STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4
Appeal No.: 2016AP2176

MARQUETTE COUNTY,

Plaintiff-Respondent,

vs.

MATTHEW J. OWENS,

Defendant-Appellant.

REPLY BRIEF OF 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.

BY: ERIK C. JOHNSON
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ARGUMENT

The facts of this case are distinguishable from State v. Baudhuin, 141 Wis.2d 642, 416 N.W.2d 60 (1987). In that case, the officer stopped Baudhuin because he was impeding traffic. Baudhuin, 141 Wis.2d at 645. There were eight to ten other vehicles behind the officer's squad car and no vehicles in front of the defendant's slow moving car. Id. The officer testified that he stopped the slow moving car, "to see if the driver needed a hand or if he had something mechanically wrong with is car." Id. The Court found there was reasonable suspicion to stop the defendant's vehicle, because the officer observed facts that the defendant was violating a traffic law by impeding traffic. *See* Id.

In this case, Officer Noll's specific purpose for contacting Mr. Owen's was his belief that Wis. Stat §346.19 (1) was violated. As stated in Defendant-Appellant's initial brief, no traffic violation was committed by Mr. Owens. Therefore, Baudhuin is inapplicable to this case.

The County's reliance on State v. Houghton, 2015 WI 79, 364 Wis. 2d 234, 868 N.W. 2d 143 (2015), does not create reasonable suspicion for the traffic stop in this case. In Houghton, the Court determined that an objectively reasonable mistake of law justified the officer's stop of Defendant's vehicle. Id. ¶52. Houghton was stopped for failure to display a front license plate and for having an air freshener and GPS unit visible on his front windshield. Id. ¶3. The officer detected the odor of marijuana, ultimately leading to the arrest of Houghton. Id. Houghton argued this was an invalid investigatory stop and probable cause was required. Id. ¶4. The state argued that reasonable suspicion was sufficient for the traffic stop and the officer had that reasonable suspicion relying on Wis. Stat § 346.88 (3) (b) (2011-12) "Obstruction of operator's view or driving mechanism." Id.

In deciding Houghton, the Wisconsin Supreme Court looked to the United States Supreme Court case of Heinen v. North Carolina, 574 U.S. —, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014). In reaching its decision, the Court analyzed the

officer's reasoning and interpreted the statute that formed the basis for the stop of Houghton. Houghton, 2015 WI 79, ¶53. The Court determined that the first step in interpreting a statute is to look at the, "common, ordinary, and accepted meaning," to determine its intended effect. Id. ¶54. If the meaning of the statute, after examination of the plain language is still unclear, then extrinsic sources will be examined. Id. ¶55.

In Houghton, the Court interpreted Wis. Stat § 346.88, which specifically deals with an unobstructed windshield requirement in Wisconsin. Id. ¶ 56. The Court noted that two of the provisions, Wis. Stat § 346.88(3)(a) and (3)(b) each provide slightly different intentions. The Court stated that subsection (3)(a) appeared to be a strict prohibition upon a narrow group of items on the windshield, and subsection (3)(b) was more forgiving applying to more items. Id. ¶57. The Court then went through a number of analyses to interpret the meaning of both subsections. Id. ¶59-61. Furthermore, the Court looked to Black's Law Dictionary for the definition of "obstructions." Id. ¶62. In short, the Court

completed a thorough analysis of the statute to determine its meaning. This is significant because none of the interpretation completed by the Court in Houghton needs to be undertaken in this case.

In this case, Deputy Noll's reasoning for stopping Mr. Owens' vehicle was his mistaken belief that Wis. Stat § 346.19(1) was violated. The language of Wis. Stat §346.19 (1) is clear, and is easily applied based only upon the language itself. No ambiguities need to be resolved by this Court.

Wis. Stat § 346.19(1) states:

> (1) Upon the approach of any authorized emergency vehicle giving **audible** signal by siren the operator of the 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. *Emphasis added.*

Nothing in Wis. Stat § 346.19(1) creates any ambiguity as to the interpretation of the language itself. The officer did not activate an audible signal; therefore, it cannot be used as a

basis for the stop. There is nothing objectively reasonable about his mistake.

In discussing whether or not the officer's stop of Houghton's vehicle was objectively reasonable, the Court looked to the U.S Supreme Court case in Heinen v. North Carolina, 574 U.S.—, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014). In reviewing the Heinen decision, the Court looked to Justice Kagen's concurrence, which was joined by Justice Ginsberg. That concurrence stated, "objectively reasonable mistakes of law are exceedingly rare." Houghton ¶ 67, *citing* Heinen, 135 S.Ct. at 541 (Kagen, J.,concurring). In Houghton, the Court continued to rely on Jutice Kagen's concurrence:

> "If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not. As the Solicitor General made the point that oral argument, the statue must pose a 'really difficult' or 'very hard question of statutory interpretation.'" Heninen, 135 S.Ct. at 541 (Kagan, J.,concurring).

The Court in Houghton, ultimately held that the officers interpretation of Wis. Stat § 346.88, prohibiting any object in the front windshield was, objectively reasonable and the stop valid. Houghton ¶70. The Court further held Wis.

Stat § 346.88 was never previously interpreted. Id. The Court believed this additionally weighed in favor finding the stop objectively reasonable. Id. ¶70.

None of the above applies to officer Noll's reasoning for stopping Mr. Owens' vehicle. No interpretation needs to be undertaken. As previously stated, Wis. Stat § 346.19(1) is not ambiguous. The language is clear. The only way to find the stop of Mr. Owens' vehicle was lawful, would be if officer Noll was giving an audible signal. That was not the case. This is not a reasonable mistake of law. The Circuit Court's decision must be overturned.

CONCLUSION

The arguments advanced by the County do not create reasonable suspicion to stop Mr. Owens' vehicle. State v. Baudhuin is not applicable. This is not the "exceedingly rare" objective mistake of law contemplated by Houghton or Heinen. Defendant-appellant respectfully requests that this Court reverse the decision of the circuit court.

Dated this 4th day of May, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional serif font. The length of this brief is 1073 words.

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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 § 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 4th day of May, 2017.

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