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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT II

Case No. 2023AP1053 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

KEVIN A. TERRY,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN FOND DU LAC
COUNTY CASE 2019CT434, THE HONORABLE JUDGE ENGLISH
PRESIDING.

BRIEF OF DEFENDANT-APPELLANT

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Whren v. United States, 517 U.S. 806, 809-10,
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STATUTES CITED

Wis. Stat. § 347.133, 9-10

ISSUE PRESENTED

The defendant, Kevin A. Terry (hereinafter referred to as “Terry”) was stopped because an officer claimed he saw a white light emitting from the upper corner of his left taillight. The officer’s squad camera revealed that Terry’s left taillight was illuminated red. Terry was otherwise traveling properly within his lane and no other law violations were observed.

The issue presented in this case is whether the officer had a reasonable basis to believe that Terry violated the traffic code to stop his vehicle.

The trial court determined that the officer did.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested because the facts and legal analysis can be sufficiently developed in writing.

STATEMENT ON PUBLICATION

Publication is requested to provide law enforcement and lower courts with guidance on how the Supreme Court’s decision in *State v. Brown*, 2014 WI 69, should be applied to traffic stops. This case presents an opportunity for this Court to further clarify how the phrase “good working order” is to be interpreted by law enforcement when conducting traffic stops.

STATEMENT OF THE CASE

Terry was driving down the road, within his lane of travel. He braked before he approached a controlled intersection, used his turn signal to safely indicate his future travel, and completed the turn. Law enforcement reported no violations pertaining to his speed or operation

of the vehicle, other than allegations pertaining to the functioning of his left taillight.

Deputy Vis began following Terry. Initially, he reported that he was approximately twenty to thirty yards behind Terry. (App. 12-13). However, when Terry used his brakes to slow down for a stop sign, the Deputy's vehicle caught up to Terry's vehicle.

According to the Deputy, as he followed Terry, he observed what appeared to be "a white light coming from the upper portion" of Terry's left taillight. (App. 6 at lines 5-6 and 19). As a result, the Deputy conducted a traffic stop of Terry's vehicle. (App. 7).

When questioned further about the Deputy's observation of Terry's taillight, the Deputy testified that at times, the left taillight was "pinkish" but also testified that the left taillight "appeared white." (App. 22, App. 10-11). He testified that there was a *slight*, visible difference between the left and right taillight, which was more visible when Terry's brakes were illuminated. (App. 10; App. 13; App. 22). However, he acknowledged that the difference between the two was "tough" and "hard to see" on Exhibit 1. (App. 20).

The Deputy was unequivocal in his testimony that his sole basis for stopping Terry's vehicle was for a violation of the traffic code, based upon the functioning of the left taillight. (App. 7-8; App. 20).

The trial court reviewed the visual recording from the Deputy's squad car. The trial court found that the video showed that the left taillight had a "pinkish tinge" before the brake lights were illuminated. (App. 23). When the brake lights were illuminated, the court opined that the video showed a white light, rather than a red light. (App. 23-24).

The trial court found that the Deputy testified that Terry's left taillight was "not emitting red light." The trial court found that the Deputy testified that the taillight was "emitting a white light." (App. 23).

The trial court found that if Terry's left taillight was not emitting red light, it was not in good working order. The trial court found that the Deputy's testimony reliable, supporting that the taillight was illuminated white, not red. Therefore, the trial court upheld the stop.

Terry was subsequently convicted. He appeals the judgment on the grounds that the trial court erroneously denied his motion to suppress all fruits of the traffic stop.

ARGUMENT

Law enforcement stopped Terry's vehicle without a reasonable basis to believe that he had committed a traffic violation. *State v. Brown*, 2014 WI 69, 355 Wis. 2d 668, 850 N.W.2d 66. Although his left taillamp was not in perfect working order, it was in good working order. Therefore, the officer violated Terry's constitutional right to be free from unreasonable seizures when he stopped his vehicle.

Whether evidence obtained after the traffic stop was initiated must be suppressed is a question of constitutional fact. *State v. Knapp*, 2005 WI 127, ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899. Therefore, a circuit court's findings of fact are upheld unless they are clearly erroneous. However, whether the facts of the case demonstrate a violation of Terry's constitutional right to be free from unreasonable government seizures is reviewed by this Court independently. *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182.

I. The trial court erroneously found that Terry's left taillight was emitting white light and not red light.

Deputy Vis's observations of Terry's vehicle in the sixty seconds before he effectuated a traffic stop are contained on a recording from the dash camera of his squad car. That video was admitted by the trial court as Exhibit 1. (R. 23; E. 110).

At 10:55:19, the video begins with the Deputy following Terry. (R. 110 at 10:55:19). According to the Deputy, at that moment, he

estimated that he was approximately twenty to thirty yards behind Terry. (App. 12-13; R. 110). At that moment and continuing up to the point that Terry's brake-lights were illuminated, Exhibit 1 shows that both left and right taillights were illuminated red, not white. (App. 110).

At 10:55:26, Exhibit 1 shows that Terry's brake lights were illuminated and remained illuminated until he began to turn at the stop sign. Therefore, the lights are brighter, but continued to emit a red light. The left taillight was not white.

At 10:55:30, Exhibit 1 shows that Terry was still braking as he approached the intersection, but also activated his right turn signal. Once again, his left taillight remained illuminated red, not white.

At 10:55:53, after the Deputy turned right to continue following Terry, his squad fell back further away from Terry's vehicle. However, Terry's left taillight remained visible, still illuminated red. In fact, there was little or no significant difference between the left and right taillight.

At 10:55:55, Terry braked again before turning right. Both the left and right taillight once again emitted a darker and brighter red light, from the same taillights in question.

The Deputy turned right to continue following Terry he effectuated his traffic stop seconds later, at 10:56:19. (R. 110). The emergency lights for the Deputy's squad, signaling to Terry that he was not free to leave, were illuminated by the beginning of the first frame at 10:56:20.

The trial court's finding that Terry's left taillight was white, not red is clearly erroneous. The Deputy's testimony does not overcome the clear, visible evidence contained on Exhibit 1.

Deputy Vis testified that as he initially approached Terry's vehicle, he observed what appeared to be "a white light coming from the upper portion" of the left taillight. While it is possible that the

Deputy was able to see a small white light emitted from the upper portion of the left taillight that is not otherwise visible on the video, it does not change the fact that the video clearly shows that the taillight was emitting a red light.

The officer never testified that the left taillight was completely white. Therefore, the trial court's factual finding that Terry's taillight was not emitting red light is clearly erroneous. At best, the Deputy's testimony was inconsistent.

First, he said that there was "a white light coming from *the upper portion*." (App. 6). Later, he said that the left taillight "appeared white." (App. 10-11; App. 16). Later, he described the left taillight as "pinkish."

When questioned about Exhibit 1, Deputy Vis testified that the difference between the two lights was "tough" and "hard to see." He then admitted that there was only a "slight difference" between the two lights.

A factual finding is clearly erroneous when "it is against the great weight and clear preponderance of the evidence." *Phelps v. Physicians Ins. Co.*, 2009 WI 74, ¶ 39, 319 Wis. 2d 1, 768 N.W.2d 615 (citing *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis.2d 358, 752 N.W.2d 748; quoting *State v. Sykes*, 2005 WI 48, ¶ 21 n. 7, 279 Wis.2d 742, 695 N.W.2d 277).

The evidence in this case with the greatest weight is Exhibit 1, the clear video showing red lights emanating from both the taillights on Terry's vehicle. Exhibit 1 clearly shows that both the left and right taillight were emitting a red light. It is clear and convincing. Nothing about Deputy Vis's inconsistent testimony refutes the evidence that is plainly visible on Exhibit 1.

Terry's left taillight was emitting a red light throughout the entirety of the sixty seconds before the Deputy stopped his vehicle. There is no credible or greater weight of evidence to the contrary in this record.

Even if Deputy Vis's testimony is credible that he saw a white light emitting *from a small portion of a taillight*, that does not make the entire taillight white. To find that the taillight was illuminated white is not supported by the record.

Nothing in Deputy Vis's testimony can be interpreted or found to refute the clear, visible evidence on Exhibit 1. The taillight was illuminated red as required by the traffic code. Therefore, this Court should reject the trial court's factual finding to the contrary. The trial court's factual finding that Terry's taillight was illuminated white, and not red, is not supported by the greater weight or by clear and convincing evidence in this record.

II. Terry's constitutional right to be free from unlawful seizures was violated because the Deputy stopped his vehicle without any reasonable basis to believe that a moving traffic violation existed.

Because Terry's vehicle was emitting a red light from both his left and right taillight, as required by sec. 347.13(1), his taillights were in "good working order." *Brown*, 2014 WI 69. The traffic stop was unlawful.

A traffic stop is a seizure within the meaning of the Fourth Amendment. Therefore, it must be reasonable to pass constitutional muster. *State v. Popke*, 2009 WI 37, ¶ 11, 317 Wis.2d 118, 765 N.W.2d 569; *Whren v. United States*, 517 U.S. 806, 809-10, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996).

The Supreme Court determined that "good working order" is not defined by the legislature and relied upon the dictionary definition of that term in *Brown*. *Id.* at ¶¶ 28-29. The Supreme Court held that "good working order" centers on "whether an object is functioning so as to fulfill its intended purpose." *Id.* at ¶ 29.

In the context of sec. 347.13, Wis. Stats., good working order means that the taillight must emit a red light visible behind the vehicle

during hours of darkness. Exhibit 1 shows that Terry's taillights complied with sec. 347.13(1), Wis. Stats. There is no credible evidence that Terry's taillight was not emitting a red light visible from 500 feet behind his vehicle.

Deputy Vis began following Terry at approximately 10:55 p.m. At that time, it was dark outside.

As Exhibit 1 reflects, Terry's taillight was emitting red light. Furthermore, the red light was clearly visible, and illuminated, the entire time that Deputy Visi was behind his vehicle. Therefore, there is no evidence in this record that Terry's left taillight was not functioning in good working order.

As the Supreme Court held in *Brown*, "good working order" does not mean that the taillight must be functioning perfectly. In fact, even when one lightbulb is burned out, a taillight can be in good working order.

Similarly, here, where the taillight may have been emitting a small white light, that does not change the fact that the taillight was functioning in good working order.

The taillight was visible to the officer as he was following Terry's vehicle. The taillight served its function to make Terry's position on the roadway known to the officer. Furthermore, when Terry braked, the taillight functioned to notify the vehicles behind him that he was doing so. Therefore, the officer had no reasonable basis to conclude otherwise.

Terry's lights were in good working order. Therefore, the traffic stop was without proper cause and was unlawful. As such, all evidence stemming from the stop should be suppressed.

CONCLUSION

Terry's constitutional right was violated when law enforcement stopped his vehicle without a reasonable basis to believe that Terry had violated a traffic law. Therefore, all results stemming from the stop should have been suppressed. Terry seeks an order setting aside his conviction and suppressing all direct and derivative evidence stemming from the stop.

Signed and dated: October 4, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 2,091 words.

Signed and dated: Wednesday, October 4, 2023.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with sec. 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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