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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 DALE L. ENGLISH PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

ISSUE PRESENTED	3
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	3
INTRODUCTION	4
STATEMENT OF THE CASE.....	4
STANDARD OF REVIEW	5
ARGUMENT	6
A. Controlling legal principles.	6
B. Relevant lighting equipment statutes.....	6
C. The white light emitted from the left rear tail lamp of Terry’s vehicle was a traffic violation and provided reasonable suspicion to stop his vehicle.....	7
D. Even if the white light emitted from Terry’s tail lamp did not constitute a traffic violation, Deputy Vis’ belief that it did was a reasonable mistake of law.....	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

<i>Heien v. North Carolina</i> , 574 U.S. 54, 135 S. Ct. 530 (2014).....	10
<i>Lessor v. Wangelin</i> , 221 Wis. 2d 659, 586 N.W.2d 1 (1998).....	6
<i>State v. Arias</i> , 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748	6
<i>State v. Brown</i> , 2014 WI 69, 355 Wis. 2d 86, 700 N.W.2d 899	9
<i>State v. Hogan</i> , 2015 WI 76, 364 Wis. 2d 167, 868 N.W.2d 124	6
<i>State v. Houghton</i> , 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143	6, 10
<i>United States v. Lewis</i> , 608 F.3d 996 (7 th Cir. 2010).....	6

Statutes

Wisconsin Stat. § 347.07.....	7, 9
Wisconsin Stat. § 347.13.....	6, 7, 8
Wisconsin Stat. § 347.15.....	7
Wisconsin Stat. § 347.26.....	7

ISSUE PRESENTED

Did the police have reasonable suspicion to stop Terry's vehicle?

The trial court answered this question yes and denied the defendant's motion to suppress.

This Court should also answer this question yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This is a fact-specific question that can be resolved by applying the facts to established legal precedent.

INTRODUCTION

Deputy Vis stopped Terry's vehicle because Vis observed a white light coming from the upper portion of Terry's left rear tail lamp. The stop was during nighttime hours. Vis made contact with Terry and observed signs of intoxication. Terry was charged with Operating While Intoxicated (2nd Offense) and Operating with a Prohibited Alcohol Concentration (2nd Offense).

Terry moved to suppress evidence arguing that Vis' stop was improper because he lacked reasonable suspicion that Terry had committed a traffic violation. Terry asserted that his tail lamp was in good working order, per statute. The trial court properly denied the motion, finding that because the tail lamp was emitting a white light during at least part of the time Vis observed the vehicle, Vis had a sufficient basis to stop the vehicle.

STATEMENT OF THE CASE

On August 10, 2019, Deputy Michael Vis of the Fond du Lac Sheriff's Office encountered defendant Kevin Terry's Jeep while Vis and Terry were traveling Southbound on Hickory Street approaching the intersection with Rolling Meadows in the City of Fond du Lac, Wisconsin, at approximately 10:56 p.m. (R. 85:6-7.) As

the Jeep slowed, the stop lights illuminated. (R. 85:7.) Vis saw a white light coming from the upper portion of the left tail lamp when the brake lights were illuminated. (R. 85: 7, 17, 22.) After stopping Terry and approaching the Jeep, Vis observed a “3-inch by 3-inch crack or hole in the taillight” which was partially covered with a “light red transparent tape.” (R. 85:8, 9.)

The video from Vis’ squad camera was introduced into evidence and played for the trial court. (R. 85:10.) Vis testified that the video captured Terry’s vehicle approaching the Hickory and Rolling Meadows intersection. (R. 85:11.) Vis testified that the video quality was not as good as what the human eye can capture. (*Id.*) Despite these limitations, Vis testified that the video still showed a difference in color between the two tail lamps and showed the white light coming from the top corner of the left tail lamp. (R. 85: 11-12.) Vis confirmed on cross examination that the white light was visible on video and that he recalled seeing the white light in person. (R. 85:14.)

The trial court found that the video “shows different things at different times.” (R. 85:30.) The court noted the video did show a pink or pinkish tinge and different colors between the two lights. (*Id.*) However, at 22:55:39¹ of the video, the trial court found that it was “clear” that the “left taillight is emitting a white light, not a red light.” (R. 85:30-31, 35.) The trial court held that this violation was a sufficient basis to stop the vehicle. (R. 85:35).

STANDARD OF REVIEW

Whether a defendant’s Fourth Amendment rights have been violated is a question of constitutional fact. The resolution of a constitutional fact is a two-step process. First, the trial court’s findings of historical fact are to be upheld unless they are clearly erroneous, and the application of these facts to constitutional principles

¹ The trial court referenced “22:55:39” and “22:59:39” of the video in the same sentence when discussing the white light visible from the tail lamp. (R. 85:35.) The State asserts that the trial court misstated the time stamp when it referenced “22:59:39” and that the correct reference was the “22:55:39” time stamp. Terry’s vehicle was already parked by 22:56:23. (R. 85:18-19.)

are reviewed *de novo*. *State v. Hogan*, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 868 N.W.2d 124.

ARGUMENT

A. Controlling legal principles.

Reasonable suspicion that a traffic law has been, or is being violated, is a sufficient basis for a traffic stop. *State v. Houghton*, 2015 WI 79, ¶ 30, 364 Wis. 2d 234, 868 N.W.2d 143.

A trial court's factual finding is clearly erroneous if it is against the great weight and clear preponderance of the evidence. *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748. A trial court's factual findings shall not be set aside unless clearly in error, and due regard should be given to the trial judge's opportunity to judge the credibility of the witnesses. *Lessor v. Wangelin*, 221 Wis. 2d 659, 667, 586 N.W.2d 1 (1998). A trial court's finding of fact is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. Special deference is given to the fact that the trial court heard the testimony and observed the witnesses at the suppression hearing. *United States v. Lewis*, 608 F.3d 996, 999 (7th Cir. 2010).

B. Relevant lighting equipment statutes.

A motor vehicle driven in Wisconsin must be equipped with one or more tail lamps that signal the rear of the vehicle at night. Wis. Stat. § 347.13(1):

No person may operate a motor vehicle, mobile home, or trailer or semitrailer upon a highway during hours of darkness or during a period of limited visibility unless the motor vehicle, mobile home, or trailer or semitrailer is equipped with at least one tail lamp mounted on the rear which, when lighted during hours of darkness, emits a red light plainly visible from a distance of 500 feet to the rear. No tail lamp may have any type of decorative covering that restricts the amount of light emitted when the tail lamp is in use. No vehicle originally equipped at the time of manufacture and sale with 2 tail lamps may be operated upon a highway during hours of darkness or during a period of limited visibility unless both lamps are in good working order. This subsection does not apply to any type of decorative covering originally equipped on the vehicle at the time of manufacture and sale.

The color of a vehicle's head and tail lamps are further defined and restricted by Wis. Stat. § 347.07(2) which prohibits the operation of a vehicle on a highway if that vehicle has lights which display "any color of light other than white or amber visible from directly in front" or "any color of light other than red on the rear." Wis. Stat. §§ 347.07(2)(a) and (b), respectively.

An exception to the limit of red lights to the rear of the vehicle is the vehicle's back-up lamp, controlled by Wis. Stat. § 347.26(4). That section reads:

(a) Any motor vehicle may be equipped with not more than 2 back-up lamps which shall be so directed as to project a white or amber light illuminating the roadway to the rear of such vehicle for a distance not to exceed 75 feet.

(b) No lighted back-up lamp shall be displayed on any vehicle upon a highway except when such vehicle is about to be or is being driven backward. Whenever a back-up lamp is lighted during hours of darkness, the tail lamp or tail lamps on the vehicle displaying such lighted back-up lamp also shall be lighted.

Another exception is the vehicle's directional lamps, which permit "a flashing red or amber light visible to the rear" of the vehicle to indicate the direction of a turn. Wis. Stat. § 347.15(2).

White and amber lights are therefore only to be used on the front of the vehicle to indicate the vehicle's front and to illuminate the roadway in the vehicle's direction of travel, or on the rear only when the vehicle is being operated in reverse, thereby again indicating the vehicle's direction of travel and illuminating the roadway. If a vehicle is signaling a turn, a flashing amber light is permitted on the rear. Illumination of a white light on the rear tail lamp is prohibited.

C. The white light emitted from the left rear tail lamp of Terry's vehicle was a traffic violation and provided reasonable suspicion to stop his vehicle.

Nothing about the trial court's findings of fact are clearly erroneous, and the defendant has not met his burden to show otherwise. What is "clear" is that the great weight and preponderance of the evidence shows that Terry was in violation of Wis. Stat. §§ 347.13(1) and 347.07(2)(b). The trial court found that at various points in

the video, Terry's left rear tail lamp appeared to be different colors, including pink. (R. 85:30.) At least at one point in the video, the trial court found that Terry's left rear tail lamp clearly displayed a white light. (R. 85:30-31.) Deputy Vis testified that not only did the video show the white light coming from Terry's left rear tail lamp, but he also recalled observing this white light in person while following Terry.

Terry asserts that the "clear, visible evidence" on the squad video disproves Vis' observations and testimony. (Terry's Br. 7.) Terry argues that because Vis never testified that the tail lamp was "completely white," the trial court's factual finding that Terry's tail lamp was not emitting red light was clearly erroneous. (Terry's Br. 8.) Further, Terry argues that the video, which constitutes the "greatest weight," showed red light emanating from both of Terry's tail lamps.

There are three main problems with Terry's argument. First, as Vis noted in his testimony, the resolution of the squad video is of lower quality than his personal observations at the scene. Despite this limitation, Vis testified, and the trial court found, that the video does in fact show the display of a white light. Terry disagrees, but his interpretation does not render the trial court's findings clearly erroneous.

Second, the trial court never found Vis to be an unreliable witness. Rather, the trial court found his testimony consistent with the court's own observations in the video. Even if Terry is correct that the lower resolution video does not show a white light, there was no other testimony or evidence offered to disprove Vis' observations at the scene on the night of the stop. The trial court could reasonably believe Vis' testimony as to his personal observations even without the video. The court also found that in the court's experience, "it's not uncommon to have testimony and the squad video not entirely correspond. Or, for example, the officer will say, well, what I saw was this and it's not clearly reflected in the video, based on video quality, et cetera." (R. 85:30.)

Third, Terry does not have to display an entirely white light on the rear of his vehicle at all times for him to be in violation of traffic laws. Rather, any display of white light, even with a concurrent display of red, violates Wis. Stat. §§ 347.13(1)

and 347.07(2)(b). The statutes permit only a red light to be displayed on the rear tail lamp and brake lights, unless the car is backing up or signaling a turn. Here, the partially-covered hole in Terry's left rear tail lamp allowed white light to escape alongside the covered portion of the tail lamp assembly which glowed a red color. It appears that the white light is displayed or intensified when Terry applies his brakes, which makes sense if the crack was on the upper portion of the tail lamp assembly, as Vis testified, covering the extra bulb that is illuminated when the driver applies the brakes.

In that latter respect, this case is distinguishable from *State v. Brown*, 2014 WI 69, 355 Wis. 2d 86, 700 N.W.2d 899. In *Brown*, the Wisconsin Supreme Court examined the definition of "good working order" from Wis. Stat. § 347.13(1), finding that the meaning focuses on "whether an object is functioning so as to fulfill its intended purpose." *Brown*, 355 Wis. 2d 86, ¶ 29. The Supreme Court determined that a tail lamp with a burned out bulb nonetheless complied with Wis. Stat. § 347.13(1). *Id.* at ¶ 41. There appeared to be no dispute that the tail lamp in *Brown* still projected a red light up to 500 feet behind the vehicle as required by that statute.

Here, the violation is not that Terry's vehicle did not project a red light from the tail lamp. The violation, rather, is that Terry's vehicle also projected a white light from the top portion of the tail lamp. Not only does that fail to fulfill the purpose of Wis. Stat. § 347.13(1), but it violates Wis. Stat. § 347.07(2) which requires lights to the front of the vehicle to be white or amber and lights to the rear of the vehicle to be red. Motorists need to discern at night, based upon a vehicle's lights, in which direction the vehicle is headed. Displaying white lights on the rear of the vehicle next to or in place of red lights defeats that purpose and violates state law.

D. Even if the white light emitted from Terry's tail lamp did not constitute a traffic violation, Deputy Vis' belief that it did was a reasonable mistake of law.

An objectively reasonable mistake of law by a police officer can form the basis for reasonable suspicion to conduct a traffic stop. *State v. Houghton*, 364 Wis. 2d 234, ¶ 52. If a statute is genuinely ambiguous, such that overturning the police officer's judgment requires hard interpretive work, then the police officer has made a reasonable mistake of law. *Houghton*, 364 Wis. 2d 234, ¶ 68 (quoting *Heien v. North Carolina*, 574 U.S. 54, 135 S. Ct. 530, 541 (2014) (Kagan, J., concurring)). Vis' stop of Terry's vehicle was lawful based on his observations that the left rear tail lamp emitted a white light when the vehicle appeared to be braking.

If the vehicle lighting statute is interpreted to permit people to operate with a cracked or defective rear tail lamp that permits white light to escape, then Vis' actions would be a reasonable mistake of law. In *State v. Houghton*, the Wisconsin Supreme Court endorsed *Heien v. North Carolina*, 135 S. Ct. 530, which held that an officer's objectively reasonable mistake of law may form the basis for a finding of reasonable suspicion. *Houghton*, 364 Wis. 2d 234, ¶¶ 4–5. *Heien* held, “The question here is whether reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition. We hold that it can.” *Heien*, 135 S. Ct. at 536. The mistake, though, must be “*objectively* reasonable.” *Id.* at 539 (emphasis original).

Certainly, Vis reasonably relied on traffic laws which, on their face, require the display of a red light, and only a red light, on the rear tail lamp of a vehicle. In the absence of any case law pointing to the contrary, Vis' reading of the law was reasonable, even if it can be somehow interpreted that it was mistaken.

CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm the trial court's denial of Terry's motion to suppress.

Dated this 1st day of December, 2023.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,939 words.

Dated this 1st day of December, 2023.

Electronically signed by David W. Maas

DAVID W. MAAS
Assistant District Attorney

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 1st day of December, 2023.

Electronically signed by David W. Maas

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