COURT OF APPEALS
DECISION
DATED AND FILED

September 20, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP872-CR **Cir. Ct. No. 2006CT83**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Michael Jones appeals a judgment of conviction for operating a motor vehicle after revocation, fourth offense, in violation of WIS. STAT. § 343.44(1)(b) and operating a motor vehicle while under the influence of

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

an intoxicant, third offense, in violation of WIS. STAT. § 346.63(1)(a). He contends the circuit court erred in denying his motion to suppress evidence because, he asserts, the arresting officer did not have the requisite reasonable suspicion to stop his vehicle. We conclude the circuit court did not err and we therefore affirm.

BACKGROUND

¶2 At the motion hearing, the officer testified as follows. On the night he arrested Jones he received a call from dispatch that a white Oldsmobile leaving Livingston on Highway 80 was possibly being driven by a drunk driver. The officer went to that area and observed a vehicle that appeared to be an Oldsmobile, although he could not tell the color since it was night. The officer had been given a license plate number by dispatch, but there was no front license plate on the vehicle the officer observed, so the officer turned his squad car around to get behind the vehicle and he followed it. He observed that this vehicle had a temporary plate on the rear, so he knew it did not have the plate number that dispatch had given him. He also observed that the lamp on the plate was burned out or not working. He continued to follow the vehicle and observed that it was taking an odd route—taking a right turn, then a left, and then going back the way it had come. When the vehicle made the left turn, the officer again noticed that the plate lamp was out: he explained that when the light span on his squad car was not on the vehicle he could see that the license plate lamp was not on. After the vehicle stopped at the stop sign on the highway, it "started to lurch forward," then stopped again and signaled a right turn. At this point the officer activated the emergency lights of his squad car and the vehicle pulled over on the highway.

¶3 Jones was the driver of the vehicle. After the officer spoke to Jones and administered field sobriety tests, the officer arrested Jones for driving while under the influence of an intoxicant.

¶4 On cross-examination, the officer reaffirmed that he did not see the plate lamp working and he looked several times.

¶5 Jones's attorney played a copy of a videotape that the officer made of the traffic stop and it was received in evidence. On the tape, while the officer was following Jones's vehicle and before he made the stop, he stated twice that the license plate lamp was not working. Jones argued that the videotape showed that the plate lamp was working because the area of the plate was light. He also argued that nothing else the officer observed constituted reasonable suspicion.

¶6 The circuit court denied the motion to suppress. The court first found that the tip from dispatch was apparently for another vehicle. The court then stated that the route Jones took after the officer started following him was suspicious, but in itself did not constitute the requisite reasonable suspicion for the stop, and the same was true of the vehicle's manner of stopping and signaling at the stop sign. On the issue of whether the license plate lamp was working, the court noted that the officer testified that it was not and the video provided "some evidence" that it was. The court found that it was not working and explained:

> I don't doubt that this taillight or this license plate light was not working. The fact that given a camera through a window of a squad car at night with other lights and traffic in the area would indicate that there was some area of either reflection or illumination in the area of the license plate I don't think is sufficient for me to disregard the testimony of the trooper. And the fact that he immediately seized upon this and stated it on the ticket or on the tape, excuse me, would not be a particularly smart thing to do knowing that there is – you know there is a tape of it, and he really doesn't know what the tape will reveal or not

> knowing there is likely another officer is going to be there, whether it is Deputy Smith or somebody from Fennimore, and it just doesn't make a lot of sense to me that the trooper would just create a vehicle infraction and state that on the tape just to create probable cause. I mean there is a hundred other ways the trooper could do that.
>
> Certainly he flipped on his camera before the lights came on, so he was obviously taping what he believed would be probable cause or I should say reasonable suspicion. If he was trying to set Mr. Jones up, I guess that's a theory, but not one that I would buy into. If he hadn't seen this light, he would in my mind either have followed the vehicle to get more probable cause or reasonable suspicion. Persons truly intoxicated, odds are that the person will violate some kind of rule of the road, but it just seems that on this record it is not plausible that the trooper is making this license plate light thing up given the fact he turned the videotape on before the stop, given his comments on the tape, and I don't think the tape allows me to disregard that testimony, because I think there probably are other explanations for it. So I think there was reasonable suspicion to pull the vehicle over.

DISCUSSION

¶7 On appeal, Jones makes two arguments: (1) the circuit court was required to accept what the videotape showed and it showed the license plate lamp was on; and (2) even if the lamp were not functioning, that is not a violation of any traffic statute.[2]

¶8 The temporary detention of individuals during the stop of an automobile by the police constitutes a "seizure" of "persons" within the meaning

[2] It does not appear that Jones raised this second issue in the circuit court. However, the State has briefed the issue on appeal and does not contend that we should apply waiver. Therefore we address the issue.

of the Fourth Amendment.[3] ***Whren v. United States***, 517 U.S. 806, 809-10 (1996). An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. ***Id.*** at 810. A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, ***id.***, or have grounds to reasonably suspect a violation has been or will be committed. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 439 (1984) (*citing* ***United States v. Brignoni-Ponce***, 422 U.S. 873, 881 (1975)).

¶9 Jones's argument in the circuit court was based on the reasonable suspicion standard and that is the standard he sets forth in his brief on appeal. However, at one point in his appellate brief he faults the circuit court for using a reasonable suspicion rather than a probable cause standard. Probable cause exists when, under the circumstances, the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Woods***, 117 Wis. 2d 701, 710, 345 N.W.2d 457 (1984). Thus, when an officer observes unlawful conduct, the observation of unlawful conduct itself gives the officer probable cause for a lawful arrest. ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Under the lower reasonable suspicion standard, the law does not require an officer to observe criminal conduct; rather, under the totality of the circumstances, the officer must consider all the facts together and "as they accumulate," draw "reasonable inferences about [their] cumulative effect." ***Id.*** at 58. So long as there are specific

[3] Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee the right of citizens to be free from unreasonable searches and seizures. In general, the Wisconsin Supreme Court follows the United States Supreme Court's interpretation of the search and seizure provision of the Fourth Amendment in construing the same provision of the state constitution. ***State v. Fry***, 131 Wis. 2d 153, 171-72, 388 N.W.2d 565 (1986).

and articulable facts which yield reasonable inferences, which, in turn, reasonably warrant a suspicion that an offense has occurred or will occur, there is reasonable suspicion. ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968).

¶10 Jones does not explain why, since he is challenging the traffic stop only and not the arrest, we should be concerned with whether there was probable cause rather than reasonable suspicion. We therefore will analyze his arguments under the reasonable suspicion standard, although we recognize that in this case it appears that, if there is reasonable suspicion to stop because of a non-functioning plate lamp, there is also probable cause.

¶11 We uphold the trial court's findings of fact unless they are clearly erroneous. ***State v. Kolk***, 2006 WI App 261, ¶10, 289 Wis. 2d 99, 726 N.W.2d 337. However, whether the facts as found by the circuit court, or the undisputed facts, are sufficient to fulfill the constitutional standard is a question of law, which we review de novo. ***State v. Krier***, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991). The proper construction of a statute also presents a question of law. ***State v. Gillespie***, 2005 WI App 35, ¶6, 278 Wis. 2d 630 N.W.2d 320.

¶12 Jones's first argument goes to the court's fact-finding and is based on the premise that the videotape indisputably shows that the plate lamp was on. We have viewed the videotape. We conclude the circuit court's finding that the videotape does not indisputably show the plate lamp was on is not clearly erroneous. While the rectangular area that is apparently the rear plate shows white in several shots, it is also true that what appear to be the bumpers on either side of the plate also show as white rectangles. It is thus not clear whether the white of the plate area is due to a functioning lamp over the plate or to a reflection caused by another source. When this ambiguity is coupled with the officer stating twice

on the tape, as he is watching the rear of the car just ahead, that the plate lamp is not functioning, it is a reasonable inference that it was not functioning and that the officer was able to see that it was not. It is reasonable to infer that the officer could see more clearly than viewers of the videotape. When there are conflicting reasonable inferences to be drawn from evidence, selecting which inferences to draw is the function of the circuit court, as is the evaluation of a witness' credibility. *See* ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). In this case, the court had the opportunity to evaluate the officer's credibility on the stand. The court's explanation for rejecting the hypothesis that the officer was deliberately misstating on the tape is a reasonable explanation.

¶13 ***Scott v. Harris***, 127 S. Ct. 1769 , 1776, ____U.S. ___ (2007), on which Jones relies, does not require that we disregard the court's factual finding. In that case, the Court concluded that the videotape of events was so clear on certain points that no reasonable jury could believe the non-moving party's later version of events to the contrary, and therefore the moving party, who had submitted the videotape, was entitled to summary judgment. ***Id.*** In this case, in contrast, we conclude that the videotape does not clearly show whether the plate lamp was on. In addition, in ***Scott*** there was no contemporaneous description on the tape of what was being observed and here there is. *See* 127 S. Ct. 1769.

¶14 We conclude the court's finding that the license plate lamp was not working is not clearly erroneous.

¶15 We turn next to Jones's argument that WIS. STAT. § 347.13(3) does not prohibit driving a motor vehicle with a non-functioning plate lamp. Section 347.13(3) provides:

> (3) No person shall operate on a highway during hours of darkness any motor vehicle upon the rear of which a registration plate is required to be displayed unless such motor vehicle is equipped with a lamp so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of 50 feet to the rear. Such lamp may be incorporated as part of a tail lamp or may be a separate lamp.

According to Jones this statute requires that the vehicle must be equipped with a plate lamp, but it need not be functioning.

¶16 When we construe a statute, we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and we interpret it reasonably to avoid absurd or unreasonable results. ***Id.***, ¶46. We also consider the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. ***Id.***, ¶48. If, employing these principles, we conclude the statutory language has a plain meaning, then we apply the statute according to that plain meaning. ***Id.***, ¶45.

¶17 Jones's construction of WIS. STAT. § 347.13(3) overlooks the closely related section of WIS. STAT. § 347.06(3), which provides:

> (3) The operator of a vehicle shall keep all lamps and reflectors with which such vehicle is required to be equipped reasonably clean and in proper working condition at all times.

When this section is read together with § 347.13(3), the plain meaning is that the required plate lamp must be kept in proper working condition. There may be other reasons why Jones's proposed construction of § 347.13(3) is unreasonable, but we need not discuss them.

¶18 In summary, we conclude the circuit court's finding of fact that the plate lamp was not working was not clearly erroneous, and the court correctly concluded the officer therefore had reasonable suspicion to stop Jones.

By the Court.—Judgment affirmed.

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