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COURT OF APPEALS

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 3**

STATE OF WISCONSIN,

Plaintiff-Respondent,

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

v.

KYLE M. KLEINSCHMIDT,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

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

SUBMITTED BY:

CARL W. CHESSHIR
State Bar No. 01008915
Attorney at Law
S101 W34417 Hwy LO
Suite B
Eagle, Wisconsin 53119
(414) 899-8579
Attorney for Defendant-
Appellant

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COMPLIANCE CERTIFICATE

I hereby certify that this Reply Brief 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 Reply Brief is 1,250 words.

Dated this 1st day of October 2020.

Electronically signed by:

Carl W. Chesshir
Attorney for Defendant-Appellant,
Kyle Kleinschmidt
State Bar No. 1008915
S101 W34417 Hwy LO
Suite B
Eagle, Wisconsin 53119
(414) 899-8579

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v.

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**COMPLIANCE CERTIFICATE FOR ELECTRONIC
FILING**

I hereby certify that:

I have submitted an electronic copy of this Reply Brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 1st day of October 2020.

Electronically signed by:

Carl W. Chesshir
Attorney for Defendant-Appellant,
Kyle Kleinschmidt
State Bar No. 1008915
S101 W34417 Hwy LO
Suite B
Eagle, Wisconsin 53119
(414) 899-8579

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ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING KLEINSCHMIDT’S MOTION TO SUPPRESS BASED ON AN ILLEGAL STOP.

The State argues that there is nothing in Wis. Stats. § 347.14 in regards to a high mounted stop light or any restriction on the Department of Transportation to regulate a high mounted stop light. (State’s Brief at 1). Kleinschmidt agrees that the statute is silent in regards to a high mounted stop light. (Appellant’s Brief at 10). However, the State then makes the specious argument that since the statute makes no mention of a high mounted stop light, the department’s rule, Trans 305.15(15)(a), to regulate high mounted stop lights stop light is not contrary to the statute. (State’s Brief at 1). Since no Wisconsin State mentions a high mounted stop light, according to the State then, the regulation is not contrary to any State statute. The State’s argument must fail because the State cites to no statutory authority for the promulgation of Trans 305.15(15)(a). As noted in Appellant’s Brief, “if a rule is not authorized by statute it must be invalidated. *Mallo v.*

DOR, 2002 WI 70, ¶ 14, 253 Wis.2d 391, 645 N.W.2d 853; (Appellant's Brief at 10).

There is no statutory authority for the Department of Transportation to promulgate Trans 305.15(15)(a). Wis. Stats. § 347.14 is clear and not ambiguous and makes no mention of a high mounted stop light. *See* (Appellant's Brief at 6-7). As a result, Trans 305.15(15)(a) exceeds the statutory authority and is therefore invalid. *See Seider v. O'Connell*, 2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659.; (Appellant's Brief at 10-11).

Since there is no legal basis for the trial court to rely upon Trans 305.15(15)(a), the decision to deny Kleinschmidt's motion to suppress evidence must be reversed.

II. OFFICER PERRA'S CONDUCT WAS NOT REASONABLY OBJECTIVE AND THEREFORE THE TRAFFIC STOP WAS ILLEGAL.

The State cites to *State v. Houghton*, 364 Wis. 2d 234,

868 N.W.2d 143 (2015) to support its argument that Officer Perra conducted himself in an “objectively reasonable manner”. (State’s Brief at 4). However, the statute in this case is distinguishable for the statute in *Houghton*, and therefore *Houghton* does not apply.

In, *Houghton* the statute in question was Wis. Stats. § 346.88(3)(b) and what constituted an obstruction of the driver's clear view through the front windshield. *Houghton* at ¶ 57. At issue was “an air freshener suspended from the rearview mirror and a GPS unit were visible through the front windshield.” *Houghton* at ¶ 7. The court held that the Officer’s interpretation that the air freshener and GPS unit were an obstruction under the statute did create such a prohibition that was objectively reasonable and, accordingly, Officer Price had reasonable suspicion to stop Houghton's vehicle, and it was not error for the circuit court to deny Houghton's motion to suppress. *Houghton* at ¶ 80.

In the present case, Wis. Stats. § 347.14 requires that a vehicle with two stop lamps that both are to be in good working order. There is no dispute that at the time of the traffic stop, the two brake lights mounted on the back of Kleinschmidt's pickup were in good working order. There also is no dispute that Officer Perra based his decision to stop Kleinschmidt on the stop light statute, Wis. Stat. § 347.14. (*Id.* at 13-14; *see also* R. 52; Exhibit (dash video)). The statute makes no reference to a high mounted stop light and therefore Officer Perra was not called upon to make an objectively reasonable interpretation to apply Wis. Stat. § 347.14 in the present case.

As such, the argument that Officer Perra's decision to stop Kleinschmidt was reasonably objective must fail. Therefore, the trial court's decision to suppress evidence is in error and must be reversed.

CONCLUSION

For all of the reasons stated above and in Appellant's Brief, Kyle Kleinschmidt requests this court this court to vacate his judgment of conviction and remand this case back to the circuit court.

Electronically signed by:

Carl W. Chesshir
Attorney for Defendant-Appellant,
Kyle Kleinschmidt
State Bar No. 1008915
S101 W34417 Hwy LO
Suite B
Eagle, Wisconsin 53119
(414) 899-8579