COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

CASE NO. 2014AP2119-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KIM M. LERDAHL,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING SUPPRESSION OF EVIDENCE IN
EAU CLAIRE COUNTY CIRCUIT COURT
THE HONORABLE PAUL J. LENZ, PRESIDING

# REPLY BRIEF OF PLAINTIFF-APPELLANT

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## ARGUMENT

THE COURT ERRED WHEN IT RULED THAT OFFICER ROTH DID NOT HAVE REASONABLE SUSPICION OR PROBABLE CAUSE FOR THE TRAFFIC STOP OF THE VEHICLE DRIVEN BY KIM LERDAHL AND GRANTED THE MOTION TO SUPPRESS EVIDENCE.

In the recently decided U.S. Supreme Court Case of Heien v. North Carolina, Chief Justice John Roberts wrote: "The Fourth Amendment prohibits "unreasonable searches and seizures." Under this standard, a search or seizure may be permissible even though the justification for the action includes a reasonable factual mistake. An officer might, for example, stop a motorist for traveling alone in a high-occupancy vehicle lane, only to discover upon approaching the car that two children are slumped over asleep in the back seat.

The driver has not violated the law, but neither has the officer violated the Fourth Amendment." 574 U.S. ___ (2014). The same is true here.

"A traffic stop for a suspected violation of law is a "seizure" of the occupants of the vehicle and therefore must be conducted in accordance with the Fourth Amendment. *Brendlin v. California*, 551 U.S. 249, 255-259 (2007). All parties agree that to justify this type of seizure, officers need only "reasonable suspicion" – that is, "a particularized and objective basis for suspecting the particular person stopped" of breaking the law. *Prado Navarette v. California*, 572 U.S. __, __ (2014)(slip op., at 3)(internal quotation marks omitted)." *Id.*

"[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, 573 U.S. ___, ___ (2014) (slip op., at 5) (some internal quotation marks omitted). To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them "fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). We have recognized that searches and seizures based on mistakes of fact can be reasonable." *Id.*

"The limit is that "the mistakes must be those of reasonable men." *Brinegar* at 176. … Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out

to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law." *Id.*

Lerdahl asserts 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). This assertion is unreasonable, as it all but eliminates the possibility of a reasonable mistake. It can be clearly seen on the squad video (9:Exhibit 1: time 02:00:52 – 02:01:22), that all the observations Officer Roth was able to make before Lerdahl made clear her intention to exit the roadway, occurred within 30 seconds before Officer Roth activated the squad car's emergency lights. It can be seen on the video at 2:00:01:20, that approximately two seconds before the emergency lights were activated, Lerdahl activated her brake lights in anticipation of the right turn into the parking lot. A reasonable officer under those circumstances could conclude that Lerdahl's turn into the grocery store parking lot was made for the purpose of evading Officer Roth, as Officer Roth had already observed the occupants of the vehicle turn around and look at her two different times, first when she was observing traffic from Starr Avenue (11:9) , and soon thereafter when she was traveling behind Lerdahl's vehicle (11:9).

The "35% light pass-through requirement" window tint discussion from *State v. Conaway* is not particularly instructive in resolving this case. In *Conaway*, the Court noted that officers likely cannot distinguish with the naked eye small variations in the amount of light that passes through suspect windows.

2010 WI App 7. Some technical expertise or equipment would always be necessary to evaluate a window tint violation. In contrast, when observing a light on the back of a pickup truck which is traveling on the roadway in the early morning hours, no such technical expertise is required. All one needs is to see if the light is on or off. What reasonably looked like a high-mount stop lamp due to its location, appeared to be non-functioning because it did not light when the brakes were applied. Expecting a law enforcement officer under the circumstances that existed in this case to distinguish the difference between the features of a 1992 pickup truck and a 1994 pickup truck before making the traffic stop is simply not reasonable.

## CONCLUSION

For all the reasons cited, the court's Order Granting Suppression of Evidence should be reversed.

Dated this 9th day of January, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4 pages and 789 words.

Dated this 9th day of January, 2015.

_____
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