STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2022AP1764
Outagamie County Case No. 2021TR7591

STATE OF WISCONSIN,

Plaintiff- Respondent,

v.

GLEN MICHAEL BRAUN,

Defendant- Appellant.

BRIEF OF DEFENDANT- APPELLANT

APPEAL FROM THE CIRCUIT COURT FOR OUTAGAMIE COUNTY
THE HONORABLE MARK MCGINNIS PRESIDING

JOHN MILLER CARROLL LAW OFFICE S.C.
Attorney for Defendant – Appellant

John Miller Carroll
State Bar. No. 1010478

226 S. State St.
Appleton WI 54911
(920) 734-4878

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ISSUE PRESENTED FOR REVIEW

1. Did the Trial Court erroneously apply the law when determining the officer had reasonable suspicion?

The Circuit Court answered: No.
Defendant-Appellant submits: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication is requested. The issues present questions of significance.

ARGUMENT

i. THERE WAS NOT REASONABLE SUSPICION OF CRIMINAL ACTIVITY

The last argument in the Brief of Respondent asks this Court to examine the totality of the circumstances in accordance with *State v. Post*, 2007 WI 60, 301 Wis. 2d 1, 733 N.W.2d 634 and find that there was sufficient reason to stop Mr. Braun's vehicle based on indicators of criminal activity. Even if we ignore the general rule "that issues not presented to the circuit court will not be considered for the first time on appeal," *State v. Gove*, 148 Wis.2d 936, 437 N.W.2d 218 (1989), "the prosecutor did not argue the totality of the circumstances give rise to a reasonable suspicion of a violation of a criminal or traffic law," (Respondent's brief Pg. 16), but we must contend that the reason for this is obvious and that's because the argument that the sole observation of a vehicle reducing its speed is indicative of criminal activity is tenuous, at best, and does not, under these circumstances, support reasonable suspicion of criminal activity.

The Respondent tries to raise an issue not put before the trial court, and we would therefore urge this Court to afford this argument zero weight, "arguments not presented to the court in the first instance are deemed waived," *State v. Caban*, 210 Wis.2d 597, 563 N.W.2d 501 (1997). However even assuming this argument was properly preserved in the trial court, the Respondent offers little to support their position. While the Respondent does expound on *Post* in their brief, they fail to mention that the Supreme Court in *Post* strictly rejected a bright line rule that weaving within a single lane of traffic provides, alone, the requisite reasonable suspicion to conduct a traffic stop.

In the present matter, the Trooper testified that the only thing he found suspicious about the Defendant's vehicle was the reduction in speed (R21, Pg. 16). There is no bright-line rule allowing officers to stop people simply because they reduce their speed.

The Respondent claims that the Trooper said most people reduce their speed by 10 MPH when they become aware of police presence (Respondent's Brief Pg. 17). However, the Trooper actually testified that most people will maintain their speed when passing a squad car (R.21 Pg. 9) and yet despite this, the Trooper did not feel like it was appropriate to stop the vehicle solely based on this reduction of speed (R.21 Pg. 16). The Court specifically ruled that the Trooper's decision to not stop the vehicle based on the speed was proper, "I think the trooper was also proper to say, well, I'm not going to stop the vehicle because of that," (R.21 Pg. 29). Even the State conceded that "I certainly have no objection that it's not illegal for an individual to drive at a speed lower than the posted speed limit," (R.21 Pg. 25). The Defendant's reduction in speed was not a violation of the law and would simply not support a reasonable suspicion of criminal activity.

ii. THE STATE DID ABANDON THE DECAL ARGUMENT IN THE TRIAL COURT

The Respondent also argues that the location of the Defendant's decal also gave the Trooper reasonable suspicion to conduct the traffic stop. The Respondent argues on appeal, that this issue was not "abandoned" in the trial court, respectfully disagreeing with the Appellant's position that the State effectively conceded this argument and that: "reading the transcript as a whole," makes it obvious that the State argued this issue at the trial level. And it must be conceded that the State did make some initial arguments that the decal itself was a violation, however, the court and the State had a colloquy on this issue. The Circuit Court articulated clear reasons why the decal was not a violation and the State did not counter the judge's argument in any way, the State never argued that the officer's conduct was a good faith mistake of law, and after pivoting to the legibility issue the State never returns to the decal issue; there is a common word used to describe this practice of once arguing a point of view and then halting your argument after someone else offers an opposing view, that word is "concede." The Respondent now seeks to argue an issue that was waived at the trial court level.

In order to justify presenting fresh arguments to the Court on appeal the State argues: "it is well-established law in Wisconsin that an appellate court may sustain a lower court's ruling 'on a theory or on reasoning not presented to the lower court,'" (Respondent's Brief Pg. 16). What remains unclear, however, is how this law is "well-established" The State gratuitously cites *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶27 n.4, 326 Wis. 2d 729, 786 N.W.2d 78 to support their argument, however, while a footnote in *Blum* does contain some of the quotes the State uses to support its position, it does not hold that waived arguments can be presented to an appellate court, nor does the case cited in the *Blum* footnote, *Liberty Trucking Co. v. Department of Industry, Labor & Human Relations*, 57 Wis. 2d 331, 204 N.W.2d 457 (Wis. 1973). The rule that is in-fact "well-established," is that issues will not be considered when raised for the first time on appeal, *Smith v. Burns*, 65 Wis. 2d 638 (Wis. 1974). *State v. Gove*, 148 Wis.2d 936, 437 N.W.2d 218 (1989), *State v. Caban*, 210 Wis.2d 597, 563 N.W.2d 501 (1997), *Tatera v. FMC Corp.*, 2010 WI 90, 328 Wis. 2d 320, 786 N.W.2d 810. As with any rule there is always exceptions, *see Apex Electronics Corp. v. Gee*, 217 Wis. 2d 378, 786 N.W.2d 78 (Wis. 1998), the State does not cite any of these and instead simply asserts that they can make waived arguments under *Blum*, a case with no factual similarity and no holding which supports the State's position, and we would again urge this Court to afford the State's argument, on this issue, zero weight.

iii. TROOPER LACOURT-BAKER DID NOT HAVE REASONABLE SUSPICION TO CONDUCT A STOP BASED ON THE CONDITION OF THE DEFENDANT'S REGISTRATION PLATE

The issue of the legibility and display of the appellant's plates is at the forefront of this case. While the trial court did consider the totality of the circumstances, this issue is what the trial court used to ultimately justify its ruling that the Trooper did have reasonable suspicion to conduct a traffic stop on the night in question.

The Respondent begins addressing this point by citing to *United States v. Dexter*, 165 F.3d 1120 (7th Cir. 1999). *Dexter*, while providing some minimal insight into this issue, is not on point with the facts in this case. The *Dexter* court did set a standard of the

distance in which an officer must be able to read the plate. However, the standard is ambiguous at best. "Normal" means almost nothing in this context as the distance at which you might normally follow another vehicle varies depending on a huge variety of factor and there are conditions which may prevent an officer from reading the plate at a safe following distance, that have nothing to do with the way the plate is maintained. For example, in *Dexter* the officer could not read the plate even though it was maintained in a legible manner because there was a physical object, a tinted piece of glass, in front of the plate. Therefore, the Defendants in *Dexter* clearly violated Wis. Stat. § 341.15(2) by failing to display the plates in manner so that they "can be readily and distinctly seen and read," Wis. Stat. § 341.15(2).

The present matter is simply not analogous to *Dexter*. The Appellant plates were clearly displayed in a manner which would allow them to readily and distinctly read. The Trooper testified to this fact. The main issue in this case is the maintenance of the plates and whether or not Mr. Braun maintained the plates properly and whether Trooper LaCourt-Baker's interpretation that the plates weren't properly maintained was reasonable. The Appellant reasserts that the Trooper's suspicions were not reasonable.

The Trooper did articulate one objective fact as to why he believed that the plate was not maintained in accordance with the statute, peeling paint. However, the Court challenged the Trooper on this point: (in reference to exhibit 2) "Like, I'm looking at this picture and it seems it seems pretty easy to read" (R.21 Pg. 17). The Trooper couldn't elaborate how the peeling paint made the license plate illegible and instead simply pointed it out and asserted that "from where I was following him – because of the peeling paint it was illegible."

The State explains this by taking liberties with the Trooper's testimony stating things like "he also testified that the exhibit showing the license plate in the daylight was not an accurate depiction of how it would look at night, from a normal following distance," (Respondent's Brief Pg. 16). However, the State does not quote the Trooper nor provide a line number, and, to be frank, the Trooper testified to no such thing. What

the Trooper did testify to was, when asked "if that (exhibit 2) looks like the license plate on the vehicle that you stopped that day," was "yes" (R.21:Pg.10:Ln.16,17,18). Defense counsel then followed up by asking: "and so does that appear to be what the plate looked like," and again the Troopers response was "yes" (R.21:Pg.10:Ln. 19,20,21). Now, it can't be denied that the picture was taken during daylight while the traffic stop was at night. The State seems to imply that although the plate may have been legible in the daylight, it was not legible in the dark. The Appellant has no control over the rise and fall of sun nor can he be held accountable for the plethora of other naturally occurring conditions which may inhibit an officer's subjective ability to read a license plate. The Appellant's duty under the law was to maintain his license plates so that they were legible and displayed in a manner so as to allow them to be distinctly seen and read and the evidence on this record does not support the idea that the Trooper's suspicions were reasonable.

CONCLUSION

WHEREFORE, the Defendant-Appellant humbly asks this Court to find that the Trial Court erred in interpreting Wis. Stat. § 341.15(2) and misapplied this error in law to the facts of the case, thus violating the Defendant-Appellant's Fourth Amendment right to be free from any unreasonable seizure of his person. The Defendant-Appellant thus requests an order from this Court reversing the Trial Court's reasonable suspicion determination and remanding the case back to the trial Court for reconsideration, consistent with the finding of this Court.

Dated at Appleton, Wisconsin this 27th day of March, 2023

Respectfully Submitted:

John Miller Carroll Law Office

By: ***Electronically signed by John Miller Carroll***
John Miller Carroll
State Bar #1010478

ADDRESS:
226 South State Street
Appleton, Wisconsin 54911
(920) 734-4878

FORM AND LENGTH CERTIFICATION

I, John M. Carroll, hereby certify that this brief conforms to the rules contained in s. 809.19 (8)(b), (bm) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2138 words.

Dated this 27th day of March, 2023.

Electronically signed by John Miller Carroll

John Miller Carroll
State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 27th day of March, 2023.

Electronically signed by John Miller Carroll

John Miller Carroll
State Bar #1010478