STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,
Plaintiff-Respondent

v.

Appeal No.: 2024AP000524
(Sauk County Circuit Court
Case No. 2023TR001025)

COLIN R. DOWLING,
Defendant-Appellant

ON APPEAL FROM THE CIRCUIT COURT FOR SAUK COUNTY,
THE HONORABLE PATRICIA A. BARRETT PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

1. Given the undisputed fact Dowling's reduced speed was "necessary for the safe operation" of the car in which he and his family were traveling, was his conviction for violating Wis. Stat. § 346.59(1) clearly erroneous as a matter of law?

Trial Court Answer: This issue was not addressed by the trial court even though it was raised by Dowling in his Argument in Support of a Not Guilty Verdict (Doc. 15, p. 3).

2. Were the trial court's findings that at the time of the alleged violation of Wis. Stat. § 346.59(1): (1) the speed of Dowling's car was "somewhere in the forties;" and (2) the only two vehicles observed by the State Patrol Trooper in the area "approached from the back and went around" Dowling's car sufficient, as a matter of law, to establish a violation of § 346.59(1), given the other, undisputed evidence that Dowling's car was traveling in the right lane of the two westbound lanes of Interstate I90/94 with no minimum speed limit on a clear winter night with its headlights and emergency four-way flashers on?

Trial Court Answer: "Yes."

3. Was the trial court's apparent belief that the reduced speed of Dowling's car could be "not [sic] enough to cause vehicles unable in the dark to get a clear understanding of how slow the vehicle was going to kind of move around it" legally sufficient to establish a violation of § 346.59(1) where there was no evidence Dowling actually impeded traffic?

Trial Court Answer: The trial court implicitly concluded "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Dowling does not believe oral argument will be necessary, as the issues raised can be fully addressed in the briefs.

Publication of the decision is warranted as this case appears to be the first appellate case in Wisconsin, and in other jurisdictions having statutes identical or substantially similar to Wis. Stat. § 346.59(1), where the issue of whether a vehicle's reduced speed was "necessary for safe operation" precludes a conviction for a violation of the statute is directly presented. Additionally, this appears to be the first appellate case in Wisconsin where the question of whether a vehicle's reduced speed must actually impede "the normal and reasonable movement of traffic" to establish a violation of § 346.59(1). The decision in this case will provide guidance to motorists, law enforcement, litigants and courts on these matters.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case involves the propriety of Dowling's conviction by the trial court of violating Wis. Stat. § 346.59(1), Wisconsin's "impeding traffic" statute, where: (1) the car he and his family were in was traveling at approximately 45 m.p.h. in the right lane of an interstate highway at night with its headlights and four-way emergency flashers on; (2) it is undisputed Dowling's reduced speed was "necessary for the safe operation" of his car; and (3) the only two vehicles in the area safely passed his car by moving into the open left lane without having to brake or even slow down.

II. PROCEDURAL HISTORY AND DISPOSITION IN THE TRIAL COURT

Dowling and his family were driving their Tesla on Interstate I90/94 to Lake Delton the night off January 19,2023. The Tesla's battery began dissipating much faster than normal and the car's computer instructed Dowling to drive a reduced speed to reach the next Tesla charger in Lake Delton. He passed a state trooper who subsequently pulled him over. Dowling was charged with violating Wis. Stat. § 346.04(2t) for "failing to stop his … vehicle as promptly as safety reasonably permits" since he delayed stopping his car while driving approximately 27 m.p.h. on the shoulder in the hope he could have 991 have the trooper follow them to the nearby Tesla charger. He was also cited for impeding traffic in violation of Wis. Stat. § 346.59(1).

The § 346.04(2t) charge, Sauk County Circuit Court Case No 2013CT00039, was tried to a jury on November 27, 2023, with the parties agreeing to have the trial court adjudicate the impeding traffic citation based on the evidence presented in the jury trial. The jury returned a guilty verdict that night and the court set December 20, 2023 for a hearing on disposition of the impeding traffic citation and for sentencing on the § 346.04(2t) conviction.

Dowling filed with the court his "Argument in Support of a Not Guilty Verdict" (Doc. 15, p. 3) and the court also heard argument from the parties at the December 20, 2023 hearing. The trial court found Dowling guilty of impeding traffic in violation § 346.59(1). In doing so, it found that the evidence showed the trooper saw "a slow-moving vehicle in the right lane and wasn't quite sure exactly how slow it was at that point, but cars approached from the back and went around, and he thought he saw two of

them do that." The trial court also concluded that when the trooper observed the Tesla "it was doing someplace in the forties." (Cir. Ct. Doc. No. 31, pp. 8-10; App., pp. 8-9).

This appeal followed. (Doc. 19)

III. STATEMENT OF FACTS

On the evening of January 19, 2023 Dowling, his wife and two children, ages 4 and 3 were traveling in their Tesla sedan from their home in the Chicago area to spend a couple of nights in Lake Delton, Wisconsin. (Doc. 30, pp. 92-93; 119) The Tesla is an all-electric vehicle with a sophisticated computer system. The computer provides information as to the current battery level as well as the % of charge needed to reach a specified destination and the expected remaining battery level on arriving at the destination. In making those calculations the computer takes into account various factors, including highway speeds and weather conditions. (Doc. 30, pp. 106-07,120-22)

They added charge to the Tesla in Kenosha and there was more than enough charge to reach a Tesla charger in Madison. (Doc. 30, p. 94, 106) As they neared Madison the computer indicated there would still be 1% charge remaining if they continued on to Lake Delton without stopping. Nonetheless, Dowling and his wife decided to stop at the Tesla charging station just off Interstate I90/94 in Madison. (Doc. 30, pp. 106-07, 109, 128-29)

The Tesla computer advised them that 12% battery level would be required to safely reach the Tesla charger in Lake Delton by continuing on I-90/94. However, to provide a greater safety cushion, they charged it to 20%. They planned on fully charging the battery overnight at the hotel they would be staying at. (Doc. 30, pp. 106-07, 109,128-29, 149-50)

After driving for a while at the prevailing speed of traffic. the computer system advised Dowling to reduce the speed to 70 m.ph to safely reach the Telsa charger at the Lake Delton exit. Dowling set the cruise control at 70 m.ph. A while later, the display indicated he should reduce the speed to 65 m.p.h., which he did while staying in the right lane. Later, the computer directed him to reduce the speed to 60 m.p.h., which he did. He put on the four-way emergency flashers at this point. A short distance later the computer system indicated the speed could be increased to 65. He increased his speed accordingly and turned off the emergency flashers. (Doc. 30, pp. 129-131)

After passing exit 106, the Highway 33 exit for Baraboo and the last exit before Lake Delton, the computer once again instructed him to reduce the speed to 60 m.p.h. He did so and put the emergency flashers back on. About four miles later, the computer indicated the speed now needed to be reduced to 55 m.p.h., and then within about 0.1 mile later the recommended speed was now 50 m.ph. At that point they were about six miles past the last exit. (Doc. 30, pp. 132-33) He drove at 50 m.p.h. for a while but shortly before reaching the area where Highway T passes over I90 the computer directed him to reduce the speed to 45 m.p.h., which he did. This area was also referred to at the trial as the “07 crossover” because it is located at mile marker 97. (Doc. 30, pp. 126-27) Dowling used cruise control to make sure the Tesla stayed right at the recommended speeds. (Doc. 30, p. 131)

As Dowling and his wife were driving at the slower and slower speeds they became seriously concerned the Tesla would simply stop running and would have to be stopped on the shoulder. Mrs. Dowling began Googling to find out what reserve, if any, the Tesla would have after the displayed battery

level reached 0%, which they were getting close to. She learned there was, unfortunately, no reserve. (Doc. 30, pp. 99-100)

It was a winter night in a dark, rural section of Interstate I90 with the nearest exit, Exit 92, still a number of miles away. Dowling and his wife had already other taken steps to reduce the demand on the battery, including turning down the heat. Their two young children were huddling in the rear seat. There was no emergency kit in the car. Had the Tesla simply stopped running it was unknown how cold it would get in the car, how long the headlights and emergency flashers would remain on, and how long they would be stranded on the shoulder with the risk of being struck by another vehicle. (Doc. 30, pp. 96, 101-02, 119, 152)

They knew that if the Tesla stopped with a very low battery level remaining there was a significant risk there would not be enough charge left to get the Tesla moving again. In fact, the Tesla displays that specific warning if you do stop it in that condition. Complicating the problem presented by those circumstances is the fact the Tesla is always "idling" when it is stopped, further depleting an already extremely low charge. (Doc. 30, p. 140, 162-63)

Dowling and his wife had not experienced this type of problem with the Tesla before. To the contrary, in their experience the computer was quite accurate in calculating the charge needed to reach a destination. They had not had any problems in the first two and a half hours of their trip that night. The charging cushion they thought they had when they left Madison was now of no benefit. (Doc. 30, pp. 103-04, 163-64)

As they were driving at the reduced speeds Dowling made a point of checking for approaching vehicles. No vehicles had any problems in simply moving to the left lane to pass them. (Doc. 30, pp. 99,133-34)

A short time after passing the 97 crossover Dowling noticed a vehicle coming up behind him in the right lane. As the vehicle got closer he recognized it as a police squad. The squad had actually been stopped at the crossover when Dowling passed it. The squad came up very close to the rear of the Tesla and turned on its overhead lights. Dowling pulled onto the right shoulder and reduced the Tesla's speed to about 27 m.p.h. At the same time, he called 911 asking for assistance from the officer in the squad to follow them to the Lake Delton exit, which was only a few miles away. (Doc. 30, pp. 100,134-35)

Included for the court's benefit at page 6 of the Appendix is a Map of Relevant Portions Of Interstate I90 and Relevant Landmarks. (It is referenced as "Exhibit No. 13 – Map" in Sauk County Clerk Certificate of Aug. 19, 2024 (App. Doc. No. 38))

He called 911 because the battery level, which had been decreasing far faster than normal, was at or near 0%. He and his wife were afraid that if they stopped the Tesla at that low of a battery level there would not be enough charge left to get it moving again, which would leave them stranded on the shoulder until a flat-bed tow truck could take it to the Tesla charger. It was their hope the 911 operator could reach the trooper and simply have him follow them to the Lake Delton exit. (Doc. 30, pp. 100,134-35,140-41)

After briefly describing the situation to the 911 operator, the operator transferred him to State Patrol Dispatch. After Dowling once again began to try to explain the situation and his family's concern to the dispatcher, the dispatcher realized another dispatcher was on the line with the trooper in the squad following the Tesla on the shoulder. The dispatcher Dowling was speaking with then told him he needed to stop despite the condition of the Tesla. Dowling then immediately stopped. About three minutes elapsed from when the squad lights were turned on to when the Tesla stopped on the

shoulder. (Doc. 14, pp. 41-42.). When he stopped the Tesla, Dowling, in fact, did get a message alert about the potential inability to get the car moving again. (Doc. 30, pp. 102, 138-39, 140-41, 162-63)

The trooper charged Dowling with violating Wis. Stat. § 346.04(2t) because he had not stopped the Tesla as soon as the trooper thought he should have. He also cited Dowling for impeding traffic in violation of Wis. Stat. § 346.59(1). At Dowling's request the trooper then followed him on the shoulder to the Tesla charger at the Lake Delton exit, traveling at the same speed he initially did on the shoulder. Fortunately, Dowling and his family were able to reach the charger even though the battery level was 0%. (Doc. 30, p. 161)

Dowling was able to confirm the Tesla's speeds and battery levels at various points along its travel from Madison to Lake Delton by retrieving and reviewing data stored in the Tesla computer system. The data was assembled in a spread sheet marked as Exhibit 14 in the jury trial in Cir. Ct. Case No. 2023CT000039 labeled Doc. 73. (Doc. 30, pp. 123-24)

The arresting trooper, who had been a trooper for less than a year and a half at the time of the incident, testified he observed a slow-moving Tesla approach the 97 crossover where he was parked. (Doc. 14, pp. 14, 25, 31-32) It was in the right lane with its emergency lights on. As the Tesla passed him there were no other vehicles around. (*Id.*). When the Tesla drove further up the road he saw two cars travelling at "highway speed" approach the Tesla in the right lane and then move into the left lane to pass the Tesla. They were the only vehicles in the area at that time other than the Tesla. (Doc. 14, pp. 31-32) That was the entirety of his testimony regarding the interaction between the Tesla and any other vehicle cars. He did not testify to observing either car braking or slowing down as they approached

the Tesla and moved into to the left lane to pass. Nor did he testify as to how far each car was from the Tesla before moving into the left lane.

The trooper explained the manner in which his squad camera recorded a video of his subsequent driving to catch up with the Telsa and pull it over. When he turns his squad's overhead lights on the camera preserves video of the prior 30 seconds and of all further action under it is turned off. In this case, the squad video shows the movement of the squad car beginning when it is already in the left lane and then moving into to the right lane as it catches up with the Tesla. The flash drive containing the video covering his catching up to the Tesla, pulling it over and the traffic stop was marked as Exhibit 1 in the criminal traffic trial and was included as a part of the Record on Appeal as indicated in the Sauk County Clerk Certificate of Aug. 19, 2024, (App. Doc. No. 38). The flash drive has two videos on it. The one showing the events up the completion of the traffic stop is titled 19012023215258.wmv. (Doc. 14, 27-28, 40)

ARGUMENT

I. Dowling Did Not Violate Wis. Stat. § 346.59(1) Because It Was Undisputed His Reduced Speed Was "Necessary For Safe Operation."

Wis. Stat. § 346.59, titled "**Minimum Speed Regulation**," states:

> (1) No person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or is necessary to comply with the law.
>
> (2) The operator of a vehicle moving at a speed so slow as to impede the normal and reasonable movement of traffic shall, if practicable, yield the roadway to an overtaking vehicle and shall move at a reasonably increased speed or yield the roadway to overtaking vehicles when directed to do so by a traffic officer.

Subsection (1) clearly states that "**when reduced speed is necessary for safe operation**" the prohibition against "imped[ing] the normal and reasonable movement of traffic" does not apply,

As noted earlier, the trial court did not address Dowling's defense that it was undisputed his reduced speed was necessary for the safe operation of the Tesla and, in turn, the protection of his family. In any event, the standard of review of the application of a statute to facts is a question of law subject to independent review by the appellate courts. ***State v. Booker***, 717 N.W.2d 676, 2006 WI 79, § 12 (Wis. 2006)

When the trooper observed the two cars move around the Tesla to pass, the Tesla was in the right lane with its headlights and four-way emergency flashers on. Dowling's reduced speed was necessary to reach the Tesla charging station at the upcoming exit for Lake Delton. The Telsa

computer system had been directing him to drive at increasingly reduced speeds to reach the charging station and avoid being stranded on the shoulder of the interstate highway because the battery level was dropping abnormally. When the trooper observed the Tesla, it was long past the prior exit, Exit 106 for Highway 33, and was only a few miles from the next exit, Exit 92 for Lake Delton, the exit Dowling was trying to reach.

Had Dowling not followed the instructions from the Tesla computer he and his family faced the very real risk the Tesla would simply stop running and would have to be stopped on the shoulder. It was a winter night in a dark, rural section of Interstate I90 with the nearest exit, Exit 92, still a number of miles away. Dowling and his wife had already other taken steps to reduce the demand on the battery, including turning down the heat. Their two young children were already huddling in the rear seat. There was no emergency kit in the car. Had the Tesla simply stopped running it was unknown how cold it would get in the car, how long the headlights and emergency flashers would remain on, and how long they would be stranded on the shoulder with the risk of being struck by another vehicle.

Unlike a gasoline powered vehicle, one cannot simply bring the equivalent of a gas can to the Tesla to allow it to get going again. A Tesla with a depleted battery can only be “refueled” at an electrical charging station and must be towed there by a flat-bed tow truck.

It is not uncommon to see vehicles driving on interstate and other highways at significantly reduced speeds out of necessity in order to operate safely. Probably the most common sighting involves a semi-tractor trailer or another large truck, a vehicle towing a large trailer or a large RV having to drive significantly below the posted speed limit because they are going up a grade, are first pulling onto a highway or simply do not have enough power to reach the posted speed limit all the time. Other instances of vehicles

needed to be driven at a reduced speed are those having mechanical issues that either limit the speed of the vehicle or make it unsafe to drive at a higher speed. With newer cars, a driver changing a flat tire will have frequently have to use a much smaller temporary spare tire, a "donut," that the manufacturer usually warns against operating at normal highway speeds. Moving trailers rented by consumers typically specify they should not be operated above a certain speed, which is often below the posted speed limit.[1]

Motorists regularly encounter these slower moving vehicles at all times of day and night. On some occasions, but certainly not all, the vehicles have their emergency flashers on, as was true here.

There do not appear to be any published decisions in Wisconsin or in other jurisdictions that have directly considered the "necessary for safe operation" exception as a complete defense to an alleged violation of . However, two cases have been found which do provide some guidance on this question.

Slattery v. Lofy, 172 N.W.2d 341, 45 Wis.2d 155 (Wis. 1969), considered the second exception to an impeding traffic charge, *i.e.,* "where reduced speed . . . is necessary to comply with the law." It was a civil action for damages resulting from a rear-end collision. The plaintiff, Slattery, had made a right turn from his driveway onto Highway 53, a two lane, undivided highway, which had a speed limit of 65 m.p.h. at that location. There was no minimum speed limit. Slattery had traveled some 400 to 500 feet on the highway and reached a speed of 15 to 18 m.p.h. when he was rear-ended by

[1] See, for example, the highlighted portion of the **"**U-HAUL TRAILER USER INSTRUCTIONS" (2020) found on page 10 of the Appendix. The document was downloaded from the U-Haul web page shown in the Table of Contents for the Appendix.

Lofy. Lofy testified she was driving at 75 m.p.h. when she saw the Slattery car some 300 feet ahead. She testified about 30 to 60 seconds passed between first seeing Slattery's car and the collision. She applied her brakes but was unable to stop in time. The left lane of the highway was free of oncoming traffic. The collision took place just before the speed limit on Highway 53 dropped to an unspecified limit as it approached the village of Trego. 45 Wis.2d at 157-59.

The Wisconsin Supreme Court upheld the trial court's directed verdicts finding Slattery not negligent and finding Lofy causally negligent. The court noted Wis. Stat. § 346.59(1) has an exception to an impeding traffic violation when reduced speed is "necessary to comply with the law." In upholding the directed verdict in favor of Slattery, the court stated:

> Not only is it undisputed that plaintiff was entering an area where reduced speed was required, but it is also undisputed that the left or passing lane was free of oncoming traffic. Miss Lofy could have simply passed the plaintiff in the left lane without danger and without incident. Under these circumstances the plaintiff's speed could not have been a cause of the accident. We are therefore of the opinion that the trial court properly directed the verdict in favor of the plaintiff as to the liability issue.
>
> 45 Wis.2d at 160.

Leon v. FedEx Ground Package Sys., Inc., No. CIV 13-1005 JB/SCY (D. N.M. Feb 21, 2016), (App., p. 12) was a civil action arising from a rear-end collision between two tractor-trailer trucks on an interstate highway at night. In a memorandum opinion, the federal district court denied FedEx Ground Package Sys. Inc.'s motion for partial summary judgement that Payne, the driver of the tractor-trailer rear-ended by the truck in which the injured plaintiff, Leon, was a passenger, violated New Mexico's impeding traffic statute. The statute provides "[a] person shall not drive a motor vehicle at such a slow speed as to impede the normal and reasonable

movement of traffic except when reduced speed is necessary for safe operation or to be in compliance with law." (Almost identical language is found in Wis. Stat. § 346.59(1)) (Mem. Op. & Order p. 8; App. p. 14)

The posted speed limit was 75 m.p.h. The rear-ended truck was accelerating in the right lane after stopping on the shoulder to check for a mechanical defect. It had reached a speed of approximately 34 to 38 m.p.h. when struck. The semi-trailer in which the plaintiff was riding had been in the left lane of the interstate but moved back into the right lane just before the collision. (Mem. Op. & Order pp.3-4; App. p.13)

The district court observed that the mere fact the truck's speed was slow, *i.e.,* 34 to 38 m.p.h. in a 75 m.ph. zone, did not, without more, violate the impeding traffic statute. It cited in support ***United States v. Valadez-Valadez***, 525 F.3d 987, 992 (10th Cir. 2008); ***Salter v. N. Dakota Dep't of Transp.***, 505 N.W.2d 111, 114 (N.D. 1993); and ***Com. v. Robbins*****,** 441 Pa. Super. 437, 439, 657 A.2d 1003, 1004 (1995). (Mem. Op. & Order p. 24; App. p. 23**.**

The district court also noted a jury could find that slow speed was necessary for safe operation or for compliance with the law:

> It may have been safer for Payne to accelerate in the roadway than on the shoulder, given the size of his tractor-trailer. Payne's reduced speed may have been either the best speed physically possible or the speed 'necessary for safe operation or to be in compliance with law.').
>
> (Mem. Op. & Order p. 25; App. p. 23)

The clear language of Wis. Stat. § 346.59(1) and the reasoning of the courts in ***Slattery*****,** supra*,* and ***Leon*****,** *supra,* support the conclusion that because Dowling's reduced speed was necessary for the safe operation of the Tesla, his conviction must be set aside.

II. Even if One Disregards for the Moment the Fact Dowling's Reduced Speed Was Necessary for Safe Operation, His Reduced Speed Did Not Impair the "Normal And Reasonable Movement Of Traffic."

A. The Trial Court's Findings as to the Actions of the Two Cars in Passing the Tesla By Simply Moving Into the Left Lane Establish There Was No Violation of Wis. Stat. § 346.59(1).

The trial court found that the two cars that passed the slower-moving Tesla "approached from the back and went around." The court also concluded the Tesla was travelling "somewhere in the forties" when the trooper observed it. (Doc. 31, pp. 8-9; App. p. 4). It was undisputed the Tesla was in the right, "slow," lane of the two westbound lanes of Interstate I90/94, which had no minimum speed limit. Its headlights and emergency four-way flashers were on. The only vehicles the trooper observed anywhere in the vicinity of the Tesla were the two cars that passed the Tesla. They did by simply moving into the left lane, where there was no traffic. There was no evidence either car braked, slowed down or even hesitated before moving around the Tesla. Nor was there any testimony as to how far away from the Tesla each car was before it moved to the left lane to pass it. We don't even know where each car was in relation to the other as each passed it. There is no evidence either driver had difficulty in observing the Tesla or in timely recognizing it was travelling at a slower speed. To the contrary, the ease by which the two cars passed the Tesla without even braking or slowing down shows those drivers were able to timely observe the Tesla, tell it was moving slow, and move into the open left lane to pass it without difficulty or delay.

By it very terms, § 346.59(1) required the State to show more than the Telsa was being operated at a reduced speed. The State also had to prove the reduced speed "impede[d] the normal and reasonable movement of traffic." The entirety of the evidence of the effect of the Tesla's reduced speed on traffic was that two cars moved from the right lane to the left lane to pass the Tesla without any difficulty or impairment. Common sense tells us there could be no violation of Wis. Stat. § 346.59(1), irrespective of the fact the Telsa's reduced speed was necessary for its safe operation.

B. Although Wisconsin Case Law Discussing § 346.59(1) is Limited, It Does Support the Conclusion Dowling Did Not Violate the Statute.

There appear to be only four published opinions in Wisconsin discussing § 346.59(1): ***Bentzler v. Braun***, 149 N.W.2d 626, 34 Wis.2d 362 (Wis. 1967) [2]; ***State v. Baudhuin***, 416 N.W.2d 60, 141 Wis.2d 642 (Wis. 1987); ***Slattery v. Lofy***, *supra*; 45 Wis.2d 155; and ***Werner Transp. Co. v. Barts***, 205 N.W.2d 394, 57 Wis.2d 714 (Wis. 1973).

Bentzler was a personal injury action arising from a rear-end collision on a two-lane highway during a rainy and misty night. There was evidence the defendant Braun slowed to 5 m.p.h. without applying his brakes so he could yell to the operator of a car mired on the side of the highway to let him know a wrecker was on its way. Other vehicles were generally traveling between 35 and 50 m.p.h. Braun was rear-ended by a car in which the plaintiff, Bentzler, was a passenger. 34 Wis.2d at 371.

[2] ***Bentzler*** is best known for being the first Wisconsin case to address the defense of an injured plaintiff's failure to use an available seatbelt.

The trial court allowed the plaintiff to amend the pleadings at the close of evidence to allege negligence on Braun's part based on a violation of § 346.59(1). *Id.* at 374. The Wisconsin Supreme Court sustained the trial court's allowance of the amendment and its instruction to the jury regarding § 346.59(1). In doing so, the Court noted:

> There was testimony that Braun intentionally slowed down to "holler" at Bergstrom and that he reduced his speed, according to Mrs. Bergstrom, to five miles per hour. There is no dispute that a rearward observation would have revealed the approach of Klimmer. The brakes were not applied, and the brake lights were not activated to warn that Braun intended to stop or slow down. While Braun also was not faced with an emergency which required that his lookout ahead or to the side be diverted, we deem this factor standing alone would not require a lookout to the rear if the brake lights had been activated. Under these circumstances if he intended to stop or slow down appreciably, he had the duty of making an observation to the rear to see that it could be done with safety. His failure to do so was lack of ordinary care.
>
> 34 Wis.2d at 371.

The court also noted

> Braun's low speed was not for a reason recognized by [§ 346.59(1)] - a speed of little more than five miles per hour was not necessary for the safe operation of the vehicle nor in compliance with the law - it was solely because of the decision of Braun to tell Bergstrom that a wrecker was on the way .
>
> Id. at 377.

Baudhuin, *supra,* 141 Wis.2d 642, discussed § 346.59(1) in the context of whether an arresting officer lacked reasonable cause to stop the defendant so that evidence of his intoxication discovered during the traffic stop should be excluded. At about 2:00 a.m., the officer observed the defendant turn onto a city street with a 25 m.p.h. speed limit. The defendant was directly ahead of him. The officer followed the defendant for

six or seven blocks, during which the defendant drove at a speed which never exceeded 17 m.p.h. When the officer stopped the defendant eight to ten vehicles were backed up behind the officer. No vehicles were ahead of the defendant and there was no indication the defendant's car was having any mechanical problems or other condition to explain its slow speed. 141 Wis.2d at 645-46.

The Wisconsin Supreme Court concluded there were articulable facts sufficient to give the officer reasonable cause to stop the defendant for violating § 346.59(1) and affirmed the denial of the defendant's suppression motion. *Id*. at 650, 652.

As previously noted, the court in ***Slattery***, *supra*, 45 Wis.2d 155, emphasized the facts the slow-moving car was approaching an area where the speed limit was reduced and that the striking driver could have passed it by using the lane for oncoming traffic, which was clear.

Werner Transp. Co. v. Barts, *supra*, 57 Wis.2d 714, was a civil action arising from a rear-end collision at night between two trucks traveling on I-94 at night. The Wisconsin Supreme Court held there was ample evidence supporting the jury's conclusion the rear-ended driver was causally negligent and that his fault was greater than that of the striking driver. That evidence included testimony that at the time of the collision the rear-ended truck had either stopped or was moving less than 15 m.p.h., with non-functioning taillights and with headlights either not working at all or extremely dim. 57 Wis. 2d at 719-20. In discussing the sufficiency of the evidence against the driver of the rear-ended truck, the court, citing ***Bentzler***, *supra*, noted § 346.59(1) is a safety state and its breach is negligence *per se.*

In contrast to the slow-moving vehicles involved in these cases, the Tesla's emergency flashers were on and there was no impairment of the

movement of the two cars that passed it, let alone a collision. No vehicles were ever backed up behind the Tesla and its emergency flashers clearly indicated it was operating at a slow speed because of an issue with the car. Moreover, the driving lane immediately to Dowling's left was free from traffic and the two cars that passed him used that lane without any difficulty.

C. The Consensus in Other Jurisdictions is Slow Speed Alone, Without Evidence the "Normal and Reasonable Movement of Traffic" Was Actually Impaired, is Legally Insufficient to Even Justify a Traffic Stop.

The consensus of courts in other jurisdictions with statutes identical or substantially similar to Wis. Stat. § 346.59(1) is that that reduced speed, alone, without evidence it actually impaired the "normal and reasonable movement of traffic," is insufficient to even give rise to a "reasonable suspicion" to initiate a traffic stop, let alone support an actual conviction. The consensus is also that a slow-moving vehicle which only causes a limited delay in passing it or minor inconvenience to other motorists does not give rise to a reasonable suspicion justifying a traffic stop. Reasonable suspicion is not as strict a standard as is "probable cause." ***United States v. Hensley***, 469 U.S. 221, 226, 105 S.Ct. 675, 679, 83 L.Ed.2d 604 (1985), and it is far below the burden of proof that must be met to prove an actual violation of § 346.59(1) and similar statutes.

In ***State v. Hannah*****,** 259 S.W.3d 716 (Tenn. 2008), the state appealed the suppression of evidence of drug possession obtained in a traffic stop for violating Tennessee's impeding traffic statue. The statute states: "No person shall drive a motor vehicle at such a slow speed as to impede the normal

and reasonable movement of traffic, except when reduced speed is necessary for safe operation or compliance with law." 259 S.W.3d at 721.

The officer observed the defendant's car travelling in the left lane of a four-lane highway at 1:00 a.m.. The speed limit was 35 m.p.h. and the defendant's speed was approximately 20 m.p.h. There was no minimum speed. The officer followed the defendant's car and testified other vehicles coming up behind them braked fairly quickly before passing. Traffic was moderate and most traffic was travelling at 50 miles m.p.h.. *Id.,* at *719.*

The Tennessee Supreme Court reversed the decisions of the trial court and the court of appeals suppressing the criminal evidence on the grounds the following vehicles had not been forced to stop. The Supreme Court held "While a driver does not have to be stopped in the roadway or cause other automobiles to stop, we believe that a slow driver does not violate the statute by merely causing minor inconvenience to other motorists." *Id.*, at 722. (Emphasis added).

The court observed other jurisdictions, including Wisconsin, having statutes nearly identical to Tennessee's statute, "…have focused on whether a driver's slow speed blocked or otherwise backed-up traffic." *Id*., at 722. (Citations omitted) It then noted the same reasoning had led courts to conclude that if a driver's slow speed does not affect other motorists then the driver is not impeding traffic. *Id*., at 722. (Citations omitted)

The court remanded the case and provided the following guidance for trial courts reviewing whether a slow driver impeded traffic:

> [W]hile not an exhaustive list, . . . [a trial court] should consider how slow the driver's automobile was traveling, the posted maximum speed limit, the posted minimum speed limit, if any, the effect on traffic, the duration of the effect on traffic, and the normal and reasonable flow of traffic in that area. Also, the trial court should consider whether other traffic could safely pass the slow-moving automobile …."

Id. at 722-23.

As noted in ***Hannah***, supra, the ability of faster traffic to simply pass a slow-moving vehicle, even if it not immediately possible, is an important, and often dispositive, factor, in determining whether traffic was actually impeded. For example no impeding was found where faster traffic could use (1) an open left lane going in the same direction: ***People v. Isaac*****,** 780 N.E.2d 777, 335 Ill. App.3d 129, 269 Ill. Dec. 305 (Ill. App. 2002); ***State v. Dean*****,** 2013 Ohio 313, Case No. 12-CA-60 (Ohio App. Feb 01, 2013); and ***People v. Beeney*****,** 694 N.Y.S.2d 583, 181 Misc.2d 201 (N.Y. Dist. Ct. 1999)**;** or, (2) passing zones on two-lane highways: ***U.S. v. Valadez-Valadez*****,** 525 F.3d 987 (10th Cir. 2008); and ***Salter v. North Dakota Dept. of Transp.***, 505 N.W.2d 111 (N.D. 1993).[3]

In ***People v. Isaac*****,** 780 N.E.2d 777, 335 Ill. App.3d 129, 269 Ill.Dec. 305 (Ill. App. 2002) the court observed there were no reported cases in Illinois where a violation of Illinois' impeding traffic law was the basis for a stop. That law prohibits driving "at such a slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation of [a] vehicle or in compliance with law." The court then looked at other jurisdictions and observed "[C]ases from other jurisdictions have held that impeding traffic' statutes may be the basis for a valid traffic stop if there is evidence that a defendant's slow driving was directly responsible for slowing other traffic." 780 N.E.2d at 779-80. (Citations omitted.).

In applying that reasoning to the case before it, the court concluded:

> Here, it was not reasonable to believe that defendant was violating the statute against impeding traffic. Although at least six cars were driving behind her, it appears that they simply

[3] As previously noted, an open oncoming traffic lane was considered significant in ***Slattery v. Lofy***, *supra,* 45 Wis.2d 155 at 160.

could have gone around her in the other westbound lane.

Id. at 780. (Emphasis added)

***State v. Dean*,** 2013 Ohio 313, Case No. 12-CA-60 (Ohio App. Feb 01, 2013) was also a suppression case, The appellate court held the trial court had erroneously denied the defendant's motion to suppress. The court observed "The prevailing view is that 'slow speed' without some demonstration of impeding or obstruction of traffic is insufficient to validate a stop . . . ." 2013 Ohio 313 at ¶14. (Citations omitted) In reversing, the appellate court concluded the defendant had not impeded traffic because "As soon as the road widened, the other vehicle behind him passed and [the officer] freely admitted he too could have passed appellant." *Id.* at ¶ 15

The defendant in ***People v. Beeney*,** 694 N.Y.S.2d 583, 181 Misc.2d 201 (N.Y. Dist. Ct. 1999), was convicted of violating New York's impeding traffic statute. The statute states "No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law." 181 Misc.2d at 203. Beeney had been traveling in the right-hand lane of a controlled access, three-lane, one-way super-highway. When he was first observed by the officer, his estimated speed was 30 m.p.h. with three vehicles behind him. Traffic in the center and left lanes was moving at approximately 60 m.p.h.. The officer finished a traffic stop and when he caught up with Beeney he saw two different vehicles behind Beeny and estimated their speed as 45 m.p.h.

Lacking New York precedent, the district court looked to other jurisdictions for guidance. It noted several states had impeding traffic laws with language virtually identical to New York's. After examining the relevant case law in those states, the district court concluded

> According to the courts of Pennsylvania, North Dakota, Michigan and Illinois, the dispositive factor when determining whether slow speed is a violation (or may serve as reasonable articulable suspicion for a stop) is its effect upon other drivers. In other words, whether the slowness impedes traffic so as to pose a real danger to other motorists, as opposed to potential danger or temporary inconvenience.
>
> 181 Misc.2d at 206. (Citations omitted)

Continuing, the court observed "[T]here was nothing in the record to suggest that the vehicles traveling behind Mr. Beeney were not free to pass him." *Id.*, at 207. The court concluded the record "fails to show as a matter of law that there existed a substantially dangerous condition as created by Mr. Beeney's below speed limit driving that not just impeded traffic, but, as required by law, impeded the normal and reasonable movement of traffic." *Id.* at 208. Accordingly, the conviction was overturned.

U.S. v. Valadez-Valadez, 525 F.3d 987 (10th Cir. 2008), reversed the district court's denial of a motion to suppress evidence of transporting illegal aliens obtained during a traffic stop for violating New Mexico's impeding traffic statute. The arresting officer followed the defendant's pickup for several miles on a two-lane highway as it drove at 45 m.p.h. in a 55 m.p.h. zone. Another vehicle came up behind the officer and they all continued driving at the same speed for several more miles. The officer eventually stopped the pickup in a passing zone.

The 10th Circuit announced it was joining "[W]hat appears to be a consensus of courts that driving at a speed moderately below the speed limit does not, without more, constitute obstructing or impeding traffic. 525 F.3rd at 992. (Citations omitted). In applying those principles to the case before it, the court noted the officer testified oncoming traffic was light and he never asserted he could not have passed the defendant earlier. In fact, the

officer's testimony suggested there had been earlier passing zones. It also rejected the officer's concern about passing the defendant on a stretch of road a mile ahead as a justification for the stop, stating "Vehicles cannot be stopped on 'reasonable suspicion' that the driver will commit a traffic infraction in the future." *Id.* at 992-93.

The plaintiff in ***Salter v. North Dakota Dept. of Transp.***, 505 N.W.2d 111 (N.D. 1993), had been stopped for violating Nebraska's impeding traffic statute, which provides

> No person may drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law.
>
> 505 N.W.2d at 113.

Evidence of driving under the influence was discovered during the stop and Salter's license was suspended. The North Dakota Supreme Court affirmed the lower court's dismissal of the license suspension, holding "The minimal facts in this record do not support a conclusion that [the officer] had a reasonable and articulable suspicion that Salter was impeding traffic in violation of the statute." *Id.*, at 114. Elaborating, the Court noted:

> There is no evidence of the length of the no-passing zone, nor do we know if there was one, five, or ten cars coming up behind Salter and [the officer]. We do not know if Salter was truly impeding traffic in violation of the statute, or if Salter's relatively slow speed only momentarily delayed some drivers from traveling at higher speeds while they traveled through a short no-passing zone.
>
> *Id.* (emphasis added)

Later, in ***Johnson v. Sprynczynatyk*****,** 2006 ND 137, 717 N.W.2d 586 (N.D. 2006), another suppression case, the North Dakota Supreme Court held the stopping of a motorist at 12:43 a.m. solely for driving 8-10 m.p.h. in

a 25 m.p.h. zone was not based on a reasonable suspicion the conduct violated the impeding traffic statute. In reaching that conclusion the court relied on its decision in ***Salter****, supra,* 505 N.W.2d at 114, and its later holding in ***State v. Brown****,* 509 N.W.2d 69, 71 (N.D.1993), that "evidence that the driver was traveling at a slower than usual speed, with no further evidence of illegal activity, did not alone create a reasonable and articulable suspicion justifying a stop." 2006 ND 137 at ¶ 12.

Other courts have also have explicitly stated slow speed alone does not give rise to a "reasonable suspicion" the impeding traffic statute was violated. In ***People v. Parisi*****,** 222 N.W.2d 757, 393 Mich. 31 (Mich. 1974), the Michigan Supreme Court ruled criminal evidence obtained in a traffic stop made solely because the defendant was traveling 25 m.p.h. in a 45 m.p.h. zone at 3:00 a.m. should have been excluded. The court held "Given the absence of a minimum speed requirement, erratic driving, interference with traffic or some other reason of substance, we must conclude that this alone was not sufficient to warrant a stop." 393 Mich. at 35.

The only basis for stopping the defendant in ***Texas Dept. of Public Safety v. Gonzales,*** 276 S.W.3d 88 (Tex. App. 2008), was the fact he was driving 45 m.p.h. in a 65 m.p.h. zone at 4:00 a.m. The court observed that "Texas courts interpreting section [Texas's impeding traffic statute] have held that slow driving, in and of itself, is not a violation of the statute; a violation only occurs when the normal and reasonable movement of traffic is impeded." 276 S.W.3d at 93 (Emphasis added; citations omitted). The Texas statute, which is almost identical to Wis. Stat. § 346.59(1), states "[a]n operator may not drive so slowly as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law." *Id.*

***State v. Bacher*,** 867 N.E.2d 864, 170 Ohio App.3d 457, 2007 Ohio 727 (Ohio App. 2007), held there was no reasonable suspicion to stop a driver going 42 or 43 m.p.h. on an interstate highway with a posted limit of 65 m.p.h. at 3 in the morning. There was no posted minimum speed. The appellate court agreed with the trial court's conclusion there was no evidence supporting a reasonable suspicion the driver was violating Ohio's slow-speed statute. 867 N.E.2d at 868-69.

The foregoing cases instruct us that slow speed alone, even by a vehicle driving 42 to 45 m.p.h. in the early morning hours on a highway or interstate with a 65 m.p.h. speed limit, is insufficient to legally stop the driver for violating an impeding traffic statute such as Wis. Stat. § 346.59(1). Even when a slow-moving vehicle causes following motorists minor inconvenience or a limited delay in passing that is still insufficient to establish reasonable suspicion to stop it for impeding traffic.

It should also be noted that in none of the forgoing cases did the defendant's vehicle have its four-way emergency flashers, even though many of the stops occurred during the night. The absence of emergency flashers was not discussed and was not a factor considered by the courts. Here, of course, the Telsa's emergency flashers were on, allowing other motorists, like the drivers of the two cars that passed the Tesla, to timely observe the Tesla was moving slowly and timely move into the open left lane to safely pass the Telsa without having to brake or even slow down. Interestingly, no cases have been found where a slower-moving vehicle with its emergency flashers on was stopped for impeding traffic. [4]

[4] The only impeding traffic case that has been found where emergency flashers was mentioned by the court is **C*om. v. Robbins*,** 441 Pa. Super. 437, 657 A.2d 1003 (1995). However the comment was on the absence of emergency flashers on

Moreover, one must bear in mind what the "normal and reasonable movement of traffic" actually means on a day-to-day basis. It is a "normal," everyday occurrence for faster vehicles to pass slower moving vehicles, both on interstate highways and two-lane roads. Similarly, there is nothing unreasonable in expecting faster drivers to anticipate slower moving vehicles, particularly those with four-way emergency flashers on, and to allow enough time and space to pass safely.

Even putting aside for the moment the fact the Telsa's reduced speed was "necessary for safe operation" and, thus, is a complete defense in and of itself, the Telsa's reduced speed did not delay or in any way inconvenience, let alone impede, the two cars that passed it. Because the facts of this case do not even remotely give rise to a reasonable suspicion Dowling violated Wis. Stat. § 346.59(1), his conviction cannot be sustained.

III. The Trial Court's Apparent Belief Dowling's Reduced Speed Could Potentially Impede Traffic In Other, Undescribed Circumstances Is Legally Insufficient to Support His Conviction.[5]

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a vehicle that caused a 17 to 20 car backup in a no-passing zone. The other drivers were blowing their horns and raising their fists. 657 A.2d at 1004.

[5] As was done earlier, the following legal analysis will ignore, for the moment, Dowling's absolute defense to violating § 346.59(1) by virtue of the fact the Tesla's reduced speed was necessary for its safe operation.

A. Introduction.

In the course of its ruling finding Dowling guilty of violating § 346.59(1), the trial court made the following comment:

> Now, this is a traffic citation. And it would appear there was a significantly reduced speed and not enough to cause vehicles unable in the dark to get a clear understanding of how slow the vehicle was going to kind of come around it.
>
> (Doc. 31, p. 10; App., p. 11)

It is unclear what the trial court meant because it did not elaborate on the comment; nor did it explain how the role, if any, the comment played in the trial court's conclusion Dowling violated § 346.59(1). It will be assumed the trial court believed the Tesla's reduced speed could potentially impede other motorists under certain, other, unspecified circumstances. That assumption is made because there was no evidence any motorist, including the drivers of the two cars that passed the Tesla, did not have a clear understanding of how slow the Tesla was going in order to safely pass it.

The trial court found "… cars approached from the back [of the Tesla] and went around, and [the trooper] thought he saw two of them do that." (Doc. 31, pp. 8-9; App., pp. 9-10) The trial court made no other finding regarding the actions of those two cars. The ease with which the two cars passed the Tesla without even braking or slowing down shows those drivers were able to timely observe the Tesla was moving slowly and timely move into the open left lane to pass the Telsa without difficulty.

We also know the trooper had no trouble seeing the Tesla and recognizing it was travelling in the right lane at a significantly reduced speed with its hazard lights on. He was able to do this before the Telsa reached his parked position and also when he later observed the two cars pass the Tesla

further down the interstate. Additionally, we can see for ourselves from the first thirty seconds of the squad video how easy it was to see the Tesla driving at a reduced speed in the right lane with its headlights and emergency flashers on long before actually catching up to it. ((Exhibit #1: Flashdrive" from Cir. Ct. Case No. 2023CT000039 per Sauk County Clerk Certificate of Aug. 19, 2024 (App. Doc. No. 38); There are two video files on the flash drive. The relevant file is titled 19012023215258.wmv.)

To the extent the trial court relied on the mere possibility the Tesla's reduced speed might impede traffic in certain undefined circumstances, that reliance is contrary to the plain language of § 346.59(1) and directly conflicts with the clear consensus of other jurisdictions that actual impairment of traffic must be shown to establish even a "reasonable suspicion" an impeding traffic law was violated. Moreover, in a recent decision the Michigan Supreme Court explicitly rejected the argument that potential interference with hypothetical or nonexistent traffic is sufficient to establish a reasonable suspicion of violating Michigan's impeding traffic statute. The case, ***People v. Lucynski,*** 509 Mich. 618, 983 N.W.2d 827 (Mich. 2022), will be discussed in greater detail in Subsection III (C) of the Argument.

B. The Plain Language of § 346.59 Precludes a Trial Court From Convicting a Driver for Violating § 346.59(1) on the Possibility His or Her Slow Driving Might Impede Traffic in Other, Undescribed Circumstances.

Construction of a statute is a question of law decided independently by the appellate courts. ***State v. Michels,*** 141 Wis.2d 81, 87, 414 N.W.2d 311 (Ct. App. 1987)

§ 346.59(1) uses the phrase "so as to impede the normal and reasonable movement of traffic." "Impede" is an active verb generally

describing an effect in real time. If the legislature had intended § 346.59(1) to apply not just to situations occurring in real time but to potential or hypothetical circumstances as well, then, at a minimum, it would have used such language as "possibly impede" or "potentially impede."

Subsection (1) also uses the expression "the normal and reasonable movement of traffic." What is "normal and reasonable" in real time could be much different at other times or even a different location on the same roadway. What may not impede in real time may impede at another time or location. The driver of a slow-moving vehicle may act much differently were it a different time or a different location. A conviction for "impeding the normal and reasonable movement of traffic" under circumstances different from those that existed when slower driving occurred makes no sense.

Subsection (2) of § 346.59 requires the driver of a slow-moving vehicle that is impeding "the normal and reasonable movement of traffic" to take certain actions, if practicable, such as yielding the roadway to faster traffic, if conditions warrant it. It is clear subsection (2) can only apply and make sense if the impeding is occurring in real time. In turn, the only sensible reading § 346.59 is that both subsections (1) and (2) only apply to the circumstance existing in real time.

C. The View That the Mere Possibility A Slow-moving Vehicle Might Impede Traffic in Other Circumstance is Not Supported by Wisconsin Case Law and Is Contrary to the Prevailing Law in Other Jurisdictions.

None of the four Wisconsin cases[6] that have discussed § 346.59(1) support the trial court's apparent view the mere possibility the Tesla's slow speed could impede traffic in different circumstances establishes Dowling's guilt. In each of those cases, the events and circumstances considered by the courts were those that were actually present at the crash or traffic stop.

The holdings in cases from other jurisdiction having impeding traffic laws identical or substantially similar to § 346.59(1) discussed in Subsection II C, above, are totally inconsistent with the view apparently taken by the trial court. The clear consensus is that there must be evidence the reduced speed actually impeded the "normal and reasonable movement of traffic" to satisfy even the low standard of reasonable suspicion. As the court ***Beeney***, *supra,* 181 Misc.2d 201, noted, its review of cases from other jurisdictions showed

> . . . [T]he dispositive factor when determining whether slow speed is a violation (or may serve as reasonable articulable suspicion for a stop) is . . . whether the slowness impedes traffic so as to pose a real danger to other motorists, as opposed to potential danger or temporary inconvenience.
>
> *Id.* at 206. (Emphasis added)

In ***People v. Lucynski*****,** *supra,* 509 Mich. 618, the Michigan Supreme Court expressly rejected "the prosecutor's argument that the potential interference with hypothetical or nonexistent traffic is sufficient" to establish a reasonable suspicion of violating Michigan's impeding traffic statute. The case concerned criminal evidence discovered when the defendant was pulled over for stopping on a two lane rural road to talk to a driver stopped and facing in the opposite direction. No other vehicles were on the road at

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[6] The cases are ***Bentzler v. Braun***, *supra,* 34 Wis.2d 362 ; ***State v. Baudhuin***, *supra* 416 141 Wis.2d 642 ; ***Slattery v. Lofy***, *supra*; 45 Wis.2d 155; and ***Werner Transp. Co. v. Barts***, , *supra* , 57 Wis.2d 714 .

the time and the officer did not have to slow down or take action to avoid either car before they moved on. No erratic driving was observed.

In addressing the question of whether the defendant had impeded traffic so as to give the deputy reasonable suspicion justifying a traffic stop, the Michigan Supreme noted 'the focal issue is whether [the impeding traffic statute] requires evidence that the accused's conduct actually affected the normal flow of traffic or whether the mere possibility of it affecting traffic is sufficient." *Id.* at 648. [7] It held

> [T] the statute is not violated if the normal flow of traffic was never impeded, blocked, or interfered with. In short, in order to interfere with the normal flow of traffic, some traffic must have actually been disrupted or blocked.
>
> *Id.* at 648-49.

In rejecting the prosecutor's argument that potential interference is sufficient to establish a reasonable suspicion the impeding statute was violated, the court stated

> This argument ignores the phrase 'normal flow of ... traffic' as used in [the statute]. Such an interpretation would also lead to the untenable situation in which every person crossing a street and every vehicle attempting to park along the side of a road would potentially be guilty of a civil infraction even if no other vehicles or pedestrians are present on the roadway.
>
> *Id.* at 648-49

In a footnote, the Court stated it need not rely on the doctrine of construing statutes "to prevent absurd results, injustice, or prejudice to the

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[7] Michigan's impeding traffic statute is somewhat unique in that it is not limited to reduced speed as a potential cause of the obstruction or impairment of traffic, including pedestrian traffic. In fact, it does not even mention reduced speed. Instead it speaks in more general terms of obstructing by means of a "barricade, object, or device." 509 Mich. at 647. The parties in ***Lucynski*** agreed that the statute applies to a person operating a vehicle. *Id.,* at 647-48.

public," . . . . because no reasonable reading of [the impeding statute] supports the prosecution's argument." *Id.* at 648, *ftnt.* 18.

Only one other case, ***Wilkes v. Commissioner of Public Safety****,* 777 N.W.2d 239 (Minn. App. 2010)**,** has been found in which a court considered the question of whether a possible impairment of traffic can support a reasonable suspicion that an impeding traffic statute has been violated. It too was a suppression of evidence case. The defendant's car was observed around midnight stopped in the right lane of a road which had two lanes running in the same direction. As the officer approached, the car slowly drove away. The officer testified the speed limit was 35 to 45 m.p.h., and he had to reduce his own speed below 30 m.p.h. as he approached the car because it was stopped in the lane ahead. As the defendant's car drove away, the officer observed its right tires cross into the gutter area of the curb. The officer acknowledged the left lane was open and there no vehicles backed up behind the defendant's car. The officer stopped the defendant less than a mile later and arrested the defendant for impaired driving. *Id.,* 777 N.W.2d at 241.

In discussing the defendant's arguments regarding the question of impeding traffic, the court of appeals stated:

> Appellant argues that his vehicle was only "briefly halted" and that he was not impeding the flow of traffic because there was an open lane to the left and no cars were piled up behind him. We disagree. '[T]he purpose of traffic regulation is to protect against traffic hazards,' and a violation may occur 'regardless of whether it appears that other traffic will be affected.' ***State v. Bissonette****,* 445 N.W.2d 843, 845-46 (Minn.App.1989).
>
> *Id.,* at 243

A number of observations can be made regarding the court's comment that a "violation may occur 'regardless of whether it appears that other traffic will be affected." Frist, the only authority it cites is **State v.**

Bissonette, *supra,* which involved a traffic citation for failing to signal lane changes even though no other traffic was affected. 445 N.W.2d at 843. However, the court of appeal's reliance on ***Bissonette*** is misplaced. In affirming the defendant's conviction, the court observed the applicable statute always "requires the use of a turn signal when changing lanes regardless of whether it appears that other traffic will be affected." *Id*. at 846.

Secondly, as we have already seen, the view expressed by the ***Wilkes***, *supra,* court is inconsistent with the clear consensus in other jurisdictions. Nor does it appear ***Wilkes*** has been cited in any other published case in Minnesota or elsewhere despite the fact it was decided 14 years ago. The prosecution apparently did not even cite it in support of their unsuccessful position in ***People v. Lucynski***, *supra,* 509 Mich. 618, since it was not mentioned in the opinion.

The trial court's apparent belief that the mere possibility of impeding the "normal and reasonable movement of traffic" was sufficient to find Dowling guilty of violation of Wis. Stat. § 346.59(1) is contrary to the plain language of the statute. Such a position would lead to absurd and unpredictable results. The trial court's apparent position has been expressly rejected in the well-reasoned opinion in ***People v. Lucynski*** and is inconsistent with the prevailing law in various jurisdictions.

CONCLUSION

It is respectfully submitted the trial court's conviction of Dowling for violating Wis. Stat. § 346.59(1) was clearly erroneous and should be reversed with direction to dismiss the citation against him. Dowling's reduced speed was "necessary for safe operation," thus no violation of § 346.59(1) occurred as a matter of law. Even apart from that absolute defense, the trial court's conclusion that Dowling impeded traffic is wrong as a matter of law. Its own factual findings and the other relevant evidence which was undisputed clearly demonstrate that Dowling's reduced speed did actually impede any traffic. Similarly, to the extent the trial court concluded the mere possibility Dowling's reduced speed might impede traffic in other circumstances establishes a violation § 346.59(1) is wrong as a matter of law and against the great weight of the credible evidence.

Dated this 4th day of November, 2024.

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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. The length of this brief is 42 pages and contains 11,000 words.

Dated this _4th_ day of November, 2024.

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