STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Nos. 2015AP1033, 2015AP1034

VILLAGE OF BAYSIDE,
Plaintiff-Respondent,

-vs.-

RYAN ROBERT OLSZEWSKI,
Defendant-Appellant.

ON APPEAL FROM THE FEBRUARY 18, 2015, ORDER ADJUDGING GUILT, AND THE SEPTEMBER 4, 2014, DECISION DENYING THE DEFENDANT'S MOTION TO SUPPRESS, IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. MCADAMS, PRESIDING. MILWAUKEE COUNTY CASE NOS. 2014TR4995, 2014TR4996

DEFENDANT-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

ARGUMENT

Ryan Olszewski stopped his van at the intersection of Port Washington and Brown Deer Roads in the early morning hours of February 16, 2014. The question before this Court is whether police had reasonable suspicion to believe that, in doing so, he was violating the law.

Olszewski argues that the facts do not objectively demonstrate reasonable suspicion that he violated a traffic law. The intersection was partially obscured by snow such that the lines defining where he should stop were not clearly visible. *See* Wis. Stat. § 346.37(1)(c) (rule regarding where to stop at red light). In that circumstance, Olszewski complied with the law by stopping before entering the intersection and then safely navigating it. *Id.*; *see also* Wis. Stat. § 346.46(2)(c). The subsequent traffic stop was unconstitutional.

I. OFFICER PICCIOLO LACKED REASONABLE SUSPICION THAT OLSZEWSKI HAD COMMITTED A CRIME.

Importantly, the Village makes no argument and points to no evidence in the record to establish that Olszewski stopped his van in the intersection—as that term is relevantly defined, Wis. Stat. §§ 340.01(25), 346.01(1)—which, in the absence of a crosswalk, would constitute a violation of Wis. Stat. § 346.37(1)(c). Instead, for the first time on appeal, the Village asserts that an unobscured signal pole located in the intersection served to demarcate where Olszewski should have stopped, regardless of the obscured lines on the pavement. (Village's Br. at 3.) There is no evidence in the record to support the Village's contention that the signal pole is a "clearly visible sign or marking" demarcating the place where a person should stop at the intersection absent the crosswalk. *See* Wis. Stat. § 346.37(1)(c); *see also* (Village's Br. at 3). Picciolo never testified that the

signal pole served that purpose. The photograph to which the Village refers this Court does not, in the absence of relevant testimony, resolve the matter—there are no visible signs that read, for example, "Stop here on red." And the Village cites to no authority in its brief to establish that, in the absence of a crosswalk, a signal pole like the one in the instant case constitutes "clearly visible sign or marking" pursuant to Wis. Stat. § 346.37(1)(c).

It was the Village's burden to establish sufficient relevant facts proving that Picciolo's stop was constitutionally done. *State v. Post*, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 773 N.W.2d 634. Thus, if the Village wanted to rely on the signal pole to establish a Wis. Stat. § 346.37(1)(c) violation, it had the burden of proving that the signal pole is a "clearly visible sign or marking" as contemplated by Wis. Stat. § 346.37(1)(c). Insofar as the Village did not adduce testimony or other evidence resolving the matter, it cannot now rely on the bare suggestion that the signal pole is a "clearly visible sign or marking" to salve Picciolo's intrusion on Olszewski's constitutional rights.

The Village directs this Court's attention to the unpublished decision in *State v. Ullrich*, slip op. No. 2009AP88-CR (Wis. Ct. App. Aug. 27, 2009), for support. (Village's Br. at 3-4); *see also* R-Ap. 2-3. Even if *Ullrich* were controlling authority, it would not be dispositive.[1]

The issue in *Ullrich* was whether evidence obtained during traffic stop should have been suppressed because snowy conditions made it difficult for the defendant to comply with the traffic code. *Ullirch*, 2009AP88, ¶¶ 1, 8; R-Ap. 2-3. While *Ullrich* may appear comparable to the instant case on the surface because it involved a traffic stop during snowy conditions, the similarities end there. There are

[1] *Ullrich*—a one-judge opinion—is not binding authority. Wis. Stat. § (Rule) 809.23(3)(b).

relevant factual differences between *Ullrich* and the instant case that distinguish its holding to Olszewski's benefit.

In *Ullrich*, accumulated snowfall caused snow and ice to obscure the rear registration plate on the defendant's car. *Id.* at ¶ 8. A deputy sheriff observed that car traveling along the highway and stopped it because he could not read the rear registration plate. *Id.* ¶¶ 2, 7; R-Ap. 2-3. The traffic code mandates that a driver's registration plates must be readily and distinctly seen and read at all times. *Id.* ¶ 7; R-Ap. 3; *see also* Wis. Stat. § 341.15(2). The defendant moved to suppress, arguing that it was unreasonable to find that she failed to comply with the statute because the recent snowfall caused her plate to be obscured. *Ullrich*, 2009AP88, ¶¶ 3, 8; R-Ap. 2-3.

No one disputed that the snow—not the defendant—had caused her plate to be obstructed. *Id.* at ¶ 8; R-Ap. 3. But, the defendant argued that she should not be at fault because it was the snow that caused the obstruction. *Id.* at ¶¶ 3, 8; R-Ap. 2-3. Essentially, the defendant asked the court to read an exception into the law that provided for "an act of God," such as recent snow, which would relieve drivers from the statutory obligation to have a readable plate. *Id.* ¶ 8; R-Ap. 3. Under that exception, she claimed, the officer would have lacked reasonable suspicion to stop her. *Id.*

This Court rejected the defendant's request to find an exception in the traffic code where none existed. *Id.* ¶ 9; R-Ap. 3. While the court was sympathetic to the defendant's situation, it concluded that the statute clearly mandated that her plates had to be visible, without exception, even for scenarios where snow makes it difficult to keep the plate visible. *Id.*

In sharp contrast to *Ullrich*, Olszewksi does not ask for an exception in the law where none exists. Nor

does he assert an "act of God" defense like was asserted in *Ullrich*. Instead, Olszewski maintains that the traffic code itself provides an exception to the rule that he was alleged to have violated. *See* Wis. Stat. §§ 346.37(1)(c), 346.46(2)(c). Specifically, when a crosswalk is not visible—say, because of recent snowfall—the traffic code provides an exception to stopping before those lines; it merely requires the driver to stop safely at the intersection. *Id.* Thus, the traffic code as written includes an exception for circumstances in which the relevant lines are obscured by snow. Such was not the case in *Ullrich*. There, the registration plate law had no exceptions or alternative means of compliance in the event of snow cover. Whereas the statute at issue in the instant case includes an exception or alternative means of compliance in the event of snow, the reasoning in *Ullrich* is distinguishable. The defendant in *Ullrich* lost because she was asking the court to invent an exception to the law where none existed. But, Olzsewski's success does not necessitate reading language into the relevant statute. Instead, he can succeed on the law as it exists. *Ullrich* thus does not establish that Picciolo's stop was reasonable.

To the contrary, *Ullrich* actually highlights the unreasonableness of Picciolo's stop. Like the defendant in *Ullrich*, the Village asks this Court to create a Fourth Amendment exemption in the event of adverse weather conditions. The difference is that the Village asks for an exemption that applies to law enforcement, not to drivers: "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." (Village's Br. at 4.) In other words, the Village argues that, in varying weather conditions, police should be exempt from the reasonable suspicion requirement because it is unreasonable to expect an officer to know how the traffic code applies. Similar to the way it decided *Ullrich*, this Court should reject the Village's

invitation to create an "act of God" exemption to the Fourth Amendment's requirement that police stop only when they have a reasonable suspicion of criminal behavior. If an officer does not know the condition of the intersection because of the weather, and thus cannot tell whether a person violated Wis. Stat. § 346.37(1)(c) when stopping at the intersection, an infringement on that person's rights cannot constitutionally lie.[2]

The Village's final argument regarding reasonable suspicion is that, even if Olszewski complied with the traffic law when he stopped his van at the intersection, the totality of the circumstances nonetheless demonstrate reasonable suspicion of drunk driving. That argument must fail.

The Village is claiming that Olszewski's compliance with the traffic law at 1:00 a.m. on a Sunday—errantly believed to be traffic violation by Picciolo—was alone sufficient to establish reasonable suspicion of drunk driving. Under that theory, every person on the road at bar time on Sunday could properly be subjected to an investigatory stop. That cannot possibly be the law; it allows the police to cast too wide a net when fishing for criminals. Even the case on which the Village relies to support its contention is favorably distinguishable from Olszewski's case. (*See* Village's Br. at 4 (relying on *Post*, 2007 WI 60).)

In *Post*, a police officer witnessed what he believed was suspicious, albeit, non-criminal driving by the defendant. 2007 WI 60, ¶ 28. Specifically, the defendant was canted into the parking lane rather than driving in a designated lane of traffic. *Id.* ¶ 36. Despite seeing that suspicious behavior, the officer did

[2] Obviously, if the officer did additional investigation and learned that the condition of the intersection was such that the person's stop was not compliant with the traffic code, then a stop would be valid. However, those are not the facts of this case.

not stop the defendant. Instead, the officer turned around and began following him. *Id.* ¶ 5. He followed the defendant for a total of eight or nine blocks, observing his driving the entire time. *Id.* While following the defendant, the officer saw him swerve "in a smooth 'S-type' pattern" within his own lane "between five feet and nine feet." *Id.* ¶¶ 5, 35. The defendant's swerving occurred several times and continued for two blocks. *Id.* ¶ 5. It was not until after making those observations that the officer pulled the defendant over on suspicion of drunk driving. *Id.* According to the officer, "[The defendant]'s driving was a 'clue that he may be intoxicated.'" *Id.* ¶ 5 (quoting testimony).

As those facts demonstrate, *Post* is significantly different than the instant case. In the instant case, Picciolo witnessed only one thing: Olszewski's failure to stop before the crosswalk. On the other hand, the officer in *Post* observed an ongoing pattern of suspicious driving that persisted for eight or nine blocks before the stop. Amongst that pattern of questionable driving were multiple types of suspicious behavior: canting into the parking lane, not driving within a designated lane, and weaving within a single lane of traffic for two blocks. What is more, the officer in *Post* clearly articulated a suspicion, based on his observations, that the defendant was driving drunk. In the instant case, however, Picciolo had no suspicion of drunk driving. Instead, as shown by his testimony, Picciolo's stop was entirely premised on his opinion that Olszewski violated the crosswalk rule. (R.15:3-14, R.18:3-12.) The audio recording from Picciolo's squad car shows that when he approached Olszewski's vehicle and advised him of the reason for the stop, he made no mention of drunk driving. (R.9:Attached Ex. B at 1:02:47-1:04:01.) It was not until Picciolo spoke to Olszewski after the stop that he came to suspect drunk driving. (*Id.*)

The totality of the circumstances in *Post* is therefore favorably distinguishable from the instant case. Whereas the officer in *Post* relied on a number of consecutive events to support his suspicion of drunk driving, Picciolo's observation at 1:00 a.m. on a Sunday of Olszewski's stop at and safe navigation through the intersection was not enough to create reasonable suspicion of drunk driving.

II. OFFICER PICCIOLO'S MISTAKE WAS UNREASONABLE.

The Village argues that, to the extent Picciolo made a mistake of law, it should not render his stop unconstitutional because it was similar to the reasonable mistake made by the officer in *State v.* Houghton, 2015 WI 79, ¶¶ 56-57, 70, __ Wis. 2d __, __ N.W.2d __. (Village Br. at 6.) The Village's reliance on *Houghton* is misplaced.

In *Houghton*, the supreme court explained that a mistake of law is reasonable where the statutes involved are genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work. *Houghton*, 2015 WI 79, ¶ 68. Otherwise, if the statutes are not difficult or very hard to interpret, the mistake is unreasonable and the stop unconstitutional. *Id.*

The officer in *Houghton* made a mistake when he stopped the defendant for having an air freshener and GPS unit near his windshield. *Id.* ¶ 6. Turning to the statutes at issue in the case before it, the *Houghton* court concluded that the traffic code was unclear: there were two competing provisions. *Id.* ¶¶ 56-65. The court then noted that there were no appellate court decisions resolving the conflict. *Id.* ¶ 70. In light of both the conflicting statues and the absence of any appellate decision resolving it, the court concluded that the officer's mistake was reasonable. *Id.*

The Village relies on *Houghton* when adducing the absence of appellate court decisions about the issue before this Court as evidence that Picciolo's mistake was reasonable. (Village Br. at 6.) But the problem with the Village's argument is that, unlike the statutory provisions in *Houghton*, the statute at issue in the instant case is not ambiguous; it is not difficult to interpret. *See* Wis. Stat. § 346.37(1)(c). Accordingly, there are no appellate court decisions on the matter simply because no guidance is needed to apply the statute's clear rule. The absence of any ambiguous terms or conflicting statutes renders Picciolo's mistake unreasonable. *See Houghton*, 2015 WI 79, ¶ 68.

The Village also relies on the circuit court's statement that Wis. Stat. § 346.37(1)(c) is "more nuanced" than Picciolo thought to support its contention that Picciolo's mistake was reasonable. Olszewski has two responses. First, the matter of any ambiguity in Wis. Stat. § 346.37(1)(c) is a matter of statutory interpretation, and thus reviewed de novo on appeal. What the circuit court thought about the statute is thus not determinative. Second, the circuit court's use of the phrase "more nuanced" reads in the record as a polite way of saying that Picciolo's understanding of the statute was wrong, not that the statute itself was hard to understand. Importantly, the circuit court never expressed an opinion that the statute was ambiguous or prone to multiple interpretations. *Cf. Houghton*, 2015 WI 79, ¶ 68 (only statutes that are genuinely ambiguous lead to a reasonable mistake). Instead, the circuit court merely explained that the law was "more nuanced" than Picciolo's apparent belief that a stop must be made at the line regardless of whether the crosswalk is visible. (16:20), A-Ap. 58. Simply because the law was more nuanced than Picciolo recognized—as the circuit court stated—does not mean that his unawareness of that nuance is reasonable.

Indeed, the law is clear and logically dictates that the crosswalk lines or other markings establish where a driver must stop when visible; when no such lines exist or are not visible, a driver should stop before entering the intersection. Wis. Stat. § 346.37(c). Thus, any reasonable officer should know that when a driver approaches an intersection with no clearly visible crosswalk or other marking all that the driver must do to comply with Wis. Stat. § 346.37(1)(c) is stop before entering the intersection. So long as the intersection is subsequently navigated safely, there is no traffic violation. *See id.*

Finally, the Village suggests that even if Picciolo was wrong to think that Olszewski violated the law, that mistake was still reasonable because road conditions can change quickly due to weather. (Village Br. at 3, 4, 6.) The problem with this contention is that such a mistake is not reasonable. Picciolo knew it was snowing. (15:5-6), A-Ap. 23-24. He knew snow was accumulating on the roadway. (15:6-8, 10), A-Ap. 24-26, 28. It is unreasonable for an officer of the law to assume a traffic violation in the absence of sufficient evidence; reasonable suspicion mandates more than a hunch. If Picciolo could not see whether the line was visible when Olszewski stopped at the intersection, then he needed to do additional investigation before he could articulate sufficient, objective facts constituting a basis for the stop. *See Houghton*, 2015 WI 79, ¶¶ 73-76. In the absence of such evidence and Picciolo's awareness of the same, it was unreasonable for him to conduct the traffic stop.

In its brief, the Village addresses only one of the two mistakes made by the officer in *Houghton*—the one the court found reasonable. However, Picciolo's mistake in the instant case is actually more akin to the *Houghton* officer's second mistake, which the court deemed unreasonable. In addition to the aforementioned mistake regarding obstruction of the windshield, the officer in *Houghton* also made a

mistake when he saw a driver without a front license plate and jumped to the conclusion that it constituted a traffic violation. In fact, the driver was not violating the law because he was driving an out-of-state vehicle that was not required to have front and rear plates. The *Houghton* court concluded that the officer acted unreasonably because there is so much interstate traffic that is not subject to that requirement. *Houghton*, 2015 WI 79, ¶¶ 75-76. Likewise, Picciolo was unreasonable in the instant case when he jumped to the conclusion that Olszewski violated Wis. Stat. § 346.37(c) without confirming that the crosswalk was visible. Picciolo knew there was snow accumulation and he should have known that the traffic code provides that drivers need to stop only before entering the intersection when the lines or marking to stop are not clearly visible. Thus, like the officer in *Houghton*, Picciolo acted unreasonably, and his stop was unconstitutional.

CONCLUSION

For all those reasons and the reasons adduced in Olszewski's first brief, he asks this Court to reverse the circuit court's order on his motion to suppress and to return his case to the circuit court for further proceedings.

Dated this 2nd day of October, 2015.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,997 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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 2nd day of October, 2015.

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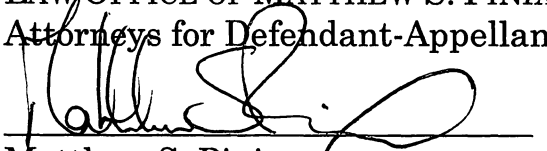

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CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Short Appendix will be delivered to a FedEx, a third-party commercial carrier, on October 2, 2015, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 2nd day of October, 2015.

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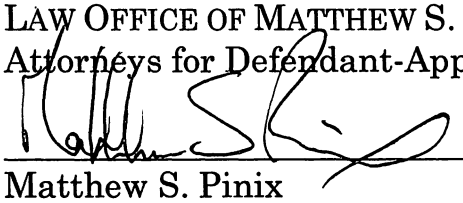

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