STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2015AP715-CR

Mark A. Tralmer,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND DECISIONS DENYING SUPPRESSION AND RECONSIDERATION MOTIONS, ENTERED IN THE MONROE COUNTY CIRCUIT COURT, THE HONORABLE J. DAVID RICE, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. THE WISCONSIN SUPREME COURT'S DECISION IN *HOUGHTON* DEFEATS TRALMER'S CLAIM REGARDING THE APPROPRIATE LEGAL STANDARD

Tralmer previously argued that the court erroneously applied the reasonable suspicion standard to uphold the stop in this case, when the applicable was probable cause. After Tralmer submitted that argument, however, the Wisconsin Supreme Court overruled prior caselaw supporting Tralmer's position in ***State v. Houghton***, asserting, "We conclude that reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." ***Id.,*** 2015 WI 79, ¶30. Tralmer concedes that ***Houghton*** controls this case.

II. OFFICER STEINBORN LACKED REASONABLE SUSPICION TO STOP TRALMER'S VEHICLE FOR AN ALLEGED TRAFFIC VIOLATION, AND HIS MISTAKE OF FACT WAS NOT REASONABLE

The evidence presented at the motion hearing amply demonstrated that Tralmer's traffic lane was obstructed because of parked cars that infringed his lane due to snowy conditions. The video showed this, the officer acknowledged it to some extent (19: 15-16), and Tralmer's testimony, combined with his photographs and measurements, demonstrated it beyond doubt (19: 23-27). The State correctly argues that Officer Steinborn is not required to rule out innocent explanations for a suspect's behavior before initiating a stop (State's brief: 9). However, an officer also may not ignore facts that negate elements of an offense or that support defenses built into the statute, such as here, where the statute clearly permits driving left of center when overtaking an obstruction in one's lane. Wis. Stat. sec. 346.05(1). Such facts are part of the 'totality of circumstances' when assessing the reasonableness of the officer's decision.

The measurements Tralmer took, which were supported by the photographs submitted as exhibits, demonstrated that even if Tralmer had driven right next to the parked cars, his vehicle could not fit completely within his own lane and would have needed to move at least ½ a foot over the center line for safety (19: 23-27). This is because his traffic lane was 18 feet wide, the distance between the curb and the edge of the parked vehicles were 11 ½ feet, and his own vehicle was 7 feet wide (19: 23-27). An officer observing this cannot simply ignore the context of Tralmer's swerve toward the center. Viewing these actions in a vacuum and ignoring the surrounding conditions is simply not reasonable.

The State contends that "the defense did not lay any foundation to establish the basis of Tralmer's knowledge or expertise" regarding the measurements or photographs (State's brief: 9). It is not clear whether the State intends to challenge the admissibility or the weight of Tralmer's testimony. Any challenge to its admissibility would be

forfeited by failure to object during the motion hearing. The court received the testimony, and it is part of the record.

Further, Tralmer's testimony involved lay evidence for which there was ample foundation, as he testified that he personally took the photographs and measurements on the same street, the same week of the stop, and he testified as to the accuracy of the photographs (19: 22-23, 26-27). Tralmer also described the method he used to make sure the conditions of the photos and measurements matched the time of his stop as closely as possible. The State does not suggest what type of "expertise" Tralmer lacked in order to accurately measure distances.

If the State intends to challenge the weight of Tralmer's observations, it has offered nothing to suggest his measurements are inaccurate, or that his method in obtaining those measurements was somehow flawed.

Finally, the State argues that "Even if Officer Steinborn was incorrect, and the parked vehicle was an obstruction to Tralmer, that is a reasonable mistake of fact under Heien" (State's brief: 10). This is the first time the State suggests the officer may have been reasonably mistaken, though the issues of "objectively reasonable mistakes" of law or fact have been pending before both state and federal courts since Tralmer's case began. *See* ***State v. Brown,*** 2014 WI 69; ***Heien v. North Carolina,*** 135 S.Ct. 530; and ***State v. Houghton, id.*** In fact, the US Supreme Court held that searches and seizures can be based on mistakes of fact as far back as 1990. See ***Illinois v. Rodriguez***, 497 U.S. 177, 183-86 (1990). This argument should therefore be deemed forfeited.

If the court chooses to address the argument, the defense asserts Officer Steinborn's mistake is not objectively reasonable. The standard for assessing whether a mistake of fact is "objectively reasonable" is likely the same as assessing whether a mistake of law is reasonable – whether the analysis is a "close call" and whether a "reasonable judge could agree with the officer's view." ***Houghton,*** 2015 WI 79, ¶¶70-71. In this case, the circumstances do not present a close call on whether Tralmer's lane was obstructed. The video,

photographs, and Tralmer's measurements demonstrate unequivocally that parked vehicles impinging on Tralmer's lane constituted an obstruction that permitted Tralmer to briefly move across the center. Wis. Stat. sec. 346.05(1). Considering there was no other traffic behind Tralmer, no cars in front of the officer, and the movement of Tralmer's vehicle didn't affect Officer Steinborn's vehicle, Tralmer's movement was permitted by statute. The stop was not reasonable, and Steinborn's failure to consider the parked cars in Tralmer's lane as an obstruction was objectively unreasonable.

CONCLUSION

For the reasons discussed above, the defendant respectfully requests that this court reverse the judgment, reverse the order denying the motion to suppress, and remand to the circuit court for further proceedings.

Respectfully submitted 9/29/15:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 909 words.

Dated 9/29/15:

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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 s. 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.

Signed 9/29/15:

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