COURT OF APPEALS
DECISION
DATED AND FILED

August 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2119-CR **Cir. Ct. No. 2013CT499**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

KIM M. LERDAHL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed*.

¶1 STARK, J.[1] The State of Wisconsin appeals an order granting Kim Lerdahl's motion to suppress evidence obtained as a result of a traffic stop.[2] The

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] *See* WIS. STAT. § 974.05(1)(d)2.

State argues the circuit court erred when it ruled that the arresting officer did not have reasonable suspicion or probable cause to stop Lerdahl's vehicle. We affirm.

BACKGROUND

¶2 The following facts are derived from a July 2014 suppression hearing. Officer Amber Roth, of the Eau Claire Police Department, testified she initiated a traffic stop of Lerdahl's vehicle in October of 2013 at approximately 2:00 a.m. Roth testified she had observed three occupants of a vehicle, later identified as Lerdahl's, staring at her while driving by her marked squad car. The staring "caught [her] attention," so she followed the vehicle. Shortly thereafter, Lerdahl turned into a parking lot, and Roth followed.[3] Roth stated she observed what she believed to be a nonfunctioning center high-mount brake light (CHMSL)[4] on Lerdahl's pickup truck and activated her squad lights. It is undisputed that what Roth believed was a nonfunctioning CHMSL was in fact a cargo lamp that is not activated by the application of brakes.

¶3 Roth testified that Lerdahl was driving a 1992 Chevrolet K1500 pickup truck. She also testified she did not know whether 1992 Chevrolet pickup trucks similar to Lerdahl's were equipped with "factory installed" CHMSLs. The parties ultimately established at the suppression hearing that 1994 and later models

[3] Lerdahl observes the squad video shows the supermarket whose parking lot she turned into was open for business at the time of the stop, and the parking lot had "numerous other parked vehicles."

[4] Also known as a center high-mounted stop lamp (CHMSL). WISCONSIN ADMIN. CODE § TRANS 305.15 (December 2010) requires, in relevant part: "**(5)(a)** The high-mounted stop lamp of every motor vehicle originally manufactured with a high-mounted stop lamp shall be maintained in proper working condition and may not be covered or obscured by any object or material."

of Lerdahl's pickup were factory-equipped with CHMSLs that are therefore required to be in proper working condition per WIS. ADMIN. CODE § TRANS 305.15(5)(a) (December 2010). In addition, Roth testified the color of the cargo lamp was "whitish," rather than the usual red of brake lights.

¶4 The circuit court concluded Roth's mistake in believing Lerdahl's 1992 Chevrolet pickup truck was equipped with a nonfunctioning CHMSL was not reasonable, explaining:

> When the only reason for stopping a vehicle is the lack of a high mounted tail [sic] lamp, the police officer needs to have a reasonable belief that such vehicle came equipped with that, so if that's the reason, you need, then, at least something that wasn't established here, which is some sort of training in the identification of the age of vehicles.

The court granted Lerdahl's motion to suppress.

DISCUSSION

¶5 The Fourth and Fourteenth Amendments of the United States Constitution and article I, section 11 of the Wisconsin Constitution protect citizens from unreasonable searches and seizures. Traffic stops are considered seizures, and if the seizure was unreasonable and consequently unconstitutional, any evidence obtained therefrom is inadmissible. ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569; ***State v. Harris***, 206 Wis. 2d 243, 263, 557 N.W.2d 245 (1996). The burden falls on the State to prove that a stop meets the constitutional standards. ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634; ***Harris***, 206 Wis. 2d at 263.

¶6 An officer must have reasonable suspicion that a traffic law has been or is being violated to justify a traffic stop. ***State v. Houghton***, 2015 WI 79, ¶30,

__Wis. 2d__, __N.W.2d__. Reasonable suspicion depends on an officer's ability "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Terry v. Ohio***, 392 U.S. 1, 21 (1968); ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). We focus on reasonableness, and examine whether the facts of the case would warrant a reasonable police officer, in light of his or her training and experience, to suspect that an individual is committing, is about to commit or has committed an offense. ***State v. Anderson***, 155 Wis. 2d 77, 83-84, 454 N.W.2d 763 (1990).

¶7 Whether evidence should be suppressed is a question of constitutional fact. ***State v. Knapp***, 2005 WI 127, ¶19, 285 Wis. 2d 86, 700 N.W.2d 899. We will uphold a circuit court's findings of fact unless they are clearly erroneous, but we independently review whether those facts meet the constitutional standard. ***State v. Johnson***, 2007 WI 32, ¶13, 299 Wis. 2d 675, 729 N.W.2d 182.

¶8 Here, the circuit court found Roth had:

> observed a vehicle before [her], saw the right and left tail area brake lights illuminate but did not see a high mount brake light illuminate. There appeared to be some kind of a light in the area where commonly now high mount brake lights are. This was the reason for the stop.

These findings of fact are supported by the record and are not clearly erroneous. However, we independently review whether those facts amount to reasonable suspicion.

¶9 The parties frame the appeal as involving a mistake of fact, and contest the reasonableness of Roth's mistake. A reasonable mistake of fact will

not invalidate an officer's reasonable suspicion to support a traffic stop,[5] and our supreme court very recently determined the same regarding mistakes of law.[6] *See* ***Houghton***, 2015 WI 79, ¶52. (An "objectively reasonable mistake of law by a police officer can form the basis for reasonable suspicion to conduct a traffic stop."). Here, it appears that Roth made a mistake of law founded on a mistake of fact: Roth mistook Lerdahl's cargo lamp for a CHMSL (mistake of fact), and she stopped Lerdahl believing that what she thought was a CHMSL was not working, in violation of WIS. ADMIN. CODE § TRANS 305.15(5)(a) (December 2010). Roth's apparent belief that all CHMSLs must be functional is a mistake of law, as the administrative code section only requires that CHMSLs of vehicles "originally manufactured with a high-mounted stop lamp shall be maintained in proper working condition …."

¶10 Accordingly, we now determine whether Roth's mistakes were objectively reasonable. The State argues Roth made a reasonable factual mistake when she mistook Lerdahl's cargo lamp for a nonfunctioning CHMSL. The State compares Roth's mistake to

> the situation in which an officer conducts a traffic stop of a vehicle after seeing that the vehicle is registered to a person whose operating privileges are revoked, and then finds after the stop that the person driving the vehicle is not the registered owner. The traffic stop was reasonable, even though the officer turned out to be wrong as to the identity of the driver.

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[5] *See* ***Heien v. North Carolina***, 135 S. Ct. 530, 536 (U.S. 2014) ("We have recognized that searches and seizures based on mistakes of fact can be reasonable."); *see also* ***State v. Houghton***, 2015 WI 79, ¶45, __Wis. 2d__, __N.W.2d__.

[6] We observe the parties briefed their arguments without the benefit of ***Houghton***, which was released after the close of briefing in this case.

¶11 In response, Lerdahl argues Roth's belief that her truck had a nonfunctioning CHMSL was not a reasonable mistake of fact. She directs us to the circuit court's observation that the State presented no testimony at the suppression hearing to show Roth had any general knowledge or information as to which vehicles are factory equipped with CHMSLs and which vehicles do not come so equipped. She asserts, "Therefore, there is no way [for Roth] to rationally assess the likelihood that Lerdahl's specific truck had a center high-mounted stop lamp, apart from speculation." Lerdahl also identifies Roth's concession on cross-examination that the cargo lamp had "a 'whitish' colored lens instead of a red lens, as is commonly seen on stop lamps," and as required by WIS. STAT. § 347.14(2).

¶12 Lastly, in an argument seemingly addressing Roth's mistake of law, Lerdahl argues Roth did not have a sufficient factual basis to believe any violation of law was being committed. She contends "a traffic officer must possess some knowledge about either the age of a pick-up truck, or other original-equipment vehicle information, in order to rationally assess whether it is in violation of Wisconsin Administrative Code Trans § 305.15(5)(a)." Lerdahl argues this case is controlled by ***State v. Conaway***, 2010 WI App 7, 323 Wis. 2d 250, 779 N.W.2d 182, in which we concluded a traffic stop based on rear window tinting was unlawful because the officer did not testify that he had any training or experience rendering him capable of judging the technical standard of fact set forth in the administrative rule.

¶13 The State responds that requiring a traffic officer to "possess some knowledge about either the age of a pick-up truck or other original-equipment vehicle information, in order to rationally assess whether it is in violation of Wisconsin Administrative Code Trans § 305.15(5)(a)" is "unreasonable, as it all

but eliminates the possibility of a reasonable mistake." The State argues that ***Conaway*** is distinguishable because "no such technical expertise is required" to determine whether a CHMSL is functioning, because it is simply "on or off." Further, the State continues, "expecting a law enforcement officer … to distinguish the difference between the features of a 1992 pickup truck and a 1994 pickup truck before making the traffic stop is simply not reasonable."

¶14 Despite the State's arguments, our supreme court's recent decision in ***Houghton*** does not excuse an officer's complete lack of knowledge about the law, but only a reasonable mistake concerning it. And, as stated by Justice Kagan in her concurrence in ***Heien v. North Carolina***, 135 S. Ct. 530 (2014), objectively reasonable mistakes of law are "exceedingly rare." ***Heien***, 135 S. Ct. at 541 (Kagan, J., concurring).

¶15 Citing Justice Kagan's concurrence in ***Heien***, our supreme court in ***Houghton*** considered what constitutes an objectively reasonable mistake of law:

> A court tasked with deciding whether an officer's mistake of law can support a seizure thus faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not. As the Solicitor General made the point at oral argument, the statute must pose a "really difficult" or "very hard question of statutory interpretation."

Houghton, 2015 WI 79, ¶68 (citing ***Heien***, 135 S. Ct. at 541 (Kagan, J., concurring)).

¶16 In ***Houghton***, our supreme court determined that the officer's mistaken interpretation of WIS. STAT. § 346.88 to prohibit the placement of any object in the front windshield was objectively reasonable. ***Houghton***, 2015 WI

79, ¶70. The statute was ambiguous, the analysis of the statute was a "close call[,]" and "a reasonable judge could agree with the officer's view." ***Id.***, ¶¶70-71.

¶17 The administrative code provision at issue here is unambiguous. A working CHMSL is not required in every truck, but only those motor vehicles originally manufactured with one. *See* WIS. ADMIN. CODE § TRANS 305.15(5)(a) (December 2010). There is no room for interpretation. If a law enforcement officer is enforcing a law that clearly dictates certain terms to constitute a violation, the officer must know those terms in order to enforce the law. Roth's enforcement of a law she fundamentally misunderstood was not reasonable without some evidence that she had been trained—or tried to obtain information—to distinguish which vehicles were originally manufactured with CHMSLs, thus requiring them to have a high-mounted stop lamp in working order, and evidence that she erroneously—but reasonably—believed she was seeing such a vehicle.

¶18 Roth's mistake of law is similar to the second mistake of law considered by the court in ***Houghton***. Officer Price stopped Houghton's vehicle for a violation of WIS. STAT. § 341.15, which requires a vehicle to display a front license plate only when two license plates are issued for that vehicle. ***Houghton***, 2015 WI 79, ¶73. The court considered whether the lack of a front license plate, without more, may give rise to a reasonable suspicion to conduct a traffic stop and concluded it did not.

> To answer this question in the affirmative, we would have to hold that it is reasonable for a police officer in Wisconsin to believe that, if a vehicle is operating on a Wisconsin road, it must have been issued two license plates.
>
> Such a belief would usually be unreasonable. Wisconsin borders four other states, and residents from those and many other states pass through Wisconsin on a regular basis. That *most* vehicles on Wisconsin roads might be

> registered in Wisconsin and *most* vehicles registered in Wisconsin might be issued two plates is not enough to conclude that a stop of a vehicle *solely* because it lacks a front license plate passes constitutional muster.
>
> ….
>
> Here, however, there was no initial indication that Houghton's vehicle was from Wisconsin. Once Officer Price was behind Houghton's vehicle, it would have become apparent from the rear plate that the vehicle was registered in Michigan. Thus, to the extent that Officer Price may have believed that Houghton was violating the law by not having a front license plate displayed, we hold that belief was neither a reasonable mistake of law nor a reasonable mistake of fact.

Houghton, 2015 WI 79, ¶¶75-76, 78.

¶19 Similarly here, stopping Lerdahl's truck due to a nonfunctioning CHMSL, without more, is not enough to pass constitutional muster. There was no evidence that Roth had any information or knowledge concerning the likelihood that Lerdahl's truck was "originally manufactured" with a CHMSL. As a result, Roth did not have reasonable suspicion to support her traffic stop of Lerdahl when WIS. ADMIN. CODE § TRANS 305.15(5)(a) (December 2010) was the basis for that stop.[7] Based on the record before us, we conclude Roth's mistake of fact—that Lerdahl's truck had a CHMSL—and her mistake of law—that a working CHMSL was required on Lerdahl's truck—were unreasonable. The stop of Lerdahl's vehicle premised on those unreasonable mistakes was therefore not lawful.

[7] Roth's observation that Lerdahl's passengers "stared at [her]" lends nothing to her reasonable suspicion that a traffic violation had been committed or that a person had committed, was committing, or was about to commit an offense.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.