

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV**

Appeal No. 2016AP2176

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

MARQUETTE COUNTY,

Plaintiff-Respondent,

v.

MATTHEW J. OWENS,

Defendant-Appellant.

**ON APPEAL FROM AN ORDER ENTERED ON DECEMBER 9,
2015 IN THE CIRCUIT COURT FOR MARQUETTE COUNTY,
THE HON. BERNARD N. BULT PRESIDING**

BRIEF OF PLAINTIFF-RESPONDENT

Respectfully Submitted,

**MARQUETTE COUNTY
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STATEMENT OF ISSUE FOR REVIEW

Did Deputy Noll have reasonable suspicion to stop Defendant's vehicle? The circuit court found that he did.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Marquette County recognizes that this appeal, as a one judge appeal, does not qualify under this Court's operating procedures for publication. Hence, publication is not sought. The County does not seek oral argument as the briefs should adequately present the issues on appeal.

STATEMENT OF CASE

I. PROCEDURAL BACKGROUND

Owens appeals the circuit court's decision denying his suppression motion that was filed on July 29, 2015. After an evidentiary hearing and briefing, the circuit court denied Owens' motion on December 9, 2015. (R. 15 pp. 1-3) The matters¹ subsequently went to jury trial on September 30, 2016, where Owens was found guilty by a six person jury of OWI and PAC, both as first offenses.

II. FACTUAL BACKGROUND

On March 1, 2015, Deputy Brian Noll of the Marquette County Sheriff's Office stopped Matthew Owens' vehicle within the City of Montello in Marquette County, Wisconsin. (R. 10.) The resulting interaction between Deputy Noll and Owens resulted in Owens being cited for Operating While Under the Influence and Operating With a Prohibited Concentration. (R. 10.) Deputy Noll's squad car was traveling behind Owens' vehicle. Deputy Noll had observed a traffic violation by a vehicle that was directly in front of Owen's vehicle. (R. 34 p. 4.) Thus, Owens' vehicle was between Deputy Noll and the vehicle that Deputy Noll intended on stopping. (R. 34 p. 5.) The three vehicles proceeded eastbound on Park Street. The lead vehicle and Owens signaled and

¹ Owens was cited with Operating While Under the Influence (OWI) as a first offense in Marquette County case no. 15TR327 and Operating With a Prohibited Alcohol Concentration as a first offense in Marquette County case no. 15TR328.

conducted turns heading northbound on Doty Street. Deputy Noll followed. (R. 34 p. 5.) Shortly after this turn was negotiated two actions were taken almost simultaneously. Owens active his left turn signal to turn into a parking lot of an apartment complete on the west side of Doty Street. (R. 34 p. 6.) Almost at the same time, Deputy Noll activated his emergency lights but not his siren. (R. 34 p. 5.) Deputy Noll believed that Owens vehicle started to pull to the right. (R. 34 p. 5.) Deputy Noll then pulled out into the left lane to go around Owens' vehicle and shortly after, Owens conducted a left turn into the parking lot. (R. 34 p. 6.) Deputy Noll had to apply his breaks "pretty hard" to avoid a crash. (R. 34 p. 7.) He then pulled in behind Owens, foregoing the original vehicle he intended to pull over. (R.10 p. 3.) Deputy Noll was going to make contact with Owens regarding why he had made a left turn in front of his squad instead of just pulling to the right shoulder of the road. (R. 34 p.10.)

Owens admitted that he did observe Deputy Noll's emergency lights behind him and that he was aware of them right after they both made the turn onto Doty Street. (R. 34 pp. 12-13.) However, Owens told Deputy Noll that even though he observed the lights of the Deputy that he was just going to pull left into the parking lot anyway. (R. 34 p. 12)

Deputy Noll's observations of Owens upon speaking with him lead him to further investigation and eventually the arrest. (R. 10 pp. 3-8.)

ARGUMENT

I. THE COURT DID NOT ERR IN FINDING THAT DEPUTY NOLL HAD REASONABLE SUSPICION TO STOP DEFENDANT’S VEHICLE.

Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. State v. Popke, 317 Wis.2d 118, 765 N.W.2d 569, 2009 WI 37, ¶10 (Citing State v. Mitchell, 167 Wis.2d 672, 684, 482 N.W.2d 364 (1992) and State v. Williams, 2001 WI 21, ¶ 18, 241 Wis.2d 631, 623 N.W.2d 106.); A finding of constitutional fact consists of the circuit court's findings of historical fact, which this court should review under the “clearly erroneous standard,” and the application of these historical facts to constitutional principles, which this court would review de novo. Williams, ¶¶ 18–19.

A. Deputy Noll’s Incorrect Reliance on Wis. Stat. §346.19(1) Does Not Render the Stop Unlawful Because Owens was in Violation of Wis. Stat. § 346.04

Deputy Noll stopped his vehicle because Owens did not yield to the right in response to his emergency lights. (R. 34, p. 19) The circuit court made a factual finding that Deputy Noll justified the stop as Owens had violated Wis. Stat. §346.19(1). (R. 14, P.1) Deputy Noll cited Owens with the violation of §346.19(1) at the same time as the OWI related citations.² This statute reads as follows:

² That citation was filed in Marquette County case no. 15TR343 and was subsequently dismissed on the County’s motion.

346.19 What to do on approach of emergency vehicle.

(1) Upon the approach of any authorized emergency vehicle giving **audible signal by siren** the operator of a vehicle shall yield the right-of-way and shall immediately drive such vehicle to a position as near as possible and parallel to the right curb or the right-hand edge of the shoulder of the roadway, clear of any intersection and, unless otherwise directed by a traffic officer, shall stop and remain standing in such position until the authorized emergency vehicle has passed.

(2) This section does not relieve the operator of an authorized emergency vehicle from the duty to drive with due regard under the circumstances for the safety of all persons using the highway. (*emphasis added*)

The County conceded at the trial court level and concedes now that this statute could not be the basis for a stop by Deputy Noll. However, the factual situation that presented itself to Deputy Noll did constitute a violation of the Wisconsin traffic laws.

Wis. Stat. § 346.04 reads as follows:

346.04 Obedience to traffic officers, signs and signals; fleeing from officer.

(1) No person shall fail or refuse to comply with any lawful order, signal or direction of a traffic officer.

(2) No operator of a vehicle shall disobey the instructions of any official traffic sign or signal unless otherwise directed by a traffic officer.

(2t) No operator of a vehicle, after having received **a visible** or audible signal to stop his or her vehicle from a traffic officer or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety reasonably permits.

(3) No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

(4) Subsection (2t) is not an included offense of sub. (3), but a person may not be convicted of violating both subs. (2t) and (3) for acts arising out of the same incident or occurrence. (*emphasis added.*)

Did Owens' actions of continuing his left turn into the parking lot after seeing the squad lights on Deputy Noll's constitute "failing to stop his or her vehicle as promptly as safety reasonably permits?" The County recognizes that this is not a situation where Owens led Deputy Noll on some long drawn-out or high speed chase. However the important issue is that Owens not only continued driving, granted a short distance, but took a left turn after Deputy Noll with lights activated had pulled into the left lane and began going around him. That action was failing to stop his vehicle as promptly as safety reasonably permitted. Owens' action of completing his left turn after observing Deputy Noll's emergency lights and almost striking Deputy Noll was neither a prompt action to comply with Deputy Noll's emergency lights nor the safest option. This safety issue is a direct result of Deputy Noll pulling into the left lane and beginning to go around the Defendant. It was the Defendant's action of not complying with the direction of the emergency lights that led to the near collision.

The County will also take this opportunity to discuss Owens' claim that Deputy Noll was in violation of some rule of the road and thus "any potential traffic violation was actually the driving of Deputy Noll." (Owens' Brief pp 11-12) The facts simply do not

support this contention and the circuit court correctly found that while Wis. Stat. § 346.03(5) notes the he is not exempt from following the rules of the road, Deputy Noll had activated his emergency lights, believed the vehicle was pulling over to the right and then began making a lawful pass. (R. 34 p. 7.) In fact, it was the quick reactions and careful driving of Deputy Noll that prevented a crash of the two vehicles when Owens continued into his left turn despite observing Deputy Noll's lights. (R. 34 p. 7.)

It does not matter what Deputy Noll believed or subjective reason for making his stop does not matter. The motivation or subjective reason of the stopping officer is not a relevant factor in determining the Fourth Amendment validity/reasonableness of a traffic stop since an objective standard/test is used to judge the Fourth Amendment reasonableness of such a stop. An officer's subjective reason for stopping a car does not create a Fourth Amendment violation as long as there was a legally permissible justification to stop the car, if there were objective facts that would have supported a correct legal theory to be applied to the facts. State v. Anagnos, 2012 WI at ¶ 60, 341 Wis.2d at 601-02, 815 N.W.2d 675, State v. Sykes, 2005 WI at ¶ 29, 279 Wis.2d 742, 759 (the lawfulness of a vehicle stop depends on the objective facts observed by the officer and not the officer's subjective intent); State v.

Gaulrapp, 207 Wis.2d 600, 609-10, 558 N.W.2d 696 (Ct. App. 1996); State v. Baudhuin, 141 Wis.2d at 650-52, 416 N.W.2d 60 (1987), (the officer intended to stop the defendant's car to see if he needed assistance; the Court found that the stop was justified because of a violation of the impeding traffic law); United States v. Smith, 668 F.3d 427, 430 (7th Cir. 2012) (the actual motivations of the police officer bear no weight on the constitutional reasonableness of traffic stops). Notable is the Baudhuin case. The officer intended to stop the car to see if they needed assistance, with no intent to cite the driver for any violation. Much like that, Deputy Noll here intended to "speak to (Owens) in regards to the requirement to pull to the right shoulder of the roadway for an emergency vehicle." (R. 34 p. 8.) Obviously, the resulting interaction lead to arrest and citations but Deputy Noll's intentions are not relevant to the court's analysis.

The circuit court made a series of factual findings regarding the actions of Owens and made a finding that they created an objective conclusion for a reasonable police officer that a violation of sec. 346.04 had occurred. (R. 14 p. 2.) Given the actions taken by Owens that early morning, there was a legally permissible justification to stop the car.

B. Even If This Court Finds That Wis. Stat. §346.04 Was Not Violated, Deputy Noll's Stop Was Based on An Objectively Reasonable Mistake of Law and Thus Did Not Violate Owens' Fourth Amendment Rights

If this court finds that the factual situation presented to Deputy Noll does not satisfy the requirements of Wis. Stat. §346.04, the stop is still valid as it was a reasonable mistake of law by Deputy Noll. If this court believes that the actions observed by Deputy Noll do not rise to reasonable suspicion of a violation of Wis. Stat. § 346.04(2t), Deputy Noll's belief that Owens needed to pull to the right in response to his emergency lights was a reasonable mistake of law and the stop did not violate Owens' fourth amendment rights.

In State v. Houghton, 2015 WI 79, ¶ 31, 364 Wis.2d 234, 251, 868 N.W.2d 143 the Wisconsin Supreme Court addressed the issue of whether a seizure predicated by an objectively reasonable mistake of law violates the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution.

Prior to Houghton the law in Wisconsin was that a seizure predicated on a police officer's mistake of law was invalid under the Fourth Amendment. Houghton, 2015 WI at ¶ 32, 364 Wis.2d at 251-52.

In Houghton the Court, based on the United State Supreme Court case Heien v. North Carolina, 135 S.Ct. 530 (2014), held that under Article I, Section 11 of the Wisconsin Constitution and the Fourth Amendment an objectively reasonable mistake of law by a law enforcement officer can

form the/serve as the basis of reasonable suspicion to conduct a traffic stop.

2015 WI at ¶¶ 52, 79, 364 Wis.2d at 257-58, 268. In Houghton the Court addressed the holding of the U.S. Supreme Court in Heien:

The Court held that an objectively reasonable mistake of law could give rise to reasonable suspicion. “Because the officer's mistake about the brake-light law was reasonable, the stop ... was lawful under the Fourth Amendment.” *Id.* In support of this holding, the Court noted, “To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection.” Heien, 135 S.Ct. at 536.

Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law. *Id.*

Thus, under Heien, a seizure predicated on reasonable suspicion based on a law enforcement officer's objectively reasonable mistake of law is not a violation of an individual's Fourth Amendment rights.

Houghton, 2015 WI at ¶¶ 44-46, 364 Wis.2d at 255-56.

Much like the officer's mistake in Heien where he was mistaken that both tail lights had to be lit, Deputy Noll here was mistaken that showing of emergency lights alone could trigger the requirements of Wis. Stat. § 346.19. This is a reasonable mistake. Deputy Noll turned his emergency lights on behind Owens and then pulled into the left lane. The clear implication to any driver in Owens' position is that either (a) the Deputy wanted him to pull over or (b) the Deputy was going to get around him on the left. Deputy Noll's belief that Owen's failure to go to the right after seeing the emergency lights is not unreasonable. In fact, this is the very

type of situation where the courts can give law enforcement “fair leeway for enforcing the law in the community's protection.”

Deputy Noll was simply trying to get around Owens’ car. He did so by turning on his emergency lights. Upon his belief Owens’ car was pulling to the right, he began going around him. Only the actions of Owens continuing with a left turn after seeing Deputy Noll’s lights and the resulting near collision brought the two together. To fault Deputy Noll for this decision based on his reasonable belief regarding Wis. Stat. § 346.19 cuts against the attempts of law enforcement to keep our roads safe.

CONCLUSION

For the above stated reasons Marquette County requests that the court find that the trial court correctly denied Owens’ Motion to Suppress and affirm its ruling.

Respectfully Submitted this 4th of April, 2017.

MARQUETTE COUNTY

By _____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.18(8)(b) and (c) for a document produced with a proportional serif font. The length of this entire document is 2688 words.

Dated this 4th day of April, 2017.

By: _____
Chad A. Hendee
District Attorney
Marquette County, Wisconsin
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**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 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 Wis. Stat. § (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 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 4th day of April, 2017.

By: _____
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