then directs this court's attention to the fact 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." Iverson's Brief at 4. Even assuming *arguendo* that law enforcement rarely issues citations for littering violations, Iverson fails to demonstrate why such fact is relevant.

Iverson cites no authority establishing a requisite frequency of citations issued for ordinance violations which may serve the basis for a constitutional traffic stop. In effect, Iverson requests that this Court establish an unusual and impractical rule whereby law enforcement must not only articulate facts supporting probable cause or reasonable suspicion but also present statistics demonstrating an acceptable frequency of citations for that violation.

Iverson further argues that because passenger, not Iverson, was the individual responsible for littering, neither probable cause nor reasonable suspicion supported a traffic stop. Iverson's Brief at 7. The State again emphasizes that law enforcement may stop a vehicle based upon suspicion that the vehicle or an occupant is subject to seizure for violation of law. *State v. Washington*, 120 Wis.2d 654, 660, 358 N.W.2d 304, 307 (Ct. App. 1984). Iverson fails to cite any contrary authority prohibiting police from stopping a vehicle for conduct other than the driver's.

Finally, Iverson argues a littering violation does not justify a stop unless there exists "some real danger." Iverson's Brief at 7. La Crosse City Ordinance 7.04(A) contains no element that an

individual cause imminent harm or danger by littering.

C. This Court should not abandon established authority by adopting a test which takes into consideration law enforcement's subjective intent to stop a vehicle.

Iverson concludes his argument by encouraging this Court to abandon firmly established Wisconsin and United States Supreme Court authority in favor of a rule precluding law enforcement from initiating traffic stops premised upon noncriminal offenses as a tool to investigate other possible crimes. Iverson's Brief at 8.

"Typically, the Supreme Court interprets the Wisconsin Constitution's prohibition against unreasonable searches and seizures in tandem with the Fourth Amendment jurisprudence of the United States Supreme Court." *State v. Young*, 2006 WI 98, ¶ 30, 294 Wis.2d 1, 717 N.W.2d 729. "We embrace the Fourth Amendment jurisprudence of the United States Supreme Court when we perceive soundness in Supreme Court analysis and value in uniform rules." *Id.*

Iverson concedes the United States Supreme Court has recognized the constitutional reasonableness of a traffic stop does not depend on the actual motivations of an individual officer involved in a traffic stop. Iverson's Brief at 8 (citing *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996)). Wisconsin

courts continue to recognize the same. *State v. Newer*, 2007 WI App 236, ¶ 4 n.2, 306 Wis.2d 193, 742 N.W.2d 923 (affirming "if the officer has facts that could justify reasonable suspicion (or probable cause), it is of no import that the officer is not subjectively motivated by a desire to investigate this suspicion"). Still, Iverson asks that this court deviate from established precedent for two apparent and distinct reasons.

First, Iverson argues the requested change is warranted by "the increasing number of traffic stops in Wisconsin and Milwaukee and the racial disparities reflected in the statistics." Iverson's Brief at 9. While racial prejudice is an undesirable reality, Iverson fails to allege, nor does the record before this court demonstrate, how increased traffic stops targeting minority groups had any role in the stop of *his* vehicle.

Second, Iverson advances an argument similar to that rejected in *Whren*. Specifically, Iverson argues broadening constitutional protections is 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." Iverson's Brief at 9-10 (citing *State v. Ochoa*, 146 N.M. 32, 39, 206 P.3d 143, 150 (N.M. 2008)). The *Whren* Court previously held:

> But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by

> what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

Whren, 517 U.S. at 818-19. The State respectfully requests that this Court heed the words of the Supreme Court and not deviate from such clear and ambiguous authority to adopt Iverson's proposed subjective test.

CONCLUSION

For the reasons offered in the State's principal brief and in this reply brief, the State respectfully requests that this court reverse the order of the circuit court granting Iverson's motion to suppress evidence.

Dated this 4th day of August, 2014.

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 1,527 words.

_____
John W. Kellis
Assistant District Attorney

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 at La Crosse, Wisconsin, this 4th day of August, 2014.

_____
John W. Kellis
Assistant District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on August 4, 2014, I deposited in the United States mail for delivery to the clerk by first-class mail, the original and five copies of the plaintiff-appellant's brief and appendix.

Dated this 4th day of August, 2014.

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John W. Kellis
Assistant District Attorney