STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2015AP001613-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JAMES A. WEBB,

Defendant-Respondent.

On Notice of Appeal from an Order Entered in the Milwaukee County Circuit Court, the Honorable John Siefert, Presiding.

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

JOHN R. BREFFEILH
Assistant State Public Defender
State Bar No. 1085119

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
breffeilhj@opd.wi.gov

Attorney for Defendant-Respondent

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ISSUE PRESENTED

1. Whether Milwaukee Police Officer Joel Susler had reasonable suspicion to stop Mr. Webb's 2001 Ford Expedition because it did not have a functioning high-mount stop lamp.

The circuit court determined that Officer Susler did not have reasonable suspicion to stop Mr. Webb's vehicle and suppressed the evidence derived from the stop. (8; 15:13; A-Ap. 115, 153).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Webb does not request oral argument, and as a one-judge appeal, this case is not eligible for publication. *See* WIS. STAT. RULE 809.23(1)(b)4.

STATEMENT OF THE CASE

The State provided an accurate summary of the facts. Therefore, Mr. Webb will not supplement the facts, but will reference them, as needed, in his argument. *See* WIS. STAT. RULE 809.19(3)(a)2.

ARGUMENT

I. Officer Susler Lacked Reasonable Suspicion to Stop Mr. Webb's 2001 Ford Expedition.

A. Standard of review

The Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 11 of the Wisconsin

Constitution protect citizens from unreasonable searches and seizures. U.S. CONST. amend. IV, IVX; WIS. CONST. art. 1, § 11. Traffic stops are considered seizures, thus if a traffic stop is unreasonable, the evidence derived therefrom is inadmissible. ***State v. Popke***, 2009 WI 37, ¶ 11, 317 Wis. 2d 118, 765 N.W.2d 569; ***State v. Harris***, 206 Wis. 2d 243, 263, 557 N.W.2d 245 (1996). The burden falls on the State to prove that a traffic stop is reasonable. ***State v. Post***, 2007 WI 60, ¶ 12, 301 Wis. 2d 1, 733 N.W. 634; ***Harris***, 206 Wis. 2d at 263.

Whether a traffic stop is reasonable is a question of constitutional fact. ***State v. Houghton***, 2015 WI 79, ¶ 18, 364 Wis. 2d 234, 868 N.W.2d 143. This Court reviews questions of constitutional fact under a two-part standard of review. ***Id***. First, it reviews the circuit court's findings of fact for clear error. ***Post***, 301 Wis. 2d 1, ¶ 8. Then, it reviews the circuit court's conclusions of law *de novo*. ***Id***.

B. Introduction

The State seeks to reverse a circuit court order granting Mr. Webb's motion to suppress on the grounds that WIS. ADMIN. CODE § TRANS 305.15(5)(a) is a valid exercise of the Department of Transportation's regulatory authority, and prohibited Mr. Webb from driving without a high-mount stop lamp. (Brief-in-chief at 7-12). The State argues that, since Officer Susler observed Mr. Webb driving his 2001 Ford Expedition without a functioning high-mount stop lamp, he had reasonable suspicion to conduct a traffic stop. (Brief-in-chief at 5-6).

However, the State fails to recognize that the Wisconsin Administrative Procedure Act prohibits the Department of Transportation from promulgating a rule that exceeds the scope of an existing statute. *See* WIS. STAT. §§

227.11(2)(a)3, 227.10(2). Since the Wisconsin Legislature passed WIS. STAT. § 347.14(1)— requiring motorists to maintain one to two working stop lamps—the Department of Transportation lacked the authority to require a third.

Moreover, even if WIS. ADMIN. CODE § TRANS 305.15(5)(a) is a valid exercise of the Department of Transportation's regulatory authority, the State failed to meet its burden to prove that Mr. Webb violated the rule, or that Officer Susler had a reasonable basis to believe that he did. Therefore, the circuit court's order must be affirmed.

C. WISCONSIN ADMIN. CODE § TRANS 305.15(5)(a) violates the Wisconsin Administrative Procedure Act because it is more restrictive than the requirement set forth in WIS. STAT. § 347.14(1).

The Wisconsin Legislature has provided the Department of Transportation with regulatory authority to promulgate rules to ensure that Wisconsin roads are safe. *See* WIS. STAT. §§ 85.16, 110.075, 194.38, 194.43, 346.45, 347.02, and 347.35. However, this grant of authority is limited by the Wisconsin Administrative Procedure Act, which states:

> No agency may promulgate a rule which conflicts with state law.

WIS. STAT. § 227.10(2).

It continues:

> A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is

> *more restrictive* than the standard, requirement, or threshold contained in the statutory provision.

WIS. STAT. § 227.11(2)(a)3 (emphasis added).

Moreover, the Department of Transportation has acknowledged this limitation by codifying it in the "applicability" section of its code:

> Trans. 305.02 Applicability.
>
> (7) Nothing in this chapter is intended to modify the provisions of ch. 347, Stats., and all vehicles to which this chapter applies shall also comply with the requirements of ch. 347, Stats.

WIS. ADMIN. CODE § TRANS 305.02(7).

Thus, it is beyond dispute that "[a]n agency rule cannot defeat the plain language of an unambiguous statute." *See* ***Seider v. O'Connell***, 2000 WI 76, ¶ 69, 236 Wis. 2d 211, 612 N.W.2d 659; *see also* ***Lincoln Sav. Bank, S.A. v. Wisconsin Dep't of Revenue***, 215 Wis. 2d 430, 443, 573 N.W.2d 522 (1998); ***National Amusement Co. v. Wis. Dep't of Revenue***, 41 Wis.2d 261, 274, 163 N.W.2d 625 (1969).

However, in this case, it is clear that WIS. ADMIN. CODE § TRANS 305.15(5)(a) conflicts with WIS. STAT. § 347.14(1) because it administratively creates a requirement that does not exist in the statute.

The statute, WIS. STAT. § 347.14(1), states:

> 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.

The rule, WIS. ADMIN. CODE § TRANS 305.15(5)(a), states:

> The high-mounted stop lamp of every motor vehicle originally manufactured with a high-mounted stop lamp shall be maintained in proper working condition and may not be covered or obscured by any object or material. This paragraph does not apply to the temporary covering or obscuring of a high mounted stop lamp by property carried on or in the motor vehicle or in a trailer towed by the motor vehicle.

Therefore, the Department of Transportation exceeded its regulatory authority by promulgating a rule that establishes a more stringent standard than the statute. As a result, the circuit court was correct when it held that, in this case, "[i]ndividual vehicles are governed by the statutory provisions, not the Administrative code."[1] (15:14; A-Ap. 154).

Here, Mr. Webb satisfied the statutory requirements because he had two working stop lamps when Officer Susler initiated the stop. WISCONSIN ADMIN. CODE § TRANS 305.15(5)(a) is not applicable because it added an additional requirement that did not exist in the statute. Thus, the circuit court correctly found that Officer Susler did not have a lawful

[1] Admittedly, the circuit court employed the wrong reasoning, but its conclusion is sound.

basis to conduct a traffic stop. Its ruling should be affirmed on appeal.

D. Even if WIS. ADMIN. CODE § TRANS 305.15(5)(a) is a valid exercise of the Department of Transportation's regulatory authority, the State failed to meet its burden to prove that Mr. Webb violated the regulation, or that Officer Susler had a reasonable basis to believe that he did.

If valid, WISCONSIN ADMIN. CODE § TRANS 305.15(5)(a) requires a vehicle to maintain a high-mount stop lamp "in proper working condition" *if* the vehicle was originally manufactured with one. Thus, to prove Mr. Webb violated WIS. ADMIN. CODE § TRANS 305.15(5)(a), the State had the burden to prove that Mr. Webb's 2001 Ford Expedition was originally manufactured with a high-mount stop lamp. ***Post***, 301 Wis. 2d 1, ¶ 12; ***Harris***, 206 Wis. 2d at 263.

Here, the State failed to meet its burden. It offered no evidence to support a finding that Mr. Webb's vehicle was subject to the high-mount stop lamp provision. Officer Susler was the State's only witness. Yet, he did not testify that Mr. Webb's 2001 Ford Expedition was manufactured with a high-mount stop lamp. He merely testified that Mr. Webb's high-mount stop lamp was not functioning when he observed it, as demonstrated by photographs of the car. (14:7-9; 20; A-Ap. 121-123).

While this evidence may support a finding that a nonfunctioning high-mount stop lamp was, in fact, affixed to the back of Mr. Webb's car, it does not provide a basis to find that the stop lamp was originally part of the car as opposed to an after-market modification. Thus, the State failed to meet

its burden to prove that Mr. Webb actually violated the regulations set forth in WIS. ADMIN. CODE § TRANS 305.15(5)(a).

Moreover, the State failed to prove that Officer Susler reasonably interpreted WIS. ADMIN. CODE § TRANS 305.15(5)(a) to apply to Mr. Webb's situation. The reasonableness of a traffic stop turns on whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that an individual is committing, is about to commit, or has committed an offense. ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990); ***State v. Lerdahl***, No. 2014AP2119, ¶ 6, unpublished slip op. (WI App Aug. 4, 2015) (R-Ap. 102).

In this case, the facts are undisputed. Officer Susler observed Mr. Webb driving a 2001 Ford Expedition without a functioning high-mount stop lamp and conducted a traffic stop because he believed that, under WIS. ADMIN. CODE § TRANS 305.15(5)(a), *every* car built after "the '80s" was required to have a high-mount stop lamp:

State:	What do you do for a living, officer?
Officer:	I'm a police officer for the City of Milwaukee.
State:	And do you have any special training or education for that position? Generally?
Officer:	The Academy.
State:	While you were doing that, were you trained in certain traffic and ordinance violations?
Officer:	Yes.

State: Are you familiar with any type of violation when it comes to a high-mount light on a vehicle?

Officer: Yes.

State: What would that be?

Officer: That it's required to work.

. . .

Court: Under – I have a couple of other questions for you.

Officer: It is –

Court: Under [WIS. ADMIN. CODE § TRANS 305.15(5)(a)], is a high-mount brake light required on a car?

Officer: It is required.

Court: You mean *every* car has to have a high-mount brake light?

Officer: Well, I believe it's after a certain year. Like, it's in the 80's, I believe.

(14:6, 12-13; A-Ap. 120, 126-127) (emphasis added).

Clearly, Officer's Susler's belief that WIS. ADMIN. CODE § TRANS 305.15(5)(a) authorized him to stop *any* car built after the "80's" is an unreasonable reading of the rule. WISCONSIN ADMIN. CODE § TRANS 305.15(5)(a), if valid, unambiguously limits its application to vehicles "originally manufactured with a high-mounted stop lamp." There is nothing in the record to suggest that all vehicles manufactured in the "80's" meet this standard. Moreover, ***Lerdahl***

establishes that they do not. ***Lerdahl***, No. 2014AP2119 (R-Ap. 101-104).

In ***Lerdahl***, an officer in the Eau Claire Police Department stopped a defendant for driving a 1992 Chevrolet pickup truck because it did not have a functioning high-mount stop lamp. ***Id***. at ¶ 2 (R-Ap. 101). After stopping the truck, the police officer learned that the model in question was not manufactured with a high-mount stop lamp until 1994. ***Id***. at ¶ 3 (R-Ap. 101). However, the State sought to introduce evidence derived from the stop on the grounds that the officer committed a permissible mistake of law. ***Id***. at ¶ 13 (R-Ap. 103).

The ***Lerdahl*** court rejected the State's claim. ***Id***. at ¶ 19 (R-Ap. 104). It found that the officer's mistake of law was unreasonable because WIS. ADMIN. CODE § TRANS 305.15(5)(a) was unambiguous, thus the officer's interpretation was unreasonable:

> Despite the State's argument, our supreme court's recent decision in ***Houghton*** does not excuse an officer's complete lack of knowledge about the law, but only a reasonable mistake concerning it.
>
> . . .
>
> The administrative code provision at issue here is unambiguous. A working [high-mount stop lamp] is not required in every truck, but only those motor vehicles originally manufactured with one. There is no room for interpretation. If a law enforcement officer is enforcing a law that clearly dictates certain terms to constitute a violation, the officer must know those terms in order to enforce the law. Roth's [the Eau Claire officer who stopped the defendant] enforcement of a law she fundamentally misunderstood was not reasonable without some evidence that she had been trained—or

> tried to obtain information—to distinguish which vehicles were originally manufactured with [high-mount stop lamps], thus requiring them to have a high-mounted stop lamp in working order, and evidence that she erroneously—but reasonably—believed she was seeing such a vehicle.

Id. at ¶¶ 14-17 (R-Ap. 103) (citations omitted).

The ***Lerdahl*** court concluded:

> … stopping [the defendant's] truck due to a nonfunctioning [high-mount stop lamp] without more, is not enough to pass constitutional muster. There was no evidence that Roth had any information or knowledge concerning the likelihood that [the defendant's] truck was "originally manufactured" with a [high-mount stop lamp]. As a result, Roth did not have reasonable suspicion to support her traffic stop.

Id. at ¶ 19 (R-Ap. 104).

The same principle controls the case at bar. During the suppression hearing, the State presented absolutely no evidence to suggest that Officer Susler had any information or knowledge concerning the likelihood that Mr. Webb's 2001 Ford Expedition was "originally manufactured" with a high-mount stop lamp. Moreover, there is no evidence to support a claim that Mr. Webb's vehicle was, in fact, required to have a working high-mount stop lamp.

Instead, the record contains a bare statement from Officer Susler that, in his opinion, *every* car manufactured in (or after) "the 80s" is required to have a high-mount stop lamp. (14: 12-13; A-Ap. 126-127). This is an unreasonable interpretation of the law. WISCONSIN ADMIN. CODE § TRANS 305.15(5)(a), if valid, does not provide the police with *carte blanche* to stop *any* car manufactured after "the 80s" for

failing to maintain a functioning high-mount stop lamp. ***Lerdahl***, No. 2014AP2119, ¶ 19. For the stop to be valid, the State must demonstrate that the car actually violated the regulation, or that the detaining officer had reason to believe that it did.

In this case, the State has failed to prove either prong. Therefore, the circuit court's decision must be affirmed.

CONCLUSION

The circuit court correctly concluded that WIS. ADMIN. CODE § TRANS 305.15(5)(a) did not apply to Mr. Webb, even though it employed the wrong reasoning. The Department of Transportation did not have the authority to promulgate a rule that exceeded the regulations set forth in WIS. STAT. § 347.14. However, even if WIS. ADMIN. CODE § TRANS 305.15(5)(a) was a valid exercise of the Department of Transportation's authority, the State failed to meet its burden to prove that Mr. Webb violated the regulation, or that Officer Susler had a reasonable basis to believe that he did.

Therefore, the circuit court's order should be affirmed.

Dated this 14th day of December, 2015.

Respectfully submitted,

JOHN R. BREFFEILH
Assistant State Public Defender
State Bar No. 1085119
Office of the State Public Defender
735 North Water Street, Ste 912
Milwaukee, WI 53202-4116
(414) 227-4805
breffeilhj@opd.wi.gov
Attorney for Defendant-Respondent

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of RULE 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 2,536 words.

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 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 on or after 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 14th day of December, 2015.

Signed:

JOHN R. BREFFEILH
Assistant State Public Defender
State Bar No. 1085119
735 North Water St., Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
breffeilhj@opd.wi.gov
Attorney for Defendant-Respondent

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with RULE 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under RULE 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 14th day of December, 2015.

Signed:

JOHN R. BREFFEILH
Assistant State PublicDefender
State Bar No. 1085119
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
Attorney for Defendant-Respondent

APPENDIX

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