COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1581-CR **Cir. Ct. No. 2012CF187**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD E. HOUGHTON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Richard E. Houghton, Jr., appeals from a judgment convicting him of possession with intent to deliver THC. He contends that the circuit court wrongly denied his motion to suppress evidence because police

lacked sufficient reason to stop his vehicle. We agree with Houghton, and therefore, we reverse the judgment and remand the cause for further proceedings.

¶2 In April 2012, police officer Jeff Price observed a blue sedan approaching his location on a highway in the village of East Troy. Price made several observations that he believed constituted traffic violations: (1) there was a standard-size, pine-tree-shaped air freshener hanging from the rearview mirror, (2) there was a three-by-five-inch GPS unit attached to the lower left-hand corner of the windshield, and (3) the vehicle had no front license plate. Accordingly, he initiated a stop of the vehicle. He subsequently discovered marijuana inside of it along with sandwich bags and a digital scale.

¶3 Houghton moved to suppress the evidence that resulted from the traffic stop, claiming that the stop was unlawful. The circuit court held a hearing on the motion at which Price testified and reiterated his observations. At the conclusion of the hearing, the court declined to justify the stop on the ground that the air freshener or GPS unit obstructed Houghton's clear view through the windshield contrary to WIS. STAT. § 346.88(3)(b) (2011-12).[1] The court essentially determined that police have better things to do than stop vehicles with views obstructed to the degree of Houghton's.[2] However, the court still found the stop to be valid because the vehicle had no front license plate, which is required whenever two plates are issued for a vehicle. *See* WIS. STAT. § 341.15(1).

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

[2] The circuit court remarked, "Now as far as the GPS which is in the field of the defendant's vision and the air freshener there must be a zillion cars driving around with air fresheners and not very many of them would get stopped by the traffic officer. They've got better things to do."

¶4 In reaching its decision, the circuit court acknowledged that Houghton could not actually be found guilty of a traffic violation under WIS. STAT. § 341.15(1). That is because, as a Michigan resident, Houghton was issued only one license plate, which he attached to the rear of his vehicle in accordance with § 341.15(1)(b). Nevertheless, the court concluded that the stop was still proper, reasoning, "I don't believe a traffic officer is required to have at his finger types [sic], memorized or on his computer in his squad car the requirements of each of the … states with respect to front license plates and the Canadian provinces."

¶5 After the circuit court denied Houghton's motion to suppress, he entered a guilty plea to the charged offense. This appeal follows.

¶6 The temporary detention of individuals during the stop of an automobile by police constitutes a seizure within the meaning of the Fourth Amendment. ***State v. Popke***, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. Whether police have probable cause or reasonable suspicion to conduct such a stop presents a question of constitutional fact. ***Id.***, ¶10. "A finding of constitutional fact consists of the circuit court's findings of historical fact, which we review under the 'clearly erroneous standard,' and the application of these historical facts to constitutional principles, which we review de novo." ***Id.***

¶7 Where, as here, a police officer is acting upon an observation of a traffic violation committed in his presence and is not acting upon a suspicion warranting further investigation, the appropriate test is whether the officer had probable cause to believe that a law had been broken. ***State v. Longcore***, 226 Wis. 2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999). Probable cause exists when

there is a "quantum of evidence" that would lead a reasonable police officer to conclude that a traffic violation has occurred. ***Popke***, 317 Wis. 2d 118, ¶14.

¶8 On appeal, Houghton contends that the circuit court wrongly denied his motion to suppress evidence because police lacked sufficient reason to stop his vehicle. He maintains that Price lacked probable cause to believe that a traffic violation had occurred.

¶9 The State concedes that Price made a mistake of law when he believed that Houghton was required to have a front license plate. It further concedes that a mistake of law cannot be grounds for a valid traffic stop. *See* ***Longcore***, 226 Wis. 2d at 9.[3] However, the State submits that the stop was still valid, as Price had probable cause to believe that a different traffic violation had occurred (i.e., Houghton's clear view through the front windshield was obstructed in violation of WIS. STAT. § 346.88(3)(b)). Accordingly, it asks that we uphold the circuit court's decision denying the motion to suppress evidence on that alternative basis.

¶10 WISCONSIN STAT. § 346.88(3)(b) provides that "[n]o person shall drive any motor vehicle upon a highway with any object so placed or suspended in or upon the vehicle so as to obstruct the driver's clear view through the front

[3] We have become aware that the United States Supreme Court recently granted certiorari in ***Heien v. North Carolina***, 749 S.E.2d 278 (N.C. 2013), *cert. granted*, 82 U.S.L.W. 3351 (U.S. Apr. 21, 2014) (No. 13-604), where the question presented is whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop. If the Court answers the question in the affirmative, it could well throw ***State v. Longcore***, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999) (holding that no probable cause exists when an officer makes a stop based on a mistake of law), *aff'd by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 279, 607 N.W.2d 620 (per curiam), in doubt. We suppose the State can petition the Wisconsin Supreme Court for review and then ask that the petition be held in abeyance pending the outcome in ***Heien***.

windshield." Again, the only objects near Houghton's front windshield were a standard-size, pine-tree-shaped air freshener hanging from the rearview mirror and a three-by-five-inch GPS unit attached to the lower left-hand corner. On these facts, we are not persuaded that there was probable cause to conclude that a violation of § 346.88(3)(b) had occurred. Because Price had no other valid reason to stop Houghton's vehicle, we reverse and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.