STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
Appeal No. 2016AP002225
DUSTIN M. SHERMAN
Defendant-Appellant.

ON APPEAL FROM A REFUSAL CONVICTION
ENTERED BY THE CIRCUIT COURT FOR CLARK COUNTY
THE HONORABLE TODD WOLF, PRESIDING

BRIEF OF DUSTIN M. SHERMAN

Respectfully submitted,
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STATE OF WISCONSIN COURT OF APPEALS

STATE OF WISCONSIN,
Plaintiff-Respondent,

V.

Appeal No.: 2016AP002225
Circuit Court Case No.: 2016TR363

DUSTIN M. SHERMAN,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

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TABLES OF CONTENTS

CASES CITED

STATUTES CITED

ISSUE

1. Did the police officer have reasonable suspicion or probable cause to stop the vehicle in which Mr. Sherman was driving due to dim taillights?

   The trial court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant believes that the Court can decide the issues based on the briefs and the need for oral argument is not necessary in this matter. Furthermore, publication is most likely not warranted pursuant to Wis. Stat. §809.23.

STATEMENT OF THE CASE

On February 21, 2016, the defendant was stopped by Jason King, a police officer with the City of Neillsville. The officer indicates that he conducted a traffic stop on the defendant because the defendant's taillights were dim (transcript page 12, line 19-22)[1]. Once he conducted the traffic stop and walked up to the defendant's vehicle, he was able to see that there was a type of covering over the taillights. The officer was unable to observe this covering until he was right next to the vehicle (transcript page 15, line 7-18)[2] and the officer's testimony admits that he never suspected there to be a covering on the taillights (transcript page 20, line 20-25)[3]. The defendant was arrested for an OWI 1st offense and when asked to give an evidentiary chemical test of his blood, he refused.

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[1] A copy of motion hearing transcript page 12 is included as page App 1 in the Appendix

[2] A copy of motion hearing transcript page 15 is included as page App 2 in the Appendix.

[3] A copy of motion hearing transcript page 20 is included as page App 3 in the Appendix.

On May 11, 2016, defense counsel filed a motion to suppress evidence alleging that there was no reasonable suspicion or probable cause for the traffic stop in regards to the operating while intoxicated charge. If the court found that there was no reasonable suspicion or probable cause for the traffic stop, the refusal would be found reasonable. On September 30, 2016, that motion hearing took place along with the refusal hearing.

At the hearing, defense counsel argued that there was no reasonable suspicion or probable cause as the lights were clearly visible within 500 feet and beyond (transcript page 20, line 10–19)[4]. The fact that the taillights were merely dim, yet clearly visible, was not enough for reasonable suspicion to stop the vehicle.

The defense called a retired police officer from Clark County Sheriff's Department to testify. Defense counsel had the witness observe the same vehicle on the same street in which the traffic stop was conducted on the night before the hearing during the hours of darkness (transcript page 25, line 19-25, page 26, line 1-6)[5]. The witness testified that he was able to clearly see the taillights of the vehicle from approximately 1,584 feet away (transcript page 27, line 17-19)[6]. The witness further testifies that the brightness of taillights vary based on the vehicle and the year of the vehicle (transcript page 28, line 12-14).[7] The prosecution argued that the officer had reasonable suspicion to pull the defendant over and probable cause was not necessary.

However, the court denied the motion to suppress and found that the refusal was unreasonable[8] (and transcript page 54, line 8-9)[9]. On December 21, 2016, a court trial was held in regards to the operating while intoxicated charge and the court found the defendant not guilty of the charge[10]. The defendant appeals the refusal conviction.

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[4] A copy of motion hearing transcript page 20 is included as page App 3 in the Appendix.

[5] A copy of motion hearing transcript page 25 and 26 is included as page App 4 in the Appendix.

[6] A copy of motion hearing transcript page 27 is included as page App 5 in the Appendix.

[7] A copy of motion hearing transcript page 28 is included as page App 6 in the Appendix.

[8] A copy of the judgment of conviction is included as page App 7 in the Appendix.

[9] A copy of motion hearing transcript page 54 is included as page App 8 in the Appendix.

[10] A copy of the judgment of dismissal/acquittal is included as page App 9 in the Appendix.

ARGUMENT

I. The police officer lacked reasonable suspicion and probable cause to stop the vehicle for dimmed taillights and therefore, all evidence acquired after stop must be suppressed.

When reviewing a motion to suppress, appellate courts apply a two-step standard of review. *State v. Pallone,* 236 Wis.2d 162, 613 N.W.2d 568 (2000). First, an appellate court will uphold a circuit court's findings of historical facts unless those facts are clearly erroneous. Second, an appellate court reviews *de novo* the application of constitutional principles to those facts.

The Fourth Amendment to the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution protects citizens against unreasonable searches and seizures. Furthermore, *State v. Popke*, 317 Wis.2d 118, 765 N.W.2d 569 (2009) states "[A] traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed."

Whether reasonable suspicion or probable cause is necessary for a law enforcement officer to stop a vehicle is a question of law. *State v. Kramer,* 2001 WI 132, 248 Wis.2d 1009, 637 N.W.2d 35. "An officer may conduct a traffic stop when he or she has probable cause to believe a traffic violation has occurred." *State v. Gaulrapp,* 207 Wis.2d at 605; see also *State v. Whren,* 517 U.S. at 809-10 (stating that a traffic stop is "reasonable where the police have probable cause to believe" there was a traffic violation, such as "No person shall turn any vehicle . . . without giving an appropriate signal" and "No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions"); 4 Wayne R. LaFave, Search and Seizure § 9.3(a) (4th ed. 2004) (concluding that probable cause for even the slightest traffic violation is legally sufficient to justify a traffic stop). *Id.* Probable cause refers to the "quantum of evidence which would lead a reasonable police officer to believe that a traffic violation has occurred". *Johnson v. State,* 75 Wis. 2d 344, 348, 249 N.W.2d 593 (1977).

Wis. Stat. 347.13(1) provides, in relevant part, as follows:

"(1) No person may operate a motor vehicle [...] upon a highway during hours of darkness or during a period of limited visibility unless the motor vehicle [...] is equipped with at least one tail lamp mounted on the rear which, when lighted during hours of darkness, emits a red light plainly visible from a distance of 500 feet to the rear."

The trial court's finding of fact was that the officer would have to be less than 500 feet to clearly see the taillights due to the dimness of the taillights. The trial court further indicated that upon cross examination it was undetermined the distance at which the taillight was clearly visible.

The trial court opined as follows "I mean, clearly the officer was at different locations. He was far behind the vehicle. He was, you know, he indicated a block and a half at one point in time. He then was at within 300 feet within the same block before he pulled it over. So I was waiting for some explanation when it was brought up here about that it was plainly visible. That was never put in the reference of an actual distance. In other words, so was it plainly visible 500 feet or more? The officer never said that. He indicated that it was plainly visible, but again, not any reference to a distance. So his direct examination was less than 500 feet before he could see it." (transcript page 50, line 1-13)[11].

In order for the trial court's decision to be reversed, the fact finding must be clearly erroneous. Here, the trial court failed to consider the context of Officer King's testimony during cross examination.

Attorney Matousek: And when you observed this vehicle albeit they were dim, you could still see the taillights, correct?

Officer King: Yes.

Attorney Matousek: Yes. So in any event, they were clearly visible to you, correct?

Officer King: They were visible, yes.

Attorney Matousek: And clearly visible because you could see them, correct?

Officer King: Yes.

Attorney Matousek: Is that fair to say?

Officer King: Yes.
(transcript page 20, line 10–19)[12]

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[11] A copy of motion hearing transcript page 50 is included as page App 10 in the Appendix.

[12] A copy of motion hearing transcript page 20 is included as page App 3 in the Appendix.

It is clear from the question that when Officer King observed the vehicle, albeit, the lights were dim, he could still see the taillights. The testimony is that he observed the vehicle from behind on Division Street and continued to follow him on Highway 10 and then Highway 73 until Sherman's vehicle was pulled over (transcript page 11, line 14-25[13], transcript page 12, line 1-2)[14]. This is continuous observation. Therefore, the trial court's position that it is unclear at what distance the vehicle was dimly lit is clearly erroneous. It is also not relevant because Officer King clearly states when he observes the vehicle, the taillights were dim, but they were still clearly visible to him. Because they were clearly visible, §343.17 does not apply. There is no violation and therefore, no reasonable suspicion to stop Sherman's vehicle and no probable cause.

Officer King's testimony is corroborated by the witness, Officer Myren's testimony in so far as both indicate the taillight was clearly visible. Myren's testimony expands the distance to over 1500 feet of clear visibility of the taillights (transcript page 27, line 17-19)[15]. The trial court gives limited weight to Myren's testimony indicating different conditions existed, however, according to the record, both the night of the incident and the night of Myren's viewing were in conditions of complete darkness (transcript page 25, line 19-25 and transcript page 26, line 1)[16].

Both the City and the State argue that the covering of the taillights was a violation of a statute, however, this was not observed until after the initial stop and furthermore, the testimony does not clearly show a violation of that statute. When Officer King turned his lights on to effectuate the stop, the seizure occurred and that seizure lacked reasonable suspicion.

Attorney Matousek: Yes. Okay. And -- and it wasn't -- when you wrote your report and when you first observed this vehicle you didn't put in your report that you stopped the vehicle because you thought it had a cover, lens cover on it, correct?

Officer King: Correct.
(transcript page 20, line 20-25)[17]

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[13] A copy of motion hearing transcript page 11 is included as page App 11 in the Appendix

[14] A copy of motion hearing transcript page 12 is included as page App 1 in the Appendix.

[15] A copy of motion hearing transcript page 27 is included as page App 5 in the Appendix

[16] A copy of motion hearing transcript page 25 is included as page App 4 in the Appendix

[17] A copy of motion hearing transcript page 20 is included as page App 3 in the Appendix.

The question is whether the facts of this case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that the individual has committed, was committing, or is about to commit a crime. *State v. Post,* 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634. In order to justify a seizure, police must have reasonable suspicion that a crime or violation has been or will be committed; that is, "the police officer must be able 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, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). This reasonable suspicion standard was understood to be a lower standard than probable cause.

State v. Houghton, 346 Wis.2d 234, 848 N.W.2d 904 (2015) states that an investigative stop may be based on reasonable suspicion, but a stop for an observed violation must be based on probable cause. However, *Houghton* goes on to further state that it is undisputed that a traffic stop must be reasonable under the circumstances. Here, Officer King admits in his own testimony that he could clearly see the taillights (transcript page 20, line 10–19)[18], he did not suspect there to be a covering over the taillights (transcript page 20, line 20-25)[19], and the taillights were the only reason for conducting a traffic stop on Sherman (transcript page 12, line 19-22)[20]. Therefore, it is clear that this stop was unreasonable under the circumstances.

State v. Colstad, 2003 WI App 25, 260 Wis. 2d 406, 659 N.W.2d 394 states that the question of what constitutes reasonable suspicion is a common-sense test. The test is an objective one, and the suspicion must be grounded in specific, articulable facts along with reasonable inferences from those facts. *Id.* Stated otherwise, to justify an investigatory stop, "the police must have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is violating the law." *Id.* Common-sense would not warrant an officer to pull an individual over for having dim, yet clearly visible (per the officer's testimony) taillights. There is nothing specific and articulable when noting that the taillights were dim, yet clearly visible.

Of course, there is the good faith exception under *State v. Houghton,* 346 Wis.2d 234, 848 N.W.2d 904 (2015), however, the good faith exception does not apply

[18] A copy of motion hearing transcript page 20 is included as page App 3 in the Appendix.

[19] A copy of motion hearing transcript page 20 is included as page App 3 in the Appendix.

[20] A copy of motion hearing transcript page 12 is included as page App 1 in the Appendix.

here because Officer King does not observe a traffic violation before conducting the traffic stop and that is identified by not only the police report, but also by Officer King's testimony[21].

This finding was clearly erroneous and cannot support a decision that there was reasonable suspicion for the stop. Absent reasonable suspicion, evidence related to the officer's observations of Sherman's intoxication and his refusal to voluntarily consent to the blood test should have been suppressed.

CONCLUSION

Therefore, because there was no probable cause or reasonable suspicion for a traffic violation, the stop of the vehicle was unconstitutional and the evidence obtained after the stop of the vehicle must be suppressed, and the refusal conviction must be reversed.

For the reasons set forth above, the defendant-appellant respectfully requests this Court reverse the refusal conviction of the circuit court.

Dated this 3 day of March, 2017.

John Matousek
Attorney for Defendant-Appellant
State Bar No.: 1009195

[21] A copy of motion hearing transcript page 46 is included as page App 12 in the Appendix.

FORM AND LENGTH CERTIFICATION §809.19(8)(d))

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b) and (c) for a brief and appendix produced with a proportional font. The length of this brief is eight pages and 2,415 words.

Signed:

John Matousek, Attorney for Appellant
State Bar No.: 1009195

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 s. 809.19 (12). I further certify that:

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Signed:

John Matousek, Attorney for Appellant
State Bar No.: 1009195

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I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of Court of Appeals by first-class mail, or other class of mail that is at least expeditious, on March 4, 2017.

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John Matousek, Attorney for Appellant
State Bar No.: 1009195

CERTIFICATION AS TO APPENDIX (Wis. Stat. §809.19(2)(b))

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 s. 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 s. 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.

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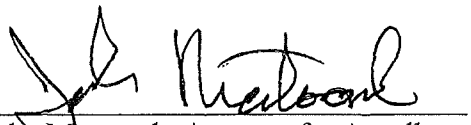

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PLAINTIFF-APPELLANT APPENDIX TABLE OF CONTENTS