STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

CITY OF OSHKOSH,

Plaintiff-Respondent

Appeal No.: 20-AP-867

-vs-

BRIAN D. HAMILL,

Defendant-Appellant,

Waupaca Co. Cir. Ct.
Case No: 18-TR-12055

REPLY BRIEF OF DEFENDANT-APPELLANT

On Appeal from the Circuit Court of Winnebago County
The Honorable Karen L. Seifert, Presiding

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ARGUMENTS

I. DEFENDANT DID NOT WAIVE HIS RIGHT TO APPEAL

The Plaintiff-Respondent in this case has conceded the fact that the right to appeal has not been waived and the Defendant-Appellant consents to that concession and the issue is now moot.

II. OFFICER FRANKLIN DID NOT HAVE REASONABLE SUSPICION TO BELIEVE THE DEFENDANT WAS OPERATING WHILE INTOXICATED

With respect to the reasonable suspicion issue that is at the heart of this matter, the Plaintiff-Respondent cites State v. Post, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634 as being instructive on a case that is similar to this. Post is different than the case at hand in that the vehicle in Post veered in its lane for two blocks, made an S-pattern within a single lane several times, and this occurred at 9:30 p.m. In the Seward case, which discusses the Post case and similar incidences, the weaving occurred for approximately one mile. City of Tomah v. Seward, 357 Wis.2d 723, 855 N.W.2d 905 (Ct.App 2014) In Michaels, the vehicle abruptly swerved in the lane three times after accelerating quickly towards the officer's location. (City of West Allis, at ¶ 2) In this case, there was only one alleged drift, no acceleration, no speed

violation, and was clearly less suspicious than the Michaels case. The Court ultimately found that there was no reasonable suspicion in that case.

The only alleged improper driving in this case was an alleged drift of 30-40 feet, which when traveling at the speed of 35 mph would take approximately less than 1 second. The vehicle then allegedly corrected itself to the original position for another 40 feet which would take another 1-2 seconds. So in this case at hand we are talking about approximately 2-3 seconds, not 15-20 seconds that was estimated by Officer Franklin in the Plaintiff-Respondent's Brief. (See Plaintiff-Respondent's Brief, p. 10.) A vehicle traveling at 35 mph, which was the posted speed limit at the time, would be traveling 51 feet per second. So if the officer is correct in stating that the initial drift was 30 feet, it took less than a second, and then the correction to its original position for 40-50 feet would have taken a little over a second. This math was not done by the Plaintiff-Respondent in this case and the conclusions are completely incorrect. (It should be noted that if the vehicle stayed on its path close to the centerline without correcting itself, that would presumably be considered reasonable suspicion for a stop and would show a lack of awareness by the driver.) The

correction of the driving shows the driver was aware of the circumstances and corrected the vehicle to its original position. In light of that, the actual "drifting" that took place here was a 1-second drift towards the center of the lane, and the response was simply a correction of that drift and not evidence of more "bad" driving.

The Plaintiff-Respondent also states that the time of driving was different than the Post and Seward cases. (See Plaintiff-Respondent's Brief, p. 12) But as the Plaintiff-Respondent concedes, both of those cases considered the times at which the driving occurred as factors that gave consideration to the reasonableness of the stop. In other words, in all three cases that factor was the same, so the time at which the case at hand occurred is a consistent factor and that does not make this case any different than those two.

II. DEFENDANT-APPELLANT DID NOT VIOLATE WIS. STATS. § 346.05 AND THE STOP WAS NOT A REASONABLE MISTAKE OF LAW

Without going through any previous arguments made with respect to why this was not a violation, it is conceded by the Defendant-Appellant that it was not clearly a violation in that they believe the statute is "somewhat ambiguous". The Plaintiff-

Respondent argues that this was "a mistake of law" and is suitable for a constitutional stop. Wisconsin case law provides differently.

A. THE MISTAKE OF THE LAW HERE IS NOT REASONABLE

It is argued that Officer Franklin stopped the Defendant-Appellant's vehicle for a violation of Wis. Stats. § 346.05. Based on the preceding argument, it would be conceded that this was not a violation. If that is correct, then recent Wisconsin law must be looked at to determine whether an officer's mistaken belief of the law violates the Fourth Amendment.

> "In the past, Wisconsin courts have held that a seizure predicated on a police officer's mistake of law is invalid under the Fourth Amendment. *See* State v. Brown, 2014 WI 69, ¶ 22, 355 Wis.2d 668, 850 N.W.2d 66; Longcore, 226 Wis.2d at 3-4, 594 N.W.2d 412. However, the Supreme Court's recent decision in Heien is at odds with these holdings."

The Houghton case was cited by the Plaintiff-Respondent for this proposition. That case is telling because there were two pertinent alleged violations that an officer observed that led to the stop. The first violation was thought to be reasonable in that the driver had objects on his windshield in his line of sight. Wisconsin statutes do not allow any sign, poster or any transparent material upon the front of a windshield. Wis. Stat. 346.88. The officer was found to be reasonable in thinking that the objects in his view

would be a reason for the stop based on the statute. However, the Court found that the statute is not absolute violation of statute that any object be in his way, but only those that obstruct the view. State v. Houghton, 364 Wis.2d 234, 868 N.W.2d 143, 2015 WI 79, at P. 61. In this case, it was found that even though there was no obstacle in his vision, the officer's interpretation of that statute was objectively reasonable because he thought the statute was absolute.

The second part of the Houghton case, though, involved the observation by the officer that there was no front license plate on the vehicle. He used this as justification for his stop as well thinking Wisconsin law required both a back and a front license plate as stated in Wis. Stats. 341.15. However, the officer was mistaken in this belief as the statute is clear that only vehicles that are issued two license plates must display both. In some cases, vehicles do not have to do that. (P. 72 – 78) The State conceded that notion and stated in its brief:

> "However, the officer's subjective understanding of the law is irrelevant and 'the government cannot defend an officer's mistaken legal interpretation on the ground that the officer was unaware of or untrained in the law.' Heien, 135 S.Ct. at 541 (Kagen J. concurring). The question is whether it is objectively reasonable for an officer to interpret Wis. Stat. § 341.15 as requiring that Houghton's vehicle display a front license plate. The State believes the answer to that question must be no. The law is clear

> that if a vehicle is only issued one license plate, only one license plate needs to be displayed. Wis. Stats § 341.15(1)(b)."

The Court also concluded that this was not an objectively reasonable mistake of law and that this could not be a mistake that would allow for a constitutional stop of a vehicle.

> "Thus, to the extent that Officer Price may have believed that Houghton was violating the law by not having a front license plate displayed, we hold that belief was neither a reasonable mistake of law nor a reasonable mistake of law."

That mistake of a violation is strikingly similar to the case at hand.

In Houghton, when determining what was objectively reasonable, the Court looked to the statutes that were being violated and said that, "If this process of analysis yields a plain, clear statutory meaning . . . the statute is applied according to this ascertainment of its meaning." As stated before, Wis. Stats. § 346.05 is not ambiguous at all, it states as follows:

> **346.05 Vehicles to be driven on right side of roadway; exceptions.**
> (1) Upon all roadways of sufficient width the operator of a vehicle shall drive on the right half of the roadway and in the right-hand lane of a 3-lane highway, except:
> (a) When making an approach for a left turn or U-turn under circumstances in which the rules relating to U-turns require driving on the left half of the roadway; or
> (b) When overtaking and passing under circumstances in which rules relating to overtaking and passing permit

or require driving on the left half of the roadway; or
(c) When the right half of the roadway is closed to traffic while under construction or repair; or
(d) When overtaking and passing pedestrians, animals or obstructions on the right half of the roadway; or
(e) When driving in a particular lane in accordance with signs or pavement markings designating such lane for traffic moving in a particular direction or at designated speeds; or
(f) When the roadway has been designated and posted for one-way traffic, subject, however, to the rule stated in sub. (3) relative to slow moving vehicles.
(g) If the vehicle is a wide implement of husbandry, as defined in s. 347.24 (3)(a), being operated in compliance with any applicable requirement under s. 347.24(3), 347.245 (1), or 347.25 (2g), and the vehicle is operated as much as practicable on the right half of the roadway and in the right-hand lane of a 3-lane highway, a portion of the vehicle may extend over the center of the roadway into any lane intended for travel in the opposite direction and may extend into any passing lane of a 3-lane highway. A wide implement of husbandry operated as described in this paragraph is subject to any restriction under ss. 346.06, 346.09 (2) and (3), and 346.59.
(1m) Notwithstanding sub. (1), any person operating a bicycle or electric personal assistive mobility device may ride on the shoulder of a highway unless such riding is prohibited by the authority in charge of the maintenance of the highway.
(2) The operator of a vehicle actually engaged in constructing or maintaining the highway may operate on the left-hand side of the highway; however, whenever such operation takes place during the hours of darkness the vehicle shall be lighted as required by s. 347.23.
(3) Any vehicle proceeding upon a roadway at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand edge or curb of the roadway, except when overtaking and passing another

> vehicle proceeding in the same direction or when preparing for a left turn or U-turn at an intersection or a left turn into a private road or driveway, and except as provided in s. 346.072.

Clearly, operating "on the right-hand side of the roadway" is not ambiguous. The lanes are divided by a divided line, and everything on the right side of the dotted line is in the right-hand lane, and everything on the left-hand side of the dotted line is in the left-hand lane. Nothing could be more clear. In this case, the Wisconsin case law has described this as "left of center". State v. Popke, 317 Wis.2d 118, 765 N.W.2d 569, 2009 WI 37. There is no way an objectively reasonable officer with knowledge of the Wisconsin Statutes would believe that the vehicle in question was operating on the left side of the lane. This is more similar to the Houghton violation of license plates where the officer did not know the law in question. This is not a matter of interpretation like the objects in the windshield. As stated in the Defendant-Appellant's Brief, the test for ambiguity is where the law at issue is "so doubtful in construction that a reasonable judge could agree with the officer's view." I do not believe that a reasonable judge could believe that this vehicle was operating left of center and that makes his mistake of law unreasonable.

Recent cases have shed further light on what a reasonable mistake of the law is. In State of New Jersey v. Sutherland, 231 N.J. 429, 176 A.3d 775 (2018), the Court found that the language of the statute was unambiguous as it was here, and held that the officer's mistaken belief that the statute was violated was not reasonable in that there was no ambiguity in the statute. The Court found that the circumstances there did not amount to the "rare" case that involves an objectively reasonable mistake of law. It pointed to the Puzio case where the Court reasoned:

> "If officers were permitted to stop vehicles where it is objectively determined that there is no legal basis for their action, 'the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive." State v. Puzio, 379 N.J. Super. 378, 878 A.2d 857 (App. Div. 2005)

A recent Wisconsin case law also addressed the issue with respect to window tinting. State v. Rusk, 388 Wis.2d 623, 935 N.W.2d 562, 2019 WI App 54. It shows a difference in the Houghton case where the statute actually states where the window tinting can occur and is not as subjective as the statute used in Houghton to justify the stop. In this case, the statute specifically says: Operating "on the right-hand side of the roadway" and is not

ambiguous, which is more similar to the Rusk case than the Houghton case.

CONCLUSION

It is conceded in this case that there was no violation of Wisconsin law that occurred prior to the stop. The statute used to justify the stop is not ambiguous. The officer made a mistake when he made the stop and admitted so. If a stop is allowed in a case like this, almost any vehicle on the roadway could be stopped at any time and the Fourth Amendment would be rendered meaningless. A simple drift of approximately one second and then a correction to the original path is not reasonable suspicion for a traffic stop and the Motion to Suppress should be granted and the court overruled.

Dated this 23rd day of October, 2020.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19 (8)(b) and (c), as modified by the Court of Appeals Order dated November 12, 2018, for a brief produced with a proportional serif font. The length of this Reply Brief is 15 pages and is 2884 words (exclusive of signatures).

I have submitted an electronic copy of the brief, which complies with the requirements of Wis. § 809.19 (12). I certified that the electronic brief is identical in content and format to the paper form of the brief filed as of this date, other than the signature.

Dated this 23rd day of October, 2020.

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