COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2010

A. John Voelker
Acting 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. 2010AP832-CR

Cir. Ct. No. 2009CT265
2009TR3813R

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN THE MATTER OF THE REFUSAL OF JOSEPH F. BROWN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH F. BROWN,

DEFENDANT-APPELLANT.

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH F. BROWN,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed.*

¶1 VERGERONT, P.J.[1] Joseph F. Brown appeals the judgment of conviction for operating a motor vehicle while intoxicated, second offense, in violation of WIS. STAT. § 346.63(1)(a) (OWI). Brown also appeals the judgment finding that he refused to submit to the test for intoxication in violation of § 343.305(10). He asserts that the traffic stop was unlawful and the circuit court therefore erred in denying his motion to suppress evidence and erred in entering the judgment of refusal. We conclude the traffic stop was lawful and affirm both the judgment of conviction and the judgment of refusal.

BACKGROUND

¶2 At the hearing on Brown's motion to suppress evidence, Brown and the arresting officer, Police Officer Bret Gerritsen of the City of Columbus, both testified.

¶3 The officer testified as follows. At 2:09 a.m. on May 23, 2009, he was traveling southbound on Park Avenue in the city of Columbus when he observed Brown's vehicle traveling northbound on Park Avenue. The officer was approaching the Columbus Community Hospital from the downtown, and there are street lights in that area. Brown's vehicle was traveling northbound on Park Avenue from the direction of Highway 151, where there are no street lights. The officer observed that Brown had his low-beam headlights on, that he flashed his

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

high-beam headlights in the direction of the officer's vehicle, and he then immediately switched back to low beam. When Brown flashed his high-beam headlights, he was approaching the officer's vehicle and was just about to pass him going north as the officer was traveling south. The officer was certain that, when Brown flashed his high-beam headlights, he was less than 500 feet from the officer's vehicle. The officer had his headlights on, but he was positive he did not have his high-beam headlights on at the time that Brown flashed his high-beam headlights. The officer initiated a traffic stop because Brown flashed his high-beam headlights at the officer's vehicle within a distance of 500 feet.

¶4 On cross-examination the officer acknowledged that he did not write in his report that he did not have his high-beam headlights activated, but he reaffirmed his testimony that he did not have them activated when Brown flashed his high-beam headlights.

¶5 Brown testified that, as he was coming into town on Park Avenue, northbound, he noticed a vehicle coming towards him that "appeared to have his bright lights on" and he flashed his high-beam headlights and dimmed them immediately. He did not have his high-beam headlights activated prior to approaching the vehicle because he was traveling on Highway 151 and got off at the exit into the city. There was no reason for him to have flashed his high-beam headlights other than the fact that the southbound vehicle had its high-beam headlights on. Brown did not see that the southbound vehicle was a police car at the time he flashed his high-beam headlights.

¶6 On cross-examination Brown denied that the fact that an hour later a test showed he had a blood alcohol concentration of .17 had any bearing on his ability to remember what had occurred. He acknowledged that it was possible that

the oncoming vehicle did not have its high-beam headlights on because, he stated, "[t]here's a lot of cars today that appear to have bright lights on and maybe they are not on." However, he repeated that it appeared to him that the oncoming vehicle did have its high-beam headlights on. That's why he flashed his high-beam headlights and immediately dimmed them.

¶7 WISCONSIN STAT. § 347.12(1)(a) provides:

> (1) Whenever a motor vehicle is being operated on a highway during hours of darkness, the operator shall use a distribution of light or composite beam directed high enough and of sufficient intensity to reveal a person or vehicle at a safe distance in advance of the vehicle, subject to the following requirements and limitations:
>
> (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 Brown argued to the circuit court that the statute is not violated if the person flashing the high-beam headlights perceives that the high-beam headlights of the oncoming vehicle are on, even if they are not. The State's position was that the statute permits the flashing only if the high-beam headlights of the oncoming vehicle "*are* lit." WIS. STAT. § 347.12(1)(a) (emphasis added). The court concluded it did not need to resolve this issue because it determined that Brown did not flash his high-beam headlights because he perceived the officer's vehicle to have its high-beam headlights on. The court credited the officer's testimony of the distance between the officer's vehicle and Brown's vehicle when Brown flashed his high-beam headlights, which testimony Brown did not contradict. The court inferred that, if Brown were in fact flashing his high-beam headlights

because he perceived the officer had his high-beam headlights on, Brown would have done that at an earlier point and would not have waited until the two cars were almost passing. The court reasoned that, "if he thought the bright headlamps [of the oncoming vehicle] were on, they would have been causing an impairment of his vision much sooner than at the time the cars were almost passing." Ultimately, the court concluded the officer did have a reasonable basis to believe there was a violation of § 347.12(1)(a). Accordingly, the circuit court denied the motion to suppress.

¶9 Brown subsequently entered a plea of no contest to the OWI charge, and a judgment of conviction was entered thereon. The parties stipulated that the transcript from the suppression hearing and the court's findings could be applied to the refusal proceeding and on that basis Brown agreed to the entry of a judgment of refusal.

DISCUSSION

¶10 On appeal Brown contends that the circuit court's findings of fact are against the great weight and clear preponderance of the evidence. He argues that the great weight and clear preponderance of the evidence supports his position that he believed the officer had his high-beam headlights activated and that is why he activated his. In Brown's view, the circuit court's decision ignored and did not decide the legal reasoning for his motion—that WIS. STAT. § 347.12(1)(a) does not apply to a motor vehicle operator who believes the high-beam headlights of an approaching motorist are activated. The State's position, as it was in the circuit court, is that the relevant inquiry under the statute is whether the officer's high-beam headlights were on when Brown flashed his, not whether Brown perceived they were on.

¶11 The temporary detention of individuals during the stop of an automobile by the police constitutes a seizure of persons within the meaning of the Fourth Amendment.[2] ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. An automobile stop is thus subject to the constitutional imperative that it not be unreasonable under the circumstances. ***Id.*** A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred or have grounds to reasonably suspect a violation has been or will be committed. ***Id***.

¶12 Brown's motion to suppress contended there was no reasonable suspicion for the traffic stop. The State argued there was probable cause and the circuit court appears to have applied a probable cause standard. In his brief on appeal, Brown does not refer to any standard for a lawful traffic stop. The State in its brief sets forth the standard for reasonable suspicion but then uses the term "probable cause." Brown's reply brief, like his main brief, does not refer to either reasonable suspicion or probable cause. We will employ the higher probable cause standard, which is more favorable to Brown, because the officer testified that he observed the behavior that he believed constituted a traffic violation. *See* ***State v. Longcore***, 226 Wis. 2d 1, 8, 594 N.W.2d 412 (Ct. App. 1999) (holding that probable cause rather than reasonable suspicion is the appropriate standard when the officer observes what he or she believes is a traffic violation).

[2] 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. Sveum***, 2010 WI 92, ___ Wis. 2d ___, 787 N.W.2d 317.

¶13 Probable cause exists when an officer has reasonable grounds to believe that a traffic violation has occurred. ***Popke***, 317 Wis. 2d 118, ¶14. The evidence need not establish proof beyond a reasonable doubt or even that guilt is more probable than not; rather, probable cause requires that the information lead a reasonable officer to believe that guilt is more than a possibility. ***Id.*** (citation omitted). "Probable cause is a common sense test that looks to the totality of the circumstances facing the officer at the time of the [stop] to determine whether the officer could have reasonably believed the defendant had committed, or was committing, an offense." ***Longcore***, 226 Wis. 2d at 8 (citation omitted).

¶14 We affirm the factual findings of the circuit court unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***State v. Post***, 2007 WI 60, ¶8, 301 Wis. 2d 1, 733 N.W.2d 634. We recognize that Brown formulates our standard of review as affirming findings of fact unless they are "against the great weight and clear preponderance of the evidence," citing ***State v. Richardson***, 156 Wis. 2d 128, 137, 456 N.W.2d 830 (1990). This formulation is substantively the same as the current "clearly erroneous" standard. ***State v. Hambly***, 2008 WI 10, ¶16 n.7, 307 Wis. 2d 98, 745 N.W.2d 48 (citing ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983)). Whether the facts as found by the circuit court and the undisputed facts fulfill the constitutional standard presents a question of law, which we review de novo. *See* ***Post***, 301 Wis. 2d 1, ¶8.

¶15 As a threshold issue, we decide the parties' dispute over the proper construction of the statute. Because this presents a question of law, our review is de novo. *See* ***Cambier v. Integrity Mut. Ins. Co.***, 2007 WI App 200, ¶12, 305 Wis. 2d 337, 738 N.W.2d 181. Therefore, we may decide this issue even though the circuit court did not.

¶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 Cnty.***, 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. If, employing these principles, we conclude the statutory language has a plain meaning, we apply the statute according to that plain meaning. ***Id.***

¶17 We agree with the State that the plain language of WIS. STAT. § 347.12(1)(a) permits the operator of a vehicle that is within 500 feet of an oncoming vehicle to flash its high-beam headlights if the high-beam headlights of the oncoming vehicle "are lit." It is unreasonable to construe the term "are lit" to mean "are perceived to be lit even though actually not lit." Therefore, if the high-beam headlights of the oncoming vehicle are not lit, it is a violation of the statute for an operator to flash his or her vehicle's high-beam lights within 500 feet of the oncoming vehicle.

¶18 The circuit court found that Brown did flash his high-beam headlights within 500 feet of the officer's oncoming vehicle, and that finding is not clearly erroneous. This was the officer's testimony and Brown's testimony does not contradict it.

¶19 As for whether the officer had his high-beam headlights on when Brown flashed his, the court arguably did not make an express finding on this point. However, it is implicit in its decision that the officer's high-beam

headlights were not lit. If they were lit, there would be no need for the circuit court to address Brown's contention that he did not violate the statute because he *perceived* the officer's high-beam headlights to be lit. In addition, a finding that the officer's high-beam headlights were lit when Brown flashed his would be inconsistent with the court's reason for finding that Brown did not flash his high-beam headlights because he thought the officer had his high-beam headlights on. As explained above, the court found that Brown would have seen the officer's high-beam headlights at an earlier point and would not have waited until he was within 500 feet to flash his. When a circuit court does not make an express finding of fact but an implicit finding is supported by the evidence, we accept that implicit finding of fact. *See* ***Town of Avon v. Oliver***, 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260. The officer's testimony here that he was certain his high-beam headlights were not activated when Brown flashed his high-beam headlights supports the implicit finding of the circuit court.

¶20 Based on the factual findings, both explicit and implicit, made by the circuit court and the undisputed facts, we conclude the officer had probable cause to believe that Brown was violating WIS. STAT. § 347.12(1)(a) by flashing his high-beam headlights within 500 feet of the officer's vehicle. Accordingly, we affirm the circuit court's order denying the motion to suppress, the judgment of conviction, and the judgment of refusal.

By the Court.—Judgments and order affirmed.

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