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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP000226

TOWN OF BLOOMFIELD,

Plaintiff-Respondent,

v.

PETKO ZVETKOV BARASHKI,

Defendant-Appellant.

ON APPEAL FROM THE FINDINGS, ORDER &
JUDGMENT ENTERED IN THE WALWORTH COUNTY
CIRCUIT COURT, THE HONORABLE JAMES L.
CARLSON PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case does not qualify for publication.

Oral argument is not necessary to decide this case.

STATEMENT OF THE CASE

Appellant Petko Barashki appeals his convictions of December 1, 2014, for driving while registration lamps not lit and operating while intoxicated, first offense, plus the separate finding that his refusal to provide a chemical sample was unreasonable.

On September 2, 2013, Town of Bloomfield Officer Henson stopped and cited Barashki, for driving while his registration lamps were not lit, contrary to Wis. Stat. §347.13(3), as adopted by the Town of Bloomfield; and operating while under the influence, contrary to Wis. Stat. §346.63(1) as adopted by the Town of Bloomfield. (R. 1, docs. 2 and 1 respectively).

Officer Henson subsequently processed Barashki for refusing to provide a blood sample, contrary to Wisconsin's implied consent law. (R.4, Document 1, Municipal Court transcript, p.1)

The Bloomfield Municipal Court, the Honorable David Schultz presiding, found Barashki guilty of the citations and found the refusal unreasonable. (*Id.* at 18 and 19)

Barashki appealed this decision to the Walworth County Circuit Court, the Honorable James L. Carlson presiding. Barashki filed no motion to suppress the traffic stop based upon an illegal stop.

The case went to trial before Judge Carlson, without a jury on December 1, 2014. (R. 5, p.1)

At trial, the court admitted a video recording of the traffic stop. (R.4, Exhibit 2, CD) The court also admitted a transcript of Officer Henson's municipal court testimony. (R.4, Exhibit 1)

The court found Barashki guilty of the two citations and found the refusal unreasonable. (R.5)

Barashki has appealed Judge Carlson's decision. (R.6) Barashki filed a Statement on Transcript February 9, 2015 in which he stated "a transcript is not necessary for the prosecution of this appeal."

After Barashki filed his notice of appeal, the trial court approved an Amended Findings, Order and Judgment, correcting technical flaws. (R. 13)

Barashki's issues on appeal are whether there was reasonable suspicion for the stop; and he combines three other issues into one, whether Barashki was guilty of operating without registration lamp lit, whether Barashki was guilty of operating a motor vehicle while under an intoxicant and whether Baraski's refusal was unreasonable.

ARGUMENT

I. Standard of Review.

Barashki argues on appeal that the officer, in essence did not have a valid reason to stop him, because his registration lamps were in working order. The trial court found that the registration lamps were not functioning at all

per the judgment. Therefore, Barashki argues that the trial court committed error in its findings of facts.

“Findings of facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Wis. Stat. §805.17(2).

II. Barashki Failed to Procure a Full or Partial Transcript for this Appeal, so this Court has Insufficient Evidence to Reverse the Trial Court.

Barashki did not procure a full or partial transcript. However, he asks this Court to reverse his convictions based upon a claimed erroneous finding of fact. “When this court does not receive a complete transcript, we assume that any fact necessary to sustain the trial judge’s exercise of discretion is supported by the record.” *Haack v Haack*, 149 Wis.2d 243, 247, 440 N.W.2d 794, 796 (Ct. App. 1989). *See also T.W.S., Inc. v. Nelson*, 150 Wis.2d 251, 254-55, 440 N.W.2d 833, 835 (Ct. App. 1989).

In this case, this Court does not have before it all of the evidence considered by the circuit court judge. This Court must assume that every fact necessary to support the trial court’s decision is supported by the record. Since Barashki only claims an erroneous factual finding, that is, that his registration lamps were functioning, he fails to meet his heavy burden of proof to convince this Court to reverse the trial court decision.

Barashki’s failure to obtain a transcript is especially troublesome in this case. This Court is deprived of the opportunity to review all of the evidence considered by the trial court.

Similarly, Barashki's failure to obtain a transcript unfairly hampers the Town of Bloomfield's ability to respond to Barashki's factual assertions, because the Town does not have the transcript to review and accurately address the additional evidence contained therein. The Town is thus restricted to making argument based upon limited portions of the record, which are far less clear and accurate than the contents of a complete transcript. Barashki should not benefit from his failure to provide adequate information to the Court or the opposing party, by alleging factual error without providing supporting documentation.

III. The Video Footage in the Record is, at best, Ambiguous, Contrary to Barashki's Assertion, and Other Evidence Contravenes Barashki's Assertion of What He Claims the Video Shows.

At page 3 of his brief, Barashki claims that the registration lamps on his car were clearly working. That is not the case. The video footage, to this writer's best recollection, is unclear. The officer's squad car headlights make it difficult to determine whether the registration lamps were working. The distance from the squad car to the license plate also make it difficult.

The record includes the transcript testimony of Officer Henson from the Bloomfield Municipal Court trial, R.4, document 1. In it, at page 10-11, the following exchange occurs:

SH:During your entire time on this traffic stop did the registration lamps start functioning properly?

AH: No.

SH: All right. They always just didn't work?

AH: Correct.

Although this Court should affirm the trial court's factual findings and judgment based upon Barashki's failure to obtain a transcript, if this Court elects to make factual findings based solely upon the limited materials provided, then Barashki still fails to satisfy his burden of proof. The video does not ambiguously show the lamps were working, and Henson's transcript testimony clearly states they were not working. Therefore, the trial court did not make a clearly erroneous factual finding that Barashki's "registration lamps on his car were not functioning at all on the night of this incident," at paragraph 2 of December 17, 2014 Amended Findings, Order & Judgment.

IV. The Officer had Reasonable Suspicion to Stop Barashki.

As stated above, Barashki fails to provide sufficient evidence for this Court to conclude that it was clearly erroneous for the trial court to find that Barashki's registration lamps were not functioning. However, this does not address the legal question of whether there was "reasonable suspicion for the stop," as Barashki generally asserts.

A. Barashki has waived any claim that the facts of this case do not constitute sufficient grounds to stop his vehicle.

Barashki appears to only claim that the facts justifying the reasons for the traffic stop were erroneous. He does not appear to argue whether the facts, if established, constitute sufficient grounds to stop his vehicle. Barashki has therefore waived any legal argument that the facts, as they are

established in this case, were not sufficient grounds to stop his vehicle.

Any argument not raised in the circuit court is considered waived. E.g., *Segall v. Hurwitz*, 114 Wis.2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). Further, Barashki has failed to brief this Court on whether the facts as established, constitute sufficient grounds to stop his car. This Court should therefore also decline to consider this issue.

B. If this Court elects to consider the issue, there was a reasonable suspicion to stop Barashki's car.

If this Court elects to consider whether the officer properly stopped Barashki, the Court should determine that there was indeed a reasonable and articulable suspicion to stop Barashki.

Wis. Stat. §968.24 reads in relevant part “a law enforcement officer may stop a person in a public place for a reasonable period of time when the officer reasonably suspects that such person is committing, is about to commit or has committed a crime, and may demand the name and address of the person and an explanation of the person's conduct....” This essentially codifies the concept of the *Terry* stop.

State v. Krier, 165Wis.2d 673, 478 N.W.2d 63 (Ct. App. 1991), clarifies that an investigative stop may be performed when a person's activity may constitute either a forfeiture or a crime.

Section 347.13(3), Stats. makes it illegal to “operate on a highway during hours of darkness any motor vehicle upon the rear of which a registration plate is required to be

displayed unless such motor vehicle is equipped with a lamp so constructed and placed as to illuminate with a white light the registration plate and render it clearly legible from a distance of 50 feet to the rear.”

The trial court found that Barashki’s registration lamps were not functioning at all on the night of the stop. Barashki has failed to meet his burden to convince this Court that this factual finding was clearly erroneous. Therefore, Officer Henson had sufficient grounds to stop Barashki because of a violation of Wis. Stat. §347.13(3).

C. The Trial Court Properly Convicted Barashki for Operating without Registration Lamps Lit and Operating While Intoxicated, and Properly Found that his Refusal was Unreasonable.

Barashki generally asserts that his traffic convictions and the refusal finding must be reversed. His only reason in support of this contention is that “there was not reasonable suspicion to stop the vehicle...” Barashki Brief, p.3.

As stated above, Barashki fails to meet his burden to prove that the trial court’s factual finding that his registration lamps were not lit is in error. This provided a valid legal basis to stop his vehicle, as a violation of the law that Officer Henson personally witnessed. Consequently, the one legal basis asserted for reversal of his convictions (and reversal of his refusal finding) is refuted. Therefore, this Court should affirm the decision of the trial court.

CONCLUSION

Barashki claims that the trial court made an erroneous finding of fact when it found that his registration lamps were not functioning at all on the night of the incident in this case. However, Barashki has failed to provide a transcript to this Court. In the absence of a transcript, this Court will assume that every fact essential to sustain the circuit court is supported by the circuit court record. Therefore, this Court should assume that the full record, which Barashki failed to provide, contains sufficient evidence that Barashki's registration lamps were not functioning.

Barashki asserts that the squad camera footage clearly shows that his registration lamps were actually working. However, the footage, which this Court has in its possession, is not so clear, because of distance and the squad car's headlights may be what is illuminating Barashki's license plate. This is insufficient for this Court to reverse the trial court's decision, especially when other evidence exists in the record that Barashki's registration lamps were not functioning at all.

Therefore, this Court should affirm the trial court's decision that Barashki's registration lamps were not functioning.

Having established that Barashki's registration lamps were not functioning at all, the officer had sufficient grounds to determine that a violation of section 347.13(3), Stats., was occurring, so he had reasonable grounds to stop Barashki.

Since the officer had reasonable grounds to stop Barashki, and since Barashki asserts no other grounds to reverse the trial court convictions and finding of unreasonable refusal, this Court should affirm the decision of the trial court.

Dated this 30th day of April, 2015.

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 2,659 words.

Dated this 30th day of April, 2015.

Signed:

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**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 30th day of April, 2015.

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