

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP915-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CF450

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD D. LAUFER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: JAMES G. POUROS, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Donald D. Laufer appeals from a judgment of conviction for operating a motor vehicle while intoxicated entered upon his guilty

plea following the denial of his suppression motion.¹ Laufer argues that the trial court erred by concluding that the stop leading to his arrest was supported by probable cause to believe that Laufer was violating Wisconsin's vehicle registration laws. In its supplemental brief, the State concedes that the officer's reason for the traffic stop, which also served as the basis for the trial court's suppression decision, was based on a mistake of law. The State offers an alternative ground on which to affirm the trial court's decision, namely, that Laufer's license plate was obstructed in violation of WIS. STAT. § 341.15(2) and (3) (2011-12).² We agree with the parties that the traffic stop was based on a mistake of law and was therefore not supported by probable cause. We also conclude that the circuit court record does not contain sufficient facts to support the State's new theory and we reverse.

¶2 Officer Jason Pollard stopped Laufer after a random registration check indicated that the license plate on his blue truck was registered to a red truck. After stopping Laufer, Pollard realized he had misread the license plate by one digit and that, in fact, Laufer's truck was properly registered. When Pollard met with Laufer to explain the mistake, he detected signs of intoxication and eventually, Laufer was arrested for operating while intoxicated.

¹ The judgment reflects that along with the operating while intoxicated conviction, Laufer was convicted of and sentenced for obstructing an officer. The misdemeanor obstructing charge is not included in the criminal complaint and because we have only the suppression hearing transcript, we do not know the factual basis for the obstructing conviction. Laufer's notice of appeal does not mention the misdemeanor conviction, nor do any of the briefs. We take no position on whether our opinion has any ramifications on Laufer's misdemeanor conviction.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 Laufer filed a suppression motion in the trial court, arguing that Pollard’s stop was not supported by reasonable suspicion or probable cause that Laufer had violated the vehicle registration code. The trial court found that Pollard had a good faith belief that Laufer was displaying plates issued to another vehicle in violation of WIS. STAT. § 341.15(3)(a), and that because Pollard’s mistake was factual, the fruits of the traffic stop were not subject to the exclusionary rule.

¶4 Laufer appealed, arguing that Pollard’s mistake was actually a mistake of law because the registration code does not require a person to report a change in color made to an already registered vehicle. We affirmed the judgment, concluding that the stop was supported by a reasonable, if mistaken, suspicion that Laufer was violating WIS. STAT. § 341.15(3)(a). Our opinion assumed that operating a blue truck when the registration indicated it was a red truck violated § 341.15(3)(a).

¶5 The parties jointly filed a motion to reconsider this court’s opinion, alleging that after its release, the State became aware of WIS. STAT. § 349.02(2)(c), which provides that “a law enforcement officer may not stop a vehicle solely because the vehicle’s color differs from the color stated in the application for registration of that vehicle.”³ The State requested permission to file a supplemental brief arguing that the traffic stop was nonetheless lawful because Laufer’s license plate was obstructed in violation of WIS. STAT. §§ 341.15(2) and (3). See *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d

³ Though this principle appears to be the central argument in Laufer’s appellant’s brief, the applicable statute was never cited. Instead, Laufer cited to WIS. STAT. § 341.08(2)(c) and (cm), which regulates the vehicle registration application process.

679 (Ct. App. 1985) (on appeal, a party may raise new arguments in support of the trial court's decision). We granted the parties' reconsideration request, withdrew our opinion, and ordered simultaneous supplemental briefing.

¶6 Whether there is probable cause or reasonable suspicion to justify a traffic stop is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. We apply a two-step standard of review to questions of constitutional fact. *State v. Williams*, 2001 WI 21, ¶18, 241 Wis. 2d 631, 623 N.W.2d 106. First, we review the trial court's findings of historical fact under the clearly erroneous standard. *Popke*, 317 Wis. 2d 118, ¶10. Then, we review do novo the application of those facts to constitutional principles. *Id.*

¶7 We agree with the parties that the stop of Laufer's vehicle cannot be justified by reference to Pollard's mistaken belief that Laufer's truck was improperly registered under WIS. STAT. § 341.15(3)(a). Pursuant to WIS. STAT. § 349.02(2)(c), there was no basis in law for Pollard to stop Laufer's truck based solely on the color discrepancy. Because the stop was premised not only on a mistake of fact (the misreading of the license plate number), but also on a mistake of law, the exclusionary rule applies. See *State v. Longcore*, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999), *aff'd by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620 (where the facts would support a violation only under a legal misinterpretation, there can be no probable cause that a violation has occurred); *State v. Brown*, 2013 WI App 17, ¶21, 346 Wis. 2d 98, 827 N.W.2d 903 (reaffirming *Longcore's* holding that a lawful stop cannot be predicated on a mistake of law). Therefore, in order to affirm the trial court's suppression ruling, there must be another legally sufficient ground supporting the traffic stop.

¶8 In its supplemental brief, the State presents a new theory not argued in the trial court: that the traffic stop was justified because Pollard had reasonable grounds to believe that Laufer was operating a vehicle with an obstructed registration plate in violation of WIS. STAT. § 341.15(3)(b) and (c). In support, the State points to Pollard’s suppression hearing testimony that he “was not completely able to see the registration due to a trailer hitch being in the way,” and that the first time the officer was able to “see what the correct registration on the vehicle was is when [he] had walked up to the vehicle and was about even with the tailgate of the truck.” The State also relies on the trial court’s written order characterizing the license plate as “obstructed by a trailer hitch attachment on the back of the vehicle.” The State asserts that this is a finding by the trial court, that it is not clearly erroneous, and that it supports a conclusion that Pollard had sufficient grounds to believe that Laufer was violating a vehicle registration law.

¶9 While this court may affirm a trial court’s decision on alternate grounds, *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987), we are not a fact-finding court, *see Lange v. LIRC*, 215 Wis. 2d 561, 572, 573 N.W.2d 856 (Ct. App. 1997). WISCONSIN STAT. § 341.15(2) states in pertinent part:

Registration plates shall be attached firmly and rigidly in a horizontal position and conspicuous place. The plates shall at all times be maintained in a legible condition and shall be so displayed that they can be readily and distinctly seen and read.

Though the State argues that the operation of “a vehicle with an obstructed registration plate” subjects the driver to a forfeiture, the statute is more specific in its application. WISCONSIN STAT. § 341.15(3) imposes a forfeiture on persons operating vehicles without any displayed evidence of registration under para. (a), as well as:

(b) A person who operates a vehicle with a registration plate attached in a non-rigid or non-horizontal manner or in an inconspicuous place so as to make it difficult to see and read the plate; [and]

(c) A person who operates a vehicle with a registration plate in an illegible condition due to the accumulation of dirt or other foreign matter.

¶10 The issue of whether Laufer's trailer hitch violated WIS. STAT. § 341.15(3)(b) or (c), was never addressed in the trial court, and the relevant facts were never developed on the record. To affirm on the ground that Laufer violated any of the provisions of § 341.15(3) would require this court to find facts and make inferences from an inadequate and unsuitable record. We do not know, for instance, whether the plate was, in fact, attached in an inconspicuous place or whether the obstruction was due to the officer's particular vantage point at the time in question. Because the State's theory was not litigated in the trial court, we cannot determine from the record whether Pollard had a reasonable suspicion or probable cause to believe that Laufer violated WIS. STAT. § 341.15(3). Therefore the State has not met its burden to justify the warrantless traffic stop, and we reverse.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

