STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

La Crosse County Case No. 18 CT 71
Appeal No. 2019AP000135

RICHARD R. RUSK,

Defendant-Appellant.

ON APPEAL OF JUDGMENT OF CONVICTION AND DECISION DENYING SUPPRESSION MOTION, ENTERED IN THE LA CROSSE COUNTY CIRCUIT COURT, THE HONORABLE GLORIA L. DOYLE, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUE

I. DID RUSK'S VEHICLE'S WINDSHIELD DECAL TINT VIOLATE ANY TRAFFIC LAW, AND IF NOT, WAS TROOPER DIGRE'S MISTAKEN BELIEF THAT IT DID VIOLATE A TRAFFIC LAW REASONABLE, RENDERING SUPPRESSION OF THE EVIDENCE ARISING FROM THE TRAFFIC STOP UNNECESSARY?

The trial court answered: yes.

STATEMENT ON ORAL ARGUMENT

Appellant believes that one of the issues in this matter is an issue of first impression, and therefore oral argument may be warranted.

STATEMENT ON PUBLICATION

This matter presents both settled issues and an issue of first impression. Publication therefore may be appropriate, notwithstanding the fact that this is a one-judge appeal, pursuant to Wis. Stat. § 809.23(1)(a)1.

STATEMENT OF THE CASE

On January 23, 2018, State Trooper Cody Digre executed a traffic stop on Rusk and Rusk's vehicle at approximately 9:01 p.m. (R2:3). Rusk's vehicle was a white truck, and had a white material covering the top portion of its windshield, which Trooper Digre believed to be window tint. (R2:3). The majority of the decal was above the A-line on Rusk's windshield, with the middle portion extending slightly below the A-line, but not below the location of the rearview mirror attachment on the inside of Rusk's vehicle's windshield. (R29:5, 12). The fact that the middle portion of the decal extended below the A-line of the windshield was the sole basis for Trooper Digre's stop of Rusk's vehicle, as Trooper Digre believed that nontransparent material below the A-line on a windshield violated Wis. Admin. Code ch. Trans § 305.34(6). (R29:12-13, 15). Other than the tint decal across the top of it, Rusk's windshield was otherwise clear and unobstructed. (R29:16). In addition, Trooper Digre agreed that the material at the top of Rusk's windshield did not interfere with the driver's normal panoramic view through the windshield, and that a person seated normally in the driver's seat of Rusk's vehicle would have generally been able to see through the front of the windshield. (R29:19).

Nevertheless, believing that the tint at the top of Rusk's windshield violated Wis. Admin. Code ch. Trans 305.34(6), Trooper Digre conducted a traffic stop on Rusk and his vehicle. (R29:8-9). Upon stopping Rusk, Trooper Digre made contact with him, and after making further observations, arrested Rusk for operating under the influence of an intoxicant. (R29:8-9). Ultimately, Rusk was charged in the criminal complaint in this matter with operating a motor vehicle while under the influence of an intoxicant and with a prohibited blood alcohol content, each as a third offense. (R2:1-2).

Subsequently, Rusk, through counsel, moved to suppress all evidence obtained as a result of Trooper Digre's traffic stop of his vehicle. (R8:1). Rusk argued that the tint at the top of his windshield did not violate Wis. Admin. Code ch. Trans 305.34(6), as that provision was interpreted by the Supreme Court of Wisconsin in ***State v. Houghton***, 2015 WI 79, 364 Wis.2d 234, 868 N.W.2d 143, and that as a result, the traffic stop of his vehicle was unsupported by reasonable suspicion of a law violation and was therefore unlawful, requiring suppression of any evidence obtained as a result of said stop. (R8:3-5). Rusk further argued, in his reply brief to the State's brief in opposition to his motion, that even if the tint at issue could be said to have violated Wis. Admin. Code ch. Trans § 305.34(6), that regulation is invalid and unenforceable pursuant to Wis. Stat. § 227.11(2)(a)3. because it prescribes a standard which is more restrictive than the statute it interprets and which provided the sole authority for its promulgation, which statute is Wis. Stat. § 346.88(3). (R12:2-4).

The State, in opposition to Rusk's motion, argued that the tint did in fact violate Wis. Admin. Code ch. Trans § 305.34(6), that ***Houghton*** was distinguishable from the facts in this matter, and that even if the tint did not constitute a violation of any traffic law, Trooper Digre's conclusion to the contrary was an objectively reasonable mistake of law, and therefore that suppression was inappropriate. (R11:1-5).

The circuit court ultimately denied Rusk's motion. (R13:1). In doing so, the court first ruled that Trooper Digre was correct when he interpreted Wis. Admin. Code ch. Trans § 305.34(6)(c) to be violated when any material of any kind extends below the A-line on a windshield of a motor vehicle, and further, that even if Trooper Digre was mistaken regarding the extent of the tint on Rusk's windshield, his mistake was objectively reasonable. (R13:3). At no point in its decision did the circuit court mention, much less address, Rusk's argument that the regulation was invalid. (R13:1-4). Subsequently, Rusk pled no contest to count one of the complaint, and was found guilty of operating a motor vehicle while under the influence of an intoxicant as a third offense. (R30:8). This appeal follows pursuant to the provisions of Wis. Stat. § 971.31(10). Additional facts of record shall be cited as necessary below.

ARGUMENT

I. RUSK'S DECAL RUNNING ACROSS THE TOP OF HIS VEHICLE'S WINDSHIELD DID NOT VIOLATE ANY VALID LAW, AND TROOPER DIGRE'S MISTAKEN BELIEF THAT IT DID VIOLATE A VALID TRAFFIC LAW WAS UNREASONABLE, RENDERING THE TRAFFIC STOP IN THIS MATTER AN UNREASONABLE SEIZURE OF RUSK, AND THEREFORE SUPPRESSION OF ALL EVIDENCE DERIVING FROM THE TRAFFIC STOP IS REQUIRED.

A. Summary of Arguments and Standard of Review

Contrary to the circuit court's determination and the State's argument below, the decal tint on Rusk's windshield at issue here did not violate any provision of Wis. Admin. Code ch. Trans § 305.34(6), including sub. (6)(c). While it is true that the middle portion of the decal tint extended below the A-line of Rusk's windshield by an inch or two, it did not extend below the level of the attachment for Rusk's review mirror, did not obstruct Rusk's panoramic view out of the front of the vehicle's windshield, and thus was nothing more than a *de minimis* obstruction, insufficient to violate any portion of either Wis. Admin. Code ch. Trans § 305.34(6) or Wis. Stat. § 346.88(3).

Even if the circuit court was correct in determining that the decal tint on Rusk's vehicle's windshield did violate Wis. Admin. Code ch. Trans § 305.34(6)(c), which is not conceded, the circuit court erred in implicitly determining that Wis. Admin. Code ch. Trans § 305.34(6)(c) was valid and enforceable under Wis. Stat. § 227.11(2)(a)3. This is so because under Trooper Digre's interpretation of Wis. Admin. Code ch. Trans § 305.34(6)(c), that regulation prescribes a "a standard, requirement, or threshold that is more restrictive than the standard, requirement or threshold contained in the statutory provision [it interprets]." *See* ***id.*** Wis. Stat. § 346.88(3) is the only conceivable statutory provision which could provide the Department of Transportation with the authority to promulgate and enforce Wis. Admin. Code ch.

Trans § 305.34(6), and as such, is the relevant statute for comparison.

As authoritatively interpreted by the Supreme Court of Wisconsin in ***Houghton***, Wis. Stat. § 346.88(3) prohibits only "material obstructions" that cut off the driver's view through the windshield and which have a more than *de minimis* effect on operation of a vehicle. ***Houghton***, 364 Wis.2d 234, ¶¶62-65. In no sense can the decal tint at issue here be said to have had more than a *de minimis* effect on Rusk's safe operation of his vehicle, and thus the decal tint did not constitute a material obstruction of his view through the windshield of his vehicle. Accordingly, even if Wis. Admin. Code ch. Trans § 305.34(6)(c) can be reasonably interpreted to prohibit the decal tint at issue here, which again is not conceded, that regulation is invalid and unenforceable because it constitutes a more restrictive standard or requirement than the standard or requirement prescribed in the statute it interprets, Wis. Stat. § 346.88(3).

Finally, because Wis. Stat. § 346.88(3) (and because the regulation depends for its existence on the DOT's authority to interpret that statute, Wis. Admin. Code ch. Trans 305.34(6) as well) was authoritatively interpreted by the Supreme Court of Wisconsin in ***Houghton*** to prohibit only material obstructions of windshields of motor vehicles, and because ***Houghton*** was issued on July 14, 2015, long before the January 23, 2018 traffic stop at issue here, Trooper Digre's mistake of law in believing that the decal tint at issue here violated a traffic law was objectively unreasonable. Accordingly, Trooper Digre's stop of Rusk's vehicle based upon the decal tint was without reasonable suspicion of a law violation and therefore constituted an unreasonable seizure of Rusk and his vehicle, and as such, the circuit court erred when it denied Rusk's motion to suppress all evidence deriving from said traffic stop.

This court's "review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact." ***State v. Robinson***, 2010 WI 80, ¶22, 327 Wis.2d 302, 786 N.W.2d 463 (citation omitted). Similarly, "[w]hether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact." ***State v. Popke***, 317 Wis.2d 118, ¶10, 765 N.W.2d 569 (citations

omitted). "When presented with a question of constitutional fact, this court engages in a two-step inquiry. First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts." ***Robinson***, 327 Wis.2d 302, ¶ 22, 786 N.W.2d 463 (citations omitted). "A finding is clearly erroneous if it is against the great weight and clear preponderance of the evidence." ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis.2d 358, 752 N.W.2d 748 (internal citations and quotation marks omitted, brackets added).

"Reasonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops." ***Houghton***, 364 Wis.2d 234, ¶30. "Whether a statute has been properly interpreted and applied . . . is a question of law [appellate courts] review de novo, but [such courts] do so "while benefitting from the analyses of the . . . circuit court."" ***Id.***, ¶18 (quoting ***118th St. Kenosha, LLC v. DOT***, 2014 WI 125, ¶ 19, 359 Wis.2d 30, 856 N.W.2d 486. (internal quotation marks and additional citations omitted, brackets and ellipsis added). Similarly, the interpretation of an administrative regulation is a question of law which this court reviews independently of the circuit court. ***Falls Communications v. Rev. Dept.***, 131 Wis.2d 545, 547, 389 N.W.2d 65, 66 (Ct.App. 1986).

"Whether an administrative rule exceeds statutory authority is also a question of law that [appellate courts] review de novo, "although [such courts] benefit from the analys[is] of the circuit court . . . ."" ***Castaneda v. Welch***, 2007 WI 103, ¶24, 303 Wis.2d 570, 735 N.W.2d 131 (quoting ***Conway v. Bd. of the Police Fire Comm'rs of the City of Madison***, 2003 WI 53, ¶ 19, 262 Wis. 2d 1, 662 N.W.2d 335) (brackets and ellipsis added). Administrative rules exceed statutory authority and are therefore unenforceable unless they are expressly authorized by statute. Wis. Stat. § 227.10(2m) ("No agency may implement or ***enforce*** any standard, requirement, or threshold, . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter . . . .") (emphasis and ellipses added). "To determine whether the legislature gave express authority, we identify the elements of

the enabling statute and match the rule against those elements. ***Castaneda***, 303 Wis.2d 570, ¶27 (citing ***Wis. Hosp. Ass'n v. Natural Res. Bd.***, 156 Wis. 2d 688, 706, 457 N.W.2d 879 (Ct. App. 1990)). "If the rule matches the statutory elements, then the statute expressly authorizes the rule. However, the enabling statute need not spell out every detail of a rule in order to expressly authorize the rule; if it did, no rule would be necessary." ***Id.*** (internal citations, quotation marks, and brackets omitted).

"Under the elemental approach, the reviewing court should identify the elements of the enabling statute and match the rule against those elements. If the rule matches the statutory elements, then the statute expressly authorizes the rule." ***Wis. Ass'n of State Prosecutors v. WERC***, 2018 WI 17, ¶39, 380 Wis. 2d 1, 907 N.W.2d 425. Finally, an administrative rule is not expressly authorized even if it purports to interpret a statute it is authorized to administer and enforce if the rule "contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision." Wis. Stat. § 227.11(2)(a)3.

B. The decal tint at issue here did not violate Wis. Admin. Code ch. Trans § 305.34(6), and Trooper Digre could not have reasonably suspected Rusk's vehicle of being in violation of sub. (6)(c).

Wis. Admin. Code ch. Trans § 305.34(6) provides in full as follows:

> Nothing may be placed or suspended in or on the vehicle or windshield so as to obstruct the driver's clear vision through the windshield. There may not be any posters, stickers or other nontransparent material, other than a certificate or sticker issued by order of a governmental agency, located on the windshield or located between the driver and the windshield. This subsection does not prohibit the following:
> (a) Attachment of an inside rearview mirror in accordance with s. Trans 305.26.
> (b) Windshields tinted by the manufacturer of the glazing and installed as part of the original manufacturing process.
> (c) Application of window tinting film or other nontransparent material to the inside of the windshield if

> it is attached only to that portion of the windshield which is both outside the critical area and above the horizontal line delineated by the mark "A" or "A." If no such mark was affixed to the windshield by its manufacturer, no window tinting film may be attached to the windshield.

Id. The regulation therefore has two basic parts: (1) a provision prohibiting placement or suspension of anything which would obstruct the driver's clear vision through the windshield, including specifically "posters, stickers or other nontransparent material, other than a certificate or sticker issued by order of a governmental agency, located on the windshield or located between the driver and the windshield;" and (2) a provision listing specific types of items which may be placed in the windshield notwithstanding the preceding prohibition. ***Id.***

Here, the decal tint at issue did not in any way obstruct Rusk's panoramic view through his windshield, nor did it extend below the level of the expressly permitted rearview mirror attachment. (R29:5, 12-13, 15-16, 19). Further, although the regulation states that "[t]here may not be any stickers or other nontransparent material, other than a certificate or sticker issued by order of a governmental agency, located on the windshield or located between the driver and the windshield[,]" Wis. Admin. Code ch. Trans § 305.34(6) (intro), the language contained in its enabling statute, Wis. Stat. § 346.88(3)(a)[1] and (3)(b)[2], has been authoritatively interpreted by the Supreme Court of Wisconsin to prohibit only material obstructions, e.g., obstructions which have "more than a *de minimus* effect on the driver's vision . . . ." ***Houghton***, 364 Wis.2d 234, ¶¶60-62. Interpreting Wis. Admin. Code ch. Trans § 305.34(6) to be more restrictive than its enabling statute, such as by interpreting it to proscribe items which the enabling statute does not, would, as is argued in section I.C *infra,* render the regulation invalid under Wis. Stat. § 227.11(2)(a)3., and as such, Wis. Admin. Code ch. Trans § 305.34(6) cannot validly

[1] Wis. Stat. § 346.88(3)(a) provides in relevant part as follows: "No person shall drive any motor vehicle with any sign, poster or other nontransparent material upon the front windshield, front side wings, side windows in the driver's compartment or rear window of such vehicle other than a certificate or other sticker issued by order of a governmental agency." ***Id.***

[2] Wis. Stat. § 346.88(3)(b) provides in full as follows: "No person shall drive any motor vehicle upon a highway with any object so placed or suspended in or upon the vehicle so as to obstruct the driver's clear view through the front windshield." ***Id.***

be read to prohibit that which Wis. Stat. § 346.88(3) does not, namely, the decal tint here, which indisputably did not in any way constitute a material obstruction of Rusk's view through his vehicle's windshield.

This conclusion is reinforced by the facts in ***Houghton***: there, the police officer had stopped Houghton in part because that officer believed that Wis. Stat. § 346.88 prohibited any obstruction at all from being present between the driver and the windshield, and Houghton had a GPS unit affixed to the center of his dashboard as well as an air freshener hanging from his rearview mirror. 364 Wis.2d 234, ¶¶7, 67. Given the ***Houghton*** court's conclusion that the GPS unit and air freshener, items which certainly were more obstructive of Houghton's view through the windshield of the vehicle than the decal tint at issue here, did not violate Wis. Stat. § 346.88(3) because these items did not materially obstruct Houghton's view through his windshield, *see* ***id.***, ¶¶60-64, *a fortiori* the decal tint at issue here cannot constitute a material obstruction sufficient to violate either the statute or the regulation enforcing it.

Finally, the structure of Wis. Admin. Code ch. Trans § 305.34(6) appears to require that a given piece of material on a windshield must first constitute a violation of the prohibition stated in sub. (6)(intro) before sub. (6)(c) is even implicated. Wis. Admin. Code ch. Trans § 305.34(6)(intro) states the same prohibition that is contained in Wis. Stat. §§ 346.88(3)(a) and (3)(b) combined, and does so using identical language. Sub. (6)(c), however, states exceptions to the prohibition stated in sub. (6)(intro), and as such, logically is not implicated unless the material at issue otherwise would violate sub. (6)(intro). Because the decal tint at issue here did not constitute a "material obstruction" as that phrase is used in ***Houghton*** and therefore did not violate the prohibition stated in sub. (6)(intro), whether or not it met one of the exceptions to that prohibition is irrelevant. Accordingly, the decal tint on Rusk's windshield could not have supported a reasonable suspicion that Rusk was in violation of a traffic law by having it on his windshield, and Rusk's motion to suppress should have been granted.

C. **Even if Trooper Digre and the circuit court were correct in determining that the decal tint at issue**

here constitutes a violation of Wis. Admin. Code ch. Trans § 305.34(6)(c), that regulation contains a standard or requirement which is more restrictive than that contained in its enabling statute, Wis. Stat. § 346.88(3), and is therefore invalid and may not be enforced, rendering the traffic stop at issue here unreasonable and therefore unlawful.

As is noted above, an administrative agency may only promulgate and enforce administrative rules to the extent that such rulemaking and enforcement authority is expressly conferred on the agency by statute or by a rule that has been promulgated in accordance with subchapter II of chapter 227, Stats. Wis. Stat. §§ 227.10(2m). Although no statute expressly permits the department of transportation to promulgate and enforce windshield regulations specifically, it is authorized to promulgate and enforce regulations implementing the provisions of the motor vehicle code, including ch. 346, Stats. *See* Wis. Stat. §§ 15.46, 227.10(1), 227.11(2)(a)(intro), and 340.01(12). While it is true that prior to 2011, administrative agencies were permitted to promulgate and enforce rules even if the rules were not expressly authorized by statute if said rules could be said to be implicitly authorized by some statutory provision, the enactment of 2011 Wis. Act 21 (hereinafter "Act 21") eliminated the ability of an administrative agency to promulgate or enforce rules based on only implicit authorization by creating Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)1.-3. 2011 Wis. Act 21 §§ 1r-3. The effective date of 2011 Wis. Act 21 was June 8, 2011, long before the January 23, 2018 traffic stop at issue here.

As is relevant here, and as noted above, "[n]o agency may implement or enforce any standard, requirement, or threshold, . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [subchapter II of ch. 227, Stats.]." Wis. Stat. § 227.10(2m) (brackets and ellipsis added). Further, Wis. Stat. § 227.11(2)(a)(intro) provides that agencies are expressly authorized to "promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is

not valid if the rule exceeds the bounds of correct interpretation." ***Id.*** In addition, and as is relevant here, "[a] statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision." Wis. Stat. § 227.11(2)(a)3.

While no published appellate opinion has interpreted Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)3., the attorney general of Wisconsin has published an opinion explaining their operation, which opinion, while not binding on this or any other court, can be relied upon as persuasive authority nonetheless. *See*, *e.g.*, ***State v. Johannes***, 229 Wis.2d 215, 223, 598 N.W.2d 299 (Ct. App. 1999) ("An Attorney General's opinion is only entitled to such persuasive effect as the court deems the opinion warrants."); *see also* ***Green v. Jones***, 23 Wis. 2d 551, 558, 128 N.W.2d 1 (1964) (noting that "After this particular opinion [of the Attorney General] was rendered, several legislative changes were made in the statute, none affecting the coverage provisions of sec. 103.50 (1), Stats., construed in the opinion" and holding that it was therefore particularly appropriate to rely upon the attorney general's opinion as persuasive authority).

In this opinion, then-Attorney General Brad D. Schimel interpreted Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)3. as requiring "a three-step analytical inquiry to determine whether a rule "contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in"" its enabling statute, as the rule must not do so to avoid violation of Wis. Stat. § 227.11(2)(a)3. Wis. Op. Att'y. Gen. OAG-4-17, ¶16 (2017), https://docs.legis.wisconsin.gov/misc/oag/recent/oag_4_17 (quotation marks in original). The opinion then goes on to set forth the attorney general's proposed three-step inquiry as involving the following questions: (1) "whether both a rule and a statute contain a "specific standard, requirement, or threshold" governing the same subject matter conduct;" (2) whether the standard, requirement, or threshold prescribed by the rule when compared to the enabling statute is "more restrictive" than the standard, requirement, or threshold

prescribed by the statute; and (3) if the rule is more restrictive than the statute, whether the rule is otherwise expressly permitted by statute or valid rule." ***Id.***, ¶17. If the regulation is not expressly authorized, it may not be enforced or administered. ***Id.***, ¶24. A regulation prescribes a more restrictive standard, requirement, or threshold than its enabling statute if the regulation "restricts or limits more conduct than does the requirement announced in the statute" or if the regulation "compels additional conduct or [is] more demanding [of] the party [against] whom the standard is enforced." ***Id.***, ¶20 (brackets added).

Because there is no more precise legal guidance available for applying the prohibition contained in Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)3., what follows will apply the three-step inquiry suggested by the Attorney General, and as that analysis is very similar to the "elemental approach" used to analyze whether a regulation exceeds statutory authority, utilization of that analysis seems particularly appropriate. *See* ***Wis. Ass'n of State Prosecutors***, 380 Wis. 2d 1, ¶39 ("Under the elemental approach, the reviewing court should identify the elements of the enabling statute and match the rule against those elements. If the rule matches the statutory elements, then the statute expressly authorizes the rule.").

First, Wis. Admin. Code ch. Trans § 305.34 is the only regulation on the subject of objects in or on the windshield of a motor vehicle, and likewise, Wis. Stat. § 346.88(3) is the only statute on the subject of objects in or on the windshield of a motor vehicle. Accordingly, the inquiry shifts to a comparison of the "standard, requirement, or threshold" each provision prescribes. OAG-4-17, ¶17. Wis. Stat. § 346.88(3)(a) prohibits only the attachment of ""sign[s], poster[s]," and other items of a similar nature to the front windshield of a motor vehicle." ***Houghton***, 364 Wis.2d 234, ¶60. Similarly, Wis. Stat. § 346.88(3)(b) prohibits any object from being in the windshield of a motor vehicle only if it constitutes a material obstruction of the driver's clear view through the windshield; to be material, the obstruction must have "more than a *de minimus* effect on the driver's vision . . . ." ***Id.***, ¶¶61-65.

In contrast, the interpretation of Wis. Admin. Code ch. Trans § 305.34(6)(c) applied by Trooper Digre and accepted

by the circuit court in this matter prohibits "any material" from being on the windshield if that material extends below the A-line of the windshield. The regulation itself, in sub. (6)(intro), tracks the language of Wis. Stat. § 346.88(3) precisely, and given the interpretation of that provision set out in ***Houghton***, prohibits only the attachment of signs, posters, and other items of a similar nature to the windshield of a motor vehicle. 364 Wis.2d 234, ¶60. As is relevant here, Wis. Admin. Code ch. Trans § 305.34(6)(c) does not prohibit "[a]pplication of window tinting film or other nontransparent material to the inside of the windshield if it is attached only to that portion of the windshield which is both outside the critical area and above the horizontal line delineated by the mark "A" or "A."" ***Id.***

By implication, then, it appears that under Trooper Digre's and the circuit court's interpretation, Wis. Admin. Code ch. 305.34(6)(c) prohibits window tinting film such as the decal tint at issue here from extending below the A-line on the windshield, regardless of whether that tint constitutes a "material obstruction" as is required for a violation of Wis. Stat. § 346.88(3)(b). Accordingly, even if Trooper Digre and the circuit court were correct in their interpretation, this would only mean that Wis. Admin. Code ch. Trans § 305.34(6)(c) imposes a requirement that is more restrictive than the requirement imposed by Wis. Stat. §§ 346.88(3)(a) and (3)(b). Finally, no other provision of the statutes outside of Wis. Stat. § 345.88 even conceivably expressly confers on the Department of Transportation the authority to promulgate or enforce Wis. Admin. Code ch. Trans § 305.34(6)(c), and as such, the regulation is invalid and unenforceable. *See* Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)3; *see also* OAG-4-17, ¶¶32-33. Wis. Admin. Code ch. Trans § 305.34(6)(c) therefore cannot have supplied Trooper Digre with a reasonable suspicion that Rusk was committing a law violation by having the decal tint applied to his windshield as he did, and as such, the stop effectuated by Trooper Digre of Rusk's vehicle constituted an unreasonable and therefore unlawful seizure, requiring suppression of the results thereof.

D. **Trooper Digre's mistaken belief that the decal tint at issue here constituted a traffic law violation was an objectively unreasonable mistake of law, and therefore the circuit court**

erred in denying Rusk's motion to suppress all of the evidence obtained as a result of Trooper Digre's traffic stop of Rusk's vehicle.

Although Trooper Digre was mistaken when he determined that the decal tint on Rusk's vehicle's windshield violated a valid traffic law, mistakes of law vitiate reasonable suspicion only if they constitute objectively unreasonable mistakes of law. ***Houghton***, 364 Wis.2d 234, ¶66. In order to determine whether a given mistake of law is a reasonable one, however, the ***Houghton*** court quoted approvingly from Justice Kagan's concurrence in ***Heien v. North Carolina*** when stating the standard for determining whether a mistake of law is reasonable:

> A court tasked with deciding whether an officer's mistake of law can support a seizure thus faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not. As the Solicitor General made the point at oral argument, the statute must pose a "really difficult" or "very hard question of statutory interpretation."
>
> . . .
>
> Justice Kagan noted that the difference between a "stop lamp" and a "rear lamp" in the North Carolina statute offered "conflicting signals" as to how the statute should be interpreted. Id. at 541–42. She concluded that the sergeant's interpretation of the statute was objectively reasonable because the sergeant's "judgment, although overturned, had much to recommend it."

Houghton, 364 Wis.2d 234, ¶¶67-69 (citing and quoting ***Heien v. North Carolina***, 574 U.S. ___, 135 S.Ct. 530, 541-42, 190 L.Ed.2d 475 (2014) (Kagan, J. concurring)).

Here, while it is true that the ***Houghton*** court found the officer's mistake of law in that case to have been reasonable primarily because Wis. Stat. § 346.88(3) had not been interpreted in a previous published appellate opinion, and secondarily because the court found that its analysis of the statute was a close call, ***id.***, ¶70, ***Houghton*** was decided nearly three years prior to the traffic stop at issue. Accordingly,

although Trooper Digre was ignorant of the holding in ***Houghton*** and the effect of the interaction of that holding with the provisions of Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)3. at the time that he executed the traffic stop of Rusk's vehicle in reliance upon his erroneous belief that the decal tint violated a valid traffic regulation, such ignorance does not transform his mistake of law into a reasonable mistake. "The Fourth Amendment tolerates only reasonable mistakes, and those mistakes—whether of fact or of law—must be objectively reasonable. We do not examine the subjective understanding of the particular officer involved . . . [t]hus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce." ***Heien***, 134 S.Ct. at 539-40.

Trooper Digre thus had a duty to know the laws he enforces, and therefore, because ***Houghton*** in combination with Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)3. makes absolutely clear that Wis. Admin. Code ch. Trans § 305.34(6)(c) is invalid to the extent it purports to prohibit non-material obstructions which are not posters, signs, or other similar items, Trooper Digre's mistake of law was unreasonable. *See* ***Houghton***, 364 Wis.2d 234, ¶¶60-65. Accordingly, that mistake of law could not have supplied Trooper Digre with a reasonable suspicion that Rusk was in violation of any law, and as such, his traffic stop predicated on said mistake was unreasonable and thus unlawful. This conclusion is reinforced by the fact that the conclusion that Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)3. prohibit enforcement of those portions of Wis. Admin. Code ch. Trans § 305.34(6) which purport to impose more restrictive requirements than those imposed by the enabling statute, Wis. Stat. § 346.88(3), is readily arrived at simply by reading the relevant statutes in light of the clear holding in ***Houghton*** regarding the scope of the prohibitions contained in Wis. Stat. § 346.88(3).

Finally, this is not an exercise that requires "hard interpretive work" involving "genuinely ambiguous" statutes, particularly in light of the fact that ***Houghton*** resolved any possible ambiguity regarding Wis. Stat. § 346.88(3). *See* ***Houghton***, 364 Wis.2d 234, ¶68 (""If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a

reasonable mistake. But if not, not.”") (quoting ***Heien***, 135 S.Ct. at 541). Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)3. are not in any way ambiguous, nor is the fact that Trooper Digre's interpretation of Wis. Admin. Code ch. Trans § 305.34(6) imposes a more restrictive requirement regarding windshield tint than Wis. Stat. § 346.88(3) as interpreted by the ***Houghton*** court does. Arriving at this conclusion does not require "hard interpretive work." Trooper Digre's mistake of law was objectively unreasonable. Accordingly, suppression of any and all evidence obtained as a result of the traffic stop at issue here is required.

CONCLUSION

For the reasons discussed above, the defendant, Richard R. Rusk, respectfully requests that this court reverse and vacate the judgment of conviction entered against him in this matter, vacate the order denying his motion to suppress, and remand to the circuit court for further proceedings with instructions that the circuit court shall grant his motion to suppress.

Respectfully submitted 3/19/2018:

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CERTIFICATION

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 serif font. The length of this brief is 5,283 words.

Dated 3/28/2019:

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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:

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 3/28/2019:

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CERTIFICATION REGARDING 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 Section 809.19(2)(a), Stats., and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; 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.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 first names and last initials 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 3/28/2019:

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APPELLANT RICHARD R. RUSK'S APPENDIX –

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