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STATE OF WISCONSIN

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

D I S T R I C T I V

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

REPLY BRIEF 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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ARGUMENT

Chad Kippley was operating a small boat that was equipped with a large outboard motor during the afternoon of June 7, 2014. The question before this Court is whether law enforcement had reasonable suspicion to believe that, in doing so, he was violating the law.

Kippley argues that the facts do not objectively demonstrate reasonable suspicion that he violated any equipment law. There was no evidence that Kippley's boat was equipped with a motor that violated the capacity statute. *See* Wis. Stat. § 30.62(2m) (regulating power capacity of motors). Neither the physical size nor weight of the motor could create reasonable suspicion of a violation of the power capacity statute. (33:23; App.126.) The stop of Kippley's boat was unconstitutional.

I. Warden Dilley Lacked Reasonable Suspicion That Kippley Had Violated Any Law

Dilley testified that he stopped Kippley's boat after he noticed that the boat was traveling in a bow-up position and had a large outboard motor attached to the back. (33:11-12; App.116-17.) It was on this basis alone that the court found a reasonable suspicion of a violation of the motor capacity statute. (33:66; App.139.)

The court erred in finding that it was reasonable for Dilley to conclude, based on his observations of the physical size of the motor and the bow-up position of Kippley's boat, that Kippley had violated the motor capacity statute. Contrary to the State's argument, (resp. br. at 1), the court's conclusion regarding the reasonableness of Dilley's belief that an equipment violation had occurred is a legal conclusion which

should be reviewed *de novo* on appeal. *State v. Popke*, 2009 WI 37, ¶ 10, 317 Wis.2d 118, 765 N.W.2d 569 (circuit court's determination of reasonable suspicion or probable cause to make a traffic stop will be reviewed *de novo*).

The court's reasonableness determination was contrary to the testimony before it from both Dilley and the defense expert Wirts that power capacity cannot be determined by the motor size or appearance. (*See* 33:23; App.126 (looking at a motor would not indicate what horsepower that motor was); 33:46 (no way to tell the power capacity of a boat simply by looking at it); 33:48-49 (traveling bow-up is not necessarily an indication of motor power).) As a whole, the testimony did not support the court's conclusion that motor size and/or weight is reasonably related to horsepower, which is the only aspect of the motor regulated by Wis. Stat. § 30.62(2m).

The court also erred in finding that the fact that Dilley could not see a horsepower listing on the motor a factor supporting reasonable suspicion. (*See* Resp. Br. at 15; 33:64; App.137.) A horsepower marking could not be detected on the motor because the motor was painted. (33:23; App.126.) This is not a violation of law, (*id.*) and does not provide any evidence of a violation of Wis. Stat. § 30.62(2m).

The court should not have found that Dilley's experience and training support his suspicion that Kippley's boat violated the capacity statute. Dilley had no training related to boat equipment. (33:6; App.111.) Dilley's claim that he is familiar with the laws governing boat equipment was belied by his own confusion between motor size and weight versus horsepower in relation to what is regulated by Wis. Stat. § 30.62(2m). (33:23; App.126.) The State has failed to show that Dilley's suspicion regarding motor overcapacity was reasonable and supported by training or

experience rendering him capable of judging the standards of the statute. *See State v. Conaway*, 2010 WI App 7, ¶¶ 9-10, 323 Wis.2d 250, 779 N.W.2d 182 (stop unlawful where officer's testimony did not establish that he had any training or experience rendering him capable of judging the technical standard of fact set forth in the administrative rule).

The unpublished Court of Appeals case cited by the State (resp. br. at 14-15) is easily distinguished from this case, and should provide no persuasive value here. *See State v. Teniente*, No. 2013AP799, unpublished slip op. (Wis. Ct. App. Jan. 30, 2014). Aside from the fact that *Teniente* also involved a boating while intoxicated charge, there are no facts analogous to the current case. In *Teniente*, the operator of a boat drew the attention of law enforcement when he yelled out in a slurred voice, “[t]hat’s the sound of freedom” while his boat was waiting in line to pass through the Tenney Locks during an Independence Day fireworks event. *Id.* ¶¶ 4-5. The case did not require the court to determine whether reasonable suspicion existed based on an equipment violation, as opposed to the conduct of the boat operator.

Here, the basis for stopping Kippley’s boat was Dilley’s belief he observed an equipment violation. (33:17; App.122.) However, Dilley could not have reasonably stopped Kippley for operating with a motor that violated Wis. Stat. § 30.62(2m) because he was unable to reasonably make that determination simply by looking at Kippley’s vehicle. Therefore, because Dilley’s decision to stop Kippley was borne from an unreasonable mistake of law, the evidence gathered from it should have been suppressed.

II. Warden Dilley's Mistake Was Unreasonable

The State argues that, to the extent Dilley 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, 364 Wis. 2d 234, 868 N.W.2d 143. (Resp. Br. at 19.) This reliance is misplaced. 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.

A mistake of law is reasonable where the statutes involved are genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work. *Id.* at ¶ 68. If the statutes are not difficult or very hard to interpret, the mistake is unreasonable and the stop unconstitutional. *Id.*

The State relies on *Houghton* when listing the absence of appellate court decisions about Wis. Stat. § 30.62(2m) as evidence that Dilley's mistake was reasonable. (Resp. Br. at 19-20.) However, 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. § 30.62(2m). 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 Dilley's mistake unreasonable. *See Houghton*, 2015 WI 79, ¶ 68.

On its face, the law limits enforcement to the power capacity of a boat's engine, and not its size or weight. Wis. Stat. § 30.62(2m) (prohibiting 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."). Dilley's mistaken belief that the size or weight

of the motor in relation to the boat could violate the statute, where the law is clear that the capacity statute regulates the horsepower only, was objectively unreasonable. *Houghton*, 2015 WI 79, ¶¶ 67-68.

Dilley's mistake in this case is more similar to the second mistake of law considered in *Houghton*, which the court deemed unreasonable. There, the officer 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. *Id.* at ¶ 73. 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 court concluded that the officer acted unreasonably because of the amount of interstate traffic that is not subject to that requirement. *Id.* at ¶¶ 75-76.

Likewise, Dilley acted unreasonably in the instant case when he jumped to the conclusion that Kippley violated Wis. Stat. § 30.62(2m). Dilley should have known that the law regulates only the power capacity of boat motors, and the stop of Kippley's boat based upon the apparent size or weight of its motor was unreasonable. The stop of Kippley's boat premised on this unreasonable mistake was therefore unconstitutional.

CONCLUSION

For the reasons given above and in Kippley'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 21st day of March, 2016.

Respectfully submitted,

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 1,374 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 21st day of March, 2016.

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