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-CR

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

REPLY BRIEF OF DEFENDANT-APPELLANT

JEREMIAH WOLFGANG MEYER-O'DAY
Attorney at Law
State Bar #1091114

Martinez & Ruby, LLP
144 4th Ave, Suite 2
Baraboo, WI 53913
(608) 355-2000

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Acts, Statutes, and Administrative Code Provisions Cited

Wisconsin Acts

Wisconsin Statutes

Other Authorities Cited

STATE OF WISCONSIN

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ARGUMENT

I. THE SOLE SUBSTANTIVE AUTHORITY FOR WIS. ADMIN. CODE CH. TRANS § 305.34 IS FOUND IN WIS. STAT. § 346.88, AND DUE TO THE OPERATION OF WIS. STAT. § 227.10(2m), THE REGULATION IS ONLY VALID AND ENFORCEABLE TO THE EXTENT THAT IT DOES NOT IMPOSE A MORE RESTRICTIVE STANDARD, REQUIREMENT, OR THRESHOLD THAN THE STANDARDS, REQUIREMENTS, AND/OR THRESHOLDS CONTAINED IN THE STATUTE, AND AS A RESULT, A CONSTRUCTION OF THE REGULATION WHICH RENDERS THE DECAL AT ISSUE HERE UNLAWFUL IS NOT PERMITTED.

A. **Most of the statutes cited by the State have nothing to do with windshields, and of the statutes cited by the State as enabling the promulgation of Wis. Admin. Code ch. Trans § 305.34(6), none do anything other than grant the Department of Transportation the authority to interpret the statutes it is charged with administering, and the legislature has acquiesced in *Houghton*'s interpretation of Wis. Stat. § 346.88, which is the sole statute which provides the authority for the regulation's promulgation and enforcement.**

The State offers up several alternative sources of statutory authority for the promulgation and enforcement of Wis. Admin. Code ch. Trans § 305.34, but of those statutes, none provide any authority independent of Wis. Stat. § 346.88 for the regulation, and indeed several of them have nothing at all to do with the regulation of items placed on windshields. Wis. Stat. § 85.16(1), for instance, provides in relevant part as follows: "The secretary may make reasonable and uniform orders and rules deemed necessary to the discharge of the powers, duties and functions vested in the department." In the present context, this is nothing more than a general grant of authority to interpret and apply the statutes the department of transportation is charged with administering and does not grant the department any greater rulemaking authority than that granted to it by Wis. Stat. § 227.10(1).

The State also makes the following statement in its brief regarding the authority for Wis. Admin. Code ch. Trans § 305.34: "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." (State's brief at 5). This is simply false. Wis. Stat. § 347.43 is captioned "Safety glass," and requires that window glass used in vehicles be "treated or combined with other materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by objects from external sources or by such glass when it is struck, cracked or broken." Wis. Stat. §§ 347.43(1g) and (1s).

The State also claims that the legislature enacted Wis. Stat. § 347.435 in order to "legislatively correct[]" the Supreme

Court's interpretation of Wis. Stat. § 346.88 in ***State v. Houghton***, 2015 WI 79, 364 Wis.2d 234, 868 N.W.2d 143. (State's brief at 4) (brackets added). This statement is also clearly false. Wis. Stat. § 347.435 does not implicate any portion of the ***Houghton*** court's interpretation of Wis. Stat. § 346.88 as not prohibiting *de minimis* obstructions on a windshield, as it deals with devices mounted to the front windshield whose purpose is to "monitor the vehicle and provide feedback to the operator for the purpose of safety or improving vehicle operation" and/or to comply with applicable federal regulations. *See generally* Wis. Stat. § 347.435.

Houghton, by contrast, involved an air freshener and a GPS unit, neither of which have anything at all to do with vehicle monitoring and feedback. ***Houghton***, 364 Wis.2d 234, ¶¶3-6. In any event, if the legislature had disagreed with the Supreme Court's interpretation of Wis. Stat. § 346.88 in ***Houghton***, it would have amended Wis. Stat. § 346.88 to "correct" that interpretation; this it did not do, and thus, the legislature did not "correct" but in fact indicated its agreement with ***Houghton***'s construction of Wis. Stat. § 346.88. *See, e.g.*, ***Progressive Northern Ins. Co. v. Romanshek***, 2005 WI 67, ¶¶52, 56-57, 281 Wis.2d 300, 697 N.W.2d 417 (legislative silence in face of court interpretations indicates legislative approval of the court's interpretation, particularly where the legislature acted in related areas but did nothing to alter the court's interpretation).

Finally, there is nothing in the legislative history of 2015 Wis. Act 160 to indicate an intent that Wis. Stat. § 347.435 somehow alters the meaning of Wis. Stat. § 346.88 as construed by the Supreme Court in ***Houghton***. 2015 Wis. Act 160 enacted into law 2015 A.B. 651. The drafting file for 2015 A.B. 651 contains only one statement as to the purpose of the enactment, which is reproduced in full here:

> Under current law, no person may drive a motor vehicle on a highway with any object so placed as to obstruct the driver's clear view through the front windshield. This bill allows a person to operate a motor vehicle that has a monitoring and feedback device mounted to the front windshield directly above, behind, or below the rearview mirror.

Drafting file for 2015 A.B. 651 at 3, Wis. Legis. Reference Bureau, Madison, Wis., *available at* https://docs.legis.wisconsin.gov/2015/related/drafting_files/wisconsin_acts/2015_act_160_ab_651/02_ab_651/15_2615df.pdf.

As can be seen, the above analysis by the Legislative Reference Bureau makes clear that the legislature knew it was legislating against a background of law which included ***Houghton***'s interpretation of Wis. Stat. § 346.88, as it uses the same language the Supreme Court used there to describe what the statute proscribes. *See* ***Houghton***, 364 Wis.2d 234, ¶65 (holding that "Wis. Stat. § 346.88(3)(b)—which requires that an object "obstruct" a driver's clear view to be a violation—does not mean that every object in a driver's clear view is a violation. Rather, we interpret subsection (3)(b) as requiring a *material* obstruction—even if minor—in order to be considered a violation of the statute.") (emphasis in original). Accordingly, ***Houghton***'s construction of Wis. Stat. § 346.88 remains the law.

B. **The State misreads and therefore misapplies *Houghton*, and on a proper reading of *Houghton*, Wis. Stat. § 346.88 does not prohibit the decal at issue here, rendering Trooper Digre's belief that Wis. Admin. Code ch. Trans § 305.34(6) prohibits the decal at issue here mistaken, as the regulation cannot be enforced against such a decal where the regulation's enabling statute would not prohibit it pursuant to Wis. Stat. § 227.10(2m) and 227.11(2)(a)3.**

The State also argues that Wis. Stat. § 346.88 as interpreted by ***Houghton*** still prohibits the decal at issue here, and does so by arguing that GPS units and air fresheners are "very different from the decal on Mr. Rusk's windshield[,]" and that the decal is "of a similar nature to" a sign or poster or windshield," rendering it "clearly in violation of Wis. Stat. Sec. 346.88(3)(a) and [Trans. Sec.] 305.34(6)." This argument is wholly without merit, as it ignores key portions of the discussion of the meaning of Wis. Stat. § 346.88 in ***Houghton*** and further ignores the extremely *de minimis* nature of the "obstruction" that was created by the less than square inch

intrusion of the decal into the windshield below it's A-line.

First, the Supreme Court in ***Houghton*** drew a distinction between *de minimis* obstructions in a windshield, which it held do not violate Wis. Stat. § 346.88, and *material* obstructions in a windshield, which it held *do* violate Wis. Stat. § 346.88. ***Houghton***, 364 Wis.2d 234, ¶65. In so doing, it focused on the meaning of "obstruct," holding that in order to violate the statute, "an object needs to have more than a de minimus effect on the driver's vision to be considered an "obstruction" of a driver's clear view." ***Id.*** at ¶¶61-62. In arriving at this conclusion, the Supreme Court expressly considered several items which although not present in the facts of the case it considered to also not violate the statute, among which was an oil change sticker:

> For example, what if the area of the windshield beyond the range of the wipers is entirely covered with snow? Under the State's argument, the presence of the snow may not be a violation. However, if the driver were to stop and clean the entire windshield—***thereby exposing a one-inch by two-inch oil change sticker***—the driver may then be subject to a ticket, even though the driver's view would be significantly less obstructed than it would have been had the driver not cleaned away the snow.

Id. at ¶60 n. 9 (emphasis added).

Notably, this discussion immediately precedes the court's statement that it would "interpret subsection (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." ***Id.*** at ¶60. Accordingly, the Supreme Court clearly held that a "decal" such as a two square inch oil change sticker was not an "item of a similar nature to" "sign[s]" or "poster[s]." The State's argument to the contrary is disingenuous at best.

This is particularly so in light of the fact that with respect to the decal at issue here, less than two square inches of it extended below the A-line area and even then only in the area already obstructed by the rearview mirror, and as such, the decal at issue here is even less of an obstruction than the two square inch oil change sticker discussed by the ***Houghton*** court. (R.9:1-3). The conclusion that the decal at issue here was

at worst a *de minimis* obstruction of Mr. Rusk's view through his windshield is reinforced by the officer's concession during the motion hearing here that the decal did not in any way impede Mr. Rusk's clear view through the windshield. In response to several direct question asking whether the decal on Mr. Rusk's windshield would have impeded a normally seated driver's panoramic view through the windshield, the trooper indicated that it would not have done so, while simultaneously maintaining that the decal did not have to obstruct the driver's view in order to violate Wis. Admin. Code ch. Trans § 305.34. (R.27:19).

Contrary to the State's argument, the trooper's interpretation of Wis. Admin. Code ch. Trans § 305.34 *is* more restrictive than ***Houghton***'s interpretation of Wis. Stat. § 346.88, and therefore cannot permissibly be enforced under Wis. Stat. § 227.10(2m), as the regulation as interpreted by Trooper Digre prohibits a decal whose intrusion into the windshield's "critical area" (the area below the A-line) is of a similar character to an oil change sticker; less than two square inches in size and presenting no more than a *de minimis* obstruction of the view through the windshield. Wis. Stat. § 346.88 prohibits only "material" obstructions, which by definition must have more than a *de minimis* impact on the ability to see clearly through the windshield, ***Houghton***, 364 Wis.2d 234, ¶65, and as such, Trooper Digre's opinion that the decal at issue here represented an enforceable violation of Wis. Admin. Code ch. Trans § 305.34 was a mistake of law, and as shall be shown below, this was an unreasonable mistake of law.

II. TROOPER DIGRE'S MISTAKEN BELIEF THAT WIS. ADMIN. CODE CH. TRANS § 305.34(6) WAS VIOLATED BY THE DECAL AT ISSUE HERE WAS NOT A REASONABLE MISTAKE OF LAW, AND THEREFORE SUPPRESSION IS REQUIRED.

Only reasonable mistakes of law can support reasonable suspicion of a law violation. ***Houghton***, 364 Wis.2d 234, ¶79. The State's argument that Trooper Digre's mistake of law here was reasonable attempts to draw a distinction between objects in the windshield on the one hand and tint or decals on the other, and from that distinction, the State argues that ***Houghton***

only dealt with objects in the windshield, not tint or decals. (State's brief at 8). As noted above, this distinction fails in light of the Supreme Court's example of a *de minimis* obstruction in footnote 9 of ***Houghton***: a one inch by two inch oil change sticker. ***Id.*** at ¶60 n. 9. First, stickers are clearly "decals," and second, they are also clearly "objects."

The State also apparently argues that because Trooper Digre was interpreting the administrative code provision interpreting Wis. Stat. § 346.88, and because ***Houghton*** did not expressly deal with the regulation itself but rather its enabling statute, his mistake of law had to be reasonable. This argument fails for at least this reason: it has been the law since at least mid-2011 that no regulation can be enforced to the extent it contains a standard, threshold, or requirement that is more restrictive than the standard, threshold, or requirement set forth in the statute it purports to interpret. *See* Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)3, created by 2011 Wis. Act 21, with an effective date of June 7, 2011.

Accordingly, and contrary to the State's argument, it is highly significant that Trooper Digre was completely unaware of the Supreme Court's construction of Wis. Stat. § 346.88 in ***Houghton***, as "[t]he Fourth Amendment tolerates only reasonable mistakes, and those mistakes—whether of fact or of law—must be objectively reasonable . . . [w]e 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 v. North Carolina***, 574 U.S. ___, 135 S.Ct. 530, 539-40, 190 L.Ed.2d 475 (2014) (brackets and ellipses added).

Here, the officer completely failed to study the law at all, much less do so sloppily, and as such, the officer's mistake of law cannot be deemed reasonable. Trooper Digre may have explained *his* understanding of the Wisconsin Administrative Code as noted by the State, *see* State's brief at 8, but this is irrelevant; had Trooper Digre engaged in a proper study of the law, he would have been aware of the fact that the regulation cannot validly be more restrictive than its enabling statutes under Wis. Stat. §§ 227.10(2m) and 227.11(2)(a)3., and he would further have been aware of the fact that Wis. Stat. §

346.88 was interpreted in ***Houghton*** nearly three years prior to the stop at issue here to not prohibit stickers which do not constitute material obstructions of the view through the windshield, *see* ***id.*** at ¶¶60 n. 9, 62-65. Taken together, these insights would have made it impossible for Trooper Digre to reasonably believe that Mr. Rusk's windshield decal constituted an enforceable violation of Wis. Admin. Code ch. Trans § 305.34, and as such, his mistake of law was unreasonable. Mr. Rusk's motion to suppress therefore should have been granted. ***Houghton***, 364 Wis.2 234, ¶79 (only reasonable mistakes of law prevent suppression of evidence).

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 7/14/2019:

Jeremiah Wolfgang Meyer-O'Day
State Bar No. 1091114

Martinez & Ruby, LLP
144 4th Avenue, Suite 2
Baraboo, WI 53913
Telephone: (608) 355-2000
Fax: (608) 355-2009

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 2,472 words.

Dated 7/14/2019:

JEREMIAH WOLFGANG MEYER-O'DAY
Attorney at Law
State Bar No. 1091114

Martinez & Ruby, LLP
144 4th Avenue, Suite 2
Baraboo, WI 53913
Telephone: (608) 355-2000
Fax: (608) 355-2009

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 7/14/2019:

_____

JEREMIAH WOLFGANG MEYER-O'DAY
Attorney at Law
State Bar No. 1091114

Martinez & Ruby, LLP
144 4th Avenue, Suite 2
Baraboo, WI 53913
Telephone: (608) 355-2000
Fax: (608) 355-2009