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STATE OF WISCONSIN

COURT OF APPEALS — DISTRICT III

Case No. 2019AP001908-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY F. HARRIS,

Defendant-Appellant.

On Appeal from an Order
Denying Suppression and a Judgment of Conviction
Entered in the Brown County Circuit Court,
the Honorable William M. Atkinson Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The stop of Harris's vehicle was based on an unreasonable mistake of fact. The stop was therefore in violation of Harris's constitutional rights. The state's attempts to rely upon an independent bad driving basis fail because the observed driving does not provide reasonable suspicion that Harris was driving while intoxicated or otherwise violating the law. As such, there is no constitutional basis for the stop and the fruits of the illegal stop must be suppressed.

A. Officer Skenandore's Belief That Harris's Vehicle Was Not Registered to a Licensed Driver Was a Result the Officer's Inexperience and Therefore Unreasonable.

The circuit court did not find that the mistake made in this case was the mistake of a reasonable officer. Rather, after hearing testimony, the court made a determination that the officer's incorrect belief that the driver of Harris's vehicle was unlicensed was "obviously a rookie mistake." (64:14; App. 104). In other words, it was the officer's lack of training and inexperience that caused the officer to "look[] at the wrong set of data." (59:10). (*See* merriam-webster.com/dictionary/rookie defining "rookie" as "a person who has just started a job or activity and has little experience").

The common sense test – "What would a reasonable police officer reasonably suspect in light of

his or her training and experience" – does not equate to the corollary – what would a reasonable police officer reasonably suspect in light of his or her *lack of training* and *inexperience*. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Training and experience and "knowledge acquired on the job" is given weight because that training and experience provides a reliable and informed basis on which to draw inferences and conclude suspicious activity is afoot. *State v. Betow*, 226 Wis. 2d 90, 98, 593 N.W.2d 499 (Ct. App. 1999). On the other hand, the officer's subjective inexperience does not help the officer make an informed decision about whether it is reasonable to suspect criminal activity, and in fact, makes it less likely the officer's suspicions are reliable. A mistake rooted in the subjective inexperience of an officer is therefore unreasonable.

The state's argument "perhaps it was just a mistake that any officer could have made in that situation" ignores the facts of this case. (State's Br. at 14). The officer was not a fully trained officer and he was inexperienced at his job. (59:4-5). There was no testimony from either Skenandore or his supervisor that the squad car computer was malfunctioning that night, that there were reasons why it would have been difficult to read the correct screen or that this is the kind of mistake that an officer using due care and diligence might have made. Based on the facts before it, the court correctly attributed the mistake to Skenandore's rookie status.

The reasonableness requirement of the Fourth Amendment is designed to "safeguard the privacy and security of individuals against arbitrary

invasions . . .” *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (citations and quotations omitted). Relying on facts that the officer obtained through carelessness or inexperience would unreasonably allow arbitrary seizures in violation of the Fourth Amendment. Mistakes in facts are tolerated under the Fourth Amendment only when the officer properly uses the investigatory tools at his/her disposal with diligence and due care but nevertheless reaches an incorrect determination about the facts s/he is dealing with. *See e.g. Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (police reasonably relied on representations by a third-party that she had the ability to consent to the search of an apartment combined with observations that the third-party had keys to the apartment and clothes and furniture in the apartment when in fact she had no authority to consent); *Hill v. California*, 401 U.S. 797, 804 (1971) (police reasonably relied on multiple third-party descriptions of the suspect, obtained and verified the suspect’s address, but nevertheless arrested the wrong suspect even though he matched the description and was at the address).

Here, unlike in *Rodriguez* and *Hill,* Skenandore was not relying on information relayed to him by a third-party or other objective facts that might have contributed to his incorrect factual determination there was an unlicensed driver. Rather, he botched a routine investigation because he did not use the police equipment properly. If it were true that the routine tasks of “observing … driving behaviors, entering a license plate into the computer and trying to read the results all at the same time” reasonably resulted in officers reading the wrong set of data and

by extension regularly pulling cars over when there was no criminal activity or other violation, then this mode of investigation would be unreasonable under the Fourth Amendment. (State's Br. at 14). Yet, typically data obtained by a search of records in the squad computer is reliable and so long as the officer uses the computer correctly, it is reasonable to rely on this data. *See State v. Newer,* 2007 WI App 236, ¶¶5, 7, 306 Wis. 2d 193, 742 N.W.2d 923. If this court holds that it is reasonable for an officer to conduct a traffic stop simply because s/he "read the wrong data" on the squad car computer – and when there is no exigency or other facts that would reasonably cause the officer read the wrong data – then it will effectively authorize stops when there is no legitimate basis in fact. This would open the door for pretextual and arbitrary stops in contravention to the Fourth Amendment and cannot be tolerated.

The state argues that the exclusionary rule should not apply under *Herring v. United States*, 555 U.S. 135, 140 (2009). *Herring,* however, is inapposite as it did not deal a mistake rooted in the officer's inexperience. The purpose of the exclusionary rule is to deter Fourth Amendment violations in the future. *Id.* at 140. Here, exclusion will incentivize additional officer training on how to correctly read the data on the squad car computer and force more caution when the sole basis for the stop is a glance at the screen. The seizure of a vehicle is a significant intrusion on an individual's Fourth Amendment rights and in order to be reasonable under the Fourth Amendment, there must be evidence that the police officer was using due care and sufficient caution when s/he made the mistaken determination of fact. *See Prouse*, 440

U.S. at 657 (a vehicle stop involves "a possibly unsettling show of authority … interfer[ence] with freedom of movement, … inconvenie[ce], … consum[tion of] time…[and] may create substantial anxiety.")

Here, though the mistake was not in bad faith, it was based solely on Officer Skenandore's improper, careless, or negligent use of the computer in his squad car. Accordingly, Officer Skenandore's mistake was unreasonable and cannot support a finding of reasonable suspicion.

B. There Was No Reasonable Suspicion That Harris Was Operating While Intoxicated.

The state does not argue that there was probable cause or reasonable suspicion to believe that Harris had committed any other traffic violation besides the crime of operating while intoxicated. The state has therefore forfeited the argument because it has failed to raise it. *See A.O. Smith Corp. v. Allstate Ins. Cos.,* 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998). Furthermore, since the state does not refute Harris's assertion that there was no other traffic violation, this point is conceded. *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp*., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979); (Opening Br. at 13).

And this makes sense. The fact of crossing a white dotted line on a multilane road is not a *per se* traffic violation. Wisconsin Stat. § 346.13 itself contemplates deviations from the lane of travel are going to be necessary on Wisconsin roadways. *See*

Wis. Stat. § 346.13(1) (the operator of a vehicle "shall drive *as nearly as practicable* within a single lane" and "shall not deviate … without first ascertaining that such movement can be made with safety"). The state offered no testimony or argument below or on appeal that there was reasonable suspicion to believe the act of crossing the line was done in an unsafe manner or was done without checking first or that it alone provides a basis to pull over the vehicle. Rather, the state has argued that the cross of the line is a one factor under the totality of the circumstances that creates a reasonable suspicion that the driver is operating under the influence.

But, as explained in the opening brief, this argument fails. One slight cross of the dotted white line that continued into a "weave" to the middle of the lane is not enough to create reasonable suspicion of intoxicated driving. There was no evidence that the cross was significant or repeated and or that the driving was otherwise zigzagged, erratic, illegal or unsafe, a far cry from the driving behaviors observed in *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634; *State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569; *State v. Puchacz,* 2010 WI App 30, 323 Wis. 2d 741, 780 N.W.2d 536 and countless others. Under the totality of the circumstances, the observed driving here was not enough to lead a reasonable officer to believe that Harris was driving under the influence of an intoxicant or committing any other crime. As such, Harris's alleged bad driving did not create a constitutional basis for the search.

CONCLUSION

For the reasons stated in this brief, Harris respectfully requests that this court vacate his judgment of conviction and remand to the circuit court with directions that all evidence derived from the unlawful seizure be suppressed.

Dated this 17th day of March, 2020

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 the brief is 1,607 words.

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 § 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.

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 this 17th day of March, 2020

Signed:

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