COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP2382-CR **Cir. Ct. No. 2018CT22**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KELLY W. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Affirmed*.

¶1 KLOPPENBURG, J.[1] Kelly Brown appeals a judgment entered on his no-contest plea to operating while intoxicated (OWI), second offense, and an

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

order denying his motion to reconsider the circuit court's ruling denying his motion to suppress evidence. He challenges whether the officer had reasonable suspicion to believe that Brown's vehicle was operating on a highway with more than four headlamps lit in violation of WIS. STAT. § 347.07(1), which provides that "not more than a total of 4 [lamps] on the front of [a] vehicle shall be lighted at any one time when [the] vehicle is upon a highway." I conclude that the circuit court properly denied the motion to reconsider and accordingly affirm.

BACKGROUND

¶2 On January 12, 2018, Brown was charged with operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration, both as second offenses. The charges resulted from a stop by a deputy with the Dodge County Sheriff's office, Robbie Weinfurter, on the night of November 15, 2017. Brown filed a motion to suppress any evidence found as a result of the stop on the ground that the stop violated the Fourth Amendment.[2] The circuit court held a hearing on the motion.

¶3 Weinfurter testified at the hearing that he stopped Brown because he observed as Brown's vehicle approached him that it "had more than four lights illuminated on the front of it." Specifically, Weinfurter testified that the vehicle had "headlights [or low beams] and high beams as well as what appeared to be some sort of fog [lights] for a total of six lights." Weinfurter also testified that the

[2] Brown filed a second motion to suppress evidence on other grounds, which the circuit court denied, and numerous other motions to suppress and to dismiss his case, which were subsequently withdrawn. Brown does not pursue any of these other motions on appeal.

lights on the front of Brown's vehicle were "probably the brightest lights I've ever seen" and "very bright directed into my eyes."

¶4 Brown testified that the housing unit that contains his headlamps has one bulb for both his high and low beams, and fog lights that turn on when the headlights are on.

¶5 Based on the evidence presented at the hearing, the circuit court found that Weinfurter stopped Brown's vehicle because Weinfurter "believed [that t]he vehicle had more than four lights illuminated on the front of it." The court determined that although the vehicle in fact had only four lights, Weinfurter's belief that it had more than four was reasonable based on Weinfurter's testimony that he saw six lights and that the lights were the "brightest lights [he had] ever seen," and on Weinfurter's long experience as a nighttime patrol officer. The court determined that because Weinfurter reasonably believed based on his observations that the vehicle had more than four front lights, Weinfurter reasonably suspected the vehicle to be in violation of WIS. STAT. § 347.07(1). Accordingly, the court determined that the stop did not violate the Fourth Amendment and denied Brown's motion to suppress.[3]

¶6 Brown filed a motion to reconsider. The circuit court denied the motion, reaffirming its determination that the stop was supported by Weinfurter's reasonable suspicion that an illegal number of headlamps were simultaneously lit

[3] At the suppression hearing, the circuit court provided a second basis for determining that the stop was reasonable. Namely, the court determined that Weinfurter stopped the vehicle because he reasonably believed the headlights' brightness was over the legal limit. However, the court later retracted its reliance on this second basis in response to Brown's motion to reconsider because it had "erroneously believed that a law existed regulating the brightness of headlamps."

on Brown's vehicle when Weinfurter encountered it on the road, in violation of WIS. STAT. § 347.07(1). Brown appeals.

DISCUSSION

¶7 The sole issue on appeal is whether Weinfurter had reasonable suspicion to justify the traffic stop. This court's review of a circuit court's order denying a motion to suppress presents "a question of constitutional fact." ***State v. Dearborn***, 2010 WI 84, ¶13, 327 Wis. 2d 252, 786 N.W.2d 97. When reviewing the constitutionality of a traffic stop, this court will uphold the circuit court's findings of fact unless they are "clearly erroneous." ***State v. Houghton***, 2015 WI 79, ¶18, 364 Wis. 2d 234, 868 N.W.2d 143. The application of the law to those facts is a question this court reviews de novo. ***Id.***

¶8 Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution prohibit unreasonable searches and seizures. ***State v. Reed***, 2018 WI 109, ¶52, 384 Wis. 2d 469, 920 N.W.2d 56. "Temporary detention of individuals during the stop of an automobile by police … constitutes a 'seizure' … within the meaning of [the Fourth Amendment]." ***Whren v. United States***, 116 S.Ct. 1769, 1772 (1996).

¶9 A police officer may conduct a traffic stop when, "under the totality of the circumstances, he or she has grounds to reasonably suspect that a … traffic violation has been committed." ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. The officer's suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion of the stop." ***Id.*** (quoted source omitted). This standard requires the appellate court to determine whether the facts of a case would warrant "a reasonable police officer, in light of his or her training and

experience," to suspect that a traffic violation has been committed. ***Id.*** (quoted source omitted).

¶10 "[A] search or seizure may be permissible even though the justification for the action contains a reasonable factual mistake." ***Heien v. North Carolina***, 135 S.Ct. 530, 534 (2014). A stop based on an officer's mistake of fact falls within constitutional limits if the mistake is reasonable ***Id.*** at 536. The standard does not require an officer conducting a traffic stop to be "perfect." ***Id.*** An officer's mistake of fact is reasonable if it is supported by "specific and articulable facts" and constitutes a "rational inference[] from those facts." ***Popke***, 317 Wis. 2d 118, ¶23.

¶11 Here, Weinfurter believed that Brown had committed a traffic violation by having "six lights activated" in the front of his vehicle, in violation of WIS. STAT. § 347.07(1). The circuit court found that Weinfurter was mistaken in this belief. However, the fact that Weinfurter erroneously believed that the vehicle had six lights does not render the stop unconstitutional. Rather, the relevant constitutional question is whether Weinfurter's factual mistake was "reasonable." ***Heien***, 135 S.Ct. at 536; *see also* ***Houghton***, 364 Wis. 2d 234, ¶¶75-78.

¶12 The circuit court determined that Weinfurter's mistake of fact was reasonable. In reaching this decision, the court relied on the following evidence adduced at the suppression hearing: Weinfurter had thirteen years of experience on nighttime traffic patrol; Weinfurter testified that he saw six lights on the vehicle (specifically, "headlights [or low beams] and high beams as well as … some sort of fog lamp or auxiliary lamp lit … for a total of six lights"); and Weinfurter testified that the lights "were probably the brightest lights [he had] ever

seen." Based on that evidence, the court determined that Weinfurter "had reasonable suspicion that [Brown's] vehicle had more than four lamps lighted."

¶13 In light of this evidence, I agree with the circuit court that Weinfurter's belief that the vehicle was operating with more than four front lights was reasonable. The specific facts articulated by Weinfurter amount to more than simple "inarticulate hunches." ***Terry v. Ohio***, 88 S.Ct. 1868, 1880 (1968). Weinfurter identified with particularity what he believed to be six lights, namely, "headlights" or "low beams," "high beams," and fog or auxiliary lamps. Further, Weinfurter's observance of an unusual, vision-impairing level of brightness on Brown's vehicle provided a "specific and articulable fact[ ]" bolstering his suspicion that a higher-than-normal number of lights were illuminated on the vehicle. ***Popke***, 317 Wis. 2d 118, ¶23. Taken together, these facts establish that Weinfurter's mistake of fact was reasonable, and, therefore, the stop of Brown's vehicle falls within constitutional limits. *See* ***id.***

¶14 Brown's argument to the contrary does not persuade. Brown argues that Weinfurter's mistake of fact was not reasonable because it rested on the mistaken belief that a vehicle typically has separate lights for high and low beams. According to Brown, "[the officer] believed that there were two lights in [the vehicle's] headlamp," one each to control the high and low beams, in addition to the separate fog lamp, for a total of six lights. However, each headlamp contained only one "multifilament" bulb that controlled both the high and low beams, so that together with the fog lamps the vehicle had a total of four lights. Brown asserts that Weinfurter's belief that the vehicle had six lights was not reasonable because, in identifying the six lights he saw, Weinfurter did not account for the possibility that each of the headlamps in fact contained just one multifilament bulb.

¶15 In support of this argument, Brown cites ***State v. Houghton***, 2015 WI 79, 364 Wis. 2d 234, 868 N.W.2d 143. There, our supreme court upheld the circuit court's denial of a motion to suppress in an OWI traffic stop case. ***Id.***, ¶6. The court concluded that an officer had reasonable suspicion to believe that a statute prohibiting objects that "obstruct" a driver's clear view was being violated when he observed both a GPS unit and an air freshener through the driver's windshield. ***Id.***, ¶¶7, 80.

¶16 Brown does not rely on the main holding in ***Houghton*** but instead points to a subsidiary issue in that case. Brown cites the portion of ***Houghton*** which stated that a second basis for the traffic stop—the officer's observation that the driver's car displayed no front license plate in violation of Wisconsin law—was grounded in an unreasonable mistake of fact, namely, the assumption that any vehicle operating on a Wisconsin road "must have been issued two license plates." ***Id.***, ¶75. The court noted that vehicles from other states would not necessarily have been issued two license plates, and determined that the mere absence of a front license plate, with no other indicia that a vehicle might be registered in Wisconsin and thus had been issued a second plate, did not justify an investigative stop. ***Id.***, ¶76. However, the court stated that "some indicia" that the vehicle was from Wisconsin, such as a Wisconsin plate on the rear bumper or "markings indicating an affiliation with a local business," might suffice to justify a stop. ***Id.***, ¶77.

¶17 Brown contends that ***Houghton*** provides guidance here. As I understand his briefing, Brown argues that in order for Weinfurter to believe he saw six lights, as Weinfurter testified, he had to assume that the vehicle had separate bulbs for the high and low beams. That is, he had to assume that the vehicle lacked multifilament lamps which comprised one bulb that controlled both

the high and low beams. Brown argues that that assumption resembles the officer's assumption in ***Houghton*** that a vehicle is necessarily issued two license plates. However, this argument misconstrues the holding in ***Houghton***.

¶18 ***Houghton*** did not establish a general rule that officers may not make assumptions concerning the operation or appearance of vehicles. Rather, the court in ***Houghton*** held only that, based on the facts of that case showing no indicia of the vehicle being registered in Wisconsin, an officer could not reasonably assume that the vehicle was registered in Wisconsin because of the likelihood that the vehicle would be registered elsewhere and so be subject to different regulatory requirements. ***Id.***, ¶76. Here, in contrast, Brown provides no evidence of the prevalence of multifilament headlights that would render unreasonable Weinfurter's assumption, based on his observation, that the headlamps he saw had separate bulbs for high and low beams. In other words, Brown does not explain why Weinfurter could not rely on his assumption that the headlights contained separate lights for high and low beams to verify his observation. Moreover, Brown does not explain why it was unreasonable for Weinfurter to be unable to distinguish a single multifilament bulb from two individual bulbs on a car traveling towards him at night operating a configuration of "exceptionally bright" headlights.

¶19 In sum, Brown does not offer a persuasive reason why Weinfurter's belief that the vehicle had more than four lights was unreasonable.

CONCLUSION

¶20 Because the circuit court properly denied Brown's motion to reconsider its ruling denying Brown's motion to suppress evidence, I affirm.

By the Court.—Judgment affirmed.

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