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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2014 AP 816, 2014 AP 817, 2014 AP 818

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

FREDERICK C. THOMAS III,

Defendant-Appellant

REPLY BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM A FINAL ORDER ENTERED ON
MARCH 26, 2014 IN THE CIRCUIT COURT
FOR MONROE COUNTY, BRANCH III,
THE HON. DAVID J. RICE PRESIDING.

Respectfully submitted,

FREDERICK C. THOMAS III,
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ARGUMENT

This Court should reverse Mr. Thomas's conviction for three separate reasons. First, Mr. Thomas committed no traffic violation when he ably avoided an accident that would have been substantially caused by Trooper Holtz. Second, Holtz unlawfully ordered Mr. Thomas out of his car based only upon (1) an odor of intoxicants of unspecified intensity, (2) "glassy eyes," (3) and Mr. Thomas's truthful confirmation that he drank a small amount of alcohol – a fact which Trooper Holtz already knew. Finally, Trooper Holtz administered the preliminary breath test ("PBT") without probable cause of either impairment or of a prohibited alcohol concentration. Therefore, Appellant respectfully requests that this Court reverse the lower court's order denying his motion to suppress.

I.
WISCONSIN TRAFFIC LAWS MERELY RESTATE THE COMMON LAW STANDARD OF PRUDENT CONDUCT; THEREFORE, THIS COURT SHOULD CONSIDER WHETHER TROOPER HOLTZ CONTRIBUTED TO THE NEAR-COLLISION THAT MR. THOMAS ABLY AVOIDED.

Respondent concedes that Wisconsin traffic laws do not demand omniscience; rather, they merely "restate the common law standard of prudent conduct." Millonig v. Bakken, 112 Wis. 2d 445, 455, 334 N.W.2d 80 (1983); (Resp't's Br. at 12). Also, Respondent

fails to address the legal proposition that since actual accidents are not *per se* proof of a traffic violation, it follows with greater force that near-accidents are also not *per se* proof. Grana v. Summerford, 12 Wis. 2d 517, 521, 107 N.W.2d 463 (1961). Thus, Respondent concedes that point. State v. Hampton, 330 Wis. 2d 531, 546, 793 N.W.2d 901 (Ct. App. 2010).

Respondent points to no particular facts establishing a traffic violation, other than a near-collision and the absence of a turn signal, the latter of which was not a violation under the facts of this case.[1] (Resp't's Br. at 6.) As to the former fact, the State merely "begs the question," a logical fallacy where the conclusion that one attempts to prove is included in the initial premise of the argument. Here, the State attempts to convince this Court that Mr. Thomas committed a violation by claiming he committed a violation (i.e., he did not ascertain his surroundings) and, in support, points to conduct that is not *per se* proof of a violation. Thus, the State's argument fails on its face, and this Court should conclude that the traffic stop in this case was unlawful.

[1] Discussed at section I-A, *infra*.

A. Mr. Thomas need not have signaled his movement upon the roadway.

No Wisconsin law imposes the responsibility to signal the type of maneuver Mr. Thomas made on the roadway. One section provides that "no person may *turn* any vehicle without giving an appropriate signal." Wis. Stat. § 346.34(1)(b) (emphasis added). However, sec. 346.34(1)(a)(3) draws a distinction between *turning*, on the one hand, and "[*moving*] right or left upon a roadway" on the other, which is all Mr. Thomas did in this case. (R. 17.) One must signal a turn under sec. 346.34(1)(b). But one need only "*move* right or left upon a roadway" with reasonable safety. Wis. Stat. § 346.34(1)(a)(3). Since "[s]tatutory language is read where possible to give reasonable effect to every word," (1) turning and (2) moving left or right cannot be read to mean the same thing. State ex rel. Kalal v. Circuit Court for Dane Cnty., 271 Wis. 2d 633, 663, 681 N.W.2d 110 (2004). Therefore, under the present facts, Mr. Thomas need not have signaled his movement left upon the roadway.

B. Mr. Thomas was not on reasonable notice that another vehicle may have been present because Trooper Holtz lingered in the blind spot of his slow-moving vehicle for 10 seconds, an inappropriate and dangerous amount of time under the facts.

Appellant asserted that Holtz lingered in Mr. Thomas's blind spot for approximately 10 seconds. (Appellant's Br. at 8.)

Respondent failed to address this either in its argument or statement of the case. (Resp't's Br. at 6.) Thus, Respondent concedes that point. Hampton, 330 Wis. 2d at 546 (citing Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) ("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute."). Simply put, Holtz contributed to the accident (which Mr. Thomas ably avoided) by matching speeds with Mr. Thomas's "slow-moving" vehicle and then lingering in that "slow-moving" vehicle's blind spot. (R. 17.)

One ought not linger in a slow-moving vehicle's blind spot. The reasonable driver would assume that the operator of a slow-moving vehicle is aware that it is moving slowly. Indeed, Holtz testified at the suppression hearing that vehicles *often* drive slowly in that area. (R. 25, p. 12.) Rather than observe the car from a safe distance or pass it at an appropriate and deliberate rate, Holtz first closed the distance between himself and Mr. Thomas and then slowed *his* approach. (R. 17.) Holtz lingered in Mr. Thomas's blind spot for about 10 seconds. (Id.) It is no wonder that Mr. Thomas reasonably had no idea Holtz's squad car was there. This Court should not allow the police to manufacture constitutional

justification for a traffic stop by creating the very driving behavior to which *their* driving reasonably causes. Mr. Thomas was not on reasonable notice that another vehicle may have been present and is therefore not guilty of any traffic violation. Proof of an accident is not *per se* proof of a violation. Summerford, 12 Wis. 2d at 521. *A fortiori*, neither is a near-accident a driver ably avoids.

The fact that Mr. Thomas avoided the accident evinces the fact that he was driving with "reasonable safety" as required by sec. 346.34(1)(a)(3), and that he similarly met the standard of ascertaining his surroundings from sec. 346.13(1). Therefore, any evidence discovered after the traffic stop should have been suppressed in the court below. Under the totality of the facts, it was reasonable for Mr. Thomas not to have any idea Holtz's squad car was there. The reasonable driver cannot predict the bizarre driving of others, even when they are police officers.

C. This Court should find that the trial court's findings are clearly erroneous to the extent that they mischaracterize that which can be more accurately discerned by watching the squad video.

Respondent misconstrues Appellant's request with respect to the lower court's factual findings on the visibility of Holtz's headlights. (Resp't's Br. at 10.) The lower court received the squad video into evidence at the suppression hearing. (R. 17.) Based on this

video, the trial court found that Mr. Thomas could have been expected to see the trooper's headlights. (R. 31, p. 11.) It is clear from watching the video that Holtz's high beams are not on. (R. 17.) The beams point downward and illuminate only the road directly in front of his squad. (Id.) They do not shine in Mr. Thomas's mirrors. They do not shine in Mr. Thomas's eyes. The beams point downward and only downward. Moreover, streetlights amply illuminate the road, diminishing the visibility and directional nature of the squad car's beams. Respondent, however, declines to address this last fact. (Resp't's Br. at 10.)

D. Trooper Holtz ordered Mr. Thomas out of his vehicle without sufficient OWI-related factual justification.

The only possible proof of impairment Trooper Holtz had at the time he ordered Mr. Thomas out of his vehicle was (1) an odor of unspecified intensity, (2) "glassy" eyes, and (3) Mr. Thomas's confirmation of consuming a small amount of alcohol, which told Trooper Holtz nothing he did not already know. These facts are insufficient to justify the appreciable intrusion in this case.

As in Cnty. of Sauk v. Leon, "[n]either side attempted to have the [trooper], an experienced law enforcement officer, characterize the odor as strong, moderate, or weak, which can be a factor in

determining reasonable suspicion, and the [trooper] did not imply any particular level of intensity." 2011 WI App 1, ¶ 9 n.3, 330 Wis. 2d 836, 794 N.W.2d 929 (Blanchard, J.) (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)). The record in this case is also bare as to the odor's intensity. This omission is significant because at a suppression hearing, the State bears the burden of establishing the constitutionality of contested evidence. State v. Koller, 248 Wis. 2d 259, 282, 635 N.W.2d 838 (Ct. App. 2001).

Still, based on the odor, Trooper Holtz knew Mr. Thomas had consumed *some* alcohol. Therefore, Mr. Thomas's confirmation that he had "a couple" did not tell Trooper Holtz anything he did not already know, other than the fact that Mr. Thomas was probably not breaking any laws. See Leon, 2011 WI App 1 at ¶ 28 (reiterating that Wis. Stat. § 346.63(1)(a) does not prohibit operating a motor vehicle after having consumed alcohol).

Finally, Trooper Holtz gave unhelpful testimony about Mr. Thomas having "glassy" eyes, but explained neither the meaning nor the significance of that term in light of his training and experience. (R. 25.) Again, it is the State's burden at a suppression hearing to prove the existence of facts justifying an expanded detention. Koller, 248 Wis. 2d at 282.

Respondent attempts to distinguish State v. Kolman because in that case, the "defendant did not commit any mistake or error while driving." 2012 WI App 27, ¶ 3, 339 Wis. 2d 492, 809 N.W.2d 901 (unpublished but citable pursuant to Wis. Stat. (Rule) 809.23(3)); (Resp't's Br. at 15). But as stated above, that fact is also present in this case. And although the court found the minimal intrusion in Kolman to be justified, they rested that conclusion upon the fact that the officer "did not require [Kolman] even to leave the driver's seat." Kolman 2012 WI App 27 at ¶ 24. Here, Trooper Holtz intruded more significantly and thus unconstitutionally by ordering Mr. Thomas out of his vehicle less than one second after he confirmed he had been drinking a small amount of alcohol. State v. Meye, 2010 WI App 120, ¶ 1, 329 Wis. 2d 272, 789 N.W.2d 755 ("It is against the law of Wisconsin to operate a motor vehicle while intoxicated. But, although unwise, it is not against the law to drink and then drive.") (unpublished but cited and attached for persuasive authority pursuant to Wis. Stat. (Rule) 809.23(3)).

II.

TROOPER HOLTZ LACKED THE DEGREE OF PROBABLE CAUSE NECESSARY TO ADMINISTER A PRELIMINARY BREATH TEST.

Trooper Holtz did not check Mr. Thomas's eyes for equal pupil size or equal tracking of the stimulus in both eyes, contrary to his training; Respondent declines to dispute these facts urged by Appellant. (Appellant's Br. at 11.) Respondent further declines to contest the fact that if any one of the standardized field sobriety test elements is changed, the validity is compromised. Respondent therefore concedes these points. Hampton, 330 Wis. 2d at 546. This Court assesses probable cause through the lens of the officer's knowledge, training, and experience. State v. Carroll, 322 Wis. 2d 299, 320, 778 N.W.2d 1 (2010). Trooper Holtz learned in his training that some people have naturally occurring nystagmus and admitted this on cross-examination. (R. 25, p. 26.) Untrained people cannot make sense of their observations on the HGN; training is required. Therefore, any probative force stemming from Trooper Holtz's observations on the HGN must result from an administration of the test that conforms to his training. Since he performed the test contrary to his training, the results should neither be trusted nor counted against Mr. Thomas in assessing probable cause.

Respondent agrees that Trooper Holtz only attempted one-third of the standardized field sobriety test battery. (Resp't's Br. at 11.) Since he performed the HGN in an unstandardized fashion, Holtz conducted no standardized tests at all. Mr. Thomas performed neither divided attention tests nor tests designed to establish whether he possessed "the clear judgment and steady hand necessary to handle and control a motor vehicle." Wis. JI-2663 (2006). Trooper Holtz declined to offer alternative tests such as the alphabet or finger dexterity tests. (R. 25, p. 31.) Other than his unreliable observations on the HGN, Trooper Holtz gained no additional evidence in between the moment he ordered Mr. Thomas out of his vehicle and the moment he requested a PBT. Therefore, this Court should conclude that Trooper Holtz lacked the degree of probable cause necessary to request the PBT and reverse the lower court's order denying Mr. Thomas's motion to suppress.

CONCLUSION

This Court should reverse Mr. Thomas's conviction for three separate reasons. First, Mr. Thomas committed no traffic violation when he ably avoided an accident that would have been substantially caused by Trooper Holtz. Second, Holtz unlawfully ordered Mr. Thomas out of his car based on impermissibly scant evidence.

Finally, Trooper Holtz administered the preliminary breath test ("PBT") without probable cause of either impairment or of a prohibited alcohol concentration. Therefore, Appellant respectfully requests that this Court reverse the lower court's order denying his motion to suppress. The remaining evidence would then be insufficient for a conviction as to any charge issued to Mr. Thomas.

Dated at Madison, Wisconsin, January 16, 2015.

Respectfully submitted,

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<u>CERTIFICATION</u>

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,989 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated: January 16, 2015.

Signed,

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