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

REPLY BRIEF OF DEFENDANT-APPELLANT KELLY W. BROWN

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The State argues Deputy Weinfurter ("Weinfurter") had reasonable suspicion to stop Brown. "[P]olice officers who ***reasonably suspect*** an individual is breaking the law are permitted to conduct a traffic stop." *State v. Houghton*, 346 Wis. 2d 234, 247, 868 N.W.2d 143 (2015) (*emphasis added*).

The State accepts Weinfurter's actions as reasonable. The State contends, "Based on Deputy Weinfurter's observations and his knowledge of Wisconsin Statute § 347.07(1), it was *perfectly reasonable* to suspect that Brown's vehicle was violating a traffic law by operating with more than four lights illuminated at one time and that it was projecting an intensity greater than 300 candlepower." (Resp. Br. at 4) *emphasis added.*

The State relies on the brightness of Brown's lights and "his observation of six [']almost blinding[']] lights illuminated at one time and then observed four "extremely bright" lights after the high beams were turned off." (Id.).

The State simply accepts that Weinfurter thought he saw a violation, but it ignores why he thought he saw a violation. Weinfurter testified when Brown's vehicle was coming towards him it had its high beams activated, and he believed it had six lights illuminated. (R. 59:11). He testified that this was the only reason for the stop. (Id.). Weinfurter testified that it was his understanding that on all vehicles, when fog lights are on and high beams are switched on, the fog lamps automatically turn off. (R.59 at 26). Later in his testimony he recants, acknowledging that a vehicle may be equipped with a single bulb for both high and low beam operation, so a vehicle could operate with high beam lights and fog lamps, compared to high and low beams, or low beams and fog lamps. (R. 59 at 28-30).

Brown does not argue that Weinfurter should have known that his vehicle utilized multifilament bulbs. Rather, Brown contends Weinfurter's belief that a violation occurred is founded by the erroneous conclusion that all vehicles use the same lighting configurations, and they all work the same. This is unreasonable. At the time of the stop, Weinfurter

believed that no vehicles operate with high beams and foglamps simultaneously illuminated. (R. 59: 26). This is simply untrue.

Much of the State's argument centers on the brightness of Brown's lights. There is nothing in the record that supports the brightness of Brown's lights contributed to Weinfurter's stop decision. (R. 59 generally). Brightness is not the issue; the issue is the number of lights. (R. 59:11, 33). Wis. Stat. 347.07(1).

The State argues Weinfurter has knowledge that Brown is operating "with more than four lights illuminated at one time and that [his lights are] projecting an intensity greater than 300 candlepower." (Resp. Br. at 4). The elements of Wis. Stat. § 347.07(1) require both more than four lights and a brightness component. Yet Weinfurter testified that he did not know that there was a brightness component to Wis. Stat. § 347.07(1) until after his encounter with Brown had ended. (R. 59: 32-33). To argue brightness contributed to his stop decision contradicts his testimony. While the brightness may have drawn Weinfurter's attention to the vehicle, it may have only qualified as a violation of Wis. Stat. §

347.07(1) if Brown had more than four lights and the intensity was greater than 300 candlepower.

Weinfurter testified that after Brown turned his high beams off, four total lights were illuminated. (R. 59:7-8). He also said that the low beam lights and fog lights were still very bright. (Id.). He did not testify he stopped Brown for this reason, but rather, because thought Brown had more than four headlamps illuminated based on Brown's suppression of his headlamps and the fact his fog lamps remained on. (R. 59:11, 33). Weinfurter is focused on the number of lights, not the brightness. (Id.). Weinfurter appeared to be focused on Brown's fog lamps. (R. 59:26).

The State argues, "Whether Brown's bulbs were multifilament lamps is irrelevant. What is relevant here is that Deputy Weinfurter was practically blinded by Brown's oncoming vehicle and observed it with six lights illuminated at once." (Resp. Br. at 4-5). Brown disagrees. If Brown's vehicle had a single multifilament bulb for high/low beam operation he could not have more than four lamps illuminated. Brown does not contend that Weinfurter should have

known his specific vehicle was equipped with a single bulb headlamps, but rather that vehicles in general may utilize this configuration. The fact that Brown's vehicle is equipped with a multifilament bulb is relevant to the reasonableness of Weinfurter's belief that a violation had occurred. It is clear from Weinfurter's testimony that Brown suppressed his headlamps. (R. 59:8). The question is whether Brown had four or six lamps illuminated before he suppressed his high beams.

It is illogical that Weinfurter would have been able to count the number of lights illuminated on Brown's vehicle while being "practically blinded" by their brightness. (Resp. Br. at 4-5). Even if we assume Brown's vehicle used two bulbs instead of one (for its high and low beams) it is also illogical that Weinfurter would be able to differentiate between the two at a distance of more than 500 feet, the distance a driver is required to suppress their high beam lamps for oncoming traffic pursuant Wis. Stat. § 347.12(1)(a), which Brown did. (R. 59 at 8).

It is clear, that Weinfurter believed Brown was operating with six lights because his fog lamps

remained illuminated when he switched from his high to low beam lights. He mistakenly believed that all vehicles use a two-bulb high/low beam configuration. (R. 59:10, 26). Weinfurter testified as to the location he believed Brown's high beam bulbs would have been on his vehicle. (R. 59:10). He clearly stated that the high beams as an "extra" set of lights. (Id.). Weinfurter admitted he did not actually inspect Brown's headlamps to see how many bulbs they used. (R. 59:23). To adopt Weinfurter's rationale would permit law enforcement to stop any vehicle that has its high beam lights and fog lamps simultaneously illuminated. This would mean that Brown could be stopped any time despite having a legal lighting configuration. The same would hold true for the driver of the Dodge brand vehicle discussed at the motion hearing. (R. 59: 27-30).

The only issue is whether it was reasonable for Weinfurter to believe that all vehicles use separate bulbs for operating high and low beam headlamps. Brown argues it was not. An unreasonable mistake of fact cannot form the basis for reasonable suspicion to stop. *State v. Houghton*, 364 Wis. 2d 234, 256, citing *Heien*

v. North Carolina, 135 S. Ct. 530, 536, 190 L.Ed. 2d 475 (U.S. 2014). Without something more than the fact that Brown's fog lamps were on in conjunction with his high beam headlamps, Weinfurter lacked reasonable suspicion to stop Brown.

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 and motion for reconsideration. The matter should be remanded with instructions for the Court to vacate the Judgment of Conviction, and to enter an order granting Brown's motion.

Dated this 15th day of April, 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 1448 words.

Dated this 15th day of April, 2019.

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Dated this 15th, April, 2019.

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