

RECEIVED

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

09-18-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

VILLAGE OF BAYSIDE,

Plaintiff-Respondent,

Appeal Nos. 2015-AP-1033
2015-AP-1034

v.

RYAN ROBERT OLSZEWSKI,

Defendant- Appellant.

**APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY
CASE NOS. 14-TR-4995, 14-TR-4996
HON. THOMAS J. MCADAMS, PRESIDING**

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

Elizabeth K. Miles
WI Bar No. 1064284
Davis & Kuelthau, s.c.
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 225-1491
emiles@dkattorneys.com

*Attorneys for Plaintiff-Respondent
Village of Bayside*

TABLE OF CONTENTS

| | |
|--|---|
| STATEMENT OF THE ISSUE..... | 1 |
| STATEMENT ON PUBLICATION AND ORAL ARGUMENT | 1 |
| STATEMENT OF THE CASE..... | 1 |
| STANDARD OF REVIEW | 1 |
| ARGUMENT | 2 |
| I. This Court Should Affirm Denial Of Olszewski’s Motion To Suppress Because Officer Picciolo Reasonably Suspected That Olszewski Violated A Traffic Law | 2 |
| II. Even If This Court Concludes That Officer Picciolo Made A Mistake Of Law Regarding Wis. Stat. § 346.37(1)(c), It Should Affirm Denial Of Olszewski’s Motion To Suppress Because The Mistake Was Reasonable | 5 |
| CONCLUSION..... | 6 |
| FORM AND LENGTH CERTIFICATION | 7 |
| CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) | 8 |
| MAILING CERTIFICATION | 9 |

TABLE OF AUTHORITIES

Cases

| | |
|--|------|
| <i>County of Jefferson v. Renz</i> , 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999)..... | 2 |
| <i>Heien v. No. Carolina</i> , 574 U.S. ___, 135 S.Ct. 530, 534 (2014)..... | 5, 6 |
| <i>State v. Conaway</i> , 2010 WI App 7, ¶ 5, 323 Wis. 2d 250, 779 N.W.2d 182..... | 2, 3 |
| <i>State v. Hampton</i> , 2010 WI App 169, ¶ 23, 330 Wis. 2d 531, 793 N.W.2d 901..... | 2 |
| <i>State v. Houghton</i> , 2015 WI 79, ¶ 52, ___ Wis. 2d ___, 868 N.W.2d 143..... | 5, 6 |
| <i>State v. Popke</i> , 2009 WI 37, ¶ 27, 317 Wis. 2d 118, 765 N.W.2d 569..... | 5 |
| <i>State v. Post</i> , 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634..... | 2, 4 |
| <i>State v. Ullrich</i> , 2009 WI App 141, ¶ 1, 321 Wis. 2d 478, 774 N.W.2d 476..... | 4 |

Statutes

| | |
|---------------------------------|---------------|
| Wis. Stat. § 341.15..... | 4 |
| Wis. Stat. § 341.15(2) | 4 |
| Wis. Stat. § 341.15(3)(c) | 4 |
| Wis. Stat. § 346.37..... | 4, 6 |
| Wis. Stat. § 346.37(1)..... | 5 |
| Wis. Stat. § 346.37(1)(c)..... | 1, 3, 4, 5, 6 |
| Wis. Stat. § 346.46..... | 6 |
| Wis. Stat. § 346.46(1) | 6 |
| Wis. Stat. § 346.46(2)(c)..... | 6 |

STATEMENT OF THE ISSUE

Whether Village of Bayside (“Village”) police officer Paul Picciolo had reasonable suspicion to stop Defendant-Appellant Ryan Olszewski’s (“Olszewski”) vehicle after observing it stop for a red traffic arrow past the marked crosswalk at approximately 1:00 a.m. on a snowy Sunday morning.

The circuit court answered “yes.”

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The Village does not request oral argument or publication. This case can be resolved by applying well-established legal principles to the facts of the case.

STATEMENT OF THE CASE

The Village agrees with Olszewski’s Statement of the Case except the contention on page five of his brief that the circuit court determined that Officer Picciolo made a mistake of law. The circuit court concluded that the law on where a driver must stop for a red arrow when snow partly covers a marked crosswalk and stop line was “a bit more nuanced” than Officer Picciolo’s interpretation, that Olszewski complied with the “spirit” of Wis. Stat. § 346.37(1)(c),¹ and that, if the parties were conducting a trial on whether Olszewski violated § 346.37(1)(c), the court “would probably hold that the City [sic] had not met its burden of proof.” R. 16:20, A-Ap. 58.

Of course, the parties were not conducting a trial on whether Olszewski violated § 346.37(1)(c). The court was determining whether Officer Picciolo had reasonable suspicion to stop Olszewski’s vehicle. R. 16:21, A-Ap. 59. The circuit court concluded that he did, and denied Olszewski’s motion to suppress. R. 16:23-24, A-Ap. 61-62.

STANDARD OF REVIEW

In reviewing the circuit court’s denial of Olszewski’s motion to suppress, this Court upholds the circuit court’s factual findings unless clearly erroneous, but

¹ Wis. Stat. § 346.37(1)(c) states:

Vehicular traffic facing a red signal shall stop before entering the crosswalk on the near side of an intersection, or if none, then before entering the intersection or at such other point as may be indicated by a clearly visible sign or marking and shall remain standing until green or other signal permitting movement is shown.

reviews *de novo* the application of law to those facts. *State v. Hampton*, 2010 WI App 169, ¶ 23, 330 Wis. 2d 531, 793 N.W.2d 901.

ARGUMENT

This Court should affirm the circuit court's denial of Olszewski's motion to suppress because Officer Picciolo reasonably suspected that Olszewski had violated a traffic law and because, if this Court finds that Officer Picciolo made a mistake of law, the mistake was reasonable.

I. This Court Should Affirm Denial Of Olszewski's Motion To Suppress Because Officer Picciolo Reasonably Suspected That Olszewski Violated A Traffic Law.

A police officer may make an investigatory traffic stop if he reasonably suspects a driver is violating a traffic law. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999). Reasonable suspicion requires more than an unparticularized suspicion or hunch; the officer must point to specific and articulable facts that reasonably warrant the stop. *State v. Post*, 2007 WI 60, ¶ 10, 301 Wis. 2d 1, 733 N.W.2d 634. Reasonable suspicion does not require ruling out innocent explanations. *State v. Conaway*, 2010 WI App 7, ¶ 5, 323 Wis. 2d 250, 779 N.W.2d 182. If any reasonable inference of wrongful conduct can be objectively discerned, the officer may temporarily detain the driver. *Id.* The totality of the circumstances may give rise to reasonable suspicion even if a defendant's driving alone does not. *See Post*, 2007 WI 60, ¶ 2.

The circuit court correctly concluded that Officer Picciolo reasonably suspected Olszewski of violating a traffic law. On Sunday, February 16, 2014 at approximately 1:00 a.m., Officer Picciolo observed Olszewski approach the intersection of N. Port Washington Road and W. Brown Deer Road. R. 16:4, A-Ap. 42. Olszewski's lane was marked with a white stop line and a crosswalk beyond the stop line. R. 16:4-6, A-Ap. 42-44; R. 17 (Ex. 1) R-Ap. 1. Olszewski's left turn was controlled by red traffic arrows displayed in two places: on a traffic light across the intersection from his vehicles and on a traffic light in the median to his left, which was located after the stop line and before the crosswalk. R. 15:11-12, A-Ap. 29-30; R. 17 (Ex. 1) R-Ap. 1.

Olszewski stopped beyond the stop line, beyond the traffic light to his left, and three-quarters of a car length past the crosswalk. R. 18:7, A-Ap. 12; R. 16:5-6, A-Ap. 43-44. Officer Picciolo conducted a traffic stop of Olszewski's vehicle. R. 15:3, A-Ap. 21. He subsequently arrested and cited Olszewski for operating while intoxicated as well as citing him for operating with a prohibited alcohol concentration. R. 17 (Ex. 5), A-Ap. 3-4.

Officer Picciolo lawfully stopped Olszewski because he reasonably suspected Olszewski of violating Wis. Stat. § 346.37(1)(c). § 346.37(1)(c) requires a vehicle facing a red signal to “stop before entering the crosswalk on the near side of the intersection, or if none, then before entering the intersection or at such other point as may be indicated by a clearly visible sign or marking.”

Officer Picciolo articulated the following facts supporting his belief that Olszewski violated § 346.37(1)(c): (1) Olszewski’s vehicle was controlled by traffic arrows; (2) Olszewski’s lane had a crosswalk, and; (3) Olszewski stopped past the crosswalk and necessarily also past the stop line and traffic light to his left. R. 18:6-7, A-Ap. 11-12. The stop was not based on some hunch. Officer Picciolo knew from experience where the crosswalk and stop line were located and observed Olszewski stop past both. R. 18: 6-7, A-Ap. 11-12. Olszewski does not dispute that, on a clear day, his stop would have violated § 346.37(1)(c).

The circuit court concluded that the fact that snow partially covered the crosswalk and the stop line² made the analysis of whether § 346.37(1)(c) governed Olszewski “more nuanced.” R. 16:20, A-Ap. 58. Olszewski seizes on this and argues that Officer Picciolo made a objectively unreasonable mistake of law when he concluded that Olszewski violated § 346.37(1)(c). Olszewski is incorrect.

To the extent the snow meant there was no crosswalk, § 346.37(1)(c) required Olszewski to stop before entering the intersection or at such other point as was indicated by a clearly visible marking. There was no evidence that the traffic signal displaying the red arrow to Olszewski’s immediate left was obscured. This signal constituted a “clearly visible marking” indicating where Olszewski should stop for the light. Even if Olszewski could not see the crosswalk or the stop line, his failure to stop at the traffic light displaying the red arrow violates § 346.37(1)(c).

Additionally, the weather was not so stormy that it would have been obvious that the crosswalk and stop line were obscured and that Olszewski could stop past them but before entering the intersection. The court found that the snow falling was “not that bad” and that the roads were only “partially covered.” R. 16:21, A-Ap. 59. Officer Picciolo was entitled to stop Olszewski for the perceived violation and investigate the circumstances surrounding Olszewski’s stop. Police officers are not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. *Conaway*, 2010 WI App 7, ¶ 5.

This case is similar to *State v. Ullrich*, in which the court held that an officer had reasonable suspicion to stop a vehicle for a snow-covered license plate. 2009 WI App 141, ¶ 1, 321 Wis. 2d 478, 774 N.W.2d 476. In *Ullrich*, the deputy sheriff stopped the defendant’s vehicle after observing that it did not have a rear

² The circuit court found that the stop line in Olszewski’s lane was partially covered with snow. R. 16:4-5, A-Ap. 42-43. Officer Picciolo testified that he did not know whether the stop line and crosswalk were covered with snow, and Olszewski did not testify. R. 15:12, A-Ap. 30.

registration plate. *Id.*, ¶ 2. Upon approaching the vehicle, he observed that the plate did have a registration plate, but it was covered with snow. *Id.* The deputy sheriff subsequently arrested the defendant for operating while intoxicated. *Id.*

The defendant did not dispute that Wis. Stat. § 341.15(2) requires vehicle registration plates to be maintained and displayed so that they can be readily and distinctly seen and read at all times or that § 341.15(3)(c) penalizes drivers for plates kept in an illegible condition due to the accumulation of dirt or other foreign matter. *Id.* ¶ 7. The defendant also did not dispute that when she was pulled over, her plate was unreadable because it was covered with snow. *Id.* ¶ 8. However, she asked the court to make an exception to § 341.15 when fresh snow was on the ground. *Id.*

The *Ullrich* court rejected the defendant's request and held that there was reasonable suspicion to stop her vehicle. *Id.* ¶ 10. It reasoned that although strict compliance with the statute might be difficult during heavy snow, common sense dictates that every snowfall does not render plates unreadable. *Id.* ¶ 9.

Similarly here, although a stop line and crosswalk might be difficult to see when it is snowing, common sense dictates that an officer who perceives what he or she knows to be a violation of § 346.37(1)(c), the officer is entitled to conduct an investigatory stop. Road conditions in Wisconsin change by the minute based on temperature, the number of cars driving through the intersection, whether a snow plow or salt truck has come through, and whether the snowfall is keeping up with the melting on the pavement. It is unreasonable to require an officer to know at every moment the exact state of the intersection and, thus, whether and exactly how § 346.37 applies.

Finally, even if this Court finds that Olszewski's stop alone did not give Officer Picciolo reasonable suspicion to stop him, *Post* dictates that this Court should affirm denial of Olszewski's motion to suppress because the totality of the circumstances give rise to reasonable suspicion that Olszewski was operating while intoxicated.

In *Post*, the court concluded that the defendant's act of weaving within his own lane alone did not give rise to reasonable suspicion justifying a traffic stop. 2007 WI 60, ¶ 38. But when all the facts and circumstances were considered, the officer did have reasonable suspicion to believe the defendant was driving while intoxicated. *Id.*, ¶ 28. Those facts included driving in the parking lane, weaving in a discernible S-type pattern within a lane more than twice as wide as the standard single lane, several times within two blocks, at 9:30 p.m. *Id.*, ¶ 36. Taken together, these facts were sufficient to lawfully stop the car and investigate. *Id.*, ¶ 38.

Here, Officer Picciolo observed Olszewski stop for a red arrow past the stop line, the traffic light, and the crosswalk. R. 18:7, A-Ap. 12; R. 16:5-6, A-Ap. 43-44. There was no evidence that Olszewski's vehicle slid to a stop, which might have suggested to Officer Picciolo that Olszewski's failure to properly stop was

out of his control. Additionally, this occurred on a Saturday night/Sunday morning around 1:00 a.m. – prime time for drivers leaving a bar or a party. *See State v. Popke*, 2009 WI 37, ¶ 27, 317 Wis. 2d 118, 765 N.W.2d 569 (considering the fact of defendant’s driving at 1:30 a.m. as part of the totality of the circumstances). The circuit court properly concluded that, taken together, these facts give rise to reasonable suspicion to make an investigatory stop. The circuit court’s decision should be affirmed.

II. Even If This Court Concludes That Officer Picciolo Made A Mistake Of Law Regarding Wis. Stat. § 346.37(1)(c), It Should Affirm Denial Of Olszewski’s Motion To Suppress Because The Mistake Was Reasonable.

The Village contends that Officer Picciolo did not make a mistake of law and that Olszewski’s stop did violate Wis. Stat. § 346.37(1)(c). Even if this Court concludes that Officer Picciolo made a mistake of law, however, the mistake was reasonable, and the traffic stop therefore was lawful.

A traffic stop based on a mistake of fact or law is not necessarily unreasonable. *Heien v. No. Carolina*, 574 U.S. ___, 135 S.Ct. 530, 534 (2014). The Fourth Amendment prohibits only unreasonable searches and seizures. *Id.* As long as a mistake is objectively reasonable, it can give rise to reasonable suspicion. *Id.*; *State v. Houghton*, 2015 WI 79, ¶ 52, ___ Wis. 2d ___, 868 N.W.2d 143. Here, it was objectively reasonable to conclude that Olszewski violated § 346.37(1)(c).

First, the weather conditions were not such that the crosswalk and stop line were obviously obscured. This was not a blizzard. The Department of Transportation camera shows that the intersection was partially covered by snow and that some of the stop lines and crosswalks were visible. R. 17 (Ex. 4) A-Ap. 5. It is unreasonable to conclude that Officer Picciolo must have known that Olszewski could not see the crosswalk or stop line and, therefore, was entitled to stop past them but before entering the intersection. Moreover, regardless of whether snow covered the crosswalk and stop line, there was no testimony that the traffic light to the left of Olszewski’s vehicle was obstructed. It is reasonable to interpret § 346.37(1)(c) as directing Olszewski to stop before the traffic light.

Second, it is not unreasonable to conclude that § 346.37(1)(c) controlled Olszewski’s stop rather than § 346.46(2)(c). § 346.37 applies to vehicles controlled by traffic-control signals. Wis. Stat. § 346.37(1). Olszewski’s vehicle was controlled by traffic-control signals. R. 15:11-12, A-Ap. 29-30. § 346.46 applies to vehicles approaching a stop sign. Wis. Stat. § 346.46(1). Olszewski was not approaching a stop sign. There is nothing in § 346.37, § 346.46, or any other relevant traffic statute or case law that instructs an officer to apply § 346.46 rather than § 346.37 when snow might be covering a crosswalk or stop line.

To the extent Officer Picciolo made a mistake of law regarding § 346.37, it is analogous to the officer's belief regarding the defendant's air freshener and GPS unit in *Houghton*. Similar to § 346.88 in *Houghton*, the application of § 346.37 when it is snowing has not been addressed by the Wisconsin appellate courts. This weighs in favor of finding Officer Picciolo's interpretation objectively reasonable. *Houghton*, 2015 WI 79, ¶ 70.

The circuit court considered the application of § 346.37 when it is snowing not to be a straightforward question, which also weighs in favor of finding Officer Picciolo's interpretation reasonable. *Id.* Although the circuit court concluded that it probably would not have found that Olszewski violated § 346.37(1)(c) if that had been the issue before it, it did not find that Officer Picciolo's view of the law was patently wrong or defied common sense. Rather, it found that its own view of the law was "more nuanced" and that Olszewski satisfied the "spirit" of § 346.37(1)(c). R. 16:20, A-App. 58. This suggests that the circuit court thought Olszewski technically violated § 346.37(1)(c), supporting the conclusion that any mistake of law was reasonable.

Ultimately, as the Supreme Court in *Heien* recognized, officers confront situations in the field about which they must make quick decisions when the application of a statute may be unclear. *Heien*, 135 S.Ct. at 539. Even if the officer ultimately was wrong on the law, the stop is lawful if the mistake was reasonable. Officer Picciolo made a decision in the field regarding whether Olszewski violated § 346.37(1)(c). To the extent he was mistaken, the mistake was reasonable, and this Court should affirm the circuit court's denial of Olszewski's motion to suppress.

CONCLUSION

For the reasons stated above, the Village asks this Court to affirm the circuit court's denial of Olszewski's motion to suppress.

Dated: September 17, 2015

DAVIS & KUELTHAU, S.C.

Elizabeth K. Miles
WI Bar No. 1064284
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 225-1491
emiles@dkattorneys.com

*Attorneys for Plaintiff-Respondent
Village of Bayside*

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,511 words.

Dated: September 17, 2015

DAVIS & KUELTHAU, S.C.

Elizabeth K. Miles
WI Bar No. 1064284
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 225-1491
emiles@dkattorneys.com

*Attorneys for Plaintiff-Respondent
Village of Bayside*

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the supplemental appendix, that complies with the requirements of Wis. Stat. § 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: September 17, 2015.

DAVIS & KUELTHAU, S.C.

Elizabeth K. Miles
WI Bar No. 1064284
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 225-1491
emiles@dkattorneys.com

*Attorneys for Plaintiff-Respondent
Village of Bayside*

MAILING CERTIFICATION

I hereby certify that on September 17, 2015, in accordance with Wis. Stat. §§ 809.80(3)(b) and 809.80(4), 10 copies of this brief and supplemental appendix were mailed via UPS Overnight Mail, postage pre-paid, addressed to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53701-1688.

I further certify that on September 17, 2015, 3 copies of this brief and supplemental appendix were mailed via UPS Overnight Mail, postage pre-paid, addressed to opposing party:

Matthew S. Pinix, Esq.
Law Office of Matthew S. Pinix, LLC
1200 East Capitol Drive, Suite 220
Milwaukee, Wisconsin 53211

Dated: September 17, 2015

DAVIS & KUELTHAU, S.C.

Elizabeth K. Miles
WI Bar No. 1064284
111 E. Kilbourn Avenue, Suite 1400
Milwaukee, WI 53202
(414) 225-1491
emiles@dkattorneys.com

*Attorneys for Plaintiff-Respondent
Village of Bayside*