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**SUPREME COURT**

STATE OF WISCONSIN

SUPREME COURT

Case No. 2023AP1053 – CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEVIN A. TERRY,

Defendant-Appellant-Petitioner.

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PETITION FOR REVIEW

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The defendant-appellant-petitioner, Kevin Terry (“Terry”), hereby petitions the Supreme Court of Wisconsin, pursuant to Wis. Stats. §§ 808.10 and 809.62 to review the final decision of the Court of Appeals, filed on January 31, 2024, which denied Terry relief.

### **ISSUE PRESENTED**

Terry was driving at the posted speed limit, within his lane of travel, when a sheriff deputy pulled out behind him and began to follow him. Terry reached an intersection, stopped, and turned using his directional.

While the deputy was initially driving behind Terry, Terry’s rear tail lamps can be clearly and visibly seen on the deputy’s squad camera emitting a red light. When the deputy’s squad car catches up to Terry’s vehicle at the stop sign, the deputy indicated that he could see a small white light on the corner of Terry’s left tail lamp. He stopped Terry for an alleged violation of sec. 347.13(1), Wis. Stats.

The trial court determined that Terry’s left rear tail lamp differed slightly in color compared to the right tail lamp. Once the deputy was immediately behind Terry’s vehicle and the deputy’s squad car was positioned so that his headlights illuminated Terry’s vehicle, the trial court indicated that a small patch of white light could be seen peeking out from the corner of the tail lamp.

**ISSUE PRESENTED:** Did the deputy have reasonable suspicion to stop Terry for a violation of the traffic code?

The trial court determined that the deputy had seen white light emitting from the corner of Terry’s left tail lamp, in violation of Wis. Stat. § 347.13(1).

The Court of Appeals determined that the deputy had seen white light, in violation of Wis. Stat. § 347.07(2).

Both courts upheld the stop.

### CRITERIA SUPPORTING REVIEW

This Court should grant review because the issue presented in this case implicates a real and significant issue of constitutional law. Furthermore, review of this case will aid lower courts by developing and clarifying the law. Third and finally, Terry urges this Court to grant review because there is a substantial and compelling basis for review.

Terry was stopped based upon a deputy's claim that he saw a white light peeking from the upper corner of Terry's left, rear tail lamp. However, the video from the deputy's squad camera reveals that Terry's left tail lamp was emitting red light as he drove down the road.

Terry maintains that his tail lamp was in good working order, as required by Wis. Stat. § 347.13(1). His tail lamp was visibly illuminating red light from five hundred feet to the rear, providing the requisite notice and warning to motorists traveling behind him.

The Court of Appeals did not decide whether Terry's tail lamp was in good working order, pursuant to sec. 347.13(1). Rather, the Court denied Terry relief on the grounds that Wis. Stat. § 347.07(2)(b) prohibits a rear tail lamp from emitting any white light.

Terry urges this Court to grant review because the Court of Appeals' decision improperly interprets the traffic code. In doing so, the improper interpretation of Wis. Stat. § 347.07(2) led to the validation of an unlawful traffic stop. It violated Terry's right to be free from unreasonable seizures.

Therefore, this case warrants review because it involves a real and significant issue of constitutional law, and because it presents a compelling basis for review. Terry's constitutional right to be free from unreasonable seizures was violated. In addition, review of this case will aid lower courts in their interpretation of the traffic code, aiding in their assessment of future suppression challenges.

### STATEMENT OF THE CASE

On August 10, 2019, Terry was driving down the road, within his lane of travel. Before reaching a controlled intersection, he safely used a turn signal, braked, and completed the turn. The deputy that stopped him testified that he saw no violations pertaining to Terry's speed or operation of the vehicle. (App. 25). He stopped Terry for an alleged mechanical defect with his rear left tail lamp.

The deputy estimated that when the squad camera was activated, the deputy was approximately twenty to thirty yards behind Terry. (App. 24). Therefore, he would have been approximately sixty to ninety feet behind Terry. However, the deputy had been following Terry before his camera was activated.

As Terry slowed for a stop sign, the deputy caught up to Terry's vehicle. The deputy testified that he first saw a white light coming from the upper portion of Terry's left tail lamp when Terry was stopped. (App. 17). The deputy did not observe anything before Terry stopped at the corner. The State offered no evidence of any violations observed before the deputy caught up to Terry at the corner.

When questioned further about his observation of the tail lamp, the deputy testified that the tail lamp was "pinkish." (App. 33, 21-22). He also testified that there was only a slight, visible difference between the left and right tail lamps. (App. 21, 24, 33). The deputy stated that the difference between the two lamps was "tough" and "hard to see" on the video from his dash camera. (App. 31).

The trial court reviewed the video. The trial court agreed that the left tail lamp initially exhibited a "pinkish tinge" as Terry reached the corner. (App. 35). Then, the court found that the video showed a white light on the corner of the tail lamp. (App. 35-36).

The trial court ultimately concluded that when Terry was at the corner, just before he turned, and while the deputy was directly behind him and the deputy's headlights were illuminating the rear of Terry's vehicle, that Terry's left rear tail lamp was emitting a pinkish or white light, not a red light. (App. 7). Therefore, the trial court concluded that Terry's left tail lamp was not in good working order.

The Court of Appeals did not reach a determination on whether Terry's left tail lamp was in good working order. The court agreed with the lower court's factual findings. However, the court concluded that white light was visible coming from the left tail lamp in violation of Wis. Stat. § 347.07(2), which prohibits any color of light other than red on the rear of a vehicle. (App. 10).

## ARGUMENT

**I. This case presents a real and significant issue of constitutional law and presents a compelling basis for review because the deputy lacked reasonable suspicion to believe that Terry had committed a traffic law violation and therefore, the stop was unlawful.**

**a.** *Section 347.07, Wis. Stats. cannot form a lawful basis for a reasonable suspicion traffic stop in this case because Terry was not violating sec. 347.07, Wis. Stats.*

The Court of Appeals concluded that because a small white light was peeking out of the corner of Terry's left rear tail lamp, that the deputy had reasonable suspicion to infer that Terry was in violation of sec. 347.07(2)(b), Wis. Stats. However, Terry did not have a white lamp affixed to his vehicle; therefore, he was not in violation of sec. 347.07(2). The deputy did not have reasonable suspicion to stop Terry's vehicle under that traffic provision.

This Court interprets a statute by first examining the plain meaning of the contents of the statute. *State v. Lopez*, 2019 WI 101, ¶ 10, 389 Wis. 2d 156, 936 N.W.2d 125. Where a term is not defined by the legislature, traditional definitions of words are considered. *State v. Brown*, 2014 WI 69, ¶ 28, 355 Wis. 2d 668, 850 N.W.2d 66. In addition, the context in which the statute's language is used, as well as the surrounding and closely related statutes are examined to avoid an absurd or unreasonable result. *Id.* at ¶ 26.

Section 347.07(2)(b) provides that no person shall operate a motor vehicle "which has displayed thereon: ... Any color of light other than red on the rear," except "as otherwise expressly authorized or required by this chapter." Wis. Stat. § 347.07(2). The plain language of the statute provides that lamps *displayed on* a motor vehicle must emit a red light, unless otherwise provided for in Chapter 347. The plain language also provides for an exception to the requirement that the rear

lamps display red light: “as otherwise expressly authorized or required by this chapter.” *Id.*

The word “display” was not given a special definition by the legislature. However, its common dictionary meaning is “to show,” “to make visible,” or “to place something for people to see.” Merriam Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/display> (last visited February 28, 2024). The third definition is the proper definition applicable to sec. 347.07 because it matches the plain language of the statute, when viewed in the context of the entirety of Chapter 347.

Terry did not place or affix a white lamp to his vehicle. He did not display a white lamp on his vehicle. Terry’s vehicle was equipped with two red, rear tail lamps, as required by sec. 347.07(2), Wis. Stats.

Section 347.07(2), Wis. Stats., does not prohibit a small quantity of white light peeking or leaking out of a corner of a tail lamp. Rather, it prohibits the installation and use of white lamps on the rear of a vehicle. Section 347.13, Wis. Stats., addresses the functionality of a red rear tail lamp.

In addition to the plain language of the statute, the courts must look to the rest of Chapter 347 to avoid an absurd result or interpretation. Consistent with Terry’s interpretation, the remainder of Chapter 347 contains exceptions which were contemplated by the legislature. Those exceptions permit a lamp emitting a light other than red light to be affixed to the rear of a vehicle. *See* Wis. Stat. §§ 347.15, 347.25, and 347.27.

Finally, the title of the statute supports Terry’s interpretation of sec. 347.07. Section 347.07(2)(b) is titled “Special restrictions on lamps and the use thereof.” Wis. Stat. § 347.07 (2019-20). The title of the statute implies that there are limits on the kinds of lamps that can be used on a vehicle.

The focus of the title and the context in which sec. 347.07 is created, is on the fixtures put on motor vehicles, not the functionality of a red rear tail lamp. The functionality of a red, rear tail lamp is governed by sec. 347.13(1), Wis. Stats. Therefore, sec. 347.07(2) is not applicable to the facts of this case.

Section 347.13(1) provides that tail lamps must emit a red light visible from five hundred feet behind the vehicle. The statute requires that the red rear tail lamp must be in good working order to meet that requirement. The statute does not

require that the red, rear tail lamp be in perfect working order. *Brown*, 2014 WI 69 at ¶¶ 34-36.

Because the functionality of Terry's left rear tail lamp is directly and expressly addressed by sec. 347.13, Terry disagrees that 347.07 is applicable to separately prohibit any small quantity of white light from peeking out of a corner. By interpreting the statute otherwise, the Court of Appeals order denying Terry relief validated an unlawful stop that violated Terry's right to be free from unlawful seizures.

- b.** *Terry's tail lamps were in good working order because they properly emitted a red light as required by sec. 347.13, Wis. Stats. and therefore, the deputy's stop of Terry's vehicle was unlawful.*

As this Court acknowledged in *Brown*, the policy behind the legislature enacting sec. 347.13(1), was to ensure that a running red light was visible from five hundred feet at night to protect other motorists by providing visibility, thereby ensuring public safety. *Brown*, 2014 WI 69 at ¶ 36. Terry's tail lamps did precisely that. They emitted a red light that was visible to the requisite distance. The deputy's squad video, depicted in Exhibit One, shows that Terry's left red tail lamps was in good working order.

Section 347.08(1), Wis. Stats. established the standard(s) by which visibility and distance are to be measured regarding the functionality of the rear tail lamp. Wis. Stat. § 347.08(1). Section 347.08(1) provides guidance to law enforcement and the reviewing court.

The legislature established that visibility should be measured in the dark, without additional lighting illuminating the tail lamp. In addition, the tail lamps' visibility was to be measured on a straight, level basis.

However, in this case, law enforcement and both courts focused on how Terry's red, left, rear tail lamp appeared while he was stopped. In addition, while stopped, they viewed the tail lamp while the deputy's white headlights were illuminating it, not in the dark as required by sec. 347.08, Wis. Stats.

They did not assess the tail lamp as it appeared in the dark, traveling five hundred feet behind. The legislature established guidelines for how to assess the visibility of the tail lamps' illumination for a reason. By assessing tail lamps at



night, from an appropriate distance and stance, the functionality of the lamp is measured in a way that matches the legislative purpose.

The deputy's headlights altered the appearance of Terry's rear tail lamp. In doing so, the lamp's functionality was not measured by the vantage of its functionality to provide notice and warning to other motorists. If it had been, the video shows that the lamp was functioning properly.

Instead of assessing the lamp from the viewpoint of a passing motorist, in the dark, the lamp was assessed by the circuit court while the vehicle was stopped with the squad car's headlights shining on it.

It was not until Terry stopped at the stop sign that the deputy claimed that he saw any white light. Up to that point, both the video and the deputy's testimony support one fact: that Terry's left tail lamp was emitting red light. Therefore, the tail lamp was functioning in good working order.

There is also no evidence in this record to suggest that the left tail lamp was emitting anything other than a red light from five hundred feet to the rear. Therefore, Terry complied with sec. 347.13, Wis. Stats. Terry's rear tail lamp was in good working order. Therefore, the deputy stopped Terry without reasonable suspicion that he violated the traffic code and Terry was unlawfully seized.

**II. This case presents a meaningful opportunity to clarify and harmonize the law regarding the interpretation of the traffic code to guide the lower courts in their analysis of suppression challenges.**

Fourth amendment challenges to stops for traffic violations account for a generous portion of the appeals that are filed each year. Therefore, this case presents an opportunity for this Court to provide guidance to lower courts. A decision would provide guidance to law enforcement and would aid lower courts in reviewing the validity of searches and seizures.

Terry could not locate any published decisions in which Wis. Stat. § 347.07 has been interpreted by an appellate court. However, in *State v. Frank*, 2012 WI App 62, 341 Wis. 2d 491, 815 N.W.2d 407, an unpublished Court of Appeals decision, the court acknowledged the applicability of sec. 347.07, Wis. Stats., to an after-market, white cargo lamp.

That decision is in line with Terry's interpretation of Wis. Stat. § 347.07, as being applicable to lamps affixed to a vehicle. However, it is unpublished and therefore cannot be relied upon by reviewing courts.

For those reasons, this case warrants review to provide guidance to lower courts in assessing other suppression cases. Stops based upon the functionality of rear tail lamps are common and likely to recur.

For all the reasons stated herein, Terry urges this Court to grant review of his case.

Signed and dated this February 29, 2024.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b) and (bm) for a petition. The length of this petition is 2,574 words.

Signed and dated this February 29, 2024.

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## CERTIFICATION OF FORM OF APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (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 courts' 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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