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DISTRICT II

August 10, 2016

To:

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Sheboygan County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2015AP1787-CR State of Wisconsin v. Avery L. Applewhite, Sr. (L.C. # 2013CF89)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Avery L. Applewhite, Sr., appeals from a judgment of conviction and an order denying his motion for postconviction relief. He challenges the lawfulness of his traffic stop. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm the judgment and order of the circuit court.

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

On February 16, 2013, police officer Brent Vreeke stopped a car driven by Applewhite and discovered evidence of drug crimes inside it. The State charged Applewhite with a felony count of possession with intent to deliver tetrahydrocannabinols (THC) and misdemeanor counts of possession of drug paraphernalia and possession of an illegally obtained prescription. According to a police report, Vreeke initiated the traffic stop based upon his observation that a passenger in the car's backseat was not wearing a seatbelt.

Applewhite moved to suppress the evidence that resulted from the traffic stop. Among other things, he asserted that Vreeke could not have seen whether the passenger was wearing a seatbelt under the circumstances.

At a hearing on the motion, Vreeke testified that he saw through a back window of the car the buckle of the rear passenger's seatbelt loose near the passenger's shoulder. Defense counsel tried to present a dash cam video recording of the stop but was unable to get it to play on a computer. The circuit court denied the motion, concluding that the stop was justified by Vreeke's observation of a seatbelt violation.

Following a change of defense counsel, Applewhite moved for reconsideration, arguing that the unavailability of the video recording at the prior hearing denied the circuit court the opportunity to assess all of the relevant evidence. The court ordered a second hearing at which it viewed the recording and reviewed the transcript of the first hearing. Again, the court denied the motion, finding Vreeke's prior testimony credible.

Applewhite subsequently entered no contest pleas to an amended felony charge of possession of THC as a second offense and to the misdemeanor charges of possession of drug

paraphernalia and possession of an illegally obtained prescription. The circuit court accepted the pleas and sentenced Applewhite to thirty days in jail.

After sentencing, Applewhite filed a motion for postconviction relief, reasserting his claim that the traffic stop was unlawful because Vreeke could not have seen whether the passenger was wearing a seatbelt. The circuit court ordered another hearing on the matter at which Vreeke testified and reiterated his observation. After being shown the video recording, Vreeke agreed that the buckle was not visible on it but maintained that he saw it with his naked eye. Ultimately, the circuit court denied the motion, finding Vreeke's testimony credible and concluding that the recording did not contradict it due to its poor quality and darkness. This appeal follows.

Investigative traffic stops are subject to the constitutional requirement of reasonableness. ***State v. Post***, 2007 WI 60, ¶12, 301 Wis. 2d 1, 733 N.W.2d 634. A police officer's reasonable suspicion that a motorist is violating or has violated a traffic law is sufficient to initiate a stop of the offending vehicle. ***State v. Houghton***, 2015 WI 79, ¶5, 364 Wis. 2d 234, 868 N.W.2d 143.

Whether reasonable suspicion exists presents a question of constitutional fact. ***State v. Walli***, 2011 WI App 86, ¶10, 334 Wis. 2d 402, 799 N.W.2d 898. When reviewing questions of constitutional fact, we will uphold a circuit court's findings of historical fact unless they are clearly erroneous. ***Id.*** This standard applies even when the findings are based in part on video evidence. ***Id.***, ¶17. We review de novo, however, the court's application of constitutional principles to its findings. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829.

On appeal, Applewhite renews his challenge to the lawfulness of his traffic stop. He does not dispute that Vreeke would have had grounds to make the stop had he observed evidence of a seatbelt violation. *See* WIS. STAT. § 347.48(2m) (explaining a seatbelt's required use). However, he insists that Vreeke could not have made such an observation because no such evidence is visible on the video recording of the stop. Applewhite asserts that it was clearly erroneous for the circuit court to find otherwise.

Upon review of the video recording, we cannot say that it was clearly erroneous for the circuit court to find that Vreeke had observed evidence of a seatbelt violation. The recording is dark, jumpy, and low in resolution. It is not of sufficient quality to establish what Vreeke could and could not have seen inside of Applewhite's car. Given these limitations, the circuit court could reasonably find, from both Vreeke's testimony and its evaluation of it, that Vreeke observed evidence of a seatbelt violation. Based upon this finding, the stop of Applewhite's car was permissible. *See* ***Houghton***, 364 Wis. 2d 234, ¶5.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals