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STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2015AP1671-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHAD T. KIPPLEY,

Defendant-Appellant.

On Appeal from the Circuit Court for Dane County, the
Honorable John W. Markson, Presiding
Circuit Court Case No. 2014CT768

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
222 S. Hamilton St., Suite 21
Madison, WI 53703
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Defendant-Appellant

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STATEMENT OF THE ISSUES

1. Under the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution, is it unreasonable for law enforcement to initiate a traffic stop of a boat based on an incorrect belief that the boat's engine was overpowered in violation of Wis. Stat. § 30.62(2m)?

Trial Court Answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented can be fully presented in briefing, so Mr. Kippley does not request oral argument. Publication is not appropriate because this is a one-judge appeal. Wis. Stat. § 752.31(2)(d) and (3) and § (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

Kippley appeals from the circuit court ruling that denied his motion to suppress evidence, including his statements to law enforcement, that a Department of Natural Resources warden found after stopping Kippley's boat based on an incorrect belief that the boat's motor was overpowered for the boat, contrary to Wis. Stats. § 30.62(2m).

Warden Kyle Dilley was launching a patrol boat in the Yahara River from Lottes Park boat landing in the City of Monona in the early evening of June 7, 2014, when Kippley's boat approached the landing. (33:9-10; App.114-15.) Dilley made two observations that he believed constituted equipment violations. First, Kippley's boat was small with a large motor attached and was traveling in a bow-up position, which Dilley

believed indicated that the boat was equipped with a motor in excess of its horsepower rating. (33:11-12; App.116-17.) Second, Dilley believed the registration decals were not contrasting colors but were the same color as the boat. (33:12; App.117.)

Dilley turned the patrol boat around and followed Kippley back to the landing dock, where he approached Kippley on his boat for the purpose of investigating whether or not the motor attached to Kippley's boat was in excess of the maximum horsepower rating. (33:12-13, 17; App.117-18.)

Wis. Stat. § 30.62(2m) states:

> OVERPOWERING. No person may sell, equip or operate, and no owner of a boat may allow a person to operate, a boat with any motor or other propulsion machinery beyond its safe power capacity, taking into consideration the type and construction of such watercraft and other existing operating conditions.

As a result of the conversation, Dilley detected an odor or intoxicants from Kippley and that Kippley's eyes appeared to be glassy and bloodshot. (33:16; App.121.) Kippley was ultimately arrested and charged with operating a motorboat while under the influence of an intoxicant (2nd offense). (3:1.)

Kippley moved to suppress evidence and statements resulting from the stop on the basis that Dilley did not have reasonable suspicion to believe that a crime or ordinance violation had occurred or was occurring. (14.). The court initially denied Kippley's suppression motion without a hearing. (16; App.101-04.) Kippley moved the court to reconsider its denial of the motion to suppress without a hearing. (18; 105-10.) The court granted the motion to

reconsider, and an evidentiary hearing was held at which Dilley testified for the State, and Patrick Johnson, Jim Wirts, and Kippley testified for the defense. (19; 20.)

Dilley testified that his basis for stopping Kippley's boat was to determine "if the vessel was rated for the size of the motor that was equipped on that vessel, or if the vessel was, I guess, being operated over capacity, which would be a weight limit of the vessel." (33:17; App.122.) Dilley had observed that Kippley's boat, a small vessel, traveling upstream from several hundred yards away, "with what appeared to be a large object attached to the back or stern of the vessel." (33:10; App.115.) When Kippley's boat was approximately ten to fifteen feet from the landing, Dilley was able to see that the object was a large outboard motor attached to the transom of the vessel. (33:11; App.116.) The boat was traveling at a slow speed in a bow-out position. (33:11-12; App.116-17.) Dilley believed the large size of the motor and the fact that the boat was in a bow-out position suggested that the boat may be equipped with a motor that is in excess of its maximum horsepower rating. (*Id*.)

On cross-examination, Dilley testified that he had no idea whether the weight of a motor has any relevance to the horsepower of a motor. (33:23; App.126.) He agreed that Wisconsin law only regulates the horsepower of a motor, and not the motor's weight. (*Id.*) Looking at a motor would not indicate what horsepower that motor was. (*Id.*)

Ultimately, although Kippley informed Dilley that the motor was 30 horsepower, Dilley could not determine whether the overcapacity statute was violated because Kippley's boat lacked a capacity plate, which is not a requirement for all boats. (33:14; App.119.) Dilley did not

know whether it was a violation of law for Kippley's boat to be without a capacity plate. (*Id.*)

Jim Wirts testified that he has repaired marine engines and boats professionally for over thirty-six years. (33:42.) Wirts met Kippley for the first time in relation to this case, and had the opportunity to inspect Kippley's boat and boat engine. (*Id.*) Wirts testified that Kippley's boat engine was a 1957 28-horse Evinrude, which is heavier than newer motors with a higher horsepower. (33:43-45.) With regards to the motor on Kippley's boat, there was no way to tell the power capacity of the motor simply by looking at the boat. (33:46.) Further, based on his knowledge and experience, Writs testified that a boat traveling bow-up in the water may not be an indication of an overpowered engine, depending on how the trim is set on the boat. (33:48-49.)

There was conflicting testimony regarding Dilley's observation that the boat's decals were not contrasting colors, which Dilley thought to be a violation of Wis. Stats. § 30.523(2). Wisconsin law requires the owner of a boat to affix certification decals to each side of the boat and to "maintain the decals in a legible condition at all times." Wis. Stat. § 30.523(2)

Dilley testified that the registration numbers and letters on the starboard (right) side of the vehicle were black, which matched the color of the vessel (33:12; App.117.) However, he did not raise the issue of the decals during his stop of Kippley. (33:27; App.130.) Further, Dilley testified that his purpose in stopping Kippley was to investigate the power of Kippley's boat motor. (33:17; App.122.)

Patrick Johnson, a friend of Kippley's who had been in contact with Kippley's boat between five and ten times in the past, testified that he was on the dock at the boat landing on

the day in question and witnessed Kippley's boat approaching the dock and Dilley's subsequent interactions with Kippley. (33:35-37, 40.) Johnson testified that Exhibit 1 (20:3) was Kippley's boat, and accurately displayed the decals on the boat on the day in question. (33:38.) Johnson stated that he did not recall ever seeing Kippley's boat with black on black decals. (33:38-39.)

Kippley testified that the photo of the boat in Exhibit 1 was the boat he was using when stopped by Dilley in June 2014, and that he had not changed the motor or decals on that boat between being stopped by Dilley and taking the photograph. (33:50.)

The court upheld the stop solely because of the suspected motor capacity violation and made no factual finding or ruling regarding the legibility of the boat decals. (33:62-69.)

Circuit Court Ruling Regarding Boat Stop

In upholding the stop, the court characterized the issue as whether there was reasonable suspicion to investigate whether there was an equipment violation, that is, whether the motor was oversized. (33:62-63; App.135-36.)

The court noted that Dilley had four years of experience and seasonally was involved in boating law enforcement, including equipment enforcement. (33:63; App.136.) The court found credible Dilley's testimony that Kippley's boat was in an unusually bow-up attitude as it approached the dock where Dilley was, and that in a no-wake zone this could be indicative of either the boat traveling at a greater speed than was permitted, or that the motor was oversized. (*Id.*)

The court reasoned that there is a reasonable relationship between the motor's horsepower and the size of the motor. (33:64; App.137.) Because Kippley's motor was painted over, Dilley had no ability to determine the horsepower simply by looking at the motor. (*Id.*) Dilley was therefore entitled to investigate his suspicion that "this motor was simply too big and too powerful for this boat." (*Id*.) The court found that a "logical reasonable explanation from the standpoint of this experienced warden was that the motor was oversized," and that the question of whether the motor was oversized, "in and of itself furnishe[d] an adequate basis for the stop." (33:66; App.139.)

The court also referenced ***Heien v. North Carolina,*** 135 S.Ct. 530 (2014), which had been decided one month before the suppression hearing. Although the court did not think that a mistake of law had been made in this case, it noted that a reasonable mistake of law or fact can form the basis for reasonable suspicion. (33:65-66; App.138-39.) The court stated that it was not basing the decision on ***Heien***, and rejected the defense's theory that there was a mistake of law in the way that Dilley applied the statute. (33:67-68; App.140-41.)

Kippley later entered a guilty plea to Operate Boat while Intoxicated (2nd) contrary to Wis. Stat. § 30.681(1)(a). (30.) He appeals pursuant to Wis. Stat. § 971.31(10).

ARGUMENT

Kippley's boat did not violate any statute or code, and the DNR officer's suspicion that it did was unreasonable, thus the trial court erred in upholding the stop.

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

Constitution protect citizens from unreasonable searches and seizures. Traffic stops are considered seizures, and if the seizure was unreasonable and consequently unconstitutional, any evidence obtained 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 stop meets the constitutional standards. ***State v. Post,*** 2007 WI 60, ¶ 12, 301 Wis.2d 1, 733 N.W.2d 634; ***State v. Taylor***, 60 Wis. 2d 506, 519, 210 N.W.2d 873 (1973) ("[w]here a violation of the Fourth Amendment right against unreasonable search and seizures is asserted, the burden of proof upon the motion to suppress is upon the state").

Whether there is reasonable suspicion or probable cause to conduct a traffic stop is a question of constitutional fact. ***Popke***, 2009 WI 37, ¶ 10. Appellate courts apply a two-step standard of review to questions of constitutional fact. ***State v. Williams***, 2001 WI 21, ¶ 18, 241 Wis.2d 631, 623 N.W.2d 106. First, the court will review the circuit court's findings of historical fact and uphold them unless they are clearly erroneous. ***Popke***, 317 Wis. 2d 118, ¶ 10. Second, the circuit court's determination of reasonable suspicion or probable cause to make a traffic stop will be reviewed de novo. ***Id***.

I. Warden Dilley did not have reasonable suspicion of a violation of the motor power capacity statute

An officer must have reasonable suspicion that a traffic law has been or is being violated to justify a traffic stop. ***State v. Houghton***, 2015 WI 79, ¶ 30, 364 Wis.2d 234, 868 N.W.2d 143. Reasonable suspicion depends on an officer's ability to "point to specific and articulable facts

which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry v. Ohio***, 392 U.S. 1, 21 (1968). In determining reasonableness, the court examines 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. ***Post,*** 2007 WI 60, ¶ 13 (citation omitted).

Here, Dilley stopped Kippley's boat after he noticed that the boat was traveling in a bow-up position and had a large object attached to the back. Before the stop, Dilley was able to see that the object was the boat's motor. Dilley testified, and the circuit court agreed, that these observations were sufficient to articulate a reasonable suspicion of a violation of the motor capacity statute.

However, Wis. Stat. § 30.62(2m) deals with the power of a motor, not its size. The court erred in finding a reasonable relationship between motor size or weight and horsepower, based on the testimony presented. Dilley admitted on cross-examination that he had no knowledge of the relevance between motor weight and horsepower, but the statute regulates that only horsepower. (33:23; App.126.) Wirst testified that motors newer than Kippley's 1957 model would be lighter than Kippley's, even with higher horsepower. (33:44-45.)

Further, Wirts testified that a boat traveling bow-up in the water does not necessarily indicate that its motor is overpowered. (33:48.) Instead, the setting of trim on the boat will impact whether the power capacity of a motor causes the boat to be in a bow-up position. (33:48-49.) A motor's weight does not correlate with its power capacity, and there was no evidence before the court that heavier motors are more

powerful motors such that a boat that is bow up while traveling at a slow-no-wake speed would be in violation of this statute. Stopping a boat on the basis of its size is not a legitimate reason to determine whether the boat is over capacity – if it were, any boat could be stopped at any time for this reason.

Here, the record also fails to demonstrate that Dilley's suspicion regarding motor overcapacity were reasonable or supported by training or experience rendering him capable of judging the standards of the statute. An officer must have a sufficient factual basis to believe any violation of law was being committed. *See* ***State v. Conaway***, 2010 WI App 7, 323 Wis.2d 250, 779 N.W.2d 182 (concluding traffic stop based on rear window tinting was unlawful because the officer did not testify that he had any training or experience rendering him capable of judging the technical standard of fact set forth in the administrative rule).

When asked about his training as a DNR warden, Dilley testified that he attended law enforcement training academies, but listed no trainings related to boat equipment. (33:6; App.111.) Although Dilley testified that he is familiar, based on his training and experience, with the laws governing boat equipment, his answers contain the same confusion of motor size and weight with horsepower. Dilley testified that he was familiar with laws regarding motor size in relation to different types of boats, that his familiarity was better than average with respect to different types of boats and motor sizes and capacities, and that he is generally able to tell when a boat is operating with visibly illegal equipment or motors. (33:7-8; App.112-13.) However, as was established by both Dilley's and Wirts' testimony, whether the power capacity of a boat's motor is overpowered for that boat is *not* something

that is visibly illegal, and cannot be determined by the motor size or appearance.

Based on the evidence presented at the suppression hearing, Dilley failed to articulate specific facts providing a reasonable suspicion that the motor on Kippley's boat violated Wis. Stat. § 30.62(2m).

II. Warden Dilley's mistaken belief that Kippley's boat violated the motor capacity statute was unreasonable and therefore did not create reasonable suspicion to justify the stop

Dilley's stated his suspicion regarding the power of Kippley's boat was based on his observations of the motor's physical size and the boat's bow-up positions – neither of which relate to the boat's horsepower, according to the evidence heard at the suppression hearing. Were this a reasonable mistake of the law, the stop would be justified. ***Houghton***, 2015 WI 79, ¶ 52 (an "objectively reasonable mistake of law by a police officer can form the basis for reasonable suspicion to conduct a traffic stop."); ***Heien v. North Carolina***, 135 S. Ct. 530, 536 (2014). However where the officer's mistake of law is unreasonable, the evidence collected from the traffic stop should be suppressed. *See* ***id.*** at 539.

Objectively reasonable mistakes of law are exceedingly rare and occur "when a statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work." ***Id.*** ¶ 67-68 (quoting ***Heien***, 135 S. Ct. at 541 (Kagan, J., concurring)). A mistake of law cannot be deemed reasonable where the mistake is one of ignorance, rather than a reasonable misinterpretation of the law's confines.

The statute at issue here is not ambiguous; it prohibits the operation of "a boat with any motor or other propulsion machinery beyond its safe power capacity, taking into consideration the type and construction of such watercraft and other existing operating conditions." Wis. Stat. § 30.62(2m). On its face, the law limits enforcement to the power capacity of a boat's engine, and not its size or weight. Dilley's mistaken belief that the size or weight of the motor in relation to the boat could violate the statute is an unreasonable interpretation of the law. Thus the record fails to demonstrate that Dilley's mistakes regarding motor overcapacity were reasonable or supported by training or experience. The record shows instead that Dilley lacked knowledge regarding the overcapacity statute, and that this was unreasonable stop.

CONCLUSION

For the reasons given above, the circuit court's order denying Chad Kippley's motion to suppress should be reversed and the case should be remanded for further proceedings.

Dated this 6th day of November, 2015.

Respectfully submitted,

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JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
222 S. Hamilton St., Suite 21
Madison, WI 53703
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Defendant-Appellant

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 2,794 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 § 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 6th day of November, 2015.

Signed:

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
222 S. Hamilton St., Suite 21
Madison, WI 53703
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Defendant-Appellant

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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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 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 6th day of November, 2015.

Signed:

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
222 S. Hamilton St., Suite 21
Madison, WI 53703
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Defendant-Appellant