COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2017

Diane M. Fremgen
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. 2016AP2225 **Cir. Ct. No. 2016TR363**

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

IN THE MATTER OF THE REFUSAL OF DUSTIN M. SHERMAN:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DUSTIN M. SHERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: TODD P. WOLF, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.[1] Dustin Sherman appeals the circuit court's judgment finding that Sherman unlawfully refused to submit to a chemical test of his blood. Sherman argues that police lacked reasonable suspicion or probable cause to conduct the traffic stop that led to this refusal. I disagree and affirm.

¶2 Reasonable suspicion of an ongoing traffic violation is sufficient to justify a traffic stop. ***State v. Houghton***, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143. Probable cause is not necessary. *See* ***id.***, ¶¶20-30.

¶3 In addressing reasonable suspicion, I review the circuit court's factual findings under the clearly erroneous standard. *See* ***State v. Anagnos***, 2012 WI 64, ¶21, 341 Wis. 2d 576, 815 N.W.2d 675. I review de novo whether the facts meet the constitutional standard. ***Id.***

¶4 Here, an officer stopped Sherman for a tail lamp violation. The applicable statute provides, in pertinent part:

> No person may operate a motor vehicle … during hours of darkness … unless the motor vehicle … is equipped with at least one tail lamp … which, when lighted during hours of darkness, *emits a red light plainly visible from a distance of 500 feet to the rear*.

WIS. STAT. § 347.13(1) (emphasis added).

¶5 There is no dispute that the officer stopped Sherman "during hours of darkness" (the stop occurred around 2:00 a.m.) or that the officer viewed Sherman's vehicle from the rear. Rather, the dispute relates to the statutory requirement that tail lamps be "plainly visible from a distance of 500 feet." *See* ***id.***

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c). All references to the Wisconsin Statutes are to the 2015-16 version.

¶6 The officer testified that he could not see Sherman's tail lamps until he was less than 500 feet from Sherman's vehicle. More specifically, the officer testified as follows regarding the visibility of Sherman's tail lamps:

> Q. … I mean were you able to see a light at all, taillight?
>
> A. Yes. Once I got closer to it, yes.
>
> Q. How close did you have to get to see it?
>
> A. Less than five hundred feet.
>
> Q. Okay. How many feet would you say before you could see it?
>
> A. I could not tell you, but it was less than five hundred.[2]

The circuit court credited and relied on this testimony in concluding that reasonable suspicion was present.

¶7 Sherman does *not* argue that the officer's testimony was too conclusory to support reasonable suspicion. Sherman argues, instead, that the circuit court erred by ignoring later parts of the officer's testimony in which the officer agreed that the tail lamps were "dim" but were "clearly visible."

¶8 Sherman's argument is not persuasive. Contrary to Sherman's assertions, the circuit court acknowledged these later parts of the officer's testimony, but noted that that testimony was unclear as to the officer's distance

[2] It turned out that there was a plastic covering over the tail lamps, but the officer did not realize that the covering was present until he stopped Sherman and approached the vehicle on foot. The parties appear to dispute as a secondary matter whether the presence of this plastic covering provides a reasonable basis for the stop based on a different type of tail lamp violation. My analysis does not rely on the presence of the plastic covering.

from Sherman's vehicle. The court thus credited the earlier part of the officer's testimony in which the officer clearly stated that he could *not* see Sherman's tail lamps until he was less than 500 feet from Sherman's vehicle.

¶9 Further, even if the officer's testimony was inconsistent, that inconsistency was for the circuit court to resolve. *See* ***State v. Anson***, 2004 WI App 155, ¶24, 275 Wis. 2d 832, 686 N.W.2d 712 ("[T]he trial court has no obligation to believe everything a witness says, and when the record reveals inconsistencies within a witness's testimony …, the court as fact finder determines the weight and credibility accorded to the testimony."), *aff'd*, 2005 WI 96, 282 Wis. 2d 629, 698 N.W.2d 776.

¶10 Sherman points out that a retired police officer testified for the defense that he observed Sherman's vehicle on a later date and was able to see the tail lamps from 1,584 feet. I am uncertain whether Sherman means to develop an argument regarding this testimony. Regardless, it is plain that the circuit court reasonably declined to give weight to the retired officer's testimony because Sherman failed to establish that conditions surrounding the retired officer's observations were similar to those that existed at the time of the stop in this case.

By the Court.—Judgment affirmed.

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