COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2770-CR **Cir. Ct. No. 2006CM25**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID E. TONNANCOUR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rusk County: JAMES C. BABLER, Judge. *Affirmed*.

¶1 PETERSON, J.[1] David Tonnancour appeals a judgment of conviction for operating while intoxicated, second offense. Tonnancour claims the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

trial court erred by denying his motion to dismiss[2] based on lack of reasonable suspicion to stop and by failing to consider his affidavit at the motion hearing. We disagree and affirm the judgment.[3]

BACKGROUND

¶2 On January 7, 2006, deputy Dustin Walters observed an oncoming vehicle that had its high-beams on. Walters estimated that approximately 400 to 600 feet from his squad car the oncoming vehicle, operated by Tonnancour, dimmed its lights. Walters testified that Tonnancour flashed his car's high-beams at Walters approximately three or four times when the car was within 200 to 300 feet. Walters stated his headlights were dimmed at the time Tonnancour flashed his car's high-beams.

¶3 Walters turned his car and began to follow Tonnancour. As Walters followed Tonnancour's car, he observed Tonnancour flash his high-beams at another oncoming vehicle even though the oncoming vehicle did not have its high-beams on. Walters then stopped Tonnancour.

¶4 Tonnancour was subsequently charged with operating a motor vehicle while intoxicated, second offense. Tonnancour filed a motion to dismiss based on an unconstitutional automobile stop. The court concluded Walters had

[2] The remedy for an illegal stop is suppression of evidence, not dismissal. *See* ***Mapp v. Ohio***, 367 U.S. 643, 649 (1961). We nevertheless address the merits of Tonnancour's motion.

[3] Tonnancour also argues the trial court erred by determining the stop was justified as a proper exercise of the community caretaker function. Because we conclude the officer had reasonable suspicion to stop Tonnancour, we need not address this alternative argument as cases should be decided on the narrowest grounds. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

reasonable suspicion to stop the vehicle because Tonnancour violated WIS. STAT. § 347.12(1)(a)[4] by improperly flashing his bright headlights.

DISCUSSION

¶5 Tonnancour first argues the trial court erred by finding the officer had reasonable suspicion to stop him. We uphold the circuit court's findings of fact unless they are clearly erroneous. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). However, whether those facts satisfy the constitutional requirement of reasonableness is a question of law we review without deference. ***Id.***

¶6 The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Detention of a suspect must be based upon a reasonable suspicion of wrongful activity. ***Id.*** at 55-56. Reasonable suspicion is dependent on whether an officer's suspicion is grounded in "specific articulable facts and reasonable inferences from those facts" indicating the individual committed a crime. ***Id.*** at 56 (quoting ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)). What constitutes reasonable suspicion is a common sense test. ***Id.*** We look to what a reasonable police officer would "reasonably suspect in light of his or her training and experience." ***Id.*** When considering whether reasonable suspicion exists, an officer is not required to rule out the possibility of innocent behavior. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

[4] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶7 In this case, Walters stopped Tonnancour based on his suspicion that Tonnancour violated WIS. STAT. § 347.12(1)(a), which reads as follows:

> (a) Whenever the operator of a vehicle equipped with multiple-beam headlamps approaches an oncoming vehicle within 500 feet, the operator shall dim, depress or tilt the vehicle's headlights so that the glaring rays are not directed into the eyes of the operator of the other vehicle. This paragraph does not prohibit an operator from intermittently flashing the vehicle's high-beam headlamps at an oncoming vehicle whose high-beam headlamps are lit.

¶8 Construction of a statute and its application to the facts the circuit court found presents a question of law we review without deference. ***State v. Schmidt***, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. "When we construe a statute, we begin with the language of the statute and give it the common, ordinary, and accepted meaning…." ***Id.***, ¶15. A statute should be interpreted so as to avoid absurd results. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

¶9 In this case, Walters had reasonable suspicion to believe Tonnancour violated the statute by improperly flashing his high-beams at Walters and another oncoming vehicle. Under WIS. STAT. § 347.12(1)(a) a driver is allowed to flash high-beams at an oncoming vehicle only when that oncoming vehicle has its high-beams on. Tonnancour argues Walters' halogen lights on low-beam are as bright as regular high-beams, so he was permitted by statute to flash his lights at Walters because he believed Walters had on his high-beams. However, the statute is a strict responsibility regulation and Tonnancour's mental state is irrelevant. Furthermore, the trial court accepted Walters' testimony that the other oncoming vehicle Tonnancour flashed his high-beams at did not have its high-beams on. Tonnancour did not offer any evidence at the motion hearing to refute this testimony.

¶10 Tonnancour also argues the trial court erred by not considering his affidavit that he believed the oncoming vehicle had its high-beams on. This argument has no merit. Tonnancour attempted to submit the affidavit at his evidentiary hearing. Evidence consists of testimony and received exhibits. An affidavit is neither. An affidavit is not subject to cross-examination and therefore need not be considered. However, even if the trial court erred by excluding the affidavit, any error was harmless. An error is harmless if there is no "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698. Here, there is no possibility that the outcome would be different if the affidavit were admitted. The affidavit only addresses one oncoming vehicle, presumably Walter's squad car. Therefore, the affidavit does not deny that Tonnancour improperly flashed his bright headlights at a second oncoming vehicle.

By the Court.— Judgment affirmed.

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