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

REPLY 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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

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.

The State indicates in their brief that the defendant wants the court to ignore all of the other testimony and focus on "one line" where Officer King agreed that the taillights were clearly visible because he could see them. The State further indicates that the trial court found the testimony of Officer King to be credible. The testimony of Officer King was that the taillights were clearly visible. Sherman's counsel did not put words into Officer King's mouth nor did he slip this statement in. Officer King verified several times in his testimony that the taillights were clearly visible.

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)[1]

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

That is extremely important testimony, however, that is not the only testimony to focus on when it comes to the defendant's position.

The State tries to make it seem as though the officer had reasonable suspicion to believe the defendant had some type of a covering over his taillights. However, that is the State's attempt to mislead the Court. The issue of a covering over the taillights is not relevant as the officer did not suspect there to be a covering over the taillights (transcript page 20, line 20-25)[2] and does not know there is a covering until he has already conducted the traffic stop and is next to the vehicle (transcript page 15, line 7-18)[3].

The seizure occurred the moment the officer's emergency lights came on and the defendant submitted to the seizure by pulling over. The covering is not relevant because it comes after the unlawful seizure. Therefore, the officer pulled the defendant over, according to his own testimony, because he observed taillights that were dim, yet clearly visible to him. That is not a violation of the statute.

Unfortunately, the officer does not reference distances during his testimony. The fact that the officer does not reference distance may demonstrate that the officer was aware that the taillights were clearly visible at 500 feet or less. According to the statute, as long as the taillights are plainly visible at 500 feet or less, no violation has occurred. This officer admits that they are clearly visible (transcript page 20, line 10–19)[4]. Therefore, if the officer knew that the taillights were not visible at 500 feet or less, he would have indicated the distance in his testimony, or at least a rough estimate, to support his traffic stop. The trial court even indicates "[...] 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" (transcript page 50, line 1-13)[5].

Furthermore, the State indicates in their brief that an officer must be able to point to specific and articulable facts that a violation is or has occurred. Here, there are no specific and articulable facts. This is obvious by the officer's own testimony as he stated that the taillights were clearly visible. Dim, but clearly visible taillights

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

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

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

[5] A copy of motion hearing transcript page 50 is included as page App 3 in the Appendix.

are not an articulable fact. It does not matter that the officer indicates that the taillights are dim because he said that the taillights were clearly visible which does not violate the statute.

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."

CONCLUSION

In essence, the trial court abused its discretion as it should have looked at the failure to explain the distance as a failure of the State to uphold their burden, not against the defendant.

Therefore, the trial court's finding was clearly erroneous and cannot support a decision that there was reasonable suspicion or probable cause for the stop. Absent reasonable suspicion and/or probable cause, 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.

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

Dated this 21st day of August, 2017.

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

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

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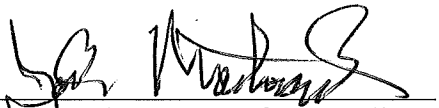
Signed: 

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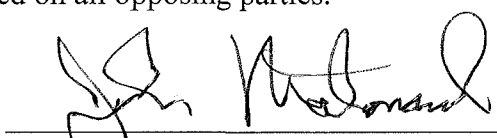
Signed: 

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Signed: 

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

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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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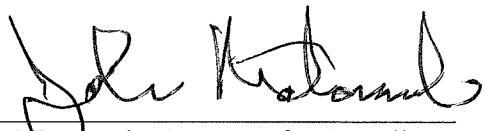
Signed: 

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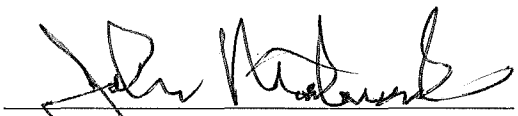
Signed: 

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