STATE OF WISCONSIN COURT OF APPEALS DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 15-AP-960-CR
Circuit Court Case No. 14-CM-72

v.

MICHAEL L. JOY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE IMPOSED IN THE CIRCUIT COURT OF MARINETTE COUNTY ON JULY 8, 2015, MARINETTE COUNTY CASE NO 14-CM-72, THE HONORABLE DAVID G. MIRON, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Patrick J. Stangl
Stangl Law Offices, S.C.
Attorneys for Michael L. Joy
6441 Enterprise Lane, Suite 109
Madison, Wisconsin 53719
(608) 831-9200
State Bar No. 01017765

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STATEMENT OF ISSUES

I. Whether repeated factual mistakes committed by an officer are objectively reasonable such that those mistakes can be relied upon to sustain a finding of probable cause that a traffic offense was committed in the officer's presence and whether a mistake of law occurred?

A hearing on the defense's motion to suppress evidence was held on July 31, 2014 in front of the Honorable Marc Hammer. The court concluded that Deputy Albrecht's repeated mistake of erroneously entering license plate information was reasonable and "…that there was a quantum of evidence which would have led a reasonable officer to believe that a traffic violation had occurred." (R. 48; p. 40, 42; App. A-42, 44. The court further determined that Deputy Albrecht did not make a mistake of law. R. 48; p. 40, 42; App. A-42-44. The court denied the motion to suppress. Id. at 42; App. A-44.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The parties' briefs will fully present and meet the issues on appeal and further develop the legal theories and authorities on each side. Wis. Stats. Rule §809.22 (2) (b) Pursuant to §752.31 (3) Wis. Stats. this case shall be decided by a one judge panel and therefore publication is not warranted unless the court, sua sponte, orders a three judge panel pursuant to §809.41 (3) Wis. Stats.

Oral argument is not requested at this time.

STATEMENT OF THE CASE AND FACTS

On April 15, 2014 Marinette County Sheriff's Deputy Zachary Albrecht was out on patrol and parked on the side of Augustine Road in the Town of Pound. R. 48; p. 8; App. A-10. As he was busy doing some paperwork Albrecht noticed a vehicle traveling north on Augustine Road and when he tracked the vehicle with his radar it was going slower than the speed limit for that particular county road but that wasn't anything out of the ordinary. Id. The vehicle slowly passed where Albrecht was parked and as it did he ran the plates. He was able to read the numbers off the front plate as the plate was illuminated by the squad's headlights. Id. His view was clear and unobstructed and he believed he was able to see the plates clearly. Id. at 21; App. A-23. He ran the registration and when the response from his registration check came back it indicated that there was "no vehicle associated with th[e] plate." Id. at 9; App. A-11. Albrecht didn't take any action and felt that he had made a mistake and ran the plate wrong. Id. at 10; App. A-12. After receiving the information he waited for a short period of time and then continued his patrol heading south on Augustine Road. Id. Albrecht took a right on East 20th Rd. and traveled down to North 3rd Rd. where he took another right. Id. He headed north and then took a left on E. 22nd Rd. and followed it until he reached the intersection of County Q and east 22nd Road. Id. at 11; App. A-13. He stopped at the stop sign, turned on his right blinker to take a right and as he did he saw another vehicle coming south on County Hwy Q approaching the stop sign. Id. at 11. The vehicle signaled to

take a left turn. He recognized that it was the same truck whose license plate he had ran as he was parked on Augustine Road. Id.

As Albrecht made the right turn his view of the front license plate was not obstructed and he was able to clearly see the license plate. Id. at 25; App. A-27. He was even more particularly attuned to getting it right the second time when he positioned his lights on the license plate of the stopped truck. Id. at 28; App. A-30. There is simply no question that Albrecht could clearly see the license plate. Id. at 27; App. A-29. He ran the plate a second time. After the second inquiry came back as "no vehicle associated with the plate" Albrecht followed the vehicle a short distance, approximately three quarters of a mile, and stopped it. Id. at 28; App. A-30. The truck, a half ton GM make, pulled over appropriately. Albrecht did not re-run the license plate before he approached the driver even though he believed that he inputted the wrong information on the plate the first time, ran it again and got the very same result. Id. at 32; App. A-34. The sole basis for the stop was probable cause to believe the vehicle had "an invalid registration." Id. at 26, 30; App. A-28; 32.

The driver was ultimately identified as Michael Joy and as Albrecht approached the vehicle he noticed a can of Milwaukee's Best Light sitting in the cup holder of the vehicle. Id. at 16; App. A-18. He thought he noticed it before he asked Joy for his driver's license. Upon request Joy provided Albrecht with his license. During his encounter with Joy he found him to be very cooperative and decent. R. 48 p. 16; App. A-18. Joy was subsequently arrested for and charged with OWI/PAC 4th, possessing a

firearm while intoxicated and carrying a concealed weapon. R. 9. He was further cited with having open intoxicants, failure to wear a seatbelt, and an Implied Consent refusal. Id. R. 4. A search warrant for the blood was obtained and the test result ultimately showed an alcohol concentration in excess of the legal limit. R. 1, 2, 3.

Michael Joy made his initial appearance on June 3, 2014. On June 16, 2014 numerous pretrial motions were filed including a Notice of Motion and Motion to Suppress Evidence Based Upon an Unconstitutional Automobile Stop. R. 17-26. The basis for the motion to suppress was that the compounded error by Deputy Albrecht in inputting the front license plate erroneously on two separate occasions was not an objectively reasonable mistake of fact and that the facts were erroneously applied to the law resulting in a lack of probable cause to stop Mr. Joy's vehicle. R. 26.

A hearing on the stop of the vehicle was held on July 31, 2014. R. 48; App. A-50. Judge David Miron did not preside over the motion hearing, instead Brown County Judge Marc Hammer heard the evidence. During the hearing the court wanted to be clear as to what traffic violation Deputy Albrecht believed Joy had committed. Id. at 30-31; App. A-32-33. The following exchanged occurred between Albrecht and the court:

THE COURT: I'm not clear and I want to be clear. When you – when you went up to the vehicle, what – what traffic violation do you believe the driver was committing?

THE WITNESS: I believe, Judge, and it's pretty common in this area, that he had plates on a vehicle, just plates that, you know, showed they were valid and they weren't.

A lot of people put plates on vehicles that they don't want to register that they got off from something else, an older vehicle and they find stickers from God knows where and put them on and try to make their vehicle look valid when it's not.

THE COURT: So you believe he was operating a vehicle that wasn't registered?

THE WITNESS: With an invalid registration.

THE COURT: But would it have come back, would the vehicle come back as an invalid registration on your computer?

THE WITNESS: If the plates would have matched the vehicle and they would have been expired, it would have come back as a expired registration. If the plates would have been from something totally different like a different truck, a red Dodge Ram, it would have came back to that instead of the black or blue, whatever it was, Silverado Chevy. But it came back to nothing, which concerned me. I've stopped people for that before and it actually has been mistakes made through D.O.T. in Madison, computer issues where they had to go to the DMV and get things fixed with their VINS and their registration because it happens, clerical errors sometimes.

THE COURT: When you were walking up to the vehicle, I'm assuming you looked at the license plate again?

THE WITNESS: Yes.

THE COURT: And you realized before you got to the driver that you inputted the wrong license plate number?

THE WITNESS: It didn't quite hit me like oh, I know that's not exactly what I ran, but I was like looking at it and I'm like is that what I ran? But you're walking and there's maybe a second or two it takes you to walk from the back of the truck to, you know, when you get right up there. There was like a hitch in the way so I wanted to get around this ball hitch to see exactly what it was from the back. You could actually see it clearer from the front than you could from the back.

THE COURT: Thank you.

R. 48. P. 30-32; App. A-32-34.

The court determined that Deputy Albrecht's actions in stopping the vehicle based on his repeated mistakes was a mistake of fact and not a mistake of law and that there was a sufficient … "quantum of evidence which would have led a reasonable police officer to believe that a traffic violation had occurred." R. 48; p. 42; App. A-44. The court denied the motion to suppress evidence.

On February 13, 2015 Michael Joy entered a plea of no contest to the OWI as a fourth offense and to count three, operation of a firearm while intoxicated. R. 38. On count one he was sentenced to sixty (60) days in the Marinette County Jail; a fine and costs of one thousand six hundred ninety four and 00/100 dollars ($1,694.00) was imposed; plus a mandatory AODA assessment. He was further ordered to install an

Ignition Interlock Device for a period of twenty four (24) months. On count three he was sentenced to thirty (30) days in the county jail. Id. At the conclusion of the plea and sentencing hearing the court addressed the defendant's pending motion for stay pending appeal and issued an order granting the motion to stay sentence pending appeal except for compliance with the IID requirement. R. 38, 39 49. A notice of intent to pursue post conviction relief was filed on February 23, 2015. R. 4.

A timely notice of appeal was filed on May 8, 2015 which brings this appeal before the court. R. 42.

Further facts will be set forth as necessary herein below.

ARGUMENT

I. REPEATED MISTAKES OF FACT ARE NOT OBJECTIVELY REASONABLE AND CAN NOT BE RELIED UPON TO SUSTAIN A FINDING OF PROBABLE CAUSE THAT A TRAFFIC OFFENSE WAS COMMITTED IN THE OFFICER'S PRESENCE.

A. Standard of Review

The denial of a suppression motion is analyzed under a two-part standard of review; the circuit court's findings of fact will be upheld unless they are clearly erroneous but whether the facts warrant suppression of the evidence is reviewed independently. State v. Conner, 2012 WI App. 105 ¶15.

"Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of fact." State v. Popke, 2009 WI 37 ¶10. The ultimate question of "whether

the facts as found by the [circuit] court meet the constitutional standard" is reviewed de novo. State v. Hindsley, 2000 WI App. 130, ¶22.

B. Probable Cause v. Reasonable Suspicion to Support Traffic Stop

Whether reasonable suspicion or probable cause is necessary for a law enforcement to stop a vehicle is a question of law which is reviewed de novo. State v. Kramer, 2001 WI 132, ¶17. At the time of the stop in this case two different standards existed for upholding traffic stops in Wisconsin. In State v. Gaulrapp, 207 Wis.2d 600 (Ct. App. 1996) the court of appeals stated that a "traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed." Id. at 605. State v. Houghton, 2015 WI 79 ¶27. In State v. Longcore, 226 Wis.2d 1 (Ct. App. 1999) the court highlighted the probable cause standard when it stated that the arresting officer "did not act upon a suspicion that warranted further investigation, but on his observation of a violation being committed in his presence," which required the officer's observations to meet the probable cause standard. Id. at 8-9. In Houghton the court concluded that "reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." Id. at ¶30. The Houghton court also held that an objectively reasonable mistake of law made by an officer can form the basis for reasonable suspicion to conduct a traffic stop adopting the Supreme Court's decision in Heien v. North Carolina, 574 U.S. ___, 135 S. Ct. 530 (2014). Id. at 42. Thus, the previous dual standard regarding the legal distinction between an arrest based solely on probable cause of an offense being committed in the officer's presence versus reasonable

suspicion to conduct an investigatory stop no longer exists in Wisconsin. Here, however, the incident occurred on April 15, 2014 prior to the Supreme Court's decision in Heien, which the Houghton decision was predicated upon. Therefore, the dual standard of reasonable suspicion versus probable cause applies in this case as does the mistake of law analysis which preceded both Heien and Houghton.

C. Repeated Mistakes of Fact Are Not Objectively Reasonable

In Whren v. United States, 517 U.S. 806 (1996) the Court addressed the issue of whether the temporary detention of "a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws." Id. at 808. The Whren court determined that pretextual stops, that is a stop designed to investigate violations not related to the observed violation are not per se unreasonable under the Fourth Amendment. Thus, "…the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Id. at 810. [1] As a general rule courts decline to apply the exclusionary rule where an officer makes a reasonable, good faith factual mistake. See United States v. Cashman, 216 F.3rd 582, 587 (7th Cir. 2000) (where an officer reasonably believed a crack in the windshield

[1] In State v. Houghton, 2015 WI 79 the Wisconsin Supreme Court decided, in an opinion filed on July 14, 2015, and in step with Heien, that mistakes of law are not prohibited by the Fourth Amendment and further concluded that reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops. The Wisconsin Supreme Court's decision in Houghton overruled State v. Longcore, 2000 WI 23 and State v. Brown, 2014 WI 69. As noted herein, the stop in the instant case occurred prior to the decisions in Heien and in Houghton and therefore Longcore was applicable at the time of the stop and is controlling in this case. Even under Houghton the repeated factual mistakes are not objectively reasonable.

was long enough to violate statute, but it was not in fact, officer had probable cause to stop for a traffic violation).

In an unpublished opinion in State v. Reierson, 2011 WI App. 75 this court looked to Cashman and other federal cases for that proposition and concluded that as long as the officer's misreading of the license plate in that case was made in good faith, "the officer had a reasonable, if mistaken, belief that [the defendant] was operating a vehicle with an expired registration." ¶11.

Certain reasonable mistakes of fact are permitted by law enforcement because "sufficient probably not certainty is the touchstone of reasonableness under the Fourth Amendment…" Hill v. California, 401 U.S. 797, 804 (1971). Regardless the mistake of fact must be objectively reasonable. A reasonableness analysis applies to "**factual** judgments that law enforcement officials are expected to make." Illinois v. Rodriguez, 497 U.S. 177, 184 (1990) (emphasis added). With respect to the reasonableness requirement "what is generally demanded of the many **factual** determinations that must be regularly made by agents of the government….is not that they always be correct, but that they always be reasonable." Id. at 185. (emphasis added). There is no dispute that an officer is allowed to make a good faith reasonable mistake of fact in carrying out his or her duties. The issue in this case, however, is not whether law enforcement is entitled to one good faith mistake but whether repeated mistakes of the same kind turn a good faith mistake into a bad faith mistake and a mistake which is not objectively reasonable under the totality of the circumstances and the Fourth Amendment.

In this case Deputy Albrecht's repeated mistake in inputting the front license plate information erroneously on two separate occasions when he was able to clearly see the license plate is not objectively reasonable. When Albrecht first inputted the wrong information the error occurred in a situation where his vehicle was stopped and Joy's vehicle slowly passed his location. Joy's front license plate was illuminated by the headlights of the officer's squad. When he inputted the license plate number and the registration check came back it did not show that the vehicle had an expired registration or that it was a different color or that the plate was registered to a different vehicle. R. 48; p. 22-23; App. A-24-25. At that point Albrecht believed he had inputted the numbers incorrectly. Id. at 23. In fact, this has happened to Albrecht before which is further confirmation that he knew he had put in the wrong plate number. Indeed, Albrecht stated: "that happens more often than you think and usually it's because you put the plate in wrong because all plates usually come back to something." R. 48; p. 23; App. A-25. There is no question Albrecht could clearly see the front license plate when he inputted the numbers incorrectly the first time. Given the fact that he has had this happen before, Albrecht knew he made a mistake with respect to the license plate the first time.

A short time later he encounters Joy's vehicle again, this time at the intersection of Hwy Q and 22nd Rd. At the intersection he purposely made his right hand turn first because he "…wanted my lights to go across his plates so I could get it again." R. 48; p. 25; App. A-27. He was able to clearly see the front plate and it was not obstructed. After

inputting the numbers again incorrectly he received the same return information, namely "there was no vehicle associated with the plate." Id. at 26; App. A-28. There was no dispute that Albrecht clearly saw the license plate the second time as well. Id. at 27. Albrecht believed the first time he inputted the license plate information that based on past experience he had gotten the numbers wrong. Knowing he likely got the number wrong the first time he inputted it again and got the same registration check information. At that point there could be no question that he knew that he had repeatedly mistakenly entered the license plate information. The very nature of the return information after the registration check was made further confirms that Albrecht was repeatedly mistaken. Albrecht acknowledged that the license plate or tag numbers are tied to a particular VIN number of a vehicle. Id. at 23. There was no testimony that the numbers on Joy's license plate appeared to be altered, forged or changed in any way. If they had been given Albrecht's two clear views of the front license plate he would have clearly noticed any type of alteration of the plate's numbers or lettering. Even though he had inputted license plate numbers incorrectly in the past and believed he had mistakenly entered the wrong license plate information here he nonetheless stopped the vehicle. As he approached the back of the vehicle he looked at the license plate again. According to Albrecht it didn't quite hit him that he ran it wrong. That was his response to the court's question about whether he realized before he got to the driver that he inputted the wrong number. Id. at 31. This testimony by Albrecht seemingly contradicts his prior testimony on direct examination when he was asked: "On your way up to the vehicle did you again look at the plate? Id. at 14; App. A-16. Albrecht's answer was as follows: "I looked at the back

plate as I got up to the vehicle. And I think I noticed that I ran it wrong or I was seeing it wrong…" Id. Albrecht has experienced this problem before and he knew that it was an error. Albrecht stated in response to a question from the court in pertinent part "but it came back to nothing which concerned me. I have stopped people for that before and it actually has been mistakes made through D.O.T. in Madison, computer issues where they had to go to the DMV and get things fixed with their VINS and registration because it happens, clerical error sometimes." R. 48; p. 31; App. A-33. Given his experience with this happening before, the fact that he believed after the first time he had made an error, by the second time there could be no reasonable interpretation that it wasn't his error. Albrecht's actions do not constitute a single good faith mistake, instead his previous experience with making the very same mistake which was compounded by two additional mistakes can not be considered to be objectively reasonable. Albrecht's repeated mistakes were not made in good faith. A good faith mistake is just that, a good faith mistake, but knowledge of the mistake and previous experience with that same mistake coupled with his compounded error can not be considered to be made within the touchstone of "reasonableness" mandated by the Fourth Amendment.

D. Mistake of Law Analysis

The Fourth and Fourteenth Amendments of the United States Constitution and Article I and Section 11 of Wisconsin Constitution protects citizens from unconstitutional unreasonable searches and seizures. State v. Brown 2014 WI 69 ¶19. When the stop of a motor vehicle is founded upon the officer's observation of an alleged violation being committed in either his or her presence, rather than a suspicion which warrants further factual investigation, then the applicable standard is probable cause. State v. Longcore, 226 Wis.2d 1-8-9 (Ct. App. 1999). [2] When 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, probable cause exists. See Brinegar v. United States, 338 U.S. 160, 175-76 (1949). Many situations which confront officers in the field are more or less ambiguous and room must be allowed for some mistakes on their part. Id. at 176. But those mistakes must be those of reasonable persons acting on facts leading sensibly to their conclusions of probability. Id. Probable cause may not be based on speculation arising from the absence of factual information. State v. Haugen, 52 Wis.2d 791 (1971). Here, Albrecht's repeated mistake of fact with respect to entering the wrong license plate information is not objectively reasonable. Albrecht believed that the vehicle was operating with an invalid registration in his presence thus placing the stop within the context of Longcore. R. 48; p. 30; App. A-32. He knew that if the plates would have been expired it would have come back as an expired registration and if the

[2] As noted in footnote 1, Longcore and Brown were overruled in State v. Houghton, 2015 WI 79, but for purposes of this appeal were the applicable law at the time of Joy's arrest.

plates were registered to a different vehicle it would have come back registered to a different vehicle. Id. at 30-31. Albrecht had had this happen before and therefore knew, or should have known, that the vehicle was not improperly registered especially in light of the lack of any testimony that the license plate markings were counterfeit or appeared to be altered in any way.

The State will likely argue that the officer had probable cause that a violation of §341.61 (2) Wis. Stats. occurred in his presence. §341.61 (2) states as follows:

> (2) Displays upon a vehicle registration plate, insert tag, decal or other evidence of registration not issued for such vehicle or not authorized by law to be used thereupon.

The very existence of the license plate means that it is associated with a particular vehicle's VIN. R. 48; p. 23; App. A-25. Thus, the existence of the license plate itself means it must be associated with a particular vehicle and that the plate on Joy's vehicle could not have been issued to another vehicle or according to Albrecht it would have come back as such. In light of Deputy Albrecht's testimony that this has happened to him before, he knew that he made an initial mistake which was further compounded by his second mistake. His mistakes of fact were not objectively reasonable and could not have been made in good faith and therefore because the factual determinations were not objectively reasonable a mistake of law occurred and under Longcore the evidence should be suppressed.

CONCLUSION

The Fourth Amendment requires that when government officials act, they act not perfectly but any mistakes "…must be those of reasonable men." Brinegar v. United States, 338 U.S. 160, 176. In this case Deputy Albrecht initially believed he made a mistake when he inputted the license plate information the first time. Knowing that he likely made a mistake he compounded that error, receiving the same information back from the registration check that the license plate was not associated with a vehicle. Moreover, Albrecht had experienced this type of error before and therefore his mistakes can not be construed to be objectively reasonable. He knew or should have known that it was his repeated error that resulted in the mistaken information especially since Michael Joy's license plate never appeared to be altered or counterfeit. Knowing that it was his mistake he did not have probable cause to believe that Michael Joy was violating §341.61 (2) Wis. Stats. and thus his factual mistakes were not objectively reasonable under the totality of the circumstances and those factual mistakes resulted in a mistake of law. This court should reverse the trial court's decision denying the motion to suppress evidence.

Respectfully submitted this day 28th day of September, 2015.

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Patrick J. Stangl
Stangl Law Offices, S.C.
Attorneys for Michael Joy
6441 Enterprise Lane, Suite 109
Madison, Wisconsin 53719
(608) 831-9200
State Bar No.01017765

CERTIFICATION

Undersigned counsel hereby certifies that this appellate brief conforms to the rules contained in §809.19 (8) (b) and (c) Wis. Stats. for a brief produced with the proportional serif font. The length of this brief is 5,199 words.

Signed:

_____

Patrick J. Stangl

CERTIFICATION OF COMPLIANCE WITH RULE 809.19 (12)

The undersigned certifies that an electronic copy of this brief, excluding the appendix, if any, complies with the requirement of §809.19 (12). The electronic brief is identical in content and format to the printed brief filed this date.

A copy of this certificate has been served with the paper copies of this brief and served upon all opposing parties.

Signed:

_____

Patrick J. Stangl

CERTIFICATION OF APPENDIX

I hereby certify that with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed:

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Patrick J. Stangl

APPENDIX

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