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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. REPEATED MISTAKES OF FACT ARE NOT OBJECTIVELY REASONABLE AND CAN NOT BE RELIED UPON TO SUSTAIN A FINDING OF REASONABLE SUSPICION THAT A TRAFFIC VIOLATION HAD OR WAS BEING COMMITTED.

Whether a police officer has reasonable suspicion justifying a warrantless search implicates the constitutional protection against unreasonable searches and seizures set forth in the Fourth Amendment to the United States Constitution and Art. I §11 of the Wisconsin Constitution. State v. Williams, 2001 WI 21 ¶18. Whether reasonable suspicion existed for an investigatory stop is a question of constitutional fact and the court applies a two level standard of review to questions of constitutional fact. Id. First, the circuit court's findings of historical fact are reviewed under the clearly erroneous standard and secondly, the determination of whether reasonable suspicion existed or not is reviewed de novo. Id. [1] In State v. Houghton, 2015 WI 79 the court adopted the Supreme Court's decision in Heien v. North Carolina, 574 U.S. 135 S. Ct. 530 (2014) that a "seizure predicated on reasonable suspicion based on a law enforcement officer's objectively reasonable mistake of law is not a violation of an individual's Fourth Amendment rights" and overruled Longcore and State v. Brown, 214 WI 69. Houghton,

[1] The defendant argued in its opening brief that the mistake of fact and law analysis set forth in State v. Longcore, 226 Wis.2d 1 (Ct. App. 1999) should apply to this case because the stop occurred prior to the Supreme Court's decision in Heien v. North Carolina, 574 U. S. 135 S. Ct. 530 (2014) and the Wisconsin Supreme Court's decision in State v. Houghton, 2015 WI 79. Wisconsin follows the federal rule announced in Griffith v. Kentucky, 479 U. S. 314, 328 (1987), that new rules of criminal procedure are to be applied retroactively to all cases pending on direct review or non-finalized cases remaining in the direct appeal pipeline. State v. Koch, 175 Wis.2d 684, 694 (1993). A decision interpreting the Fourth Amendment is applied retroactively to all convictions not yet final at the time of the decision. United States v. Johnson, 450 U.S. 537, 562 (1982). After further research and analysis the defendant cannot distinguish the application of the Griffith rule and the holding in Johnson and therefore agrees with the State that the Longcore mistake of law analysis does not apply. Thus, the reasonable suspicion standard would apply regardless of whether the arresting officer had probable cause to believe that a traffic violation occurred in his presence or not. Nonetheless the investigatory stop here is not objectively reasonable because of the repeated mistakes of Deputy Albrecht in erroneously inputting the defendant's license plate number.

however, did not undermine or in any way diminish the fact that an investigative stop must be reasonable. "[S]ufficient probability not certainty is the touchstone of reasonableness under the Fourth Amendment…" Hill v. California, 401 U.S. 797, 804 (1971). A reasonable analysis applies to "**factual judgments**" that law enforcement officials are expected to make." Illinois v. Rodriguez, 497 U.S. 177, 184 (1990) (emphasis added). Here, the repeated mistakes of Deputy Albrecht transformed what may have been considered to be one isolated good faith mistake into a series of mistakes which were not objectively reasonable under the Fourth Amendment.

In this case Deputy Albrecht was able, on two separate occasions, to clearly see the license plate yet he repeatedly inputted the wrong information. When the first mistake was made he could clearly see the license plate as the vehicle slowly passed his location. When the registration check was returned it did not show that the vehicle either 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. On the first occasion when he inputted the information he believed he had made a mistake. Id. at 23. Moreover, Albrecht had previous experience on several occasions with this same mistake. R. 48; p. 23.

On the second occasion when he encountered Joy's vehicle Albrecht again could clearly see the front plate and it was not obstructed. When he inputted the numbers the second time he received the same return information stating that "there was no vehicle associated with the plate." Id. at 26. Once the second return of the mistaken information occurred there could be no question that Albrecht knew he had repeatedly mistakenly

entered the license number information. During the evidentiary hearing there was no testimony that the license plate numbers on Joy's vehicle appeared to be forged, changed, altered or otherwise inappropriate. Here, Albrecht knew from the start that the numbers he ran were wrong, yet he put the same numbers in again and the return information he received the second time clearly demonstrated that he was wrong. Albrecht's traffic enforcement experience and knowledge had shown that he had made this mistake on previous multiple occasions. He testified that this "…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. The fact that this was an unreasonable mistake is underscored by the fact that when you run a license plate "… all plates usually come back to something." Id. Here, the license plate numbers came back to nothing since the return information he got was that "there was no vehicle associated with the plate." R. 48; p. 26. Albrecht had to have known he was in error since he acknowledged that license plate or tag numbers are tied to a particular VIN of a vehicle. Id. at 23.

The State argues that this case is "remarkably similar" to the unpublished decision in State v. Reierson, 2010-AP-596-CR, and cites it for persuasive authority. The State's reliance on Reierson is misplaced since the facts are readily distinguishable. In Reierson, the officer discovered that he misread the last number on the license plate as he approached the parked vehicle. Reierson at ¶3. Unlike the officer in Reierson who testified that a small screw or bolt obscured his view of the last number of the license plate, Albrecht had two unobstructed views of the license plate and had prior experience

with inputting wrong information when checking license plates. Unlike Reierson, the vehicle's registration did not come back as expired. Here, the license plate came back, according to Albrecht, as "no vehicle associated with the plate." Finally, unlike Reierson, where the officer only inputted the information one time, Albrecht made repeated mistakes with entering the license plate information and believed from the start that he put inputted the information erroneously. He further, in his experience, knew that when license plates are run that "…all plates usually come back to something." R. 48; p. 23. Albrecht knew from the start that he had inputted the license plate improperly, had previous experience making the same mistake in other situations, and then knowing that he made the mistake the first time repeated the mistake again, getting the same return information. Unlike Reierson, where the officer made a one time honest good faith mistake and followed up on it, Albrecht knew he had made a mistake and continued to repeat it. Knowledge of the initial mistake plus his previous experience making the same mistake compounded his previous initial error and can not be considered to be objectively reasonable within the confines of the Fourth Amendment.

CONCLUSION

"The Fourth Amendment's touchstone is reasonableness which is measured in objective terms by examining "the totality of the circumstances." State v. Gaulrupp, 207 Wis.2d 600 (Ct. App. 1996). "It is undisputed that traffic stops must be reasonable under the circumstances." Id. at 605. Here, the officer's actions were not reasonable. Deputy Albrecht, upon his initial input of the license information, believed he made a mistake. Knowing he made a mistake he compounded the error when he received the same information back from the second registration check. Unlike the one time good faith mistake misreading the license plate due to an obstruction in Reierson, Albrecht made multiple mistakes and had prior experience with the same type of error. He knew, or should have known, that it was the result of his repeated errors that caused the mistaken information he received back from the license plate check, especially given the fact that Joy's license plate never appeared to be altered or counterfeit. Albrecht's compounded factual mistakes were not objectively reasonable under the totality of the circumstances and the investigatory stop of Joy's vehicle was not objectively reasonable. Even in light of the decision in Houghton, and the fact that a mistake of law analysis no longer exists, the stop became objectively unreasonable based on Albrecht's repeated mistakes. This court should reverse the trial court's decision denying the motion to suppress.

Respectfully submitted this 8th day of December, 2015.

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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 1,850 words.

Signed:

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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:

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Patrick J. Stangl