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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT III

Case No. 2015AP000960-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

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

RESPONSE BRIEF AND SUPPLEMENTAL
APPENDIX OF PLAINTIFF-RESPONDENT

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RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES

The State rephrases the issues on appeal as follows:

- I. Did Deputy Albrecht have a reasonable suspicion to stop Mr. Joy while he was operating a vehicle that was either not registered contrary to Wis. Stats. § 341.04(1) or displaying improper use of evidence of registration contrary to Wis. Stats. § 341.61(2), based on the officer's

good faith mistake of fact in misreading Joy's license plate number?

Trial Court Answer: Yes

- II. Did Deputy Albrecht make a mistake of law when he stopped the vehicle being operated by Mr. Joy?

Trial Court Answer: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs of the parties should adequately address the issues presented.

STATEMENT OF THE FACTS

On April 15, 2015, at approximately 9:45 p.m., Deputy Albrecht of the Marinette County Sheriff's Department, an officer with 13 years police experience, was on duty working nightshift road patrol. He was operating a marked squad car with its headlights on which was parked on Augustine Road in the Town of Pound, Marinette County, Wisconsin. He was doing paperwork (R-Ap. 104-109).¹

The road Deputy Albrecht was stopped on has a speed limit of 55 miles per hour. He observed an oncoming vehicle which the radar in his squad car

¹ On July 31, 2014, there was an evidentiary motion hearing in this case. The transcript appears in the record at No. 49. The defendant-appellant included an appendix with their brief. The initial submission included a portion of the motion hearing and some other hearing transcript. That may now have been corrected. For the convenience of the court and to insure an accurate appendix, the plaintiff-respondent has included as an appendix the complete motion hearing dated July 31, 2014. (R: 49; R-Ap. 101-145). Brown County Circuit Judge Mark Hammer presided at that hearing.

indicated was traveling between 25 and 30 miles per hour. (R-Ap. 108-109). As the vehicle approached his location he could see the front license plate and its letters and numbers. He read them and entered them into a computer in his squad car to do a registration check. (R-Ap. 109-110). The vehicle was a 1999 silver Chevrolet light pickup truck. (R: 7-1). The vehicle continued on its way, and Deputy Albrecht received a response to his query that no vehicle was associated with that license plate. (R-Ap. 109). Deputy Albrecht testified that no vehicle associated with that plate could mean a number of things, including that it could be an old plate or an unregistered plate that wasn't put on the proper vehicle, or that the registration plate had expired. (R-Ap. 109). Deputy Albrecht took no action. He thought he may have misread the plate. He continued his patrol by traveling down other roadways. (R-Ap. 151).

Deputy Albrecht traveled about 1 ½ to 2 miles and came to a T-intersection controlled by stop signs. He stopped for the stop sign. He observed a vehicle approaching on another road for the T-intersection. It stopped for its stop sign. Deputy Albrecht recognized the vehicle as the Chevrolet pickup truck he had observed on Augustine Road. He again read the license plate for the vehicle and entered it into his squad car computer to do a registration check. He continued on his patrol and the vehicle continued. He again received a response that there was no vehicle associated with that license plate. (R-Ap. 110-112, 124, 151).

Deputy Albrecht turned his squad car around and using the emergency lights effectuated a traffic stop on the pickup truck. He exited his squad car and walked up to the stopped truck. As he did so, he observed that the license plate letters and numbers may be different than what he had read. (R-Ap. 131-132). He went to the driver's door, identified himself, and explained that he had stopped the vehicle because the registration was messed up or something was wrong with the plates. (R-Ap. 114-115). Deputy Albrecht observed an open can of beer in a center cup holder. He asked the operator for his driver's

license, and it identified the operator as the defendant-appellant Michael L. Joy. Deputy Albrecht subsequently observed indicia of intoxication and arrested Joy for operating a motor vehicle while intoxicated. (R-Ap. 115, 151-152). Additional facts will be set forth in the argument section of this brief.

ARGUMENT

Michael L. Joy appeals his judgment of conviction for operating a motor vehicle while intoxicated, fourth offense, contrary to Wis. Stats. § 343.63(1)(a), and possession of a firearm while intoxicated contrary to Wis. Stats. § 941.20(1)(b), and the trial court's order denying Joy's motion to suppress. (9; 38; 42; 49; R-Ap. 146-147, 153-154, 142). Joy contends that the arresting officer did not have probable cause to stop him for a registration violation. Joy also argues that the officer made a mistake of law. For the following reasons, the State disagrees and requests that this court affirm the trial court's denial of Joy's motion to suppress.

A. Applicable Law and Standard of Review.

A traffic stop is a seizure within the meaning of the Fourth Amendment. *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. All such stops must be reasonable under the circumstances. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569. A traffic stop is generally a reasonable seizure if it is based upon either probable cause or reasonable suspicion to believe that a violation has occurred. See *State v. Gaulrapp*, 207 Wis. 2d 600, 604-06, 558 N.W.2d 696 (Ct. App. 1996); see also *Popke*, 317 Wis. 2d 118, ¶ 11.

Probable cause refers to the “quantum of evidence which would lead a reasonable police officer to believe” that a traffic violation has occurred. *Popke*, 317 Wis. 2d 118, ¶ 14, citing *Johnson v. State*, 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977). Probable cause exists when the officer has reasonable grounds to believe that the person is

committing or has committed a crime. The evidence need not establish proof beyond a reasonable doubt or even that guilt is more probable than not, but rather, probable cause requires that the information “lead a reasonable officer to believe that guilt is more than a possibility.” *Popke*, 317 Wis. 2d 118, ¶ 14 (citation omitted).

Even if no probable cause exists, a police officer may still conduct a traffic stop when, under the totality of the circumstances, he or she has grounds to reasonably suspect that a crime or traffic violation has been or will be committed. *Id.* ¶ 23. “The officer ‘must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Popke*, 317 Wis. 2d 118, ¶ 23 citing *Post*, 301 Wis. 2d 1, ¶ 10. The crucial question is whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. *Popke*, 317 Wis. 2d 118, ¶ 23.

Reasonableness is measured objectively by the totality of the facts and circumstances. *Post*, 301 Wis. 2d 1, ¶ 13. In reviewing traffic stops, courts do not inquire into an officer’s actual state of mind; instead, they determine whether the facts available to the officer could arouse suspicion in a reasonable person. *State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996).

Whether there is probable cause or reasonable suspicion to conduct a traffic stop is a question of constitutional fact. *Popke*, 317 Wis. 2d 118, ¶ 10. This court applies a two-step standard of review. *State v. Powers*, 2004 WI App 143, ¶ 6, 275 Wis. 2d 456, 685 N.W.2d 869. First, it reviews the trial court’s findings of historical facts and upholds them unless they are clearly erroneous. *Id.* Second, this court applies de novo review to whether the officer had reasonable suspicion or probable cause. *Id.*

In a recent case, the Wisconsin Supreme Court held that an officer's reasonable suspicion that a motorist is violating or has violated a traffic law is sufficient for the officer to initiate a stop of the offending vehicle. *State v. Houghton*, 2015 WI 79, ¶ 5, 364 Wis. 2d 234, 868 N.W.2d 143.²

[S]earches and seizures can be based on mistakes of facts, see *Illinois v. Rodriguez*, 497 U.S. 177, 183-86 (1990); *State v. Reiersen*, No. 2010AP596-CR, unpublished slip op., ¶ 1 (Wis. Ct. App. Apr. 28, 2011), *Id.*, ¶ 75. *Reiersen* may be found in the State's Appendix (R-Ap. 155-158).

B. The Stop Was Justified By
Reasonable Suspicion to Believe
Joy Was Operating a Vehicle That
Was Either Not Registered or
Displaying Improper Registration
Plates.

At the hearing on Joy's motion to suppress, the State proved that the arresting officer had reasonable suspicion to believe that Joy was operating a motor vehicle that was either not registered contrary to Wis. Stats. § 341.04(1), or being operated with an improper use of evidence of registration contrary to Wis. Stats. § 341.61(2). The first time Deputy Albrecht read the license plate and inputted it into his computer for a registration check he received a response that there was no vehicle associated with the license plate. He didn't do anything about it because he thought he probably ran the wrong plate numbers. He waited about 30 seconds and continued his patrol (R-Ap. 110).

² The *Houghton* Decision was filed on July 14, 2015, while this case was pending on direct appeal. As will be developed later in this brief, it is the State's position that the retroactivity rule applies to this case so that the officer only needed a reasonable suspicion to stop Joy's vehicle. *State v. Dearborn*, 2010 WI 84, ¶ 31, 327 Wis. 2d 252, 786 N.W.2d 97.

When he saw the vehicle the second time, he again read the license plate letters and numbers and entered it into the squad car computer for a registration check. He again received a response that there was no vehicle associated with that plate (R-Ap. 112).

At the suppression hearing, Deputy Albrecht was asked if he again looked at the license plate as he approached the stopped vehicle. He testified as follows:

A I looked at the back plate as I got up to the vehicle. And I think I noticed then I ran it wrong or I was seeing it wrong, but I was - - I wasn't too turned about that. I was more concerned about my approach being out at night and the driver. It did - - I believe I saw it. And I was like, I don't know if that's what I ran. It kind of hit me.

Q Can you tell us what was the difference between what you saw as you approached the stopped vehicle and what you saw the other times?

A Sure. I was running in my squad FX-9605 and it was actually FK-9605. I was getting the X and the K wrong. (R-Ap. 114).

When Deputy Albrecht got to the driver's window of the stopped vehicle, he identified himself and explained the reason for the stop. When asked what he told Joy about why he stopped Joy, Deputy Albrecht testified: "I said his registration is messed or something is wrong with his plates." (R-Ap. 115).

When Deputy Albrecht stopped the vehicle, he thought that there was a violation of a statute concerning vehicle registration. He testified that license plates must match the vehicle that they are displayed on and not be expired. Since the license plate response was that it was not associated with a vehicle, he thought there was some violation regarding registration of the vehicle (R-Ap. 126).

The Court asked Deputy Albrecht what traffic violation he believed the driver of the vehicle was committing. Deputy Albrecht testified as follows:

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. (R-Ap. 130).

The court began its decision by citing from *State v. Popke*, 2009 WI 37, 317 Wis. 2d 118, 765 N.W.2d 569. (R-Ap. 137). The court found that the officer thought there was a traffic violation concerning vehicle registration, and the officer could not identify which specific violation there was. The officer thought that the vehicle may not have been registered at all or it was displaying a non-used registration. (R-Ap. 138-139). The court found that the officer was acting in good faith. (R-Ap. 139) The court found that the officer had made a mistake of fact and that it was a reasonable mistake of fact. (R-Ap. 140) The court found that the officer met the requirements of *Popke, Id.*, that there was a quantum of evidence which would have led a reasonable police officer to believe that a traffic violation had occurred. The court denied the motion to suppress. (R-Ap. 142).

The court found that as the officer was approaching the vehicle he was not concerned that he had incorrectly read the license plate number. The court further found that even if the officer had again checked the license plate number against the computer information for registration the result would have been the same. The court would have expected the officer to go to the vehicle and tell Joy that he had stopped him because the officer had made a mistake and incorrectly read the license plate. The court found that would have been reasonable. The court stated that the law is clear that not every contact between a law enforcement officer on duty and a citizen is necessarily a stop or is necessarily a confrontation. (R-Ap. 141) When the officer reached the driver's door and spoke with Mr. Joy, he would have seen the open intoxicant in the vehicle. He would have also had an opportunity to observe Mr. Joy and been able to identify those things that

he had clearly observed as set forth in the probable cause section of the Criminal Complaint. (R-Ap. 141-142, 151).

This case is remarkably similar to the unpublished case of *State v. Reiersen*, No. 2010AP596-CR unpublished slip op., (Wis. Ct. App. Apr. 28 2011). (R-Ap. 155-158). That case is helpful persuasive authority. In *Reiersen* the officer did a registration plate check and mistook one digit when doing so. Based upon his mistake, he believed that the registration was expired. The officer made a traffic stop on the vehicle. Slip op. ¶ 2 (R-Ap. 155). As the officer approached the stopped vehicle, he realized that he had misread the license plate number. He did not recheck the correct license plate number and proceeded on to make contact with the driver to explain his reason for the stop. The officer then detected indicia of intoxication. Slip op. ¶ 3 (R-Ap. 155-156). *Reiersen* filed a motion to suppress based upon an unlawful stop. He argued that the officer had neither reasonable suspicion nor probable cause to believe that *Reiersen* had committed an offense. The trial court denied the motion, finding that the officer made a good faith mistake of fact when he misread the defendant's license plate number. Slip op. ¶¶ 4 and 5, (R-Ap. 156).

Reiersen appealed, and the Court of Appeals affirmed. Slip op. ¶ 8 (R-Ap. 156-157). The court noted that “as a general rule, courts decline to apply the exclusionary rule where an officer makes a reasonable, good-faith factual mistake.” Slip op. ¶ 9 (R-Ap. 157), citing *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000); *United States v. Miguel*, 368 F.3d 1150, 1153-54 (9th Cir. 2004) (additional citations omitted). The court concluded that the trial court properly denied the motion to suppress because “the traffic stop was the product of the officer's reasonable belief, which was based on a good-faith mistake of fact, that *Reiersen* was operating a vehicle with an expired registration, contrary to Wis. Stat. § 341.04(1).” Slip op. ¶ 8 (R-Ap. 156).

The State maintains that the same reasoning applies in this case. Like the officer in *Reiersen*, Deputy Albrecht

made a good faith mistake of fact when he misread a letter in Joy's license plate. As in *Reiersen*, it was reasonable of Deputy Albrecht to believe, based upon the information he received as a result of the registration check, that a violation was occurring. Since Deputy Albrecht had a reasonable suspicion to initiate the traffic stop, the trial court did not err when it denied Joy's motion to suppress.

Joy focuses incorrectly on whether Deputy Albrecht's belief about the lawfulness of the registration was correct, rather than on whether it was reasonable. Joy's Br. at 13-17. The crucial question is whether the officer had a reasonable belief that Joy was committing a violation. *Popke*, 317 Wis. 2d 188, ¶ 14 (citation omitted). Deputy Albrecht correctly understood that it was unlawful to drive a vehicle displaying a registration plate issued to some other vehicle contrary to Wis. Stats. § 341.61(2). (R-Ap. 130). The deputy's vehicle registration checks indicated the plate on the vehicle he had observed was not issued to any vehicle (R-Ap. 110, 112, 155). At that point, Deputy Albrecht had reason to believe the driver was operating the vehicle without the proper registration plate being displayed. *Reiersen*, Slip op. ¶ 11 (R-Ap. 157).

The deputy's observations, together with the reasonable inferences that can be drawn from the facts, constitute reasonable suspicion sufficient to justify the stop. In *State v. Griffin*, 183 Wis. 2d 327, 329, 515 N.W.2d 535 (Ct. App. 1994), the court held that "the absence of a registration plate, and reasonable inferences that can be drawn from that fact, constitute reasonable suspicion sufficient to justify an investigatory stop of a motor vehicle." In *Griffin*, the defendant's vehicle bore a "license applied for" sign. *Id.* at 329-30. The court reasoned that, without stopping the vehicle, the officers in *Griffin* had no way of knowing whether the defendant was in violation of vehicle registration laws. *Id.* at 333-34. See *State v. Gammons*, 2001 WI App 36, ¶7, 241 Wis. 2d 296, 625 N.W.2d 623.

It makes no difference whether innocent explanations for observed conduct might exist. An officer need not rule out innocent explanations for a suspect's behavior where there are also reasonable inferences supporting reasonable suspicion to justify a stop. See *State v. Waldner*, 206 Wis. 2d 51 at 60, 556 N.W.2d 681 (1996). While reasonable suspicion cannot be based upon an inchoate and unparticularized hunch, it does not require mathematical precision. *State v. Washington*, 2005 WI App 123, ¶ 16, 284 Wis. 2d 456, 700 N.W.2d 305. As long as an officer reasonably believes an infraction is occurring, he has reasonable suspicion to make the stop.

In conclusion, Deputy Albrecht had a reasonable suspicion to conduct the traffic stop of Joy's vehicle because, viewed under an objective standard, the undisputed evidence provided reason to suspect Joy of operating a vehicle that was either not registered or was displaying an improper registration. The trial court correctly denied Joy's motion to suppress.

C. The Officer Did Not Make a Mistake of Law When Stopping the Vehicle Operated By Joy.

Joy argues that the officer made a mistake of law when he incorrectly read the registration plate of the vehicle being operated by Joy. Joy's Br. at 18-19. Joy concludes his argument with the following statement: "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." Joy's Br. at 19. The State asserts that this statement lacks logic, is a leap of faith by Joy, that the retroactivity rule of constitutional jurisprudence applies to this case, that *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143, opinion filed July 14, 2015, set forth the rule that only reasonable suspicion is required that a traffic law has been or is being violated to justify all traffic stops, and that

State v. Longcore, 226 Wis. 2d 1, 593 N.W.2d 412 (Ct. App. 1999) was overruled by *Houghton*. *Id.* ¶ 52.

The retroactivity rule states that newly declared constitutional rules must apply "to all similar cases pending on direct review." *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987); *see also United States v. Johnson*, 457 U.S. 537, 562 (1982) (holding that a decision of the Supreme Court "construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered"). This rule accords with "basic norms of constitutional adjudication" and contains "no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 479 U.S. at 322, 328 (1987). *State v. Dearborn*, 2010 WI 84, ¶ 31, 327 Wis. 2d 252, 786 N.W.2d 97.

It cannot be disputed that Joy's case is now pending on direct review. *State v. Houghton*, 2015 WI 79, was filed on July 14, 2015. The *Houghton* court specifically cited *Longcore* several times. *Id.* ¶¶ 14, 27, 32, 36, 39, 46, 47. The *Houghton* court overruled the holding in *Longcore*. *Id.* ¶ 52. Joy's reliance on *Longcore* is in err.

Joy cannot cite to the court one instance in the record where the trial court found that the officer made a mistake of law. Joy cannot point to any of the testimony in the record to conclude that the officer made a mistake of law.

The trial court found that the officer had made a mistake of fact and not a mistake of law. (R-Ap. 140). The court found that the officer believed that the vehicle being operated by Joy was either not registered at all or that it was using an old, out-of-date, non-used registration. (R-Ap. 138-139). Wis. Stats. § 341.04(1) requires motor vehicles operated on highways to be registered. Wis. Stats. § 341.61(2) prohibits displaying a registration plate on a vehicle which is not issued for such vehicle. Wis. Stats. § 341.15(3)(a) requires a person to forfeit not more

than \$200.00 if they operate a vehicle for which a current registration plate has been issued without such plate.

The court found that the officer thought there was a traffic violation and that the officer could not necessarily identify a specific violation that he believed was occurring. (R-Ap. 138). The court found that the officer had checked the license plate twice and both times it came back with a problem. The officer was looking at a license plate on a vehicle and the license plate was not proper for that vehicle. The court found that the officer had made a mistake of fact in reading the license plate, not a mistake of law. The court further found that it was a reasonable mistake by the officer. (R-Ap. 140).

The court found that it was satisfied this was a mistake of fact by the officer and not a mistake of law. The court further found that the officer had met the requirements set forth in *Popke* that there was a quantum of evidence which would have led a reasonable police officer to believe that a traffic violation had occurred. (R-Ap. 142). Joy's leap of faith in arguing that the mistakes of fact by the officer morphed into a mistake of law under *Longcore* lacks logic, is not grounded in the findings of the court or any evidence adduced at the motion hearing, and is in error because *Longcore* was overruled by *Houghton, Id.* ¶ 52.

CONCLUSION

For the reasons set for above, the State respectfully requests that this court affirm Joy's judgment of conviction and the trial court's denial of his motion to suppress.

Dated this 19th day of November, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,891 words.

Dated this 19th day of November, 2015.

Allen R. Brey
District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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.

Dated this 19th day of November, 2015.

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District Attorney

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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.

Dated this 19th day of November, 2015.

Allen R. Brey
District Attorney