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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 21 AP 327 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

JOHN WILLIAM LANE,

Defendant-Respondent.

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

ON APPEAL FROM A FINAL ORDER
ENTERED ON FEBRUARY 12, 2021, BY THE
PORTAGE COUNTY CIRCUIT COURT,
THE HONORABLE PATRICIA BAKER PRESIDING.

Respectfully submitted,

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Defendant-Respondent

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STATEMENT OF THE ISSUES

- I. WHETHER OFFICER KLEIN HAD REASONABLE SUSPICION TO STOP MR. LANE'S MOTORCYCLE.

CIRCUIT COURT HELD:
NO.

- II. ASSUMING THERE WAS NO REASONABLE SUSPICION TO STOP MR. LANE, WHETHER A REASONABLE MISTAKE OF LAW EXISTED.

CIRCUIT COURT HELD:
NO.

STATEMENT ON PUBLICATION

Defendant-respondent does not request publication of the opinion in this appeal.

STATEMENT ON ORAL ARGUMENT

Oral argument would be appropriate in this case only if the Court concludes that the briefs have not fully presented the issues being raised on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal by the prosecution from the trial court order granting Mr. Lane's motion to suppress and for reconsideration, in which he moved to suppress evidence derived from his unlawful stop.

On August 21, 2017, Officer Justin Klein stopped Mr. Lane's motorcycle for a supposed violation of Wis. Stat. § 346.34(1)(a)3.¹ He ultimately arrested Mr. Lane for operating while under the influence of an intoxicant ("OWI").² After the officer read Mr. Lane the Informing the Accused form, Mr. Lane submitted to a blood test.³ Officer Klein took Mr. Lane to the hospital, where his blood was drawn.⁴

On September 14, 2017, the Portage County District Attorney's Office charged Mr. Lane with operating a motor vehicle while under the influence of an intoxicant and operating with a prohibited alcohol concentration, both as a third offense.⁵ On November 22, 2017, Mr. Lane moved to suppress his unlawful stop, along with other motions not relevant to this appeal.⁶

On April 27, 2018, the Honorable Thomas Flugaur presided over an evidentiary hearing on the unlawful stop motion. At the hearing, Officer Klein testified that he was on patrol at night on August 21, 2017, when he observed a motorcycle leave Morley's Bar.⁷ He testified that after following the motorcycle for

¹ R.4.

² *Id.* at 2.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ R.21; R.24; R.20.

⁷ R.74 at 21.

approximately $\frac{3}{4}$ of a mile, he observed the bike cross the centerline on I-39 from the right lane.⁸ The motorcycle then promptly reentered the right lane. It did not signal. This maneuver was done once.⁹ No other vehicles were in the vicinity.¹⁰ Officer Klein's squad vehicle was at least a few hundred yards behind Mr. Lane.¹¹ Officer Klein did not note any other traffic violations.¹²

On July 24, 2018, the court presided over a decision hearing. The court noted that the lane deviation for which Officer Klein stopped Mr. Lane allowed an individual to deviate from a lane when it is reasonably safe to do so.¹³ However, the court ruled that based upon *State v. Houghton* and *Heien v. North Carolina*, the officer's mistake regarding Wis. Stat. § 346.34(1)(a) was a reasonable mistake of law.¹⁴ The court denied Mr. Lane's motion.

On March 4, 2020, Mr. Lane filed a motion for reconsideration on the motion to suppress.¹⁵ In the motion, Mr. Lane noted that the court's ruling that Officer Klein made a reasonable mistake of law did not follow the Supreme Court's holding in *State v. Houghton*. More specifically, that Officer Klein failed to testify about what his subjective belief was of the conduct barred by Wis. Stat. § 346.34(1)(a). Mr. Lane also noted that the mistake of law must be objectively reasonable.

⁸ *Id.* at 5; 21.

⁹ *Id.* at 21.

¹⁰ *Id.* at 22.

¹¹ *Id.*

¹² *Id.* at 6.

¹³ R.75 at 5.

¹⁴ *Id.* at 7; *Houghton*, 2015 WI 79, 363 Wis. 2d 234, 868 N.W.2d 143; *Heien*, 135 S. Ct. 530 (2014).

¹⁵ R.50.

On August 26, 2020, the court presided over a motion hearing on the motion for reconsideration. With respect to the unlawful stop, the court noted:

I, in watching the video, watched it carefully, I watched it several times once again to refresh my recollection. The defendant was driving his motorcycle near the center line towards the middle or towards the left side of the lane, kind of hugging the center line, which I indicated before is commonly done by motorcyclists when there is not people around them. . . . Certainly nothing improper about that. And there is just one, from what I could see, one slight lane deviation, if you will, going from the right lane into the left lane just momentarily, and then back from the left back into the right.¹⁶

The court continued, noting that the lane deviation was not unsafe and an individual could “go into the left lane or back into the right lane . . . without signalling [sic] and it’s not a violation of law.”¹⁷ Mr. Lane argued that based on *Houghton*, the mistake of law was not reasonable, as there was no ambiguity in the statute on lane deviation.¹⁸ The court ruled that based on *Houghton* and *State v. Anagnos*, the officer did not make a reasonable mistake of law, thereby reversing its prior decision.¹⁹ The court ordered briefing on the issue of whether reasonable suspicion existed without the reasonable mistake of law.²⁰

On September 15, 2020, Mr. Lane filed his brief. In his brief, he relied upon an unpublished case, *State v. Vanderlinden*, to argue that Officer Klein could not reasonably infer that Mr. Lane operated while intoxicated based on the fact that he

¹⁶ R.76 at 15.

¹⁷ *Id.* at 18; 19.

¹⁸ *Id.* at 23; 24.

¹⁹ *Id.* at 30.

²⁰ *Id.* at 31.

left a bar at night or early morning.²¹ On September 16, 2020, the State filed its brief.²² The State argued that lawful behavior can support reasonable suspicion to stop a vehicle, relying upon *State v. Waldner* and *State v. Post*.²³ On September 16, 2020, Mr. Lane filed a supplemental letter brief.²⁴ In that brief, Mr. Lane argued that neither *State v. Post* nor *State v. Waldner* supported Mr. Lane's traffic stop.²⁵

On December 4, 2020, the court presided over a decision hearing. At the hearing, the court reiterated its previous ruling, that the lane deviation was not an objectively reasonable mistake of law.²⁶ The court continued:

The relevant facts in this case are pretty simple and pretty straightforward[.] . . Officer Klein first began pursuing Mr. Lane's motorcycle in the early morning hours. It would be after midnight. He then observed Mr. Lane's motorcycle as it left the parking lot of the Morey's Bar. He followed it through several turns and onto streets that led to the interstate. And he observed no traffic violations, either getting onto the interstate or while Mr. Lane was operating his motorcycle on the interstate, until, as I described at the last hearing, he was driving his motorcycle close to the center line, which is not that uncommon to see motorcyclists do. And he followed Mr. Lane for approximately three quarters of a mile. And there was the turning of the vehicle over the center line and then quickly back into its lane of traffic. There was no signal. And that was the reason described by Officer Klein for stopping. In fact, when you watch the video, he's behind Mr. Lane. Mr. Lane goes across the line. And it's a [sic] momentary. It probably is for a second, it might be two at most. And as soon as he gets back into his lane of traffic, you can see the reflections on the road signs light up. The officer turned on his emergency lights immediately after that happened.²⁷

²¹ *State v. Vanderlinden*, 2016 WI App 75, ¶ 13, 371 Wis. 2d 759, 886 N.W.2d 592 (unpublished but citable).

²² R.60.

²³ *Id.*; *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634; *State v. Waldner*, 206 Wis. 2d 51, 556 N.W.2d 681 (1996).

²⁴ R.61.

²⁵ *Id.*; *Post*, 2007 WI 60, ¶ 24; *Waldner*, 206 Wis. 2d at 57.

²⁶ R.77 at 3.

²⁷ *Id.* at 4-5.

Ultimately, the court ruled that under the totality of the circumstances, there was not reasonable suspicion to stop Mr. Lane for operating while impaired.²⁸ The court noted, “What we are left with here is a case in which you have somebody leaving a bar after midnight. And certainly there is nothing illegal or really nothing there. . . Has not committed any traffic violations. Closest thing they did was swerve, if you will, over the lane of traffic, over the center line momentarily, and then back. And having complete control of his motorcycle, never losing control.”²⁹ The court noted this driving maneuver was not perfect, “but drivers are not expected or required to be perfect.”³⁰

On February 12, 2021, the Court entered an order granting Mr. Lane’s motion on the unlawful stop. On February 16, 2021, the State appealed to this Court. On May 12, 2021, the State filed its initial brief to this Court. Mr. Lane now responds.

ARGUMENT

Mr. Lane respectfully requests that this Court uphold the circuit court’s granting of his motion to suppress based on unlawful stop.

I. OFFICER KLEIN DID NOT MAKE A REASONABLE MISTAKE OF LAW.

A. Standard of Review

²⁸ *Id.* at 8.

²⁹ *Id.* at 8-9.

³⁰ *Id.* at 8.

An appellate court upholds a circuit court's findings of facts unless they are clearly erroneous.³¹ The appellate court independently reviews whether those facts meet the constitutional standard.³²

B. The circuit court properly concluded that Officer Klein's mistake was not reasonable.

The State failed to address reasonable mistake of law in its initial brief. Accordingly, any further argument by the State is waived.³³ Should the Court find that it is not waived, Mr. Lane addresses the argument below.

In *State v. Houghton*, the Wisconsin Supreme Court examined whether an officer's interpretation of Wis. Stat. § 346.88 constituted a reasonable mistake of law.³⁴ The statute in question prohibited any object that obstructed the driver's clear view through the front windshield.³⁵ After determining a mistake of law existed, the Court examined whether it was reasonable.³⁶ The Court relied on the concurrence in *Heien*.³⁷ In the concurrence, Justice Kagan determined a reasonable mistake of law existed if the statute was "genuinely ambiguous."³⁸ The majority in *Heien* also

³¹ *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis.2d 675, 729 N.W.2d 182.

³² *Id.*

³³ See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) ("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute.").

³⁴ 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143.

³⁵ *Id.*

³⁶ *Id.* ¶ 70.

³⁷ *Id.* ¶ 68-70.

³⁸ *Id.* ¶ 68 (internal citation and quotations omitted).

considered whether previous caselaw interpreted the statute, as that took away from the ambiguity.³⁹

In the circuit court, the court noted that *State v. Anagnos* interpreted Wis. Stat. § 346.34(1)(a)3.⁴⁰ In *Anagnos*, the Court ruled that the defendant did not violate the statute when he made a left turn without signaling when there was no oncoming traffic or pedestrians present when he turned.⁴¹ As the statute here was not ambiguous and because caselaw interpreted Wis. Stat. § 346.34(1)(a)3, the mistake of law was not objectively reasonable.

In examining *Heien* and *Houghton*, the mistake here was not objectively reasonable. First, in examining the language of the statute, Wis. Stat. § 346.34(1)(a)3, states:

No person may turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety.⁴²

The language of the statute allows movement from one lane to the other when safe to do so. The *State v. Anagnos* decision was well-established at the time Officer Klein stopped Mr. Lane's motorcycle.⁴³ In fact, the Court may take judicial notice that the case is part of the annotated statutes. Accordingly, the circuit court properly determined Officer Klein did not make a reasonable mistake of law.

³⁹ *Id.* ¶ 70.

⁴⁰ R.76 at 27; 2011 WI App 118, 337 Wis. 2d 57, 805 N.W.2d 722 (reversed on other grounds).

⁴¹ *Anagnos*, 2011 WI App 118, ¶ 46, 337 Wis. 2d 57, 805 N.W.2d 722.

⁴² Wis. Stat. § 346.34(1)(a)3 (2018-19).

⁴³ R.76 at 27.

II. REASONABLE SUSPICION DID NOT EXIST TO STOP MR. LANE.

A. Standard of Review

Whether a court properly interprets and applies a statute is a question of law reviewed de novo, but “while benefitting from the analyses of the court of appeals and circuit court.”⁴⁴ A circuit court’s findings are subject to a clearly erroneous standard of review.⁴⁵ An appellate court reviews application of historical facts to constitutional claims independently of the circuit court’s analysis.⁴⁶

B. Under *State v. Post* and *State v. Waldner*, there was no reasonable suspicion that Mr. Lane operated while impaired.

The State concedes that the circuit court properly found that Officer Klein made a reasonable mistake of law. Accordingly, Mr. Lane focuses on whether reasonable suspicion existed without the reasonable mistake of law.

Mr. Lane agrees with the State that *State v. Post* and *State v. Waldner* apply here.⁴⁷ In *State v. Waldner*, the Wisconsin Supreme Court reviewed whether reasonable suspicion existed in a situation where no traffic violation occurred.⁴⁸ The driver of the vehicle drove at 12:30 a.m. slowly down the road, then accelerated

⁴⁴ *118th St. Kenosha, LLC v. DOT*, 2014 WI 125, ¶ 19, 359 Wis. 2d 30, 856 N.W.2d 486 (internal quotations omitted).

⁴⁵ *State v. Floyd*, 2017 WI 78, ¶ 11, 377 Wis. 2d 394, 898 N.W.2d 560.

⁴⁶ *Id.*

⁴⁷ *State v. Post*, 2007 WI 60, ¶ 2, 301 Wis. 2d 1, 733 N.W.2d 634.

⁴⁸ *State v. Waldner*, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996).

suddenly, then stopped at an intersection with no stoplights, then parked and dumped a plastic cup of liquid and ice onto the roadway.⁴⁹ The Court ruled that the facts together equated reasonable suspicion of operating while impaired.⁵⁰

In *State v. Post*, the Supreme Court held that while the driving behavior did not supply reasonable suspicion, under the totality of the circumstances, there was reasonable suspicion to initiate a traffic stop.⁵¹ More specifically, the Court held that the driver's drifting from the parking lane to the center line in an S-type manner for approximately two blocks provided reasonable suspicion for operating while impaired.⁵²

Mr. Lane's case is distinguishable from those of the appellants in *Waldner* and *Post*. The following information was available to Officer Klein. First, Mr. Lane left Morey's Bar at midnight or so. Second, that Mr. Lane, in negotiating the curve of the roadway while on his motorcycle, went from his lane into the left lane, then went back into his lane without signaling.⁵³ Unlike in *Post*, Mr. Lane did not travel in an unusual manner for two blocks. Unlike the appellant in *Waldner*, there was one single instance of unusual driving behavior, not three. Moreover, the court found it was benign driving behavior.⁵⁴ A circuit court's findings may not be disturbed unless clearly erroneous.⁵⁵

⁴⁹ *Id.* at 60-61.

⁵⁰ *Id.* at 61.

⁵¹ *Post*, 2007 WI 60, ¶ 2.

⁵² *Id.* ¶ 30-31.

⁵³ R.76 at 18.

⁵⁴ R.75 at 5.

⁵⁵ *Johnson*, 2007 WI 32, ¶ 13.

Moreover, it is not enough that Officer Klein observed Mr. Lane leave a bar in the early morning hours.⁵⁶ There must be specific, articulable facts to believe he was impaired. The State's brief notes, "Officer Klein could have reasonably inferred from where Lane was leaving and the time of night/morning, that there was a distinct possibility Lane had consumed alcohol."⁵⁷ The State then continues, noting that after following Mr. Lane and observing him swerve abruptly from the right lane, into the passing lane, and back into the right lane, the officer had reasonable suspicion "that Lane's 'ability to safely control the vehicle' was impaired."⁵⁸ Again, the question is whether there was reasonable suspicion of a crime, not of consuming alcohol. The State concedes there was no reasonable suspicion in leaving the bar in the early morning hours. Adding the single maneuver of the vehicle into the analysis does not alter the conclusion that there was no reasonable suspicion of OWI. The State does not challenge the circuit court's finding that Mr. Lane's maneuver was safe. Because the maneuver was safe, Officer Klein had no reasonable suspicion of impaired driving.

It is evident that Officer Klein initiated a stop based upon a hunch of operating while impaired. Based on the limited facts, there was no reasonable inference that Mr. Lane operated while impaired. Consequently, the traffic stop was unreasonable and violated the Fourth Amendment.

⁵⁶ State's Brief at 10.

⁵⁷ *Id.* at 10.

⁵⁸ *Id.*

CONCLUSION

For the reasons stated above, Mr. Lane respectfully requests that this Court uphold the circuit court's order granting his suppression motion.

Dated at Middleton, Wisconsin, June 7, 2021.

Respectfully submitted,

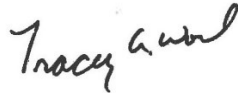
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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13-point body text, 11 points for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2, 694 words.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

I hereby certify that: I have submitted an electronic copy of this 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: June 7, 2021.

Signed,

BY: /s/ electronically signed by Teuta Jonuzi

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CERTIFICATION

I hereby certify that filed with this 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, at a minimum:

- (1) a table of contents;
- (2) the findings or opinion of the circuit court;
- (3) a copy of any unpublished opinion cited under s. 809.23 (3)(a) or (b) and;
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 and parents of juveniles, with a notion that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: June 7, 2021.

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CERTIFICATION

I certify that this appendix conforms to the rules contained in s. 809.19(13) for an appendix, and the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated: June 7, 2021.

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APPENDIX TABLE OF CONTENTSPAGE

State v. Vanderlinden, 2016 WI App 75, 371 Wis. 2d 759, A-1
886 N.W.2d 592 (unpublished but citable).