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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State Mischaracterizes As Findings Of Fact Certain Recollections Expressed by The Trial Court During the Trial Which Were Not Accurate.¹

On page 9 of its Brief the State purports to list the trial court's findings of fact.² However, the first two listed "findings" were not findings of fact the trial court made at the December 20, 2023 hearing. (See R. 31, pp. 8-10; Appell. App., pp. 3-5; and Resp. App., pp. 371-373)

The purported "findings" were comments the trial court made in the course of hearing objections during the cross examination of the State Patrol officer. In the first, the court expressed its recollection the squad video showed "cars sort of whip around him really pretty quickly" and "trucks whipping past his vehicle." When defense counsel asked whether the court was referring to when Dowling's vehicle was on the shoulder, the court replied "No, at the beginning of that video, as I recall, he's on the roadway." (R. 14, p. 83; Resp. App., p. 83)³ The second was the court's recollection "that what drew this officer's attention was that Mr. Dowling's vehicle was travelling less than the speed limit and he was observing cars kind of having to go around him because they were coming up too close." (R. 14, p. 86; Resp. App., p. 86) (emphasis added) Both recollections were inaccurate.

The trooper expressly confirmed the squad video did not show any cars moving around the Tesla. (R. 14, pp. 88-89; Resp. App., pp. 88-89) A

¹ The State's Statements of Facts begins with a derogatory and baseless comment about Dowling believing he was above the law because he was driving a Tesla. The comment is unprofessional and violates SCR Chapter 62, "Standards of Courtesy and Decorum for the Courts of Wisconsin."

² Although the State's list of "findings" purport to be exact quotes from the referenced transcripts, many are not.

³ The State also cites this "finding" at page 12 of its Brief.

review of the video shows it is not until the Tesla moved on to the shoulder, at approximately the 41 second mark, that one first sees any vehicle other than the Tesla.⁴ That vehicle is a truck travelling in the left lane. Furthermore, the video shows that all of the vehicles which pass the squad car and Tesla after they are on the shoulder are already in the left lane as they pass.

A review of the trooper's testimony confirms he never testified he saw cars or vehicles of any kind "coming up too close" to the Tesla. In fact, the trooper offered no testimony whatsoever as to how close any vehicle was to the Tesla at any time.

Prior to the December 20, 2023 hearing the trial court reviewed both the transcript of the trooper's testimony, which included the court's earlier comments, and the squad video. (R. 31, pp. 3, 8,10; Appell. App., pp. 3, 5; Resp. App., pp. 366, 371, 373). Needless to say, the court did not include its erroneous comments in its findings of fact.

II. The State Has Not Provided Any Competent Factual or Legal Argument to Support Dowling's Conviction.

The State devotes considerable discussion in Argument Sections I and II to a number of non-consequential items, such as "Dowling has not challenged the circuit court's factual findings," (Resp. Brief, p. 13), "whether Wis. Stat. § 346.59(1) requires a certain number of vehicles be affected," (*Id.*, p. 14), and the dictionary definition of "impede." (*Id.*, p. 15)⁵

⁴ The squad video is the flash drive marked at trial as Exhibit 1 and accompanied the Sauk County Clerk Certificate of Aug. 19, 2024, (App. Doc. No. 38). The relevant file on the flash drive is titled 19012023215258.wmv.

⁵ Page 13 of the State's Brief also contains a factual miscalculation. The Tesla's speed dropped from the fifties, not 71-84 m.p.h., to the mid-forties in about eight minutes between 9:45 p.m. and 9:53 p.m.

Ultimately, one finds the only arguments the State actually makes in support of Dowling's conviction are: 1. The two cars the officer observed pass the Tesla moved into the left lane to do so; and 2. The squad car slowed down as it came up behind the Tesla to pull it over. (Resp. Brief, pp. 15-16)

The State asserts merely moving into the left lane, without even having to slow down or wait, to pass a slower moving vehicle in the right lane on an interstate highway with no minimum speed means the passing vehicle was impeded in violation of § 346.59(1). This proposition defies common sense and experience. In the State's view, a driver going 65 m.p.h. in the right lane of an interstate highway with a 70 m.p.h. speed limit who is passed by a following vehicle which easily moved into the left lane to do so, would be guilty of impeding traffic

The State provide no legal authority for its position. Nor does it even address the numerous cases discussed at length at pages 25 to 30 of Appellant's Brief. Those cases, which are from jurisdictions having impeding traffic statutes the same as or nearly identical to § 346.59(1), hold that observing a slow-moving vehicle causing only a limited delay in passing it does not even give rise to a reasonable suspicion justifying a traffic stop. The State also ignores the emphasis the Wisconsin Supreme Court in **Slattery v. Lofy**, 172 N.W.2d 341, 18-19, 45 Wis.2d 155 (Wis. 1969), placed on the availability of an open oncoming traffic lane for passing the plaintiff's slow-moving vehicle.

In a novel argument, the State asserts that because the State Patrol squad car necessarily slowed down as it deliberately pulled up behind the Tesla to pull it over, it was impeded by the Tesla's slow speed. This argument also defies common sense and leads to absurd results. Once again, no legal authority is offered for this proposition. The State did not try

to assert this argument below and the circuit court made no findings supporting it. Suffice it to say, under the State's theory, every motorist, even those traveling at or above the speed limit, who slows down when a squad quickly comes up behind his or her vehicle violates § 346.59(1), an absurd result hardly intended by the legislature.

III. By Not Responding To It, The State Has Conceded

Dowling's Argument That The Trial Court's Apparent Belief Dowling's Reduced Speed Could Potentially Impede Traffic Is Legally Insufficient To Support His Conviction.

In Section III of his initial brief, Dowling argued the trial court's apparent belief his slow speed could potentially impede traffic in other, undefined circumstances was a legally insufficient basis to convict him of violating § 346.59(1). The State has not responded to this argument.⁶ Accordingly, it should be deemed conceded. See *United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (a respondent's failure to respond to an argument may be taken as a concession); and, *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App.1979).

IV. The State Did Not Dispute Below Dowling's Need To Drive At A Slower Speed For Safe Operation, And Its Belated Arguments On Appeal Are Without Merit.

Sections III and IV of the State's Argument are devoted to the issue of Dowling's immunity because his reduced speed was necessary for safe

⁶ Although the title of the State's Argument "II a" on page 13 of its Brief, "By Its Plain Language, Wis. Stat. § 346.59(1) Does Not Require Traffic Be Impeded For a Violation to Occur," suggests it might contain a response to this argument, one finds that not to be the case at all.

operation. At outset it should be noted the State did not raise any of its arguments below and, contrary to the title of Section IV of the State's Argument, the trial court did not address this defense in its ruling.

The State claims there was a dispute during the trial over this matter. But the only record citations it offers in support are Dowling's "Argument in Support of a Not Guilty Verdict" (R. 15, p. 3) and the following brief comment the State's counsel at the December 20, 2023 hearing:

And the defendant did argue that his vehicle was running out of fuel which required, in his judgment and in the messages that his vehicle was providing to him, to reduce speeds. In that case I believe 346.59 (2) may apply in that -- under that statute, he would have the duty to, if practical, yield the roadway to an overtaking vehicle and move at a reasonably increased speed, or yield the roadway to overtaking vehicles when directed to do so by a traffic officer. It was only when Trooper Nicholson provided him with [a] signal then he moved over onto the shoulder.

(R. 31, p. 4; Resp. App. p. 367)

As shown by the foregoing, the State did not dispute Dowling's need to drive slower. And, Dowling, of course, was not charged with violating Wis. Stat. § 346.59(2). Nor was there any basis to do so since the two cars that passed the Tesla did so by simply moving into the left lane without even slowing down.

The actual dispute at trial was whether Dowling's concern about stopping the Tesla after he pulled onto the shoulder because he believed it would very likely not move again and, instead, calling 911 and State Patrol Dispatch, to see if the trooper could follow him to the charging station, was a defense to the charge of violating Wis. Stat. § 346.04(2t) for "failing to stop his ... vehicle as promptly as safety reasonably permits."

The State claims the phrase "necessary for safe operation" only means such reduced speed as to "safely [keep] the vehicle in motion" (Resp. Brief, p. 19) One does not drive at a reduced speed merely to keep a vehicle in

motion in an abstract sense. You reduce the vehicle's speed to keep it running so you can safely reach a "destination." That may or may not be your original destination. For a semi-trailer going up a hill at a reduced speed that means its original destination. For Dowling and his family that meant the next available exit, which also happened to be their original destination.

Dowling's reduced speed when the trooper observed the two cars pass him was in direct response to the directions of the Tesla's computer of what speed was necessary to safely reach the next available exit. "Safely" meant reaching that exit without being stranded on the shoulder of a rural interstate highway on a winter night with no lights or heat.

The State also asserts, without offering any supporting authority, the limited criminal law defense of "necessity" found in Wis. Stat. § 939.47 applies to § 346.59(1). By its express terms, § 939.47 only applies to a criminal prosecution. A violation of § 346.59(1) is not a crime. Nor does § 346.59(1) even reference § 939.47. Moreover, the application of the criminal law concept of "necessity" to § 346.59(1)'s "safe operation" defense makes no sense. A semi-trailer may have to reduce its speed below the speed limit to go up a hill to avoid over-taxing its engine and having it fail, thereby leaving the semi-trailer stranded on the side of the road. Even though the engine failure is very unlikely to result in "imminent public disaster, imminent death or great bodily harm to the [driver] or another," no one would reasonably contend the semi-trailer's reduced speed was not necessary for its safe operation.⁷

⁷ The State tries to distinguish **Leon v. FedEx Ground Package Sys., Inc.**, No. CIV 13-1005 JB/SCY (D.N.M. Feb 21, 2016), (Appell. App., p. 12), discussed in Dowling's initial Brief. (Resp. Brief, pp. 23-24) (The State's citation, 163 F. Supp. 3d 1050, is incorrect as it for an earlier order in the case) However, there is no logical difference between slow speed due a "mechanical issue" and slow speed due an electric vehicle's battery unexpectedly

Although the criminal law concept of “necessity” has no bearing on this case, Dowling does feel it necessary to briefly respond to inaccurate assertions the State makes in its attempt to apply that defense here. In claiming the need to reduce the Tesla’s speed was a problem of Dowling’s own making (Resp. Brief, pp. 22-23), the State ignores the fact Dowling charged the battery in Madison to 167% (20% versus 12% of full charge) of the level the Tesla computer system indicated would safely get them at normal highway speeds to their hotel in Lake Delton, where the Tesla would be charged overnight.

The State also suggests Dowling could have pulled over on the shoulder to “assess the status” of the Tesla or take an earlier exit. Stopping would achieve nothing since the computer told Dowling everything he needed to know and there was no roadside repair he could possibly make.

He was already past the Highway 33 exit, exit 106, before the computer instructed him to maintain a speed well below 65 m.p.h. to reach the next exit. After passing exit 106 the Tesla computer directed Dowling to reduce its speed to 60 m.ph. About 4 miles later the computer directed him to reduce the speed to 55 m.p.h. and then to 50 m.p.h., at which point he was about 6 miles past exit 106. Shortly thereafter, Dowling had to reduce his speed to 45 m.p.h., which occurred just before reaching mile marker 97, which is where the trooper was parked. (R. 30, pp. 126-127, 131-133; Resp. App., pp. 256-257, 261-263)

discharging faster than anticipated. Furthermore, the district court’s discussion of the phrase “necessary for safe operation” is inconsistent with the State’s position:

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 [on the roadway] may have been either the best speed physically possible or the speed ‘necessary for safe operation’
(Mem. Op. & Order p. 25; Appell. App., p. 23)

The State also seems to claim Dowling's reliance on the computer's warnings was unreasonable since it turned out the Tesla was ultimately able to reach exit 92 without getting stranded. Even if the Tesla computer proved, after the fact, to be too conservative in its assessments of remaining battery level and recommended reduced speeds, Dowling had no reason to ignore the computer's warnings and risk having his family stranded on the side of a rural interstate on a winter night.

CONCLUSION

The State's arguments that Dowling's conviction for violating Wis. Stat. § 346.59(1) should be sustained are without legal or factual support. Accordingly, for the reasons stated in his original Brief and herein, Dowling's conviction should be reversed and the action against him dismissed.

Dated this 10th day of February, 2025.

Electronically signed by Robert G. Dowling

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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 12 pages and contains 2,862 words.

Dated this 10th day of February, 2025.

Electronically signed by Robert G. Dowling

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