

RECEIVED

STATE OF WISCONSIN

06-10-2015

IN SUPREME COURT

**CLERK OF SUPREME COURT
OF WISCONSIN**

No. 2014AP515-FT

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

DANIEL S. IVERSON,

Defendant-Respondent.

ON A PETITION FOR REVIEW OF A DECISION
AFFIRMING AN ORDER GRANTING A MOTION TO
SUPPRESS AND DISMISSING THE CASE ENTERED IN
THE LA CROSSE COUNTY CIRCUIT COURT, THE
HONORABLE RAMONA A. GONZALEZ, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

BRAD D. SCHIMEL
Attorney General

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-
Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

TABLE OF CONTENTS

	Page
ARGUMENT	1
I. Wisconsin Stat. § 110.07, which authorizes troopers to conduct traffic stops for littering violations, does not conflict with other statutes.	1
II. Discarding a cigarette butt constitutes littering of solid waste under Wis. Stat. § 287.81.....	4
III. Even if discarding a cigarette butt does not constitute littering, Trooper Larsen's mistaken belief would not invalidate the reasonableness of his stop.	7
CONCLUSION.....	8

CASES CITED

Heien v. North Carolina, ___ U.S. ___, 135 S. Ct. 530 (2014).....	7
Illinois v. Krull, 480 U.S. 340 (1987).....	3
State v. Brown, 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66.....	8

	Page
State v. Dairyland Power Coop., 52 Wis. 2d 45, 187 N.W.2d 878 (1971)	3
State v. Longcore, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999).....	7
State v. Timmerman, 198 Wis. 2d 309, 542 N.W.2d 221 (Ct. App. 1995).....	6
State v. Young, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729	3

STATUTES CITED

Wis. Stat. § 110.07	1, 3, 4
Wis. Stat. § 110.07(1).....	2, 3, 7
Wis. Stat. § 110.07(1)(a)(1)	2
Wis. Stat. § 110.07(1)(a)2.	2
Wis. Stat. § 110.07(1)(a)3.	2, 3
Wis. Stat. § 110.07(1)(b)	3
Wis. Stat. § 287.81	2, 4
Wis. Stat. § 287.81(2).....	2, 4, 6
Wis. Stat. § 287.81(10)	4
Wis. Stat. § 289.01(9).....	4, 5

	Page
Wis. Stat. § 289.01(28).....	5
Wis. Stat. § 289.01(33).....	4, 5, 6
Wis. Stat. § 345.22	2
Wis. Stat. § 968.07	2
Wis. Stat. § 968.24	2

OTHER AUTHORITY

MERRIAM-WEBSTER DICTIONARY (2015).....	5
BLACK’S LAW DICTIONARY (6th ed. 1990)	6

STATE OF WISCONSIN
IN SUPREME COURT

No. 2014AP515-FT

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

DANIEL S. IVERSON,

Defendant-Respondent.

ON A PETITION FOR REVIEW OF A DECISION
AFFIRMING AN ORDER GRANTING A MOTION TO
SUPPRESS AND DISMISSING THE CASE ENTERED IN
THE LA CROSSE COUNTY CIRCUIT COURT, THE
HONORABLE RAMONA A. GONZALEZ, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

ARGUMENT

- I. Wisconsin Stat. § 110.07, which authorizes troopers to conduct traffic stops for littering violations, does not conflict with other statutes.**

Iverson asserts “that there appear to be conflicting statutes governing the authority for law enforcement to stop a vehicle if the driver has in fact violated the littering of

solid waste statute under Wis. Stat. § 287.81.” Iverson’s brief at 13. The “conflicting” statutes that Iverson cites address the authority of law enforcement officers generally to make arrests for crimes under Wis. Stat. § 968.07, conduct investigatory stops under Wis. Stat. § 968.24, and arrests for violations of traffic regulations under Wis. Stat. § 345.22.

Wisconsin Stat. § 110.07(1) does not conflict with these other provisions. It serves a different purpose. It is enabling legislation that authorizes the creation of the Wisconsin State Patrol and specifies the authority of troopers. Wisconsin Stat. § 110.07(1) provides additional authority, not necessarily authorized under Wis. Stat. §§ 345.22, 968.07, and 968.24. This additional authority includes the authority to investigate and make arrests for several offenses, including littering, contrary to Wis. Stat. § 287.81(2). Wisconsin Stat. § 110.07(1)(a)(1) expressly authorizes a trooper to enforce the littering statute when the offense occurs on a highway. Wisconsin Stat. § 110.07(1)(a)2. vests troopers with the powers of the sheriff to enforce the littering statute. Finally, Wis. Stat. § 110.07(1)(a)3. provides separate express authority to troopers “to stop such vehicles while en route at any time upon the public highways to examine the same and make arrests” for violating the littering statute.

Further, even if Wis. Stat. § 110.07(1) conflicted with the other more general statutes related to an officer’s authority to seize a person, Wis. Stat. § 110.07(1) controls the scope of a trooper’s authority. Wisconsin Stat. § 110.07 is a specific statute defining the authority of a specific class of law enforcement officers with respect to a specific set of

statutes.¹ And under the rules of statutory construction, a more specific statute controls over a more general statute. *See State v. Dairyland Power Coop.*, 52 Wis. 2d 45, 53, 187 N.W.2d 878 (1971) (more specific provisions control the more general provisions, when legislative intent is not otherwise clear from a reading of the provisions).

Iverson also suggests that Wis. Stat. § 110.07(1) is “unclear [of] the level of suspicion or cause necessary to authorize a stop” Iverson’s brief at 13. The State disagrees. Wisconsin Stat. § 110.07(1)(a)3. authorizes a trooper to arrest for littering violations. An arrest is only lawful if it is based on probable cause. *State v. Young*, 2006 WI 98, ¶ 22, 294 Wis. 2d 1, 717 N.W.2d 729. Similarly, the level of suspicion required to conduct an investigatory stop under Wis. Stat. § 110.07 is no different from the standard applied for assessing the reasonableness of an investigatory stop generally. *See* State’s brief-in-chief at 17-20. An investigatory stop is lawful only if it satisfies the constitutional requirement of reasonable suspicion. *Young*, 294 Wis. 2d 1, ¶ 20. There is simply no reason to believe that the Legislature contemplated authorizing troopers to seize a person on less than reasonable suspicion or arrest on less than probable cause. *See Illinois v. Krull*, 480 U.S. 340, 351 (1987) (“[C]ourts presume that legislatures act in a constitutional manner”).

¹ The Legislature extended the enforcement authority of state troopers under Wis. Stat. § 110.07(1) to other law enforcement officers.

All municipal judges, judges, district attorneys and law enforcement officers shall assist in enforcing this chapter, ss. 167.31 (2) (b) to (d) and 287.81 and chs. 194, 218 and 341 to 351, and orders or rules issued pursuant thereto and shall report to the department the disposition of every uniform traffic citation issued for cases involving those chapters.

Wis. Stat. § 110.07(1)(b).

Trooper Larsen acted pursuant to his authority under Wis. Stat. § 110.07 when he stopped Iverson's Jeep following his observations of the littering violation.

II. Discarding a cigarette butt constitutes littering of solid waste under Wis. Stat. § 287.81.

Under Wis. Stat. § 287.81(2), littering occurs when "solid waste" is deposited on or along any highway or thrown from a vehicle. Iverson argues that Trooper Larsen lacked reasonable suspicion or probable cause to stop him because a cigarette butt does not constitute solid waste. Iverson's brief at 14-17.

A cigarette butt constitutes solid waste for purposes of the State's littering statute. Wisconsin Stat. § 287.81(10) defines "solid waste" by reference to its definition in Wis. Stat. § 289.01(33). This subsection provides in relevant part:

(33) "Solid waste" means 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

Wis. Stat. § 289.01(33).

The State agrees that a cigarette butt is not garbage because it is not the product of handling, processing, storing, or consuming food. Wis. Stat. § 289.01(9). Likewise, a cigarette butt is not sludge because it does not come from a waste treatment plant, a water supply plant, or an air pollution control facility.

But a cigarette butt does constitute refuse or other discarded material. Refuse is broadly defined and "means all matters produced from industrial or community life, subject

to decomposition, not defined as sewage.” Wis. Stat. § 289.01(28). A cigarette consists of tobacco rolled and enclosed in a wrapper of thin paper and may also include a filter. Because tobacco and paper derive from organic materials, they are subject to decomposition. A mass produced cigarette is certainly the product of industrial life. It requires a variety of raw materials to convert to a consumable product. And whether a cigarette is mass produced or hand rolled, it is the product of community life. A cigarette butt certainly falls within the definition of refuse.

Iverson suggests that the term “refuse” is further qualified by the phrase “from a waste treatment plant, water supply treatment plant or air pollution control facility.” Iverson’s brief at 15. The State disagrees. That phrase limits the definition of “sludge,” not the terms “garbage” or “refuse” that precede “sludge.” The Legislature separately defined garbage under Wis. Stat. § 289.01(9), and refuse under Wis. Stat. § 289.01(28), without reference to whether it came from a waste or water supply treatment plant or an air pollution control facility. There is simply no reason to believe that the Legislature attempted to further qualify the terms “garbage” or “refuse” when it more generally defined “solid waste.”

Alternatively, a cigarette butt also constitutes discarded material. To discard something means “to get rid of especially as useless or unwanted.” *Discard Definition*, MERRIAM-WEBSTER DICTIONARY (2015), <http://www.merriam-webster.com/dictionary/discard> (last viewed June 9, 2015). The phrase “discarded . . . materials” is further limited by the following clause: “including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining and agricultural operations, and from community activities” Wis. Stat. § 289.01(33). A cigarette butt is certainly a “solid” material. Cigarettes are produced from tobacco and paper products so they result from “industrial, commercial, mining, and agricultural operations.” They also result from “community

activities,” that are activities in which community members participate (i.e., the production, distribution and consumption of cigarettes).

Iverson suggests that Wis. Stat. § 289.01(33)’s definition of discarded material “appears to be geared toward larger scope operations and activities and not small individual acts like the tossing of a single cigarette butt.” Iverson’s brief at 16. Nothing within the definition of “solid waste” or the littering statute suggests this limitation. First, the word “any” precedes the types of materials that constitute solid waste: “garbage,” “refuse,” “sludge,” or “discarded or salvageable materials.” The term “any” is defined broadly. “Any” is defined as “[s]ome; one out of many; an indefinite number” and is ‘often synonymous with ‘either,’ ‘every,’ or ‘all.’” *See State v. Timmerman*, 198 Wis. 2d 309, 316-17, 542 N.W.2d 221 (Ct. App. 1995), (quoting BLACK’S LAW DICTIONARY 94 (6th ed. 1990)). In this context, the use of “any” suggests that the Legislature intended the definition of “solid waste” to extend to any amount of refuse or discarded material without reference to quantity.

In addition, Iverson’s attempt to limit the reach of the littering statute to large scale operations also ignores Wis. Stat. § 287.81(2)’s plain language. Wisconsin Stat. § 287.81(2) extends liability to a person who deposits solid waste along a highway or permits it to be thrown from a vehicle. By allowing enforcement against those who deposit solid waste along a highway or permit others to throw it, the Legislature was not limiting littering enforcement to large scale operations. Rather, it intended to extend liability to any person who litters, without regard to the quantity of solid waste littered.

When Trooper Larsen observed a cigarette butt being discarded from Iverson’s Jeep, he had either probable cause or reasonable suspicion to believe that someone had littered

solid waste. Wisconsin Stat. § 110.07(1) authorized Trooper Larsen to stop the Jeep, investigate the littering violation, and make an arrest for littering, if appropriate.

III. Even if discarding a cigarette butt does not constitute littering, Trooper Larsen's mistaken belief would not invalidate the reasonableness of his stop.

In *State v. Longcore*, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999), the court of appeals held that a mistake of law cannot form the basis for a traffic stop. If *Longcore* is still good law and Trooper Larsen erred in assuming that a discarded cigarette butt constituted solid waste, then he lacked authority to stop Iverson's Jeep. But the State questions *Longcore's* continued viability.

In *Heien v. North Carolina*, ___ U.S. ___, 135 S. Ct. 530 (2014), the United States Supreme Court upheld the reasonableness of a traffic stop based upon an officer's objectively reasonable mistake of law. In *State v. Richard E. Houghton, Jr.*, No. 2013AP1581-CR (oral argument held Apr. 22, 2014), the State asked this Court to overrule *Longcore* and follow *Heien*. For the reasons the State articulated in *Houghton*, the State requests this Court to apply *Heien* to this case. See State's brief-in-chief in *Houghton* at 17-21.

Even if a discarded cigarette butt does not constitute solid waste and cannot form the basis for a littering violation, Trooper Larsen still acted reasonably when he stopped Iverson's Jeep. A reasonable interpretation of the definition of solid waste would lead a reasonable person to believe that a cigarette butt constitutes solid waste because it is either "refuse" or "other discarded" material. See Sec. II above. Further, no Wisconsin cases have ever held that a discarded cigarette butt does not constitute solid waste and would fall beyond the scope of the littering statute. A law enforcement officer is not a legal technician and cannot

reasonably know how a court will subsequently interpret a statute in all circumstances. *See State v. Brown*, 2014 WI 69, ¶ 103, 355 Wis. 2d 668, 850 N.W.2d 66 (Roggensack, J. dissenting). Under the circumstances, Trooper Larsen would have had an objectively reasonable belief that discarding a cigarette butt constituted littering, even if his belief was mistaken.

CONCLUSION

For the reasons stated by the State in its brief-in-chief and in this reply, the State respectfully requests that this Court reverse the court of appeals' decision affirming the circuit court's order granting Iverson's motion to suppress evidence and dismissing his case.

Dated this 10th day of June, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-
Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@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 1,900 words.

Dated this 10th day of June, 2015.

Donald V. Latorraca
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 10th day of June, 2015.

Donald V. Latorraca
Assistant Attorney General