FILED
09-11-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 3

STATE OF WISCONSIN

Plaintiff-Respondent,

vs.

Appeal No. 2020AP000881 CR
Circuit Case No. 2018CM000053

KYLE M. KLEINSCHMIDT

Defendant-Appellant.

For Official Use

RESPONDENT'S REPLY BRIEF AND APPENDIX

Appeal from the Judgment of Conviction and Sentence entered In Lincoln County Circuit Court
Honorable Jay R. Tlusty, presiding

SUBMITTED BY:

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Plaintiff-Respondent

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COMPLIANCE CERTIFICATE

I hereby certify that this Respondent's Reply Brief and Appendix conforms to the form and length requirements of Rule 809.19(8)(b) and (c) in that it is typewritten using a proportional font. The length of this Respondent's Reply Brief is 1,536 words. I further certify in accordance with Rule 809.19(12)(f) that the text of the electronic copy of this Respondent's Reply Brief and Appendix is identical to the text of the paper copy of this Respondent's Reply Brief and Appendix.

Dated this 11th day of September, 2020

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TABLE OF AUTHORITIES CITED

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Wisconsin Case Law

Wisconsin Statutes Administration Code

STATEMENT OF THE ISSUES

1. Did the trial court improperly deny Kleinschmidt's motion to suppress?

STATEMENT ON ORAL ARGUMENT

Plaintiff-Respondent, State of Wisconsin believes that since this case involves the application of the facts in the record to existing case law, oral argument is not necessary.

STATEMENT REGARDING PUBLICATION

Plaintiff-Respondent, State of Wisconsin believes that the facts of this case and the legitimacy of the stop are issues which are likely to arise on a regular basis throughout the State of Wisconsin. Accordingly, Plaintiff –Respondent, State of Wisconsin believes that the opinion in this case would be instructive to all Circuit Courts and therefore publication is advisable.

STATEMENT OF THE FACTS

In addition to the facts set forth in the Defendant-Appellant's Brief, Plaintiff-Respondent, believes that it is significant that while Officer Perra did not know that the requirement of a functional high brake lamp on vehicles so equipped was found in the Administrative Code as opposed to Wisconsin Statutes, he had been using the code provision for approximately twenty (20) years and was aware that defective high mounted stop lamps were a violation of Wisconsin law. (R. 66, P. 14).

Perra indicated that he had been using the Wisconsin law prohibiting operating with a defective high break lamp for fifteen (15) to twenty (20) years, his whole career. (R. 66, P.49). Perra indicated that while he can't cite every Administrative Code provision off the top of his head, he has read through the traffic code book several times throughout his career. (R. 66, P. 50).

ARGUMENT

The Circuit Court properly denied the Defendant-Appellant's Motion to Suppress the fruits of the stop of Defendant-Appellant.

I. Trans 305.15(5)(a) is a valid Administrative Code provision and can provide a legal basis for a traffic stop.

Defendant-Appellant claims that Trans 305.15(5)(a) is invalid because it exceeds the authority granted to the Department of Transportation in promulgating administrative rules because the code provision conflicts with Wisconsin Statutes § 347.14. Defendant-Appellant correctly notes that an administrative code provision cannot defeat the plain language of an unambiguous statute. However, Trans 305.15(5)(a) is not contrary to the plain language of Wisconsin Statutes § 347.14. There is nothing in Wisconsin Statutes § 347.14 that indicates that it is permissible to operate a motor vehicle in Wisconsin with a defective high mounted stop light. There is nothing in Trans 305.15(5)(a) that indicates that if a high mounted stop light is operational then the other requirements of 347.14 are not applicable. There is nothing in Wisconsin Statutes § 347.14 which indicates that the Department of Transportation is unable to mandate that if a high mounted stop light is installed in a vehicle

that it must work.

The Defendant-Appellant points to *Seider v. O'Connell*, 2000 WI 76, 236, Wis. 2d 211, 612 N.W. 2d 659 as authority for their claim that transportation code provision Trans 305.15(5)(a) exceeds the authority of the Department of Transportation. However, it should be noted that in *Seider* the relevant Wisconsin statute provided that insurance claims which involved a structure that was used as a dwelling would receive beneficial treatment. The administrative code provision taken up in *Seider* specifically denied that favorable treatment to dwellings which were also used for commercial purposes. In that case the administrative code provision clearly and unambiguously conflicted with State Statute. A conflict of that nature is not present in Mr. Kleinschmidt's case.

Defendant-Appellant claims that *Mallo v. DOR*, 2002 WI 70, 253 Wis. 2d 391, 645 N.W. 2d 853 indicates that if a rule is not authorized by statute that it must be invalidated. However, in reviewing the facts of that case the Supreme Court determined that the interpretation of the Department of Revenue reflected in the Administrative code provision was consistent with the Wisconsin Statute provision implicated in that case. At Paragraph 15 the Supreme Court noted that no agency may promulgate a rule which conflicts with State law. As previously indicated Trans 305.15(5)(a) does not conflict with Wisconsin Statute § 347.14. Consequently, Trans 305.15(5)(a) should be determined to be valid under the same reasoning that the Supreme Court used in determining that the administrative code provision in *Mallo* was valid.

In *Mallo* the Appellant argued that the Wisconsin Statute concerning transitional change in the valuation of agricultural land required a full ten (10) year phase in period. The Supreme Court ruled that the interference of a ten (10) year phase in requirement was not supported in the clear language of the Statute and thus the Department of Revenue Administrative code provision accelerating the transitional valuation period was legal.

In this case Appellant argues that Wisconsin Statute 347.14 creates an inference that if a vehicle has two (2) working stop lamps that the Department of Transportation cannot add additional requirements on

the operation of additional factory installed stop lamps. This inference is not found in the clear language of 347.14 just as the inference of a ten (10) year phase in requirement was not found in the State Statute relevant to the *Mallo* decision. The Department of Transportation's enactment of Trans 305.15(5)(a) is not contrary to the plain language of an unambiguous State statute and thus is legally permissible and could form the basis for a lawful traffic stop.

II. Officer Perra's stop of Kleinschmidt was supported by a reasonable and articulable suspicion despite the fact that Perra was unaware of the specific portion of the traffic code which was violated.

Defendant-Appellant claims that because Officer Perra did not know specifically that the prohibition on operating a motor vehicle equipped with a high brake lamp that was nonfunctional is found at Trans 305.15(5)(a), that the stop was without a reasonable and articulable suspicion. Law enforcement officers are not required to know the exact statute or administrative code provision prohibiting conduct before they can make a stop based upon that conduct. In *State v. Guzy,* 139 Wis. 2d 663, 407 N.W. 2d 548 (1987) at Paragraph 8 the Wisconsin Supreme Court indicated:

> We recognize that a law enforcement officer cannot, in the few seconds sometimes available to him or her, always articulate at the moment all of the facts and circumstances that motivate their action. Instinct based on training, experience and circumstances may well lead that officer to the correct decision notwithstanding his or her ability to articulate either at the time or even after the fact, to him or herself or others, the reasons for the action. We cannot demand that and we do not. The law expects reasonableness, and the courts must take into account the factors outlined in this opinion in judging the reasonableness of law enforcement officer's actions.

Officer Perra indicated that while he did not know the exact administrative code provision prohibiting a person with a vehicle equipped with a high mounted stop light from operating that vehicle without the high mounted stop light being functional was in the administrative code, he indicated that he had reviewed the traffic code many times during his twenty (20) year career and had been conducting stops pursuant to that provision for fifteen (15) to twenty (20) years. Officer Perra having seen the violation occur in front of him and knowing

that it was a violation of Wisconsin traffic law to have a defective high mounted stop light certainly coalesced into a reasonable and articulable suspicion to conduct a traffic stop despite the officer's failure to know the exact administrative code provision under which he was operating.

III. Officer Perra's reliance on Trans 305.15(5)(a) was objectively reasonable.

Defendant-Appellant correctly notes pursuant to *State v. Houghton*, 364 Wis. 2d 234, 868 N.W. 2d 143 (2015) that "an Officer's objectively reasonable mistake of law may form the basis for a finding of reasonable suspicion." However, Defendant-Appellant contends that Officer Perra's stop of Kleinschmidt was not based on an objectively reasonable mistake of the law. The State agrees with the assertion that Officer Perra's stop was not based on an officer's objectively reasonable mistake of the law because the State believes that Perra made no mistake as to the law at all. Even if Defendant-Appellant's contention that Trans 305.15(5)(a) is invalid were correct, Officer Perra would clearly have been acting under an objectively reasonable mistake of law. For fifteen (15) to twenty (20) years Officer Perra was aware that the Wisconsin traffic code prohibited operating a motor vehicle with a defective high mounted stop light and conducted traffic stops based on that law. Officer Perra had no reason to believe that this administrative code provision was inconsistent with a Wisconsin statute. The Trial Court in this very case found that there was no inconsistency between Trans 305.15(5)(a) and Wisconsin Statutes § 347.14. (R. 39, P. 6) If the Court were somehow in err it would be inappropriate to attempt to hold a law enforcement officer to a higher standard than a Circuit Court trained in the nuances of the law and statutory interpretation. Officer Perra was conducting himself in an objectively reasonable manner.

CONCLUSION

As demonstrated above Trans 305.15(5)(a) is not contrary to Wisconsin Statutes § 347.14. Since it is not clearly contrary to that statue the Department of Transportation was authorized to enact and have law enforcement officers enforce Trans 305.15(5)(a). Consequently, Officer Perra had a reasonable and articulable suspicion to stop the Defendant-Appellant. Law enforcement officers are not required to know the specific

section of the traffic code under which a violation is found in order to enforce the traffic code. Officer Perra had a reasonable and articulable suspicion to stop the Defendant-Appellant for a defective high mounted brake light despite not knowing that the provision was located in the Administrative code and not knowing the specific Administrative code provision. Officer Perra objectively and reasonably relied on Trans 305.15(5)(a) in detaining the Defendant-Appellant thus the detention was lawful. The Trial Court properly denied the Defendant-Appellant's motion to suppress the fruits of Perra's stop of Defendant-Appellant.

Dated this 11th day of September, 2020

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APPENDIX CERTIFICATE

I hereby certify that with this Reply Brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral and written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that 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, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 4th day of September, 2020.

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