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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 3

Case No. 2014AP002119-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KIM M. LERDAHL,

Defendant-Respondent.

On Appeal from a Pretrial Order Granting a Motion to
Suppress Evidence, Entered in the Circuit Court for Eau
Claire County, the Honorable Paul J. Lenz Presiding

BRIEF OF DEFENDANT-RESPONDENT

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ISSUE PRESENTED

Whether the circuit court erred in granting Lerdahl's pretrial motion to suppress evidence derived from a warrantless motor vehicle stop, ruling that the officer did not have a sufficient factual basis to believe that any violation of law was being committed?

Trial court answered: Judge Lenz concluded, in relevant part, that "[w]hen the only reason for stopping a vehicle is the lack of a high mounted tail lamp [*sic*], the police officer needs to have a reasonable belief that such vehicle came equipped with that, so if that's the reason, you need, then, something that wasn't established here, which is some sort of training in the identification of the age of the vehicles." (appellant's App. 30-31;11:28-29).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Respondent Kim M. Lerdahl ("Lerdahl") does not request oral argument because this brief fully presents and develops the dispositive issue on appeal and the applicable legal authorities. Wis. Stat. Rule § 809.22(2)(b).

Publication of the Court of Appeals' opinion is not warranted because the issue presented involves no more than the application of well-settled principles of law to the evidentiary record, and no reasons appear for questioning the controlling precedents. Wis. Stat. Rule § 809.23(1)(b)1., 3.

STATEMENT OF THE CASE

This case was commenced on November 6, 2013, with the filing of a two-count criminal complaint (as to Lerdahl) which alleged that she had operated a motor vehicle while intoxicated, and with a prohibited alcohol concentration, as a fourth offense in the City of Eau Claire. (1; docket entries). The complaint alleged that a police officer obtained various items of incriminatory evidence against Lerdahl pursuant to the initial vehicle stop. (id.).

Lerdahl filed a pretrial motion to suppress evidence derived from a warrantless stop of her vehicle. (5). The circuit court held an evidentiary hearing on the motion (9:Exhibits 1, 2, 3, 4, 5, 6, 7; 11), and the court ultimately granted relief in a written order. (appellant's App. 2; 12).

The state's notice of appeal (13) is taken from the order granting the suppression of evidence (12), pursuant to Wis. Stat. § 974.05(1)(d)2.

SUMMARY OF THE FACTS

On October 10, 2013, at approximately 2:00 a.m., City of Eau Claire police officer Amber Roth was stopped in her patrol car at the intersection of Birch Street and Starr Avenue when another motor vehicle passed her position in a perpendicular direction. (appellant's App. 11; 11:9). Officer Roth testified that the other vehicle caught her attention because all three of its occupants initially "turned and stared at" her, after which they turned and looked at her again when she began to follow their vehicle. (id.).

Officer Roth also noticed an object on the rear of the other vehicle which she believed to be a non-functioning, center high-mounted brake light¹ because it was located in the same place that she had seen center high-mounted brake lights on other pick-up trucks in the past. (appellant's App. 12; 11:12). The patrol car's video camera recorded the events after Officer Roth began to follow the truck. (appellant's App.. 11-12; 11:9-10).

On direct-examination by the prosecutor, Officer Roth testified that the truck "immediately" pulled into the parking lot at Gordy's supermarket "as soon as [the truck's occupants] noticed" that she was following it. (appellant's App. 11, 20; 11:9, 18). Under cross-examination by defense counsel, however, Officer Roth conceded that she had followed the truck for "some distance" through several intersections before it turned into the parking lot. (appellant's App. 20-22; 11:18-20). The video recording, itself, reveals that Officer Roth followed the pick-up truck for a period of approximately thirty seconds before the truck's turn signal was activated. (9:Exhibit 1: time 02:00:53-02:01:22).² No suspicious circumstances appear in the video recording, or were observed by Officer Roth (appellant's App. 22; 11:20), during that time span.

¹ According to a popular, syndicated newspaper column which addresses readers' questions about motor vehicles, a center high-mounted stop lamp is known by the acronym "CHMSL," which is pronounced "chim-zel." Car Talk: What's a CHMSL and How Do We Fix It? (<http://www.cartalk.com/blogs/tom-ray/today-whats-chmsl-and-how-do-we-fix-it>), September 4, 2014.

² The patrol car video contains running time stamps which are described as "media current time," commencing at time 02:00:52. Lerdahl's citations to these time stamps represent undersigned counsel's best approximations between the activities depicted in the video and the time stamps.

Officer Roth testified that she activated the emergency lights on her patrol car “right as the truck was turning right into the Gordy’s parking lot.” (appellant’s App. 12; 11:10). The video recording, itself, shows that reflections of the patrol car’s emergency lights became visible approximately one second after the truck’s turn signal was activated. (9:Exhibit 1: time 02:01:22-23).

Officer Roth made contact with the truck’s driver in the parking lot and identified her as Lerdahl. (appellant’s App. 14; 11:12). The video recording depicts lighted commercial signage in the area indicating that Gordy’s supermarket was open for business at that time, as well as numerous other parked vehicles in the parking lot. (9:Exhibit 1: time 02:01:34-42).

A vehicle registration check on Lerdahl’s truck disclosed that it was a 1992 model Chevrolet (appellant’s App. 15; 9:Exhibit 2; 11:13), although Officer Roth couldn’t remember whether she had had that information before she stopped the vehicle. (appellant’s App. 15; 11:13). At that time, Officer Roth didn’t know whether similar 1992 model Chevy trucks were equipped with a “factory installed” center high-mounted stop lamp. (appellant’s App. 15-16; 11:13-14). Officer Roth admitted that the color of the ostensible, center high-mounted stop lamp was “whitish,” rather than the red color that is ordinarily seen on brake lights. (appellant’s App. 18-19; 11:16-17).

Subsequent investigation by Lerdahl’s attorney revealed that the whitish object was actually a “cargo lamp,” which may be used to illuminate the interior of the truck bed after dark. (appellant’s App. 25-28; 11:23-26).

Such other facts as may be relevant to this appeal will be set forth, and cited to the record, in the Argument below.

ARGUMENT

The Trial Court Did Not Err in Granting Lerdahl's Pretrial Motion to Suppress Evidence Derived from a Warrantless Motor Vehicle Stop Because the Officer Did Not Have a Sufficient Factual Basis to Believe that Any Violation of Law Was Being Committed in Her Presence.

A. The relevant statutes and administrative rule, the applicable general principles of law and the standard of appellate review.

Wis. Stat. §§ 340.01, 347.14 and 349.02,³ provide, in relevant part, as follows:

340.01 Words and phrases defined. In s. 23.33 and chs. 340 to 349 and 351, the following words and phrases have the designated meanings unless a different meaning is expressly provided or the context clearly indicates a different meaning:

* * *

(63) "Stop lamp" means a device giving a steady warning light to the rear of the vehicle to indicate the intention of the operator of the vehicle to diminish speed or stop.

* * *

347.14 Stop lamps. (1) No person shall operate a motor vehicle, . . . upon a highway unless such motor vehicle. . . is equipped with at least one stop lamp mounted on the

³ All statutory references are made to the 2011-12 edition unless indicated otherwise.

rear and meeting the specifications set forth in this section. * * * No vehicle originally equipped at the time of manufacture and sale with 2 stop lamps shall be operated upon a highway unless both such lamps are in good working order.

(2) A stop lamp shall be so constructed as to be actuated upon application of the service or foot brake. . .and shall emit a red or amber light. . . .

349.02 Police and traffic officers to enforce law. (1) It is the duty of the police, sheriff's and traffic departments of every unit of government and each authorized department of the state to enforce chs. 346 to 348 and 350. * * *

(2) (a) Notwithstanding sub. (1), a police officer, sheriff, deputy sheriff, traffic officer or motor vehicle inspector may not stop or inspect a vehicle solely to determine compliance with a statute or ordinance specified under par. (b) unless the police officer, sheriff, deputy sheriff, traffic officer or motor vehicle inspector has reasonable cause to believe that a violation of a statute or ordinance specified under par. (b) has been committed. * * *

(b) The statutes and ordinances covered under par. (a) are all of the following:

* * *

3. Chapters 341 to 346.

* * *

The Wisconsin legislature has also authorized the Department of Transportation to adopt relevant administrative rules. Wis. Stat. §§ 85.01(1); 85.16(1).

Wisconsin Administrative Code Trans § 305.15 provides, in relevant part, as follows:

Trans 305.15 Stop lamps. (1) Every automobile originally manufactured commencing with the 1950 models, every light truck or motor home originally manufactured commencing with the 1955 models, . . . , shall be equipped with at least 2 stop lamps. All other motor vehicles shall be equipped with at least one stop lamp.

(2) The stop lamps of every vehicle shall be maintained in proper working condition and in conformity with this section and s. 347.14, Stats.

* * *

(5) (a) The high-mounted stop lamp of every motor vehicle originally manufactured with a high-mounted stop lamp shall be maintained in proper working condition and may not be covered or obscured by any object or material. * * *

* * *

The Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 11, of the Wisconsin Constitution protect citizens from unreasonable searches and seizures. *State v. Brown*, 2014 WI 69, ¶ 19, 355 Wis. 2d 668, 678, 850 N.W.2d 66. Traffic stops are considered seizures and thus must be reasonable to pass constitutional muster. *Id.* If the seizure is unreasonable and therefore unconstitutional, then evidence obtained as a result is generally inadmissible. *Id.*, at 679. The burden is on the State to prove that a stop meets the constitutional reasonableness requirement. *Id.*, at 679. In general, a traffic stop can be based on probable cause or reasonable suspicion. *Id.*, at 679.

When a motor vehicle stop is founded upon the officer's observation of an ostensible violation being committed in his or her presence, rather than a suspicion which warrants further investigation, then the applicable standard is probable cause. *State v. Longcore*, 226 Wis. 2d 1, 8-9, 593 N.W.2d 412 (Ct. App. 1999), *aff'd* 233 Wis. 2d 278, 607 N.W.2d 620. See also Wis. Stat. § 349.02(2)(a), and *City of Milwaukee v. Nelson*, 149 Wis. 2d 434, 455, 439 N.W.2d 562 (1989) ("A 'reasonable grounds' for arrest has been equated to mean 'probable cause.'").

Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed. E.g., *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. *Id.*, at 176. But the mistakes must be those of reasonable persons, acting on facts leading sensibly to their conclusions of probability. *Id.*, at 176. Probable cause may not be based on speculation arising from the absence of factual information. *State v. Haugen*, 52 Wis. 2d 791, 795, 191 N.W.2d 12 (1971).

On appeal, the question whether there was probable cause to stop a vehicle is a question of constitutional fact. *State v. Brown*, 2014 WI 69, ¶ 17, 355 Wis. 2d 668, 677, 850 N.W.2d 66. The reviewing court will sustain the circuit court's findings of fact unless they were clearly erroneous, but the court will independently assess the application of those facts to the constitutional principles. *Id.* The circuit court's decision whether to draw a permissive inference, or not to draw an inference, is a finding of fact which is binding

on the appellate court. *State v. Friday*, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989).

- B. The officer's belief that Lerdahl's pick-up truck had a non-functioning, center high-mounted stop lamp was not a reasonable mistake of fact.

The essence of the state's argument is that Officer Roth made a reasonable mistake of fact in presuming that the object on the upper rear of Lerdahl's pick-up truck was a non-functioning, center high-mounted stop lamp. (appellant's brief, at 5-7). From this premise, the state concludes that the seizure of Lerdahl's vehicle was lawful. (id.).

Certainly, it is true that the officer's factual belief was erroneous. The undisputed evidence at the motion hearing established that Lerdahl's truck was equipped with a cargo lamp, not a center high-mounted stop lamp. (appellant's App. 25-28; 11:23-26).

However, the circuit court correctly ruled that the officer's erroneous belief was not a reasonable mistake.

First, as Judge Lenz observed, the state presented no testimony that Officer Roth had any general knowledge or information concerning which vehicles are equipped with center high-mounted stop lamps and which vehicles are not so equipped. (appellant's App. 30-31; 11:28-29). Therefore, there is no way to rationally assess the likelihood that Lerdahl's specific truck had a center high-mounted stop lamp, apart from speculation.

Second, the officer admitted that the cargo lamp on Lerdahl's truck has a "whitish" colored lens instead of a red lens, as is commonly seen on stop lamps. (appellant's

App. 18-19; 11:16-17). Indeed, Wisconsin law requires that stop lamps emit a red or amber light. Wis. Stat. § 347.14(2). Although the circuit court did not rely on this particular evidentiary fact for its ruling, that ruling may nevertheless be sustained on appeal on an alternative ground. *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

Consequently, the state failed to carry its burden of proof that the officer's action was founded on a reasonable mistake of fact.

- C. The officer did not have a sufficient factual basis to believe that any violation of law was being committed, in any event.

Moreover, even if Officer Roth's erroneous assumption about a center high-mounted stop lamp on Lerdahl's truck had been reasonable, she still did not have lawful grounds to stop the vehicle. This is so for essentially the same reason, namely that the officer claimed no information or knowledge concerning the likelihood that Lerdahl's truck had been "originally manufactured" with a center high-mounted stop lamp, as Wisconsin Administrative Code Trans § 305.15(5)(a) requires.

By statute, the United States Congress has authorized the National Highway Traffic Safety Administration ("NHTSA") to adopt relevant administrative rules for vehicle safety. 49 U.S.C. § 3011(a).

In 49 C.F.R. § 571.108, entitled "Standard 108; Lamps, reflective devices, and associated equipment," at S5.1.1.27(a), the NHTSA adopted a rule that "each passenger car manufactured on or after September 1, 1985, and each multipurpose passenger vehicle, truck, and bus, . . . ,

manufactured on or after September 1, 1993, shall be equipped with a high-mounted stop lamp. . . .”

It follows that a traffic officer must possess some knowledge about either the age of a pick-up truck, or other original-equipment vehicle information, in order to rationally assess whether it is in violation of Wisconsin Administrative Code Trans § 305.15(5)(a).

Here, Officer Roth testified that a vehicle registration check showed that Lerdahl’s truck was a 1992 Chevrolet model, although the officer could not recall if she had had that information before she stopped it. (appellant’s App. 15; 11:13). However, Officer Roth gave no testimony about the apparent age of Lerdahl’s truck or other manufacturer’s information to suggest that it had likely been originally-equipped with a center high-mounted stop lamp.

Accordingly, this case is controlled by the court of appeals’ previous decision in *State v. Conaway*, 2010 WI App 7, 323 Wis. 2d 250, 779 N.W.2d 182. There, a warrantless vehicle stop had been founded on a police officer’s belief that the rear window tinting of a car failed to satisfy an administrative rule that at least 35% of the light must pass through unless the window tint is original equipment, Wisconsin Administrative Code Trans § 305.32(5)(b). *Id.*, ¶¶ 1-3 at 252-53. The court concluded that the stop had been unlawful because the officer did not testify that he had any training or experience which made him capable of judging the technical standard of fact set forth in the administrative rule. *Id.*, ¶¶ 9-14 at 255-57.⁴

⁴ Lerdahl acknowledges that the court of appeals’ decision in *State v. Conaway* treated the applicable legal standard as one of reasonable suspicion, rather than probable cause. However, the parties had argued the case solely under that rubric, without addressing

Finally, the fact that the occupants of Lerdahl's truck had initially taken notice of Officer Roth's presence in a patrol car adds nothing to the legal analysis.

In the absence of unprovoked flight, a citizen's mere cognizance that a police officer is present does not even raise a reasonable suspicion for investigation, much less probable cause. Compare *State v. Williamson*, 109 Wis. 2d 83, 93-94, 325 N.W.2d 360 (Ct. App. 1982), with *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000).

Wis. Stat. § 349.02(2)(a) or *State v. Longcore*, 226 Wis. 2d 1, 8-9, 593 N.W.2d 412 (Ct. App. 1999), *aff'd* 233 Wis. 2d 278, 607 N.W.2d 620. Therefore, *State v. Conaway* is not controlling on the issue. E.g., *State v. Goetz*, 2001 WI App 294, ¶ 18, 249 Wis. 2d 380, 387, 638 N.W.2d 386 (the court of appeals does not develop or decide arguments that are not raised by the parties).

CONCLUSION

For the reasons set forth above, Lerdahl respectfully requests the Court of Appeals to enter an order affirming the circuit court's order granting the suppression of evidence, and remanding to the circuit court for further proceedings.

Dated this 19th day of December, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,739 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 19th day of December, 2014.

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