STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2025AP000684-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH M. HEROFF,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Defendant's Suppression Motion Entered in Winnebago County the Honorable Scott C. Woldt, presiding

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BRIEF OF DEFENDANT-APPELLANT

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CASES CITED

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ISSUE PRESENTED

Did police have reasonable suspicion of a traffic violation to support stopping Mr. Heroff?

The circuit court answered yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication is not requested because the issues can likely be decided by applying established legal principles. Mr. Heroff would welcome oral argument, though he anticipates the issues will be fully presented in the briefs.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

On a December night, Mr. Heroff was driving in the Fox Valley, his home of many years. (9:26; 56:4). Unbeknownst to him, Officer Seaholm was observing and following his car. (9:26). Seaholm thought Mr. Heroff may have sped through a turn, but did not pull him over for that, and continued to follow him. (9:26). Officer Seaholm then decided that Mr. Heroff's rear car windows looked too dark. (9:26). Officer Seaholm continued to follow Mr. Heroff without pulling him over. (9:26-27). Officer Seaholm claimed he was unable to see into Heroff's windows at all. (9:26-27). However, he also later testified he was

able to see into the car well enough to see something dangling from the ceiling. (9:27).

When Officer Seaholm eventually stopped the car and approached Mr. Heroff, he noticed signs that Mr. Heroff might have been intoxicated. (9:28). A subsequent blood test indicated that Mr. Heroff was driving with a prohibited amount of alcohol in his system. (9:5). Mr. Heroff received written warnings for Rear Window Excessive Tinting and Obstructed Driver's Vision Rear View. (9:11-12); Wis. Adm. Code Trans. § 305.32(5)(b); Wis. Stat. § 346.88(3)(c).

Mr. Heroff filed a motion to suppress evidence from the traffic stop, arguing the officer did not have reasonable suspicion of a traffic violation. (33). At the motion hearing, Officer Seaholm testified that the law requires side and rear windows to allow at least 35% visibility. (59:5). Officer Seaholm said he was trained on window tint by learning the statute, looking at tinted windows at night, and riding with other officers to observe vehicles. (59:8, 13). While Officer Seaholm knew that the department had a tint meter, he admitted that he was not trained on how to use it and did not have one with him the night he stopped Mr. Heroff because "this isn't a stop that [he] would make routinely." (59:11).

Officer Seaholm testified that he compared Mr. Heroff's windows to a van he saw around the same time, his squad car, and other cars he had seen during his time as an officer, however he did not know what tint level those vehicles had. (59:8-9). Trial counsel

argued, "he can say it's darker than a van or it's darker than a squad car, but if he doesn't know what the van or the squad car are at, as far as light passing through, then it just being darker is not enough for it to be illegal." (59:11).

Trial counsel asked whether Officer Seaholm had ever tested the visibility percentages when he stopped cars for excessive window tinting in the past. (59:9). The circuit court questioned whether this was relevant, and trial counsel said, "he's saying that his experience in pulling over vehicles leads him to believe that these were darker than 35 percent. But […] even if he's pulled over 100 other vehicles for having tinted windows, if he doesn't follow those up with a measurement, it's not really relevant. If [he] doesn't verify his suspicions, that doesn't tell us whether or not his suspicions are accurate." (59:10).

During the hearing, the state offered photos of Mr. Heroff's car that Officer Seaholm took the day after he arrested Mr. Heroff. (59:6). Trial counsel flagged for the court that these photos did not reflect the circumstances under which Officer Seaholm saw the car—given that the stop occurred at night, but the photos were taken in daylight—but the court admitted them anyway. (59:5-7).

The circuit court denied the suppression motion stating that an officer does not need to suspect an exact blood alcohol level to have reasonable suspicion for operating while intoxicated and by the same logic, an officer does not need to know the exact visibility

percentage to have reasonable suspicion of excessive window tinting. (59:15-16; App. 7-8). The court also noted that "Silhouettes appeared to be dangling from the ceiling. It really doesn't matter much." (59:15; App. 7). On the totality of the circumstances, including a discussion about how many bars were in the area, the circuit court felt there was reasonable suspicion to support the stop. (59:14-15; App. 6-7).

After the circuit court denied the suppression motion, Mr. Heroff entered a no-contest plea to, and was convicted of, an OWI fourth offense with a modifier for a BAC between 0.17 and 0.199. Wis. Stat. § 346.63(1)(a-b). (45; 64:2-3; App. 3-5). Counts of misdemeanor bail jumping and operating with prohibited alcohol content were dismissed and read in and dismissed outright, respectively. (46; 64:4). The court imposed a fine and sentenced Mr. Heroff to 60 days in jail for the OWI. (45; 64:5; App. 3-5). This appeal follows.

ARGUMENT

I. Officer Seaholm lacked reasonable suspicion of any traffic violation.

Officer Seaholm lacked reasonable suspicion of any traffic violation before stopping Mr. Heroff. As such, all evidence obtained as a result of the stop should be suppressed.

The Fourth Amendment to the U.S. Constitution—mirrored by Article I, Section 11 of the Wisconsin Constitution—protects against unreasonable searches and seizures. U.S. CONST. Amend IV; WI CONST. art I § 11. Applications of the Fourth Amendment attempt to balance public and officer safety with an individual's right to privacy and personal security. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

A traffic stop is considered a seizure and must be supported by reasonable suspicion of wrongdoing. *State v. Wright*, 2019 WI 45, ¶8, 386 Wis. 2d 495, 926 N.W.2d 157; *State v. Adell*, 2021 WI App 72, ¶12, 399 Wis. 2d 399, 966 N.W.2d 115. If there was not reasonable suspicion supporting a traffic stop, the exclusionary rule prevents the introduction of evidence obtained during the stop. *State v. Scull*, 2015 WI 22, ¶21, 361 Wis. 2d 288, 862 N.W.2d 562.

When reviewing a lower court's decision on a motion to suppress, this Court follows a two-step analysis in which the circuit court's findings of fact are upheld unless clearly erroneous, but the application of constitutional principles to the facts is reviewed de novo. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625.

A. Officer Seaholm did not have reasonable suspicion to stop Mr. Heroff for excessive window tinting.

Officer Seaholm lacked reasonable suspicion that Mr. Heroff's car windows were excessively tinted.

When considering whether window tinting is illegally dark, officers are tasked with assessing if at least 35% of light striking the window can pass through the tinting film on the car.[2] Wis. Adm. Code Trans. § 305.32(5)(b)(2)-(6)(b). Officers can use a tint meter to test the amount of visible light striking the window that can pass through the tinting film (called the "light passthrough rate"). Wis. Adm. Code Trans. § 305.32(7). Although police are not required to know the exact passthrough rate of a window or have tested with a tint meter in order to pull a car over, reasonable suspicion requires specific, articulable facts showing the car is at or below the statutory minimum. *State v. Conaway*, 2010 WI App 7, ¶7, 323 Wis. 2d 250, 779 N.W.2d 182.

When assessing reasonable suspicion, courts consider the specific, articulable facts presented, alongside rational inferences, to test if they can support the intrusion of a traffic stop. *See e.g. State v. Houghton*, 2015 WI 79, ¶21, 364 Wis. 2d 234, 868 N.W.2d 143. A commonsense test is used to determine what a reasonable officer would do based on his or her training and experience. *State v. Waldner*, 206 Wis. 2d 51, 56, 556 N.W.2d 681 (1996). Window tint cases have established that a reasonable officer should testify "that he or she is familiar with how dark a minimally complying window appears and that the suspect

[2] Tinting film is a coating on the vehicle's glass used to cut down glare, protect from UV rays, or used for privacy. *See* https://www.caranddriver.com/shopping-advice/a26114973/car-window-tinting/

window appeared similarly dark or darker, taking into account the circumstances of the viewing." *Conaway*, 2010 WI App 7, ¶7.

An officer's training and experience on window tinting is relevant, but the court is not required to take an officer's suspicions as reasonable just because of his or her experience. *State v. Young*, 212 Wis. 2d 417, 429, 569 N.W.2d 84 (Ct. App. 1997). For police to establish they know what minimally complying windows look like, they should be able to show a track record of correctly identifying excessively tinted windows. *Conaway*, 2010 WI App 7, ¶9.

Neither Officer's Seaholm's report, nor his testimony, established that he knew what minimally acceptable tint looked like. His report indicated that Heroff's windows appeared completely black,[3] but that statement was inconsistent with him saying he could see something hanging inside the vehicle. (9:26-30). Additionally, Seaholm's report failed to contain any information about his track record with correctly or incorrectly identifying illegally dark windows and he never referred to the relevant 35% standard. (9:26-30).

As for testimony, Officer Seaholm testified to his knowledge of the statute, but his training on recognizing improper window tinting was otherwise minimal. (59:5). For example, Officer Seaholm was never trained on the use of a tint meter because he did

[3] Officer Seaholm's suppression hearing testimony that the windows did not appear completely blacked out contradicted this statement in the report. (59:13).

not often stop cars for excessive tint. (59:11). Officer Seaholm admitted that he did not know what percentage Mr. Heroff's windows would have been at and just basically felt the windows were probably under 35% visibility. (59:9). He testified he compared Mr. Heroff's windows to those on vehicles nearby but did not articulate how much darker Heroff's windows appeared than other vehicles. (59:9-13). Officer Seaholm's comparison to other vehicles meant little considering he did not know the level of tint on those other vehicles. (59:9).

During the suppression hearing, Seaholm did not discuss familiarity with the appearance of a minimally complying window besides saying he had seen some pictures during training. (59:10-13). He did not testify to a track record of confirming he had correctly identified improperly tinted windows. (59). As trial counsel stated, "if he doesn't verify his suspicions, that doesn't tell us whether or not his suspicions are accurate." (59:10).

Because Officer Seaholm had insufficient experience regarding what amount of tint was too dark to meet the statute's requirements, he could not establish reasonable suspicion to pull Mr. Heroff over.

This Court's decision in *State v. Conaway*, 2010 WI App 7, is instructive in this case. In *Conaway*, a police officer stopped a car for appearing to have a "dark window tint." *Id*. at ¶2. The officer approached the car and saw drug paraphernalia on the floor of the car, then searched the car and found heroin. *Id*. The

officer testified to over thirteen years as a state trooper, training on the use of a tint meter, awareness of the tint statute, and experience stopping between 10 and 100 cars for tint violations. *Id*. at ¶8.

This Court found the officer's experience was relevant but noted he failed to make the connection between his training and experience and his ability to determine when a window is illegally tinted. *Id*. at ¶9. Additionally, "[t]he officer did not testify whether his prior suspicions were ever verified by subsequent testing. So far as this record discloses, the officer might have a very poor track record." *Id*. at ¶11.

The *Conaway* court clarified that the officer did not need to be certain of the light passthrough rate or that a violation had necessarily occurred before stopping the vehicle. However, to support reasonable suspicion, the officer did need to provide specific, articulable facts demonstrating familiarity with the appearance of a minimally compliant window and evidence that the stopped vehicle's window was similarly dark or darker. *Id*. at ¶8.

Like in *Conaway*, Officer Seaholm lacked reasonable suspicion in this case. Officer Seaholm testified that he was trained on the window tint statute and had experience stopping other cars for excessive window tint. (59:9-13). But, though asked at the suppression hearing to do so, Officer Seaholm failed to connect his training to effectiveness in recognizing illegal tint, just as the police in *Conaway* did. (59:8-9). Without evidence that Officer Seaholm

had ever been correct in judging whether a window was excessively tinted, his observations of Mr. Heroff's car are unpersuasive.

Comparing the stop for excessive window tint to an OWI investigation, the circuit court stated an officer does not need to know the exact blood alcohol level of a driver when making an OWI stop and similarly does not need to know the exact light passthrough rate before stopping a car for reasonable suspicion of excessive tint. (59:16; App. 8). This is correct, however, an officer does need to show facts to support his belief that the windows appeared to be near or below the 35% threshold, just as they should give specific reasons for believing a driver is operating a vehicle with a blood alcohol level of above 0.08.

While an officer with experience stopping drivers for suspected OWIs can point to his or her training on characteristics that drunk drivers display, Officer Seaholm did not present similar levels of training on what to look for with excessive window tinting. (59:13). Additionally, officers who have stopped drivers for suspected OWIs have field sobriety tests and blood alcohol levels that confirmed their beliefs as a basis for future reasonable suspicion. With no past confirmation of suspected illegal window tinting, Officer Seaholm was unable to produce a reason to trust his suspicion in Mr. Heroff's case.

Under *Conaway*, Officer Seaholm did not provide a basis to believe he had the ability to judge whether a window came close to, or failed, to meet the

statutory requirements. Officer Seaholm lacked reasonable suspicion that Mr. Heroff's car windows were excessively tinted.

B. Officer Seaholm did not have reasonable suspicion to stop Mr. Heroff for an item hanging from his car ceiling.

At the suppression hearing, Officer Seaholm testified the window tinting was his sole reason for stopping Mr. Heroff, but the incident report quoted by the circuit court also mentioned something hanging from the ceiling in Mr. Heroff's car. (9:26-27; 59:4). In the circuit court, the state did not elicit any testimony, or provide any argument, that a window obstruction provided an alternative basis to stop. Likewise, the circuit court did not place any weight on this alleged obstruction in its ruling, stating "Silhouettes appeared to be dangling from the ceiling. It really doesn't matter much." (59:15; App. 7). To the extent the state now, for the first time in the court of appeals, attempts to argue that a window obstruction provided alternative grounds to stop Mr. Heroff, this rationale is likewise lacking the requisite reasonable suspicion and is waived. *See Kolupar v. Wilde Pontiac Cadillac, Inc.,* 2007 WI 98, ¶23, 303 Wis. 2d 258, 735 N.W.2d 93 ("Generally, arguments raised for the first time on appeal are deemed waived.").

Wisconsin Statute § 346.88(3)(b-c) prohibits driving with any hanging/suspended obstruction that interferes with the driver's ability to see out of the front or rear windows. However, this statute does not

set out a complete prohibition on objects suspended within a vehicle. *Houghton*, 2015 WI 79, ¶59. Instead, only objects that obstruct the driver's view are prohibited. *Id*. at ¶61. Obstruction has been construed to mean something more than a de minimis effect on the driver's line of sight. *Id*. at ¶61-62. To stop a driver for a violation of Wis. Stat. § 346.88(3)(b-c), a police officer must have reasonable suspicion that an item was obstructing the driver's view, not just that there was something suspended in the car. *Id*. at ¶65.

Officer Seaholm described the hanging object in the incident report by stating that "[t]he vehicle did come to a stop at 6th Av. & Ohio St. where I was able to see a silhouette [...][which] appeared to be something dangling from the ceiling to the left of what I believed to be the driver's seat of the vehicle." (9:26-27). During cross-examination, Officer Seaholm went on to say he could not confirm there was something hanging because "I could not see into the vehicle that well." (9:27). He later also said the item was "extremely difficult to see." (59:13). Once Officer Seaholm approached Mr. Heroff, he noted that there were some air fresheners hanging from the ceiling behind the driver's seat. (9:27). At the suppression hearing, the state failed to elicit and Officer Seaholm offered no testimony about whether or why he believed the air fresheners would obstruct Mr. Heroff's vision in violation of Wis. Stat. § 346.88(3)(b-c). (59).

Officer Seaholm presented no specific and articulable facts to suggest suspicion that the air fresheners had more than a de minimis effect on Mr. Heroff's line of sight. Instead, Officer Seaholm's own comments establish he was not able to see the item well enough to have reasonable suspicion it was obstructing Mr. Heroff's view when he pulled him over. At the suppression hearing, Officer Seaholm could not explain the inconsistency in him claiming he could see the item dangling from the ceiling while simultaneously claiming the windows were so dark he could not see into the car. (59:13). By Officer Seaholm's own statements, he could not see the hanging item in the car well, so he did not have reasonable suspicion to believe the hanging object was obstructing Mr. Heroff's view. Thus, the hanging object could not form the basis for a legal traffic stop. The circuit court's statement regarding the object supports this conclusion: "Silhouettes appeared to be dangling from the ceiling. It really doesn't matter much." (59:15; App. 7).

Finally, in its suppression ruling, the circuit court referenced how many bars are in the area where Mr. Heroff was pulled over, which was information that was not presented as evidence at the suppression hearing. (59:14-15; App. 6-7). This information was irrelevant because Officer Seaholm never claimed to have reasonable suspicion of OWI when he pulled Mr. Heroff over. The record is clear there was no allegation of swerving or other erratic driving that would have indicated Mr. Heroff was under the influence. Likewise, Officer Seaholm did not state in

his report or at the suppression hearing that he pulled Mr. Heroff over on suspicion of him being intoxicated. (9; 59). Bars being in the area would do nothing to support reasonable suspicion that Mr. Heroff committed a traffic violation related to window tinting or an obstruction.

CONCLUSION

For the foregoing reasons, Mr. Heroff respectfully requests that this Court reverse the circuit court's holding that the traffic stop was supported by reasonable suspicion and remand with directions that the circuit court suppress all evidence from the traffic stop.

Dated this 18th day of June, 2025.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,106 words.

I hereby certify that filed with this brief 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; (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 rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or 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.

Dated this 18th day of June, 2025.

Signed:
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