COURT OF APPEALS DECISION DATED AND FILED

June 18, 2003

Cornelia G. Clark
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 Nos. 03-0177
03-0178

Cir. Ct. Nos. 02-CV-0133, 02-CV-1691

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

VILLAGE OF ELM GROVE,

PLAINTIFF-RESPONDENT,

V.

MICHAEL R. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

¶1 NETTESHEIM, P.J.[1] Michael R. Johnson appeals from a forfeiture judgment of conviction for operating a motor vehicle while intoxicated (OWI).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version.

Johnson was stopped for a defective tail lamp, an ordinance violation based on WIS. STAT. § 347.13(1) which provides, in part, that "[n]o vehicle originally equipped at the time of manufacture and sale with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in good working order …." Johnson's vehicle was equipped with two tail lamps, each containing two bulbs. One of the bulbs of the right tail lamp was not illuminated at the time of the stop.

¶2 The Village of Elm Grove Municipal Court and the reviewing circuit court dismissed Johnson's citation for operating with a defective tail lamp but found sufficient evidence to support an OWI conviction. Johnson argues that absent a defective tail lamp, the arresting officer did not have probable cause or reasonable suspicion to stop his vehicle. He also argues that the municipal court improperly awarded witness fees to the Village computed on the basis of the officers' overtime compensation.

¶3 We conclude that the failure of one of Johnson's taillight bulbs to illuminate constituted probable cause for the police to believe that the taillight was not "in good working order" under WIS. STAT. § 347.13(1). We further conclude that Johnson has waived his challenge to the award of witness fees.

FACTS

¶4 On August 17, 2001, Johnson was cited with OWI, operating with a prohibited alcohol concentration (PAC) and operating a motor vehicle with a defective tail lamp at night. The following facts were established at Johnson's trial in the municipal court. On August 17, 2001, at approximately 1:07 a.m., Officer Joseph T. Ipavec observed a vehicle directly in front of him and noted that "[t]he top light bulb [of the] right taillight assembly was not illuminating." Ipavec

activated his squad car's emergency equipment and initiated a traffic stop. Ipavec approached the vehicle, identified the driver as Johnson and informed him that he had been stopped for driving with a defective right tail lamp. During Ipavec's initial conversation with Johnson, he noted both an odor of intoxicants emanating from the vehicle and that Johnson had bloodshot eyes. Ipavec asked Johnson whether he had been consuming intoxicants and Johnson responded that "he had consumed three alcoholic beverages, starting at approximately 7:00 p.m." Although Johnson told Ipavec the name of the establishment at which he had been drinking, Ipavec could not understand him. Ipavec then requested backup and Sergeant Tim Mackesey arrived.

¶5 Ipavec and Mackesey approached Johnson's vehicle and Ipavec requested that Johnson exit the vehicle for field sobriety testing. Ipavec then led Johnson to a "flat, level surface, free of debris, and facing away from [his] squad's emergency lights." Ipavec administered the horizontal gaze nystagmus test, the nine-step walk and turn, the one-leg stand and the alphabet test. Based on Johnson's performance on the field sobriety tests, Ipavec "did not believe [Johnson] would be able to safely operate a vehicle from that location." Ipavec placed Johnson under arrest for OWI and transported him to the Village of Elm Grove Police Department. A later breath test indicated a value of .145%. The entirety of the stop was recorded on video, which was shown during the municipal court proceedings.

¶6 During his testimony, Ipavec acknowledged that there was light coming from both of Johnson's tail lamps but that there was a "defective light bulb." In Ipavec's opinion, the defective light bulb violated WIS. STAT. § 347.13(1) which provides that a tail lamp must be "in good working order." Mackesey additionally testified that because the "top light bulb of the tail lamp

assembly on the right side was not illuminated … [he] didn't feel it was in good working order." Johnson testified that while one of his tail lamps was brighter than the other, he was not sure whether one of the bulbs was burned out.

¶7 Prior to trial in the municipal court, Johnson brought a motion to suppress contending that the stop of his vehicle was not supported by probable cause. The municipal court denied the motion.[2] As noted, the matter later proceeded to trial, and at the close of testimony and arguments, the municipal court dismissed the citation for a defective tail lamp; however, the court expressly found that Ipavec had reasonable suspicion to stop Johnson. The municipal court then found Johnson guilty of OWI and dismissed the PAC charge.

¶8 Johnson followed with an appeal to the circuit court pursuant to WIS. STAT. § 800.14. Because he did not request a trial de novo pursuant § 800.14(4), the circuit court review was conducted on the basis of the transcript of the municipal court proceedings pursuant to § 800.14(5). This review was conducted in two phases. First, on November 8, 2002, the circuit court rejected Johnson's motion to suppress, ruling that Ipavec had a reasonable and articulable suspicion to stop Johnson's vehicle for an equipment violation under WIS. STAT. § 347.13. Second, on December 5, 2002, the circuit court found Johnson guilty of OWI and PAC, but not guilty of the tail lamp charge. The circuit court entered judgment on the OWI and dismissed the PAC charge.

¶9 Johnson appeals.

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[2] Johnson sought interlocutory review of this ruling in the circuit court. The circuit court ruled that it did not have jurisdiction to conduct an interlocutory appeal. This ruling is not before us.

DISCUSSION

¶10 In reviewing a decision of a municipal court under WIS. STAT. § 800.14(5), the court of appeals applies the same standard of review as the circuit court. ***Village of Williams Bay v. Metzl***, 124 Wis. 2d 356, 361-62, 369 N.W.2d 186 (Ct. App. 1985). Therefore, we will not set aside the findings of fact of the municipal court unless clearly erroneous and due regard will be given to the opportunity of the municipal court to judge the credibility of the witnesses. ***Id***. We search the record for facts to support the municipal court's findings of fact. ***Id***. at 362. However, we review questions of law de novo. *See* ***id***. at 360.

¶11 As a threshold issue, we must address the parties' dispute as to the appropriate test by which we measure the stop of Johnson's vehicle. Johnson cites to ***State v. Longcore***, 226 Wis. 2d 1, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620, in support of his contention that the trial court erred in applying a "reasonable suspicion" standard as opposed to a "probable cause" standard to the traffic stop made by Ipavec in this case.

¶12 In ***Longcore***, an officer stopped the defendant's vehicle after observing that a rear passenger window was missing and replaced with a plastic sheet. ***Id***. at 4. The officer believed that this violated the safety glass statute, WIS. STAT. § 347.43(1). ***Longcore***, 226 Wis. 2d at 4. The circuit court upheld the stop, holding that the officer was justified in stopping the defendant's vehicle "even if the officer was incorrect about the violation actually occurring." ***Id***. After finding the safety glass statute ambiguous, the circuit court held, without resolving the ambiguity:

> [A]n officer's belief that a traffic violation had occurred constitutes reasonable suspicion, even if the officer was incorrect about the violation actually occurring. If the

> officer had a reasonable belief that there was a traffic violation, and ultimately some magistrate concludes that the officer was wrong, if the belief is reasonable, that still constitutes reasonable suspicion.

Id. at 5. Essentially, the circuit court held that "the officer believed a traffic regulation was being violated, the regulation is ambiguous, the officer's interpretation was reasonable and therefore his suspicion that the law was violated was reasonable." ***Id***.

¶13 This court reversed the circuit court's ruling. ***Id***. at 3. In addressing the appropriate test, we stated:

> [The arresting officer] observed the plastic window covering, which he believed constituted an equipment violation. He did not act upon a suspicion that warranted further investigation, but on his observation of a violation being committed in his presence. The issue is, then, whether an officer has probable cause that a law has been broken when his interpretation of the law is incorrect. If the facts would support a violation only under a legal misinterpretation, no violation has occurred, and thus by definition there can be no probable cause that a violation has occurred. We conclude that when an officer relates the facts to a specific offense, it must indeed *be* an offense; a lawful stop cannot be predicated upon a mistake of law.

Id. at 8-9 (footnote omitted). We therefore remanded to the circuit court to determine whether the facts proven at the hearing constitute a violation of WIS. STAT. § 347.43(1). ***Longcore***, 226 Wis. 2d at 10.

¶14 In opposition to Johnson's reliance on ***Longcore***, the Village cites to ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 310, 603 N.W.2d 541 (1999) (footnote omitted), for the proposition that "an officer may make an investigative stop if the officer 'reasonably suspects' that a person has committed or is about to commit a crime, WIS. STAT. § 968.24, or reasonably suspects that a person is

violating the non-criminal traffic laws, ***State v. Griffin***, 183 Wis. 2d 327, 333-34, 515 N.W.2d 535 (Ct. App. 1994)."

¶15 Under the facts of this case, we agree with Johnson that probable cause is the proper test for measuring the validity of Ipavec's stop of Johnson's vehicle. The ***Longcore*** court expressly distinguished situations where the officer has only a suspicion that an offense has occurred or will occur, does not know what particular offense may have been committed, or has a need to resolve an ambiguity arising from suspicious conduct. ***Longcore***, 226 Wis. 2d at 8 & n.8. The purpose of the investigatory stop is to resolve such ambiguity. ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996).

¶16 Here, Ipavec did not observe anything ambiguous about the condition of the taillight on Johnson's vehicle. Instead, Ipavec stopped the vehicle because one of the lamps was not "in good working order," a violation of WIS. STAT. § 347.13(1). The statute provides in relevant part:

> **(1)** … No person shall operate a motor vehicle … upon a highway during hours of darkness unless such motor vehicle … is equipped with at least one tail lamp mounted on the rear which, when lighted during hours of darkness, emits a red light plainly visible from a distance of 500 feet to the rear …. *No vehicle originally equipped at the time of manufacture and sale with 2 tail lamps shall be operated upon a highway during hours of darkness unless both such lamps are in good working order* …. (Emphasis added.)

¶17 "When an officer observes unlawful conduct there is no need for an investigative stop: the observation of unlawful conduct gives the officer probable cause for a lawful seizure." ***Waldner***, 206 Wis. 2d at 59. Ipavec observed what he believed to be unlawful conduct. Therefore, the question narrows to whether the undisputed facts observed by Ipavec constituted probable cause of a violation of WIS. STAT. § 347.13(1). Stated differently, but to the same effect, we must

determine whether Ipavec's belief constituted a mistaken view of the law under ***Longcore***.

¶18 Johnson's vehicle was equipped with two tail lamps each consisting of two bulbs. At the time of the stop, one of the two bulbs of the right tail lamp was not illuminated. Both the municipal court and the circuit court held that this did not constitute a violation of WIS. STAT. § 347.13(1). The municipal court held:

> Although I think it's a proper stop, I do not think there was a violation of the head [sic] lamp statute. It may or may not seem inconsistent … but I find that the statute 347.13(1) was not in fact violated by [Johnson]…. [T]he tail lamp assemblies with one bulb were in good working order. I think the testimony does not say they weren't in good working order. I think the video would indicate that it was in good working order … the fact that we kicked around in December about whether the statute requires it to be in perfect working order or the same working order they were when they came out of the factory … the statutes simply say good working order … but not perfect working order … I am satisfied that … one missing light bulb out of four did not make the lamps … did not render them not in good working order.

¶19 On the basis of this reasoning, the municipal court dismissed the taillight citation. The circuit court did likewise on further judicial review. The propriety of those holdings are not directly before us because the Village has not appealed or cross-appealed those rulings. Nonetheless, whether the condition of the taillight constituted probable cause of a violation of WIS. STAT. § 347.13(1) to justify the stop of Johnson's vehicle is before us. More specifically, we must determine whether the circumstances observed by Ipavec constituted probable cause to believe that the taillight was not "in good working order."

¶20 The interpretation of WIS. STAT. § 347.13(1) presents a question of law that we review de novo. *See* ***State v. Setagord***, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997). The purpose of all statutory construction is to discern the intent of the legislature. ***Id***., at 406. We give the language of an unambiguous statute its ordinary meaning. *See* ***id***. Therefore, our analysis begins with the language of the statute itself; if the statute clearly and unambiguously sets forth the legislative intent, our inquiry ends, and we apply the plain meaning of the statute. ***Id***.; ***State v. Williquette***, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986). A statute is ambiguous when it is capable of being understood in two or more different senses by reasonably well-informed persons. *See* ***Williquette***, 129 Wis. 2d at 248.

¶21 Johnson's vehicle was equipped with four bulbs—two in each tail lamp. It is undisputed that one of the bulbs on the right tail lamp was not illuminated at the time of the stop. As noted, WIS. STAT. § 347.13(1) provides that "[n]o vehicle originally equipped at the time of manufacture and sale with 2 tail lamps shall be operated upon a highway during hours of darkness *unless both such lamps are in good working order* ...." (Emphasis added.) We conclude that § 347.13(1) is unambiguous in requiring that both tail lamps be "in good working order." A commonsense application of that language would require that all bulbs servicing those tail lamps be "in good working order."

¶22 In ***Dane County v. Sharpee***, 154 Wis. 2d 515, 453 N.W.2d 508 (Ct. App. 1990), the court of appeals set out a test for probable cause.

> Probable cause to arrest exists where the officer, at the time of the arrest, has knowledge of facts and circumstances sufficient to warrant a person of reasonable prudence to believe that the arrestee is committing, or has committed, an offense. As the very name implies, it is a test based on probabilities; and, as a result, the facts faced by the officer

> "need only be sufficient to lead a reasonable officer to believe that guilt is more than a possibility." *It is also a commonsense test.*

Id. at 518 (citations omitted; emphasis added).

¶23 Here, Ipavec observed that one of the light bulbs servicing one of the tail lamps on Johnson's vehicle was not illuminated. From such an observation, a person of reasonable prudence and exercising commonsense would conclude that the tail lamp was not "in good working order." Similarly, such a person would conclude that "guilt [was] more than a possibility." ***Id***. Under this test, we conclude that Ipavec had probable cause to stop Johnson's vehicle for a violation of WIS. STAT. § 347.13(1).

¶24 Because the Village has not appealed the trial court's dismissal of the taillight citation, Johnson contends that "law of the case" principles mandate a conclusion that Ipavec stopped Johnson's vehicle under a mistake of law. We disagree for two reasons. First, in ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989), the supreme court held that "law of the case" means that "a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal." Here, Johnson seeks to employ the decisions of the municipal court and the circuit court as law of the case against this appellate court. However, as ***Univest Corp.*** reveals, the doctrine works just the opposite—it binds a trial court to the legal declaration of an appellate court. ***Id***.

¶25 Second, even assuming that the trial court properly determined that Johnson was not guilty of the taillight citation, our holding that Ipavec had probable cause to stop the vehicle does not toy in the slightest with those rulings. After this appeal is completed, Johnson will still be acquitted of that charge. To

repeat, this appeal concerns the issue of probable cause to stop Johnson's vehicle for a violation of WIS. STAT. § 347.13(1). That issue presents a question of law which we review de novo.[3] Our authority to review the probable cause question is not barred by the Village's failure to appeal the dismissal of the taillight violation.

¶26 On a related theme, Johnson also argues that because his acquittal by both lower courts on the taillight charge is not before us, we are duty bound to respect those rulings and, from that, it necessarily follows that Ipavec's stop of the vehicle was without probable cause. The flaw in this argument is that Johnson appears to equate a finding of not guilty with an absence of probable cause. However, the United States Supreme Court has held that the validity of an arrest does not depend on whether the suspect actually committed a crime. ***Michigan v. DeFillippo***, 443 U.S. 31, 36 (1979).

¶27 Finally, we conclude that Johnson has waived the argument that the lower courts improperly awarded witness fees to the Village computed on the basis of the police officers' overtime compensation. We find no indication that Johnson raised this issue before the municipal court or the circuit court. *See* ***Hopper v. City of Madison***, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977) (we generally do not consider legal issues which are raised for the first time on appeal). Because Johnson had the opportunity to raise this issue before the trial courts and failed to do so, we see no reason to address it for the first time on appeal.

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[3] Contrary to Johnson's argument, whether his tail lamp was "in good working order" is not an issue of fact requiring deference to the municipal court. Rather, the application of WIS. STAT. § 347.13(1) to the undisputed facts of this case presents a question of law.

CONCLUSION

¶28 We hold that probable cause supported the stop of Johnson's vehicle. We further hold that Johnson waived the right to challenge the award of witness fees to the Village. We affirm the judgment.

By the Court.—Judgment affirmed.

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