

RECEIVED

06-24-2019

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2019AP000135-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RICHARD R. RUSK,

Defendant-Appellant.

ON APPEAL OF A JUDGMENT OF CONVICTION AND
ORDER DENYING MOTION TO SUPPRESS, ENTERED
IN LA CROSSE COUNTY CIRCUIT COURT, THE
HONORABLE GLORIA L. DOYLE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

Respectfully submitted,

JESSICA SKEMP
Deputy District Attorney
State Bar #1025642

Attorney for:

La Crosse County District Attorney's Office
333 Vine Street, Room 1100
La Crosse, Wisconsin 54601
(608) 785-9604
(608) 789-4853 (Fax)
jessica.skemp@da.wi.gov

TABLE OF CONTENTS

	Page
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
STANDARD OF REVIEW	3
ARGUMENT	3
I. The circuit court properly denied Rusk's motion to suppress	3
A. Legal principles	3
B. Wis. Trans. Sec. 305.34 is a valid administrative rule and Mr. Rusk's windshield decal violates both the administrative rule and Wisconsin Statutes	5
C. If this court disagreed with the State's position that Wis. Trans. 305.34(6) is a valid, enforceable regulation or that Trooper Digre correctly enforced Wis. Trans. 305.34(6)(c), his reasonable interpretation of the	

regulation is a good faith
mistake in law, and the Circuit
Court's finding that the stop of
Mr. Rusk's vehicle was lawful
should be upheld. 7

CONCLUSION	9
FORM AND LENGTH CERTIFICATION	10
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)	10
APPENDIX CERTIFICATION	11
CERTIFICATION OF MAILING	12
APPENDIX	13

TABLE OF AUTHORITIES

CASES

	Page
<i>Heien v. North Carolina</i> ,	
574 U.S. 54, 135 S.Ct. 530,	
190 L.Ed.2d 475 (2014)	7
<i>State v. Houghton</i> ,	
2015 WI 7, 364 Wis. 2d 234	passim
<i>State v. Matalonis</i> ,	
2016 WI 7, ¶ 28, 366 Wis. 2d 443,	
875 N.W.2d 567	3
<i>State v. Larsen</i> ,	
2007 WI App 147, ¶ 16, 302 Wis. 2d 718,	
736 N.W.2d 2112	3
<i>State v. Moore</i> ,	
No. 2008AP1463-CR, 2009 WL 2225804	
(Ct. App. 2009) (unpublished decision)	4
<i>State v. Busch</i> ,	
217 Wis. 2d 429, 441,	
576 N.W.2d 904 (1998)	4

STATUTES

Wis. Stat. Sec. 85.16(1)	5
Wis. Stat. Sec. 346.88(3)(a)	passim

Wis. Stat. Sec. 347.43	5
Wis. Stat. Sec. 347.435	4, 5
Wis. Stat. Sec. 809.23(1)(b)(4)	1

ADMINISTRATIVE CODE

Wis. Admin Code sec. Trans. 305.34(6)	passim
---------------------------------------	--------

ISSUE PRESENTED

Did the circuit court erroneously deny Defendant-Appellant Richard R. Rusk's motion to suppress evidence gathered by police after the traffic stop of Mr. Rusk's vehicle?

The circuit court denied Mr. Rusk's motion to suppress, concluding that Trooper Digre's decision to stop Mr. Rusk's vehicle was predicated on a correct interpretation of Wis. Admin Code sec. Trans. 305.34(6)(c).

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is precluded by Wis. Stat. § 809.23(1)(b)(4) as this appeal shall be decided by one judge. Oral argument is not requested.

STATEMENT OF THE CASE

This is an appeal from a decision and order, entered June 26, 2018 in La Crosse County Circuit Court, Branch V, Hon. Gloria L. Doyle, presiding, which denied Mr. Rusk's motion to suppress evidence obtained after an alleged unlawful stop of Mr. Rusk's vehicle when a Wisconsin State Patrol Trooper believed he observed a violation of Wis. Admin. Code sec. Trans. 305.34(6). (R. 13). The court concluded in its written decision that the Trooper was correct in his interpretation of Wis. Admin. Code sec. Trans. 305.34(6) and the subsequent stop of Mr. Rusk's vehicle was lawful and any evidence gathered as a result of that stop need not be suppressed. (R. 13:3.)

STATEMENT OF FACTS

On January 3, 2018, Wisconsin State Patrol Trooper Cody Digre observed a vehicle he described as a white Chevrolet Silverado traveling in the area of Windsor Street

and Rose Street in the City and County of La Crosse, Wisconsin. Trooper Digre's attention was drawn to a large, white window decal affixed across the top of the Silverado's windshield. (R. 29:5.)

Trooper Digre conducted a traffic stop of the vehicle based on his belief that the windshield tint or decal he observed was a violation of Wisconsin law. (R. 29:5-6.) Trooper Digre found the driver of the vehicle, Richard Rusk, to be impaired following further investigation. Mr. Rusk was ultimately placed under arrest for operating under the influence of an intoxicant. (R. 29:8.)

Mr. Rusk moved to suppress the evidence gathered following Trooper Digre's stop of his vehicle, maintaining the stop was unsupported by reasonable suspicion and purportedly made in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, Article I, Sections 7, 8, and 11 of the Wisconsin Constitution, and "all applicable statutory authority." (R. 8.) He specifically alleged that Trooper Digre's interpretation and enforcement of Wis. Admin. Code sec. Trans. sec. 305.34(6) was erroneous and unlawful in light of the Wisconsin Supreme Court's ruling in *State v. Houghton*, 2015 WI 7, 364 Wis. 2d 234. (*Id.*)

After considering the testimony of Trooper Digre at a motion hearing held on April 24, 2018, exhibits submitted during that hearing, and subsequent written legal arguments submitted by both parties, the circuit court denied Mr. Rusk's motion by issuing a written Decision and Order. (R. 13.) Mr. Rusk pled no contest to operating while intoxicated, and the court imposed a sentence consisting of 45 days jail, a fine, a 24-month license revocation, a 24-month ignition interlock device requirement, and a requirement that Mr. Rusk complete an alcohol assessment and driver safety plan. (R. 18.)

Mr. Rusk now appeals the circuit court's denial of his motion to suppress, advancing several arguments that the window decal did not violate any valid law and asserting that Trooper Digre's belief that the window tint violated a traffic law was unreasonable. (Rusk's Br. at pp 8, 17-18.)

However, the circuit court's decision was proper. Trooper Digre was trained in both Wisconsin Statutes and the Wisconsin Administrative Code as they relate to motor vehicle requirements. Trooper Digre observed a vehicle bearing a window tint or decal which violated the Wisconsin Administrative Code. (R. 29:5.) Even if the window tint or decal was determined to be lawful, Trooper Digre's stop of the vehicle in order to investigate the violation was lawful. (*See*, 13:3.) Accordingly, this Court should affirm.

STANDARD OF REVIEW

When reviewing a decision on a motion to suppress, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Matalonis*, 2016 WI 7, ¶ 28, 366 Wis. 2d 443, 875 N.W.2d 567.

ARGUMENT

I. The circuit court properly denied Rusk's motion to suppress.

A. Legal principles

"The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution prohibit 'unreasonable searches and seizures.'" *Matalonis*, 366 Wis. 2d 443, ¶ 29. While the general rule is that police need a warrant to execute a search or seizure, there are several well-defined exceptions. *State v. Larsen*, 2007 WI App 147, ¶ 16, 302 Wis. 2d 718, 736 N.W.2d 211.

The Wisconsin Supreme Court recently affirmed, “[R]easonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops.” *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis.2d 234, 868 N.W.2d 143 (2015). Further, the Wisconsin Court of Appeals has previously affirmed that law enforcement may conduct a traffic stop of a vehicle for a violation of the Wisconsin Administrative Code, holding, “[a]dministrative rules have ‘the force and effect of law.’” *State v. Moore*, No. 2008AP1463-CR, 2009 WL 2225804 (Ct. App. 2009) (unpublished decision).

The Wisconsin Supreme Court in *Houghton* specifically limited its holding to **objects** present in the front windshield of a vehicle (2015 WI ¶ 80) and also noted in its discussion that Wis. Stat. Sec. 346.88(3)(a) prohibits “the attachment of ‘sign[s], poster[s],’ and other items *of a similar nature* to the front windshield of a motor vehicle.” (Id. ¶ 60.)

Shortly after the Court’s decision in *Houghton*, the Wisconsin Legislature passed an additional statute restricting the placement of objects in a vehicle’s windshield, thereby legislatively correcting the Court’s interpretation of Wis. Stat. Sec. 346.88. *See*, Wis. Stat. Sec. 347.435, enacted February 29, 2016 in 2015 Wisconsin Act 160.

The Wisconsin Administrative Rule at issue in this appeal, Wis. Admin. Code sec. Trans. 305.34, was certified by the Secretary of the Department of Transportation on December 19, 1995, submitted to the Revisor of Statutes Bureau on December 20, 1995 and published. The authority for the code was listed as “ss. 85.16(1), 110.075, 227.10(1) and 347.35(3)(b), Stats.” and asserted that it interpreted “ss. 342.07(2), 342.20 and Ch. 347, Stats.” These regulations still must be interpreted in harmony with statutes also governing windshield obstructions, such as ss. 346.88 and 347.435. *See*, *State v. Busch*, 217 Wis. 2d 429, 441, 576 N.W.2d 904 (1998).

B. Wis. Trans. Sec. 305.34 is a valid administrative rule and Mr. Rusk's windshield decal violates both the administrative rule and Wisconsin Statutes.

Wis. Admin. Code sec. Trans. Sec. 305.34(6) is a valid administrative rule that does not exceed its enabling statutes. The enabling statutes for the code were listed on the code itself: “ss. 85.16(1), 110.075, 227.10(1) and 347.35(3)(b), Stats.” It further states that it interprets, among other statutes, Wis. Stat. ch. 347 governing the equipment of vehicles. Within Wis. Stat. ch. 347, sec. 347.43 regulates windows in vehicles, corresponding to Wis. Admin. Code sec. Trans. 305.34, which is therefore, by the face of the code itself, the enabling statute. Wis. Stat. Sec. 85.16(1), another of the listed enabling statutes, gives the Department of Transportation broad authority to establish rules to meet its duties. Wis. Admin. Code sec. Trans. Sec. 305.34(6) must also be interpreted in harmony with other statutes, particularly Wis. Stat. Sec. 346.88. *See, State v. Busch*, 217 Wis. 2d 429, 441, 576 N.W.2d 904 (1998).

Important to the interpretation of Wis. Admin. Code sec. Trans. 305.34(6), in light of the Wisconsin Supreme Court's decision in *Houghton* is a brief discussion of Wis. Stat. sec. 347.435. Wis. Stat. Sec. 346.88(3) is not the only statute that addresses objects in or on the windshield of a motor vehicle”. (*See*, Rusk's Br. at p. 16.) Wis. Stat. Sec. 347.435 clarifies 346.88(3). When read together, they state that the only devices allowed to be placed on the windshield of a vehicle are for monitoring and feedback. In passing this law after the decision in *Houghton*, the legislature implicitly rejected the statutory interpretation of the Wisconsin Supreme Court and reaffirmed that objects, other than what are specifically authorized by statute, are not permitted to be mounted to the windshield. Therefore, Wis. Admin. Code sec.

Trans. 305.34 is not more restrictive than the legislature authorized and is a valid exercise of the department's regulatory powers.

In *Houghton*, the Wisconsin Supreme Court was clear that they interpreted Wis. Stat. Sec. 346.88(3)(a) to prohibit “the attachment of ‘sign[s], poster[s],’ and other items *of a similar nature* to the front windshield of a motor vehicle.” *Houghton*, 2015 WI at ¶60. Likewise, Wis. Trans. Sec. 305.34(6) prohibits “posters, stickers or other nontransparent material”. The Court in *Houghton* went further to examine Wis. Stat. Sec. 346.88(3)(b), which prohibited objects such as the air freshener hanging from the Houghton's rearview mirror and the GPS device mounted on his windshield. These objects are very different from the decal on Mr. Rusk's windshield. The Court determined that Wis. Stat. sec. 346.88(3)(b) only prohibits these objects if they materially obstruct a driver's vision. *Id.* at ¶65. Significantly, a material obstruction can also be “minor”. *Id.*

The item displayed on Mr. Rusk's vehicle is best classified as a decal, affixed to the exterior of the windshield, not an object mounted to the interior of the windshield (R. 10.), and therefore the relevant statutory provision to be read in harmony with Wis. Admin. Code sec. Trans. 305.34(6) is Wis. Stat. Sec. 346.88(3)(a). The decal on Mr. Rusk's vehicle extends the entire width of the windshield and extends lower behind the rearview mirror. (*Id.*) From the photograph of the interior of the vehicle, the decal does not appear to be transparent. (R. 9:3.) This decal is mounted to the exterior of the windshield and is substantial and “of a similar nature” to a sign or poster on the windshield, clearly in violation of Wis. Stat. Sec. 346.88(3)(a) and 305.34(6).

The only exception to the prohibition upon “signs, posters, and items of a similar nature” to be affixed to a windshield is for tint or nontransparent material to be applied to the inside of the windshield if it is *both* outside the critical

area and above the “A line”. *See*, Wis. Admin. Code sec. Trans. 305.34(6)(c). This is not more restrictive than what is allowed in Wis. Stat. Sec. 346.88, as interpreted by *Houghton*, and therefore does not run afoul of Wis. Stat. Sec. 227.10(2m) as alleged by Mr. Rusk. The middle portion of the decal depicted in exhibit 1 (R. 10.) from the motion hearing noticeably extends several inches below the top of the windshield, appearing to exceed the A line rule which Trooper Digre testified was usually found below the “top couple inches of the windshield.” (R. 29:7.) This observed violation created a reasonable suspicion allowing Trooper Digre to stop Mr. Rusk’s vehicle and investigate further. *Houghton*, 2015 WI ¶ 30.

- C. If this court disagreed with the State’s position that Wis. Trans. 305.34(6) is a valid, enforceable regulation or that Trooper Digre correctly enforced Wis. Trans. 305.34(6)(c), his reasonable interpretation of the regulation is a good faith mistake in law, and the Circuit Court’s finding that the stop of Mr. Rusk’s vehicle was lawful should be upheld.**

In *Houghton*, the Wisconsin Supreme Court continued the longstanding practice of interpreting the Wisconsin Constitution’s provisions on search and seizure to be coextensive with the Fourth Amendment, construing the state constitution consistent with the United States Supreme Court’s construction of the federal constitution. 2015 WI 79, ¶¶ 49-50. In doing so, the Court adopted the Supreme Court’s holding in *Heien v. North Carolina*, 574 U.S. 54, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014), and concluded that “an objectively reasonable mistake of law by a police officer can form the basis for reasonable suspicion to conduct a traffic stop. *Id.* ¶ 52.

Here, Trooper Digre explained thoroughly his understanding of the Wisconsin Administrative Code, his knowledge concerning the placement of the “A-Mark” found on many motor vehicle windshields, and his belief that the decal affixed to the length of Rusk’s windshield constituted a violation of the Wisconsin Administrative Code as the decal proceeded several inches below where the “A-Mark” would normally be found. (R. 29:6-8.)

It is not unreasonable for Trooper Digre to have applied Wis. Trans. 305.34(6)(c) as written. The Wisconsin Supreme Court in *Houghton* had addressed “material obstructions” as they pertain to objects in the windshield, not tint or decals. It is reasonable to believe that an officer in Trooper Digre’s position would not interpret the language in *Houghton* to apply to items other than objects mounted inside the windshield; the Court itself had distinguished objects from other items applied to the windshield, like the large decal on Mr. Rusk’s vehicle. That Trooper Digre testified that he was unaware of the *Houghton* decision does not make his interpretation of the Administrative Code unreasonable. (See, Rusk’s Br. at 18-19.) Further, *Houghton* did not directly address the constitutionality of a traffic stop predicated upon a perceived violation of the Wisconsin Administrative Code as it relates to windshield equipment violations.

Trooper Digre effectuated a traffic stop of Rusk’s vehicle based on his reasonable belief that the window tint affixed to Rusk’s windshield would necessarily extend below the “A-Mark,” a violation of the Wisconsin Administrative Code, Transportation Code section 305.34(6)(c).

The State maintains that even if this court were to find that Trooper Digre erred in his interpretation of the Wisconsin Administrative Code or conclude that the Wisconsin Supreme Court’s holding in *Houghton* should be extended not only to statutes governing driving with an obstructed view but also to administrative code sections

setting forth objective, quantifiable measurements which window tinting cannot lawfully exceed, Trooper Digre's interpretation of the Wisconsin Administrative Code was objectively reasonable when he stopped Rusk's vehicle. Consequently, in accordance with *Houghton*, this court should nevertheless deny Rusk's Motion to Suppress.

CONCLUSION

For the reasons set forth above, the State requests that this Court affirm the circuit court's order denying Rusk's motion to suppress as well as his judgment of conviction.

Dated this 21st day of June, 2019.

Respectfully submitted,

Jessica Skemp
Deputy District Attorney
State Bar #1025642

Attorney for Plaintiff-
Respondent

La Crosse County District Attorney's Office
333 Vine Street, Room 1100
La Crosse, Wisconsin 54601-3296
(608) 785-9604
(608) 789-4853 (Fax)
jessica.skemp@da.wi.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,357 words.

Jessica Skemp
Deputy 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 at La Crosse, Wisconsin, this 21st day of June, 2019.

Jessica Skemp
Deputy District Attorney

APPENDIX CERTIFICATION

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 Wis. Stat. § 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.

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 this 21st day of June, 2019.

Jessica Skemp
Deputy District Attorney

CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on June 21, 2019, I deposited in the United States mail for delivery to the clerk by first-class mail, the original and ten copies of the plaintiff-respondent's brief and appendix.

Dated this 21st day of June, 2019.

Jessica Skemp
Deputy District Attorney