

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

RECEIVED

08-08-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2016AP002225

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Dustin M. Sherman,

Defendant-Appellant.

ON APPEAL FROM A REFUSAL CONVICTION
ENTERED IN THE CLARK COUNTY CIRCUIT COURT,
THE HONORABLE TODD P. WOLF PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

Holly Wood Webster
Assistant District Attorney
State Bar No. 1063967

Attorneys for Plaintiff-Respondent

Clark County District Attorney's Office
517 Court Street, Room 404
Neillsville, Wisconsin 54456
(715)743-5167

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	1
STATEMENT ON PUBLICATION AND ORAL ARGUMENT	1
ARGUMENT	1
I. THE CIRCUIT COURT CORRECTLY FOUND THAT THERE WAS REASONABLE SUSPICION TO STOP SHERMAN’S VEHICLE	1
A. Introduction	1
B. Applicable legal principles and standard of review ...	1
C. Argument.....	2
CONCLUSION	5
CERTIFICATION.....	6
CERTIFICATION OF APPENDIX.....	7
INDEX TO APPENDIX	8

TABLE OF AUTHORITIES

CASES CITED	Page
<i>Brunton v. Nuvelt Credit Corporation</i> 325 Wis.2d 135 785 N.W.2d 302 (2010).....	4
<i>State ex. Rel. Kalal v. Circuit Court for Dane Cnty.</i> 2004 WI 58, 271 Wis.2d 633 681 N.W.2d 110	4
<i>State v. Kennedy</i> 2014 WI 132, 359 Wis.2d 454 856 N.W.2d 834	2
<i>State v. Popke</i> 2009 WI 37, 317 Wis.2d 118 765 N.W.2d 569	1, 2
<i>State v. Rutzinski</i> 2001 WI 22, 241 Wis.2d 729 623 N.W.2d 516	1, 4
<i>State v. Turner</i> 136 Wis.2d 333 401 N.W.2d 827 (1987).....	2
 STATUTES CITED	 Page
WIS. STAT § 347.13.....	3, 4, 5
WIS. STAT § 805.17(2)	2

ISSUE PRESENTED

I. Did the officer have reasonable suspicion or probable cause to conduct a traffic stop of Sherman's vehicle?

The circuit court answered yes.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND THAT THERE WAS REASONABLE SUSPICION TO STOP SHERMAN'S VEHICLE.

A. Introduction

The State believes that the circuit court was correct in finding that Officer Jason King had reasonable suspicion to stop Sherman's vehicle.

B. Applicable legal principles and standard of review

A police officer may conduct a traffic stop when he has probable cause to believe a traffic violation occurred or when he has reasonable suspicion, under the totality of the circumstances, that a crime or traffic violation has been or will be committed. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis.2d 118, 765 N.W.2d 569. "The officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." *Id.* at ¶ 23 (citations and quotations omitted). When determining whether a set of facts gives rise to reasonable suspicion, "courts should apply a commonsense approach". *State v. Rutzinski*, 2001 WI 22, ¶ 15, 241 Wis.2d 729, 623 N.W.2d 516.

In reviewing decisions made by a circuit court, Wis. Stat. § 805.17(2) states, in part, “Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” As such, the appellate court is “bound not to upset the trial court’s findings of historical or evidentiary fact unless they are contrary to the great weight and clear preponderance of the evidence.” *Popke* at ¶ 20 (citing *State v. Turner*, 136 Wis.2d 333, 343, 401 N.W.2d 827 (1987)). The application of those facts to constitutional principles, however, is a question of law reviewed de novo. *State v. Kennedy*, 2014 WI 132, ¶ 16, 359 Wis.2d 454, 856 N.W.2d 834.

C. Argument

The circuit court found that Officer Jason King’s testimony was credible. (App.1 14:15-17). Officer King testified that, on February 21, 2016, he observed Sherman’s vehicle traveling southbound on Hewett Street, then westbound on Division Street, in the City of Neillsville, Clark County, Wisconsin. (App.1 1:20-24; 2:8-11). Officer King stated that the vehicle had very, very dim taillights that were hard to see. (App.1 2:15-17). He testified that he followed the vehicle and still had a difficult time seeing the taillights, so he performed a traffic stop. (App.1 2:20-23). When he walked up to the vehicle, he noticed there was a lens covering over the taillights. (App.1 3:8-9). The court specifically noted that the observation of the lens covering added credibility to Officer King’s testimony that the taillights were dim. (App.1 14:15-17).

Although not likely relevant, the court also considered the testimony of Allen Myren. Myren testified that, approximately six months after the initial stop, he observed the same vehicle at what he believed to be the same locations as Officer King. (App.1 6:1-8:10). Myren testified that, at a distance of greater than 500 feet, he believed that the tail lamps were clearly visible. (App.1 9:19-23). During cross examination, Myren did admit that the tail lamps were dim and that he could not testify as to whether the road and weather conditions when he observed the vehicle were the

same as the conditions of when Officer King observed the vehicle. (App.1 10:19-21; 11:5-10). The court concluded that Myren's testimony was not actually helpful in that it was not comparing apples to apples. (App.1 14:8-11).

The court found that Officer King had reasonable suspicion to stop the vehicle for a violation of Wis. Stat. § 347.13. (App.1 14:23-15:9). Wis. Stat. § 347.13(1) states:

No person may operate a motor vehicle, mobile home, or trailer or semitrailer upon a highway during hours of darkness or during a period of limited visibility unless the motor vehicle, mobile home, or trailer or semitrailer 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. No tail lamp may have any type of decorative covering that restricts the amount of light emitted when the tail lamp is in use.** No vehicle originally equipped at the time of manufacture and sale with 2 tail lamps may be operated upon a highway during hours of darkness or during a period of limited visibility unless both lamps are in good working order. This subsection does not apply to any type of decorative covering originally equipped on the vehicle at the time of manufacture and sale.

(emphasis added.)

The court's findings were also consistent with Sherman's own testimony. Sherman admitted that there was a cover on the taillights. (App.1 12:4-15). Sherman also admitted that he did not believe the cover was manufacture installed. (App.1 13:16-18). Clearly, the vehicle was in violation of Wis. Stat. § 347.13(1), consistent with Officer's King's observations.

Sherman wants this court to ignore all of the above-referenced testimony and focus on one line where Officer King agreed with Sherman's attorney on cross examination that the taillights were clearly visible because he could see them. (App.1 4:16-17). However, Officer King never wavered on the fact that the taillights were dim, forming the basis for his stop. (App.1 5:1-2). There is nothing clearly erroneous with the circuit court's findings of fact, as Sherman is asking this Court to find.

Wis. Stat. § 347.13 requires that the light from the tail lamps be plainly visible from a distance of 500 feet and that they not have any type of after-manufacture covering that restricts the amount of light emitted. Contrary to Sherman's argument, the fact that Officer King was not able to actually see that there was a cover on the tail lamps until after he stopped the vehicle does not negate the fact that the taillights were dim to a degree that he had difficulty seeing them.

An officer must be able to point to specific and articulable facts, which, taken together with the reasonable inferences therefrom, would lead a reasonable person with the knowledge and experience of the officer that a violation is or has occurred. *State v. Rutzinski*, 2001 WI 22, ¶ 14. Officer King testified to specific, articulable facts as the basis for his stop, specifically that the taillights were so dim that he had difficulty seeing them. Taking the reasonable inferences from those facts, the logical conclusion is that there is a violation of Wis. Stat. § 347.13. As such, Officer King had, at a minimum, reasonable suspicion to believe that the vehicle was in violation of Wis. Stat. § 347.13, regardless of whether he could see the cover on the tail lamps before or after enacting the stop. The fact that there was a cover on the tail lamps only serves to further validate Officer King's observations.

A further concern with reversing the circuit court, as Sherman is requesting, is that it would involve ignoring half of the statute. The Supreme Court of Wisconsin stated in *Brunton v. Nuvel Credit Corporation* that "statutory language is read to give effect to every word, to avoid surplusage and to avoid absurd results." 325 Wis.2d 135, 146, 785 N.W.2d 302, 307 (2010). The Court added that "[i]n construing a statute, we favor a construction that fulfills the purpose of the statute over one that undermines the purpose." *Id.* "[A] plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose." *Id.* citing *State ex. Rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110.

Clearly, the legislature intended that individuals not have covers on their tail lamps. It would be difficult to interpret the statutory language any other way. One obvious purpose for this is so that the tail lamps, and, consequently, the vehicle itself, are not difficult to see, such that it could lead to an accident. To not allow an officer to stop a vehicle that has tail lamps that are difficult to see would render that section of the statute essentially void. Without actually enacting a traffic stop, Officer King would not have been able to confirm that there was a cover on the tail lamps, in direct violation of the statute.

CONCLUSION

For all of the aforementioned reasons, the State respectfully requests that this Court deny Sherman's motion and uphold the circuit court's findings that Officer King observed a tail light that was not plainly visible from within 500 feet and that this constituted reasonable suspicion of a violation of Wis. Stat. 347.13, such that the refusal conviction is upheld.

Dated this 5th day of July, 2017.

Respectfully submitted,

Holly Wood Webster
Assistant District Attorney
State Bar No. 1063967
Attorney for Plaintiff-Respondent

Clark County District Attorney's Office
517 Court Street, Room 404
Neillsville, Wisconsin 54456
(715)743-5167

CERTIFICATION

I certify 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 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 1,461 words.

Dated this 5th day of July, 2017.

Holly Wood Webster
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 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 5th day of July, 2017.

Holly Wood Webster
Assistant District Attorney

CERTIFICATION OF 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 s. 809.19 (3) (b) and that contains, at a minimum: (1) a table of contents; (2) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); 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 the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation 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 5th day of July, 2017.

Holly Wood Webster
Assistant District Attorney

Index to Appendix

	Page
TRANSCRIPT EXCERPTS FROM CIRCUIT COURT MOTION HEARING, SEPTEMBER 30, 2016.....	1 – 15