

STATE OF WISCONSIN
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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal Case No. 2015AP001613-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

JAMES A. WEBB,

Defendant-Respondent.

ON APPEAL FROM THE ORDER GRANTING
MOTION TO SUPPRESS, ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JOHN SIEFERT, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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ISSUE PRESENTED

Did reasonable suspicion exist to justify the stop of Mr. Webb's vehicle?

Answer: The circuit court found no reasonable suspicion existed because it was not the hours of darkness and the Department of Transportation only has authority to enforce Wis. Admin. Code § Trans. 305.15 on commercial vehicles.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This case can be resolved by applying well-established legal principles to the facts of the case and will not meet the criteria for publication. See Wis. Stat (Rule) 809.23(1)(b).

STATEMENT OF THE CASE

On January 25, 2015, at approximately 5:15 p.m., Milwaukee Police Officer Joel Susler was on patrol and was stopped behind a 2001 Ford Expedition SUV at a red light. (R2:1), (R4:2; App.102), (R14:6-7, 10; App.120-121, 124). Officer Susler observed the Expedition's high mount brake light was not working while the vehicle was braking. (R4:2; App.102), (R14:6-7, 10; App.120-121, 124). Officer Susler conducted a traffic stop of the Ford Expedition for the defective high mount brake light. (R4:2; App. 102), (R14:7, App.121). James Webb was driving the Ford Expedition. (R2:1), (R4:2; App.102), (R14:7; App.121).

During the traffic stop, Officer Susler asked Mr. Webb if he had a firearm on him, and Mr. Webb stated he had a gun in his vehicle, next to his seat. (R2:1), (R4:2; App.102) (R14:16; App.130). Mr. Webb provided Officer Susler with a pink receipt for the gun and admitted that it was not a permit to carry, just a receipt. (R2:1), (R4:2; App.102), (R14:18; App.132). Officer Susler then recovered a loaded Jimenez brand .9 mm semi-automatic handgun concealed between the driver's seat and center console. (R2:1), (R4:2; App.102), (R14:10; App.124). Mr. Webb admitted he was not a CCW permit holder. (R2:1), (R4:2; App.102), (R14:18; App.132).

On January 27, 2015, the Milwaukee County District Attorney's Office issued a charge against Mr. Webb of Carrying a Concealed Weapon, a Class A misdemeanor under Wis. Stats. § 941.23(2). (R2:1).

On April 15, 2015, Mr. Webb filed a motion to suppress physical evidence, alleging one issue: Officer Susler lacked

probable cause or reasonable suspicion to detain the vehicle based on a defective high mount brake light. (R4:3; App.).

On May 8, 2015, Mr. Webb appeared with counsel before the Honorable John Siefert, Branch 47 of the Milwaukee County Circuit Court, for a suppression motion. (R1:2), (R14:1; App.116). Defense counsel submitted to the circuit court that this was not a case where there was a great factual dispute, but instead the main issue was if Officer Susler had the authority to stop Mr. Webb for the violation of his defective high mount brake light. (R14:4; App.118). The circuit court heard testimony from Officer Susler, which was similar to the facts described above. (R14:6-21; App.120-135). Officer Susler testified he observed a violation of Wis. Admin. Code § Trans. 305.15(5)(a) on Mr. Webb's vehicle and conducted a traffic stop for that violation. (R14:7, 20; App.121,134). Officer Susler further testified that under Wis. Admin. Code § Trans. 305.15, vehicles manufactured since the 1980s are required to have a functioning high mount brake light. (R14:12; App.126). Further, the circuit court received Exhibit 2, which showed what Officer Susler viewed when Mr. Webb's Ford Expedition brake pedal was applied, a defective high mount brake light. (R20:3; App.). The circuit court adjourned for a decision, requesting the parties submit briefs as to whether a violation under Wis. Admin. Code § Trans. 305.15(5)(a) has a penalty. (R14:22; App.136)

The State and defense submitted the requested briefs. In particular, the State argued Officer Susler had reasonable suspicion to stop Mr. Webb for a violation of Wis. Admin. Code § Trans. 305.15(5)(a). (R6:1-5; App.107-111), (R7:1-3; App.112-114), On May 28, 2015, the circuit court gave an oral decision. (R15:1-18; App.142-158). The circuit court granted defense's motion and suppressed the evidence, explaining Wis. Stat. §347 did not apply because this offense did not occur during the hours of darkness and Wis. Admin Code § Trans. 305.15(5)(a) is only enforceable with commercial motor vehicles. (R15:10-11; App.150-151), (R15:12 -13; App.152-153).

The circuit court further explained Wis. Admin. Code § Trans. does not permit the Department of Transportation to promulgate any rule, if the vehicle combination does not

include a commercial motor vehicle described in Section § 348(c)(d) and the vehicle combination is operated solely in intrastate commerce. (R15:11; App.151). The circuit court stated Mr. Webb's vehicle was not a truck and the provision allowing law enforcement to stop for a violation for motor vehicle inspection under Wis. Stat. § 110.075 applied to commercial vehicles, not SUVs like Mr. Webb's. (R15:11; App.151).

The circuit court further elaborated, stating non-commercial vehicles are governed by the statutory provision, not the Administrative Code. (R15:14; App.154). A written order of Judgment was signed on July 22, 2015. (R8:1; App.115). The State now appeals from that order.

STANDARD OF REVIEW

The reasonableness of a traffic stop is a question of constitutional fact. *State v. Post*, 2007 WI 60 ¶ 8, 301 Wis. 2d 1, 733 N.W.2d 634. A constitutional fact is a mixed question of both law and fact. *Id.* This court reviews the circuit courts finding of fact under the clearly erroneous standard of review, but applies those facts to constitutional principles *de novo*. *Id.*

ARGUMENT

I. Officer Susler had reasonable suspicion to stop Mr. Webb's Ford Expedition.

A. Relevant legal principles

A police officer may stop a vehicle if "the officer has an articulable suspicion that the person has committed or is about to commit a crime." *State v. Goyer*, 157 Wis. 2d 532, 536, 460 N.W.2d 424 (Ct. App. 1990) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22(1968)). The constitutional standard set forth in *Terry* is codified in Wis. Stat. § 968.24, which provides that "a law enforcement officer may stop a person in public place for a reasonable period of time when the officer reasonably suspects that such a person is committing, is about to commit or has committed a crime." *Id.*

Terry instructs that,

in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Terry, 392 U.S. at 21-22, 27. The determination of reasonableness is common sense test and is based upon the totality of the circumstances. *Post*, 301 Wis.2d at 9. This court must look to what a reasonable police officer would “reasonably suspect in light of his or her training and experience.” *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996).

Finally, the foregoing principles apply to investigative stops of motor vehicles. *See State v. Gammons*, 2001 WI App 36, ¶ 6, 241 Wis. 2d 296, 625 N.W.2d 623. Moreover, reasonable suspicion to believe that a motorist has violated a *noncriminal* traffic law also will justify a “traffic stop,” in accordance with the constitutional protections against unreasonable searches and seizures. *See, e.g., id.* at ¶¶6-9.

B. Officer Susler stopped Mr. Webb on the reasonable suspicion of a non-criminal traffic violation.

On January 25, 2015, at 5:15 p.m., Milwaukee Police Officer Joel Susler was on patrol with his partners in the City and County of Milwaukee. (R2:1), (R4:2; App.102), (R14: 6-7, 10; App.120-121, 124). Officer Susler was stopped at a red light directly behind a 2001 Ford Expedition SUV. (R4:2; App.102), (R14:6-7, 10; App.120-121, 124). Officer Susler observed the Expedition’s high mount brake light was not working while the vehicle was braking. (R4:2; App.102), (R14: 6-7, 10; App.120-121, 124). Officer Susler testified under Wis. Admin. Code § Trans. §305.15(5)(a), vehicles manufactured since the 1980s are required to have a functioning high mount brake light. (R14:12; App.126). Officer Susler testified he conducted a traffic stop of the Ford Expedition for the defective high mount brake light and James Webb was driving the Ford Expedition. (R2:1), (R4:2; App.102), (R14:7; App.121).

As stated, a police officer may stop a vehicle based on the reasonable suspicion of a non-criminal traffic violation. *See State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394. “Administrative rules enacted pursuant to statutory rulemaking authority have the forces and effect of law in Wisconsin.” *Id.* (quoting *Wisconsin Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40 ¶ 3 n.5, 207 Wis. 2d 318, 677 N.W.2d 612) (quoting *Staples v. DHHS*, 115 Wis. 2d 363, 367, 340 N.W.2d 194 (1983)). State law requires that motor vehicles that were originally manufactured with a high mount brake light must have the brake light in proper working conditions. Wis. Admin. Code § Trans. 305.15(5)(a) (Nov. 1997). Thus, Wis. Admin. Code § Trans. 305.15(5)(a) has the force of law.

Officer Susler testified he personally observed Mr. Webb’s 2001 Ford Expedition motor vehicle in violation of Wis. Admin. Code § Trans. 305.15(5)(a). (R4:2; App.102), (R:14:6-7, 12; App.120-121, 126). Officer Susler also testified that this violation was enforceable to every motor vehicle manufactured since the 1980s. (R4:2; App.102), (R:14:6-7, 12; App. 120-121, 126). Therefore, Officer Susler’s observation of Mr. Webb’s defective high mount brake light provided an adequate basis for Officer Susler to believe Mr. Webb was violating a non-criminal traffic law and conduct a traffic stop.

Officer Susler’s stop is further supported by the unpublished court of appeals decision of *State v. Lerdahl*, which was decided after the circuit court’s decision in Mr. Webb’s case. 2014AP2119-CR (Ct. App. August 4, 2015) (unpublished) (*See* App.160-169) Similar to Mr. Webb’s matter, *Lerdahl* involved traffic stops for non-criminal violations of Wis. Admin. Code § Trans. 305.15(5)(a). *Id.* at ¶2.

In *Lerdahl*, Officer Roth initiated a traffic stop for a violation of Wis. Admin. Code § Trans. 305.15(5)(a), when she noticed what she believed was Mr. Lerdahl’s high mount brake light was not working. 2014AP2119-CR at ¶2. It turned out that Officer Roth was mistaken, and instead it was a cargo lamp that did not activate by the application of brakes which did not light up. 2014AP2119-CR at ¶2. Mr. Lerdahl challenged the lawfulness of the initial stop arguing Officer Roth did not have reasonable suspicion to initiate the traffic stop. *Id.* at ¶7.

The court in *Lerdahl* found that a traffic stop for a violation of the high mount brake light is valid if there is evidence the officer had any information or knowledge concerning the likelihood that the stopped vehicle was manufactured with a high mount brake light. *Id. Lerdahl*, though decided after the circuit court's decision in Mr. Webb's matter, supports Officer Susler had reasonable suspicion to stop Mr. Webb for the violation of Wis. Admin. Code § Trans. 305.15(5)(a). Officer Susler testified that vehicles manufactured since 1980s have high mount brake lights, which would include Mr. Webb's 2001 Ford Expedition. (R4:2; App.102), (R14:12; App.126).

C. The Secretary and Department of Transportation have statutory authority to regulate brake lights with Wis. Admin. Code § Trans. 305.15(5) for motor vehicles, which includes Mr. Webb's vehicle, and to delegate enforcement to local law enforcement officers, like Officer Susler.

The Secretary and the Department of Transportation have clear authority to establish and enforce vehicle equipment standards, including standards for commercial or motor vehicle brake lights, like these manufactured on Mr. Webb's Ford Expedition, contrary to the circuit court's findings.

The circuit court found the Department of Transportation cannot promulgate any rule, like Wis. Admin. Code § Trans. 305.15, if the vehicle combination does not include a commercial motor vehicle and the vehicle combination is operated solely in intrastate commerce. (R15:10-11; App.150-151). The circuit court stated the provision allowing law enforcement to stop any violation for motor vehicle inspection under Wis. Stat. § 110.075 applied to commercial vehicles, not SUVs like Webb's. (R15:10-11; App.150-151). The circuit court's decision asserts the requirement and enforcement that a motor vehicle manufactured with a high mount brake light must be in proper working condition constitutes an unlawful expansion of the Department of Transportation's rulemaking authority. (R15:10-11; App.150-151).

The State asserts that the court's ruling is in error. The general rulemaking authority of the Department of Transportation is set forth in Wis. Stat. § 85.16, which states that "[t]he secretary may make reasonable and uniform orders and rules deemed necessary to the discharge of the powers, duties and functions vested in the department [of transportation]." As to vehicle equipment specifically, Wis. Stat. § 110.075 provides:

110.075. Motor vehicle inspection

(1) No person shall drive or move, or cause or knowingly permit to be driven or moved, on any highway *any vehicle* or combination of vehicles which is not in conformity with the requirements of this section.

(2) When directed by any traffic officer or motor vehicle inspector, the operator of any motor vehicle shall stop and submit such motor vehicle to an inspection and such tests as are necessary to determine whether it meets the requirements of this section, or that its equipment is not in proper adjustment or repair, or in violation of the equipment provisions of ss. 110.05, 110.06, 110.063 and 110.064, ch. 347, or rules issued pursuant thereto. Such inspection shall be made with respect to the brakes, *lights*, turn signals, steering, horns and warning devices, glass, mirrors, exhaust system, windshield wipers, tires, *and other items of equipment designated by the secretary*.

(4) When *any motor vehicle* is found to be unsafe for operation, traffic officers or motor vehicle inspectors may order it removed from the highway and not operated, except for purposes of removal and repair, until it has been repaired pursuant to a repair order as provided in sub. (5).

(6) *The secretary shall set standards and adopt rules to establish a plan of inspection to implement the inspection program provided by this section. ...*

(emphasis added).

The statute is completely clear that the Secretary may promulgate rules regarding *any vehicle* and its equipment, and that no person may drive *any motor vehicle* that fails to conform to those standards. Wis. Stat. § 110.075.

Wis. Stat. § 340.01(74) defines “vehicle” in part as every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. Further, Wis. Stats. § 304.01(35) defines in part “motor vehicle” as a vehicle, including a combination of 2 or more vehicles or an articulated vehicle, which is self-propelled, except a vehicle operated exclusively on a rail. “Motor vehicle” includes, without limitation, a commercial motor vehicle or a vehicle which is propelled by electric power obtained from overhead trolley wires but not operated on rails. These definitions are not limited and actually include commercial motor vehicles in the definitions. These definitions demonstrate that the Department of Transportation in fact has the authority to promulgate and enforce vehicle equipment standards for any vehicle, specifically the brake lights in Mr. Webb’s Ford Expedition.

Wis. Stat. § 374.14 addresses brake lights and provides in part that:

(1) No person shall operate a *motor vehicle*, lightweight utility vehicle as defined in s. 346.94(21)(a)2., mobile home, or trailer or semitrailer upon a highway unless such motor vehicle, lightweight utility vehicle, mobile home, or trailer or semitrailer is equipped with at least one stop lamp mounted on the rear and meeting the specifications set forth in this section. The stop lamp on a mobile home or trailer or semitrailer shall be controlled and operated from the driver's seat of the propelling vehicle. A stop lamp may be incorporated with a tail lamp. No vehicle originally equipped at the time of manufacture and sale with 2 stop lamps shall be operated upon a highway unless both such lamps are in good working order.

(2) A stop lamp shall be so constructed as to be actuated upon application of the service or foot brake or separate trailer brake and shall emit a red or amber light plainly visible and understandable from all distances up to 300 feet to the rear during normal sunlight when viewed from the driver's seat of the vehicle following.

(emphasis added).

Again, this statute provided a specific list of applicability to “motor vehicle” which definition is provided above. This again would include more than just commercial

vehicles as found by the circuit court, specifically, it would include Mr. Webb's Ford Expedition.

Further, Wisconsin legislature does not place itself in a position to be required to rewrite its voluminous statutes every time a technological advancement or safety improvement is made, such as the addition of high mount brake lights on vehicles. Instead, it creates administrative agencies and empowers them to promulgate rules to fill gaps in the legislative process. High mount brake light regulation is an example of exactly such process. Wis. Stat. § 110.075 gives the Department of Transportation authority to set standards for all motor vehicle equipment, and Wis. Admin. Code § Trans. 305.15 sets forth the standards as to brake lights, which applies to every motor vehicle, not just commercial vehicles. The regulation as applied to Mr. Webb's Ford Expedition is completely within the scope of authority granted to the Department of Transportation and is a proper and important regulation of high mount brake light.

Wis. Stat. § 347.14(1) sets forth a minimum, but not comprehensive or exclusive, standard. Wis. Stat. § 110.075 empowers the Department of Transportation, under the guidance of the Secretary, to promulgate rules to match the ever-changing landscape of technology and innovation. The Department of Transportation has promulgated Wis. Admin. Code § Trans. 305.15 which sets forth reasonable and safe standards for the operation of brake lights in every motor vehicle, in just commercial vehicles.

Further support that Wis. Admin. Code § Trans. 305.15 applies to every motor vehicle can be found in Wis. Admin. Code § Trans. 305.01 which defines the purpose and scope of the code which relates to the high mount brake light. Wis. Admin. Code § Trans. 305.01 (2) specifies that the chapter "includes equipment requirements for manufactured...vehicles, and motor vehicles...", again the definition of motor vehicles is above. Therefore, the scope would include Mr. Webb's Ford Expedition, not only commercial vehicles as found by the circuit court.

D. Mr. Webb's high mount brake light is required to be maintained in proper working condition at all times, not just during the hours of darkness.

The circuit court's decision that Wis. Stat. § 347.14 and its sub-sections does not apply, because Mr. Webb's motor vehicle violation did not occur during the hours of darkness is an incorrect reading of the statute. (R15:9;App.149). In so ruling, it appears that the court may have confused the rules governing brake lights with those governing tail light, or tail lamps.

Wis. Stat. § 347.13, regulates tail lamps. It provides,

(1) No person shall operate a motor vehicle, mobile home or trailer or semitrailer upon a highway *during hours of darkness* unless such motor vehicle, mobile home or trailer or semitrailer is equipped with at least one tail lamp mounted on the rear which, when lighted *during hours of darkness*, emits a red light plainly visible from a distance of 500 feet to the rear

(emphasis added).

However, at issue in this case is the proper operation of a brake lamp or stop lamp, which is governed by Wis. Stat. § 347.14 (recited in relevant portion, above). Wis. Stat. § 347.14 contains no provision that brake lamps be operational only at certain times of the day. Enforcement of Wis. Stat. §347.14 and Wis. Admin Code Trans. §305.15 applies at all hours of the day, not just during the hours of darkness.

Indeed, Wis. Stat. §347.14 clearly contemplates a requirement that, regardless of the time of day, brake lights must turn on when a brake pedal is pushed. (which did not occur in the high mount brake light of Mr. Webb's Ford Expedition). This is further supported by a review of Wis. Admin. Code § Trans. 305.15(5)(a), which again does not make any reference to the hours of darkness nor to Wis. Stat. §347.13. Lastly, common sense dictates it would be a major safety concern if brake lights were only required to be in proper working condition during the hours of darkness.

Therefore, the circuit court's finding in relation to the hours of darkness was in error. The sole issue if was whether Mr. Webb's high mount brake light was in proper working condition at the time of Officer Susler's traffic stop. Based on Susler's testimony and exhibit 2, it was not. Therefore, Officer Susler's observation of Mr. Webb's defective high mount brake light provided an adequate basis for Officer Susler to believe Mr. Webb was violating a non-criminal traffic law. (R14:6, 9; App.120, 123) (R20:3; App.159).

CONCLUSION

For the foregoing reasons, the State respectfully requests this court reverse the circuit court's decision granting Mr. Webb's motion to suppress.

Dated this _____ 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 word count of this brief is 3,451.

Date

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CERTIFICATE OF COMPLIANCE WITH 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 s. 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.

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