WISCONSIN COURT OF APPEALS
DISTRICT IV
Appeal No.: 2018AP002382-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KELLY W. BROWN,

DEFENDANT-APPELLANT.

ON APPEAL FROM ORDERS ENTERED
IN THE CIRCUIT COURT FOR DODGE COUNTY,
THE HON. STEVEN G. BAUER, PRESIDING

BRIEF OF DEFENDANT-APPELLANT KELLY W. BROWN

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STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Appellant believes that this opinion should not be published because the issues are fact-specific, and do not extend or modify existing law. For the same reason, the Appellant does not recommend oral argument.

STATEMENT OF THE ISSUE

Whether the Circuit Court erred in denying Brown's motion challenging reasonable suspicion to stop.

SUMMARY OF THE ARGUMENT

The question on appeal is whether the arresting officer's mistake of fact was reasonable, and under the totality of the circumstances, whether there was reasonable suspicion to stop given the mistaken belief that a traffic violation was being committed a traffic violation. The Circuit Court found the deputy's mistake was reasonable and that there was reasonable suspicion to stop.

STATEMENT OF THE CASE

I. Procedural History.

A criminal complaint was filed in Dodge County Circuit Court on January 12, 2018, charging Defendant-Appellant, Kelly W. Brown (hereinafter "Brown"), with Operating a Motor Vehicle While Intoxicated – 2nd Offense and Operating with a Prohibited Alcohol Concentration – 2nd Offense. (R.3). Brown entered not guilty pleas.

On February 14, 2018, Brown filed a Motion to Dismiss and/or Suppress Illegal Stop/Arrest and motions regarding probable cause to perform a preliminary breath test (commonly referred to as a "Renz Motion") and probable cause to arrest[1]. (R.11, R.14, R12). The Circuit Court, the Honorable Steven G. Bauer, held an evidentiary hearing on May 4, 2018. The Circuit Court denied Brown's motions. Brown filed a Motion for Reconsideration on May 24, 2018,

[1] Brown filed other motions that were withdrawn.

asking the Circuit Court to reconsider its ruling with respect to reasonable suspicion to stop. (R.28). Brown did not ask for reconsideration on any other motions. (R.28).

A motion hearing on Brown's reconsideration motion was held on June 20, 2018. The Circuit Court issued a written Decision on Motion for Reconsideration denying the motion on June 21, 2018. (R.34).

On September 14, 2018, Brown plead no contest to Count 1 of the Criminal Complaint, and he was found guilty and sentenced to 30 days in jail, along with other statutory penalties for a criminal drunk driving. (R.38).

Brown filed a Notice of Intent to Pursue Postconviction Relief. (R.47). There were no postconviction motions. On December 13, 2018, Brown filed his Notice of Appeal. (R.53).

II. **Factual Background**.

Brown was arrested on Wednesday, November 15, 2017, and subsequently charged with Operating Motor Vehicle While Intoxicated 2nd Offense and Operating with a Prohibited Alcohol Concentration.

(R:3). On November 15, 2017, Deputy Robbie Weinfurter (hereinafter "Weinfurter"), was on duty around 9:47 P.M. (R: 3, R.59 at 5). Weinfurter was patrolling Hwy G, southbound, in Town of Beaver Dam, Dodge County Wisconsin. (R: 3, R.59 at 5). Brown suppressed his headlamps from his high beams to his low beams as Weinfurter was approaching. (R.59 at 8, 18). Weinfurter performed a traffic stop on Brown's vehicle as he observed what he thought were more than four lights illuminated on the front of Brown's vehicle in violation of *Wis. Stat*. § 347.07(1). (R:3). Weinfurter states "I could see that it had headlights and high beams as well as what appeared to be some sort of fog lamp or auxiliary lamp lit as well for a total of six lights". (R.59 at 8). "I noticed as we got closer the operator of the vehicle turned the high beams off and the fog lights remained illuminated. Based on those observations the vehicle was operating with more than four headlamps illuminated." (R.27, R.59 at 8). Weinfurter testified at the May 4, 2018, motion hearing that Brown's lights were "probably" the brightest lights he has ever seen. (R.59 at 8). However,

the only basis for the traffic stop was the lighting violation. (R.59 at 11, 23).

Weinfurter stated that on all vehicles from a factory, when the fog lights are on and you switch you high beams on, the fog lamps automatically turn off. (R.59 at 26). He did not know whether this was true for vehicles with multifilament headlamps. (R.59 at 26). Weinfurter testified that he did not know whether Brown's vehicle used multifilament headlamps. (R.59 at 23). Weinfurter later agreed that fog lamps may stay on when high beams are engaged in vehicles using multifilament headlamps. (R.59 at 28-30).

Brown testified that his headlights use multifilament bulbs. (R.59 at 38). The Court found that Brown's vehicle had multifilament bulbs that controlled the high and low beam headlamps, not separate lamps for each. (R.34 at 2). The Court found that Weinfurter was mistaken. (R.59 at 44-45). The Court found he mistakenly believed fog lamps turn off when high beams are turned on. (R.34 at 2). The Court states, "This case is not about a deputy stopping anyone with fog lamps operating while high beam lights were on."

(R.34 at 3). The Court ruled Weinfurter had reasonable suspicion to stop Brown. (R.34 at 3).

ARGUMENT

I. The Circuit Court erred by denying Brown's motion challenging reasonable suspicion to stop.

The facts of the case are essentially uncontroverted. The question on appeal is whether, Weinfurter's mistake of fact is reasonable and under the totality of the circumstances, whether Weinfurter had reasonable suspicion to stop Brown's vehicle given his mistaken belief that Brown had committed a traffic violation. It is unreasonable to assume that headlamps function the same on all vehicles, or that no vehicles use a single bulb for both high and low beam headlamps. Under the totality of the circumstances Weinfurter lacked reasonable suspicion to stop Brown.

A. Standard for Appellate Review.

Whether a traffic stop is reasonable is a question of constitutional fact subject to a two-step standard of review. *State v. Post*, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. The circuit court's findings of fact are

reviewed under a clearly erroneous standard, and then the facts are applied and reviewed independent of the trial court's conclusions. Id.

B. Weinfurter's mistaken belief that Brown's was operating with more than four headlamps in violation Wis. Stat. § 347.07(1) was unreasonable.

Weinfurter stopped Brown's vehicle because he believed Brown had more than four lights illuminated on the front of his vehicle in violation of Wis. Stat. § 347.07(1). (R.59 at 6, 8, 9-10, 11, 15, 17-18, 29, 32, 33). "Whenever a motor vehicle equipped with headlamps also is equipped with any adverse weather lamps, spotlamps or auxiliary lamps, or with any other lamp on the front thereof projecting a beam of intensity greater than 300 candlepower, not more than a total of 4 of any such lamps or combinations thereof on the front of the vehicle shall be lighted at any one time when such vehicle is upon a highway." *Wis. Stat*. § 347.07(1). The only violation Weinfurter observed was the alleged lighting violation. (R.59 at 11).

Weinfurter believed Brown had six headlamps illuminated. (R.59 at 8). His belief was based on his assumption that all vehicles headlamps operate the same. (R.59 at 26). Weinfurter testified, "When a vehicle comes from the factory, when you have the fog lights on and you switch your high beams on, the fog lights automatically turn off." (R.59 at 26). Weinfurter did not know whether Brown's vehicle was equipped with multifilament headlamps. (R.59 at 23).

Weinfurter could not visually see both the high and low beam lights on Brown's vehicle but could see that the fog lights remained on when he switched his high beam to his low beam headlights[2]. (R.59 at 9-11). Weinfurter believed that there were two lights in Brown's headlamp. (R.59 at 9). His basis for that belief was his assumption that all vehicles headlamps contain separate bulbs for low and high beam operation. (R.59 at 26). Weinfurter states, "I noticed as we got closer the operator of the vehicle turned the high beams off and

[2] While reviewing Exhibit 4 (R.25) during the motion hearing, Weinfurter describes where he believes the second headlamp bulb would be, but due to the poor quality of the photo and brightness of the lights it appears to be one light. (R.59 at 9-11).

the fog lights remained illuminated. Based on those observations the vehicle was operating with more than four headlamps illuminated." (R.3 at 2)**.** "I could see that it had headlights and high beams as well as what appeared to be some sort of fog lamp or auxillary lamp lit as well for a total of six lights." (R.59 at 8). It is clear Weinfurter focused on the operation of Brown's foglamps. (R.59 at 9-11). Weinfurter assumes six lights are on. (R.59 at 26). He admits he thinks this because when the high beams are engaged that all foglamps turn off. (R.59 at 26). Brown's foglamps did not turn off when he switched to his low beams. (R.59 at 26). Weinfurter believed that Brown has separate bulbs for his low and high beam headlamps. (R.59 at 9). Weinfurter's belief that all headlights contain two bulbs for low and high beam operation is unreasonable, and it ignores the fact that vehicles may use different, but legal lighting configurations using a single bulb for both low and high beam operation. For example, a 2014 Dodge Durango. (R.26).

In *State v. Houghton*, 346 Wis. 2d 234, 267, 868 N.W.2d 143 (2015), it was determined it would not be

reasonable to stop a vehicle simply because it did not have a front license plate. To allow an officer to stop a vehicle because "most vehicles on Wisconsin roads might be registered in Wisconsin and most vehicles registered in Wisconsin might be issued two plates is not enough to conclude that a stop of a vehicle solely because it lacks a front license plate passes constitutional muster." *Id.* This would require the court to hold that "it is reasonable for a police officer in Wisconsin to believe that, if a vehicle is operating on a Wisconsin road, it must have been issued two license plates." *Id.* This case would require a similar conclusion.

Searches and seizures based on mistakes of fact can be reasonable. *Id*. at 256 citing *Heien v. North Carolina,*135 S. Ct. 530, 536, 190 L.Ed. 2d 475 (U.S. 2014). Reasonable does not mean perfect. However, it is unreasonable to conclude all vehicles operating with foglamps and high beams have more than four lamps illuminated. This conclusion would mean that no vehicles on Wisconsin roadways use a single bulb for low and high beam headlamps. Weinfurter admitted

that a multifilament configuration could be legal. (R.59 at 28-30). Weinfurter acknowledged that if a vehicle uses the same bulb for both its low and high beam lights, that the fog lights may stay illuminated when a driver switches from high to low beams, and this would not be a violation. (R.59 at 28-30). He admitted he did not know whether Brown had multifilament bulbs. (R.59 at 30). Weinfurter thought he saw a violation. (R.59 at 30). But what he thought he saw is based on his belief that all vehicles lighting configurations operate the same. (R.59 at 26). He does not say he saw two lights simultaneously lit in Brown's headlamp housing unit. It would be unreasonable to think anybody could distinguish one from two bulbs from a distance of 500 feet or more[3].

It would be unreasonable for law enforcement to stop a vehicle simultaneously operating high beam lights and foglamps without additional information. The stop in the case is based on a mistake that is grounded in Weinfurter's assumption that all vehicle

[3] The distance a driver is required to dim or suppress high beams for on-coming traffic. Wis. Stat. § 347.12(1)(a).

headlamps use more than one bulb for low and high beam operation. This mistake ignores that some vehicles operate using a headlamp with a single bulb for low and high beam operation, and that the foglamps on these vehicles may not suppress when a driver switches from low beams to high beams. This is not a reasonable mistake.

C. The brightness of Brown's lights does not support a finding of reasonable suspicion and it should not be considered.

The Circuit Court stated, "[t]his case is not about a deputy stopping anyone with fog lamps operating while high beam lights were on." (R.34 at 3). The Circuit Court appears to rely on the brightness of Brown's lights a factor for reasonable suspicion to stop.

Candlepower is a measure of light. (R.59 at 32). In relevant part, Wis. Stat. § 347.07(1) states, "Whenever a motor vehicle equipped with . . . any other lamp on the front thereof projecting a beam of intensity greater than 300 candlepower, not more than a total of 4 of any such lamps or combinations thereof on the front of the vehicle shall be lighted at any one time when such

vehicle is upon a highway." Weinfurter testified he did not know candlepower was part of the statute prior to stopping Brown. (R.59 at 31-32). Other than knowing candlepower is a measure of light, Weinfurter does not offer any additional information as to his understanding of candlepower. (R.59 at 31). Weinfurter does not know it is part of the statute, and he relies on the number of lights to stop Brown. (R59 at 31-33).

Brown contends Weinfurter did not factor candlepower into his stop decision. While Weinfurter testified Brown's lights are the brightest he has ever seen. (R.59 at 8). Even if that is the case, the brightness of Brown's lights would not make the stop reasonable.

First, Weinfurter did not contend that the brightness contributed to his belief that Brown was operating with six headlamps. Rather, he states that even after Brown switches from his high beam to his low beam lights, that the lows are still exceptionally bright. (R.59 at 8).

Weinfurter did not contend that the intensity of Brown's lights were a violation. (R.59 generally). Rather, he very specifically testified that he relied on the

fact that Brown's foglamps stay on, concluding that Brown was operating with six headlamps. (R.59 at 11). Weinfurter does not state that brightness is a factor for the stop, or that it is a violation.

Vehicle lighting equipment is regulated in Wis. Stat. Ch. 347. Headlamps specifications are addressed in Wis. Stats. §§ 347.09, 347.10 and 347.12. These sections fail to address brightness, other than to set minimum requirements as to the distance a beam must project, and how it is aimed, *Wis. Stat.* § 347.10(2). Intensity is referenced in Wis. Stat. § 347.07(1), but only as it relates to the number of lights that can be illuminated, not the intensity itself. Even if Brown's headlamps were more than 300 candlepower that would not be violation, unless he was operating with more than four lamps illuminated, which he was not.

Headlights are also regulated by Wis. Admin. Trans. Code § 305.11. There is nothing in Trans § 305.11 that regulates output or intensity[4]. Rather like the Wisconsin Statutes, it prescribes minimum

[4] As it pertains to how bright lights can be.

equipment requirements for vehicles and standards for equipment. *Wis. Admin. Trans. Code* § 305.01(1).

The brightness of Brown's lights did not contribute to Weinfurter's stop decision. Even if brightness is considered, brightness would only regulate the number of lamps Brown could have illuminated. Considering, Weinfurter is mistaken as to the number of lamps Brown had illuminated, it would be unreasonable to consider the brightness as a reasonable factor without additional information or without Weinfurter stating that the extra lights were why Brown's lamps were so bright. Weinfurter's mistake as to the number of lights is unreasonable. Considering he did not know brightness (candlepower) was part of the statute, it is unreasonable to conclude it as a factor in his arrest decision.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that the court reverse the order of the Circuit Court denying Brown's stop motion. The matter should be remanded with instructions for the Court to

Dated this 28 day of February, 2019.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 3,102 words.

Dated this 28 day of February, 2019.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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2) 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 28, February, 2019.

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