STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
****

CASE NO. 2019AP00789-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2017 CT 444**
(Walworth County)

JAMIE ELLIN GRIMM,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS, ENTERED IN THE CIRCUIT COURT FOR WALWORTH COUNTY, THE HONORABLE PHILLIP KOSS PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

BY:

Philip J. Brehm
Atty For Defendant-Appellant
23 West Milwaukee St., #200
Janesville, WI 53548
608/756-4994
Bar No. 1001823

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STATEMENT OF ISSUE

I. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

On 2/12/18, the trial court orally denied defendant's motion to suppress evidence (58:12-19, App. at 101-08). An order denying defendant's motion to suppress was entered on 4/25/19 (52, App. at 109).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. As this is a one-judge appeal, the case is not eligible for publication.

STATEMENT OF THE CASE

On 9/19/17, a criminal complaint was filed in Walworth County Circuit Court against defendant Jamie Ellin Grimm alleging the commission of the offenses of operating while intoxicated as a second offense and operating with a prohibited alcohol concentration as a second offense, the offenses allegedly occurring on 9/3/17 (1). On 10/23/17, defendant filed a motion to suppress evidence related to the stop of her vehicle and her subsequent arrest (9). A motion to suppress was heard over two days, 1/8/18 and 2/12/18 (57, 58). At the conclusion of the suppression hearing, the trial court orally denied the motion (58:12-19, App. at 101-08). An order denying the motion to suppress was entered 4/25/19 (52, App. at 109).

On 10/25/18, a jury trial commenced (60). At the conclusion of the trial, the jury found defendant not guilty of operating while intoxicated as a second offense (38). The jury found defendant guilty of operating with a prohibited blood alcohol concentration as a second offense (39).

On 11/21/18, the court sentenced defendant to 14 days in jail, imposed a fine of $350 plus costs, revoked defendant's license for 12 months, imposed a requirement of 12 months of ignition interlock and ordered defendant to obtain an assessment (55:7). The sentence has been stayed pending appeal (46). On 4/23/19, a notice of appeal was entered (50).

STATEMENT OF FACTS

The issue in this case is whether the arresting officer had a legal basis to detain defendant's vehicle. During the first part of the suppression hearing on 1/8/18, the arresting officer, Officer Sean Blanton of the Sharon Police Department testified (57:4-37). Before he testified, a squad video was viewed by the parties and was made a part of the record, Exhibit 1 (15, 57:2). Officer Blanton testified he was working on 9/3/17 at 11:32 p.m. (57:5). He testified he was traveling east on State Line Road in Walworth County when a vehicle approached him from the west with its high beams on and the driver failed to dim them (57:5-6). He testified he was familiar with the difference between high beams being on and off (57:5). He testified the law requires a person to dim their high beams within 500 feet of an oncoming car (57:6). He testified the vehicle never dimmed its lights (57:6-7). He testified he pulled over the vehicle (57:7). Defendant was the sole occupant of the vehicle (57:7). He testified defendant admitted she had forgotten to dim the lights (57:7). Thereafter, Officer Blanton testified he observed indicia of intoxication (57:8). Defendant Grimm tested .097 on the PBT (57:12). Defendant was arrested for operating while intoxicated (57:13, 27).

On cross-examination, Officer Blanton testified he did not flash his bright lights at defendant (57:14). He did not testify as to whether his own bright lights were on or off. He testified he did not observe any other driving offenses (57:15).

The video evidence contradicts Officer Blanton's testimony in that during the video, defendant's high beams were not on as she approached Officer Blanton and that her high beams were flashed one time for less than a second as she met him (15).

On 2/12/18, the second day of the suppression motion hearing, the accuracy of Officer Blanton's testimony was called into question during argument by the defense:

> Your honor, initially regarding the stop, the officer testified that my client was driving with high beams on from when he first saw the vehicle until it passed the officer. The court has seen the video. I would agree that what the officer testified to would be a violation of 347.12, which stats that whenever the operator of a vehicle equipped with multiple beamed headlights approaches or follows another within 500 feet, then they have to turn off the high beams or direct the headlamps. But what actually happened, the video is very clear, it is not a violation of 347.12 The video clearly shows that [defendant] flashed her brights, and the conversation with the officer indicates that that's what he saw. But there is no testimony that that within 500 feet of the officer's vehicle. And you can't tell from the video because just the inherent way the videos are, you can't estimate 500 feet for two vehicle that are approaching each other at a 45 mile-an-hour speed zone. The officer's testimony did not clear up whether the flashing was within 500 feet; and so there was no testimony on that. And so there was not, in this record, a reasonable suspicion to stop any vehicle, my client's vehicle. But if the court did decide that that, based on the video or somehow, says that the flashing of the brights was within 500 feet, the statue talks about approaching vehicles or following vehicles. And that talks about vehicles moving, traveling towards another vehicle. And in this case, as soon as the brights were on, they were dimmed. It was just a flashing of the brights for a fraction of a second. And that's what the statute says to do. If you're traveling within 500 feet of another vehicle and your brights are on, you have to dim them; and that's what [defendant] did. And I think, and I think that makes sense; that's what the legislature meant (58:4-5).

The trial court responded:

All right, I've reviewed the video again, and Officer Blanton does ask [defendant], "Do you know why I'm stopping you?" And she says "no." And he says you flashed your bright lights at me; you can't do that. She gives some reasons why she did it. So it's not quite consistent. I got the impression from his testimony that she was—he was saying [defendant] was driving with her brights continuously on, and that's how the testimony seemed. 347.12 states:

> Whenever the operator of a vehicle equipped with multiple-beam headlights—headlamps approaches an oncoming vehicle within 500 feet, the operator shall dim, depress or tilt the vehicles headlights so … the glaring rays are not directed in the eyes of the operator of the other vehicle. This paragraph does not prohibit an operator from intermittently flashing the vehicle's high-beam headlamps at the oncoming vehicle whose high-beam headlamps are lit.

They are approaching each other on east/west road leading into Sharon. She's coming from Lake Geneva. I read 347.12(1)(a)—let me just say as a preface here, unfortunately for [defendant] this case raises a lot of interesting issues that result in her being here today. I have to interpret—well, if Blanton is saying she did not dim her headlights at all, clearly there is a basis to stop. If Blanton is saying you flashed them at me one time, that's a much closer case. But the statute only permits, apparently, according to the second sentence, when it says: This paragraph does not prohibit an operator from intermittently flashing at a vehicles are on as they approach, you could read that to say therefore, it does not prohibit an operator from flashing high beams when it's not for that reason. So it appears it's a violation, according to the way the statute is read—written, a violation of 347.12 either way. With that, by the way—and I'll make a finding that they were flashed, or at least that's what—based on the most—on the best evidence, which I think is what he immediately says to [defendant] at the scene and how she is answering in context, as if they were flashed. So for appellate purposes, [defense counsel], I'll make a finding that they were not on constantly but were flashed. And when Officer Blanton—who frankly I believe gave credible testimony. I think he was summarizing that it was just driving with

> high beams in the way he later—or was earlier described in the video. So I'm still finding that there was a basis to stop, as a violation of 347.12(1)(a) (58:12-14).

ARGUMENT

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS BECAUSE DEFENDANT'S VEHICLE WAS UNLAWFULLY STOPPED.

A. Standard of review.

The relevant standard of review is set forth in *State v. Popke,* 2009 WI 37, ¶¶10-11, 317 Wis.2d 118, 765 N.W.2d 569:

> Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact. *State v. Mitchell*, 167 Wis.2d 672, 684, 482 N.W.2d 364 (1992); *State v. Williams*, 2001 WI 21, ¶18, 241 Wis.2d 631, 623 N.W.2d 106. A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the "clearly erroneous standard," and the application of these historical facts to constitutional principles, which we review de novo. *Id*., ¶¶ 18-19.
>
> "The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of the Fourth Amendment." *State v. Gaulrapp*, 207 Wis.2d 600, 605, 558 N.W.2d 696 (Ct.App.1996) (citing *Whren v. United States*, 517 U.S. 806, 809-10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996)). An automobile stop must not be unreasonable under the circumstances. *Gaulrapp*, 207 Wis.2d at 605, 558 N.W.2d 696 (citing *Whren*, 517 U.S. at 810, 116 S.Ct. 1769). "'A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred,' *id*., or have grounds to reasonably suspect a violation has been or will be committed." *Gaulrapp*, 207 Wis.2d at 605, 558 N.W.2d 696 (citing *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317, (1984); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, (1968)).

B. Wis. Stat. §347.12.

Wis. Stat. §347.12 in relevant part reads:

> (1) Whenever a motor vehicle is being operated on a highway during hours of darkness or during a period of limited visibility, the operator shall use a distribution of light or composite beam directed high enough and of sufficient intensity to reveal a person or vehicle at a safe distance in advance of the vehicle, subject to the following requirements and limitations:
>
> (a) Whenever the operator of a vehicle equipped with multiple-beam headlamps approaches an oncoming vehicle within 500 feet, the operator shall dim, depress or tilt the vehicle's headlights so that the glaring rays are not directed into the eyes of the operator of the other vehicle. This paragraph does not prohibit an operator from intermittently flashing the vehicle's high-beam headlamps at an oncoming vehicle whose high-beam headlamps are lit.
>
> (b) Whenever the operator of a vehicle equipped with multiple-beam headlamps approaches or follows another vehicle within 500 feet to the rear, the operator shall dim, depress, or tilt the vehicle's headlights so that the glaring rays are not reflected into the eyes of the operator of the other vehicle. This paragraph does not prohibit an operator from intermittently flashing the vehicle's high-beam headlamps as provided under par. (a).

C. State v. Tomaszewski.

In support of its argument at the circuit court level, the State cited *State v. Tomaszewski,* 2010 WI App 51, 324 Wis.2d 433, 782 N.W.2d 725 (13:3). In *Tomaszewski,* defendant was following a semi truck with his high beams on within 400 feet of the truck. A Wisconsin State trooper observed his actions. He was pulled over for violating Wis. Stat. §347.12 (Wisconsin Statutes 1999-2000 version). He appeared to be intoxicated. He was later arrested for operating while intoxicated. He filed a motion to suppress, arguing that because the truck did not have a rear window, his headlights could not have blinded the trucker and he could not have violated the statute. The appellate court rejected this argument. While the court found that defendant's failure to

dim his lights within 500 feet of the truck was a basis to stop defendant's vehicle, the court did not address the issue relevant to this case, that is whether a brief flash of the high beams is a lawful basis to stop a vehicle. *Tomaszewski* does not resolve the issue before the court.

In reaching its decision, the *Tomaszewski* court found the applicable statute "assumes the use of high beams within 500 feet will cause impairment, and prohibits their use." *Id.* at ¶10. It is worth noting that while *Tomaczewski* was decided in 2010, defendant Tomaczewski's arrest for operating while intoxicated occurred on 8/4/99. At that time, Wis. Stat. §347.12 was different. §347.12(a) and (b) did not include the language; "**This paragraph does not prohibit an operator from intermittently flashing the vehicle's high-beam headlamps as provided under par. (a)**." (emphasis added). This language was added by 1999 Wisconsin Act 66, enacted on 4/25/00, eight months after Tomaczewski's arrest. This newer version of the statute has remained the same since 2000.

D. Other relevant law.

Counsel for defendant was unable to find a Wisconsin case that addresses the specific issue raised in this case. However, counsel did find the case of *Sarber v. Comm'r of Pub. Safety,* 819 N.W.2d 465 (Minn. App., 2012), a case closely on point from the sister state of Minnesota. In *Sarber,* a sheriff's deputy was on patrol during the late night hours of 8/9/11, when he noticed defendant's vehicle approaching from the other direction. Its low beams were illuminated. When it was within six to seven hundred feet of the deputy's vehicle, defendant flashed his high beams once at the deputy. When it was a "couple hundred feet closer," defendant flashed his high beams a second time for less than a second. Both flashes occurred in quick succession. The deputy assumed defendant was signaling him to dim his lights. The deputy conducted a traffic stop based solely on the flashing headlights which he believed was a violation of Minn. Stat. §169.61 (2010 version), which provided:

> COMPOSITE BEAM. (a) When a motor vehicle is being operated on a highway or shoulder adjacent thereto during the times when lighted lamps on vehicles

> are required in this chapter, the driver shall use a distribution of light, or composite beam, directed high enough and of sufficient intensity to reveal persons and vehicles at a safe distance in advance of the vehicle, subject to the following requirements and limitations. (b) When the driver of a vehicle approaches a vehicle within 1,000 feet, such driver shall use a distribution of light, or composite beam, so aimed that the glaring rays are not projected into the eyes of the oncoming driver. (c) When the driver of a vehicle follows another vehicle within 200 feet to the rear, except when engaged in the act of overtaking and passing, such driver shall use a distribution of light permissible under this chapter other than the uppermost distribution of light specified in section 169.60.

In addressing the issue, the court noted:

> Examining the language of the statute, the legislature's inclusion of the term "glaring" leads us to conclude that briefly flashing or flickering one's high beams at an oncoming vehicle is not a violation, unless another driver was at least temporarily blinded or impaired by the lights. … A light is "glaring" if it shines intensely and blindingly. … Briefly flashing one's high beams at another driver does not, standing alone, amount to use of a light "intensely and blindingly." A bright light of extremely short duration does not amount to "glaring rays." Accordingly, it is common practice for drivers to flash their high beams to warn other drivers of hazards, or to signal others to adjust their own headlights. … In some instances, then, flashing one's high beams may serve to avert risk rather than cause it. *Id.* at 468-69.

The Minnesota court found there was no basis to pull over the defendant:

> At the implied-consent hearing, the deputy testified that the sole basis for the traffic stop was appellant's actions in twice flashing his high beams at the deputy. The district court found that this flashing was directly visible to oncoming traffic. However, the deputy did not testify that the high beams blinded, distracted or otherwise impaired him or any other drivers. To the contrary, the deputy affirmed that what he saw amounted to two "very quick flash[es]," each less than a second in duration. The deputy testified that he assumed appellant was merely trying to signal him to dim his own headlights. The record reveals no other articulable facts, besides the

> headlight-flashing, that would have supported the stop. In fact, the deputy testified that he was specifically attentive to the possibility of other traffic violations, but saw none. Because there was no indication that this brief flashing projected "glaring rays… into the eyes of the oncoming driver," appellant's behavior did not violate the statute. Minn. Stat. §169.61(b). The commissioner thus failed to meet his burden in establishing a reasonable justification for the stop. As the record unquestionably reflects the sole basis for the traffic stop was the deputy's mistaken interpretation of the law, the stop was unjustified. *Id.* at 472.

Sarber includes cites to cases in Minnesota and other states. In reaching its conclusion, the *Sarber* court noted an unpublished decision from Wisconsin had reached the same conclusion, as had the court in the New York case of *People v. Lauber,* 162 Misc.2d 19, 617 N.Y.S.2d 419 (N.Y.App. Term 1994).

In *Lauber,* the court held that a mere showing the defendant had "flipped" or "flicked" her high beams at approaching vehicles to warn them of the presence of a traffic officer was insufficient to establish a violation of a similar statute. *Id.* at 419-20. The relevant statute in *Lauber* read: "[W]henever a vehicle approaching from ahead is within five hundred feet … shall be operated so that dazzling light does not interfere with the driver of the approaching vehicle." *Id.* at 419.

The *Sarber* court cited to a North Dakota case, *State v. Westmiller,* 730 N.W.2d 134 (N.D. 2007), where the court reached a contrary conclusion. In *Westmiller,* the court found the plain language of the relevant statute did not authorize the intermittent flash of the high beams within 500 feet of an approaching vehicle.

E. Analysis.

Defendant does not challenge the trial court's findings of fact. Defendant challenges the trial court's conclusion of law. The trial court's conclusion of law is subject to de novo review.

The State had the burden of proof at the suppression hearing. It had to demonstrate there was reason to believe defendant had violated a traffic law at the time the officer stopped her. The focus is what information Officer Blanton had at the time he made the decision to pull over defendant. The evidence shows Officer Blanton pulled over defendant for one alleged traffic violation. Officer Blanton admitted there were no other alleged violations. While he testified he stopped her because she failed to dim her high beams as she approached him, the trial court correctly disregarded that testimony. The video evidence showed that defendant flashed her high beams a single time for less than one second as she approached Officer Blanton. As the video demonstrates, after he pulled over defendant Grimm, the first thing he said to her was that she could not flash her high beams at him. That was simply not accurate. Officer Blanton's motivation for the stop was the result of his incorrect understanding of the law. Wis. Stat. §347.12 allows a driver to flash their high beams at an approaching vehicle if that vehicle's high beams are lit.

> 1. As the record is silent as to whether Officer Blanton had his high beams on, the State has not demonstrated reasonable suspicion to stop.

In support of its argument in favor of the legality of the stop, the State asserted defendant's failure to dim her high beams at all as she approached Officer Blanton was a sufficient basis to detain defendant (13:2-3, 58:3). The evidence did not support that theory and the trial court so found. The State did not address the issue as to whether a single flash of the high beams within 500 feet of an oncoming driver would be a sufficient legal basis to stop a driver.

The record is silent as to whether Officer Blanton had his high beams on as he approached defendant. The record fails to demonstrate Officer Blanton had on his low beams only at the time he approached defendant's vehicle. From this record, one cannot conclude Officer Blanton had reasonable suspicion to stop defendant's vehicle because, if he had his high beams on, defendant Grimm's actions were lawful. As the State failed to demonstrate there was reason to believe defendant violated the statute, the stop should be found unlawful.

It is important to remember the focus is on what facts the officer had at his disposal at the time he decided to stop defendant, not what was discovered by the officer at the time of the stop. In other words, the defendant's stated reasons for flashing the high beams is not dispositive on the issue of whether the stop of defendant's vehicle was lawful. Regardless of whether defendant Grimm flashed her high beams to remind Officer Blanton to dim his lights or she did it by mistake, there would be no reason for Officer Blanton to reasonably believe defendant Grimm was violating the statute if he had his own high beams on.

2. The law and analysis from *Sarber,* a Minnesota case, supports defendant's position.

Regardless of any insufficiencies in the record, based on the law cited from *Sarber* and *Tomaszewski,,* the purpose of statutes like Wis. Stat. §347.12 is to prevent approaching drivers from being blinded by high beams. In *Tomaszewski,* the court wrote:

> The statute directs drivers operating within 500 feet to dim their headlights, and concludes by describing the purpose of this requirement: to prevent the glaring rays from reflecting into another driver's eyes. *Id.* at ¶10.

The *Sarber* decision supports defendant Grimm's position. The analysis from *Sarber* is logical and compelling. The *Sarber* court's focus was on a Minnesota statute similar to Wisconsin's. Arguably, the Minnesota statute was more restrictive in that it did not contain the Wisconsin exception that allows a driver to intermittently flash their high beams at an approaching vehicle. There is no Wisconsin appellate case that resolves the relevant issue.

This court should adopt the legal analysis from *Sarber*. As recognized in *Sarber,* an intermittent flash of a high beam is not "glaring." Like in *Sarber,* an intermittent flash is authorized by Wis. Stat. §347.12. As noted in *Sarber,* drivers often flash their high beams at an oncoming driver to remind the approaching driver to dim their lights or to warn of road

hazards. This is common practice for conscientious drivers. It is not cause for concern. The practice is codified in Wis. Stat. §347.12's exception. When one looks at the cases cited by the *Sarber* court, it is apparent defendant Grimm's position is consistent with that of other state appellate courts.

3. The State has not cited persuasive law in support of its position.

In its brief in support of its position, the State cited *Thomaszewski* (13:3). In reviewing the State's argument before and after the testimony at the suppression hearing, it is apparent the State's argument was grounded in its belief it had shown defendant Grimm had failed to dim her high beams as she approached Officer Blanton (13:3). While that would be a legally compelling argument, this factual premise was clearly rejected by the trial court in its oral ruling (58:12-14). The State did not cite any case that specifically authorized an officer to detain a vehicle for flashing its high beams at an oncoming vehicle. There is no such case in Wisconsin. Again, this court should adopt the analysis from the Minnesota case of *Sarber.*

CONCLUSION

For the reasons set forth above, defendant's motion to suppress should be granted and the matter should be remanded to the trial court for further proceedings.

Dated: 7/8/2019

_____
Philip J. Brehm
Attorney for Defendant

23 West Milwaukee, #200
Janesville, WI 53548
608/756-4994
Bar No. 1001823

CERTIFICATION AS TO FORM AND LENGTH/APPENDIX CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 4343 words. I certify that filed with this brief, as part of this brief, an appendix complying with s. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court entries;

(3) the findings or opinions of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning related to those issues.

I further certify 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: 7/8/2019

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Philip J. Brehm

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of 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 on or after this date and that 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: 7/8/19

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Philip J. Brehm

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