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 REPLY BRIEF

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

A. Undisputed facts.

During the suppression hearing, Officer Blanton of the Sharon Police Department 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). This testimony was demonstrably false. The State concede a squad video 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 briefly as she met him[1] (15). In the officer's personal camera video, when approaching defendant, Officer Blanton is heard to say to defendant, "You flashed your brights at me, you can't do that" (15:00:13-00:16 (officer's personal video)). There was no evidence presented as to whether Officer Blanton's high beams were on or off when he met defendant's vehicle.

B. Officer Blanton's mistaken belief of the law was not objectively reasonable and thus would not authorize an otherwise illegal detention.

Officer Blanton's statement to defendant that she could not flash her brights at him was legally inaccurate.[2] Citing *State v. Houghton,* 2015 WI 79, ¶52, 364 Wis.2d 234, 868 N.W.2d 143, the State argues that even if Officer Blanton was reasonably mistaken in his interpretation of the law as it relates to the use of high beams, the stop was still legal (State's brief at 14). The defense disagrees with this assertion by the State. It overstates the holding of *Houghton.*

[1] The flash of the high beams of defendant's vehicle was for a single time, one second or less (15:00:53 (squad video)).

[2] Although not directly related to the analysis, within minutes of making this statement, Officer Blanton told defendant that if she refused to do the field sobriety tests, she would be arrested for a refusal. This was not a technically accurate statement of the law. His statement led to defendant agreeing to field sobriety tests (15:05:11-5:12 (officer's personal video)).

Houghton stands for the proposition that a police officer, in enforcing the law, does not have to be perfect in his or her understanding of criminal or civil statutes. Objectively reasonable mistakes of law by an officer do not necessarily make an arrest unlawful. However, the *Houghton* court made it clear that what would constitute an objectively reasonable mistake in law would typically involve ambiguous or unsettled law:

> The State contends that Officer Price's stop of Houghton was not based on a mistake of law because the presence of the GPS unit and air freshener in Houghton's front windshield was indeed a violation of Wis. Stat. §346.88. The State argues in the alternative that any mistake of law by Officer Price as to whether those items violated the statute was objectively reasonable. Houghton counters it was not objectively reasonable for Officer Price to interpret the statute as carrying an absolute prohibition on all items in the front windshield, pointing to Justice Kagan's concurrence in *Heien*[3]--joined by Justice Ginsburg—in which she stated that objectively reasonable mistakes of law are "exceedingly rare." *Heien,* 135 S.Ct. at 541 (Kagan J., concurring).
>
> Justice Kagan's concurrence also expanded on what could constitute an objectively reasonable mistake of law:
>
> > 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." *Id.* at ¶¶67-68.

As an example, the *Houghton* court recognized an officer's mistaken belief that a vehicle registered in a state other than Wisconsin needed a front license plate like in Wisconsin would not be a reasonable mistake of law that would save an otherwise unlawful stop. *Id.* at 76.

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[3] *Heien v. North Carolina,* 574 U.S. ___, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014).

The statute in question, Wis. Stat. §347.12, is not ambiguous or difficult to interpret. The law is not new. There is a statutory exception to the rule about whether a driver can intermittently flash high beams at an approaching vehicle. The change in the law authorizing this action occurred in April of 2000. Under these circumstances, Officer Blanton's statement, "You flashed your brights, you can't do that" would not be an objectively reasonable mistake of the law. The law from *Houghton* would not save an otherwise invalid stop by Officer Blanton.

C. Other analysis.

The State had the burden of proof at the suppression hearing. The evidence shows Officer Blanton pulled over defendant for one alleged traffic violation. Officer Blanton admitted there were no other alleged violations. The applicable statute does not absolutely proscribe the alleged illegal conduct engaged in by defendant.

While Officer Blanton testified he could tell the difference between low beams and high beams, his suppression hearing testimony suggests otherwise in that he inaccurately testified defendant had her high beams on as he approached her. This material error in his testimony calls into question his ability to discern high beams and low beams. Common sense would suggest the task of discerning whether an approaching vehicle has its high beams is difficult. Of course, headlights are not uniform in their light output.

Ultimately, it was not reasonable for Officer Blanton to pull defendant's vehicle over for lawful conduct on his mistaken belief it was necessarily unlawful. The clear purpose of Wis. Stat. §347.12 is to prevent drivers from blinding approaching drivers with their high beams. Flashing high beams, by definition, is acceptable and lawful conduct in Wisconsin because it is authorized by the statute.

While *State v. Tomaszewski,* 2010 WI App 51, 324 Wis.2d 433, 782 N.W.2d 725, cited by the State, suggests the mere possibility high beams could blind a driver would be sufficient to justify a stop, regardless of the actual effect on the approaching driver, that case analyzed conduct occurring prior to the enactment of the amendment to Wis. Stat. §347.12

This court should adopt the analysis utilized by the Minnesota court in *Sarber v. Comm'r of Pub. Safety,* 819 N.W.2d 465 (Minn. App., 2012) quoted in defendant's first brief. The Minnesota statute analyzed in *Sarber* is substantially the same as Wis. Stat. §347.12.

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: 8/22/2019

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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 1519 words

Dated: 8/22/2019

_____
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: 8/22/19

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Philip J. Brehm